

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

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

WILLIAM GREEN,
Appellant

v.

D1-17-104

CITY OF LAWRENCE,
Respondent

Appearance for Appellant:

William Green, *pro se*

Appearance for Respondent:

Robert D. Hillman, Esq.
Deutsch Williams
One Design Center Place, Suite 600
Boston, MA 02210

Commissioner:

Cynthia A. Ittleman

DECISION

On May 22, 2017, William Green (the Appellant or Mr. Green) filed the instant appeal with the Civil Service Commission (the Commission) under G.L. c. 31, ss. 42 and 43, challenging the decision of the City of Lawrence (the Respondent, the City or Lawrence) to terminate his employment as a Patrol Officer in the Lawrence Police Department (the LPD or the Department). The Commission held a prehearing conference in this regard at the Mercier Community Center in Lowell on July 10, 2017 and a full hearing was held at the same location in Lowell on August 14, 2017.¹ Having not received a written request for a public hearing, the hearing was private. The hearing was digitally recorded and copies of the recording were sent to

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR ss. 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31 or any Commission rules taking precedence.

the parties.² The witnesses, with the exception of the Appellant, were sequestered. Both parties submitted post-hearing briefs. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT:

Thirty-six (36) Exhibits (Ex.) were entered into evidence at the hearing.³ Based on the Exhibits and the testimony of the following witnesses:

Called by the Appointing Authority:

- Sergeant (Sgt.) Sandy Picard, LPD
- Officer Wayne Taylor, LPD
- Lieutenant (Lt.) Michael McCarty, LPD
- Then-Chief James Fitzpatrick LPD

Called by the Appellant:

- William Green (Appellant)

and taking administrative notice of all matters filed in the case; stipulations⁴; pertinent statutes, case law, regulations, rules, and policies; and reasonable inferences from the credible evidence; a preponderance of the evidence establishes the following facts:

1. The Appellant was hired by the LPD in 2005 as a Patrol Officer. (Testimony of Appellant) As a member of the LPD, the Appellant was subject to the Department's Rules and Regulations. (Exs. 28 (Rules effective March 2016) and Ex. 29 (Rules effective prior to March 2016))
2. On March 20, 2017, the Respondent terminated the Appellant's employment for: 1) arriving late and in improper uniform to a day-long detail on November 2, 2016,

²If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

³The Exhibits were entered into the record at the hearing as Joint Exhibits, with the understanding that the parties did not contest the authenticity of the documents but reserved their rights to argue the relevance of the Exhibits. After careful review of all of the evidence in the record, I have found the Exhibits relevant and assigned them the weight they are due.

⁴ At the prehearing conference in this case, the parties stipulated to certain facts. (Administrative Notice)

expressed anger when ordered to produce a memo explaining his tardiness arrival, and left the detail twenty (20) minutes after he arrived after he was instructed to remain at the detail until a replacement could arrive; he was absent without leave on November 23, 26, 27, 28 and 29 and December 2, 3 and 4, 2016; 3) intimidated a witness and was insubordinate to Lt. McCarthy, who was investigating allegations that the Appellant committed an assault and battery on another officer; and 4) was untruthful when he told the Police Chief that he did not recall telling Lt. McCarthy that he (Lt. McCarthy) may become “collateral damage” regarding his investigation of the Appellant. (Ex. 1)

Charge 1: Abandoned Detail

3. Police details are administered by the Administrative Division of the LPD, which is led by Lt. Sean Burke. Sgt. Sandy Picard assists Lt. Burke in this regard. (Testimony of Picard) Details are assigned to police officers through a system established by the collective bargaining agreement (CBA) between the city and the union representing patrol officers. (Testimony of Picard) Since 2005, the list of officers eligible for details was administered by Patrol Officer Wayne Taylor, who would contact officers, in the order of eligibility, to offer them available details. (Testimony of Taylor)
4. On November 1, 2016, LPD Chief Fitzpatrick issued a “Road Job Order” to all personnel via email messages and by posting it in LPD headquarters, establishing a new process for monitoring details that would begin on November 2, 2016. (Ex. 7; Testimony of Picard) The new process required Sgt. Picard to make sure that details were staffed on time by officers who were properly uniformed. (Id.)
5. The Appellant accepted an assignment to work a series of security details requested by the Greater Lawrence Family Health Center (Health Center) at 150 Park Street in

Lawrence from 8 a.m. to 5 p.m. (Testimony of Picard)

