

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

100 Cambridge Street, Suite 200
Boston, MA 02114
(617) 979-1900

BRENDA JAMES,
Appellant

v.

BOSTON POLICE DEPARTMENT,
Respondent

D1-15-64

SUMMARY OF FINAL DECISION

This appeal has followed one of the lengthier and more circuitous paths in the Commission's history. For reasons unique to this appeal, the Commission urged the parties to work toward an agreement that would have foregone the need for the issuance of this decision. Despite their earnest efforts, no such resolution was reached, and so a final decision is being issued today.

The crux of the issue here is familiar territory for the Commission: Did the Appellant engage in untruthfulness that effectively disqualifies her from continuing to serve as a Boston Police Officer?

To answer that question, the Magistrate who heard this appeal considered divergent testimony regarding what did – or did not – occur when the Appellant was relieved from duty by a Police Captain as part of a five-day suspension. Ultimately, the Magistrate concluded that the Appellant's version of events, which evolved over time in her verbal and written statements, including those made as part of a criminal complaint that she filed against the Police Captain, were untrue.

Specifically, the Magistrate concluded that the Appellant was "... deliberately untruthful, and she consciously engaged in misleading exaggeration, both in the written reports she submitted and the later statements she made, regarding her interaction with [the Police Captain] ... [The Captain] never lunged at her; he did not touch or make contact with her breasts; he did not cause her body to twist, jerk, or contort in a manner that would cause injury; and he did not violently attempt to dislodge her firearm from its holster. [The Appellant]'s embellishments and mischaracterizations of the incident in [the Captain]'s office were both disingenuous and deceitful."

The Appellant denies that she was untruthful and has submitted numerous objections to the Magistrate's Tentative Decision, including how the Magistrate reached his conclusions. The Commission has completed a thorough review of the record and carefully considered each of the Appellant's objections, discussed in more detail below. While the Commission believes there is evidence showing that the Police Captain used poor judgment in how he relieved the Appellant of duty on the night in question, the Magistrate's conclusions, including his assessment that the Appellant's testimony before him was not credible, is amply supported and well-reasoned.

For that reason, and for the reasons stated in more detail below, the Boston Police Department's decision to terminate the Appellant is affirmed and the Appellant's appeal is denied.

DECISION

Pursuant to G.L. c. 31, § 2(b) and/or G.L. c. 7, § 4H, the Chief Magistrate of the Division of Administrative Law Appeals (DALA) agreed, on remand from the Superior Court, to conduct a full evidentiary hearing regarding the above-captioned matter on behalf of the Civil Service Commission (Commission).

Pursuant to 801 C.M.R. § 1.01 (11) (c), the Chief Magistrate (prior to his late December 2022 departure from that position) issued the attached Tentative Decision (containing two hundred and sixty-two Findings of Fact) to the Commission and the parties were then afforded thirty days in which to file written objections with the Commission. After securing an enlargement of time, the Appellant submitted lengthy objections on February 6, 2023, and the Respondent filed a detailed response on February 24, 2023.

After careful review and consideration, the Commission has voted to affirm and adopt the Tentative Decision of DALA's then-Chief Magistrate, thus making this and the attached the Final Decision of the Commission. A preponderance of the evidence establishes that the Respondent exhibited just cause to terminate the Appellant, in March of 2015, from her position as a police officer in the Boston Police Department (BPD).

This appeal involves whether the Appellant, while serving as a Boston police officer, filed meritless criminal charges against a superior officer and, if so, whether that and other misconduct justifies her termination from the Boston Police Department. After reviewing the live testimony of numerous witnesses, including the Appellant, and reviewing dozens of relevant exhibits, DALA's Chief Magistrate ultimately concluded that the Appellant did indeed deliberately pursue a false, meritless criminal charge against a superior officer after he dislodged her firearm from the holster she wore while she was being relieved of duty as part of a prior, five-day suspension. Because the Appellant's version of events changed considerably over time, the Chief Magistrate concluded that her evolving, contradictory statements can only be attributed to untruthfulness, as opposed to an honest recollection of what actually transpired.

The Appellant has been provided with a fair, impartial forum to contest her termination. The Chief Magistrate conducted a fair, impartial review, and made well-supported credibility assessments that the Commission is bound to accept. His thorough, well-reasoned findings are supported by the voluminous record.

Analysis of Appellant's Objections

In February 2023, the Appellant lodged nine specific objections to the DALA Tentative Decision. However, after thorough review, the Commission has concluded that none warrant modification of, or departure from, the Chief Magistrate's findings and conclusions. For the reasons discussed below, the objections are either unfounded or do not warrant rejecting the Tentative Decision in which the Chief Magistrate recommends upholding the Appellant's termination.

The Appellant's first objection is that allegedly she was not provided with proper notice of the offenses that underlay her termination. To the contrary, the Respondent BPD furnished the Appellant with eleven written specifications that identified with reasonable particularity the conduct for which she was being disciplined. See Tentative Decision ("Tent. Dec'n") at 33-35. As outlined in those specifications, all charges stemmed from the Appellant's conduct during a fairly short meeting with Captain Paul Russell on June 8, 2012, or her statements and actions shortly thereafter that were directly connected to, or concerned, that meeting. Given the small core nucleus of disputed facts, the Appellant had no need to speculate about which of her own statements the Respondent deemed untruthful. Several weeks before the 2014 Trial Board proceedings, the Appellant had access to the written specifications and supporting documentation; moreover, she was represented by counsel and she had an opportunity at the Trial Board hearing to hear the evidence against her, present exculpatory evidence, and contest the charges. See [Commission 2016 Decision](#) at 36, ¶¶ 161-162. This plainly satisfied the requirements of G.L. c. 31, § 41. Subsequently, the Appellant did *not* file a claim before this Commission under G.L. c. 31, § 42, alleging any failure on the Respondent's part to specify the misconduct for which she was facing discipline. Nor did she lodge any credible objection on this score before the hearing Commissioner. In any event, there could be no doubt by this point about why the Respondent had accused the Appellant of falsehoods. The fact that the Appellant was then afforded a second, *de novo* evidentiary hearing before DALA's Chief Magistrate, after hearing all of the Respondent's material evidence against her during the first proceedings presided over by Commissioner Ittleman (and the Trial Board hearing before that), disposes of any notion that the Appellant was unfairly deprived of specific notice of her terminable offenses.

The Appellant's second objection is that the Tentative Decision allegedly failed to include subsidiary findings connecting the Appellant's false statements to particular specifications. In fact, DALA's Chief Magistrate authored numerous specific findings identifying false statements by the Appellant in both her written reports and in later recounting (including under oath in court) the interactions she had with Captain Russell over less than a one-hour period on June 8, 2012. It suffices to recount how the Appellant's testimony at DALA contradicted not only other witnesses' sworn statements but her own prior statements; it is unnecessary to further tie each falsehood to specific lines in the disciplinary charging document.

The Appellant's third objection is that the Chief Magistrate purportedly relied improperly on the judgments, findings, and assessments of other adjudicators. This matter has followed an exceptionally lengthy and tortuous path through three different courts, a Trial Board, an arbitration proceeding, and two separate *de novo* Commission proceedings. Under the circumstances, the Commission does not expect the Chief Magistrate to have written upon a *tabula rasa*. Nevertheless, he heard directly from the Appellant and neutral witnesses who did not exhibit bias and he exercised independent judgment in making clear and well-supported credibility determinations. The Appellant mistakenly asserts that the law obliged the Chief Magistrate to have given "no evidentiary weight whatsoever" to the findings and evaluations of other factfinders. Rather, the Supreme Judicial Court has explicitly instructed that "[t]he [C]ommission's task . . . is not to be accomplished on a wholly blank slate." [Falmouth v. Civil Serv. Comm'n](#), 447 Mass. 814, 823 (2006). "While the commission must develop its own view of the facts, a review of the [employer]'s findings no doubt would assist the commission in determining 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.](#) at 825

n.12. Far from ignoring, or unduly relying upon, others' treatment of the same record evidence, the Chief Magistrate carefully noted how the Appellant's own statements evolved over time and through these various fora. The Chief Magistrate's impartial and unprejudiced decision-making cannot fairly be questioned simply because he has deemed the Appellant to lack credibility.

The Appellant's fourth objection claims that the Chief Magistrate failed to consider the Appellant's live testimony and "other favorable evidence" in rendering his Tentative Decision. In fact, numerous findings—*e.g.*, ¶¶ 57, 66, 67, 68, 236, and 250—do address the Appellant's testimony. Just because the Chief Magistrate did not find the Appellant credible does not mean that he "ignored" her testimony. On page 58 of the Tentative Decision, for example, the Chief Magistrate specified certain crucial parts of the Appellant's testimony (*e.g.*, her statements that Captain Russell touched her breast or that she did not know what to expect from the meeting with Captain Russell) that he simply did not believe. There is no need for discussion of other fictions or exaggerations (*e.g.*, that Captain Russell "caused a chaotic scene within the station", App. Obj. at 17) as put forth by the Appellant. The Chief Magistrate explained that he gave "little weight to any of Ms. James' testimony" because it contradicted not only the statements of other witnesses, but also the Appellant's own statements from prior occasions. (Tent. Dec'n at 57-58). *Compare McGuinness v. Department of Correction*, 465 Mass. 660, 670 (2013) (noting that "plaintiffs gave inconsistent and contradictory accounts . . . over the course of the department's investigation, which cast doubt on the plaintiffs' credibility as witnesses.").

The Chief Magistrate did not "categorically ignore" the Appellant's explanations of material facts (Appellant Objections at 17); instead, he made numerous findings regarding these events and the Appellant's allegations (Tent. Dec'n ¶¶ 57-174, pp. 13-33). The Chief Magistrate rejected the Appellant's narrative as unsupported by a preponderance of the evidence, which is his prerogative. A hearing officer is free to disbelieve the testimony of the appellant and to believe the testimony of other witnesses. *Andrews v. Civil Serv. Comm'n*, 446 Mass. 611, 617 (2006) (stating that if a hearing officer's findings are supported by evidence, it is not proper to substitute other views as to what should be the determination of the facts); *see also McCormack v. Department of State Police*, 92 Mass. App. Ct. 1103, *4 (2017) (unpublished) ("Even assuming that there are 'two fairly conflicting views' of the evidence, the commission [factfinder] is entitled to choose how to interpret the evidence before it."). The law is clear that this full Commission may not reject the Magistrate's "tentative determinations of credibility of witnesses personally appearing." 801 CMR § 1.01(11)(c)(2); *McGuinness*, *supra*, 465 Mass. at 669.¹ Finally, in response to another of the Appellant's objections, the Commission has examined the medical documentation purporting to describe an injury that the Appellant attributes to Captain Russell's actions and finds it to lack weight as persuasive causative evidence.

The Appellant's fifth objection asserts that the Chief Magistrate lacked grounds to conclude that the Appellant deliberately made false statements. This objection ignores the Chief Magistrate's

¹ Likewise, courts reviewing this Commission's final decisions "seek to uphold the findings of fact made by a hearing officer or examiner based upon the demeanor and credibility of the witnesses whose oral testimony he has personally observed and evaluated." *McGuinness v. Department of Correction*, 465 Mass. 660, 669 (2013). *See also Leominster v. Stratton*, 58 Mass. App. Ct. 726, 729 (2003) ("[A]ssessing the credibility of witnesses is a preserve of the finder of fact upon which a court conducting judicial review treads with great reluctance.").

explicit statement that he found the Appellant to be “deliberately untruthful” and “consciously engaged in misleading exaggeration” based on the Appellant’s own testimony and statements, at least three days of testimony from other witnesses, and his personal review of “the extensive documentary evidence,” which was more than adequately summarized in the Tentative Decision’s over 250 findings of fact. The Appellant was a seasoned police officer, trained in careful observations and how to write accurate reports. The Commission accepts the Chief Magistrate’s conclusion that the Appellant was conscious of her repeated exaggerations because, among other things, this determination is buttressed by the established timeline of events, the Appellant’s resolute unwillingness to meet with an Internal Affairs detective, and the evolving nature of her narrative. The Commission has long recognized that a police officer must be truthful at all times and that failure to do so constitutes conduct unbecoming an officer. Foley v. North Adams, 28 MCSR 153, 162 (2015).² “An appointing authority is justified to terminate a police officer for conduct unbecoming who repeatedly demonstrates [a] ‘willingness to fudge the truth.’” Condez v. Dartmouth, 28 MSCR 515, 531 (2015), quoting Cambridge v. Civil Serv. Comm’n, 43 Mass. 300, 303 (1997) (“The city was hardly espousing a position devoid of reason when it held that a demonstrated willingness to fudge the truth in exigent circumstances was a doubtful characteristic for a police officer.”) See also City of Boston v. Boston Police Patrolmen’s Ass’n, 443 Mass. 813, 820 (2005) (finding that police officer who files false charges, buttressed by perjured testimony, should not be entrusted with formidable authority of police badge).

The Appellant’s sixth objection professes disparate treatment in the crediting of her statements versus those of Captain Russell. The short answer to this objection is that the Appellant is ignoring the percipient testimony of a neutral witness, Lieutenant Steven Sweeney, who corroborated Captain Russell’s testimony on key points, and the Chief Magistrate’s finding that the Respondent’s Internal Affairs unit “conducted a thorough investigation into [the Appellant’s] allegations and afforded her considerable leeway in presenting her claims to them.” Tent. Dec’n at 61. Even if Captain Russell failed to behave impeccably in his interactions with the Appellant on June 8, 2012, the decisive factor is that, in the view of many experienced adjudicators, the record evidence is more than adequate to sustain the discipline meted out against the Appellant.

The Appellant’s seventh objection claims that the Tentative Decision ignored the Appellant’s right to engage in lawful petitioning activity. Prior adjudicators including the Chief Magistrate, however, have concluded that, far from “petitioning” for redress, the Appellant filed deceptive police reports, all the while repeatedly declining to meet with police investigators, and then subsequently attempted to amend a baseless complaint of assault and battery with an additional similarly meritless charge of indecent assault against a superior officer. The Clerk Magistrate dismissed the entire complaint. The Tentative Decision recounts in some detail (at page 64) the grave damage occasioned by the Appellant’s deceptions.

The Appellant’s eighth objection alleges that discipline meted out for (1) the Appellant’s failure to comply with the BPD’s annual drug testing policy; and (2) her failure to report her change of address in the summer of 2013 lacked supporting evidence, and that the Chief Magistrate failed to

² Accord Gonsalves v. Falmouth, 25 MCSR 231 (2012); Phillips v. Town of Hingham, 24 MCSR 267 (2011); Desharnais v. City of Westfield, 23 MCSR 418 (2010); Mozeleski v. City of Chicopee, 21 MCSR 676 (2008); Rizzo v. Town of Lexington, 21 MCSR 634 (2008); Layne v. Town of Tewksbury, 20 MCSR 372 (2007).

make subsidiary findings in sustaining the discipline. The Appellant’s objection omits key factual details that demonstrate ample justification for discipline on these fronts. For a paramilitary organization like the BPD to operate efficiently and with integrity, police officers cannot be permitted to behave in the manner the Appellant did regarding mandatory drug testing. Nor can a police department condone a sworn officer, even one on leave, dropping out of contact. In its 2016 Decision, this Commission noted that the Appellant stated in an internal affairs interview, a few weeks after she missed written notification of a hair drug test appointment, that she could not recall when she had been forced to move out of her apartment. The presiding Commissioner observed: “Given the significance of losing one’s apartment, it is difficult to understand how a person would not recall when that occurred.” 2016 Dec’n at 63. Likewise, the Chief Magistrate’s Tentative Decision, containing approximately fifty findings of fact and five pages of analysis devoted to the drug test and change of address issues, easily satisfies the “appellate review” test for affirmance by the full Commission of the ultimate disciplinary recommendation contained therein.

The Appellant’s ninth and final objection argues that the Appellant’s failure to update her address with the BPD is not a terminable offense. The Tentative Decision does not hold otherwise and, indeed, the Respondent BPD has never contended that a police officer’s failure to update their address is, standing by itself, a terminable offense. The Commission is satisfied that the Tentative Decision thoroughly analyzes the evidence justifying firm discipline on all points—and it notes, too, that the Chief Magistrate clearly signaled that it was the whole constellation of misconduct on the Appellant’s part, and not just proof of the charges relating to the hair drug test or failure to advise management of her whereabouts, that warranted the Appellant’s termination.

Accordingly, the Department had just cause to terminate Ms. James. This is an unfortunate outcome. Captain Russell, in his capacity as a superior officer, may not have followed all Department protocols, including the need to deescalate the situation in the early morning hours of June 8, 2012. It is indeed regrettable that the June 7-8, 2012 events, based on the later withdrawn suspension, are now part of the reasons for Ms. James’s discipline. We have taken all these facts into account, however, as did the hearing officer, when making this determination.

