

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

**One Ashburton Place - Room 503
Boston, MA 02108
(617) 727-2293**

MICHAEL GONSALVES,
Appellant

v.

TOWN OF FALMOUTH,
Respondent

CASE NO: D1-09-411

Appellant's Attorney:

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Commissioner:

Paul M. Stein

DECISION

The Appellant, Michael Gonsalves, acting pursuant to G.L.c.31, § 43, duly appealed to the Civil Service Commission (Commission) from a decision of the Town of Falmouth (Falmouth), the Appointing Authority, to discharge him as Patrol Officer in the Falmouth Police Department (FPD). Five days of hearings were held, on April 15, 2010 (at UMass School of Law at Dartmouth) on June 9, 2010 and November 29, 2010 (at the Gus Cauty Center in Falmouth) and on July 19, 2010 and September 30, 2010 (at Falmouth Town Hall). The hearing was declared private as no party requested a public hearing. By agreement of the parties, witnesses were sequestered. Falmouth called seven witnesses and the Appellant called three witnesses and testified on his own behalf. Twenty-nine (29) exhibits were received in evidence and two (2) additional exhibits marked for Identification. The hearing was stenographically recorded. Post-hearing submissions were received by the Commission from each of the parties on April 27, 2011.

FINDINGS OF FACT

Giving appropriate weight to the exhibits, the testimony (of Appellant; FPD Capt. Edward Dunne, Sgts. Brian Reid, Brian Kinsella and Scott Hartzler, Dets. Robert Murray and Ronald M. Carpenter; Ms. Kelly Barrett; Ms. Alicia Antoni; State Police Lt. (ret.) Ahmed Mustafa; and Ms. A¹) and inferences reasonably drawn from the evidence as I find credible, I make the findings of fact set forth below.

Appellant

1. The Appellant, Michael Gonsalves, a lifelong Falmouth resident, was appointed as a full-time Patrol Officer with the FPD in 1990. Throughout his service with the FPD, he received numerous accolades of praise from Falmouth citizens, as well as formal Certificates of Commendation, and other letters of commendation for outstanding police work from FPD Chief Anthony Riello and former FPD Chief Cusolito, Sgt. Brian Kinsella (as shift commander), Sgt. Scott Hartzler, and a Falmouth District Court Judge, among others. (*Exhs. 25 & 26; See also Tr.I:18-26[Barrett]; Tr.I:27-35[Antoni]; Tr.I:35-54[Mustafa]; Tr.IV:89-91, 99-105 [Gonsalves]*)

2. During his first ten years of service, Officer Gonsalves received eight oral and written reprimands for various minor offenses and, in 1998, he was suspended for one-day for “insubordination and conduct unbecoming an officer.” The nature and details of these offenses was not otherwise described. (*Exh. 14*)

3. In April 2004, Officer Gonsalves was charged with fighting with a fellow officer, which resulted in an agreement for a 25 day suspension, with 15 days served and 10 days held in abeyance for 18 month, and agreement to attend anger management. In October,

¹ Ms. A is a civilian who, as the evidence will show, was being recruited as a police informant and features in charges of alleged inappropriate behavior toward her by Officer Gonsalves and another FPD officer. Her identity is kept confidential as a precaution in the interest of protecting her safety and privacy.

2005, Officer Gonsalves was charged with a further instance of unprofessional conduct and discourtesy to a fellow officer. At that time, Falmouth Town Administrator Robert L. Whritenour, Jr. noted that Officer Gonsalves had been harassed by anonymous FPD members who resented his writing a truthful police report about another officer's alcohol-involved motor vehicle accident, and that the stress he was under mitigated the level of discipline he decided to mete out to a two day suspension and, because the new offense occurred within 18 months of the prior discipline, required Officer Gonsalves to serve the 10-day suspension previously held in abeyance. (*Exh. 14; Tr.I:51-52[Mustafa]*)

Incident at the Granite City Electric parking Lot

4. On December 20, 2008, Officer Gonsalves worked the evening or "swing" shift (3:30 pm to 1:00 am) and was assigned to cruiser unit "Oscar 13". All FPD cruisers are fitted with GPS devices and software that is able to track the exact location of all vehicles second-by-second. The FPD's GPS tracking system report, called a TrackStar Geofence Report, establishes that Officer Gonsalves' cruiser entered the Granite City Electric parking lot on Dillingham Avenue precisely at 9:26:25 PM on 12/20/2008 and exited twenty-three seconds later at 9:26:48 PM. (*Exhs. 3[Tr.27-30], 9, 10; 13[pp.8.-9]; Tr.I:105-117[Dunne]*)

5. The TrackStar Geofence Report also established that another FPD Officer, operating cruiser unit "Oscar 11" (the Oscar 11 Officer), had entered the same parking lot at 9:01:52 on 12/20/2008 and remained there for 25 minutes 54 seconds, departing at 9:27:46. (*Exhs.3[Tr.27-30], 9 & 10; Tr.I:105-117[Dunne]*)

6. According to the TrackStar Geofence Report, no other FPD cruisers entered the parking lot on December 20, 2008. (*Exhs. 3[Tr.27-28],6, 9 & 10*)

7. The Oscar 11 Officer spent the next hour and a half trying to confirm who was driving the cruiser that had pulled into the Granite City Electric parking lot after he did. A review of the FPD message log for December 20, 2008, revealed a series of messages from that officer to Officer Gonsalves, but no responses from him. (*Exhs. 3[Tr.143], 6*)

8. The Oscar 11 Officer had gone to the Granite City Electric parking lot to continue a conversation with Ms. A that began at the Falmouth Plaza. He was a member of the Falmouth Police Drug Task Force and Ms. A knew him to be a Falmouth police officer. He often sought information about narcotics trafficking from people in town. He had been talking with Ms. A for several weeks about becoming a confidential informant (CI), because she was acquainted with a person of interest to the FPD who was a known drug dealer. She followed his cruiser to the parking lot and pulled alongside and they talked in their vehicles, with the windows down, driver's side to driver's side. He recalls that Ms. A was reluctant to become a CI, but was willing to pass along information from time to time. He recalls that she also said she was having issues with her boyfriend, whom she said was abusing her, and wanted to know how to go about getting a restraining order. (*Exhs. 3[Tr.18-20],6,9; Tr.I:78-84[Dunne]; Tr.III:3-5,25-31,49[Ms.A]*)

9. After Officer Gonsalves pulled out, Ms. A told the Oscar 11 Officer that it "wasn't good" that Officer Gonsalves was there, that Officer Gonsalves has been trying to "get with her for years". She described a text message he recently sent her to which she said he had attached a picture of his genitals. (*Exhs.3[Tr.20-23],6, 9,13[pp.12-13],19,24; Tr.I:86-89[Dunne];Tr.II:95-99,101-108[Ms.A];Tr.II:118-119,123-126,130-131[Dunn]; Tr.III:20, 23-24,28-36 [Ms. A]; Tr.IV:7-8[Evidentiary Ruling]*)

