

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

One Ashburton Place, Room 503
Boston, MA 02108
(617) 979-1900

AMY HALL,
Appellant

v.

D-19-209

TOWN OF BROOKLINE,
Respondent

Appearance for Appellant:

Michael L. Mason, Esq.
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24 Thorndike Street, Suite 300
Cambridge, MA 02141

Appearance for Respondent:

Wendy H. Chu, Esq.
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Commissioner:

Christopher C. Bowman

DECISION

On October 7, 2019, the Appellant, Amy Hall (Appellant), pursuant to G.L. c. 31, § 43, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Town of Brookline (Town) to suspend her for a period of five days from her position as a police officer in the Town's Police Department (Department).¹ The appeal was timely filed with the

¹ On the same day, Chief Lipson required the Appellant to serve an additional 10 days of suspension which had been issued in April 2019 but held in abeyance pursuant to a settlement agreement.

Commission. A pre-hearing conference was held on October 29, 2019 at the offices of the Commission.² Two days of hearing were held at the same location on December 12, 2019 and January 29, 2020.³ The hearing was digitally recorded and copies were provided to both parties.⁴ The hearing was made public at the request of the Appellant. Witnesses were sequestered with the exception of the Appellant and the Respondent's representative Lieutenant Paul Campbell. The parties submitted proposed decisions on April 3, 2020.

FINDINGS OF FACT

Thirty-nine exhibits (Resp. Exs. 1-13; App. Exs. 1-16; Jt. Exs. 1-9; PH Ex. 1) were entered into evidence, as well as a chalk of the Brookline Police Station, 1st floor. Giving appropriate weight to the evidence and the testimony of:

Called by the Town:

- Patrick Elwood, Patrol Officer, Brookline Police Department;
- Carol Mann, Dispatcher, Brookline Police Department;
- Thomas Ferris, Sergeant, Brookline Police Department;
- Kevin Mealy, Lieutenant, Brookline Police Department;
- Paul Campbell, Lieutenant, Brookline Police Department;
- Andrew Lipson, Chief, Brookline Police Department;

² On November 5, 2019, the Respondent filed a motion to dismiss based on lack of jurisdiction. The Commission denied the Respondent's motion on November 15, 2019.

³ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00 *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

⁴ The Appellant subsequently used the recording to have a transcription prepared. The Respondent has objected to the transcript being considered an official record of the proceedings, citing purported typographical errors. I encourage the parties to mutually resolve that issue to avoid unnecessary expenditures by either party going forward.

Called by the Appellant:

- Scott Wilder, Police Officer in charge of technology and communications, Brookline Police Department;
- Neil Harrington, Manager of Records, Brookline Police Department;
- David Hill, Sergeant, Brookline Police Department;
- Amy Hall, Appellant;

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

1. Brookline is a community located four miles from downtown Boston with a population of approximately 59,000. (<https://www.brooklinema.gov/1539/About-Brookline>)
2. The Town's Police Department is comprised of 127 uniformed officers. The Department is divided into four divisions: Patrol Division, Detective Division, Community Service Division and Traffic Division. There is a Superintendent who reports to the Police Chief. Each division is run by a Deputy Superintendent and comprised of various number of officers of the rank of patrol officer, sergeant and lieutenant. (Testimony of Chief Lipson)
3. The Department also employs various civilian employees which, relevant to this appeal, include dispatchers and a "Manager of Records" who, among other things, responds to public record requests. (Testimony of Chief Lipson)
4. The Appellant has been a Brookline Police Officer for nineteen years. At all times relevant to this appeal, the Appellant was assigned to the day shift (7:20 AM – 3:30 PM). She is married with three children. Many years ago, the Appellant's uncle was the Town's Acting

Police Chief; her brother is a Brookline firefighter; and many other family members of the Appellant have worked for the Town over the years. (Testimony of Appellant)

5. Prior to 2019, the Appellant had never been disciplined. (Testimony of Appellant)
6. On February 17, 2019, the Appellant made a complaint that she was being bullied and harassed by another police officer. (Testimony of Appellant)
7. As part of her complaint, the Appellant alleged that this other officer, during defensive tactics training, made a comment while practicing striking, that the object she was striking (a punching bag) with padded mitts was the Appellant's face. The Appellant told her superior officers that she had not heard the comments first-hand, but, rather, that other officers had told her of the alleged comments. (Jt. Ex. 1)
8. During a five-week period in February and March 2019, superior officers met with the Appellant and, as part of their investigation into her complaint, ordered the Appellant to disclose the names of the officers who told her about the alleged comment. The Appellant refused. (Jt. Ex. 1)
9. Approximately five weeks after the Appellant first made her complaint to superior officers, the investigation was turned over to Lt. Paul Campbell, who oversees matters related to internal affairs for the Department. (App. Ex. 1)
10. On April 9, 2019, Lt. Campbell finalized a 49-page, single-spaced report regarding his findings and recommendations. That report indicates that a police officer, who was a percipient witness and who Lt. Campbell found to be credible, told Lt. Campbell that he did indeed hear the police officer, in reference to a punching bag, state words to the effect: "If this was Amy's face." (App. Ex. 1)