CONCLUSION

The Boston Police Department’s decision to terminate the Appellant is *affirmed* and the appeal of Brenda James, under Docket No. D1-15-64, is hereby *denied*.

Civil Service Commission

/s/ Christopher C. Bowman

Christopher C. Bowman

Chair

By vote of the Civil Service Commission (Bowman, Chair; Dooley, McConney, Stein and Tivnan, Commissioners) on October 19, 2023.

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 C.M.R. § 1.01(7)(l), 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 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:

Max D. Stern, Esq. (for Appellant)

Joseph A. McClellan, Esq. (for Respondent)

David Fredette, Esq. (for Respondent)

James Rooney, Esq. (Chief Administrative Magistrate, DALA)

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

14 Summer Street, 4th Floor
Malden, MA 02148
781-397-4700

BRENDA JAMES,
Appellant
v.

DALA: CS-18-0363
CSC: D1-15-64

BOSTON POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

Tara D. Dunn, Esq.
Max D. Stern, Esq.
Todd & Weld LLP
One Federal Street
Boston, MA 02110

Appearance for Respondent:

Joseph McClellan, Esq.
David Fredette, Esq.
Boston Police Department
Office of the Legal Advisor
One Schroeder Plaza
Boston, MA 02120

Magistrate:

Edward B. McGrath
Chief Administrative Magistrate

SUMMARY OF TENTATIVE DECISION AFTER REMAND

The Boston Police Department proved by a preponderance of the evidence that it had just cause for the termination of the Appellant as a Boston Police Officer for filing false reports against her commanding officer, seeking a criminal complaint against him for which a Clerk-Magistrate found there was no probable cause, failing to appear for an annual Department hair drug test, and failing to report her change of address as required by Department regulations. The Appellant's misconduct was a grave breach of the high standards to which sworn police officers are and must be held accountable and justifies her termination.

TENTATIVE DECISION AFTER REMAND

Procedural history

This disciplinary matter involving a tenured civil servant is before the Division of Administrative Law Appeals (“DALA”) after being transferred by the Civil Service Commission (“Commission”).

The Appellant, Brenda James (Ms. James or Appellant), acting pursuant to G.L. c. 31, § 43, filed a timely appeal with the Civil Service Commission (Commission or CSC) on March 31, 2015 contesting the Boston Police Department’s (BPD) decision to terminate her employment. A pre-hearing conference was held on April 21, 2015 at the Commission. A full hearing was held over three days, June 15, 2015, June 18, 2015, and September 11, 2015. The appellant did not testify at the hearing.¹ A sixty-eight-page decision issued which upheld the termination. Ms. James filed an appeal with the Superior Court

The Superior Court remanded the matter to the Commission pursuant to a Superior Court Memorandum and Judgment dated January 25, 2018. The Superior Court ruled that the Commission should have allowed Ms. James an opportunity to testify, because she showed good

¹ At the end of the CSC hearing on June 18, the parties had not completed their cases and a third day of hearing was scheduled for July 16, 2015 by agreement. On July 15, the Appellant requested a continuance because her adult daughter was going to have surgery on July 16. The matter was rescheduled for August 7 by agreement of the parties. On or about August 5, 2015, the Appellant requested another continuance because of her daughter’s health. The Commissioner provided the parties with eight alternative dates for hearing (ending September 30), indicating that there would be no further continuances. On August 7, the parties agreed to continue the matter to September 11. On August 17, the Appellant (herself) sent a letter to the Commission stating that because of her daughter’s health and rehabilitation, “I am unable to determine my availability in the immediate future” and that her daughter’s medical process was “unpredictable”. The Commissioner sent this to all counsel and indicated that the September 11 hearing would go forward. The Appellant failed to appear on September 11. Counsel for the Appellant requested an additional continuance, which was denied. The Respondent moved to dismiss the appeal, pursuant to the Commission’s hearing notice, since the Appellant failed to appear, which request was denied. The Commission informed the parties that the Commission could draw an adverse inference from a party’s failure to appear. Counsel for the Appellant requested that the Commission include in its record here the transcript of the Appellant’s testimony at the local hearing. Over the objection of the Respondent, the transcript of the Appellant’s testimony was admitted into the record, along with the transcript of the entire local hearing. The Commissioner also included in the record the transcript of the arbitrator’s hearing on Ms. James’ injured on duty grievance. (The arbitrator’s decision is Exhibit 30.) As with all evidence in this case, these transcripts are given the weight they are due.

cause why she did not appear for the third day of hearing, when she was supposed to testify. The Superior Court Judgment read, in part,

That this matter be REMANDED to the Civil service Commission for further hearing for the sole purpose of taking of [James'] testimony and possibly reconsidering its decision in light thereof.

Brenda James v. Civil Service Commission and Boston Police Dep't, Sup. Ct. 2016-01339-E (Giles, J.). After it was remanded, the Petitioner filed a motion to recuse the Commissioner who had heard the matter and a second Commissioner, who had presided over another matter involving James. The motion to recuse was denied, but to preserve the appearance of fairness and propriety, the Commission reassigned the matter to DALA on June 7, 2018. G.L. c. 7, § 4H.

I conducted a pre-hearing conference on June 13, 2018 at DALA's office. The Petitioner was present and each of the parties was represented by counsel. I scheduled the evidentiary hearing for four days of testimony commencing on February 25, 2019. The matter was continued several times at the Appellant's request. The evidentiary hearing began on June 28, 2022. It continued on June 29 and 30 and the final day of testimony was July 21, 2022. I closed the administrative record on December 13, 2022, after the parties submitted proposed decisions.

FINDINGS OF FACT:

I admitted Seventy-one (71) exhibits into evidence. Based on these exhibits, the testimony of the following witnesses:²

Called by the Respondent before remand:

² The transcripts of witness testimony at the CSC hearing before remand are part of the record. Transcripts referring to the CSC hearing are described as: Testimony of witness name, CSC Transcript, Volume #, page #. Transcripts referring to the DALA hearing are described as: Testimony of witness name, DALA Transcript, Volume #, page #.

- Captain Paul Russell, BPD
- Lieutenant Steven Sweeney, BPD
- Sergeant Detective Daniel Humphreys, BPD
- Lieutenant Detective Paul Mahoney, BPD
- Maria Osorno, Claims Investigator, Medical Unit, BPD
- Phyllis Walsh, Assistant Director of Occupational Health Services Unit/Medical Unit, BPD
- Linda Mitchell, Administrative Analyst, Medical Unit, BPD
- Sandra Tanner, Administrative Assistant, Medical Unit, BPD
- Sergeant Detective Joseph Gallarelli, BPD

Called by the Respondent after remand:

- Captain Paul Russell, Ret. BPD
- Sergeant Detective Joseph Gallarelli, BPD
- Captain Steven Sweeney, BPD

Called by the Appellant before remand:

- Officer John Bergquist, BPD
- Leonard C. Alkins, former President of the NAACP, Boston Branch
- Attorney Hassan Williams
- Attorney Susan Horwitz, Sandulli Grace

Called by the Appellant after remand:

- Lieutenant Daniel Humphreys, BPD
- Attorney Hassan Williams
- Brenda James, Appellant

and taking administrative notice of all matters filed in the case, as well as the matters in Ms. James' appeals in Commission Docket Numbers D-14-298 and D-13-22, and pertinent statutes, case law, regulations, rules, policies and reasonable inferences from the credible evidence; a preponderance of credible evidence establishes the following facts:

Timeline of Overlapping Events

1. In June 2007, Ms. James injured her knee at work and was considered out/injured on duty. (Arbitration Testimony of Ms. James, Transcript, Volume 1, pages 41-42)
2. In June 2009, Ms. James was cleared to return to light duty with continuing rehabilitation. (Arbitration Testimony of Ms. James, Id.)
3. In September 2010, Ms. James suffered bursitis in her right hip, which was deemed a recurrence of the 2007 knee injury and she was out of work and considered to be injured on duty. (Id.)
4. In November 2011, BPD's Medical Unit cleared Ms. James for light duty. (Testimony of Capt. Russell, CSC Transcript, Volume 1, page 34)
5. On December 22, 2011, Capt. Russell filed a report that Ms. James was AWOL, initiating an investigation into her work status. (Testimony of Capt. Russell, Id. at 78)
6. AWOL is absent without leave. (Testimony of Capt. Russell, DALA Transcript, Volume 1, page 32)
7. On January 2, 2012, Ms. James returned to work in a full duty capacity. (Arbitration Testimony of Ms. James, Transcript, Volume 1, page 43)
8. In April 2012, the investigation into Ms. James' AWOL status was completed, establishing four charges against Ms. James. (Testimony of Capt. Russell, CSC Transcript, Volume 1, page 35, 90; Exhibit 7)

9. On June 8, 2012, at approximately 1:00 a.m., Capt. Russell met with Ms. James on her shift and issued her a five (5)-day suspension for previously being AWOL. He planned on allowing Ms. James to serve the suspension in one day increments. (Testimony of Capt. Russell, CSC Transcript, Volume 1, pages 38-39 and 48)
10. On June 15, 2012, Ms. James wrote to Roberta Mullins, Director of the BPD medical unit, that on June 7, 2012, after she reported to work "...Capt. Russell lunged at me and violently yanked at my firearm still in my holster, while jerking my body back and forth. I felt a sharp twinge in my back and right side..." (Ex. 13)
11. On June 15, 2012, Ms. James filed a police incident report³ against Capt. Russell and an injured-on-duty report resulting from her interaction with Capt. Russell on June 8. (Exhibits 12, 13)
12. On June 20, 2012, Capt. Russell filed a request for an investigation against Ms. James. (Exhibit 14)
13. On or about August 2, 2012, Ms. James submitted correspondence to the City asserting that she had been in treatment since May 2012 for an anxiety disorder that was exacerbated by events on June 8, 2012. (Exhibit 30, page 15)
14. In August 2012, Sgt. Det. Humphreys opened an investigation into Ms. James' complaint against Capt. Russell. (Testimony of Sgt. Det. Humphreys, CSC Transcript, Volume 1, pages 197-198)
15. On September 17, 2012, a grievance was filed on Ms. James' behalf, asserting that the City of Boston violated the collective bargaining agreement (CBA) for failing to carry Ms. James forward on injured-on-duty status from June 8, 2012. (Exhibit 30, pages 13-14)

³ Exhibit 12 is the police incident report filed by Ms. James. Near the top right side of the report, the following appears: "STATUS: UNAPPROVED".

16. In June 2013, the BPD reduced Ms. James' five (5)-day suspension to a verbal reprimand and made her whole for lost time. (Testimony of Capt. Russell, CSC Transcript, Volume 1, page 83)
17. On June 13, 2013, Ms. James failed to appear at an appointment to provide a hair sample for the annual BPD hair drug test. (Exhibit 37)
18. On July 1, 2013, Ms. James again failed to appear at a rescheduled appointment to provide a hair sample for the annual hair drug test. (Exhibits 37 and 38)
19. On July 3, 2013, an investigation was opened into Ms. James' failure to appear for her drug test appointments. (Testimony of Sgt. Det. Joseph Gallarelli, CSC Transcript, Volume 3, page 39)
20. On July 17, 2013, the Appellant failed to appear at another appointment to provide a hair sample, stating that she did not receive the notice until after the appointment. (Exhibit 38)
21. On August 15, 2013, BPD investigators determined that Ms. James' allegations against Capt. Russell were unfounded and the allegations against Ms. James were sustained. (Exhibit 30 (Arbitrator's Decision), page 13)
22. On September 7, 2013, following a review of Ms. James' injured on duty claim, BPD denied Ms. James' injured-on-duty claim. (Exhibit 30)
23. On September 13, October 4, and October 9 of 2013, an arbitration hearing was held regarding Ms. James' injured-on-duty claim. (Exhibits 8 and 30)
24. On February 21, 2014, an arbitrator found that the BPD did not violate the CBA by not placing Ms. James on injured-on-duty leave following her June 8, 2012 interaction with Capt. Russell. (Exhibit 30)

25. On September 11, 2014, Ms. James was cleared for light duty by the BPD Medical Unit.
[James v. Boston Police Department, 28 MCSR 185 (April 3, 2015)(Docket No. D-14-298)]
26. On September 15, 2014, Ms. James was placed on paid administrative leave pending an investigation into her failure to report for a hair drug test. [James v. Boston Police Department, 28 MCSR 185 (April 3, 2015) (Docket No. D-14-298)].⁴
27. On September 5, and 24, 2014, BPD held a disciplinary hearing regarding Ms. James' failure to appear for her hair drug test and failure to notify BPD of her change of address. (Exhibit 21)
28. On November 18 and 19, 2014, and December 11 and 12, 2014, BPD held a disciplinary hearing regarding Ms. James' conduct stemming from her June 8, 2012 interaction with Capt. Russell. (Exhibit 21)
29. On March 10, 2015, the BPD Hearing Officer issued a report on the disciplinary hearing regarding Ms. James' failure to appear for her hair drug test and failure to notify BPD of her change of address, finding that the related Specifications against Ms. James were sustained. (BPD Hearing Officer's Report, March 10, 2015⁵)
30. On March 11, 2015, the BPD Hearing Officer issued a report on the disciplinary hearing regarding Ms. James' conduct stemming from her June 8, 2012 interaction with Capt.

⁴ The BPPA filed two grievances on behalf of the Appellant for having been cleared for light duty and for then being placed on paid administrative leave: Grievance No. 16-2174, related to the September 12, 2014 BPD letter placing her on administrative leave, which the BPPA contended was done without explanation and in violation of the CBA; Grievance No. 16-2175, related to the September 11, 2014 order that cleared Officer James for "light duty", which the BPPA contended was punitive, without medical justification and in violation of the CBA. Each of these grievances were processed through Step 4 and denied. On November 6, 2014, the BPPA submitted these two grievances for expedited arbitration. On April 2, 2015, the Civil Service Commission granted the BPD motion to dismiss Ms. James appeal docket D-14-298 because the Commission lacked jurisdiction to hear Ms. James' appeal since the subject of the appeal had been submitted to binding arbitration, pursuant to G.L. c. 150E, § 8 and G.L. c. 31, §§ 39 and 41-45.

⁵ This document was submitted by BPD at the Commissioner's request after the CSC hearing. The Appellant submitted a supplemental post-hearing brief in this regard.

Russell, finding that the ten (10) of the eleven (11) Specifications against Ms. James were sustained. (BPD Hearing Officer's Report, March 11, 2015⁶)

31. On March 18, 2015, BPD sent Ms. James a letter sustaining the Specifications in the reports of the BPD Hearing Officer and terminating her employment effective that day for submitting various false reports and testimony in violation of cited BPD rules and statutes, failing to submit a hair sample for annual drug testing, and failing to file a notice of change of address in violation of cited BPD rules. (Exhibit 21)

32. On March 31, 2015, Ms. James filed a timely appeal of BPD's termination of her employment with the Civil Service Commission. (Administrative Notice; Stipulation)

Events Leading to the Issuance of Suspension to Appellant

33. Ms. James has been employed by the BPD since 1994. (Arbitration Testimony of Ms. James, Transcript, Volume 1, page 35)

34. Throughout her career with the BPD, Ms. James has worked as a Patrol Officer. She was a BPD liaison to the Boston Public Schools and she worked with at-risk youth. Ms. James also participated in mediation training to assist in her work with at-risk youth. (Arbitration Testimony of Ms. James, Volume 1, pp. 35-38)

35. At the time of the pertinent incidents, Ms. James was assigned to District E-13. (Testimony of Capt. Russell, CSC Hearing Transcript, Volume 1, page 32)

36. At the pertinent times, Ms. James worked the overnight shift from 11:45 p.m. to 7:00 a.m. (Id. at 38)

37. Capt. Russell was the Captain of District E-13 in June 2011. (Id. at 31)

⁶ This document was submitted by BPD at the Commissioner's request after the CSC hearing. The Appellant submitted a supplemental post-hearing brief in this regard.

38. Capt. Russell first met Ms. James sometime in June 2011 when she introduced herself and said she would soon be coming back to work at District E-13 in a light duty capacity. (Id. at 32)
39. In June 2007, Ms. James suffered a knee injury while on duty. She tore her right anterior cruciate ligament (ACL) and her status was “out injured” (paid) until sometime in June 2009. (Arbitration Testimony of Ms. James, Transcript, Volume 1, pages 41-42)
40. In June 2009, Ms. James returned to work in a light duty status with continuing rehabilitation. (Id. at 42)
41. Sometime in September 2010, Ms. James developed bursitis in her right hip due to complications from her right knee injury. Ms. James was then considered “out injured” (paid) by BPD. (Id.)
42. Ms. James was cleared by the BPD Medical Unit to return to work in December 2010. However, Ms. James asserted that she was improperly returned to work. In January 2011, Ms. James was returned to injured-on-duty leave. (BPD Disciplinary Hearing, Testimony of Ms. James, Transcript, December 12, 2014, Volume 4, pages 52-54)
43. In October 2011, Ms. James’ physician created a medical treatment plan for her to stay on injured leave but return to duty in December 2011. (Id.)

