

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108
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MERRITT B. HEADY,
Appellant

v.

D-05-331

TOWN OF GREAT BARRINGTON,
Respondent

Appellant's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION

The Appellant, Merritt B. Heady (hereafter "Heady" or "Appellant"), pursuant to G.L. c. 31, § 43, filed a timely appeal with the Commission on September 22, 2005 claiming that the Town of Great Barrington (hereafter "Town" or "Appointing Authority" or "Police Department") did not have just cause to terminate him as a police officer on September 15, 2005.

A full hearing was conducted on December 20, 2006 at the offices of the Civil Service Commission. As no written notice was received from either party, the hearing was declared private. All witnesses, with the exception of the Appellant, were sequestered.

Three (3) tapes were made of the hearing and both parties subsequently submitted post-hearing briefs in the form of proposed decisions.

FINDINGS OF FACT:

Twenty-five (25) Exhibits were entered into evidence at the hearing (Joint Exhibits 1-13; Appointing Authority Exhibits 14A -23; & 25; Appellant Exhibit 24). The record was kept open for the Town to submit information regarding prior discipline regarding other employees. The Town submitted the requested information on January 19, 2007. On February 8, 2007, the Appellant submitted a Motion to Strike portions of the information submitted by the Town. Specifically, the Appellant sought to strike the final two paragraphs in the affidavit of Police Chief William Walsh along with all but the second paragraph and the entire third paragraph in the affidavit of Town Manager Burke LaClair. The Appellant argues that the information that he seeks to strike are merely “self-serving statements” that go beyond what was requested by this Commissioner. The Commission concurs; the Appellant’s Motion to Strike is allowed. Except for those portions of the information referenced in the Appellant’s Motion to Strike, the affidavit of Chief William Walsh is entered as Exhibit 26 and the affidavit of Town Manager LaClair is entered as Exhibit 27. Based on the documents submitted and the testimony of the following witnesses:

For the Appointing Authority:

- Burke LaClair, Town Manager;

- Chief William Walsh; Great Barrington Police Department;
- Officer Timothy Hassett; Great Barrington Police Department;

For the Appellant:

- Appellant Merritt Heady;

I make the following findings of fact:

1. The Appellant, Merritt Heady, was a tenured civil service employee of the Great Barrington Police Department. He had been employed by the Great Barrington Police Department for approximately 29 years prior to being terminated on September 15, 2005. (Testimony of Appellant; Stipulated Fact)
2. During the Appellant's tenure as a police officer, he served as President of the local police union for approximately 20 years, ending in January 2005. (Testimony of Appellant)
3. Burke LaClair was appointed as Great Barrington's Town Manager in February 1998. (Stipulated Fact; Testimony of LaClair)
4. The Appellant and Town Manager LaClair are polar opposites. The Appellant is a salty, unvarnished man with an imposing presence who shoots from the hip. LaClair, on the other hand, is mild-mannered, somewhat reserved and chooses his words more carefully. (Testimony, Demeanor of Witnesses)
5. Not long into LaClair's tenure as Town Manager, he and the Appellant, who was serving as the local police union president at the time, had a verbal confrontation. (Testimony of Appellant and LaClair; Exhibit 23)