6. On November 2, 2016, Sgt. Picard began her duties by visiting the details that were to begin at 7 a.m. At approximately 7:45 a.m., Sgt. Picard was at a detail at the intersection of Lawrence Street and Park Street, which was close to the Health Center. Since Sgt. Picard was near the Health Center and the Appellant was expected to begin a detail there at 8 a.m., Sgt. Picard went to the Health Center to wait for the Appellant. (Testimony of Picard)
7. The Appellant's November 2, 2016 detail was a "security" detail because there had been two (2) recent shooting incidents in that area. The Health Center had non-LPD security guards but they were unarmed. (Testimony of Picard)
8. When the Appellant had not arrived a few minutes before the detail was to begin at 8 a.m., Sgt. Picard texted the Appellant and contacted him by LPD radio, creating a time-stamped chronology of these matters. (Ex. 5)
9. The Appellant arrived at the Health Center approximately seventeen (17) minutes late. (Ex. 7) When the Appellant arrived, Sgt. Picard noted that the Appellant arrived without his hat and without displaying his badge, which are part of the required uniform for an officer on detail, as required by LPD. Sgt. Picard had to instruct the Appellant to get his hat from his car and to put his badge on his uniform. Further, Sgt. Picard told the Appellant to write a standard "to/from" memorandum to her regarding the reason for his tardiness. (Exs. 5, 6 and 7; Testimony of Picard)
10. After the Appellant retrieved his hat and put on his badge, the Appellant told Sgt. Picard that he did not want to work the detail and that he'd speak to the details administrator to obtain a replacement for himself. Sgt. Picard did not object to what the Appellant said

but she advised him that there could be no gap in coverage at the detail because the Health Center was having “trouble in the neighborhood”. (Testimony of Picard; Ex. 5)

11. On November 2, 2016, Officer Wayne Taylor was administering the details. He had assigned the Appellant to the Health Center detail. After the Appellant spoke to Sgt. Picard, the Appellant contacted Officer Taylor and complained that he had been asked to write a “to/from memo”. The Appellant complained to Officer Taylor that he was being “watched”, he would not put up with “any of this shit”, and that he was leaving the detail. Officer Taylor told the Appellant that he (Officer Taylor) would find a replacement for the Health Center detail but he did not authorize the Appellant to abandon his post. The Appellant left the detail at or around 8:35 a.m. before a replacement was identified to report to the Health Center detail. (Testimony of Taylor; Ex. 5)
12. By memo dated November 2, 2016, the Appellant provided Sgt. Picard with his explanation for his tardiness that day, citing several factors, including a broken boot lace and having to drop his wife off at work. (Ex. 10)
13. When staffing details, the LPD gives the highest priority to security details, which are filled first, prior to traffic control details. If circumstances require an officer to leave a security detail, the LPD will fill it immediately, and, if no replacement is available, the department will have a police car from that day’s shift report to that location. (Testimony of Taylor)
14. The Appellant was interviewed regarding the November 2, 2016 detail incident. In the interview, the Appellant admitted that he was late to the detail and that Sgt. Picard had to tell the Appellant to find and put on his hat and badge. The Appellant further stated that after Sgt. Picard left, he contacted Officer Taylor and asked if he could find another

officer for the detail and told Officer Taylor that he was leaving. The Appellant also admitted that he left the detail at or around 8:35 a.m. before his relief, Officer Angel Lopez, arrived. (Ex. 5)

15. LPD Rule 7.11.2, Neglect of Duty, states,

“Members shall not be absent from their assigned duty without leave; leave their post, sector, beat, or assignment without being properly detailed, relieved or making required notifications.” (Ex. 28)

16. LPD Rule 8.23.2, Reporting for Duty, states,

“All members shall report for duty promptly at the time and place required by their assignment or as otherwise directed by the Chief or Officer in charge. They shall be properly attired with uniforms cleaned, pressed and serviceable. They shall report for duty having achieved an acceptable level of personal hygiene. They shall be properly equipped and ready to immediately assume their duties.” (Exs. 28)

17. The Appellant was the only LPD officer to abandon a detail without being excused in the twelve (12) years that Officer Taylor administered details. (Testimony of Taylor) The Appellant was not the only LPD officer cited for failure to be on time for his detail on November 2, 2016 as Sgt. Picard also asked Officer L to prepare a “to/from” memo for being late to his detail at another location on November 2, 2016. (Ex. 7)⁵

18. On November 8, 2016, then-Chief Fitzpatrick directed Lt. Michael McCarthy to investigate the Appellant’s conduct on November 2, 2016 in connection with the detail to which he was assigned. Lt. McCarthy interviewed the Appellant, Officer Taylor and Sgt. Picard and obtained memoranda from Lt. Burke to Chief Fitzpatrick, from Sgt. Picard to Lt. Burke, and from the Appellant to Sgt. Picard. Lt. McCarthy prepared an investigation report in which he concluded that the Appellant was tardy for the Nov. 2, 2016 detail and

⁵ Ex. 7 includes records showing the officers whose details were checked on November 1, 2 and 3 in 2016, indicating that the Department was not only checking the Appellant’s detail. Exhibit 7 also includes the to/from memo that Officer L was ordered by Sgt. Picard to write.

that he abandoned the detail before he could be replaced in violation of LPD Rules 7.11.2 (neglect of duty) and 8.23.2 (reporting for duty). (Exs. 5, 6 and 8)