The Five (5)-Day Suspension

44. The Department Medical Unit notified Capt. Russell that Ms. James was cleared for light duty as of November 21, 2011. (Testimony of Capt. Russell, DALA Transcript, Volume 1, page 31)
45. Ms. James failed to report to work on November 21, 2011. The next week Capt. Russell spoke to Ms. James by telephone and told her she was determined to be AWOL since she had

not returned to work and that she needed to contact the BPD Medical Unit to resolve the issue. (Id.)

46. On December 22, 2011, Capt. Russell filed a “Form 1920”⁷ because Ms. James was still AWOL despite being cleared for light duty. (Id. pages 31-32)
47. Ms. James’ AWOL status was investigated at the district level. Ms. James would be subject to less severe discipline if the matter stayed at the district level since the maximum punishment Capt. Russell could issue to the Appellant was a five (5) day suspension. (Id. at 33)
48. On January 2, 2012, Ms. James returned to full duty as a patrol officer. (Arbitration Testimony of Ms. James, Transcript, Volume 1, page 43)
49. Capt. Russell understood that he had to address Ms. James being AWOL for approximately 30 days. (Testimony of Capt. Russell, DALA Transcript, Volume 1, page 31)
50. Ms. James was aware that she was the subject of an investigation regarding her AWOL status. She was asked to submit a “Form 26”⁸ regarding her status and she did so in February 2012. Ms. James was also informed by Sergeant Courtney Powell, Ms. James’ squad supervisor, that he was conducting the investigation concerning her AWOL status. (Arbitration Testimony of Ms. James, Transcript Volume 1, page 56)
51. This investigation was conducted by Sgt. Powell. (Testimony of Capt. Russell, CSC Transcript, Volume 1, page 35; Exhibit 7)
52. On April 10, 2012, Sgt. Courtney Powell completed the investigation and submitted a report to Capt. Russell, stating four charges against Ms. James. (Testimony of Capt. Russell, Id. at 90)

⁷ A Form 1920 is a BPD document requesting an internal affairs investigation.

⁸ A Form 26 is BPD administrative report and follows a To/From memorandum format. (Testimony of Capt. Russell, CSC transcript, Volume 1, page 96)

53. A Notice of Suspension issued to Ms. James, indicating that she was being suspended for five (5) working days without pay and the reason for this suspension was “that on or about 7:30 a.m. Monday November 21, 2011 you failed to return to duty after being cleared for light duty. P.O. James was informed by Capt. Russell on November 28th that she was cleared for light duty and instructed to contact the Medical Unit and resolve the issue and she failed to do so. As a result P.O. James was carried AWOL until she returned to full duty on January 2, 2012.”⁹ (Exhibit 6)

54. The Notice of Suspension states that Ms. James violated Rule 102:10 (Reporting for Duty), Rule 110:27 (Return to Duty), Rule 110: 28 (Failure to Return to Duty) and Rule 102:8 (Directives and Orders). (Exhibit 6)

55. Capt. Russell issued a report to then-Police Commissioner Edward Davis detailing the violations. It reads, in part, as follows:

- 1) “Rule 102: 8 Directives & Orders: PO James failed to report for duty when instructed by Capt. Russell and failed to contact the Medical Unit as directed.
- 2) Rule 102:10(a) Reporting for Duty: PO James failed to report for duty when instructed by Capt. Russell when she was notified that she was cleared to return for light duty.
- 3) Rule 110:27 Return to Duty: PO James failed to return to Duty on Nov. 21st 2011 after being cleared by the (sic) Nurse Zelma Greenstein, who received a completed physical capacity form from PO James doctor, Dr. Mithoefer, that was effective Nov. 9th, 2011 and changed her status from out-injured to modified duty.
- 4) Rule 110:28 Failure to Return to Duty: PO James failed to return to work on modified duty after being cleared by her physician, Dr. Mithoefer and the department’s physician, (sic) Nurse Greenstein. Several attempts were made to contact PO James by the Medical Unit and PO James failed to return to work even after being informed by Capt. Russell that she was cleared for light duty.”

(Exhibit 7)

⁹ In his testimony before the Commission, Capt. Russell indicated he spoke to Ms. James by telephone on November 29, 2011 regarding her AWOL status. Exhibit 6 indicates that the date of this conversation was November 28, 2011. This discrepancy does not alter the conclusion here.

56. The five (5)-day suspension was reduced to a verbal reprimand on or about June 7, 2013 by the BPD. (Testimony of Capt. Russell, CSC Transcript, Volume 1, page 83)¹⁰

Issuing the Five (5)-Day Suspension

57. Ms. James chose to work the overnight, 11:45 pm -7:30 am, shift because of the unresolved AWOL issue. (Testimony of Ms. James, DALA Transcript, Volume 3, page 22)

58. On June 7, 2012, at approximately 11:45 p.m., Capt. Russell arrived at the Area E-13 police station to issue the five (5)-day suspension to Ms. James. (Testimony of Capt. Russell, DALA Transcript, Volume 1, page 36)

59. Before arriving at the police station, Capt. Russell called and spoke to Lt. Sweeney at District E-13 to make sure that Ms. James was working that night. (Id.)

60. Capt. Russell normally worked the day shift Monday through Friday. (Testimony of Capt. Russell, CSC Transcript, Volume 1, at 35)

61. He travelled to the District-13 police station on the evening of June 7, 2012 to issue the five (5)-day suspension to Ms. James because he could not delegate the responsibility of issuing a suspension to a subordinate pursuant to Special Order 95-55. (Id. at 35, 37-38; Exhibit 8)

62. When he arrived at the police station, Capt. Russell spoke to Lt. Sweeney about arranging union representation for Ms. James during a meeting with her. The union representative for the station, Officer Paul Nee, was not working that night and there was no other union representative present at the station. Lt. Sweeney contacted other BPD districts to find another union representative to attend the meeting. (Testimony of Capt. Russell, CSC Transcript, Volume 1, at 37)

¹⁰ Ms. James had filed an appeal at the Commission about the five (5)-day suspension for being AWOL (Docket No. D-13-22). Ms. James and BPD reached a settlement agreement in which Ms. James was paid back her AWOL time between November 21, 2011 and January 1, 2012 and compensated for the five (5) days during which she served her suspension and the appeal was dismissed based on the parties' settlement agreement.

63. Officer Paul Nee was Ms. James' union president at that time. (Arbitration Testimony of Ms. James, Transcript, Volume 1 page 54)
64. Capt. Russell told Lt. Sweeney that he was going to suspend Ms. James for five (5) days and that Lt. Sweeney needed to bring Ms. James to Capt. Russell's office. Capt. Russell told Lt. Sweeney that Ms. James could bring her partner into the meeting if a union representative could not be found. (Testimony of Capt. Russell, DALA Transcript, Volume 1, page 36)
65. It was Capt. Russell's understanding that a union representative is not required to be present when an officer is issued a suspension. (Id. at 37)
66. Ms. James was aware that Capt. Russell was coming to the station and she spoke to Lt. Sweeney, who told her the Captain wanted to speak to her. (Testimony of Ms. James, DALA Transcript, Volume 3, page 24)
67. Ms. James saw Capt. Russell arrive at the station. (Id., page 22)
68. Ms. James called Officer Thomas Nee, her union's president, to obtain union representation for the meeting with Capt. Russell. (Testimony of Ms. James, DALA Transcript, Volume 3, page 26)
69. Two radio calls were placed over the air asking that Ms. James "return to base." (Exhibit 28)
70. An Internal Affairs investigation related to the issuing of the five (5)-day suspension determined that one call was made by Lt. Sweeney and one call was made by a woman. (Testimony of Sgt. Det. Humphreys, CSC Transcript, Volume 1, pages 200-201).
71. Ms. James mistakenly believed that it was Capt. Russell who called for her over the radio. (Arbitration Testimony of Ms. James, Transcript, Volume 1, page 111)
72. Officer Thomas Nee called Ms. James' cell phone and spoke to her prior to her meeting with Capt. Russell. (Id. at 57-58)

73. Prior to meeting with Ms. James, Capt. Russell also received a call from Officer Thomas Nee. (Testimony of Capt. Russell, DALA Transcript, Volume 1, page 37)
74. While Capt. Russell was speaking with Officer Nee, Lt. Sweeney and Ms. James entered Capt. Russell's office. (Id.)
75. Capt. Russell explained to Officer Nee the charges against Ms. James and the length of the suspension to be issued. He asked Officer Nee if he wanted to speak to Ms. James. (Id.)
76. Ms. James and Lt. Sweeney overheard Capt. Russell talking to Officer Nee since they were now in his office. (Testimony of Lt. Sweeney, CSC Transcript, Volume 1, page 129)
77. Capt. Russell asked Ms. James if she wanted to speak to Officer Nee. She declined. (Testimony of Capt. Russell, CSC Transcript, Volume 1, page 42)
78. Lt. Sweeney mentioned that he had arranged for the union representative from District 4, Officer Thomas O' Donnell, to attend the meeting but Ms. James said that was not necessary. (Testimony of Lt. Sweeney, CSC Transcript, Volume 1, page 129)
79. Ms. James declined union representation because she had heard what Capt. Russell was intending to discuss with her when he was on the phone with Officer Thomas Nee. (Testimony of Lt. Sweeney, CSC Transcript, Volume 1, page 129)
80. Ms. James told Lt. Sweeney she did not want to wait for Officer Thomas O'Donnell to arrive at the station. She said that if she was only going to be given the suspension paperwork and any necessary instructions she would be fine without union representation as long as she did not have to engage in a conversation or interrogation. (Arbitration Testimony of Ms. James, Transcript, Volume 1, page 64)
81. Capt. Russell began explaining to Ms. James the reasons for the suspension. (Testimony of Capt. Russell, DALA Transcript, Volume 1, page 41)

82. Capt. Russell believed that Ms. James was angry, because he found her nonresponsive and her tone disrespectful. (Id.)
83. While in Capt. Russell's office, Ms. James' cell phone rang and she answered it.
(Testimony of Lt. Sweeney, CSC Transcript, Volume 1, page 130)
84. Ms. James advised that the President of the BPPA, Officer Nee, was on the phone and she walked out of Capt. Russell's office and took the call. (Id.)
85. Lt. Sweeney stayed in the Captain's office for a few minutes and then went to look for Ms. James. He found her in the guard room still on the phone with Officer Nee. (Id.)
86. Lt. Sweeney waited a few more minutes for Ms. James to finish her phone call and told her that they needed to go back into Capt. Russell's office because Capt. Russell had some paperwork to give her and that the conversation could be a one-way conversation.
(Testimony of Lt. Sweeney, Id. at 131)
87. Capt. Russell went out into the hall and ordered Ms. James back into his office. (Testimony of Capt. Russell, CSC Transcript, Volume 1, page 48)
88. Ms. James and Lt. Sweeney returned to the Captain's office. (Testimony of Lt. Sweeney, CSC Transcript, Volume 1, page 131)
89. Capt. Russell began explaining the details of the suspension to Ms. James and her rights to an appeal hearing and that he did not like issuing the suspension. Ms. James replied if it bothered him so much that Capt. Russell should pay her bills. (Testimony of Capt. Russell, DALA Transcript, Volume 1, page 41)
90. Capt. Russell intended to work with Ms. James to impose the suspension in a manner that would lessen the financial burden on her. He had hoped to issue the suspension in increments

of one day. He also intended to have Ms. James finish her shift that night. (Testimony of Capt. Russell, CSC Transcript, Volume 1, pages 47-48)

91. Capt. Russell believed that Ms. James was angry. (Testimony of Capt. Russell, DALA Transcript, Volume 1, page 41)

92. Capt. Russell asked Ms. James if she was okay to go back out on the street after their meeting that night. (Testimony of Lt. Sweeney, CSC Transcript, Volume 1, pages 132-133)

93. Ms. James replied, “you know, it is a stressful situation. How would you feel?” (Id. at 133)

94. Capt. Russell had considered assigning Ms. James to the station’s front desk for the remainder of her shift that night but decided against it when he saw that, “she was angry, she was non-responsive. I was afraid of her behavior carrying over dealing with the public at the front desk, and I was also concerned that she was probably would have got (sic) hurt at the front desk. She probably would have tripped or fallen off the chair or something and gone back out injured.” (Testimony of Capt. Russell, DALA Transcript, Volume 1, page 47-48)

95. Instead, Capt. Russell decided to impose the suspension immediately and ordered Ms. James to take off her badge and give it to Lt. Sweeney, and to give Lt. Sweeney her radio and ID. (Id. at 49)

96. Ms. James told Capt. Russell that her ID was outside in her car. (Arbitration Testimony of Ms. James, Transcript, Volume 1, Page 73)

97. Capt. Russell also wanted Ms. James to turn over her firearm so he ordered her to take the magazine out of her firearm and to turn it over to Lt. Sweeney. (Testimony of Capt. Russell, DALA Transcript, Volume 1, page 44)

98. Ms. James removed the magazine clip from her weapon. (Testimony of Lt. Sweeney, CSC Transcript, Volume 1, page 136)

99. There was one bullet left in the barrel of the weapon and Capt. Russell was concerned for his safety. (Testimony of Capt. Russell, DALA Transcript, Volume 1, page 44)
100. Capt. Russell, who was seated at the time, told Ms. James to stop what she was doing and that he would remove her firearm. He did this because he was concerned about a firearm discharge. (Testimony of Capt. Russell, CSC Transcript, Volume 1, page 51)
101. Capt. Russell stood up from his seat, walked somewhat quickly around his desk towards Ms. James and attempted to pull the firearm from Ms. James' gun holster. The gun got stuck in the holster briefly and Capt. Russell had to push down on the holster and pull the gun forward in order to remove it. (Id. at 52)
102. Capt. Russell remained calm and did not yell while issuing the five-day suspension. (Testimony of Lt. Sweeney, DALA Transcript, Volume 2 page 16)
103. Ms. James was calm. (Id.)
104. When Capt. Russell was removing Ms. James' weapon it got stuck in her holster briefly. While Ms. James did move when the weapon was removed from the holster, there was no violent movement of Officer James' body, and her body did not twist. (Id. at 20-21)
105. Capt. Russell did not lunge at Ms. James. He did not contact Ms. James's body. (Id. at 19 and 21)
106. Ms. James was taken aback. (Id. at 21)
107. Capt. Russell did not touch any part of Ms. James' body, including her breasts. (Testimony of Lt. Sweeney, DALA Transcript, Volume 2, page 21)
108. Ms. James did not make any noises during this interaction, as if she was hurt; nor did she request medical attention while her weapon was being removed or immediately after it was

removed by Capt. Russell. (Testimony of Capt. Russell, CSC Transcript, Volume 1, pages 55-56; Testimony of Lt. Sweeney, CSC Transcript, Volume 1, page 141)

109. Ms. James then left Capt. Russell's office and returned with her ID badge, which she turned over to Capt. Russell. (Testimony of Capt. Russell, CSC Transcript, Volume 1, page 57; Arbitration Testimony of Ms. James, Transcript, Volume 1, page 81)

110. Capt. Russell handed Ms. James paperwork regarding her suspension and copies of applicable Massachusetts General Laws. (Arbitration Testimony of Ms. James, Transcript, Volume 1, pages 82-83)

111. Ms. James, Capt. Russell and Lt. Sweeney moved out into the hallway and Capt. Russell informed Ms. James that she needed to contact the District-13 station clerks to find out how her attendance would be marked for the suspension. (Testimony of Lt. Sweeney, CSC Transcript, Volume 1, page 142)

112. Ms. James never contacted the station clerks regarding her suspension, believing it would be best for her union representative, Officer Paul Nee, to contact them as he had done previously on another time-keeping matter. (Arbitration Testimony of Ms. James, Transcript, Volume 1, pages 84-85)

113. After her meeting with Capt. Russell and Lt. Sweeney, Ms. James went to her car. (Id. at 86)

114. Lt. Sweeney approached Ms. James' car and told her she would be paid for that night shift. Lt. Sweeney went back into the station. (Id. at 87)

115. Ms. James returned to the station and asked to speak with Lt. Sweeney about what happened during the meeting with Capt. Russell. Lt. Sweeney located Sgt. Courtney Powell, who was the sergeant on duty that night, and the three of them went into the duty

supervisor's office to talk. (Testimony of Lt. Sweeney, CSC Transcript, Volume 1, page 145)