11. As part of his findings and conclusions, however, Lt. Campbell found that the *Appellant* had engaged in misconduct, both during the investigation (i.e. – insubordination, untruthfulness) and at times during the prior year vis-à-vis the officer that the Appellant had lodged a complaint against (i.e. – making threatening statements to the officer). (App. Ex. 1)
12. In April 2019, the Town and the Appellant reached a settlement agreement in which the Appellant agreed to a 15-day suspension, with 10 days to be held in abeyance. (Resp. Ex. 4C)
13. In May 2019, the Department received notice that the Appellant had filed a complaint against the Department with the Massachusetts Commission Against Discrimination (MCAD).
(Testimony of Chief Lipson)
14. In July 2019, the Appellant received a written reprimand for violating the chain of command.
(Resp. Ex. 5)
15. On August 13, 2019, the Appellant discovered a highlighted page from the union contract in her Department mailbox. The highlighted portion related to the contractual requirement that discipline notices be posted in the station for a period of seven days. The Appellant reported it to her supervisors, claiming the paper had been placed in her mailbox to harass and retaliate against her. She requested that the Department investigate who placed the paper in her mailbox. (Resp. Ex. 7; App. Ex. 14; Testimony of Lt. Mealy, Lt. Campbell, Chief Lipson, Appellant)
16. The Appellant was told by Lt. Mealy that Lt. Campbell would conduct an investigation.
(Testimony of Appellant)
17. The Town of Brookline’s “Policy Against Discrimination, Sexual Harassment and Retaliation” (Town Policy) states in part that: “All investigations will be conducted by the

Human Resources Office or its designee. The Human Resources Office for the Town of Brookline shall record the complaint using the policy's Complaint Intake Form, when possible, and shall promptly investigate all allegations of discrimination, sexual harassment or retaliation in a fair and thorough manner." (PH Ex. 1)

18. Lt. Campbell had no communication with the Town's HR Department regarding his investigation of the Appellant's complaint. (Testimony of Lt. Campbell)
19. There is no evidence that the Town's HR Department ever delegated responsibility to the Police Department to investigate the Appellant's complaint.⁵
20. The Appellant was told by Lt. Mealy that she was not permitted to talk directly to Lt. Campbell about her complaint. (Testimony of Appellant)
21. The Town's Policy states in relevant part that investigations " ... will include, as appropriate, private interviews with the person filing the complaint, the person alleged to have committed the discrimination, sexual harassment and/or retaliation and relevant witnesses." (PH Ex. 1)
22. Lt. Campbell did not interview the Appellant. Asked to explain why he did not interview the Appellant, Lt. Campbell stated in part:

" ... I got a report from her outlining what she knew about the – the document being placed in her box. It was my preference at the time to conduct things through documents, rather than oral conversations. There's been ... a significant number of questions of people having conversations with Officer Hall with the conclusion of the conversation, uh, there were allegations of dishonesty. My preference was if this could be done through documents, that's what I wanted to do. Based on my conversation with Lt. Mealy, she didn't have any information about the document, except for the fact that she had found it, and what the timeline was." (Testimony of Lt. Campbell)

⁵ I listened carefully to the Police Chief's testimony regarding the communication that he (the Police Chief) had with HR regarding the Appellant. Based on his testimony, I conclude that the primary purpose of that communication was to discuss disciplinary action against the Appellant, as opposed to how the Appellant's complaint should be investigated and/or the merits of her complaint.

23. The Department was unable to determine who placed the highlighted contract page in the Appellant's mailbox. On August 29, 2019, Chief Lipson sent the Appellant a memo informing her of the outcome of the investigation. The memo includes a summary of the Department's investigative efforts as well as its conclusions as to the source of the paper. (Resp. Ex. 7)
24. The Appellant wanted to understand what investigation actually went on and she asked Lt. Mealy for a copy of the full investigative report (report) that had been completed by Lt. Campbell. (Testimony of Appellant)
25. Among the four "general aims" of the Town's Policy Against Discrimination, Sexual Harassment is: "to empower and strongly encourage those who reasonably believe that they have been victims of discrimination, sexual harassment or retaliation to report any incidents of such behavior and to obtain relief, as appropriate under the circumstances, through a simple, yet comprehensive complaint procedure". (emphasis added) (PH Ex. 1)
26. On either September 3rd or 4th, 2019, Lt. Mealy told the Appellant that she would need to make a public records request to obtain a copy of the report. He told the Appellant that he would ask Lt. Campbell how the Appellant could go about making such a request. (Testimony of Appellant)
27. On September 4, 2019 at 3:18 P.M., Lt. Mealy penned the following email to the Appellant: "Amy, [a]ll requests for Public Records have to go through the Records Division. There is no standard form. There is a sample form on the Mass. Public Records Website. You just put what you want in writing and submit it through Records, either Neal or Amanda, and they will forward it." (Resp. Ex. 3)