Charge 2 – Absence from Duty Without Leave

19. The LPD maintains a record of officers assigned to each shift which indicates their attendance. The record shows the assignments by platoon (indicating the shift) to which officers are assigned. Each platoon is divided into three (3) groups. Two (2) groups are assigned to work each day and one (1) group is off. (Testimony of Fitzpatrick; Ex. 11 (the group not scheduled to work is marked with a shaded block))
20. Front desk duty, as indicated on the LPD schedule, is a regular duty assignment. (Testimony of Fitzpatrick; Ex. 11) For most of the days that the Appellant was scheduled to work from November 1 – December 8, 2016, he was assigned to the front desk. In the days and/or shifts that the Appellant was not scheduled to work, other officers were assigned to the front desk. (Ex. 11)
21. The Appellant was scheduled for duty on November 23, 26, 27, 28 and 29, 2016 but he failed to report to duty and was marked “AWOL” on the LPD attendance records. (Ex. 11 (see record for November 2016))
22. On Sunday, November 27, 2016, the Appellant contacted the LPD for the first time since his “AWOL” period began. The Appellant spoke to Detective (Det.) Sgt. Aguilar, the Platoon Officer in charge, at approximately 2:45 p.m. The Appellant asserted that he was sick and would not report for duty. The Appellant had exhausted his sick leave, as well as all other available leave time so Sgt. Aguilar called him back to advise him that he was required to report for duty or he would be marked AWOL. (Ex. 14)
23. The Appellant told Sgt. Aguilar that “he needed to make some phone calls” and would

call Sgt. Aguilar back. (Ex. 14) At or about 3:10 p.m., the Appellant called Sgt. Aguilar and told him that he would not be working that night. Sgt. Aguilar told the Appellant about “potential disciplinary consequences of his refusal to report for duty” to which the Appellant responded that he “recognized” that but that he disagreed with the LPD’s position and that he would “take the night off” and “let the department do whatever it [the department] wants to do.” (Id.)

24. On Monday, November 28, 2016, following three (3) shifts of unexcused absences, the Appellant appeared at the office of Lt. Daniel Fleming, the Officer in Charge, at approximately 3:15 p.m. (Ex. 15) The Appellant told Lt. Fleming that he would not report for duty that day as scheduled and that he would not be coming to work in the “foreseeable future”. (Id.) Lt. Fleming asked the Appellant to clarify that he was refusing to work. The Appellant said “until things get resolved, I won’t be coming to work” but he did not explain what things had to be resolved. (Id.)

25. The Appellant failed to report for duty as scheduled on December 2, 3 and 4, 2016 and was marked AWOL for each of those dates. (Exs. 11 - 15) At the time that the Appellant was marked AWOL, he had no leave time available. (Ex. 18)

26. On December 8, 2016, the City sent the Appellant a letter pursuant to G.L. c. 31, s. 38⁶ indicating that the Appellant had voluntarily and permanently separated himself from employment with the City. (Ex. 16)

27. After the City sent the Appellant the separation letter under G.L. c. 31, s. 38, the City learned that the Appellant had attended a matter in Lawrence District Court as an LPD

⁶ Under G.L. c. 31, s. 38, an “... unauthorized absence shall mean an absence from work for a period of more than fourteen days for which no notice has been given to the appointing authority by the employee or by a person authorized to do so, and which may not be charged to vacation or sick leave, or for which no leave was granted pursuant to the provisions of section thirty-seven.”

police officer. (Ex. 17) The City concluded that while the Appellant failed to report for scheduled duty, the Appellant's court appearance in connection with LPD matters constituted a break in the sequence of the Appellant's absences from work under G.L. c. 31, s. 38. (Testimony of Fitzpatrick; Ex. 18)

28. By letter dated January 3, 2017, the City rescinded the Appellant's termination under G.L. c. 31, s. 38. (Ex. 18) The City paid the Appellant back pay for the period December 8, 2016 to January 10, 2017. (Testimony of Fitzpatrick)

29. The Appellant returned to work on January 10, 2017 and by a letter of the same date, the Mayor informed the Appellant that he was being placed on paid administrative leave pending an investigation regarding the Appellant's alleged violation of Rules 1.1.1, 1.5.1, 7.3.1, 7.9.1, 7.11.2, 8.23.2 and other Rules cited. (Ex. 19) The Rules listed here, in effect in November and December 2016, provide:

Rule 1.1.1, "Absent Without Leave", "Members shall not be absent from duty without permission for a proper reasons and only for a limited time. A Commanding Officer of the Chief of Police may excuse a member from reporting or being present for duty." (Ex. 28)

Rule 1.5.1, "[o]nly the appointing authority (the Mayor) may grant a leave of absence, with or without pay. A request for a leave of absence must be made in writing, stating fully the reasons for the request and shall be submitted to the Mayor and copied to the Chief of Police. Leaves will be granted in accordance with M.G.L. c. 31, s. 37." (Ex. 28)

Rule 7.3.1, members shall not engage in the commission of any felony or misdemeanor. (Ex. 28)

Rule 7.9.1, members shall not be insubordinate, which "shall include: Any disrespectful, mutinous, insolent, or abuse language or action toward a Superior Officer" (Ex. 28)

Rule 7.11.2 (Ex. 28 - *supra*)

Rule 8.23.2 (Ex. 28 - *supra*)

30. Then-Chief Fitzpatrick did not receive any request from the Appellant for a leave of absence under LPD Rules.⁷ (Testimony of Fitzpatrick)

Charge 3 – Insubordination, Intimidation and Untruthfulness

31. In or about May 5, 2015, LPD officer M alleged that the Appellant committed an assault and battery upon him. Lt. Michael McCarthy was directed to conduct an investigation of officer M’s allegation. (Testimony of McCarthy; Ex. 22)

