

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

MARION KEATING,
Appellant,

v.

D-10-46

TOWN OF MARBLEHEAD,
Respondent.

Appellant's Attorney

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Respondent's Attorney

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Commissioner:

Christopher C. Bowman

DECISION

Pursuant to G.L. c. 31, § 43, Sergeant Marion Keating (hereinafter "the Appellant"), is appealing the decision of the Town of Marblehead (hereinafter "the Town") to suspend her for thirty (30) days for submitting a false police report; ten (10) days for conduct unbecoming a police officer; and ten (10) days for creating a hostile work environment in violation of the Town's sexual harassment policy. An appeal was filed with the Civil Service Commission (hereinafter "Commission"), and a hearing was held on June 8, 2010 and July 9, 2010. The hearing was digitally recorded and both parties submitted proposed decisions.

FINDINGS OF FACT:

Based upon the twenty-seven (27) documents entered into evidence and the testimony of the following witnesses:

- Mark Mills, Police Captain, Town of Marblehead Police Department;
- Jackie Belf-Becker, Chairwoman, Board of Selectman for the Town of Marblehead;
- Michael Daigle, Police Officer, Town of Marblehead Police Department;
- Marion Keating, Appellant;
- Robert O. Picariello, Chief of Police, Town of Marblehead Police Department
- Anthony M. Sasso, Town Administrator, Town of Marblehead
- Donald Decker, Police Sergeant, Town of Marblehead Police Department
- Jonathan Lunt, Police Lieutenant, Town of Marblehead Police Department
- Richard Alex, Police Officer, Town of Marblehead Police Department
- Amy Gilliland, Civilian Police Dispatcher, Town of Marblehead Police Department
- Adam Mastrangelo, Police Officer, Town of Marblehead Police Department

I make the following findings of fact:

1. The Appellant is a tenured civil service employee in the position of police sergeant in the Town of Marblehead. She has been employed by the Town since 1977. (Stipulated Facts)
2. On December 22, 2009, at approximately 6:00 P.M., the Appellant was in the Officer in Charge (OIC) office with Sergeant Donald Decker (hereinafter “Decker”) and former Assistant District Attorney Emily Tarr (hereinafter “Tarr”). Tarr had just brought Decker some coffee. The Appellant and Tarr engaged in some light banter with the Appellant teasing Tarr about not bringing her a cup of coffee. The Appellant testified that she had a good working relationship with Tarr. (Testimony of Appellant)
3. Shortly thereafter, the Appellant left the OIC office and then returned. Decker and Tarr were looking at pictures on the Department’s computer from an out-of-state conference attended by Decker and Tarr. They showed the pictures to the Appellant which included Tarr in a jail cell “kidding around” and other humorous pictures. Tarr jokingly stated that some individuals on the trip were “fucking wasted”. (Testimony of Appellant)

4. Decker had been teaching at this conference in Arizona and Tarr decided to attend the conference with other ADAs using her vacation time. (Testimony of Appellant and Decker)
5. Shortly thereafter, the Appellant was sitting in the OIC office while Decker and Tarr were having a conversation in the hallway just outside the office. It is undisputed that Decker and Tarr were engaged in a light-hearted conversation about a woman who used to walk around Town saying “fuck you” and make obscene hand gestures toward police officers, including Decker. (Testimony of Appellant and Decker) According to the Appellant, Decker was saying that he couldn’t remember the woman’s name. At that point, according to the Appellant, she went outside the office and told Tarr and Decker, “Oh, I remember her name” and proceeded to remind Decker of the woman’s name. (Testimony of Appellant)
6. Shortly thereafter, police officer Michael Daigle joined the conversation about the woman. At some point during this discussion, Tarr remarked in jest, “well that’s ok, Daigle tells me to fuck myself at court all the time” or words to that effect. (Testimony of Appellant and Daigle)
7. What the *Appellant* said after Tarr made this remark is in dispute.
8. According to Daigle, the Appellant responded, “No, Emily, he’s not stating ‘fuck you’, he’s saying he wants to fuck you.” (Testimony of Daigle)
9. Decker testified that he was beginning to exit the police station through a door immediately behind him when he also heard the Appellant make the remark, “he’s saying he wants to fuck you.” (Testimony of Decker)
10. In determining what words were actually spoken by the Appellant that day, I am unable to credit the testimony of Mr. Decker. First, he was exiting the police station, presumably with his back to Tarr, Daigle and the Appellant. Second, while even Daigle acknowledges that