10. The Oscar 11 Officer approached Det. Robert Murray to further recruit Ms. A. as a CI. Det. Murray explained that the FPD already had a CI pipeline into the subject drug dealer and Ms. A wasn't needed as a CI. Apparently, there was no mention of the encounter with Officer Gonsalves, Ms. A's concern about him, or the text messages she had received. (*Exhs.9;Tr.II:134-135[Dunne];Tr.III:28-30[Ms.A];Tr.IV:60-61[Murray]*)

11. The FPD has a "two-person" rule which, in general, requires two officers present when interacting with a CI, to avoid any charges that the CI will accuse an officer of misconduct, more in mishandling drugs or money in a buy than sexual misconduct. Since Ms. A was not an official CI, however, the two-person rule did not apply to her and it was not necessarily improper for the Oscar 11 Officer or Officer Gonsalves to meet Ms. A alone on police business. (*Tr.II:133[Dunn];Tr.IV:60-61,76-78,81-86 [Murray]*)

12. Ms. A met Officer Gonsalves about ten years earlier, when she was a teenager and thought it was "cool" to have a policeman "on your side". He helped her with "tickets and things like that". She later worked in a hair salon patronized by Officer Gonsalves's current girlfriend. Ms. A claimed that Officer Gonsalves texted her "for coffee" as well as with more explicit dating overtones, which she found uncomfortable, especially after Officer Gonsalves's girlfriend became a client of the salon. (*Exhs.3,7,9, 11;Tr.II:89-94 [Order];Tr.II:107[Ms.A.];Tr.III:5-15,46-47[Ms.A];Tr.IV:107-109[Gonsalves]*)

13. Officer Gonsalves told Chief Rieillo that he "flirted" with Ms. A in the past and said she "flirted" back. He consistently denied any interest in a physical relationship with Ms. A and maintained that Ms. A never let him believe she was uncomfortable with their "social" relationship at any time. When asked at the appointing authority hearing if he had ever sent Ms. A the photograph in question or any pictures of "naked people or naked

body parts”, he said, after some equivocation: “I might have” and “don’t recall” if he did it more than once, but that he was “absolutely” sure it was not a picture of him. His testimony at the Commission hearing, however, was unequivocal: he “may have” sent her jokes that could be “construed as obscene” but “I never texted a naked body part to [Ms. A]” and “I did not send that picture, sir.” (*Exhs.3[Tr.136-137,140-141], 7,11,13[pp.11-13],24;Tr.IV:3-14,97,106-114,117 [Gonsalves]*)

14. Due to the passage of time, Ms. A no longer had access to her phone records. Evidence was introduced of the record of text messages exchanged between Officer Gonsalves and Ms. A for the period from November 1, 2008 through December 31, 2008, duly extracted from the personal cell phone records of Ms. A’s provider obtained through subpoena by the FPD. This is the timeframe within which Ms. A claims to have received the picture in question. The records showed nine days on which they exchanged a cumulative total of 65 such messages during that two-month period. Officer Gonsalves testified that all text messages exchanged with Ms. A during this two month period were “strictly business.” (*Exh.3[Tr.89-90], 24; Tr.II:109-118 [Colloquy]; Tr.II:181-184 [Dunne];Tr.III:3-5,43-45[Ms.A];Tr.IV:14-30[Dunne];Tr.V:87-89[Evidentiary Ruling]; Tr.IV:110-111,114-116 [Gonsalves]*)

The Armed Robbery Investigation

15. On January 3, 2009, Officer Gonsalves was assigned to a four-month rotation in the Detective Division, Special Services. A full-time position had opened up for a patrol officer in the Detective Division and he, along with Officer Michael Simoneau (who was ultimately selected for the position), had applied. The purpose of the rotation, in part, was to evaluate his skills needed for permanent assignment to the Detective Division. At the

outset of his temporary rotation, the commander of the division, Capt. Edward Dunne, told him he would be assigned a case load, but, meanwhile, he should follow-up with cases that he had been involved with in the Patrol Division which required further investigation. (*Exh.3[Tr.125-126];Tr.I:56-59,64-65,91-94[Dunne];Tr.II:13,15, 24-25, 45-46, 56-57,69-70,190-191,195-196[Dunne];Tr.IV:91-93[Gonsalves]*)

16. The Detective Division is located in separate, secure quarters on the first floor of the FPD building. Only detectives have keys to access the area. The offices had recently been renovated just when Officer Gonsalves started his rotation and new cubicles installed that the detectives used for work space. Capt. Dunne had a separate office to which only he has access and which is always locked when he is not there. (*Exh.3[Tr.12, 56-57]; Tr.I:61,191-192 [Dunne]; Tr.II:48 [Dunne];Tr.IV:163-164[Gonsalves]*)

17. One of the cases that Officer Gonsalves had worked as a patrol officer and was assigned to investigate involved an armed robbery behind Steve's Pizza on Main Street that took place on December 27, 2008, at which time the perpetrator pulled a knife on two juvenile victims. Det. Ronald Carpenter noticed that the description of the perpetrator fit one W.R., who was a suspect in several other recent larceny cases he was then handling. Both armed robbery victims picked out W.R. as the perpetrator from a photo array. A warrant for the arrest of W.R. was issued through Falmouth District Court. On Friday, January 9, 2009, Officer Gonsalves went to W.R.'s home with the intent of executing the arrest warrant. (*Exhs.13[pp.2],22,27; Tr.I:59, 136-137[Dunne]; Tr.IV:127-129,207-208[Gonsalves]; Tr.V:169-72[Carpenter]*)

18. W.R. was not found, but his girlfriend allowed Officer Gonsalves to conduct a "consent search" of the premises. According to the report filed by Officer Gonsalves, the

search yielded several knives that “appeared to fit” the description of the weapon used in the armed robbery, some (but apparently not all) of which he confiscated. Officer Gonsalves also confiscated a safe found under the master bed, in which W.R.’s girlfriend said he kept some knives and “weed”. He also took a can of mace and a starter (cap) pistol. (*Exhs.3[Tr.12-14,126-129],18,22,27;Tr.I:59-61,137-140[Dunne]; Tr.IV:129- 130, 211-214[Gonsalves];Tr.V:83-88 [Gonsalves]*)