28. The Appellant did not check her work email at or after 3:18 P.M. so she had not seen Lt. Mealy's email when she reported for work the next morning on September 5th. (Testimony of Appellant)

The events of September 5, 2019

29. On September 5, 2019, the Appellant reported for duty at 7:20 A.M. Following roll call, she left the police station for her assigned sector. At approximately 8:35 AM, the Appellant requested a return to the station. She proceeded directly to Lt. Mealy's office. (Testimony of Appellant and Lt. Mealy)

30. During parts of the next 65 minutes (from 8:35 A.M. to 9:40 A.M.), the following two sequence of events were at times occurring simultaneously: 1) the Appellant was speaking to Lt. Mealy and taking actions to secure the report; and 2) a private citizen arrived at the police department seeking to file a police report.

31. The Appellant asked Lt. Mealy if he had spoken to Lt. Campbell yet. In response, Lt. Mealy referenced his 3:18 P.M. email from the previous day which the Appellant still had not read. (Testimony of Appellant)

32. At or around the same time (8:50 A.M.), a private citizen came into the lobby of the police station wanting to file a police report, alleging that a neighbor was sneaking into her house and accessing her computer. Officer Patrick Elwood was working the front desk at the time; he was skeptical of the citizen's allegation and suspected that the citizen may have some mental health issues. (Testimony of Officer Elwood)

33. At 8:52 A.M., Officer Elwood called dispatch to ask them to send an officer to the front desk and take a report. Asked by the dispatcher if he (Elwood) could take the report, Officer

Elwood stated that the allegations were complicated and that he had a line at the front desk.

(Testimony of Officer Elwood)

34. As referenced below, the dispatcher did not dispatch any police officer to take the citizen's report until 18 minutes later, at 9:09 A.M. Thus, the Appellant was unaware, during that time period (8:52 A.M. – 9:09 A.M.) that a citizen was waiting in the lobby.

35. After accessing and reading Lt. Mealy's email, the Appellant returned to Lt. Mealy's office and stated to him: "So, now I have to speak to Neal Harrington to ask for this?" Lt. Mealy said "Yes". (Testimony of Appellant)⁶

36. The Appellant then walked to the nearby office of Neal Harrington, who serves as the Manager of Records for the Department, and asked him how to obtain a copy of an internal investigation report. Mr. Harrington said he had no idea and suggested that the Appellant contact Lt. Campbell. When the Appellant said she was not allowed to speak to Lt. Campbell, Mr. Harrington suggested that the Appellant send him (Harrington) an email and Mr. Harrington would then forward the email to Lt. Campbell. (Testimony of Appellant)

37. The Town's Policy also states: "The Town will protect the confidentiality of allegations and of the investigation and resolution to the extent possible. Such information will only be shared with those who may reasonably be expected to need such information to investigate and respond to the complaint or report and to process any appeal, take any necessary corrective action and respond to or conduct any legal and/or administrative proceeding arising out of the discrimination, sexual harassment or retaliation report." (PH Ex. 1)

⁶ There is a factual dispute regarding whether the Appellant then said to Lt. Mealy: "Do I have your authorization to go see Neal Harrington? The Appellant has a vivid recollection of posing that question to Lt. Mealy and hearing Lt. Mealy say "sure" in response. Lt. Mealy testified that the word "authorization" was never spoken. Ultimately, I have concluded that, whether or not the word authorization was used is not pivotal to this case as I have concluded, after listening to all the testimony, that Lt. Mealy understood, at the time, that the Appellant's next stop after leaving his office was likely Neal Harrington's office and he did not voice any objection.

38. At 9:17 A.M. on September 5th, the Appellant sent the following email to Mr. Harrington (who had no role in the investigation), which was copied to Lt. Mealy:

“I am formally requesting the report done by Lt. Campbell describing the investigation regarding the harassment letter on August 13, 2019. I am also requesting the paper that I submitted that shows this harassment be returned to me ASAP. I am only writing this email because Lt. Mealy sent me to records. While in records, I spoke to Neil Harrington who stated he knows nothing about a form and just send him an email and he will send it to Lt. Campbell.

In my opinion this is an attempt once again to obstruct and delay me at every turn of events. I have spoken to Lt. Mealy for 2 days but instead I am required to go see a civilian clerk in records who informed he will send the request up to Lt. Campbell. Again, there is no reason that I can see other then (sic) delayed (sic) and obstruction that I couldn't see or email Lt. Campbell directly that everyone does daily including a civilian in the records division this morning 9/5/2019 who has access to Lt. Campbell directly in spite of this so called Chain of Command. I expect (sic) an answer and report and paper requested without delay. The fact that I am the only officer known to me that is banned for (sic) speaking to Lt. Campbell is telling.