Tarr herself used the “f word” as part of this conversation, Decker has no recollection of Tarr doing so. Given that both the Appellant and Daigle clearly remember these words being spoken by Tarr, it is difficult to credit Decker’s recollection of the remainder of the conversation, which *is* in dispute. Further, although I believe Decker’s testimony is an honest reflection of what he remembers being said that day, he had recently become tangentially involved with a controversial issue where Tarr, after consulting with Decker, purportedly sought to nol pros a case where the Appellant was the arresting officer. In summary, Decker’s testimony appeared slanted by a desire to ensure that Tarr was portrayed in a better light and the Appellant in the worse light. (Testimony, demeanor of Decker)

11. The Appellant denies making the above-referenced comments attributed to her by Daigle and Decker. Rather, the Appellant testified that she said to Tarr, “Oh nice. *I* don’t think *that’s* what he meant” (with no profanity being used). The Appellant testified that her comments certainly were intended as a joking innuendo about Daigle, but she insists that she never said the words attributed to her by Daigle and Decker. (Testimony of Appellant)
12. Daigle left the police station and reported to his assigned police cruiser. Approximately five to ten minutes later, Tarr exited the police station and approached the passenger-side window of Officer Daigle’s police cruiser parked in the parking lot across from the police station on Gerry Street. Daigle testified that he apologized for the Appellant’s comments saying to Tarr, “Sorry for what just happened inside of there (the police station). That was inappropriate and uncalled for...I just didn’t think it was very professional so I apologize to you for that happening.” Tarr assured Daigle that she was not offended by whatever comments were made by the Appellant. (Testimony of Daigle)

13. Daigle testified that he was offended by the Appellant's comments because they were made in the presence of a female civilian in a public area of the police station. (Testimony of Daigle)
14. I do not credit Daigle's testimony that he was offended by whatever comments were made by the Appellant. It rings hollow to me. It is overwhelming clear that Tarr was not just any "female civilian". She was as an ADA that had developed professional and social relationships with members of the Town's Police Department. She felt comfortable enough to sit in the OIC office bantering with police officers about pictures of her, Decker and others from a trip in Arizona and she was more than comfortable dropping the "f – bomb" herself. Tarr *initiated* the above-referenced conversation that led to a response from the Appellant, by stating, "Daigle tells me to fuck myself all the time" or words to that effect. According to Daigle, Tarr herself stated that she was not offended by whatever comments were made by the Appellant. Further, Daigle acknowledged in his testimony that he uses profanity in front of civilians in the Police Department. Also, Daigle acknowledged that he has a placard on his Police Department locker which states " GAY GLE" next to a sticker which says "VALTREX". Daigle unconvincingly suggested he didn't know that Valtrex is a prescription drug used to treat herpes. Finally, Daigle's direct testimony suggested that, previous to this interaction in the police department, he had only limited contacts with Tarr. On cross examination, he acknowledged that through "mutual friends" he met up with Tarr at a Celtics game, socialized with her afterward and "head-butted" her leaving a mark on her head. He also acknowledged that he may have also socialized with Tarr prior to the disciplinary hearing before the Town. Daigle's alleged indignation appears to have been

more motivated by a desire to impress Tarr other than anything else. (Testimony, demeanor of Daigle; Exhibit 15)

15. Approximately one hour later, Daigle returned to the police station and told Decker that he thought the Appellant's remark was out of line. (Testimony of Daigle and Decker)

16. Decker indicated that he agreed that the Appellant's comments were out of line and unprofessional, and inquired if Daigle wished to meet with Chief Picariello regarding the matter; Daigle said he did. (Testimony of Decker and Daigle)

17. In turn, Decker directly emailed Chief Picariello and informed him that Daigle wanted to meet with him on December 23, 2009. Decker's email to Chief Picariello states, "Chief: Mike Daigle will be in to see you tomorrow (12/23) in regards to a complaint of an incident that happened tonight. He'll give you the details. I did not directly address it tonight, as it involves something I believe you will want to address directly. DD" (emphasis added) (Exhibit 9)

18. Decker could not provide a plausible explanation as to why he didn't report this incident through the normal chain of command, as opposed to a direct email to the Police Chief. (Testimony, demeanor of Decker)

19. At the time of this incident, both Daigle and Decker were generally aware that the Appellant was involved with an unrelated civil suit against the Police Department. It appears that this suit was common knowledge in the Department and that some individuals were not happy about a potential settlement agreement that would, in their view, give the Appellant a preferential assignment that she would not have otherwise received.