116. In that meeting, Ms. James told Lt. Sweeney that she wanted him to know that she did not decline her union representation and that she did not want to sit while in the captain's office because her right leg or knee was bothering her. She said she was not trying to be disrespectful. (Testimony of Lt. Sweeney, DALA Transcript Volume 2 page 31)

117. Ms. James also wanted to know if Lt. Sweeney would be documenting what happened in the Captain's office. Lt. Sweeney said that he would be documenting it with a Form 26. Ms. James replied that she would be documenting it also. (Testimony of Lt. Sweeney, CSC Transcript, Volume 1, page 146)

118. Ms. James left the station, went back to her car, sat there for five or ten minutes. She felt ill. (Arbitration Testimony of Ms. James, Transcript, Volume 1, pages 91-92)

119. Shortly thereafter, Ms. James decided to drive to District 4 to speak with Officer Thomas O'Donnell, who is a union representative. Ms. James waited in her car outside the station and Officer O'Donnell came out to speak to her. (Arbitration Testimony of Ms. James, Transcript, Volume 1, pages 92-93)

120. After her meeting with Capt. Russell and Lt. Sweeney, Ms. James went to Beth Israel Deaconess Medical Center, where she was examined. The Medical Center note concerning that was signed at 3:36 pm. (Exhibit 63)

121. Ms. James reported to hospital staff that: "other individual pulled her gun and forcefully pulled up several times, twisting her torso in the process. She was not punched kicked, struck in any other way...she now complains mostly of pain in her low back from the forceful

twisting motion as well as migraine headaches.” Ms. James reported feeling stressed out and overwhelmed. (Exhibit 63)

Events Occurring Shortly After Issuance of Suspension

122. Ms. James had begun experiencing migraines in May 2012 and was seen by a neurologist. (Arbitration Testimony of Ms. James, Transcript, Volume 1, page 52)
123. While at Beth Israel Hospital on June 8, 2012, Ms. James spoke to a social worker who subsequently contacted BPD’s IAD. (*Id.* at 94)
124. At 1:55 a.m. on June 8, 2012, Capt. Russell sent an email message to BPD Deputy Superintendent Lisa Holmes advising that he suspended Ms. James for five (5) days, union representation was called but declined by Ms. James, that Ms. James was relieved of duty as of 1:30 a.m., and that her firearm, police radio, badge and ID were confiscated and secured. (Exhibit 9)
125. Capt. Russell did not mention physically taking away Ms. James’ gun because he considered it insignificant. Taking away a weapon is standard procedure when an officer is suspended. (Testimony of Capt. Russell, CSC Transcript, Volume 1, page 61)
126. On June 8, 2012, Lt. Sweeney completed a report regarding the suspension of Ms. James and what occurred that night and submitted it to Capt. Russell. Lt. Sweeney’s report does not mention taking away Ms. James’ gun either. (Exhibit 10)
127. On June 8, 2012, Sgt. Powell also submitted a report regarding Ms. James’ suspension to Capt. Russell regarding his interaction with Ms. James and Lt. Sweeney. (Exhibit 11)
128. On the morning of June 8, 2012, Sgt. Det. Humphreys, who was an IAD investigator, received a phone message from a social worker at Beth Israel Deaconess Medical Center. (Testimony of Sgt. Det. Humphreys, DALA Transcript, Volume 2, page 141).

129. Sgt. Det. Humphreys returned the call and spoke to Ms. Zue, the hospital social worker who left the message for him. She indicated that there was a police officer at the hospital who wanted to file a complaint. Ms. Zue told Sgt. Det. Humphreys that the complaining officer was Ms. James and that the hospital was “managing her pain”. Sgt. Det. Humphreys instructed Ms. Zue to give Ms. James his contact information and he said that Ms. James should call him immediately when she is available. (Id. at pages 141-142)

130. Ms. James called Sgt. Det. Humphreys that afternoon and they spoke by phone. They did not discuss the details of the complaint. Ms. James stated that she felt uncomfortable going to police headquarters to talk to Sgt. Det. Humphreys. Sgt. Det. Humphreys said he could accommodate her and meet her at an attorney’s office or union hall to discuss her complaint. (Id. at 142)

131. Ms. James did not tell Sgt. Det. Humphreys the nature of her injuries or the name of the person against whom she wanted to file the complaint. The police report she prepared served as her summary of events. (Id. at 144-145)

Incidents Following Issuance of Five (5)-Day Suspension

132. On June 15, 2012, Ms. James filed a police incident report against Capt. Russell. Ms. James typed in the “key situations” box on the incident report form that the incident involved an assault and a gun. She further indicated on the form that the “type of weapon” used was “hands” and that the “suspect relationship to victim” was a superior officer. In the “unusual actions and statement of the perpetrator” box on the form, the Appellant wrote, “I DON’T LIKE YOUR ATTITUDE’: SUSPECT LUNGED AT VICTIM, BRUSHED AGAINST VICTIM, AND YANKED HER LOADED FIREARM”. (Exhibit 12)

133. Attached to this incident report is Ms. James' statement, approximately one and one-half pages of single-spaced text, about what allegedly happened the night she was suspended.

Her report states, in part:

“ ... The captain further explained that I was being given a five-day suspension and that I could have 48 hours to appeal his decision and request a hearing. He also mentioned that he was not sure how he was going to allow me to take the days. The captain cynically commented that he was doing me a favor because Internal Affairs wanted to be harsher with me, but he offered to handle it. ... He handed me papers (stapled) that I folded and put in the side pocket of my uniform pants. ...

... Tommy Nee called me on my cell phone. At which time, I walked out of the captain's office and into the guardroom to have a private conversation. Tommy and I had a brief discussion. Lieutenant Sweeney came into the guardroom. He was cognizant of the fact that the captain wanted to proceed without union representation and made an attempt to secure my rights under collective bargaining by calling a union representative from District 4. I adamantly informed the lieutenant [Sweeney] that I did not require any other union representative to come to District 13, as long as the captain did not try to force me to have any extraneous conversation or dialogue with him. I reiterated that as long as I was only being given any additional papers and/or given instructions, I would be fine. ...

... The captain repeatedly asked, 'how I felt' and inferred that I was not in my right state of mind to be on the street. ... Moreover, he began to make comments about whether or not I should work the remainder of the shift. ...

...He exclaimed for the second time, 'I don't like your attitude!' As the captain pointed his finger at me in a very condescending manner, I was ordered to hand over my badge, radio, work identification, and firearm. ...

... I was in fear and scared for my life as the captain/suspect got up from his chair (while seated at his desk) and lunged at me. My heart began to palpitate very rapidly as the suspect violently pushed my hand away while I was attempting to safely remove my firearm from the holster. He then violently yanked at my gun as my body jerked back and forth several times until my gun came out of the holster. This action caused me to feel a sharp twinge in my lower back and right side. I also felt violated as the suspect came within inches of my personal space and brushed up against me with his body. He continued to remain within inches of my personal space, even after removing my firearm, and yelled, while hovering like an ogre ...

As I was walking down the hallway, the suspect came into the hallway and began yelling with a growl, 'Officer James?' uncontrollably and repeatedly. Then, he yelled out, 'You should contact your clerks who are your fellow officers so I do not have to carry you AWOL again' (sic) He began to laugh and he looked crazed. ...

Capt. Russell's approach appeared to be retaliatory and vengeful and impulsive. ... Capt. Russell disregarded my right to have union representation. ...

Capt. Russell/suspect physically assaulted me. Every person present was put in danger when he lunged at me and repeatedly yanked at my firearm”

(Exhibit 12)

134. On June 20, 2012, Capt. Russell submitted a memorandum to then-Superintendent William Evans, outlining his meeting with the Appellant to issue the five (5)-day suspension to her, denying the allegations she made against him in her June 15, 2012 incident report, submitting a complaint against Ms. James and requesting that IAD investigate the matter.

(Testimony of Capt. Russell, CSC Transcript, Volume 1, pages 67 and 70; Exhibit 14)

135. In the memorandum, Capt. Russell stated that while he and Lt. Sweeney waited for Ms. James to meet them, BPPA Union President Officer Nee called him and Capt. Russell then explained the charges against Ms. James (for being AWOL previously) and that Ms. James would be suspended for five (5) days. Capt. Russell asked Officer Nee if he wanted to speak with Ms. James and Officer Nee said,

“only if she wanted or needed to speak with him. PO James was informed and she declined. Around that time, Lt. Sweeney informed us that he had made contact with the rep from D4 and he was on his way to Dist.E13 however PO James said that he was no longer needed.”

(Exhibit 14)

Capt. Russell's memorandum also stated, in part,

“PO James remained standing in the doorway to my office and appeared to be taking down notes. I asked PO James to have a seat however she declined and said she'd prefer to stand. At that time, I began to go over the charges outline in the 'Notice of Suspension' as well as her rights under the law to a hearing on the matter. I asked her if she understood however she refused to answer my questions. PO James had been assigned to the J101A however I was concerned that she would not be up to the task to work the street and informed Lt. Sweeney to change her assignment and have her work inside for the remainder of the tour.

PO James then abruptly walked out of my office ... I went to the front door to my office and informed PO James that she needed to return to my office in order for me to provide

her with a copy of MGL Ch. 31: 41-46 (sic). PO James refused and stated that she would not talk with me without a union rep. I then ordered her again to come back to my office at which time she complied and stood near the doorway. ...

Although I had initially intended her to complete her tour of duty, I had decided to relieve her from duty immediately primarily due to my concern that she'd go out injured. ... I then ordered her to surrender her firearm, badge, radio and police ID.

Due to my concerns over PO James (sic) behavior, specifically that she was defiant, noncompliant and insubordinate; I approached her and ordered her to safely unload her weapon by removing the magazine to her firearm. After she removed the magazine, she went to remove her firearm from the holster but due to my concerns over a discharge, whether accidental or intentional, I informed her that I'd remove the weapon from her holster. ...

(Exhibit 14)

136. In his memorandum, Capt. Russell also indicated that he was informed about Ms. James' June 15, 2012 incident report alleging that she was injured in their June 8, 2012 interaction and that he was the cause of her injury. In his memorandum, Capt. Russell "unequivocally and emphatically" denied that he was "unprofessional, hostile, disrespectful and impulsive" and that the June 8, 2012 interaction involved "sexual assault", as Ms. James alleged. (Id.)

137. On June 26, 2012, Ms. James delivered a hand-written note to Lt. Brian McEachern in IAD in support of her allegations of her interaction with Capt. Russell on June 8, 2012. The note states:

"To: Lt. Mceachern (sic)
Brenda James, ID. No. 11109
June 26, 2012 Charges June 8, 2012
1. Unreasonable Judgment
2. Hostile work environment
3. Indecent Assault
4. Sexual Harrassment (sic)
5. Abuse of Authority
6. Assault & Battery
7. Conduct unbecoming

Additional:

Firearm – fingerprints
Anti-Corruption – loss wages
Any radio transmissions

Brenda James (signature)
Brian McElle (sic)”

(Exhibit 18)

138. By giving this note to Lt. McEachern, Ms. James was requesting that “my firearm be ran (sic) for fingerprints and that Anti-Corruption do an investigation into my wages being taken for two months during the AWOL and I asked that they check any radio transmissions...” (BPD Disciplinary Hearing, Testimony of Ms. James, Transcript, December 12, 2014, Volume 4, page 129)
139. On July 10, 2012, Ms. James applied for a criminal complaint in court against Capt. Russell for assault and battery. (Exhibit 15)
140. On July 30, 2012, a Clerk-Magistrate’s probable cause hearing was held at West Roxbury District Court regarding Ms. James’ application for a criminal complaint against Capt. Russell. Ms. James, Capt. Russell and Lt. Sweeney all testified under oath. The Clerk-Magistrate found no probable cause to issue a criminal complaint against Capt. Russell. Ms. James’ attorney, Hassan Williams, requested judicial review of the probable cause determination. (Exhibit 16)
141. After the July 30, 2012 Clerk-Magistrate’s probable cause hearing at West Roxbury District Court, Capt. Russell sent a memorandum to then-Commissioner Edward Davis, through then-Superintendent William Evans, about the probable cause hearing. Capt. Russell wrote, *inter alia*:

“ ...the hearing began and PO James, Lt. Sweeney and I all testified under oath. PO James testified first and as with her incident report that she authored on June 15th, 2012 (CC# 120363946), it was filled with untruths, deceit and lies.

Amongst these lies were that I ‘repeatedly called over the air for’ her ‘to come into my office’ and that I ‘lunged’ at her and ‘yanked forcefully’ on her firearm. In addition, that

I ‘violently pushed’ her ‘hand away and repeatedly yanked on’ her ‘gun’ and ‘that caused’ her ‘body to sway back and forth and that this caused an injury’ to her ‘lower back’. PO James also alleged that I ‘brushed up against her breasts’ and invaded her personal space.”

(Exhibit 16)

142. On September 21, 2012, Capt. Russell attended a hearing before Judge Mary Driscoll at the West Roxbury District Court. Ms. James’ attorneys, Hassan Williams and Charles Spurlock, filed a motion for a change of venue based on an allegation that Capt. Russell has a business relationship with the Court and/or the Clerk-Magistrate. Judge Driscoll took the matter under advisement and indicated that she would render a decision. (Exhibit 17)
143. In October 2012, the criminal case was transferred to Charlestown District Court and Capt. Russell was notified of this change of venue. (Testimony of Capt. Russell, CSC transcript, Volume 1, page 73; Exhibits 25 and 32)
144. After a hearing, a Clerk-Magistrate found no probable cause to issue a criminal complaint against Capt. Russell. (Testimony of Hassan Williams, DALA Transcript Vol. 2, page 77)

Injured on Duty Claim

145. On June 15, 2012, the date that Ms. James filed a police incident report against Capt. Russell, Ms. James also sent a memorandum to Roberta Mullan, the Director of the BPD Medical Unit, as follows:

“Dear Sir/Madam,

On June 7, 2012 (last half tour of duty) I, Officer Brenda James, reported to work and was ordered to meet with Capt. Russell. While in Capt. Russell’s Office, I was ordered to hand over my equipment and identification. While complying, Capt. Russell lunged at me and violently yanked at my firearm, still in my holster, while jerking my body back and forth. I felt a sharp twinge in my back and right side.

Officer James went to the emergency ward at Beth Israel Hospital on June 8, 2012. Internal Affairs was contacted by the hospital. I was instructed to remain out of work until I was evaluated by my primary care doctor’s office.

I visited my doctor's office (primary care doctor on vacation) and an urgent care doctor instructed me to remain out of work pending an orthopedic evaluation by Thursday, June 21, 2012.

I respectfully submit this information to you.”

(Exhibit 13)

146. On September 17, 2012, the Boston Police Patrolmen's Association (BPPA) filed a grievance on behalf of Ms. James, alleging that BPD violated the CBA by failing to place Ms. James on injured leave as a result of her interaction with Capt. Russell on June 8, 2012.

(Exhibit 30)

147. When an officer is injured on duty, he/she is placed on “injured on duty” status immediately if she can submit any injury paperwork immediately and her supervisors can assess whether the injury occurred on duty and submit follow-up paperwork to the Medical Unit. If an officer is unable to complete the paperwork at the time of the injury, he or she is considered “officer absent pending” investigation and BPD conducts an investigation into the injury. (Arbitration Testimony of Superintendent in Chief Daniel P. Linskey, Transcript, Volume 3, pages 9-11)

148. Because Ms. James did not submit an injured on duty report immediately after she was allegedly injured, she was considered an “officer absent pending” investigation. (Id.)