Respectfully submitted,
PO Amy Hall” (Jt. Ex. 2)

39. While the Appellant was writing the above-referenced email, at 9:09 A.M., approximately twenty minutes after the private citizen had approached the front desk, and 18 minutes after Officer Elwood placed the call to dispatch, the dispatcher dispatched the Appellant to the front desk to take the citizen's report. The dispatcher directed the Appellant to see the person in the lobby before she cleared the station, meaning before she left the station to return to patrol duty. (Resp. Ex. 2(b); Testimony of Carol Mann, Officer Elwood, Appellant)

40. The dispatch can be heard over the radio. Lt. Mealy had a radio. (Testimony of Appellant)⁷

⁷ Lt. Mealy testified that he did not hear the 9:09 A.M. dispatch on his radio.

41. The Appellant acknowledged the dispatcher's call, but did not immediately report to the lobby to take the citizen's report. Rather, she continued to write the above-referenced email, which was completed and sent at 9:17 A.M. (Testimony of Appellant)
42. After sending the email to Mr. Harrington and Lt. Mealy, the Appellant went back to Lt. Mealy's office to confirm that he (Lt. Mealy) had received the email and that it would be forwarded to Lt. Campbell. Lt. Mealy said that he had not checked his email and that Lt. Campbell was going to be on vacation for a week. (Testimony of Appellant)
43. The Appellant told Lt. Mealy that she felt that she was getting the runaround and was being unfairly obstructed from obtaining Lt. Campbell's report. (Testimony of Appellant)
44. The Appellant left Lt. Mealy's office, returned to the Department computer and sent the following email to Lt. Mealy at 9:37 A.M.:

"I just been (sic) informed by Lt. Mealy on 9/5/2019 at 9:20 A.M. that Lt. Campbell is now on Vacation and will not be able to act on this until he returns. It should be notated that my first request to Lt. Mealy to contact Lt. Campbell was on 09/04/2019 in the Moring (sic). At that time Lt. Mealy thought Lt. Campbell would be going on vacation the following day. I asked specifically if he could contact Lt. Campbell ASAP on 9/4/2019 so there would not be a delay. The formal ban of me speaking to an Office of Professional Responsibility is only creating more stress to me and causing important two way information to be delayed, obstructed and unprofessional.

Respectfully submitted,

PO Amy Hall [redacted]" (App. Ex. 16)

45. At 9:40 A.M., the citizen left the police station without speaking with the Appellant or filing a report. Officer Elwood informed dispatch of the citizen's departure and dispatch then notified the Appellant to disregard the call. After dispatch canceled the call, the Appellant made her way to the station lobby and asked Officer Elwood what the resident wanted to

report. The Appellant cleared the station and returned to her patrol duties. (Resp. Ex. 2b; Testimony of Carol Mann, Officer Elwood, Appellant)

46. Sgt. Thomas Ferris was the shift supervisor that morning. He heard the front desk call go out and he heard the dispatcher cancel the call. He did not take any action against the Appellant until he was prompted later that day by Lt. Mealy, as discussed below. (Testimony of Sgt. Ferris)

47. Around noontime, Lt. Mealy passed through the lobby of the police station and asked Officer Elwood (the front desk officer who first made the call to dispatch) about the resident who had come to file the police report. Officer Elwood informed Lt. Mealy that the Appellant never reported to the lobby and the resident eventually left the station without being serviced. (Testimony of Lt. Mealy and Officer Elwood)

48. Lt. Mealy reviewed the call records and met with Sgt. Ferris. (Testimony of Lt. Mealy, Sgt. Ferris)

49. Sgt. Ferris met with the Appellant and handed her a written directive which began:

“Officer Hall, It has come to my attention⁸ that you did not respond to call today, September 5, 2019, at the front desk.” Sgt. Ferris’s directive requested that the Appellant submit a report answering the following questions:

1. Why you did not assist the citizen at the front desk.
2. Where were you when dispatch called you to service the call
3. What were you doing that you could not service the call.

(Jt. Ex. 3)

⁸ As previously referenced, Sgt. Ferris had already been aware that the Appellant had not responded to the call before it was canceled.

50. The Appellant submitted a written report the same day. Since the Appellant's report is a critical part of deciding the instant appeal, I cite it in its entirety:

"I was on authorized returned (sic) to the station in order to speak with Lt. Mealy. During this time, Lt. Mealy gave me certain instructions. Lt Mealy gave me an assignment to complete. At some point dispatched (sic) stated when you clear, there is someone at the front desk. This statement by dispatched (sic) clearly shows that not only was I on an authorized return by Lt. Mealy and Sgt. Ferris knew I was still in the station and would respond when I was clear. If at any time Lt. Mealy and or Sgt. Ferris wanted me to end my assignment and immediately respond when they would have said so. I responded by saying roger. When I cleared, I went to front desk and Officer Elwood said she just left.