20. I find that the decision to report and ratchet-up this alleged incident was partially influenced by the ill-will that this civil suit had created in the Police Department. In summary, even if I

were to accept that the Appellant made the comments attributed to her by Decker and Daigle, it is difficult to imagine that the same chain of events would have unfolded if those comments had been made by a fellow male officer who was not involved in a civil suit against the Police Department.

21. On December 23, 2009, Daigle met with Chief Picariello. He explained to Chief Picariello that he was “upset and embarrassed” by the Appellant’s statements and believed the Appellant’s remarks to be unprofessional. (Testimony of Daigle)
22. Chief Picariello informed Daigle that he had the right to file a report regarding the incident if he wished. Chief Picariello further stated that he was going on vacation and would return on January 4, 2010. (Testimony of Chief Picariello; Exhibit 12).
23. On or about December 24 or 25, 2009, Decker prepared a report regarding his recollection of the events of December 22, 2009. (Testimony of Decker)
24. Decker informed Daigle and Tarr that he was submitting the report. (Testimony of Decker)
25. On December 27, 2009, the Appellant penned an email to Chief Picariello and Captain Mills regarding a separate incident she had with Decker the previous day. According to the Appellant’s email, she had met with a domestic violence victim for approximately three hours in which Decker had apparently made the arrest. When the Appellant saw Decker at the police station, she informed him that she added a couple of charges to the criminal complaint as a result. According to the Appellant, Decker “went ballistic – screaming at me that they were fine last night and don’t touch them – screaming at me.” According to the Appellant’s email, she was rebuffed by Decker when she tried to approach him again and she was in tears as a result of the incident. (Exhibit 16)

26. In sharp contrast to the actions he took regarding the alleged incident on December 22, 2009, Chief Picariello did not meet with the complainant (the Appellant) or meet with any of the witnesses, as he did regarding the Daigle complaint. Rather, he immediately assigned the matter to Captain Mills. According to a report filed by Lt. Nicholas Economou, he spoke to Decker about the Appellant's complaint and asked him if had yelled at the Appellant. According to Economou's report, Decker told him "he may have raised his voice but felt he never yelled at her." In his own written statement, Decker states, "... Although the last comment I made to her was with a raised voice, I didn't scream at her, yell at her, or swear at her at any time, although she has alleged that." (Exhibit 20)
27. Ten days after the December 22, 2009 incident, on January 3, 2010, Daigle prepared a report for Chief Picariello in which he detailed his recollection of the events of December 22, 2009. (Testimony of Daigle; Exhibit 12).
28. On January 4, 2010, Chief Picariello, instead of delegating this matter to Captain Mills, directly contacted Tarr and asked to meet with her. Tarr met with Chief Picariello in his office on or about January 5, 2010 at which time Tarr described the December 22, 2009 incident. (Testimony of Chief Picariello)
29. Although I am allowed to do so, I give no weight to the hearsay testimony of Chief Picariello as it relates to his conversation with Tarr or the report she submitted. In this particular case, for many of the reasons previously referenced, I would only consider crediting statements attributed to Tarr after listening to her live testimony before the Commission.
30. After receiving the reports of Officer Daigle, Decker and Tarr, Chief Picariello then ordered his internal affairs officer, Captain Mark Mills to speak with the Appellant and to order her to submit a report detailing the events of December 22, 2009. (Testimony of Chief Picariello)