32. In connection with the assault and battery investigation, and in response to the request of officer M, Lt. McCarthy filed an application for a criminal complaint against the Appellant and requested a Clerk Magistrate’s hearing. The Appellant was served notice of such application in hand at the LPD. (Testimony of McCarthy; Exs. 20 – 25)

33. On November 10, 2015, shortly after the Appellant was served with the criminal complaint in connection with officer M’s allegations that the Appellant committed an assault and battery on him, the Appellant sent an email message to Lt. McCarthy about the Department’s investigation. The email message stated, in part, that the investigation was taking too long, in comparison to the Mass. State Police investigation of the Appellant’s prior claim against LPD officer S; white officers do not receive the same level of scrutiny as minority officers; the Department maintains secret files, refusing to comply with related Massachusetts laws and LPD’s contractual obligations; and the Department “engages is (sic) wholesale racial discrimination”. (Ex. 23)

34. Shortly after the Appellant sent the email message to Lt. McCarthy, he phoned Lt. McCarthy complaining about the investigation and he told Lt. McCarthy that he did not want the Lieutenant “to become collateral damage” as a result of the investigation. Lt.

⁷ The Appellant previously requested and received leave under the federal Family and Medical Leave Act, Pub.L. 103-3, but the leave period lapsed. (Testimony of Fitzpatrick)

McCarthy understood the Appellant's comment about "collateral damage" to be a threat to him (McCarthy) as the investigating officer. (Ex. 21)

35. Lt. McCarthy immediately reported the Appellant's "collateral damage" statements to then-Chief Fitzpatrick. By a letter dated December 18, 2015, the Appellant received written notice that he would be the subject of an investigative interview on Dec. 22, 2015 regarding his comments to Lt. McCarthy. (Exs. 20, 21, 23 – 25). The notice further indicated that 1) the subject of the interview was alleged violation of the law, intimidation of a witness and insubordination; 2) the Appellant has the right against self-incrimination, which he may invoke at any time, and the right to "legal and union representation"; 3) the interview will be "solely administrative in nature" and it may result in the Appellant's discipline, including dismissal; 4) if the Appellant refused to testify or answer questions he would be subject to discipline; and 5) the Appellant's statements cannot be used against him in a criminal proceeding, except for false statements, but they may be used in a subsequent LPD charge. (Ex. 25)

36. On December 21, 2015, Chief Fitzpatrick conducted a recorded interview of Lt. McCarthy for approximately one-half hour. At this interview, Lt. McCarthy recalled specific details about the email message he had received from the Appellant on November 10, 2015 about the investigation of the Appellant's alleged assault and battery investigation of another LPD officer and the Appellant's phone call to him after he sent Lt. McCarthy the email message. Lt. McCarthy also said at the interview that he took the email as a criticism of how he had handled the investigation. Lt. McCarthy recalled when the Appellant called him shortly after he received the Appellant's critical email message and that the Appellant said the email was not meant for Lt. McCarthy, that Lt.

McCarthy had always treated him fairly and that Lt. McCarthy told the Appellant he was offended by the email message. Lt. McCarthy further recalled in his interview that the Appellant said in the phone call that he did not want to see Lt. McCarthy become “collateral damage”, that he asked the Appellant to repeat that statement, and that the Appellant repeated it. In his interview, Lt. McCarthy added that he understood the Appellant’s “collateral damage” statements to mean that something bad could happen to him (Lt. McCarthy) because of his investigation of the Appellant, whether it would involve a lawsuit against Lt. McCarthy or other action taken against him. (Ex. 26)

37. On December 22, 2015, Chief Fitzpatrick interviewed the Appellant. The interview was recorded by the Chief and, by agreement, by the Appellant. Also present were Capt. Scott McNamara and Officer Robert Moody, the Appellant’s shift union steward. At the 15-20 minute interview, much of the time involved then-Chief Fitzpatrick repeating the information in the December 18 letter informing the Appellant of his rights and related discussion, with Chief Fitzpatrick stating that he had no intention of pursuing criminal charges against the Appellant for witness intimidation but that the Chief could not “guarantee” that another entity would not prosecute him.⁸ Chief Fitzpatrick further stated, in part,

“[y]ou are required to answer all questions asked of you honestly and truthfully and to the best of your knowledge. Failure to do so will result in disciplinary action up to and including dismissal. The intentional making of false statements or reports and/or the intentional omission of significant or pertinent facts is considered untruthfulness and will be treated as such.” (Ex. 27, p. 6)

At one point in the interview, there was some discussion about consulting a union attorney by phone. Officer Moody indicated that he had spoken to a union attorney the night before this interview but that union attorneys were unavailable. The Appellant