6. On Saturday, October 16, 1999, Town Manager LaClair was at the Great Barrington police station to request assistance by an officer to investigate the potential violation of a special permit. When the officer at the desk dispatched the cruiser, LaClair asked him which officer was responding. The dispatcher indicated, “Mr. Congeniality”, to which LaClair inquired, “Who? Rit?” (in reference to the Appellant). The dispatcher then responded that he was referring to another officer. (Exhibit 23)
7. On Monday, October 18, 1999, the Appellant became aware of LaClair’s remark to the dispatcher. Angered that LaClair made such a comment to the dispatcher in front of other officers, the Appellant went across the street to see LaClair in his office at Town Hall. During his testimony before the Commission, the Appellant acknowledged that he was angry during the conversation. During the conversation, the Appellant, referencing other incidents including an incident that allegedly occurred at a police association meeting, accused LaClair of lying to him. (Testimony of Appellant and LaClair; Exhibit 23)
8. As a result of the above-referenced heated exchange between the Appellant and LaClair, LaClair took the unusual step of directly issuing a written reprimand to the Appellant, as opposed to referring the matter to the Police Chief. (Exhibit 23)
9. LaClair’s written reprimand, issued October 21, 1999, stated in part, “Your confronting me privately in my office regarding my comment was justified and your need for clarification understandable under the circumstances. Your behavior, attitude, and approach, however, were totally inappropriate and your conduct crossed well beyond the threshold of acceptability. You disregarded my apology and began

accusing me of being a liar on more than one occasion. This attack on my integrity while meeting in my office was totally unjustified and had no relation to the Saturday incident... You further accused me of being just like the former Town Manager and used expletives in your description of my alleged bias against you... Your refusals to sit indicated a clear lack of respect for me and were an attempt to intimidate me.”

(Exhibit 23)

10. During his testimony before the Commission, the Appellant, who served as local Union President until 2005, stated, “that’s the way we butted heads for the next five years” referring to the above-referenced verbal altercation with the Town Manager in 1999. (Testimony of Appellant)
11. In April 2005, in an incident that is unrelated to the instant appeal or the Appellant, several officers in the Department submitted reports to the Police Chief and the State Police in which they asserted that then-Deputy Police Chief Timothy Hassett, who is now serving in the rank of police officer, had assaulted a prisoner at the station in November 2004 and destroyed the videotape from the Department’s surveillance cameras that would have captured the incident. (Testimony of LaClair)
12. Upon becoming aware of the above-referenced allegation against the then-Deputy Police Chief, the Town Manager put him on administrative leave. (Testimony of LaClair)
13. Following a state police investigation of the matter, Hassett was indicted on a charge of destruction of property. (Testimony of LaClair)

14. There is no dispute that the indictment of Hassett involved an allegation that he destroyed a police surveillance videotape which allegedly depicted Hassett assaulting a prisoner at the Great Barrington Police Department.
15. While LaClair considered the charges serious and interviewed several officers about the allegations, he testified before the Commission that he was unable to conduct a thorough investigation of the matter because several months had elapsed; the Town did not have the resources to conduct a thorough investigation; and a key police officer involved in the matter had moved out of state. Moreover, LaClair testified that the State Police had already conducted an investigation of the matter. (Testimony of LaClair)
16. LaClair had conversations with the District Attorney's office regarding the above-referenced criminal charges against the then-Deputy Police Chief. According to LaClair, then-Deputy Police Chief Hassett was not terminated. Rather, Hassett was allowed to remain employed in the lower rank of police officer. (Testimony of LaClair)
17. During LaClair's tenure as Town Manager, the only person he has ever terminated is the Appellant, although he did once look into "problems" involving a non-union department head. According to LaClair, he gave this department head the option of resigning instead of being terminated. (Testimony of LaClair)
18. During his 27-year tenure as Great Barrington Police Chief, Chief Walsh, aside from the discipline issued against the Appellant, has only issued three suspensions including: 1) a two-day suspension to an officer for being absent from duty without leave on several dates; 2) a one-day suspension to an officer for being untruthful

about conversations he had with a newspaper reporter about a road closure; and 3) a four-day suspension to an officer for making long distance telephone calls using police department phones without authorization and while on duty. (emphasis added) (Exhibit 26)