Sgt. Ferris refuses to tell me who asked for this report. Instead he handed me a computer written statement that was obviously not written by him. I am only to assume because of his refusal to tell me who ordered this report that it was neither from him nor from Lt. Mealy who authorized my assignment in the station. Therefore, it is easy to conclude that this request for report did not come from Sgt. Ferris and Lt. Mealy but had to come from a higher supervisor. That can only be Deputy Superintendent Ward or Chief Lipson. Both of whom are named in my complaint with MCAD.

This entrapment is more than obvious. Lt Mealy was well aware I was in the station and if he wanted me to clear this assignment he would have done so. It is common policy that if an officer is in the station on assignment not cancelled by a supervisor those other officers on the street would take a non-emergency call. This however is not the case with me. I still responded I would take the call and clearly dispatched, Lt. Mealy and Sgt. Ferris new (sic) I was in the station on assignment.

Also, just last week a male officer was called for 15 minutes on the radio, had all patrol and detective division looking for him, no reports, no investigation took place but instead the incident was trivialized the next morning by the three supervisors, Lt. Mealy, Sgt. Hill and Sgt. Disario by making jokes about how the officer was asleep or should listen to this radio in front of the entire first platoon roll call that I was present for.

Once again it is no surprise that I have been asked to do a report after I was in the station with Lt. Mealy expressing my dissatisfaction in trying to obtain a copy of the investigation into my latest retaliation complaint. This report is just a pretext to harass me for exercising my rights to obtain a copy of Lt. Campbell (sic) investigation and to have the intimidating note left in my mailbox on 08/13/2019 returned to me.

Presently at this moment I am in the station on an assignment writing this report. If a non-emergency call came in from dispatched (sic) and they asked me to respond when I was clear I would do exactly the same that I did this morning unless otherwise asked to respond immediately. An example is that I had a traffic post at 2:20pm but someone else took it on

authorization by Sgt. Ferris while I was on this assignment in the station. There is absolutely no difference from now or earlier this morning.” (Jt. Ex. 4)

51. After reviewing the Appellant’s response, Lt Mealy sent a 3 ½ page memo to Deputy Superintendent Ward on September 6, 2019 which begins with: “This report is in response to a report generated by P.O. Hall on 9-5-19, at the order of Sgt. Ferris. The report by P.O. Hall demands a response and rebuttal.” On page 2 of the memo, Lt. Mealy writes in part “This report from P.O. Hall contains inaccuracies and outright lies.” (Jt. Ex. 2)
52. In his memo, Lt. Mealy disputes various statements made by the Appellant including: 1) the Appellant’s statement that he (Lt Mealy) gave the Appellant an assignment to complete; 2) the Appellant’s statement that she asked Sgt. Ferris who asked for the report and/or that Sgt. Ferris failed to answer; 3) the Appellant’s statement that he (Lt. Mealy) authorized her assignment in the station. (Jt. Ex. 5)
53. The final paragraph in Lt. Mealy’s 9/6/19 statement reads:
- “This report [by the Appellant] is the latest in a series of reports and emails from P.O. Hall that are false, inaccurate, insubordinate, disrespectful, and contain straight out lies. I have never in my experience as a supervisor been witness or recipient to reports such as the ones that P.O. Hall is generating either in response to an order or in an attempt to garner information. At this time I am in agreement with all of my day shift Sergeants that there is an impasse in our ability to successful (sic) supervise P.O. Hall in the current state that she is in. We are concerned about her mental health status as well as her ability to function as a police officer under our supervision.”
(Jt. Ex. 2)
54. Lt. Mealy’s report did not make any reference to the fact that: a) he did not hear the radio dispatch at 9:09 A.M; b) he had met with and spoken with the Appellant at least once between 9:09 A.M. and 9:40 A.M. and discussed how she could go about obtaining the report she was requesting; and c) he had received two emails from the Appellant during this time period referencing what she was doing. (Jt. Ex. 2)

55. In his own written report, Sgt. Ferris disputed the Appellant's claim that he refused to tell her who had asked for the special report. According to Sgt. Ferris, the Appellant never asked him the question during the short meeting where he directed her to submit a special report. Sgt. Ferris also disputed the Appellant's claim that he was aware of what she was doing at the time and that he should have ordered her to stop working on an "assignment" in order to service the resident at the front desk. (Jt. Ex. 6; Testimony of Sgt. Ferris)
56. On September 12, 2019, Chief Lipson issued Personnel Order 2019-166, suspending the Appellant for five tours of duty for violating the Department's rules and regulations governing truthfulness, neglect of duty, and personal business on duty time based on her actions on September 5, 2019 and the statements she made in her special report to Sgt. Ferris. (Jt. Ex. 1; Testimony of Chief Lipson)
57. The Appellant filed an appeal and the Town's Board of Selectmen designated a hearing officer to hear the Appellant's appeal. (Resp. Ex. 1)
58. On October 1, 2019, the hearing officer found that the Appellant violated Department rules and regulations by: 1) conducting personal business (seeking the investigative report) while on duty; 2) failing to respond to the dispatch call to come to the lobby and meet with the citizen in order to take her report; and 3) being untruthful in her written report by stating that Lt. Mealy had given her an assignment to complete during the time period in question. (Resp. Ex. 1)
59. On October 2, 2019, the Town's Board of Selectmen adopted the hearing officer's report. (Resp. Ex. 1)

As a result of this 5-day suspension, the Appellant was required to serve the ten-day suspension that had been held in abeyance regarding the prior discipline.