19. At Capt. Dunne’s direction, on Saturday, January 10, 2009, Officer Gonsalves secured a search warrant to authorize opening W.R.’s safe. On Sunday January 11, 2009, at approximately 4:30 pm, Officer Gonsalves pried the safe open in the presence of Officer Kraus. They found several items of jewelry, some of which were identified by the owners in one of the cases handled by Detective Carpenter as stolen property, along with other property. According to the inventory filed with the return of the warrant, attested to by Det. Carpenter on January 12, 2009, the jewelry was “seized as evidence”. Also listed on the return were some personal papers, a small plastic bag of marijuana and a pair of scissors. (*Exhs.3[Tr.12-16],20, 21, 22 & 27; Tr.I:60-61 [Dunne]; Tr.II:50-65[Dunne]; Tr.IV:148[Gonsalves]; Tr.V:169-171,179-186 [Carpenter]*)

20. According to Officer Gonsalves, after its contents had been removed, Officer Gonsalves offered to return the safe to W.R., but W.R. told Officer Gonsalves he didn’t want it back, so, after clearing it with the evidence officer, Sgt. Hartzler, Officer Gonsalves threw it out. Officer Gonsalves also testified that he tagged most of the property taken in the “consent search” or from the safe, the latter “witnessed” by Det. Carpenter, as FPD practice and procedure required. He said some property was placed in evidence lockers in the basement of the FPD building and other property in a “brown

bag” that he put in the Detective Division interrogation room. (*Exh.3[Tr.3[126-130,144-159],13[pp.2-6],Tr.I:67-68[Dunne];Tr.II:13-14,26-31,167-171,175-177,195-201 [Dunne]; Tr.IV:142-163, 204, 211-224 [Gonsalves]; Tr.V:39-40,49, 55-65 ,67-68, 82-114, 116-121 [Gonsalves]; Tr.V:130[Hartzler]; Tr.V:169[Carpenter]*)

21. At approximately 7:20 a.m. on January 11, 2009, Capt. Dunne entered the Detective Division offices. He was the first to arrive that day. He discovered a brown, unmarked evidence bag sitting on top of the wall bin in the cubicle assigned to Officer Gonsalves. The bag contained a potpourri of items, including a starter pistol (cap gun), a can of mace, a box cutter with a yellow rimmed handle, a “pizza” knife, a dagger, a hatchet, some currency and coins, a leather box, a bag of marijuana and other drug paraphernalia. Capt. Dunne locked the bag and its contents in his private office. He recognized certain items as related to the W.R. consent search, and expected Officer Gonsalves to come to him inquiring about the whereabouts of the bag when he came on duty, but he never did. (*Exhs.3[Tr.12-17],6,7,18; Tr.I:59-66,137-141[Dunne]; Tr.II:10-13,21,26-32,35-42, 45-46, 48, 68-70,171-172,191-197[Dunne]; Tr.V:197-205[Dunne]*)

22. Eventually, sometime after Officer Gonsalves was discharged, the W.R. armed robbery case was dismissed because of “an illegal search and seizure”. The specific grounds of the motion were not established but it was not believed to have to do with how Officer Gonsalves handled the evidence in the case after it was seized. The outcome of the case involving the theft of the jewels was unknown. (*Tr.I:65[Dunne]; Tr.II:66, 172,180-182[Dunne];Tr.V:183-187[Carpenter]*)

23. When W.R. requested his property, the coins and currency in the bag were returned to him. Except for the property placed in his office on January 11, 2009, neither

Capt. Dunne, Sgt. Hartzler (the FPD evidence officer), nor Det. Carpenter know what happened to the other property, including the jewelry and personal papers that Officer Gonsalves took from the safe. Neither the safe nor any of the property seized, other than what was in the bag kept by Capt. Dunne, was ever found, despite a diligent search. (*Tr.I:66-68,136-141*[Dunne];*Tr.II:40,66-67,171-175*[Dunne];*Tr.VI26-128,130-13,152-158, 161-168* [Hartzler];*Tr.V:179-185,196*[Carpenter])

The Rumor

24. In early February 2009, Officer Gonsalves told Det. Robert Murray that “Sgt. Kinsella caught [the Oscar 11 Officer] with his pants down” having sex in a cruiser. Officer Gonsalves later said he heard “two guys” talking about it “before Christmas, November, December” but this was the first time Det. Murray (or any other witness) heard of such an accusation. No evidence suggests that either Officer Gonsalves or Det. Murray believed the rumor and no evidence was offered that it was true. (*Exhs.3*[*Tr.17-18,131-135,13-144*],7,8,9,13[*pp.10-11*];*Tr.I:74-77,103*[Dunne];*Tr.II:75-76,190* [Dunne];*Tr.IV:45-47,51-57*[Kinsella];*Tr.IV:56-62*[Murray];*Tr.IV:108,113,165-167* [Gonsalves])

25. Later that day, Det. Murray met with the Oscar 11 Officer, and repeated what Officer Gonsalves had said. That officer was irate. He instantly connected the story to his meeting with Ms. A at Granite City Electric about her becoming a CI, as he had previously discussed with Det. Murray. The officer wanted to confront Officer Gonsalves, but Det. Murray dissuaded him from doing so and urged him to report it to Capt. Dunne. Det. Murray also reported this episode to Capt. Dunn himself. (*Exhs.3*[*Tr.18-19,72-73*], 6, 8, 9; *Tr.I:74-78* [Dunne]; *Tr.IV:59-60*[Murray])

26. The Oscar 11 Officer explained to Capt. Dunne in complete detail how he had met Ms. A and they went to the Granite City Electric parking lot, how Officer Gonsalves had spotted them, and he described what Ms. A said about Officer Gonsalves' alleged romantic interest in her and having recently sent her an obscene picture. The officer provided Capt. Dunne with Ms. A's cell phone number. At Capt. Dunne's request, both the Oscar 11 Officer and Det. Murray later provided written statements. The Oscar 11 Officer called the charges "vicious rumors" and a "bold faced lie" that jeopardized his personal reputation in town and upset his spouse. (*Exhs.3 [Tr.18-21,75-76,93-94],8,9; Tr.I:78-82[Dunne]; Tr.II:76,84-89,119 [Dunne]*)

FPD Investigation

27. After several attempts, on or about March 12, 2009, Capt. Dunne eventually made contact with Ms. A and she met with him a few days later. He told her he was investigating rumors that she and an FPD officer were having an affair. Ms. A. said she had been hearing the same rumors "on the street" and believed Officer Gonsalves was the source. She said she had known the officer in question for a few years and had supplied him with information about criminal activities from time to time, but there was absolutely no truth to any rumor of an affair or sexual activities with him. As to Officer Gonsalves, she explained that they were just friends, although he had been "hitting on" her and wanted more, but she did not. (*Exh.3[Tr21-23,81-89], 6; Tr.I:82-94[Dunne]; Tr.II:119-120,130-132,144-145[Dunne]; Tr.III:18-20,24-25,27,43[Ms.A]*)