19. On December 29, 2004, at approximately 8:30 A.M., the Appellant was working his 8:00 A.M. to 4:00 P.M. shift when he drove cruiser 3830 to the Great Barrington Bagel Company for a coffee break. (Appellant Testimony) The bagel shop is located on Reed Street in Great Barrington. (Testimony of Walsh; Exhibits 8 & 10)
20. The Appellant left his cruiser running, in gear and unattended while he went inside the bagel shop. (Testimony of Appellant, Exhibit 10)
21. While he was in the bagel shop, the Appellant's cruiser rolled away from the bagel shop, across Reed Street, over a small snow bank and into a line of trees and brush before coming to rest against one of the trees. (Testimony of Walsh, Hassett and Appellant; Exhibit 5 at 2; Exhibits 14 – 20)
22. As a result of the cruiser's impact with the tree, the passenger side front marker lens on the cruiser was damaged. (Testimony of Hassett; Exhibits 14 -20)
23. Subsequently, one of the bagel shop workers came into the bagel shop and advised the Appellant that his cruiser was across Reed Street. (Exhibit 10 and Testimony of Appellant)
24. The Appellant went outside to check on the vehicle and found it running, in gear and sideways across Reed Street partially blocking the road and resting in the line of trees and brush. (Testimony of Appellant; Exhibit 5 at 2; Exhibits 14 -20)

25. The Appellant backed the cruiser up from its position and checked for damage.
(Testimony of Appellant) The exact nature and extent of the damage to the cruiser at this point in time is a point of contention in the instant appeal, with the Appellant testifying that the only damage to the cruiser at this point being a small dent in the rubber bumper.
26. Approximately two (2) hours later, the Appellant radioed the Police Department dispatcher and reported that he damaged his cruiser when he was behind the Great Barrington K-Mart while pulling over to let an oncoming tractor trailer pass when the cruiser caught the corner of a dumpster that was located there. (Stipulated Fact)
27. The Appellant testified that, after hitting the dumpster, he got out of the cruiser and noticed that the headlight lens was broken. Again according to the Appellant, he picked up two fairly large pieces of lens from the ground and drove to Decker's Auto Body with the intention of having the vehicle repaired. (Testimony of Appellant)
28. According to the Appellant, an employee of the auto body removed the headlight housing unit from the vehicle and advised the Appellant that they would have to order the part and fix the cruiser when the part came in. (Testimony of Appellant)
29. The broken light housing was retained by the Decker's employee. (Testimony of Appellant and Hassett)
30. The Appellant then left Decker's and went back to working his shift. (Testimony of Appellant)
31. At approximately 4:00 P.M. that same day (December 29, 2004), then-Deputy Police Chief Timothy Hassett, arrived at the police station for the start of his 4:00 P.M. to 12:00 Midnight shift. (Testimony of Hassett)

32. Upon arriving at the station, then-Deputy Police Chief Hassett noted that the front passenger side marker light on cruiser 3830, which was parked near the front steps, was damaged. (Testimony of Hassett)
33. Shortly after Hassett arrived at the station that day, the Appellant came into Hassett's office and asked him if he had seen the Appellant's report. (Testimony of Hassett)
34. Then-Deputy Chief Hassett advised the Appellant that he had not yet read it at which point the Appellant proceeded to tell him that earlier that day he was driving his cruiser behind K-Mart when, in an effort to avoid a tractor trailer the he encountered there, his cruiser struck a dumpster and suffered damage to the front passenger side marker light. (Testimony of Hassett)
35. The Appellant also advised Hassett that he had already taken the vehicle to Decker's to have it fixed and stated that he did not know if he was supposed to do this or not, but he wanted to expedite the repair process. (Testimony of Hassett)
36. Hassett subsequently reviewed a copy of the Appellant's written report that day which stated that the damage to the cruiser occurred behind K-Mart as a result of the Appellant striking the dumpster. (Testimony of Hassett; Exhibit 8)
37. On December 30, 2004, the day after the incident in question, then-Deputy Chief Hassett was on a day off when he was visited at home by Great Barrington Reserve Police Officer Robert Avery who informed him about "rumors" that he (Hassett) was "a fool for believing the K-Mart story" and that the damage sustained by the Appellant's cruiser really occurred at the bagel shop earlier the previous morning. (Testimony of Hassett)