149. Since Ms. James accused Capt. Russell of causing her injury on duty, and the immediate supervisor is the person assigned to assess and report an injured on duty claim, Superintendent Linskey assigned Deputy Superintendent Bernard O'Rourke to review Ms. James' injured on duty claim. (Id. at 25)

150. Deputy Superintendent O'Rourke completed a report on Ms. James' injured on duty claim, concluding that Ms. James was not injured on duty. (Id. at 26)

151. Superintendent Linskey concurred with Deputy Superintendent O'Rourke and determined that Ms. James should be considered out sick and not injured on duty. The Medical Unit was notified of the determination and Ms. James was "carried sick" (using what leave time she had available) until she could be deemed fit for duty by medical staff at BPD. (Id. at 22-28)
152. On September 7, 2013, the BPD Medical Unit wrote to Ms. James advising her that BPD had determined that she was not injured on duty. (Exhibit 30)
153. On September 13, October 4, and October 9 in 2013, an arbitration hearing was held on Ms. James' injured on duty claim. (Exhibit 30)
154. On February 21, 2014, the arbitrator ruled in favor of the City, deciding that the City did not violate the CBA by not placing Ms. James on injured on duty status following the events of June 8, 2012.¹¹ The arbitrator found that Ms. James' recollections "evolved over time"¹² and aspects of her recollections were "demonstrably wrong" while the testimony of Lt. Sweeney and Russell were "largely consistent" regarding Capt. Russell's retrieval of Ms. James' weapon. (Exhibit 30, p. 26)
155. The arbitrator also found, "... there is no record evidence that, in the immediate aftermath of her meeting with Russell, the Grievant notified any Department or Union official of the asserted assault or her alleged injury." (Exhibit 30, page 9)
156. Additionally, the arbitrator determined that Ms. James' asserted back injury of June 8, 2012 did not occur in the manner she described. To this end, the arbitrator found, "Overall I

¹¹ The arbitrator noted that Ms. James "... has submitted several injured on duty claims, with mixed results. In May 2005, for example, the Grievant claimed that she suffered a back injury while 'attempting to sit down in a defective officer chair' at work. ... On that occasion, the Grievant's injury claim was denied, after an investigation revealed that she was not at work on the date of the alleged accident." (Exhibit 30, page 3) The 2005 claim, like the claim underlying the instant appeal, was also filed late. (Exhibit 30, pages 3 and 23)

¹² See arbitrator's decision (Exhibit 30) at pages 24-27 describing inconsistencies in Ms. James's various reports and/or statements of her interaction with Capt. Russell on June 8, 2012. The arbitrator also had the benefit of a demonstration of the removal of Ms. James' weapon on June 8, 2012.

am not persuaded that Russell's retrieval of the Grievant's firearm caused any twisting or other forceful body movement that could have resulted in an acute low back sprain. I determine that the reported disability could not have occurred as the Grievant has reported.”
(Exhibit 30, page 28)

157. The arbitrator drew a similar conclusion regarding Ms. James' allegation that her June 8, 2012 interaction with Capt. Russell caused or exacerbated a psychological injury. Finally, with respect to the duration of time involved in processing Ms. James' injured on duty claim, the arbitrator determined,

“For almost three decades, if a delayed or late injury claim is made, the City has carried the affected officer in a (sic) ‘absent or sick pending investigation’ status, while exploring the nature and circumstances of the injury. [Ms. James], who has processed several injury claims, is undoubtedly aware of this undisputed practice. ... the current injury claim, however, is further complicated by the fact that the reported injury is only one aspect of the report. In addition, [Ms. James] alleged ‘extreme and aggressive behavior’ by a superior officer. ... as a result, it was not unreasonable for the investigation into the alleged injury to be postponed, pending an IAD investigation into the overall encounter.”

(Exhibit 30, pages 22-24)

Internal Affairs Investigations Relating to June 8, 2012 Interaction

158. While speaking to Ms. James on June 8, 2012, Sgt. Det. Humphreys made arrangements to meet with her on Monday June 11, 2012 to discuss her complaint. The meeting was to occur at an Attorney Drescheler's office whom Sgt. Det. Humphreys believed is an attorney for the BPPA. (Testimony of Sgt. Det. Humphreys, CSC Transcript, Volume 1, page 190)

159. This meeting did not occur because Ms. James cancelled it. (Id. at 191)

160. Sgt. Det. Humphreys had subsequent telephone conversations with Ms. James during which he informed her that she should file an injured-on duty claim. He also tried to schedule a time to meet with her to take her complaint. Sgt. Det. Humphreys also suggested to Ms. James that he could take her complaint over the telephone. (Id. at 192-196)

161. Ultimately, Sgt. Det. Humphreys proceeded with his investigation without meeting with Ms. James. Although unable to meet with her, Sgt. Det. Humphreys continued to call her and leave voice mails. She would respond to his calls. This went on for almost two months and Sgt. Det. Humphreys advised Ms. James that he was going to have to move forward in his investigation whether or not she met with him to give her account of the incident with Capt. Russell. (Id. at 197-198)
162. In his investigation, Sgt. Det. Humphreys interviewed Capt. Russell, Lt. Sweeney and Sgt. Bruce Smith; reviewed the June 26, 2012 note that Ms. James wrote and submitted to IAD with her allegations against Capt. Russell (Exhibit 18); reviewed Ms. James' police incident report (Exhibit 12); and reviewed the Form 26 that Ms. James submitted to Ms. Mullan at the Medical Unit. (Exhibit 13); (Testimony of Sgt. Det. Humphreys, CSC Hearing Transcript, Volume 1, pages 198-200). Sgt. Det. Humphreys also reviewed the Boston Police Operations' radio transmissions on Channel 4 for District E-13 during the June 7-8 overnight shift as Ms. James alleged that Capt. Russell called for her repeatedly by radio transmission. (Testimony of Sgt. Det. Humphreys, CSC Hearing Transcript, Volume 1, pages 200, 211; Exhibit 28)
163. Sgt. Det. Humphreys also attended the interview of Ms. James by Det. Mahoney. (Id. at 203)
164. The focus of Sgt. Det. Humphreys' investigation was to determine if any BPD rules or procedures had been violated by Capt. Russell during the incident with Ms. James. (Id. at 199)

165. Lt. Det. Paul Mahoney was assigned to open an IAD investigation into Capt. Russell's complaint against Ms. James. (Testimony of Lt. Det. Mahoney, CSC Transcript, Volume 2, page 17)
166. Lt. Det. Mahoney began his investigation by reading Capt. Russell's complaint against Ms. James and then he reviewed Lt. Sweeney's report to Capt. Russell of what occurred at the June 8, 2012 interaction with Ms. James. (Exhibit 10) He also reviewed Sgt. Courtney Powell's report to Capt. Russell about his brief meeting with Ms. James and Lt. Sweeney on June 8, 2012 (Exhibit 11); Ms. James' police incident report (Exhibit 12); Capt. Russell's report to then-Superintendent Evans on June 20, 2012 regarding events on June 8, 2012 Exhibit 14); Ms. James' application for a criminal complaint against Capt. Russell (Exhibit 15); and Ms. James' written note of her charges against Capt. Russell provided to IAD (Exhibit 18).
167. Lt. Det. Mahoney conducted the interviews of Ms. James, Capt. Russell, and Officer O'Donnell and sat in on Sgt. Humphreys' interview of Sgt. Det. Bruce Smith. (Testimony of Lt. Det. Mahoney, CSC Transcript, Volume 2, page 19)
168. Lt. Det. Mahoney did not sit in on Sgt. Det. Humphreys' interview of Lt. Sweeney but read a summary of Lt. Sweeney's testimony. (Id. at 21)
169. Lt. Det. Mahoney wanted to sit in on the Clerk-Magistrate hearing, but the Clerk-Magistrate denied him permission to attend.. (Id. at 42)
170. On September 6, 2012, Ms. James was interviewed by Lt. Det. Mahoney and Sgt. Det. Humphreys, both of IAD. Ms. James was represented by Attorney William Davis who was present at the interview. (Exhibit 19)

171. Ms. James was ordered to appear at this interview because the interview was part of the investigation relating to Capt. Russell’s complaint against Ms. James. Sgt. Det. Humphreys attended this interview and incorporated the information obtained there as part of his investigation into Ms. James’ complaint against Capt. Russell. (Testimony of Sgt. Det. Humphreys, CSC Transcript, Volume 1, pages 201-203)

172. Sgt. Det. Humphreys had considered ordering Ms. James to appear for an interview regarding the complaint she filed against Capt. Russell. However, he and members of IAD decided that because she was a complainant, they would “offer[] her the latitude of really any other complainant.” (*Id.* at 202)

173. Sgt. Det. Humphreys’ investigation concluded that Capt. Russell did not violate a department rule when he removed Ms. James’ weapon when issuing her the five (5)-day suspension and that the action he took in removing the firearm was reasonable. (*Id.* at 204)

174. Sgt. Det. Humphrey’s investigation also concluded that Ms. James’ complaint was unfounded, that “there was sufficient evidence to prove that the alleged—the allegation did not take place.” (*Id.* at 205)

BPD Complaint Against Ms. James Relating to Post-Suspension Conduct

175. On June 27, 2013, Superintendent Frank Mancini, of the BPD Bureau of Professional Standards and Development, sent the Police Commissioner a complaint against Ms. James with eleven (11) specifications:

SPECIFICATION I

Officer James engaged in a pattern of conduct during and after a June 8, 2012 Meeting with Captain Paul Russell that was disruptive to her superior officers and the Workplace. Such conduct is in violation of Rule 102 § 3 (Conduct) of the Rules and Procedures of the Boston Police Department.

SPECIFICATION II

Officer James was insubordinate and disrespectful to Captain Paul Russell during a meeting on or about June 8, 2012. Such conduct is in violation of Rule 102 § 9 (Respectful Treatment) of the Rules and Procedures of the Boston Police Department.

SPECIFICATION III

Officer James made disparaging and disrespectful statements regarding Captain Paul Russell in a Boston Police Incident report. Such conduct is in violation of Rule 102 § 9 (Respectful Treatment) of the Rules and Procedures of the Boston Police Department.

SPECIFICATION IV

On or about June 15, 2012, Office James was untruthful during her interview with Internal Affairs. Such conduct is in violation of Rule 102 § 23 (Truthfulness) of the Rules and Procedures of the Boston Police Department.

SPECIFICATION V

On or about September 6, 2012, Officer James was untruthful during her interview with Internal Affairs. Such conduct is in violation of Rule 102 § 23 (Truthfulness) of the Rules and Procedures of the Boston Police Department.

SPECIFICATION VI

Officer James presented a document to the Internal Affairs Division containing false allegations against Captain Paul Russell. Such conduct is in violation of Rule 102 § 23 (Truthfulness) of the Rules and Procedures of the Boston Police Department.

SPECIFICATION VII

On or about July 30, 2012, Officer James provided untruthful testimony during a Clerk Magistrate's Hearing in West Roxbury District Court. Such conduct is in violation of Rule 102 § 23 (Truthfulness) of the Rules and Procedures of the Boston Police Department.

SPECIFICATION VIII

Officer James sought a criminal complaint against Captain Paul Russell based on false allegations. Such conduct is in violation of rule 102 § 27 (Abuse of Process) of the Rules and Procedures of the Boston Police Department.

SPECIFICATION IX

On or about July 30, 2012, Officer James provided untruthful testimony during a Clerk Magistrate's Hearing in West Roxbury District Court in violation of G.L. c. 268 § 1. Such conduct is in violation of Rule 102 § 35 (Conformance to Laws) of the Rules and Procedures of the Boston Police Department.

SPECIFICATION X

Officer James made a false report of a crime in violation of G.L. c. 269 § 13A. Such conduct is in violation of Rule 102 § 35 (Conformance to Laws) of the Rules and Procedures of the Boston Police Department.

SPECIFICATION XI

Officer James filed a false incident report in violation of G.L. c. 268 § 6A. Such conduct is in violation of Rule 102 § 35 (Conformance to Laws) of the Rules and Procedures of the Boston Police Department.

(Exhibit 1) (emphasis in original)

176. BPD Rule 102 § 3 states:

“CONDUCT: Employees shall conduct themselves at all times, both on and off-duty, in such a manner as to reflect most favorably on the Department. Conduct unbecoming an employee shall include that which tends to indicate that the employee is unable or unfit to continue as a member of the Department, or tends to impair the operation of the Department or its employees.”

(Exhibit 2)(emphasis in original)

177. BPD Rule 102 § 9 states:

“RESPECTFUL TREATMENT: Employees shall, on all occasions, be civil and respectful, courteous and considerate toward their supervisors, their subordinates and all other members of the Department and the general public. No employee shall use epithets or terms that tend to denigrate any person(s) due to their race, color, creed or sexual orientation except when necessary in police reports or in testimony.”

(Exhibit 2) (emphasis in original)

178. BPD Rule 102 § 23 states:

“DEPARTMENTAL REPORTS – TRUTHFULNESS: Employees shall submit all necessary reports on time and in accordance with established Departmental procedures. Reports submitted by employees shall be truthful and complete. No employee shall knowingly enter, or cause to be entered, any inaccurate, false or improper information.”

(Exhibit 2)(emphasis in original)

179. BPD Rule 102 § 27 states:

“ABUSE OF PROCESS – WITHHOLDING EVIDENCE: Officers shall not intentionally manufacture, tamper with, falsify, destroy, or withhold evidence or information nor make any false accusations of a criminal charge or seek to influence the outcome of any investigations.”

(Exhibit 2)(emphasis in original)

180. G.L. c. 268, §1 states, in pertinent part:

“Whoever, being lawfully required to depose the truth in a judicial proceeding or in a proceeding in a course of justice, willfully swears or affirms falsely in a matter material to the issue or point in question, or whoever, being required by law to take an oath or affirmation wilfully (sic) swears or affirms falsely in a matter relative to which such oath or affirmation is required, shall be guilty of perjury”

(Exhibit 3)

181. BPD Rule 102 § 35 states:

“CONFORMANCE TO LAWS: Employees shall obey all laws of the United States, of the Commonwealth of Massachusetts, all City of Boston ordinances and by-laws and any rule or regulation having the force of law of any board, officer, or commission having the power to make rules and regulations. An employee of the Department who commits any criminal act shall be subject to disciplinary action up to and including discharge from the Department. Each case shall be considered on its own merits, and the circumstances of each shall be fully reviewed before the final action is taken.”

(Exhibit 2) (emphasis in original)

182. G.L. c. 269, § 13A states:

“Whoever intentionally and knowingly makes or causes to be made a false report of a crime to police officers shall be punished by a fine or not less than one hundred nor more than five hundred dollars or by imprisonment in a jail or house of correction for not more than one year, or both.”

(Exhibit 4)

183. G.L. c. 268, §6A states:

“Whoever, being an officer or employee of the commonwealth or of any political subdivision thereof or of any authority created by the general court, in the course of his official duties executes, files or publishes any false written report, minutes or statement, knowing the same to be false in a material matter, shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or by both such fine and imprisonment.”

(Exhibit 5)

184. According to Police Commissioner’s Memo, Number CM 10-007, dated January 20, 2010, marked “Post/Mention: Indefinite”, with a subject title: “Disciplinary Policy Statement”, and signed by then-Commissioner Davis,

“The following statement is issued in an effort to put employees on notice that untruthfulness will not be tolerated by the Department. When an officer is found to be untruthful, it damages the officer’s ability to testify in future court proceedings. Testifying in court is a fundamental job requirement for a police officer, and therefore it is essential that an officer’s integrity and credibility are intact. Should the Department determine that an employee has been untruthful in any report to the Department, during any sworn testimony or in an internal investigatory interview including interviews at Internal Affairs and Anti-Corruption, termination will be the presumptive disciplinary action, consistent with just cause principles.

This policy will be effective immediately.”

(Exhibit 22)

BPD Disciplinary Hearing Regarding Eleven (11) Specifications

185. On November 18 and 19, 2014 and December 11, and 12, 2014, a disciplinary hearing was held before BPD’s Chief Administrative Hearing Officer relative to the complaint that the Appellant violated BPD rules and/or policies as indicated in the eleven (11) specifications noted above in incidents following her interaction with Capt. Russell on June 8, 2012. At these hearing dates, Ms. James was represented by counsel. (Exhibit 21)
186. Ms. James testified on the last day of the hearing. (BPD Disciplinary Hearing, Testimony of Ms. James, December 12, 2014, Volume 4, pages 48-189)

187. On March 11, 2015, Deputy Superintendent Colm P. Lydon, Chief Administrative Hearings Officer (Hearing Officer Lydon), submitted his report regarding Ms. James' hearing to BPD Commissioner William B. Evans. (BPD Hearing Officer's Report, regarding Conduct, Abuse of Process, Untruthfulness, Respectful Treatment and Conformance to Laws)

188. Hearing Officer Lydon's report states, among other matters:

"Information Officer James told medical personnel has her twisting to keep the gun away and backing away instinctively, which in and of itself is different from what she wrote in her 1.1[incident report], regarding Capt. Russell's violently yanking at her gun and her body jerking back and forth several times."

(BPD Hearing Officer's Report, p. 14)

189. Hearing Officer Lydon's report further states:

"Officer James questioned by [BPD] Attorney Geraghty in the Departments (sic) hearing)(sic)

'Q. And what part of your upper body did he make contact with?

A. He brushed up against my upper body.

Q. What part of your upper body?

A. Just my upper body.

Q. Above your chest?

A. Above my chest? My upper body.

Q. Did he make contact with your breast?

A. He may have. It's a presumption I've made, because again, his upper body brushed up against my upper body, and women have breasts."