Applicable Law

G.L. c. 31, § 43 provides:

“If the commission by a preponderance of the evidence determines that there was just cause for an action taken against [a tenured civil service employee] ... 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 the 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.”

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). See also Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304 (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 (1997). See also Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983).

The Appointing Authority’s 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).

Under section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew.” Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. However, “[t]he commission’s task.. is not to be accomplished on a wholly blank slate. After making its de novo findings of fact, 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’ Id., quoting internally from Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983) and cases cited.

By virtue of the powers conferred by their office, police officers are held to a high standard of conduct. "Police officers are not drafted into public service; rather, they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question, their ability and fitness to perform their official responsibilities." Police Commissioner of Boston v. Civil Service Commission, 22 Mass.App.Ct. 364, 371 (1986).

Analysis

The three primary charges against the Appellant here are that: 1) the Appellant neglected her duties when she failed to meet the citizen in the police department lobby and assist her with filing a report; 2) the Appellant was untruthful in her report when she stated that Lt. Mealy had given her an “assignment” to obtain an investigative report related to the Appellant’s prior complaint; and 3) the Appellant violated the rules and regulations of the Department by engaging in personal business while on duty. The preponderance of the evidence only supports one of these charges.

It is undisputed that, at 9:09 A.M. on September 5th, the Appellant received and acknowledged a dispatch to meet a citizen in the lobby who wanted to file a police report. For the next 31 minutes, the Appellant, instead of meeting with the citizen, spent her time focused on obtaining the investigative report related to her own internal complaint. Importantly, the Appellant never told dispatch that she would be delayed nor did she take a few short steps into the lobby to tell the citizen there would be a delay. By failing to respond to the dispatch, the Appellant neglected her duties and violated the rules and regulations of the Department.

In regard to the charge of “untruthfulness”, the Commission has long held that, when a police officer engages in untruthfulness, that misconduct warrants, if not requires, discipline, up to and including termination. Here, as discussed in more detail below, the context in which the written statement in question was made is important. In her written report, the Appellant accurately writes that she “... was in the station with Lt. Mealy expressing my dissatisfaction in trying to obtain a copy of the investigation into my latest retaliation complaint.” She also accurately writes that “... Lt. Mealy gave me certain instructions ...” referring to the instructions she received from Lt. Mealy in regard to how to obtain the investigative report. The Town, however, seizes on that portion of the Appellant’s written statement in which she wrote that “... Lt Mealy gave me an assignment to complete”. The Town argues that the references to “an assignment” constitute “untruthfulness” that warrants discipline. While I have concluded that the Appellant’s written statements regarding an assignment were inaccurate and that those words were used to paint herself, and her actions, in a better light, I do not believe that the references to an assignment constitute untruthfulness that warrants a suspension. In reaching that conclusion, I considered many of the factors referenced in more detail below, including my conclusion that both the Appellant and the person who initiated the need for the Appellant to write the report

(Lt. Mealy) both knew what the Appellant was doing for the approximately thirty minutes after the dispatch to see the citizen in the lobby was made. Further, although it is not required to support a finding of untruthfulness, I did consider that: 1) the reference to an “assignment” did not result in any benefit to the Appellant (in fact, she was suspended for it); and 2) the reference to an “assignment” did not result in an unjustified arrest or prosecution, or in a deprivation of liberty or denial of civil rights. (See City of Pittsfield v. Local 447 International Brotherhood of Police Officers, 480 Mass. 634 (2018) (upholding an arbitrator’s decision to reinstate a police officer after the arbitrator found that three words in a police officer’s written report were “intentionally misleading” but “less than intentionally false”).).

The Town has also not proven, by a preponderance of the evidence, that the Appellant engaged in personal business while on duty. Even the Town’s hearing officer acknowledges that officers may be permitted to engage in actions while on duty that may constitute “personal business”. For example, an officer filing a request for vacation time, or talking with a co-worker about the Patriots or Red Sox could, if construed literally, be considered to be engaging in “personal business”. Importantly, the Town candidly acknowledges that they deemed the Appellant’s efforts to obtain the investigative report as personal business primarily because the Town surmised that the Appellant may ultimately use that document to support her MCAD complaint against the Town. The Town’s determination in this regard was arbitrary and, as discussed in more detail below, indicative of the Town’s bias against her.

Having determined that the Appellant did engage in misconduct, I must determine whether the level of discipline (a 5-day suspension) was warranted.