38. After receiving this information from Reserve Officer Avery, Hassett called Police Chief William Walsh at home and advised him of what Avery had told him.
(Testimony of Hassett)
39. In response to Hassett's phone call, Chief Walsh indicated that he had a personal commitment that night and instructed Hassett to do an initial investigation of the matter. Further, Chief Walsh instructed Hassett to have Officer Kevin Larkin, the Department's traffic reconstructionist, to take pictures. (Testimony of Hassett)
40. Hassett contacted Officer Larkin and asked him to join him across the street from the bagel shop. Inexplicably, Hassett also asked Reserve Officer Avery to join them across from the bagel shop, despite the fact that Avery's only role in this matter was reporting the existence of "rumors" about how the Appellant's cruiser was actually damaged the previous day. Avery was not a percipient witness to the incident in question. (Testimony of Hassett)
41. Once arriving across the street from the bagel shop, Hassett observed tire tracks in the snow heading northbound across Reed Street and leading into a line of some trees and brush. (Testimony of Hassett)
42. While at the scene, Officer Hassett observed fresh scuff marks on one of the trees where pieces of bark had been scraped off and a number of broken pieces of clear plastic that were located near the base of the tree and some pieces that were imbedded in the tree itself where the bark was scraped off. (Testimony of Hassett; Exhibits 14A – 14D)

43. The plastic pieces, some of which were quite large in size, appeared to Officer Hassett to be consistent with the type of plastic that was used on the front side marker light of the Appellant's cruiser. (Testimony of Hassett)
44. Hassett then instructed Officer Larkin to take photographs of the scene. After photographing the scene, Hassett and Officer Larkin collected the pieces of plastic from the ground and from the tree and placed them in envelopes. The photographs and pieces of plastic were entered as exhibits at the Commission hearing. (Testimony of Hassett; Exhibits 14A-14C; and Exhibits 16 and 17)
45. Hassett then instructed Officer Larkin to return the following day to photograph the scene during daylight hours and to photograph the dumpsters behind K-Mart. (Testimony of Hassett; Exhibits 18A & B; Exhibit 19)
46. Officer Hassett also instructed Officer Larkin to photograph the damaged area of the Appellant's cruiser. (Testimony of Hassett; Exhibits 15A – 15C)
47. Hassett then drove to K-Mart to examine the areas where the dumpsters were located. Upon arriving, Hassett observed two (2) dumpsters at opposite ends of the area behind K-Mart. (Testimony of Hassett; Exhibits 18A & 18B)
48. Hassett examined the area around both dumpsters and did not observe any cruiser tire tracks in the snow that was around the dumpsters or any pieces of plastic on the ground. (Testimony of Hassett; Exhibits 18A & B)
49. On December 30, 2004, the day after the incident in question, prior to the Appellant going back out on patrol, someone had put "chop blocks" in his cruiser. In reference to the "chop blocks", Reserve Officer Avery teased the Appellant and said, "you need these at the bagel shop." (Testimony of Appellant)

50. On December 31, 2004, Hassett went to Decker's Auto Body and asked an employee who had brought the damaged cruiser into the auto body. The employee advised him that the Appellant had brought the vehicle in sometime prior to lunch and that the Appellant has instructed them to order the part needed to fix the cruiser. (Testimony of Hassett)
51. The auto body employee gave Hassett the large piece of light housing that they had taken off the cruiser. (Testimony of Hassett; Exhibit 20)
52. The piece of housing that was given to Hassett was missing a significant portion of the clear plastic lens that makes up the outer shell of the light fixture. It also has the Ford Motor Company's "Ford" logo stamped on the bottom corner. (Testimony of Hassett; Exhibit 20)
53. The pieces of plastic found by Hassett at the base of the tree off of Reed Street were a match (by shape) to the pieces that were missing from the housing that Hassett recovered from Decker's Auto Body. (Exhibits 17 & 20)
54. On December 31, 2004, Chief Walsh drove behind K-Mart and examined the area around the dumpsters that were located there. (Testimony of Chief Walsh)
55. Chief Walsh did not observe any pieces of plastic lens around the dumpsters nor did he observe any evidence of white paint transfer on the dumpster. (Testimony of Chief Walsh)
56. A written report, including the physical evidence obtained, was submitted by Hassett to Chief Walsh sometime between December 31, 2004 and January 2, 2005. (Testimony of Hassett; Exhibit 6)