(Id. at 15-16, quoting Volume IV Departmental Disciplinary Hearing, page 157)

190. Hearing Officer Lydon's report also states that, at the arbitration hearing regarding Ms. James' injured on duty claim,

"Officer James was asked:

Q. What portion of your body did he brush up against?

A. The upper portion of my body, my breast. He was in my personal space."

(Id. at 16, citing Arbitration Transcript, p. 78-79, James)

191. Hearing Officer Lydon’s report also states that Ms. James references Capt. Russell in her June 15, 2012 incident report against him—saying, for example, that he was “menacing”, he had “extreme and aggressive behavior”, he “assaulted me”, “he lunged at me”, “he repeatedly yanked at my firearm”, “he looked crazed”, he “brushed up against me with his body”, “I was in fear and scared for my life”, he was “hovering like an ogre”—were descriptions “of an incident that has been discredited by testimony and evidence.” (BPD Hearing Officer’s Report, page 19)

192. The Hearing Officer’s report found that Ms. James’ denial, or failure to recall that she said something to Capt. Russell on June 8, 2012 like “give me some of your paycheck” when he suspended her was effectively contradicted by the report of Lt. Sweeney, who was in Capt. Russell’s office at the time and recalled that Ms. James made such a statement after Capt. Russell stated “several times that he did not enjoy doing this”. (BPD Hearing Officer’s Report, page 27)

193. The Hearing Officer’s report found Ms. James also made false statements at her IAD interview, maintaining that Capt. Russell “made contact with her breasts and pushing her hand away”, which evidence was effectively contradicted by the testimony and reports of Capt. Russell and supported by Lt. Sweeney’s testimony and reports. (BPD Disciplinary Hearing Report of Hearing Officer Lydon, page 28)

194. Hearing Officer Lydon’s report further states:

“In Lt. Mahoney’s investigation, he found what he believes (sic) multiple false statements in Officer James (sic) IAD interview regarding, her body being jerked back and forth several times, Capt. Russell lunging at her, her denial of making a statement regarding his paycheck, her testimony at the Magistrates (sic) Hearing, his behavior relative to yelling and growling, and Capt. Russell’s contact with her breast, a physical assault, disregard of Union representation and the yanking of the firearm.”

(BPD Hearing Officer’s Report, page 27)(citation omitted)

195. Hearing Officer Lydon found that the Department's evidence, including the reports and testimony of Capt. Russell, Lt. Mahoney, Lt. Sweeney and Sgt. Humphreys, were consistent and reliable and effectively disputed Ms. James' assertions. Capt. Russell strenuously denied any inappropriate conduct, including touching of Ms. James' body, which denials were supported by the testimony and documents of Lt. Sweeney, who was within a couple of feet of Ms. James and Capt. Russell in Capt. Russell's office when he issued the five (5)-day suspension to Ms. James. Therefore, Hearing Officer Lydon found that Ms. James' incident report and the document she submitted to Lt. Det. McEachern (alleging that Capt. Russell committed an indecent assault, sexual harassment and other inappropriate conduct by Capt. Russell were false. (BPD Hearing Officer's Report)

196. Hearing Officer Lydon found that Ms. James provided untruthful testimony during the Clerk-Magistrate's hearing in court. Specifically, when the Clerk-Magistrate asked where exactly she maintained that her body and that of Capt. Russell contacted, Ms. James indicated her breast. Capt. Russell testified at the BPD disciplinary hearing that Ms. James lied when she testified in court that he had "slapped her hand, that [he] assaulted her, ... yanked on her firearm and she went from side to side and that [he] injured her back as a result and ... that [he] sexually assaulted her and that [he] intentionally brushed up against her breast." (BPD Hearing Officer's Report, page 32)

197. The Hearing Officer states, "I accept Capt. Russell's testimony to represent the bulk of what Officer James had testified to, and couple that with the assertion again, that there was no Indecent (sic) assault, no body to body contact, and no pushing away of hands[]" and "I find Officer James not to be credible." (Id. at 33)

198. Having provided false testimony in court, the Hearing Officer found that Ms. James violated G.L. c. 268, § 1, which provides that such false testimony constitutes perjury. Having provided a false report of a crime, the Hearing Officer found that Ms. James violated G.L. c. 269, § 13A, which prohibits such false reports. Having provided a false written report, alleging that Capt. Russell committed a physical assault and violent actions upon her and “used this report as an official record to assist in documenting an incident to help prove a criminal case when she took charges against Capt. Russell”, the Hearing Officer found that Ms. James violated G.L. c. 268, §6A, which prohibits such false reports. (*Id.* at 38)
199. As a result, Hearing Officer Lydon sustained ten (10) of the eleven (11) Specifications in the complaint against Ms. James (*supra*). He did not sustain Specification II, which Specification stated that Ms. James was insubordinate and disrespectful to Capt. Russell during a meeting on or about June 8, 2012 in violation of Rule 102 § 9. (BPD Hearing Officer’s Report, pages 19-20; Exhibit 21)
200. By letter dated March 18, 2015 from Commissioner William Evans to Ms. James, Commissioner Evans informed Ms. James that he sustained the report of Hearing Officer Lydon following the three (3)-day hearing regarding the complaint that Ms. James had violated BPD Rule 102 sections regarding Conduct, Respectful Treatment, Truthfulness, Abuse of Process and Conformance to Laws; and the following statutes: G.L. c. 268, § 1 (perjury), G.L. c. 269, § 13A (false reports to police officers), and G.L. c. 268, § 6A (false written reports by public officers or employees). the Commissioner’s letter stated, in part:
- “I have determined that the charges sustained relative to each case are sufficient to warrant termination independent of the other matter. Accordingly, I hereby terminate you from your employment effective March 18, 2015.”
- (Exhibit 21)

201. Ms. James was also terminated in the same letter for violating the BPD substance abuse policy and the change of address notification policy as indicated in the next section below.

(Exhibit 21)

202. On March 31, 2015, Ms. James filed an appeal of her termination with the Civil Service Commission. (Stipulated Fact)

203. Based on the four days of testimony I heard this year, and my review of the extensive documentary evidence, I find that Ms. James was deliberately untruthful, and she consciously engaged in misleading exaggeration, both in the written reports she submitted and the later statements she made, regarding her interaction with Capt. Russell in the early hours of June 8, 2012. Capt. Russell never lunged at her; he did not touch or make contact with her breasts; he did not cause her body to twist, jerk, or contort in a manner that would cause injury; and he did not violently attempt to dislodge her firearm from its holster. Ms. James' embellishments and mischaracterizations of the incident in Capt. Russell's office were both disingenuous and deceitful.

The Hair Drug Test and Change of Address

204. BPD officers are required to submit to an annual drug test in which they have to provide a hair sample. The test is required to be conducted on or within thirty (30) calendar days of an officer's birthday. (Exhibit 34)

205. In practice, the thirty (30) calendar day requirement gives an officer sixty (60) days to have his or her hair tested since the officer has thirty (30) days before his/her birthday and thirty (30) days after his/her birthday to submit to the test. (Testimony of Ms. Walsh, CSC Transcript, Volume 2, page 217)

206. The hair sample is collected by certified employees of the BPD Occupational Health Services/Medical Unit. (Exhibit 34; Testimony of Phyllis Walsh, CSC Transcript, Volume 2, page 202)
207. Ms. James' birthday is June 29.¹³ (Exhibit 48)
208. Maria Osorno of the Medical Unit schedules hair testing appointments for officers that are on medical leave or injured. It is standard procedure for Ms. Osorno to schedule hair testing appointments on the same day in which an officer has an appointment with a doctor in the Medical Unit. (Testimony of Ms. Osorno, CSC Transcript, Volume 2, pages 266-268; Exhibit 57)
209. On March 21, 2013, Ms. James had a medical appointment with Dr. Arnold at the BPD Medical Unit and attended that appointment. After this appointment, Dr. Arnold told Ms. Osorno to schedule a follow-up medical appointment for Ms. James with him in June 2013. Ms. Osorno checked the Medical Unit's injured officer database and determined that Ms. James' birthday was in June so she scheduled both the follow-up appointment and the hair test for June 13, 2013 and so informed Ms. James. (Id. at 268-270; BPD Hearing Officer's Report, page 13)
210. Ms. James requested a written notice of the appointment be mailed to her and Ms. Osorno complied with her request. (Id. at 270)
211. Ms. Osorno searched a computer database for Ms. James' address and sent the notice to the Quincy address that was listed in the database. (Id. at 270-271)
212. The notice was delivered on March 25, 2013. (BPD Hearing Officer's Report, page 7)

¹³ A birthdate is normally confidential but one of the reasons BPD gave for terminating Ms. James' employment was that she failed to provide a hair sample for BPD's annual hair drug test within sixty (60) days of the officer's birthdate. In order to establish whether Ms. James violated this requirement, her birthdate must be revealed. Since knowledge of the year of her birth is not necessary to make that determination, it is not included in this decision.

213. Ms. James did not appear for the hair test appointment scheduled for June 13, 2013.
(Exhibit 37)
214. Ms. James's attorney sent an email message to Roberta Mullan on June 13, 2013 indicating that Ms. James would not be attending her doctor's appointment and the hair test appointment scheduled for June 13, 2013. (Testimony of Ms. Walsh, CSC Transcript, Volume 2, page 209; Exhibit 36; BPD Hearing Officer's Report, page 7)
215. On June 18, 2013, Ms. James spoke with Linda Mitchell at the BPD Medical Unit on the telephone and asked to leave a message for Maria Osorno stating that Ms. James agreed to have her hair sample collection rescheduled to take place on July 1st, 2013. (Testimony of Linda Mitchell, CSC Transcript, Volume 2, pages 242-243; Exhibit 55)
216. Ms. James' appointment was rescheduled to July 1, 2013.¹⁴ (Exhibits 37, 55, 57)
217. Officers can reschedule their hair drug test appointments by contacting the Medical Unit and asking that their test be rescheduled. (Testimony of Ms. Walsh, CSC Transcript, Volume 2, pages 207-208)
218. Ms. James did not appear at the July 1, 2013 appointment. (Exhibit 37)
219. On July 2, 2013, Ms. James called the Medical Unit and asked that a certain employee, named Nicole¹⁵ in the Medical Unit take Ms. James' hair sample for the drug test. (Exhibits 37, 53)
220. Nicole is African-American, like Ms. James, and sometimes advises the other hair collectors on how to cut African-American women's hair. (Testimony of Ms. Walsh, CSC Transcript, Volume 2, pages 223-224; Administrative Notice)

¹⁴ BPD did not mail Ms. James notice of the July 1 appointment because Ms. James verbally agreed to the date. BPD appears to send written notices for the initial hair sample appointment but not always for rescheduled appointments.

¹⁵ In order to protect BPD employees' privacy the Commission will only refer to employees who did not testify by their first name.

221. Ms. James stated that Nicole was familiar with cutting African-American hair in order to obtain a viable sample and Ms. James also stated that she was comfortable with Nicole because Nicole had taken Ms. James' hair sample previously. (Exhibit 46, page 10 (July 30, 2013 IAD Interview of Ms. James))
222. It is the Medical Unit's practice that hair samples are collected by the hair sample collectors in a rotation. Thus, the first collector who is available in the morning will take the hair sample from the first arriving police officer's hair, the second collector will collect the hair sample of the second officer who arrives and this process continues throughout the rotation. A normal rotation will have six (6) hair sample collectors taking hair samples in a day. (Testimony of Ms. Walsh, CSC Transcript, Volume 2, pages 204-206)
223. The purpose of the rotation is to guarantee the integrity of the test and to make sure the test is impartial. Police officers are not allowed to request a specific hair collector to collect their hair sample. The rotation has been in place since 1999. (Id. at 206)
224. Ms. Walsh tried to explain to Ms. James during the July 2 telephone call how the rotation works and that Ms. James could not request a specific Medical Unit hair collector. Ms. Walsh also offered to explain this to Ms. James' attorney. (Id. at 213-215; Exhibit 37)
225. Ms. James' appointment was rescheduled to July 17, 2013. (Exhibits 38 and 40)
226. On July 11, 2013, a notice of the July 17, 2013 appointment was sent by regular mail to Ms. James' PO Box and by certified mail to Ms. James' address in Quincy and a copy was sent to Officer MacGillivray, Vice President of the BPPA. (Exhibit 40)
227. The Quincy address is the address provided by Ms. James on her sworn personnel information card.¹⁶ (Exhibit 35)

¹⁶ Ms. James avers that the address of her brother and father are listed as emergency contacts on her sworn personnel card and that the BPD could have mailed notices to her there. However, their address is not listed as Ms. James'

228. The July 11 letter stated, *inter alia*: “Be advised that if you fail to appear or submit a sample on this date, it will be considered a refusal to submit to a drug test, and you will be subject to termination pursuant to Boston Police Department rule 111 Section VII.” (Exhibit 40)
229. On July 17, 2013, Ms. James did not appear for her scheduled drug hair test appointment. (Exhibits 52, 54)
230. Ms. James did not receive notice of the hair test until July 22, 2013, when she picked up her notice letter from her PO Box in Milton. (BPD Disciplinary Hearing, Testimony of Ms. James, September 24, 2014, Volume 2, page 67; *see also* Exhibit 46 (Ms. James’ IAD interview by Sgt. Det. Gallarelli on July 30, 2013))
231. Ms. James testified in the [BPD disciplinary] hearing that she did not contact anyone from the Department to reschedule an appointment to come in: ‘I did not, I contacted a union attorney.’” (BPD Hearing Officer’s Report, page 9 (Testimony of Ms. James, Transcript VII, page 87))
232. Ms. James’ attorney attempted to contact the BPD on Saturday, July 27, 2013 and Monday, July 29, 2013 about Ms. James submitting a hair sample for the drug test. (Exhibit 48)
233. The BPD did not again reschedule an appointment for Ms. James to submit a hair sample. (Administrative Notice)
234. Ms. James went to the Medical Unit on Friday, July 26, 2013, approximately between 6:30 pm and 7:00 pm, to provide a hair sample. The unit was closed at that time since it was

residential address and BPD could not have known that she would have been able to receive notices mailed to her there. It was Ms. James’ responsibility, pursuant to BPD rules, to inform BPD of her change of address within twenty-four (24) hours and she did not do so.

after normal business hours for a Friday. (Exhibit 46, pages 15-16 (July 30, 2013 IAD Interview of Ms. James); BPD Hearing Officer's Report, page 10)

235. Ms. James knew that "sometimes the Medical Unit's open at night." (Exhibit 46, page 15)

236. In 2010, Ms. James' drug test took 2 hours. (Testimony of Ms. James, DALA Transcript, Volume 4, page 118)

237. Ms. James' attorney contacted the BPD Labor Relations Office on the afternoon of Saturday, July 27, 2013 asking for Ms. James' hair sample appointment to be rescheduled. By letter dated July 29, 2013 to Deputy Andres, Director of the BPD Labor Relations, Ms. James' attorney asked to reschedule Ms. James' hair sample appointment. By letter dated July 30, 2013, Deputy Andres informed Ms. James' attorney that the matter was being investigated and that the BPD did not agree with Ms. James' attorney's assertion that Ms. James had made a good faith effort to appear on the dates she was scheduled to appear. (Exhibits 41 and 48; Testimony of Attorney Horwitz, CSC Transcript, Volume 3, pages 79-81)

238. In the summer of 2013, normal business hours for scheduled drug hair test sample collections were 6:00 a.m. to 10:00 a.m. and 3:00 p.m. to 7:00 p.m. on Tuesdays, Wednesdays and Thursdays for general sworn personnel. Officers could also walk in unscheduled and submit a hair sample on Mondays and Fridays. (Testimony of Ms. Walsh, CSC Transcript, Volume 2, pages 224-225)

239. However, hair samples could only be collected on Mondays and Fridays between the hours of 9:00 a.m. and 2:00 p.m. and the Medical Unit closed at 5:00 p.m. on Fridays. (Testimony of Linda Mitchell, CSC Transcript, Volume 2, pages 247-248)

240. Ms. James' hair sample was not taken during the sixty (60)-day period around her birthday in the summer of 2013. (Testimony of Sgt. Det. Gallarelli, CSC Transcript, Volume 3, page 47)
241. On July 3, 2013, an IAD investigation was initiated regarding Ms. James' failure to appear to provide a hair sample for the hair drug test. (Testimony of Sgt. Det. Gallarelli, CSC Transcript, Volume 3, page 39)
242. As of July 3, 2013, Ms. James had sixteen (16) business days remaining within which she could be tested. (Administrative Notice)
243. When asked if it is unusual for IAD to open an investigation into a police officer missing an appointment to submit a hair sample for the annual hair drug test, Sgt. Det. Gallarelli advised that "it has been done in the past" and that Sgt. Det. Gallarelli himself was the subject of an IAD investigation regarding an appointment to submit a hair sample for the drug test.¹⁷ Sgt. Det. Gallarelli is not aware of an officer being investigated for missing a drug test when that officer was still within the sixty (60)-day window of his/her birthday. (Testimony of Sgt. Gallarelli, CSC Transcript, Volume 3 at 58-59).
244. Sgt. Det. Gallarelli began his investigation by attempting to locate Ms. James' address in BPD department records in order to send her a notice to meet with him regarding the investigation. Sgt. Det. Gallarelli attempted to contact Ms. James by phone and certified mail to her Quincy address; he was unsuccessful at times, though he was ultimately able to reach her. (Id. at pages 39, 42; Exhibit 51)
245. Sgt. Det. Gallarelli checked the Registry of Motor Vehicles (RMV) records in order to determine Ms. James' address. (Id. at 41-42; Exhibits 43-45)

¹⁷ The investigation into Sgt. Det. Gallarelli was closed when he was able to prove that he had submitted to the drug test on a different day than the one he was originally scheduled for.