28. Capt. Dunne brought up the subject of text messaging. She admitted they exchanged many messages and said some of his messages had "dating and/or sexual overtones". When Capt. Dunn asked her if he ever sent her any nude pictures of himself

or parts of his body she appeared shocked and embarrassed and said: “Oh, you heard about that.” She said the photo had come with the message: “Erase this after! Text back what u think lol.” Capt. Dunne asked if she had erased the picture, and she said no, but didn’t know if it would still be on her phone. Capt. Dunne asked her to check. A few days later she reported that she found the message and, after some logistical complications, transmitted a copy to Capt. Dunne’s office computer on or about May 25, 2009. (*Exhs.3[Tr.22-23,83-84],6,9;Tr.I:88-94[Dunne];Tr..II:95-96,101-103 [Ms.A.];Tr.II:126-127[Dunne];Tr.III:15-17,36-38 [Ms.A]*)

29. When Officer Gonsalves reported for duty on March 18, 2009, Capt. Dunne called him aside and gave him a letter which ordered him to submit a written report “concerning your communications and actions as they relate to [Ms.A] . . . to include the context of in-person conversations, telephone communications, text messages and/or computer communications and/or cell phone communications to include any photos/images to or from [Ms.A].” The letter also ordered Officer Gonsalves to have no contact with Ms.A. (*Exhs.3[Tr.23], 6, 7; Tr.I:94-96[Dunne]; Tr.115-117[Gonsalves]*)

30. Officer Gonsalves read the letter and then asked Capt. Dunne what it was all about. Capt. Dunne said he had a report of an officer having sex with Ms. A in a police car and he needed to ask about something that related to that incident. Officer Gonsalves responded: “I don’t understand this. You are investigating [the Oscar 11 Officer] for having sex in a cruiser and now you are investigating me”. He asked what images Capt. Dunne was talking about. Capt. Dunne said he was looking for “any naked parts of his body that would have been sent” to Ms. A, to which Officer Gonsalves replied: “No, never.” Capt. Dunne also asked how Officer Gonsalves knew which officer was being

accused of having sex with Ms. A, when Dunne had not mentioned the officer by name, to which Gonsalves replied that officers, whose names he did not recall, told him “Sgt. Kinsella caught [the Oscar 11 Officer] with his pants down with [Ms.A] on Dillingham Ave.” Officer Gonsalves also said: “I see the handwriting on the wall”, meaning this was a set-up to deny him a permanent detective’s assignment. Capt. Dunne escorted Officer Gonsalves to a private area where Officer Gonsalves generated his report “under duress”.
(*Exh.3 [Tr.23-26], 6, 7; Tr.I:96-103[Dunne]; Tr.II:128-129, 136-137, 188-189[Dunne]*)

31. Officer Gonsalves stated in his March 18, 2009 written report:

From the information I gathered, this report is being ordered from an internal investigation. . . .about [the Oscar 11 Officer] having sex in a marked police cruiser with a [Ms. A]. [Ms.A] brought my name into the investigation for unknown reason. At no time before the investigation did [Ms. A] bring my name into any complaint or allegation of inappropriate messages.

I have known [Ms.A] for approximately ten years. During that time I have helped [Ms. A] out withpolice related matter. . . .Over the time of the friendship, I have flirted with [Ms.A] and she has flirted with me back but never a sexual relationship. I have spoken to [Ms. A] on the cell phone and have sent text messages in a flirting manner. I have also received messages from [Ms.A] in a flirting manner back. I . . . never felt I sent anything inappropriate in a written text. I have never, never, sent any picture text of myself, or any naked body part of mine. I have class and would not stoop that low. I have however, sent jokes that I receive from other friends and forward them to other friends. The pictures may have contained pictures of unknown females and males that were sent as jokes to me and then forwarded.

The contents of the jokes ranged from photos of women, men, animals, politics and other random parody. Again, this demand is written against my will under duress as a result of a direct order from Captain Dunne.

(*Exh.7*)

32. Officer Gonsalves brought his report to Capt. Dunne and they had further conversation. Capt. Dunne asked again who had spread the rumors about the officer in question and Officer Gonsalves again said he did not remember. Capt. Dunne asked Officer Gonsalves if he was the officer who had pulled his cruiser in behind Granite City Electric and then pulled out after seeing another cruiser. Officer Gonsalves said he was

not that officer. He did remember a message from the Oscar 11 officer on his mobile radio when he returned to his cruiser from a Dunkin Donuts one night that asked “was that you bro” and said he typed back “No”. (*Exhs.3[Tr.25-26],6;Tr.I:103-104[Dunne]*)

33. There was some dispute about the timeframe that Officer Gonsalves had in mind when he responded to these questions about being at Granite City Electric. Officer Gonsalves said he thought he was being asked about early December 2008, when he was on vacation and could not have been involved in the incident in question. He said he told Capt. Dunne to “check the GPS”. (*Exhs.3[142-144], Tr.V:14-16[Gonsalves]*)

34. Officer Gonsalves was not further involved in the investigation until June 2009, when he was called in for a recorded investigative interview, at which he was represented by private counsel (not either counsel who represented him at the hearing before the Commission). At the June 26, 2009 interview, Capt. Dunne asked questions about the matters that he had previously questioned Officer Gonsalves about (i.e., the armed robbery investigation, the Granite City Electric incident, the rumors about an officer having sex on duty and the text message and photo) as well as another matter involving taking time from work in April 2009 to run a personal errand. (*Exhs.6, 13, 23; Tr.I:71-73[Dunne]; Tr.IV:8-14 [Dunne]*)

35. As to the armed robbery investigation, Officer Gonsalves could not recall taking any evidence other than the safe, in which he found some jewelry, papers and “some other things”, maybe some marijuana. When physically shown the items that Capt. Dunne had put in his office, Officer Gonsalves said most of them did not look familiar, but one did come from W.R.’s father and others may have come from the safe. He said

he initially kept the property “upstairs” for “identification purposes” and tagged and secured it all as FPD rules and regulations required. (*Exh.13[p.5]; Tr.V:47[Gonsalves]*)

36. When shown the computer record for December 20, 2008 and asked about the Granite City Electric incident, Officer Gonsalves stated that he did pull into the parking lot and spot another cruiser that night. When asked if he responded to an inquiry from the officer driving that cruiser if he was the one who pulled in, Officer Gonsalves said: “No never responded.”(*Exh.13[pp.9-10]; See also Exh.3[Tr.143]; Tr.IV:171-174 [Gonsalves]*)

37. Officer Gonsalves admitted to telling Det. Murray about hearing that the Oscar 11 Officer was caught by Sgt. Kinsella having sex in a cruiser, which he had heard in the “guard room” from “no one specifically.” (*Exh.13[10-11]*)

38. When asked if he “ever sent [Ms. A] any types of images of human sexual organs”, counsel interrupted and after a break, the following colloquy occurred:

Dunne: Have you ever sent her cell phone any type of image of a human sexual organ from your cell phone?
Gonsalves: Possibly.
Dunne: Do you recall what that image was?
Gonsalves: Do you have a specific image I can look over?
Dunne: Yeah. Let me ask you the next question. Have you ever sent her any type of images of your penis from your cell phone?
Gonsalves: No. Never.
Dunne: Do you recall sending her an image with a text that said, “Erase this afterwards. Text back what you think. LOL?”
Gonsalves: I don’t recall”
Dunne: Do you recall sending that image?²
Gonsalves: No.