57. On January 3, 2005, Chief Walsh returned from vacation. That day, the Appellant came into the Chief's office and told him that he had taken the cruiser to Decker's Auto Body after an incident behind the K-Mart. At that time, the Chief didn't ask the Appellant any questions. (Testimony of Chief Walsh)
58. Sometime during the same week, Chief Walsh reviewed then-Deputy Chief Hassett's report regarding his investigation regarding the damage to the Appellant's cruiser. (Testimony of Chief Walsh)
59. On or about January 5, 2005, the Appellant decided to end his approximately 20-year tenure as the local union president. (Testimony of Appellant)
60. On January 21, 2005, over three weeks after the incident in question, Chief Walsh called the Appellant into his office and told him that he wanted to know what happened to his cruiser on December 29, 2004. (Testimony of Chief Walsh)
61. The Appellant responded by reiterating that he had written in his report about the cruiser being damaged behind K-Mart. (Testimony of Chief Walsh)
62. Chief Walsh then told the Appellant that he wanted to know what "really happened" and that he wanted the truth. (Testimony of Chief Walsh)
63. The Appellant responded by again referencing the K-Mart incident. (Testimony of Chief Walsh)
64. Chief Walsh then stated to the Appellant, "I know what happened; I want the truth." (Testimony of Chief Walsh)
65. In response, the Appellant pointed his finger in the direction of where the bagel shop is located and stated, "You mean down there?" to which Chief Walsh replied, "yes, down there." (Testimony of Chief Walsh)

66. At that point, the Appellant stated that earlier on the same morning in which he had struck the dumpster behind the K-Mart, he had gone to the bagel shop and left his cruiser running and unattended while he went inside the shop. The Appellant indicated that while he was inside the bagel shop, a bagel shop employee came in and told him that his cruiser was across the road blocking Reed Street. The Appellant advised the Chief that he went outside and saw the cruiser facing north and resting against a line of small trees. The Appellant told Chief Walsh that he checked the vehicle for damage and the only damage he noted was a small piece of rubber on the front fender was pulled out which he then pushed back in. The Appellant stated that there was no other damage to the cruiser. (Testimony of Chief Walsh)
67. In the past, the Appellant's coffee breaks at the bagel shop had been a point of contention between the Appellant and Chief Walsh. (Testimony of Appellant and Chief Walsh)
68. On several occasions in the past, Chief Walsh had spoken to the Appellant and admonished him regarding the length of his coffee breaks and about leaving his cruiser running and unattended during them. (Testimony of Chief Walsh)
69. At the conclusion of his conversation with the Appellant on January 21, 2005, the Chief instructed the Appellant to submit a report dealing with the bagel shop event which the Appellant did on or about January 22, 2005. (Exhibit 10)
70. Based on his investigation of the matter, Chief Walsh believed that the Appellant's version of events as to how the damage to the cruiser occurred was not credible and referred the matter to the Town Manager for the purpose of holding a disciplinary hearing. (Exhibit 1: Stipulated Facts)