246. As of July 8 and July 26, 2013, the RMV records obtained by Sgt. Det. Gallarelli state that Ms. James' active mailing address was the PO Box in Milton and her active residential address was on a street in Mattapan. (Id.)
247. Sgt. Det. Gallarelli also contacted the clerk at District-13, which was the last place Ms. James was assigned, in order to confirm her address of record on her sworn personnel card. A sworn personnel card is where officers' updated information is kept. (Id. at 43-44)
248. Sgt. Det. Gallarelli was able to interview Ms. James in person about missing her appointment to submit a hair sample for the hair drug test and her current address. (Id. at 42)
249. As part of the investigation, it was discovered that Ms. James did not provide BPD with a current address. (Exhibit 35; Testimony of Sgt. Det. Gallarelli, Testimony of Sgt. Gallarelli, CSC Transcript, Volume 3 at 44-45)
250. Ms. James considered her living situation "in transition" during this time because she was experiencing a financial hardship which caused her to no longer be able to afford her apartment. (Testimony of Ms. James, DALA Transcript, Volume 4, page 19)
251. Sgt. Det. Gallarelli's investigation concluded on December 3, 2013. In his investigation, Sgt. Det. Gallarelli found that Ms. James violated Rule 102 § 7, regarding Change of Address Notification, because she did not notify BPD of her change of address within twenty-four (24) hours. He also found that Ms. James had violated Rule 111 § 5, regarding Substance Abuse, by failing to appear to provide a hair sample for the drug test. (Testimony of Sgt. Det. Gallarelli, CSC Transcript, Volume 3, pages 47-48; Exhibit 51)

BPD Complaint Against Ms. James Relating to Hair Drug Test and Residency

252. On June 24, 2014, Superintendent Frank Mancini, of the BPD Bureau of Professional Standards and Development, sent the Police Commissioner a complaint against Ms. James

stating:

“I hereby bring the following complaint against Police Officer Brenda James . . . , presently assigned to the Extended Sick Unit for the following violations of Rule 111 § 5 (Substance Abuse Policy) and 102 § 7 (Change of Address Notification) of the Rules and Procedures of the Boston Police Department.

SPECIFICATION I

After rescheduling her first appointment, Officer James failed to appear for two subsequently scheduled appointments to submit a hair sample for her annual drug test, in violation of Rule 111 § 5.

SPECIFICATION II

Officer James failed to report a change of her residence in violation of Rule 102 § 7.”

(Exhibit 21, Attachment 1) (emphasis in original)

253. BPD Rule 111 § 5 states, in part,

“Sworn personnel of the Boston Police Department will be tested for drugs and/or alcohol under the following circumstances:

G. Annual Drug Testing (Hair) – this provision only applies to those bargaining units that have agreed to such testing. . . .

H. In a joint desire to achieve and maintain a work force that is 100% drug free and in further recognition that the Department has not yet achieved such goal, the parties agree that all sworn personnel shall be subject to an annual drug test to be conducted through a fair, reasonable, and objective hair analysis testing system. Each Officer shall submit to an annual test on or within thirty (30) calendar days of each Officer’s birthday. The Department shall schedule each examination and so notify each Officer as far in advance as practicable. Hair testing does contemplate or include testing for alcohol.”

I. The Department agrees that it will establish and adhere to written collection and testing procedures for hair samples. These procedures shall be fair and reasonable as to ensure the accuracy and integrity of the test and process. These written procedures will be appended to this rule and incorporated thereto. The union, should it so request, shall meet with the Department in order to discuss issues relative to the collection and testing process. Nothing contained herein alters the current policy as it relates to other drug/alcohol testing, procedures, or requirements.”

(Exhibit 34)

254. Rule 111 § 7, Consequences of Violation of the [Substance Abuse] Policy, states,

in part:

“Any violation of the Substance Abuse Policy shall lead to disciplinary action up to and including termination. The severity of the action chosen will depend on the circumstances of each case. ...

Refusing to submit to a drug or alcohol test ...or switching or adulterating any blood or urine sample, shall result in a recommendation of termination. ...

(Exhibit 34)

255. BPD Rule 102 § 7 states, in part:

“RESIDENCE AND TELEPHONE: Except as otherwise provided by law, all officers of the Department shall live in the city of Boston. All employees of the Department shall report their places of residence and their telephone number to the Commanding Officer or supervisor of the Bureau, Division, District, Unit or Office to which they are assigned. They shall also report to that person any change of residence or telephone number within twenty-four (24) hours after such change.”

(Exhibit 2) (emphasis in original)

256. On September 5 and 24, 2014, a hearing was held before the BPD’s Chief Administrative Hearing Officer relative to the violations of the Substance Abuse Rule and Change of Address Notification Rule, at which Ms. James was represented by counsel. (Exhibit 21)

257. Hearing Officer Lydon’s report states that Ms. James failed to appear to submit a hair sample for the annual drug test on June 13, July 1, or July 17, 2013, and that,

“[a]lthough Officer James may have personal concerns about too much hair being taken from locations and the integrity of the tests, it is not reasonable that a sworn employee require a particular person (Nicole) in order to submit to the required annual hair test.” (BPD Hearing Officer’s Report, page 11)(citation omitted)

In addition,

“the Department scheduled and used multiple fair and reasonable methods to make contact with Officer James via Certified mail, her PO Box, (which the Officer has had for 2 years) ... and notifying the Officers (sic) Union also at times to schedule the Officer for the annual drug test.” (Id.) (citation omitted)

“There have been test (sic) taken of her by others successfully and consultations have been made when needed.” (Id.) (citation omitted)

“The argument can also be made that one of the notifications (Certified Mail) sent for the July 17th test was not received by the employee until she went to the Post Office on July 22nd.” (Id.) (citation omitted)

Between July 22 and 26, 2013, “there was no attempt shown by the employee to make any type of contact with the Department by the Officer or through an Attorney up until Friday, July 26th after normal business hours between 6:30 and 7:00pm, when the Officer walks into the front desk at Headquarters.” (Id.) (citation omitted)

258. Hearing Officer Lydon’s report states, with regard to Ms. James’ change of address, that her sworn personnel information card shows a residential address in Quincy, her driver’s license residential address is in Mattapan and her mailing address is a PO Box in Milton, and that her vehicle registration residential address is in Mattapan. The Hearing Officer’s report further states that Ms. James testified at Sgt. Det. Gallarelli’s investigation interview that she changed the residential address on her driver’s license on June 29th, 2013, that she had moved from the Quincy address a few months earlier and that she was in transition. (BPD Hearing Officer’s Report, pages 12-13)

259. On March 10, 2015, Hearing Officer Lydon submitted his hearing report to BPD Commission William Evans in which he sustained the two (2) specifications against Ms. James. (BPD Hearing Officer’s Report, regarding Residence and Drug Test Specifications)

260. By letter dated March 18, 2015 from Commissioner William Evans to Ms. James, Commissioner Evans sustained the report of Hearing Officer Lydon following the two (2)-day hearing regarding the complaint that Ms. James violated BPD Rule 111 § 5 by failing to appear for her first scheduled appointment to submit a hair sample for the annual drug test and failing to appear for two such subsequently scheduled appointments and violating Rule 102 § 7 by failing to report a change of her residential address and he stated, in part:

“I have determined that the charges sustained relative to each case are sufficient to warrant termination independent of the other matter. Accordingly, I hereby terminate you from your employment effective March 18, 2015.”

(Exhibit 21)

261. Ms. James was also terminated in the same letter for violating BPD Rule 102, sections regarding Conduct, Respectful Treatment, Truthfulness, Abuse of Process and Conformance to Laws and for violating cited statutes as indicated above. (Id.)

262. On March 31, 2015, as noted above, Ms. James filed an appeal of her termination with the Civil Service Commission. (Administrative Notice; Stipulation)

DISCUSSION

Applicable Legal Standards

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, § 41. An employee aggrieved by the decision may appeal to the Commission. G.L. c. 31, § 43. Under section 43, the appointing authority carries the burden of proving 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). In performing its function:

. . .the commission does not view a snapshot of what was before the appointing authority. . . . [T]he commission hears evidence and finds facts anew. . . . [During] a hearing de novo[, initiated] upon all material evidence and . . . not merely for a review of the previous hearing held before the appointing officer[,] [t]here is no limitation of the evidence to that which was before the appointing officer. . . . For the commission, the question is . . . “whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision.”

Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003) (quoting Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983) (emphasis added)). *See also Falmouth v. Civil Serv. Comm’n*, 447 Mass. 814, 823; Cambridge v. Civil Serv. Comm’n, 43 Mass. App. Ct. 300, 303-05, *rev. den.*, 428 Mass. 1102 (1997).

An action is “justified” if it is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law.” Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass.

211, 214 (1971); Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. at 304; Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (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). It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance.” Leominster v. Stratton, 58 Mass. App. Ct. at 729. *See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n*, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 141 (1997). *See also Covell v. Dep't of Social Services*, 439 Mass. 766, 787 (2003) (where live witnesses gave conflicting testimony at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing).

The Commission determines justification for discipline by inquiring “whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service.” School Comm. v. Civil Service Comm'n, 43 Mass. App. Ct. 486, 488, *rev. den.*, 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983). The Commission is guided by “the principle of uniformity and the ‘equitable treatment of similarly situated individuals’ [both within and across different appointing authorities]” as well as the “underlying purpose of the civil service system ‘to guard against political considerations, favoritism and bias in governmental employment decisions.’” Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. It is

also a basic tenet of the “merit principles” which govern Civil Service Law that discipline must be remedial, not punitive, designed to “correct inadequate performance” and “separating employees whose inadequate performance cannot be corrected.” G.L. c. 31, §1.

Police are held to a high standard of conduct, as the Commission found in Zorzi v. Town of Norwood, 29 MCSR 189 (2016). In Zorzi, the Commission noted:

“An officer of the law carries the burden of being expected to comport himself or herself in an exemplary fashion.” McIssac v. Civil Service Comm’n, 38 Mass. App. Ct. 473, 475 (1995) (negligent off-duty handling of firearm). When it comes to police officers, the law teaches that there is a special ‘trust reposed in [a police officer] by reason of his employment Police officers must comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel. They are required to do more than refrain from indictable 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 Comm’r v. Civil Service Comm’n, 22 Mass. App. Ct. 364, 371, *rev. den.*, 398 Mass. 1103 (1986).”

This standard of conduct extends, of course, to truthfulness. In Gonsalves v. Falmouth, 25 MCSR 231 (2012), *aff’d sub nom. Gonsalves v. Civil Service Commission and Town of Falmouth*, Suffolk Superior Court, C.A. No. 12-2655G (2014), the Commission articulated the importance of an officer’s obligation to be truthful in that case and as established previously, stating:

“The most serious charge proved against Officer Gonsalves involved his untruthfulness. He left a trail of evasive, incredible and inconsistent statements that began on December 20, 2008, with his original denial to the Oscar 11 Officer It continued through the FPD investigation and was on display during his two days of testimony at the hearing before the Commission. On these grounds, alone, Falmouth is fully justified to terminate a police officer who repeatedly demonstrates his inability to tell the truth. *See City of Cambridge v. Civil Service Comm’n*, 43 Mass. 300, 303 (1997)(‘The city was hardly espousing a position devoid of reason when it held that a demonstrated willingness to fudge the truth in exigent circumstances was a doubtful characteristic for a police officer. . . . It requires no strength of character to speak the truth when it does not hurt.’) *See also Phillips v. Town of Hingham*, 24 MCSR 267 (2011)(police officer terminated for untruthfulness about inappropriate “horseplay” with civilian employee while on duty); Desharnais v. City of Westfield, 23 MCSR 418 (2010)(officer damaged cruiser in

“cowboyish” spins and then untruthfully denied his antics); Mozeleski v. Chicopee, 21 MCSR 676 (2008)(lying to cover-up inappropriate conduct during a late-night traffic stop); Rizzo v. Town of Lexington, 21 MCSR 634 (2008)(police officer failed to report use of force and later misrepresented level of force used); Layne v. Town of Tewksbury, 20 MCSR 372 (2007)(police officer denied using profanity directed to accident victims).”

Section 43 of G.L. c. 31 also 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).

The Respondent has shown by a preponderance of the evidence that it had just cause to terminate Ms. James’ employment. I reach this conclusion considering all of the evidence in the record and the weight assigned thereto, including the credibility of the testimony provided by the parties’ witnesses. The vast weight of this evidence compels the conclusion that the Respondent has established just cause to terminate the Appellant by a preponderance of the evidence.

Credibility

In this matter, the Respondent did not find the Appellant credible on critical points concerning the events of June 8, 2015, and neither do I. Clearly, one of the reasons for civil service law is to provide independent review of certain appointing authority decisions, which review was afforded to the Appellant in the Commission’s proceedings. However, the reports of the Respondent’s Hearing Officer compared specific statements of those who testified there and explicitly found the Appellant’s written and/or oral statements not only inconsistent with the testimony of the Respondent’s witnesses, but with her own statements on different occasions.

The local hearing officer also found that Attorney Hassan's testimony at the BPD disciplinary hearing indicated that the Appellant had testified in court about physical contact with Capt. Russell that simply did not occur. Similarly, the detailed findings of the arbitrator indicate that the Appellant's testimony in the various complaints was inconsistent and had 'evolved'.

In addition, I did not find Ms. James's testimony concerning the events of June 8, 2012 credible. For example: Ms. James testified at the DALA hearing that Capt. Russell touched her breast. But when she reported the incident to Roberta Mullins, a week after the incident, she did not mention Capt. Russell touching her breast. In the police report Ms. James prepared to document the incident, she wrote that Capt. Russell "brushed up against my body"; she did not write that he brushed up against her breasts. Ms. James testified at the Boston Police Department disciplinary hearing that she "presumed" Capt. Russell touched her breast. Given her other statements to the contrary and my observations of her when she testified on this point, I did not find her testimony credible. In addition, she testified at the DALA hearing that she did not know what to expect at the meeting with Capt. Russell and it made her extremely nervous and upset. Based upon my observations of her testimony, her testimony at the DALA hearing that she choose to work the third shift because she knew the issue of her allegedly being AWOL had to be dealt with, and her testimony that she called her union representative from the station's parking lot when she saw Capt. Russell arrive, I did not find her testimony that she did not know what to expect on the evening at issue credible. I give little weight to any of Ms. James' testimony.

In her post-hearing brief, the Appellant argues that BPD did not prove that "James consciously made false statements." (Appellant post-hearing brief p. 71). The number of different versions of the story concerning the events of June 8 told by Ms. James convinced me

that she was tailoring her version of events as the matter unfolded. For example, the allegation that Capt. Russell touched her breast was a statement of fact that Ms. James knew was not true.

I found the testimony of both Capt. Russell and Lt. Sweeney credible. As the only witnesses to the Appellant's suspension on June 8, 2012, their testimony is significant. Capt. Russell testified to the extent of his memory, responding directly to examination at the hearing. He consistently denied any allegation that he had touched the Appellant while retrieving her weapon when he suspended her for five (5) days. He denied "lunging" at the Appellant when he approached her to retrieve her weapon. When he approached the Appellant to remove her weapon, Capt. Russell testified that he simply stood up from his chair, walked around the desk and removed her weapon, albeit with a brief and minimal catch in the process of removing Ms. James' weapon. He further testified that he asked the Appellant to give him her weapon because he was concerned about there being one live round in Ms. James' weapon.

If Capt. Russell had concerns about his safety in this regard, it would support the testimony of Lt. Sweeney that the Captain got out of his seat and approached Ms. James somewhat quickly. However, this does not constitute "lunging" at Ms. James. And, while Lt. Sweeney perceived Ms. James as calm, based upon Capt. Russell's different role in the meeting and his different relationship with Ms. James, I do not find Capt. Russell's different perception of the situation surprising.