31. Captain Mills spoke with the Appellant in his office on Friday, January 8, 2010 and ordered her to submit such a report. Thus, the Appellant was now being asked to submit a report regarding a brief conversation that occurred 17 days ago even though the Police Chief had received an email from Decker 1 day after the December 22, 2009 conversation and had personally talked with Daigle 2 days after the conversation.
32. The Appellant indicated in her first report that she did not want to interfere with an internal investigation, but she could not prepare a report unless she was able to see the report filed against her. (Testimony of Mills and Appellant; Exhibits 3, 5 and 12)
33. At approximately 1:08 P.M. that same day, Captain Mills received a call from City attorney Marc Miller who inquired if Mills had received the Appellant's report. Mills informed Miller of what he had received and Miller instructed him to call the Appellant back in and hand her a copy of the complaint and order her to file a report by 4:00 P.M. that day. (Exhibit 5)
34. Captain Mills provided Officer Daigle's report to the Appellant later on January 8, 2010. (Testimony of Mills; Exhibits 5 & 7)
35. Later on January 8, 2010, the Appellant submitted an additional report detailing her version of the events of December 22, 2009. (Testimony of Mills and Appellant and Exhibits 4 and 12)
36. In her report of January 8, 2010, the Appellant denied saying "he's not stating fuck you, he's saying he wants to fuck you." (Testimony of Appellant; Exhibit 4; Exhibit 12).
37. On January 12, 2010, Chief Picariello wrote to Anthony Sasso (hereinafter "Mr. Sasso") in his capacity as Town Administrator of the Town of Marblehead, asking the Selectmen to conduct a hearing to determine if the Appellant's conduct on December 22, 2009 was

unbecoming a Town of Marblehead Police officer and further, whether her report of the events of December 22, 2009 was truthful. (Exhibit 10).

38. Chief Picariello testified that he referred the matter to the Board of Selectmen, without a recommendation, because of the pending civil suit. (Testimony of Picariello)

39. After reviewing Chief Picariello's letter, Sasso also made the assessment that the Town's sexual harassment policy may have been violated. He forwarded Chief Picariello's letter and attached reports to the Marblehead Board of Selectmen. (Testimony of Sasso). Thereafter, the Board of Selectmen appointed Sasso as the designated hearing officer. (Testimony of Belf-Becker; Exhibit 1).

40. On January 15, 2010, Sasso informed the Appellant that he had been appointed the designated hearing officer to determine if there were violations of Marblehead Police Department Rule 4.02 – Conduct Unbecoming an Officer; and Rule 13.2 – Falsifying Records and whether she had violated the Town's sexual harassment policy. (Exhibit 1; Exhibit 8; Exhibit 19).

41. In his capacity as Town Administrator, Sasso is also the Marblehead Police Department's sexual harassment officer. The Town has a sexual harassment policy in place that details conduct that will not be tolerated and outlines the steps of a sexual harassment investigation. The policy states that if any employee believes that he or she has been subjected to sexual harassment, the employee has the right to file a complaint. It is undisputed that Daigle never filed such a complaint and was never asked if he wished to do so. Rather, Sasso unilaterally added this as a charge against the Appellant.

42. Section IV of the Town's sexual harassment policy states in part that, "our investigation will include private interviews with the person filing the complaint, and with witnesses. We will

also interview the person alleged to have committed sexual harassment.” (Exhibit 8) Sasso did not conduct an interview with Daigle, the Appellant or any of the witnesses prior to the Town’s hearing against the Appellant. (Testimony of Sasso)

43. As part of his determination that the Appellant violated the Town’s sexual harassment policy, Sasso deemed Daigle’s statements that he was offended by what the Appellant said to Tarr as credible. Sasso testified before the Commission that he was unaware of the stickers affixed to Daigle’s locker. Further, he could not offer any plausible answer regarding why he didn’t first meet with Daigle and the Appellant before adding violation of the Town’s sexual harassment policy to the list of charges against the Appellant. It also appeared that Sasso was not fully aware of the prior social contacts between Tarr and Daigle. (Testimony of Sasso)

44. As previously referenced, I did not deem Daigle’s comments that he was offended by the Appellant’s comments as credible. (Testimony, demeanor of Daigle)

45. On February 12, 2010, Sasso conducted a hearing pursuant to G.L. c. 31, § 41. He heard testimony from the Appellant, Daigle, Tarr and Captain Mills. (Exhibit 12)

46. Sasso determined that the report and testimony of Daigle was credible and truthful. (Testimony of Sasso; Exhibit 12).