71. By letter from the Town Manager dated February 16, 2005, the Appellant was notified that a disciplinary hearing had been scheduled to determine if there was just cause to discipline him, up to and including termination of his employment. (Exhibit 1: Stipulated Facts)
72. On March 5, 2005, the Appellant went out of work on paid sick leave where he remained right up until the date of his termination. (Exhibit 1: Stipulated Facts)
73. In May 2005, the Appellant filed an application for disability retirement. (Stipulated by the parties at Commission hearing)
74. The Town's disciplinary hearing against the Appellant was held before the Town Manager on September 9, 2005. (Exhibit 1: Stipulated Facts) There is no dispute that the hearing was held several months later as a result of requests for continuances by the Appellant.
75. Although present for the hearing, the Appellant did not testify on his own behalf and did not call any witnesses. The Town Manager, during his testimony before Commission, testified that he drew an adverse inference against the Appellant from his failure to testify. (Testimony of LaClair)
76. By decision dated September 15, 2005, the Town Manager terminated the Appellant's employment. (Exhibit 1: Stipulated Facts; Joint Exhibit 2)
77. According to the above-referenced September 15, 2005 termination letter, the Appellant was charged with four rules violations and one departmental directive violation, which are as follows: 1) Section 1: F6. Required Conduct / Truthfulness; 2) Section 1: G6. Prohibited Conduct / Conduct Unbecoming and (sic) Officer; 3) Section 1: G19. Prohibited Conduct / Report of Loss or Damage; 4) Section 1: G20c.

Prohibited Conduct / Incompetence; 5) Departmental Directive issued May 13, 1994 pertaining to unattended vehicles. (Exhibit 2)

78. In his post-hearing brief, the Appellant takes issue with the second of the five charges, stating that Section 1: G6 is not related to conduct unbecoming an officer, as referenced in the letter, but, rather, is related to “discourtesy”. (Exhibit 11)
79. I find that there is ambiguity regarding the second of five charges referenced in the September 15, 2005 letter, making it difficult to determine if the Town’s charge is related to conduct unbecoming an officer or discourtesy. However, this apparent typographical error by the Town has no substantive effect on the overall charges which led to the Appellant’s termination, which largely center around the issue of untruthfulness.
80. On September 22, 2005, the Appellant filed a timely appeal of this matter with the Commission. (Exhibit 1: Stipulated Facts; Exhibit 13)
81. At the time of his termination, the Appellant’s prior disciplinary record consisted of five written reprimands and a five-day suspension. (Exhibit 23) The Appellant had also received numerous letters of appreciation and commendation during his tenure. (Exhibit 24)
82. In June 2006, the Appellant’s application for an accidental disability retirement was granted and his retirement was made effective retroactive to the date of his termination, September 15, 2005. (Exhibit 1: Stipulated Facts)
83. As a result of being terminated, the Appellant is not eligible to participate in the Town’s health insurance plan for retirees. (Testimony of LaClair) Hence, the

practical effect of the termination in this case is the elimination of town-funded family health insurance benefits for the Appellant.

84. LaClair testified at the Commission hearing that he was unaware at the time of the termination that it would result in the cessation of the Appellant's health insurance benefits upon his retirement. Prior to the hearing before the Commission, however, LaClair became aware of the Appellant's inability to access a town-funded family health insurance plan as a retiree. (Testimony of LaClair)
85. Given the practical effect of the termination in this case, namely, the cessation of family health insurance benefits for this retired police officer with 27 years of service to the Town of Great Barrington, this Commissioner encouraged the parties to reach a settlement agreement that would address this narrow, but important, issue, and forego the need for a decision by the Commission.
86. On January 19, 2007, the Town advised the Commission that "it does not appear this case is going to settle" and set forth proposed deadlines for post-hearing briefs. (January 19, 2007 letter to Commission from counsel for Town of Great Barrington)

CONCLUSION

A tenured civil service employee may only be terminated from his or her employment for "just cause:" G.L. c. 31, s. 41, a phrase judicially defined as "substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service." Murray v. Second District Court of E. Middlesex, 389 Mass. 508, 514, 451 N.E. 2d 408 (1983). The role of the Commission is to determine whether the Appointing Authority proved, by preponderance of evidence, just cause for the action taken. M.G. L. c. 31, s. 43; School Committee of Brockton v. Civil Service Commission, 43 Mass App.