(*Exh.13[12-13]*)

39. As to the personal errand, Officer Gonsalves acknowledged that he had taken about twenty-five minutes “away from [his] duties without authorization” from Capt.

² The form of this question, following Officer Gonsalves’ request to see a specific image, implies that Capt. Dunne showed him the photo in question (*Exh.19*) at this point, and I so infer. This is also confirmed by testimony at the appointing authority hearing (*Exh.3[Tr.136-140]*), and before the Commission. (*Tr.V:10-11[Gonsalves]*)

Dunne to drop off a lawnmower in his personal vehicle during the work day on April 28, 2009. He initially said Sgt. Reid approved his request for comp time. Capt. Dunne showed Officer Gonsalves Sgt. Reid's report, dated April 29, 2009, which stated he had not authorized comp time and told Officer Gonsalves he must contact his direct supervisor, Capt. Dunne, whom he could have contacted by cell phone. After another off-the-record break, Officer Gonsalves maintained his story and added that Sgt. Reid told him: "Sure, that's no problem." (*Exhs.12, 13[6-8]; See also Tr.II:149-157[Dunne]; Tr.IV:30-44[Reid]*)

40. On July 22, 2009, Capt. Dunne submitted a written report to FPD Chief Riello, which concluded that Officer Gonsalves had committed various violations of FPD rules and regulations, including conduct unbecoming an officer, untruthfulness, incompetence, unauthorized absence and violations of the policies and procedures concerning preservation and security of evidence. Capt. Dunne was not the decision-maker and his report contained no recommendations for discipline, which was left up to Chief Riello and/or the Town Manager. (*Exh.6; Tr.II:19-20[Dunne]*)

41. On July 29, 2009, Town Manager Robert Whritenour, Jr., issued a notice of contemplated discipline to Officer Gonsalves on charges of mishandling evidence and untruthfulness concerning the armed robbery investigation, making false statements about the rumor of another officer having sex in a cruiser and the related events of December 20, 2008 at Granite City Electric, sending obscene matter to a female citizen and denying doing so, taking leave without authorization on April 28, 2009 and lying about it. By written notice that same day from FPD Capt. William McManamin, Officer Gonsalves was relieved of all police powers and placed on paid administrative leave. (*Exh.4*)

42. On September 9, 2009, a hearing was conducted before a hearing officer designated by the Falmouth Town Manager, who rendered her report on October 14, 2009, finding just cause to terminate Officer Gonsalves for the following reasons:

- Officer Gonsalves failed to properly handle and identify evidence, failed to file appropriate reports and was evasive in his testimony and his explanations are unbelievable.
- Officer Gonsalves spread a false rumor regarding a fellow officer having sex in a cruiser.
- Officer Gonsalves was untruthful to Captain Dunne on March 18 when he told him he had not pulled his cruiser into the Granite City Electric Parking lot on December 20, 2008.
- Officer Gonsalves sent pictures of naked body parts, in particular, a penis, through a cell phone text message to a person he knows in his official capacity as a police officer.
- Officer Gonsalves was untruthful and evasive in his statements when he claimed he “possibly” could have sent the pictures to the female citizen.
- Officer Gonsalves was absent for duty without authorization when he left work in his personal vehicle to run an errand.
- Officer Gonsalves was untruthful to Captain Dunne when he stated he had received permission from the Sergeant to use compensatory time.

The hearing officer concluded that “Officer Gonsalves has violated the rules and regulations of the Falmouth Police Department, including rules prohibiting conduct unbecoming a police officer, untruthfulness, incompetence, unauthorized absence, and policies and procedures regarding the preservation and security of evidence.” (*Exhs.2, 3, 15,16,17*)

43. On November 9, 2009, Town Manager Whritenour adopted the findings of the Hearing Officer and dismissed Officer Gonsalves from his position as an FPD Patrol Officer, effective immediately. This Appeal duly ensued. (*Exh.1; Claim of Appeal*)

The Evidence of Alleged Racial Bias

44. On or about July 22, 2009 (the same day that Capt. Dunne submitted his written report to Chief Riello), Officer Gonsalves filed a claim of employment discrimination against Falmouth with the Massachusetts Commission Against Discrimination (MCAD).

The MCAD claim was not placed in evidence at the hearing before the Commission but the gist of the claim, as suggested by the testimony, involved Officer Gonsalves's contention that he was the only black FPD police officer and his application to become a full-time detective had been denied because of his race. (*Exh.11; Tr.IV:94-95, 98-99 [Gonsalves]; See also Tr.II:136-137 [Dunne];Tr.III:35, 53 [Ms.A]*)

45. No evidence suggests that anyone in Falmouth knew of the MCAD filing until after the July 29, 2009 notice to Officer Gonsalves had been sent and he had been placed on administrative leave. Capt. Dunne, specifically, had no knowledge of the MCAD complaint until after he had completed his investigation and submitted his July 22, 2009 report to Chief Riello. There clearly was no such claim until long after the June 26, 2009 recorded investigatory interview. The first word of the MCAD complaint in the evidence is found in two newspaper accounts, each dated August 4, 2009, that mentioned it as part of an article reporting on the pending disciplinary charges against Officer Gonsalves. (*Exhs.11, 31(ID); Tr. II:71-74[Dunne] See also Tr.IV:178-179, 190-191[Gonsalves]*)

46. Neither in their testimony nor by their demeanor did any FPD personnel exhibit indicia that they harbored any bias against Officer Gonsalves. Many witnesses testified to supportive, mentoring relationships with him. (*See Exh.26;Tr:I:54-564[Dunne]; Tr.II:70,136-137,163-167[Dunne];Tr.IV:30,40[Reid];Tr.IV:45[Kinsella];Tr.IV:57,62-65 [Murray];Tr.V:140-141[Hartzler]*)

Commission Hearing

47. Capt. Dunne and the other FPD officers who testified before the Commission presented as competent and experienced officers, most of them superior officers in command positions. They each gave coherent, credible and appropriately responsive

testimony, both on direct and cross-examination, as expected from such police professionals. Their testimony was largely consistent with the statements given during the internal investigation and appointing authority hearing, much supported by documentary evidence and not credibly impeached. (*Exhs.3,6,8,12,18;Tr.I:54-151 [Dunne];Tr.II:6-89, 118-201[Dunne];Tr.IV:8-25[Dunne];Tr.IV:30-34[Reid];Tr.IV:45-57 Kinsella];Tr.IV:57-87[Murray];Tr.V:121-168[Hartzler];Tr,168-196[Carpenter];Tr.V: 196-207[Dunne]*)