⁸ The Appellant was not prosecuted for intimidation of a witness. (Testimony of Appellant)

remained at the interview and answered a number of questions about the email he had sent to Lt. McCarthy and the phone call he made to Lt. McCarthy. He did not invoke his right against self-incrimination during this interview. Although he asked Chief Fitzpatrick if he needed an attorney, the Appellant did not ask to reschedule the interview. (Ex. 27) The Appellant had experience with similar interviews and he did not see the need for an attorney for the interview with Chief Fitzpatrick. (Testimony of Appellant) In response to Chief Fitzpatrick's questions, the Appellant stated at the interview that he recalled that he had had a phone conversation with Lt. McCarthy after he sent him an email message complaining about the assault and battery investigation, that he recalled telling McCarthy that he always treated the Appellant fairly and that the Appellant recalled McCarthy telling him that the Appellant's complaint about the investigation was now in writing. Then-Chief Fitzpatrick also specifically asked the Appellant if he told Lt. McCarthy that he "may be collateral damage in the process of this investigation". (Ex. 27, p. 6) The Appellant answered, "I don't remember saying that ..." (Id.), even though Lt. McCarthy stated in his interview that the Appellant said it once and, when Lt. McCarthy asked the Appellant to repeat the statement, the Appellant said it a second time. (Exs. 26 and 27; Testimony of Fitzpatrick) Chief Fitzpatrick found that the Appellant's response to his question at the interview was untruthful. (Testimony of Fitzpatrick)

38. Under the LPD Rules in effect prior to March 7, 2016, Chapter 28, section 2 provided that officers may be disciplined for "offenses and violations includ[ing]",

"s. 2(m) Insubordination or disrespect toward an officer of rank ...

s. 2(u) Violation of the law or of any ordinance of the city or any rule or regulation having the force of law of any board officer, (sic) or Commissioner

having power to make rules and regulations.” (Ex. 29)

In addition, Chapter 29, s. 2 of the LPD Rules prior to March 7, 2016 provided that,

Members of the Department shall conform to and abide by the Rules and Regulations of the Department, observe the laws and ordinances in force in the City of Lawrence, and render their services to the City with zeal, courage, discretion and fidelity. He must have the following qualifications: ...

(d) Be truthful at all time (sic) whether under oath or not. ...” (Ex. 29)

39. The criminal complaint in court against the Appellant for allegedly assaulting LPD officer M was dismissed in March 2017. While the criminal complaint was pending in court, the LPD did not pursue disciplinary action against the Appellant for the alleged assault and battery in order to avoid the Appellant’s invoking of his rights against self-incrimination during the LPD’s discipline investigation. (Testimony of Fitzgerald)

*History of Discipline*⁹

40. The Appellant’s prior discipline includes:

February 2009 - the Appellant received a one (1)-day suspension for being absent without leave and insubordination for using sick leave when he did not have sick leave time available. (Ex. 30)

February 2014 - the Appellant received a ninety (90)-day suspension for misappropriating the City’s funds from outside club details that paid officers in cash. (Ex. 31)

November 2014 - the Appellant received a two (2)-day suspension for leaving an arrested prisoner unguarded and allowing him to escape. (Ex. 32)

May 2015, the Appellant received a reprimand for failing to provide police reports in a complete and timely manner. (Ex. 33)

November 2015, the Appellant received a two (2)-day suspension for insubordination for putting LPD internal personnel matters on social media. (Ex.

⁹ The Appellant, who is African-American, filed a complaint with the Mass. Commission Against Discrimination (MCAD) in July 2014 alleging that the city of Lawrence, the LPD and certain members of the LPD discriminated against him, in part, when they disciplined him in regard to certain matters. In April 2017, MCAD issued a ruling finding that the complaint lacked probable cause, which finding Mr. Green could then appeal. (Ex. 36) There is no indication in the record whether the Appellant appealed the MCAD 2017 ruling.

34)

Termination of Appellant's Employment

41. By a detailed letter dated March 20, 2017, Mayor Rivera informed the Appellant that a hearing would be held at 10 a.m. on April 11, 2017 to address allegations that the Appellant violated cited LPD Rules when he,

- 1) arrived late in improper uniform at the November 2, 2016 day-long detail in a troubled location in the city, he expressed anger when ordered to produce a to-from memo to explain his late arrival and he left the detail approximately twenty (20) minutes after he arrived even though he was instructed to remain at the detail until a replacement could arrive;
- 2) was AWOL on November 23, 26, 27, 28 and 29, and December 2, 3 and 4 dates that he was scheduled for duty;
- 3) intimidated a witness and was insubordinate to Lt. McCarthy when Lt. McCarthy investigated allegations that the Appellant committed an assault and battery on officer M, twice telling Lt. McCarthy that he (McCarthy) could be "collateral damage" for investigating the criminal allegation against the Appellant and reporting the matter to court for prosecution; and
- 4) was untruthful when he told then-Chief Fitzpatrick that he did not recall telling Lt. McCarthy that he (Lt. McCarthy) may become "collateral damage" in connection with his investigation of the Appellant.