Ct. 486, 488, 684 N.E. 2d 620 (1997). “In making that analysis, the Commission must focus on the fundamental purposes of the civil service system – to guard against political considerations, favoritism and bias in governmental employment decisions ... and to protect efficient public employees from political control. When there are, in connection with personnel decisions, overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission. It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.” City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304, 682 N.E. 2d 923 (1997).

The Commission concludes that the Appellant was untruthful in regard to the events that occurred on December 29, 2004. The Appellant’s testimony regarding how his cruiser sustained damage that day can not be reconciled with the testimony of then-Deputy Police Chief Timothy Hassett and the evidence he gathered as part of his investigation. Specifically, Exhibit 17 is a collection of several pieces of clear plastic that Hassett collected from the ground near the base of the tree across from the bagel shop. The largest of those broken pieces in Exhibit 17, gathered across from the bagel shop, fits perfectly with the broken area of the light housing that Officer Hassett received from Decker’s Auto Body which had been taken off the Appellant’s cruiser. (Exhibit 20) This irrefutable evidence directly contradicts the Appellant’s testimony that the only damage sustained by his cruiser across from the bagel shop was a small piece of rubber on the front fender being pulled out which he then pushed back in.

In order for the Appellant's version of events to be true, including his testimony that the damage to the headlight casing occurred later that morning as a result of striking a dumpster behind the local K-Mart, the Commission would need to conclude that then-Deputy Police Chief Hassett, with the assistance of police officer Kevin Larkin and reserve police officer Robert Avery, fabricated a story about finding the pieces of plastic across from the bagel shop which were introduced as evidence at the Commission hearing. Despite the cloud hanging over Hassett's head as a result of a previous criminal indictment in which he was accused of destruction of property, I find Hassett's testimony before the Commission on this issue to be credible.

A more plausible explanation regarding the events of December 29, 2004, and one that the Commission concludes to be true, is that the Appellant fabricated the story regarding the alleged K-Mart incident to avoid the Chief's wrath and the possible disciplinary action that may have flowed from his cruiser being damaged as a result of his having left it running and unattended in violation of the Chief's directives.

Further, consideration must also be given to the adverse inference that the Town Manager drew against the Appellant as a result of his declining to testify at the underlying disciplinary hearing. As the courts have held, the Appellant's refusal to tell his side of the story at the disciplinary hearing and the adverse inference that the Town Manager drew therefrom is an integral part of the circumstances that existed when the Town made its decision. See Town of Falmouth v. Civil Service Commission, 447 Mass. 814, 826-27 (2006).

Having concluded that the Appellant has been untruthful regarding the events of December 29, 2004, the question before the Commission is whether the Town had reasonable justification to terminate the Appellant in this case.

If the Commission decides to modify a penalty, it must provide explanation of its reasons for so doing, because a decision to modify shall be reversible if unsupported by the facts or based upon an incorrect conclusion of law. Faria v. Third Bristol Division of the Dist. Ct. Dep. 14 Mass. App. Ct. 985, 987 (1982). Police Commissioner of Boston v. Civil Service Commission. 39 Mass. App. Ct. 594, 602 (1996). When the Commission modifies an action taken by the Appointing Authority, it must remember that the power to modify penalties is granted to ensure that employees are treated in a uniform and equitable manner, in accordance with the need to protect employees from partisan political control. Id. at 600. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 801 (2000).

Ironically, a separate disciplinary matter surrounding one of the Town's own witnesses in the instant case, then-Deputy Police Chief Timothy Hassett, raises serious questions as to whether the Town of Great Barrington treats similarly situated employees in a uniform and equitable manner. The law supports uniformity of punishment for similar offenses committed within both a departmental unit and a particular position. See McDonough v. MBTA, 13 MCSR 140 (2000). Kelleher v. Braintree Police Department, 10 MCSR 198 (1997). Cofield v. Boston Police Department, 6 MCSR 15 (1993). Murphy v. Boston Police Department, 6 MCSR 262 (1993).