48. Capt. Dunne was shown to be in error in one material respect. He had contended that Officer Gonsalves had not prepared the appropriate and required reports documenting his actions in executing the consent search and seizure of the safe and other property taken into evidence in the course of the investigation of the W.R. armed robbery and related cases. The evidence proved that, in fact, Officer Gonsalves had prepared the “appropriate” paperwork. Capt. Dunne acknowledged as much during his testimony and, for reasons he could not explain, never came across the reports, or overlooked them, in the course of his research and investigation. (*Exhs.6,20,21,22, 27,30;Tr.II:37-40,49-67,175-180[Dunne];Tr.IV:131-145,198-207,225-226[Gonsalves]*)

49. Falmouth presented considerable evidence to explain the FPD’s elaborate policies and procedures for preservation and securing of evidence, which was mostly undisputed, and which boils down mainly to mostly common sense rules that ensures the integrity of the “chain of custody” of any property that is collected during a police investigation that may be useful to solving a crime or prosecuting a case in court. In brief, all property must be labeled or tagged as soon as practicable after it is collected, packaged in an appropriate container and stored inside the “evidence room” (located on the lower level, or basement, of the FPD building) or temporarily secured in an evidence “locker” located outside the

evidence room. (*Exhs.3[Tr.15-16,40-71;Tr.I:63-64,126-128,137-141[Dunne]; Tr.II:8-14,28-31,167-181,193-95[Dunne];Tr.IV:135,143-149,202-224 [Gonsalves];Tr.V:49-66; Tr.V:122-168[Hartzler];Tr.V:168-196[Carpenter]*)

50. Other than her poor recollection of dates, Ms. A's testimony was largely consistent with what she reportedly said during the investigative interviews by Capt. Dunne and the report made by the Oscar 11 Officer with whom she met on December 20, 2008. (*Exhs.3[Tr.22-23,86-87],6,9; Tr.II:95-107[Ms.A];Tr.III:3-54[Ms.A]*)

51. Ms. A was absolutely certain that the text message she provided to Capt. Dunne was sent by Officer Gonsalves and that the attached picture was a photograph of him although she stated that she had never actually seen him in the nude. She said her conclusion was based on the fact that she knew the cell phone from which the message came to be that of Officer Gonsalves, the context in which it came as part of other messages she had received, and that the text message itself that accompanied the photo ("Erase this afte![sic]. Text back what u think lol [laughing out loud]") implied to her that the picture was taken by him. (*Tr.II:95-107[Ms.A];Tr.III:17-18,36-38[Ms.A]*).

52. Ms. A candidly acknowledged that, while she did not welcome the message it did not "offend" her. She apparently brushed off the incident until she told the Oscar 11 Officer about it on December 20, 2008. For some unexplained reason, it took her many attempts to transmit the message and photo to Capt. Dunne, which he did not receive until it was eventually sent to his computer on or about May 25, 2009. These discrepancies, however, do not change the credible truth of her core testimony about how she received the message from Officer Gonsalves. (*Tr:III:14-18,36-39[Ms.A]*)

53. As to the alleged relationship with the Oscar 11 Officer, Ms. A was persuasive that intimate contact between them on December 20, 2008 was not possible. Each party remained in separate vehicles that evening. I also believe she testified truthfully about hearing rumors that she had sex with the officer that night that she attributed to Officer Gonsalves. However, her positive identification of Officer Gonsalves in the parking lot and her claim that the rumors started “the next day”, are probably exaggerations. The subject clearly struck a chord with her and led to an unprovoked outburst directed toward Officer Gonsalves during her testimony, when she made no attempt to hide her anger:

“I have my own house. I live in this town. I don’t need to have sex in a parking lot. So the rumor that you made obviously made me angry because yours are lies. I’m the truth. You sent it.”

(Tr.III:3-5,19-36,49-54[Ms.A])

54. Ms. A’s also described her relationship over the years with Officer Gonsalves in a way that rings true to me. She relied on him for his police contacts, he tried to court her and, while she did not reciprocate, neither did she rebuke him completely. She honestly worried that Officer Gonsalves would be “jealous” that she had confided in another police officer. This description is consistent with a relationship that would lead Officer Gonsalves to believe, until the Granite City Electric incident, that he had license to send the type of lurid “jokes” involved in this case to her without recrimination. *(Exhs.6, 7 ;9; Tr.II:5-20[Ms.A]; See also Tr.IV:113-114[Gonsalves])*

55. Officer Gonsalves was not a credible witness. His testimony on nearly every core issue was equivocal, unresponsive and inconsistent. For example:

- He provided conflicting versions of the W.R. search and seizure, switching around where and when he got various items and what he did with them and why. His testimony that he tagged all the evidence is not credible and neither is his testimony

that Capt. Dunne told him to place evidence on a table in the Detective Division rather than in an evidence locker due to office renovations. He stated that he did not recognize items he previously identified and said he had taken from the W.R. residence. (*Exhs.3[Tr.125-130,144-158],13[pp.2-6],18, 21,22,27;Tr.IV:127-165,208-224[Gonsalves];Tr.V:28-68,76-76-114,116-119 [Gonsalves]*)

- He retracted his prior statements that he “may have” sent Ms. A a picture of a man’s genitals, such as the one in question here, as a “joke” and didn’t “recall” how often, and, instead, testified he knew he could not have received and did not send the text message and picture in question. (*Exhs.3[Tr.140-142],13[pp.12-13],19; Tr.IV:106-108 [Gonsalves]; Tr.V:4-11[Gonsalves]*)
- He acknowledged that he had been at the Granite City Electric parking lot on December 20, 2008, but changed his initial recollection that he had responded to the Oscar 11 Officer about being there. (*Exhs.3[Tr.26,142-144], 6,13[p.10];Tr.IV:170-180[Gonsalves]*)
- He changed his recollection that he had heard the rumor about the Oscar 11 officer, naming two officers as the ones who told him about the rumor “well before” December 20, 2008, claiming he previously denied knowing their names because he didn’t want to get them in trouble, and later re-characterized them as merely witness to the rumor, not the actual source. (*Exhs.3[Tr.132-134,161-163],13[p.10-11];Tr.IV:177-180[Gonsalves];Tr.V:17-20[Gonsalves]*)
- He changed his recollection of the April 2009 episode, claiming that he told Sgt. Reid that he didn’t need to bother calling Capt. Dunne for approval to run a personal errand and just asked for a lunch break, which Sgt. Reid approved, rather than his

earlier statements that he had asked for, and Sgt. Reid had cleared him to take comp time to run the errand. (*Exhs3[137-139,158-161],13[pp.6-8];Tr..IV:180-186 [Gonsalves];Tr.V:21-27[Gonsalves]*)

CONCLUSION

Summary

Falmouth has established just cause to discharge Officer Gonsalves from his position as a police officer. The preponderance of the evidence showed that Officer Gonsalves was responsible for using extremely poor judgment in his careless handling of evidence collected in a criminal investigation and by his evasive and inconsistent statements about this incident as well as other matters, confirmed by his demeanor and testimony at the hearing before the Commission, which amply justified Falmouth's conclusion that Officer Gonsalves was a person who could not be trusted to tell the truth, which is one of the most essential traits required of any municipal police officer.