As stated by the SJC in Falmouth v. Civ. Serv. Comm’n, 447 Mass. 814, 823-825 (2006):

“After making its de novo findings of fact, the commission must pass judgment

on the penalty imposed by the appointing authority, a role to which the statute speaks directly. G.L. c. [31], § 43 ('The commission may also modify any penalty imposed by the appointing authority.') 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.'" Id. citing Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983).

"Such authority to review and amend the penalties of the many disparate appointing authorities subject to its jurisdiction inherently promotes the principle of uniformity and the 'equitable treatment of similarly situated individuals.' citing Police Comm'r of Boston v. Civ. Serv. Comm'n, 39 Mass.App.Ct. 594, 600 (1996). However, in promoting these principles, the commission cannot detach itself from the underlying purpose of the civil service system— 'to guard against political considerations, favoritism and bias in governmental employment decisions.'" Falmouth, *supra*. (citations omitted).

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"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. The commission is not free to modify the penalty imposed by the town on the basis of essentially similar fact finding without an adequate explanation." Id. at 572. (citations omitted).

My findings do differ significantly from the Town as I have found that the Appellant's written report was not untruthful and I have found that the Appellant did not engage in personal business while on duty that warranted discipline.

That turns to the other reason that could justify a modification of the penalty here: alleged bias against the Appellant. For the reasons discussed below, the preponderance of the evidence supports the allegation that the Town's decision to discipline the Appellant was based on a bias against her.

While it is not the Commission's role to re-litigate whether there was just cause for the prior discipline meted out against the Appellant in April 2019, the underlying issues in that matter are

inexorably tied to the instant appeal and whether the Town has developed a bias against the Appellant.

As noted in the findings, the Appellant first went to her superiors in February 2019 to complain about alleged bullying in the workplace. Part of the Appellant's complaint was very specific. The Appellant had been told by colleagues that a fellow police officer joked about the Appellant, likening the punching bag she was hitting to the Appellant's face. Tucked into the Department's 49-page report on this matter is a statement from a fellow police officer, who Lt. Campbell found credible, that the police officer in question did indeed make a statement equating a punching bag she was hitting to "Amy's face." Lt. Campbell's report states that: "If I was guessing on this issue, my gut instinct is that the statement was probably made by [the police officer]." He went on to write in his report, however that his "gut instinct" was not enough to prove that the police officer made the statement. Lt. Campbell did, however, find that the *Appellant* had engaged in misconduct prior to and during the investigation. A full reading of that investigative report, and how the investigation was conducted, show the beginnings of bias against the Appellant.

First, it took five weeks before the Appellant's complaint of alleged bullying ever made it to Lt. Campbell, who was in charge of internal affairs. As referenced in that report, the superior officers who the Appellant brought her concerns to immediately ordered her to disclose the names of the police officers who had shared this information with her. Remarkably, the Appellant, who declined to identify those officers, was charged with insubordination. While I have not ignored the other examples of alleged insubordination that formed the basis of this charge, it appears that the Department had turned the Appellant's complaint upside-down. Instead of "empowering and strongly encouraging those who reasonably believe that they been

the victims of ... harassment ... to report any such incidents of such behavior”, as the Town’s anti-harassment policy requires, it is clear from that April 2019 investigative report that the discussions with the Appellant were more of an interrogation aimed at questioning the veracity of her allegations.

That investigation was noteworthy for another reason. While the Town’s Policy clearly states that complainants can go outside the chain of command and even bring their complaint directly to the Town’s Human Resources Director, the Appellant was actually admonished for going outside the chain of command. Page 44 of Lt. Campbell’s 49-page report reads in part: “In Officer Hall’s April 1st report, she wrote that Chief Lipson said the matter of Officer Hall’s complaint of bullying and harassment would be handled by Human Resources. Chief Lipson informed me that he never said this. He told Officer Hall that the matter would be handled by her supervisors, and she was told to communicate with them any specifics that she wanted addressed. She was told to complete a report with the specifics that she wanted addressed, and that this should be handled by the Sergeants through the chain of command.” To me, that portion of the report, and relevant witness testimony during the hearing, showed the beginning of bias against the Appellant. Put another way, although the Town’s own policy allows for, if not encourages, harassment complaints to be filed with the Human Resources Director directly, the Department was developing a misplaced irritation (and bias) against the Appellant for not working within the “chain of command” regarding her harassment complaint.

That leads to the Appellant’s second complaint of alleged harassment in August 2019. Lt. Campbell’s own testimony vividly shows the bias that had developed against the Appellant. The Town’s own Policy states that the investigation of any harassment complaint will include an interview with the complainant, an obvious first step in any such investigation. Here, however,

Lt. Campbell, who completed the investigation, not only opted not to interview the Appellant, but he also notified Lt. Mealy that the Appellant was prohibited from speaking with him (Lt. Campbell) about the investigation. Asked to explain this perplexing decision, Lt. Mealy candidly acknowledged that his decision was based, in part, on his conclusion that he did not trust the Appellant. The obvious course of action at this point was to refer the matter to the Town's Human Resources Director for investigation, as clearly anticipated by the Town's policy. That didn't happen.