In 2005, prior to the Town's decision to terminate the Appellant, then-Deputy Police Chief Hassett was indicted on a charge of destruction of property relating to an incident

occurring at the Great Barrington Police Department in November 2004. In sharp contrast to the instant case in which the Town launched a formal investigation into the bagel shop incident, the Town did not undertake a formal investigation of Hassett. Rather, the Town Manager relied on reports of the State Police and, after consulting with the District Attorney's office, agreed to let Hassett, a 23-year veteran of the police force, remained employed as a police officer. The Town Manager's explanation as to why there was no formal investigation of Hassett ring hollow, particularly his claim that the Town lacked the resources to undertake its own investigation. Moreover, it is clear that Town Manager LaClair considered Hassett's 23-year tenure with the Department when making his decision to demote, rather than terminate him. That same consideration appeared to be lacking in the case of the Appellant, who spent most of his career serving as the cantankerous local Union President, often butting heads with the Town Manager on union-related matters.

Town Manager LaClair also acknowledged during his testimony before the Commission that a department head who encountered "problems" during the Town Manager's tenure was given the option of resigning as opposed to being terminated. Again, this appears to be an option that was not afforded to the Appellant in the instant case. In approximately nine years as Town Manager, Mr. LaClair has never terminated an individual other than Officer Heady.

The testimony of Police Chief Walsh, in addition to his affidavit submitted after the hearing, further confirms that the penalty imposed against Mr. Heady in this case was not in line with prior disciplinary actions against police officers in Great Barrington. Specifically, in August 2004, the Chief issued a one-day suspension to an officer for

being untruthful about conversations that he had with a newspaper reporter about a road closure. At the time of the suspension, the individual had been a police officer with the Town for approximately twenty-four (24) years. Moreover, it appears from the Chief's affidavit, in addition to the post-hearing brief submitted by the Appointing Authority, that the only officer ever terminated in Great Barrington, at least as far back as 1983, is the Appellant, Merritt Heady.

The inescapable conclusion reached by this Commission is that personal bias resulted in the unprecedented decision by the Town of Great Barrington to terminate Merritt Heady. As such, the Commission's intervention is warranted in the form of ordering a reduced penalty.

The Appellant, however, should in no way view this decision as a vindication of his misconduct in this matter. It is well-established that an Appointing Authority, particularly when it pertains to police officers, should discipline individuals engaged in untruthfulness. (See Ameral and Kiely v. Somerville Police Department, 19 MCSR 348, 352 (2006), where the Commission upheld a 15-day suspension of two Somerville police officers, one of whom was a police union vice president, for lying and falsifying reports in order to conceal the fact that one of Complainants was out of his sector without permission on that day.)

The Appellant's appeal is hereby ***allowed in part***. In modifying the discipline imposed, the Commission is mindful that reducing the penalty from a termination to a suspension, regardless of the duration, would effectively result in no penalty against the Appellant in this case, as his accidental disability retirement benefits became effective the day of his termination. For this reason, the Commission hereby orders that the penalty

imposed be modified as follows: the Appellant is to reimburse the Town in an amount equivalent to 90 days pay. While this modification ensures that a penalty is indeed imposed against the Appellant, it will effectively modify the disparate penalty of termination, which ultimately served only to prohibit the Appellant from accessing the same town-funded health insurance benefits as other retirees of the Town of Great Barrington.

Civil Service Commission

Christopher C. Bowman, Commissioner

By a 2-1 vote of the Civil Service Commission (Bowman, Commissioner – YES; Guerin, Commissioner – YES; Marquis, Commissioner - NO [Taylor – Absent]) on March 22, 2007.

A true record. Attest:

Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the commission's order or decision.

Notice:

Joseph S. Fair, Esq.

Stephen C. Pfaff, Esq.