Applicable Civil Service Law

A permanent civil service employee who claims to be aggrieved by a disciplinary decision made pursuant to G.L.c.31,§41, may appeal to the Commission under G.L. c.31, §43, which provides:

“If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.

Under Section 43, the role of the Commission is to determine, under a “preponderance of the evidence” test, “whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). See also Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev.den., 440 Mass. 1108 (2003); Police Dep’t of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); McIsaac v. Civil Service Comm’n, 38 Mass.App.Ct. 473, 477 (1995); Watertown v. Arria, 16 Mass.App.Ct. 331, rev.den., 390 Mass. 1102 (1983).

In performing its function, “the commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew [in] ‘a hearing de novo upon all material evidence and a decision by the commission upon that evidence and not merely. . .a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer’ . . .For the commission, the question is . . . ‘whether, *on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision.*’ ” Leominster v. Stratton, 58 Mass.App.Ct. 726,727-728(2003)(affirming Commission decision rejecting evidence of appellant’s failed polygraph test and domestic abuse orders and crediting appellant’s exculpatory testimony) (*emphasis added*). cf. Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (inconsequential differences in facts found insufficient to hold appointing authority’s justification unreasonable) See generally Villare v. Town of North Reading, 8 MCSR 44, reconsid’d, 8 MCSR 53 (1995) (discussing need for de novo

fact finding by a “disinterested” Commissioner in context of procedural due process); Bielawski v. Personnel Admin’r, 422 Mass. 459, 466 (1996) (same)

An action is “justified” if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). The Commission determines justification for discipline by inquiring, “whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service.” School Comm. v. Civil Service Comm’n, 43 Mass. App. Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983). The Commission is guided by “the principle of uniformity and the ‘equitable treatment of similarly situated individuals’ [both within and across different appointing authorities]” as well as the “underlying purpose of the civil service system ‘to guard against political considerations, favoritism and bias in governmental employment decisions.’” ” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of the “merit principle” which governs Civil Service Law that discipline must be remedial, not punitive, designed to “correct inadequate performance” and “separating employees whose inadequate performance cannot be corrected.” G.L.c.31,§1.

The burden of proof by a preponderance of the evidence is satisfied “if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may

still linger there.” Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1982). The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001). The Commission is entitled to due weight for its experience, technical competence, and specialized knowledge, as well as to the discretionary authority conferred upon it. . . This standard of review is highly deferential to the agency on questions of fact and reasonable inferences drawn therefrom.’ ” Brackett v. Civil Service Comm’n, 447 Mass. 233, 241-42 (2006) and cases cited.

It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance.” Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003). See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003) (where live witnesses gave conflicting testimony at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing)

Untruthfulness

The most serious charge proved against Officer Gonsalves involved his untruthfulness. He left a trail of evasive, incredible and inconsistent statements that began on December 20, 2008, with his original denial to the Oscar 11 Officer that he had pulled

into the Granite City Electric parking lot while the officer and Ms. A were meeting. It continued through the FPD investigation and was on display during his two days of testimony at the hearing before the Commission. On these grounds, alone, Falmouth is fully justified to terminate a police officer who repeatedly demonstrates his inability to tell the truth. See City of Cambridge v. Civil Service Comm'n, 43 Mass. 300, 303 (1997) (“The city was hardly espousing a position devoid of reason when it held that a demonstrated willingness to fudge the truth in exigent circumstances was a doubtful characteristic for a police officer. . . . It requires no strength of character to speak the truth when it does not hurt.”) See also Phillips v. Town of Hingham, 24 MCSR 267 (2011) (police officer terminated for untruthfulness about inappropriate “horseplay” with civilian employee while on duty); Desharnais v. City of Westfield, 23 MCSR 418 (2010) (officer damaged cruiser in “cowboyish” spins and then untruthfully denied his antics); Mozeleski v. Chicopee, 21 MCSR 676 (2008) (lying to cover-up inappropriate conduct during a late-night traffic stop); Rizzo v. Town of Lexington, 21 MCSR 634 (2008) (police officer failed to report use of force and later misrepresented level of force used); Layne v. Town of Tewksbury, 20 MCSR 372 (2007) (police officer denied using profanity directed to accident victims)

Mishandling of Evidence

The evidence leaves unanswered many questions about what precisely happened to the property taken by Officer Gonsalves from the W.R. home and whether Officer Gonsalves is solely responsible for what happened. On a few points, Officer Gonsalves deserves the benefit of the doubt. Thus, it does seem probable that Sgt. Hartlzer did authorize the disposal of the safe, but Officer Gonsalves did not inform Sgt. Hartlzer of

all the surrounding facts. The responsibility for that negligent act is probably equally laid at the feet of both officers. Similarly, while some of the property that Capt. Dunne found unsecured and loose in the brown paper bag on top of Officer Gonsalves' cubicle definitely was property taken by Officer Gonsalves in the consent search, it is possible that it was comingled with other property that Officer Gonsalves had obtained from another source, as he seems to have implied. Also, while Capt. Dunne gave a credible explanation for why he waited to see if Officer Gonsalves would come to him to ask where the evidence had gone (which he never did), Capt. Dunne did not explain why he waited until the June 26, 2009 investigatory interview to confront him, and chose not to ask Officer Gonsalves about it at the same time he requested a report from him on the text message issue in March 2009. Finally, Capt. Dunne was mistaken in his belief that Officer Gonsalves had failed to file certain required written reports concerning his seizure of the property taken in the investigation.

These circumstances, however, do not mitigate the grossly negligent manner in which Officer Gonsalves handled the property he had taken, including placing it in paper bag without being tagged or secured in an evidence locker, failing to account for some of it entirely, and offering to return some of it directly to the suspect without any documentation. The fact that the potential evidence may have been co-mingled with other unrelated items, without clearly distinguishing them, only exacerbates the serious breach of the applicable chain of custody rules which are fundamental to any proper criminal investigation. In addition, it is inexplicable that Officer Gonsalves reported and testified that, during his consent search, he seized some, but not all, the knives that "fit the description" of the weapon used in the armed robbery (as well as some that did not)

Also, there was no evidence proffered to demonstrate that any of this property was ever secured in a proper “sharp” container or tagged as FPD rules expressly required.