(Ex. 1)

42. The hearing was held on April 21, 2017. (Exs. 1 and 3) While the hearing officer was reading the Mayor's notice of hearing into the record at the beginning of the hearing, union Attorney Dwyer asked to speak with the Appellant. The two (2) left the hearing room at or around 10:43 a.m. Attorney Dwyer returned alone, remained in the hearing room and informed the hearing officer that the Appellant did not want to participate in the hearing. The hearing officer indicated that the hearing would go forward as scheduled and there were no objections to proceeding. Then-Chief Fitzpatrick was the only witness. The hearing officer entered thirty (30) exhibits into the record for the

Respondent and nine (9) for the union. In his eight (8)-page report to the Mayor, the hearing officer listed numerous findings of fact, accepted the recommendation of then-Chief Fitzpatrick to terminate the Appellant's employment, and concluded that the Respondent established by a preponderance of the evidence that,

- 1) the Appellant was late for the November 2, 2016 detail, he was not in uniform and he abandoned the detail in violation of LPD Rules 7.1.2 and 8.23.2;
- 2) the Appellant was absent without leave on November 23, 26, 27, 28, 29 and December 2, 3 and 4 (2016)¹⁰ in violation of LPD Rules 1.1.1 and 1.5.1 ; and
- 3) the Appellant made inappropriate statements to Lt. McCarthy in the course of his investigation of another officer's allegation that the Appellant committed an assault and battery on him; such statements were "unacceptable, insubordinate and unprofessional" and were intended "to intimidate, threaten, and influence Lt. McCarthy's participation" in the assault and battery investigation "which ... a reasonable person would readily have construed as threatening and intimidating"; and the Appellant was untruthful to then-Chief Fitzpatrick when he interviewed the Appellant regarding the Appellant's inappropriate statements to Lt. McCarthy, all in violation of LPD Rules Chapter 28, s. 2(m) and 2(u) and Chapter 29, s. 2(d), and G.L. c. 208, s. 13B(1)(intimidation of a witness).

(Ex. 3)

43. By letter dated May 10, 2017, the Mayor informed the Appellant that he had reviewed and accepted the hearing officer's report and, therefore, was terminating the Appellant's employment on May 12, 2017. The Mayor's letter suggests that each of the violations warrant termination of the Appellant's employment.¹¹ (Ex. 4)

¹⁰ The hearing officer's report states that the Appellant was also absent without leave on December 5, 2016. However, December 5 is the date on which the Appellant appeared in court on an LPD matter, although he did not report for duty to the LPD after his court appearance. Based on the Appellant's appearance in court on December 5, the Respondent retracted its prior notice to the Appellant that he had been deemed to have voluntarily abandoned his job under G.L. c. 31, s. 38.

¹¹ The third paragraph of the Mayor's letter begins, "Each of the above-cited violations, collectively and separately, together with your prior disciplinary record, which includes a one day suspension ..." (Ex. 4) The rest of the sentence lists some of the Appellant's disciplinary record but does not complete the sentence to indicate that each of the Appellant's violations found here warrant the Appellant's termination. The Respondent's post-hearing brief asserts that each such violation warrants termination.

Applicable Law

A tenured civil service employee may be discharged for “just cause” after due notice and hearing upon written decision “which shall state fully and specifically the reasons therefore.” G.L. c. 31, s. 41. An employee aggrieved by the decision may appeal to the Commission. G.L. c. 31, s. 43. Under section 43, the appointing authority carries burden to prove to the Commission by a “preponderance of the evidence” that there was “just cause” for the action taken. *Id.*; *see e.g., Falmouth v. Civil Serv. Comm’n*, 447 Mass. 814, 823 (2006); *Police Dep’t of Boston v. Collins*, 48 Mass.App.Ct. 411, *rev.den.*, 726 N.E.2d 417 (2000). Under G.L. c. 31, s. 42, a person who believes that an appointing authority has failed to follow the procedural requirements of G.L. c. 31, s. 41 relating to disciplinary matters may file an appeal at this Commission.

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). 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 Common*, 43 Mass.App.Ct. 300, 304, *rev.den.*, 426 Mass. 1102, (1997); *Selectmen of Wakefield v. Judge of First Dist. Ct.*, 262 Mass. 477 (1928).

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 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, s.1.

G.L. c. 31, § 43 vests the Commission with authority to affirm, vacate or modify a penalty imposed by the appointing authority. The Commission is delegated with “considerable discretion” in this regard, albeit “not without bounds” so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. *See e.g.*, Police Comm’r v. Civil Service Comm’n, 39 Mass.App.Ct. 594, 600 (1996) and cases cited; Falmouth v. Civil Service Comm’n, 61 Mass.App.Ct. 796, 800 (2004); Faria v. Third Bristol Div., 14 Mass.App.Ct. 985, 987 (1982)(remanded for findings to support modification). However, the Supreme Judicial Court has added,

“Unless the commission’s findings of fact differ significantly from those reported by the town or interpret the relevant law in a substantially different way, the absence of political considerations, favoritism, or bias would warrant essentially the same penalty.” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 815, 824.

Further, “[t]he Commission is permitted, but not required, to draw an adverse inference against an appellant, as is the case here, who fails to testify at the hearing before the appointing authority” Merricks v Boston Police Department, 31 MCSR 169 (2018), citing Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006). *See also* Clark v. Boston

Housing Authority, 24 MCSR 193 (2011), Clark v. Boston Housing Authority, Suffolk Superior Court, C.A. No. SUCV2011-2554E, *aff'd* (Feb. 13, 2015).