What occurred next is deeply troubling and, most importantly, illustrative of the staunch bias, if not personal animus, that had developed against the Appellant as of September 5, 2019. After Lt. Campbell concluded that he could not determine who left a highlighted excerpt of the CBA in the Appellant's mailbox and/or whether this was done to harass the Appellant, the Appellant wanted a copy of the underlying investigative report. Setting aside whether the Appellant was entitled to receive a copy of the investigative report, it is overwhelmingly clear that the Department decided to send the Appellant on a cruel, proverbial wild goose chase. First, as referenced above, the Appellant, in seeking this report, was prohibited from making the request directly to Lt. Campbell, who is in charge of matters related to internal affairs and completed the report. Second, the Appellant was then told that she would need to file a "public records request" with a civilian employee who had no role in the investigation, requiring her to disclose otherwise confidential information to this civilian employee, which the Town's Policy seeks to prevent. Third, when she approached Mr. Harrington, she was told that he had no idea what she was talking about and that she should send him an email request which he would forward to ----- Lt. Campbell! Fourth, when the Appellant submitted this email, she was informed by Lt. Mealy that Lt. Campbell was on vacation for the next several days. This was not an inadvertent

comedy of errors by the Department. Rather, after carefully listening to all of the testimony, I conclude that it was a purposeful attempt to frustrate an employee who had filed an MCAD complaint against the Department. To me, this shows that the Department had developed a bias against the Appellant.

It is in that context that I must consider what occurred on September 5th. In the midst of this Department-orchestrated wild goose chase, the Appellant received the dispatch at 9:09 A.M. to go to the lobby and meet a citizen who wanted to file a police report. As stated above, the Appellant violated the rules and regulations of the Department by failing to respond to that dispatch in a timely manner and by inaccurately stating in her report that she had been given an “assignment” by Lt. Mealy to go see Mr. Harrington about obtaining the investigative report.

Importantly, the shift supervisor that day, Sgt. Ferris, who heard the radio transmissions and was aware that the call was canceled before the Appellant went to the lobby to see the citizen, saw no need to investigate this matter. Rather, it was the lieutenant who was part of the Department’s attempt to frustrate the Appellant’s efforts to obtain the investigative report, who was the impetus for investigating this matter. Despite being aware of what the Appellant was doing from 9:09 A.M. to 9:40 A.M., Lt. Mealy directed⁹ Sgt. Ferris to have the Appellant write a report answering three questions: 1. Why you did not assist the citizen at the front desk. 2. Where were you when dispatch called you to service the call; and 3. What were you doing that you could not service the call. Further, the Department’s witnesses failed to provide convincing testimony to explain why they never investigated why the citizen was required to wait an initial 18 minutes due to the dispatcher’s failure to dispatch the call. The dispatcher candidly testified

⁹ I don’t credit the testimony that Sgt. Ferris, on his own, developed the questions to be posed to the Appellant.

before the Commission that she could not recall there being any calls in the queue that prevented her from making the dispatch in a more timely manner. The point here is not that the dispatcher engaged in any misconduct, but, rather that the Town did not adequately explain why it did not even *consider* the fact that the citizen was required to wait approximately 50 minutes, *18 minutes of which was attributable to the delayed dispatch.*

Finally, I considered the content of Lt. Mealy's "rebuttal" to the Appellant's report in regard to whether there was evidence of bias against the Appellant. The tone and tenor of that rebuttal is harsh, calling into question the mental stability of the Appellant. The rebuttal also fails to include certain relevant points that may have painted a different picture, including the fact that the Appellant had met with him at least once during the time period in question and that he had been sent two emails from the Appellant during that same time period, something that Lt. Mealy was indeed aware of when he wrote his rebuttal the next day on September 6th. To me, it was further evidence of bias and personal animus against the Appellant.

Taken together, all of the above incidents show, by a preponderance of the evidence, that bias and personal animus against the Appellant was a factor that contributed to the Department's decision to investigate and ultimately discipline the Appellant, which is contrary to the core of the civil service system, adherence to basic merit principles, which includes assuring fair treatment of all employees in all aspects of personnel administration and assuring that all employees are protected from arbitrary and capricious actions.

For all of the above reasons, the Appellant's appeal under Docket No. D=19-209 is hereby *allowed in part*. The discipline imposed shall be modified from a five-day suspension to a written warning.

Civil Service Commission

/s/ Christopher Bowman

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 23, 2020.

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) (1), the motion must identify a clerical or mechanical error in this order or 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 this Commission order or decision.

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

Michael L. Mason, Esq. (for Appellant)
Wendy Chu, Esq. (for Respondent)
Michael Downey, Esq. (for Respondent)