It is also noted that Capt. Dunne reported that he found the bag of property on the morning of January 11, 2009, before Officer Gonsalves broke open the safe. This would mean that none of the property in the bag could have come from the safe, specifically, the jewelry that was identified as stolen by W.R. in another robbery under investigation. This stolen jewelry, of all things, should have been immediately tagged and logged into evidence, yet the jewelry was not in the paper bag, has never been located and there is a complete absence of any paper trail that the jewelry was ever in police custody and no request ever received from the owners for its return.³

Finally, further compounding these serious breaches of protocol, in Capt. Dunne’s opinion, was Officer Gonsalves’s oblivious concern for keeping track of the evidence. Had Officer Gonsalves come forward promptly to redeem the property for which he clearly was responsible, Capt. Dunne would have looked at the situation as a teachable moment and probably nothing more. However, by doing nothing, Officer Gonsalves exacerbated the problem and further demonstrated his lack of good judgment.

The Text Message

The preponderance of evidence proved that, despite his statements to the contrary, Officer Gonsalves did, indeed, transmit a text message and picture of a man’s genitals to

³ There is some evidence to suggest that certain property in the brown bag (e.g., coins and marihuana), may have come from the safe, rather than the consent search. This would imply that Capt. Dunne found the bag after the safe had been opened later in the day on January 11, 2009. Officer Gonsalves gave so many inconsistent statements about what he found in the safe, however, the weight of the evidence infers that Capt. Dunne’s recollection of when he found the bag is more likely accurate. Even if he were wrong about the date, however, that would not change, indeed, it would reinforce the conclusion that Officer Gonsalves’ conduct in comingling evidence from the safe and the consent search, without properly tagging and securing any of it, was a serious breach of protocol that compromised the chain of custody and all of the potentially relevant evidence that had been collected at various points during the investigation.

Ms. A. The circumstantial evidence and direct, credible testimony from Ms. A, was not rebutted by Officer Gonsalves' inconsistent and, often equivocal testimony, which lacked the same credibility. Ms. A clearly believed Officer Gonsalves took the picture but she apparently thought little of it at the time. Whether that is true or not, by sending and/or forwarding such a message and picture to Ms. A (and, possibly, others) and then falsely claiming he did not "recall" doing it and, eventually, denying it, Officer Gonsalves demonstrated a level of mendacity that cannot be tolerated, especially, in a police officer.

The Unauthorized Use of Comp Time

Falmouth also proved that Officer Gonsalves violated FPD protocol by electing to take his personal vehicle to run a personal errand during working hours. The preponderance of the evidence showed, as common sense would dictate, that an officer's supervisor (here, Capt. Dunne) must know the whereabouts of any of the officers under his command at all times and, especially, when an officer leaves his post or cruiser, even for a lunch break. Falmouth concedes, however, that Officer Gonsalves's misconduct in failing to get proper clearance for his personal errand was a trivial matter. Had there been nothing more to the incident, the Commission likely would see this charge as unnecessary "piling on". However, Officer Gonsalves could not even manage to come clean in acknowledging even this minor mistake, and that misconduct is further evidence that may be taken into account when deciding whether remedial discipline, short of termination, was the appropriate solution.

Retaliation Claim

The Commission can summarily dispose of the retaliation claim. No evidence suggests that anyone in Falmouth knew of the MCAD filing until after the June 26, 2009

investigatory interview by Capt. Dunne, his July 22, 2009 report to Chief Riello, and the July 29, 2009 notice to Officer Gonsalves notifying him that he had been placed on administrative leave. The Appellant proffered no evidence that Captain Dunne, Chief Riello, Town Manager Whritenour or the Hearing Officer appointed by him, ever did or said anything to suggest they were racially or personally biased against Officer Gonsalves. There simply is no basis in the evidence to support any inference by this Commission that Officer Gonsalves' discharge was an act of retaliation for his filing an MCAD discrimination charge.

Modification of Penalty

Since the facts established before the Commission do vary somewhat from those upon which Falmouth relied, the Commission has discretion to modify the penalty imposed. G.L.c.31, Section 43 vests the Commission with the authority to affirm, vacate or modify the penalty imposed by the appointing authority. The Commission has been delegated with "considerable discretion", albeit "not without bounds", to modify a penalty imposed by the appointing authority, so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. E.g., Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594,600 (1996) and cases cited.

"It is well to remember that the power to modify is at its core the authority to review and, when appropriate, to temper, balance, and amend. The power to modify penalties permits the furtherance of uniformity and equitable treatment of similarly situated individuals. It must be used to further, and not to frustrate, the purpose of civil service legislation, i.e., 'to protect efficient public employees from partisan political control' . . . and 'the removal of those who have proved to be incompetent or unworthy to continue in the public service'."

Id., 39 Mass.App.Ct. at 600. (*emphasis added*). See Faria v. Third Bristol Div., 14 Mass.App.Ct. 985, 987 (1982) (remanded for findings to support modification)

In deciding to exercise discretion to modify a penalty, the commission's task "is not to be accomplished on a wholly blank slate. After making its de novo findings of fact, the commission must pass judgment on the penalty imposed, a role to which the statute speaks directly. G.L.c.31,§43. Here, the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether "there was reasonable justification for the action taken by the appointing authority in the circumstances found by the Commission to have existed when the appointing authority made its decision.' " Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983). "The 'power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded to the appointing authority.'" Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct. 796, 800 (2004) quoting Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 600 (1996).

Thus, when it comes to its review of the penalty, unless the Commission's findings of fact differ materially and significantly from those of the appointing authority or interpret the relevant law in a substantially different way, the commission is not free to "substitute its judgment" for that of the appointing authority, and "cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation."). Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited (minor, immaterial differences in facts found by Commission and appointing authority did not justify modification of 180 day-suspension). See, e.g., Town of Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct. 796 (2004) (modification of 10-day suspension unsupported by material difference in facts or finding of political influence); Commissioner of MDC

v. Civil Service Comm'n, 13 Mass.App.Ct. 20 (1982) (discharge improperly modified to 20-month suspension)

After careful consideration, for the reasons expressed above, the differences in the facts found by the Commission in this case do not warrant the Commission's exercise of discretion to modify Falmouth's decision. Officer Gonsalves' long career with the FPD, during which he has performed on many occasions with distinction, is duly noted. Sadly, however, these distinctions and mitigating factors do not justify setting aside Falmouth's rational and reasonably justified decision to discharge Officer Gonsalves for the serious lapses of judgment and untruthfulness that were proved in this case.

Accordingly, the appeal of the Appellant, Michael Gonsalves, is hereby *dismissed*.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowall & Stein, Commissioners; Marquis [absent]) on June 14, 2012.

A True Record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of a Civil Service Commission's final decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:

Galen Gilbert, Esq. (for Appellant)

Timothy Norris, Esq. (for Appointing Authority)