Analysis

The Respondent has established by a preponderance of the evidence that it had just cause to discipline the Appellant based on his violation of the cited LPD Rules. With regard to the November 2, 2016 detail, there appears to be no dispute that the Appellant arrived at the detail approximately seventeen minutes late, he was not wearing his hat and badge and he walked off the detail approximately twenty (20) minutes after he arrived. Upset with Sgt. Picard's order to write a to/from memo explaining his tardiness, the Appellant said he was leaving the detail. In view of the recent shootings in the detail neighborhood, Sgt. Picard told the Appellant that there could be no gap in time in detail coverage. The Appellant contacted the detail coordinator and informed him that he was leaving the detail. The Appellant left the detail approximately twenty (20) minutes after he arrived, prior to the arrival of his replacement, notwithstanding Sgt. Picard's instruction. The Appellant had not asked for leave to depart prior to the replacement's arrival.

The Appellant argues that he should not be disciplined in connection with the November 2 detail for a variety of reasons. The Appellant was assigned to a detail at the Health Center where there had been recent shootings. Regarding his tardiness at this detail for the Health Center, the Appellant avers that he was not at the LPD offices on November 1, 2016 when the new details policy was issued and, therefore, did not know about it even though it had also been emailed to all members of the Department. The Appellant also asserts that he was angry when Sgt. Picard ordered him to write a to/from memo explaining the reason for his tardiness because she allegedly used profanity when she ordered him to write the memo. Further, the Appellant

asserts that it was common practice to leave a detail before a replacement arrived. None of the Appellant's arguments in this regard are availing. It cannot be a defense to tardiness that an officer did not know of a policy to be on time when officers are scheduled for details for specific time periods. The Appellant was not treated in a disparate manner because Sgt. Picard also ordered another officer to write a to/from memo for being late for a detail that day. Any concerns that the Appellant had about Sgt. Picard's manner of delivery of the order to write the memo could have been conveyed through appropriate channels after the Appellant complied with the order, not by leaving a detail like the one at the Health Center, where there had been trouble recently, before a replacement has arrived and because, as the Appellant argues, other officers do it. Thus, the Appellant's arguments lack merit.

There also appears to be no dispute that the Appellant was absent without leave on November 23, 26, 27, 28, 29 and December 2, 3 and 4, 2016 when he was scheduled to work. In fact, it wasn't until November 27, 2016 that the Appellant even contacted the LPD to indicate that he would not be reporting for duty, alleging that he was sick. When he called, the Appellant spoke to Sgt. Aguilar, the Platoon Officer in charge. Sgt. Aguilar learned that the Appellant had no remaining sick leave or other leave available and called the Appellant back to say that he was required to report for duty or he would be marked AWOL. The Appellant responded that he needed to make some calls and would call the Sergeant back. Sgt. Aguilar told the Appellant about the potential disciplinary consequences that the Appellant faced if he failed to report to work. The Appellant indicated that he was aware of the potential consequences but added "let the department do whatever it wants to do." (Ex. 14) The next day, the Appellant went to the office of Lt. Fleming, the Officer in Charge and told him he would not be returning to work in the "foreseeable future". Lt. Fleming asked the Appellant to clarify if he was refusing to work and

the Appellant said “until things get resolved, I won’t be coming to work”, without explaining what needed to be resolved. (Ex. 15) On December 8, 2016, with the Appellant having failed to return to work, the Respondent sent the Appellant a letter stating that the Appellant had voluntarily and permanently abandoned his job and that he may request a hearing within ten (10) days, pursuant to G.L. c. 31, s. 38. When the Appellant provided proof that he had appeared in court, on LPD business, on December 5 (although he did not report to the Department before or after his court appearance that day), interrupting the period of time in which he failed to report for duty as scheduled, the Respondent rescinded the notice under G.L. c. 31, s. 38 and compensated him for the time between December 8, 2016 and January 10, 2017. The Appellant argues that he did not show up for his scheduled duty because he was assigned to the LPD front desk duty, which he asserts constitutes punishment duty, which is prohibited under G.L. c. 31, ss. 62 and 62A.¹²

The Appellant’s arguments against the Respondent’s findings that he was AWOL for work scheduled over a two (2)-week period lack merit. As indicated in then-Chief Fitzpatrick’s testimony at the Commission hearing and in work assignment records (Ex. 11), desk duty does not constitute punishment duty. Moreover, repeatedly failing to appear for scheduled work, not requesting leave, and telling the LPD that you will not return “for the foreseeable future” is simply not an option for any employee, especially not for a police officer. That the Appellant waited until the third day that he was AWOL to even contact the Department to tell them that he would not report to work and that he then told his superior that he would not report for scheduled duty for an unspecified time is inexcusable and constitutes substantial misconduct which

¹² At the Commission, the Appellant testified that he asked the union to grieve his front desk assignment but that it refused to do so because the front desk duty is a police duty. The Appellant asserted that he subsequently filed a claim that the union failed to represent him. There is no indication in the record of the result of the Appellant’s claim against the union.

adversely affects the public interest by impairing the efficiency of public service and warrants discipline.