For the most part, Capt. Russell's testimony is affirmed by the testimony of Lt. Sweeney. Lt. Sweeney testified in a thoughtful and considerate manner. This was reflected in the careful way he responded to questions, taking his time to check his memory, stating honestly if he did not recall. The value of Lt. Sweeney's testimony is enhanced by the nuances of it. While he testified, similarly to Capt. Russell, about their interactions with Ms. James on June 8, 2012, he

added that Ms. James moved slightly when Capt. Russell removed her weapon and it was stuck briefly and that Ms. James appeared to be somewhat surprised that Capt. Russell was going to remove her weapon. That detail confirms that, at the most, Ms. James was moved in a minimal manner and was somewhat surprised at the Captain's decision to remove her weapon but those actions do not constitute an assault, lunging, or having her body jerked, as the Appellant alleged at different times.

The testimony of Sgt. Det. Humphreys, Sgt. Det. Gallarelli and Lt. Det. Mahoney was consistent with the findings of their investigations, as noted in the BPD Hearing Officer's Reports. The testimony of Ms. Osorno, Ms. Walsh, and Ms. Tanner, all of the Medical Unit, was supported by Exhibits entered into the record. Therefore, I find the testimony of these witnesses credible.

Incidents Related to the June 8, 2012 Suspension

It has been established by a preponderance of the evidence that Ms. James' conduct following receipt of the five (5)-day suspension violated the cited BPD policies and/or rules and these violations are grounds for termination. In response to Ms. James' complaint against Capt. Russell that she was injured when he removed her weapon on June 8, 2012, and Capt. Russell's complaint against Ms. James for her conduct and/or untruthfulness thereafter, IAD conducted two investigations. Both investigations found in favor of Capt. Russell and that Ms. James' complaint against Capt. Russell was unfounded. In addition, the arbitrator of Ms. James' injured on duty claim, which alleged that she was injured when Capt. Russell issued her the five (5)-day suspension, found that Ms. James' representations were not valid. Further, Ms. James' pursuit of a criminal complaint against Capt. Russell was unsuccessful when the Clerk Magistrate found, after a hearing at which the Appellant alleged, among other things, that Capt. Russell assaulted

her on June 8, 2012, that there was no probable cause to issue a criminal complaint against Capt. Russell.

Ms. James spoke to Sgt. Det. Humphreys on June 8, 2012, alleging that she was injured that day in her interaction with Capt. Russell. Thereafter, Sgt. Det. Humphreys contacted Ms. James and she indicated a willingness to speak to him. However, Ms. James did not reveal the nature of her allegations to Sgt. Det. Humphreys despite his repeated efforts to obtain this information from her. Although Ms. James would not tell Sgt. Det. Humphreys this information, she filed a police incident report on June 15, 2012 and an application for a criminal complaint against Capt. Russell based on her allegations. Capt. Russell filed a complaint against Ms. James and two IAD investigations ensued on these matters.

There is nothing in the record that indicates that BPD did not take Ms. James' allegations against Capt. Russell seriously. If anything, the contrary is true. IAD conducted a thorough investigation into her allegations and afforded her considerable leeway in presenting her claims to them. While it might seem odd that the BPD would have a Sergeant investigate a Captain, rather than a more senior superior, there were so many proceedings and investigations involving these matters that the allegations made by Ms. James were thoroughly vetted.

After the IAD investigations were concluded and the local hearings were held, BPD was well within its authority to discipline Ms. James for her untruthfulness and the disruptions her allegations caused the BPD. Likewise, I have determined that Ms. James was deliberately deceitful. BPD has a zero-tolerance policy for untruthfulness. BPD's rules of conduct and procedure indicate that officers shall conduct themselves in such a manner as to reflect most favorably on the Department and that employees shall on all occasions be civil and respectful towards their supervisors. A preponderance of the evidence establishes that Ms. James violated

these rules and procedures when she filed the false reports and falsely testified against Capt. Russell.

In addition to having found that the Appellant violated BPD rules and/or policies, the Respondent also alleges that the Appellant violated Massachusetts General Laws by perjuring herself under G.L. c. 268, § 1 at the Clerk Magistrate's hearing regarding the criminal complaint she sought against Capt. Russell, that her filing of a false report of a crime against Capt. Russell constituted a violation G.L. c. 269, § 13, and by filing a false police incident report the Appellant violated G.L. c. 268, § 6A. There is no indication that the Appellant was charged, prosecuted and convicted of violating these statutes. However, "[i]t is the felonious misconduct, not a conviction of it, that is determinative." DiBartolomeo v. City of Revere, 25 MCSR 480 (2012) (citing City of Boston v. Boston Police Patrolmen's Ass'n., 443. 813, 820 (2005)). In addition, in a para-military organization like the BPD and in view of the fact that it is essential for police officers to maintain their credibility through truthful reporting of events, it is within the BPD's discretion to determine that Ms. James' actions establish just cause for her termination.

There can be little question that the Appellant's conduct in providing false reports against Capt. Russell and seeking a criminal complaint against him after their interaction on June 8, 2012 constitutes substantial misconduct which adversely affects the public interest by impairing the efficiency of public service. Capt. Russell was required to defend himself against Ms. James' claims and retain counsel in regard to the criminal matter. It also required him to respond to investigators investigating Ms. James' complaint and report to his superiors what occurred during these events. Following the investigation, BPD held a multiple-day disciplinary hearing, and the BPD Hearing Officer issued reports, based upon which the Police Commissioner decided to terminate Ms. James' employment. Following BPD's decision, the Appellant filed the instant

appeal. In none of the BPD investigations involved in this case, the BPD Hearing Officer's reports, or the arbitrator's decision regarding Ms. James' injury on duty claim was there a ruling that Ms. James' claims and complaints concerning her interaction with Capt. Russell on June 8, 2012 were valid. In addition, while these processes were on-going, BPPA also filed grievances in two other related matters. The effect of the Appellant's complaints against Capt. Russell and other actions related to her alleged injury on June 8, 2012 are not easily weighed but they most directly affected Capt. Russell. Clearly other members of the BPD knew of Ms. James' false, embarrassing allegations and responding to the allegations likely encumbered a certain amount of Capt. Russell's time and energy, detracting from his ability to respond to the requirements of his position.

Similarly, BPD expended considerable time and resources to responding to, and processing Ms. James' complaints, conducting the related investigations and disciplinary hearings, and defending Ms. James' appeals to various fora.¹⁸ There can be no question that the Appellant's false claims that Capt. Russell injured her on June 8, 2012 constitute misconduct and that they absorbed significant resources by all involved, adversely affecting the public interest by impairing the efficiency of BPD's public service.

Failure to Submit to Hair Drug Test and Report Change of Address

BPD has shown by a preponderance of the evidence that it had just cause to impose discipline in the form of termination of Ms. James' employment for her failure to submit to a hair drug test and her failure to notify the BPD of her change of address. Under Rule 111, the BPD

¹⁸ At the Commission's hearing, the parties indicated that the Appellant also filed a discrimination claim at the Mass. Commission Against Discrimination against BPD. In an arbitrator's decision on Ms. James' injured on duty claim, the arbitrator also noted that she had filed for Family Medical Leave (FMLA) but that the paperwork therefor was not "brought to the City's attention until after the asserted period of incapacity has (sic) passed." Exhibit 30, p. 15.

can issue discipline, up to and including termination of employment, to an officer who fails to provide a hair sample for the annual hair drug test.

There appears to be no question that the Appellant failed to report her change of address to the BPD at all, as required, let alone within twenty-four hours of moving. This issue arose when BPD was investigating Ms. James' repeated failure to appear to submit a hair sample for the annual hair drug test. The address Ms. James provided to BPD on her sworn personnel card was the Quincy address. On July 11, 2013, the BPD Medical Unit mailed the notice for Ms. James' rescheduled hair test appointment on July 17 to her at the Quincy address and the PO Box in Milton. Ms. James asserted that she did not receive this notice until July 22, 2013, which is the day that she retrieved it from her P.O. Box. Therefore, she avers, she was not properly notified of this appointment and could not have appeared on July 17.

The Appellant testified at the DALA hearing that her residence in the summer of 2013 was "in transition", that because BPD did not place her on paid injured on duty leave she lost her apartment and, therefore, she does not have an address to report. When she was asked at the interview when she moved, Ms. James stated that she did not recall. Given the significance of losing one's apartment, it is difficult to understand how a person would not recall when that occurred. As discovered at the investigation interview, the address on Ms. James' driver's license is the address for her father in Mattapan, not the Appellant's former apartment address in Quincy, and the evidence of record indicates that Ms. James had notified the RMV of this address prior to July of 2013. Ms. James asserts that BPD has her father's address in its emergency contact database and, therefore, it should have mailed her notice to her at her father's address. It is the job of an officer to provide his or her current address to the BPD. The BPD cannot be expected to contact an officer if he or she fails to provide it with an accurate address.

Rule 102 § 7 requires officers to report any change of address within twenty-four (24) hours of moving, which the Appellant did not do. Consequently, the Respondent has proved by a preponderance of the evidence that the Appellant violated the BPD rule requiring officers to inform BPD of a change of address within twenty-four (24) hours, warranting discipline for such a violation.

The Respondent also has established by a preponderance of the evidence that it had just cause to terminate the Appellant's employment for not providing a hair sample for the 2013 hair drug test. Ms. James avers in this regard that since her birthday is June 29, under BPD Rule 111, she had until Monday, July 29, 2013 to have her hair sample taken for the annual BPD hair drug test. She appeared at BPD on Friday, July 26, 2013 between 6:30 and 7:00 pm without an appointment. The officer there called the Medical Unit to see if someone could take her hair sample but no one in the Medical Unit answered the phone. The Medical Unit hours of operation in the summer of 2013 were 9:00 a.m. to 5:00 p.m. on Fridays. Ms. James testified in her investigation interview that she was aware that the Medical Unit was sometimes closed in the evenings. On Saturday, July 27, 2013, the Appellant's attorney contacted the BPD Labor Relations Office asking to reschedule the hair sample appointment and was told on Monday, July 29, 2013 that the appointment would not be rescheduled.

By this time, the Appellant had already missed three previous appointments. Specifically, in March 2013, Ms. James was in the Medical Unit to see a physician. At the time of her March appointment, she was scheduled for her next medical appointment on June 13 and Ms. James was informed that her hair sample for the hair drug test would be collected the same day, for her convenience and as it is the Medical Unit's practice. Ms. James asked for the Medical Unit to send her a notice of these appointments, which the Medical Unit did.

Despite having three (3) months' notice, Ms. James failed to appear on June 13. Ms. James' called the Medical Unit and asked to reschedule; her appointment was rescheduled with Ms. James for July 1. Again, Ms. James failed to appear and she called again to ask to reschedule the appointment, also asking if Nicole, a Medical Unit staff person, could take her hair sample since Ms. James had a bad experience with a staff person whom Ms. James alleged was unfamiliar with taking hair samples from female African-American officers with certain hair styles and that Nicole would be able to take the hair sample in an acceptable manner. The Medical Unit staff informed Ms. James that to ensure a valid hair sample, officers are not allowed to select the person who takes their hair sample but rather staff are assigned in rotation to take hair samples as officers arrive.

As noted above, on July 11, 2013, the Medical Unit mailed the notice of appointment for July 17 to Ms. James. Ms. James did not retrieve the notice from her P.O. Box until July 22, by which time the Appellant had missed her July 17 appointment. The Appellant argues that she cannot be held accountable for missing the July 17 appointment since she did not receive notice of the appointment until thereafter and that BPD was wrong to deprive her of the opportunity to reschedule her hair sample appointment on Monday, July 29. She avers further that on July 3, well before the time period within which to have her hair sample taken, the BPD initiated an investigation into her missed appointments, implying that this evinces the Respondent's bias against her.

The Appellant is mistaken. As noted above, the Appellant had an obligation to inform BPD of her changed address, which she failed to do. Secondly, if the Appellant was relying solely on the PO Box to receive mail, knowing that she was due to give a hair sample within thirty (30) days after her June 29 birthday, it was her responsibility to retrieve her mail sooner.

Third, even if she was unable to retrieve her mailed notice in a more timely manner, she could have called the Medical Unit to reschedule her appointment when she received the notice on July 22, as she had done twice previously. Instead, on Saturday, July 27, Ms. James' attorney called the BPD Labor Relations Office to reschedule Ms. James' appointment.

On Monday, July 29, 2013, Attorney Horwitz was informed by the BPD Labor Relations Office that Ms. James would not be allowed to reschedule her hair sample appointment. The 29th was the last day of the sixty (60)-day time period surrounding her birthday within which she was obliged to provide a hair sample. It was within the discretion of the Respondent to determine that the Appellant was given multiple opportunities to provide a hair sample, of which she was fully aware on two occasions, and she failed to appear on each occasion. The Appellant is a seasoned officer with nineteen years of experience. She should have been fully aware of the rules and procedures of the BPD hair drug testing process, given that she had successfully submitted hair samples in past years. Had she acted in a more timely manner, as required, the investigation begun on July 3 may have ended differently. For these reasons, BPD had just cause to discipline Ms. James.

In rendering this decision, I have also considered a number of detracting factors. Specifically, the Appellant was off the payroll for approximately two (2) years, during which time the Appellant pursued an injury-on-duty claim, along with the other reports, claims and/or appeals noted herein. However, I note that the arbitrator found that, in view of BPD's decades- old practice of investigating an injured-on-duty claim asserted after the injury was reportedly sustained, and in view of the very serious allegations against a superior officer, the amount of time involved was not unreasonable. I note that the process was also complicated as Ms. James filed of a number of reports, appeals and/or claims, there were a number of investigations

involved, multiple grievances were filed on her behalf, there was an arbitration hearing, and the BPD held local multiple-day hearings regarding the Specifications against Ms. James.

Similarly, I note that BPD began its investigation of Ms. James' failure to submit a hair sample approximately three weeks prior to the end of the sixty (60)-day period and that such an investigation was unusual. Ultimately, however, the responsibility falls on the officer to submit a timely hair sample. By July 2, 2013, Ms. James had missed two appointments to submit a hair sample. Further, when Ms. James realized on July 22 that she had missed the third such appointment, she did not call the BPD, as she had done previously, to reschedule the appointment. Rather, she waited until Friday evening of that week to go to the BPD Medical Unit, knowing that on some evenings it would be closed. While there is no limitation in Rule 111 to the number of times an officer can make an appointment to submit a hair sample for the drug test, it was within BPD's discretion to initiate an investigation with the knowledge that Ms. James had missed multiple scheduled appointments. Moreover, given the complications of getting the test performed, showing up on Friday evening at 6:30 seems at best a half-hearted attempt at fulfilling her obligations to get the test done.

I have considered other factors but found that they do not affect the outcome here. Although the five (5)-day suspension issued to Ms. James on June 8, 2012 was ultimately reduced to a verbal reprimand, it was the false claims and reports of Ms. James, her failure to submit a hair sample for the annual drug test as required, and her failure to notify the BPD of her changed address that resulted in her termination.

In addition, I do not find it unusual that neither Capt. Russell's nor Lt. Sweeney's reports indicated that Capt. Russell removed Ms. James' weapon when Capt. Russell issued the five (5)-day suspension to Ms. James. Asking an officer to surrender her or his firearm when receiving a

suspension would seem to be the normal course. Neither the BPD Hearing Officer's reports nor the arbitrator's decision found it concerning. Based on all of the evidence adduced and the credibility assessments in the case before the Commission and DALA, I find that it is more likely than not that, at the time Capt. Russell and Lt. Sweeney wrote their reports about the events on June 8, 2012, the events were not sufficiently noteworthy and the lack of such notation in their reports does not affect the outcome.

The BPD termination letter states that each of the specifications sustained against Ms. James provides just cause for termination. While termination of employment for false reports and testimony may be viewed in this manner, it is unclear that Ms. James' violation of the BPD substance abuse rule or, especially, of the change of address rule, individually, would provide just cause for termination. However, the cumulative effect of Ms. James' violations is that BPD had just cause to discipline Ms. James by terminating her employment.

Conclusion

For all of the above-stated reasons, I recommend that Appellant's appeal under CSC Docket No. D1-15-64 and DALA Docket No, CSC-18-0363 be *denied*.

Edward B. McGrath

Edward B. McGrath
Chief Administrative Magistrate

Notice to:
Tara Dunn, Esq. (for Appellant)
Max Stern, Esq. (for Appellant)
Joseph McClellan, Esq. (for BPD)
David Fredette, Esq. (for BPD)