The Respondent also established by a preponderance of the evidence that the Appellant was insubordinate and that he intimidated a superior officer. After Lt. McCarthy conducted an investigation of another officer's allegation that the Appellant had committed assault and battery on him, he presented his findings to court and criminal charges against the Appellant issued. Upon receiving the criminal complaint against him, the Appellant sent an email message to Lt. McCarthy with highly critical statements about Lt. McCarthy's investigation that led to the issuance of the criminal complaint against the Appellant. The email message was copied to two (2) other members of the LPD. Within minutes of sending Lt. McCarthy the email message, the Appellant called Lt. McCarthy and twice said that he did not want McCarthy to become "collateral damage" for having led the investigation that led to the issuance of a criminal complaint to the Appellant. Lt. McCarthy stated that he found the Appellant's repeated reference to "collateral damage" to be an attempt to intimidate him and that he (Lt. McCarthy) did not want anything bad to happen, such as being sued by the Appellant for having conducted the investigation of the Appellant. Lt. McCarthy promptly informed then-Chief Fitzpatrick of what the Appellant had done and Chief Fitzpatrick sent the Appellant detailed notice that he would be conducting investigative interviews, explaining the subject of the interview and the Appellants rights in connection with the interview. I find that the Appellant's highly critical email message to Lt. McCarthy constitutes insubordination and that it was unprofessional and disrespectful. Further, I find that the Appellant's phone call to Lt. McCarthy, with repeated references to "collateral damage", constitutes intimidation of Lt. McCarthy as the officer who conducted the investigation that led to the issuance of criminal charges against the Appellant. The Appellant's

argument here is that the LPD did not make specific findings regarding insubordination and intimidation prior to the Respondent's local hearing. Since the Appellant was notified by the Respondent that these issues would be addressed at the local hearing, the Appellant was provided sufficient notice in this regard. Having left the local hearing shortly after it began, the Appellant missed the opportunity to address this and the other reasons the Respondent provided for his discipline and, for that reason, I draw an adverse inference from his failure to participate in the local hearing.

The Respondent also established by a preponderance of the evidence that the Appellant was untruthful when then-Chief Fitzpatrick interviewed him about the highly critical email message he sent to Lt. McCarthy and the phone call that the Appellant made to Lt. McCarthy shortly after he sent the critical email message. In the interview, Chief Fitzpatrick asked the Appellant what he recalled of his phone call with Lt. McCarthy following the email he sent him. While the Appellant recalled certain details of the phone call, he stated that he did not recall telling Lt. McCarthy that he did not want him to become "collateral damage", certainly a memorable phrase, even though Lt. McCarthy credibly reported that he asked him to repeat it and he did repeat it. Since Lt. McCarthy promptly reported to then-Chief Fitzpatrick what the Appellant said to him and the phone call between Lt. McCarthy and the Appellant occurred shortly after the Appellant received the criminal complaint, which was based on Lt. McCarthy's investigation, I find it more likely than not that the Appellant was untruthful during his interview with Chief Fitzpatrick in which that he said that he did not remember telling Lt. McCarthy that he (Lt. McCarthy) may be "collateral damage" in connection with the investigation of the Appellant.

Having found that there was just cause for discipline, we must now address whether

modification of the discipline issued is warranted. The Respondent terminated the Appellant's employment based on his conduct at the November 2, 2016 security detail, including his tardiness, lack of complete uniform and abandonment of the detail prior to arrival of his replacement despite Sgt. Picard's instruction; his absence without leave on certain days in November and December 2016, telling the Department that he would not return for the "foreseeable future"; his intimidation of, and insubordination toward a superior officer; and his untruthfulness to the Police Chief when the Chief interviewed the Appellant regarding the Appellant's insubordination and intimidation of Lt. McCarthy. While the Appellant's tardiness and lack of complete uniform at the November 2, 2016 detail constitute substantial misconduct that adversely affects the public interest by impairing the efficiency of such public service, it does not typically warrant termination. However, the Appellant's abandonment of the detail prior to the arrival of his replacement, knowing that there had been recent shootings in the area, certainly constitutes substantial misconduct as it jeopardizes public safety, when securing the public safety is the essence of a police officer's job and warrants discipline that reflect the seriousness of such misconduct. I also find that the Appellant's subsequent failure to report to work as scheduled for a number of days in November and December, 2016, his intimidation of and insubordination to Lt. McCarthy in connection with his investigation of the Appellant, and his untruthfulness to the Police Chief each constitute grave misconduct that adversely affect the public interest by impairing the efficiency of public service. Such misconduct is especially intolerable in a police department. Combined, the Appellant's actions and/or failure to act, justify the most serious discipline meted out by the Respondent. Furthermore, since the findings here do not differ significantly from those rendered by the Respondent, there is no reason to modify the discipline issued by the Respondent.

Finally, the Appellant alleges that his termination was the result of political bias against him. However, at the Commission hearing, the Appellant admitted that he is “outspoken”, having criticized the LPD at local government meetings, and he asserted that he was running for Mayor against Mayor Rivera. While we enjoy free speech, our public statements have consequences. That said, I find no evidence of bias here. Rather, unfortunately, the Appellant has provided the Respondent with multiple reasons which provide just cause for discipline.

Conclusion

For all of the above-stated reasons, the Appellant’s appeal under Docket No. D1-17-104, filed pursuant to G.L. c. 31, ss. 42 and 43, is *denied*.

CIVIL SERVICE COMMISSION

/s/ Cynthia A. Ittleman

Cynthia A. Ittleman
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on December 19, 2019.

Either party may file a motion for reconsideration within ten days of the receipt of the Commission’s decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), 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 shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

William Green (Appellant)
Robert D. Hillman, Esq. (for Respondent)