47. Sasso determined that the report and testimony of Tarr was truthful. (Exhibit 12) He found her to be a “a credible, neutral, non-biased witness who showed no preference towards Daigle or Sergeant Keating” when she testified before him. (Exhibit 12)

48. Sasso determined the report and testimony of the Appellant was unreliable and should be discredited. (Exhibit 12)

49. Sasso made the following findings with an accompanying recommendation for discipline. He found that the Appellant: 1) falsified police reports by denying that she made the statements attributed to her by Daigle and Decker (30-day suspension); 2) engaged in conduct unbecoming a police officer by actually making the comments on December 22, 2009 (10-day suspension); and violated the Town's sexual harassment policy by creating a hostile work environment (10-day suspension). (Exhibit 12)
50. On February 24, 2010, the Marblehead Board of Selectmen convened a meeting to review Sasso's findings of fact and recommendations. (Testimony of Belf-Becker; Exhibit 14)
51. At the February 24, 2010 meeting, the Board of Selectmen, after reviewing Sasso's findings of fact and listening to an oral presentation by the Appellant, voted unanimously to adopt his findings of fact and recommendations relative to the Appellant. (Testimony of Belf-Becker; Exhibit 14).
52. In an apparent attempt to show that the Appellant has a history of making inappropriate sexual remarks to subordinate officers, the Town called Lieutenant Lunt to testify. Lunt was asked to recount deposition testimony he provided as a Town witness *in the Appellant's federal lawsuit against the Town*. (Testimony of Lunt)
53. According to Lunt, several years ago, the Appellant observed then Officer (now Lieutenant) Lunt reading *Muscle and Fitness Magazine* in the dispatch room of the Marblehead Police Department. In front of others, the Appellant allegedly remarked, "All you guys that lift weights have small dicks"; then repeated the comment twice more and added, "I fucked [name of police officer], I know." (Testimony of Lt. Lunt; Exhibit 25)
54. Asked during cross-examination if he replied to the Appellant by saying something to the effect, "tell [name of Appellant's daughter] when she's [older] I'll fuck her, then we'll see",

Lunt equivocated and said he didn't think it was something he would say, but wasn't certain.

(Testimony of Lunt)

55. Lunt's above-referenced deposition took place approximately two years prior to the hearing before the Commission. Two months prior to the hearing before the Commission, Chief Picariello approached Lunt and asked him to submit to a polygraph examination. (Testimony of Lunt)¹

56. Shortly prior to the hearing before the Commission, Chief Picariello also approached police officer Richard Alex and asked him to take a polygraph examination about an incident that occurred between him and the Appellant in 2008. (Testimony of Alex)

57. According to Officer Alex, he and several officers were present in the Police Department and he corrected a fellow officer about a certain issue and cited a specific section of the motor vehicle laws. According to Alex, the Appellant, who was also present, then stated, "do you go home and masturbate to your motor vehicle book?" (Testimony of Alex)

58. Alex wrote a report about this incident several months after it occurred. Asked during cross examination why he waited so long, he said, "I knew the civil case was coming to a close and this would no longer interfere with it." Alex said he was advised about the civil suit by a friend. (Testimony of Alex)

59. Alex testified that the Appellant later apologized to him for making the remark. (Testimony of Alexis) I credit the entirety of his testimony. He was a good witness. (Testimony, demeanor of Alex)

¹ I did not accept into evidence any documents related to the lie detector tests. They were not submitted as part of a disciplinary investigation against the person submitting to the tests, but rather, as a strategic maneuver by the Town to corroborate the veracity of its witnesses before the Commission.

60. The Appellant has a disciplinary record with the Marblehead Police department including six (6) suspensions between 1980 and 1987, over two decades ago. (Testimony of Picariello; Exhibit 22)

CONCLUSION

G.L. c. 31, § 43, provides:

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

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102, (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm’n, 43 Mass. App. Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983)

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived

from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956).

"The commission's task...is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether 'there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision'", which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006). See Watertown v. Arria, 16 Mass. App. Ct. 331, 334, rev.den., 390 Mass. 1102 (1983) and cases cited.

Under Section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew." Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. The role of the Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102, (1997). See also Leominster v. Stratton, 58 Mass. App. Ct. 726, 728, rev.den., 440 Mass. 1108, 799 N.E.2d 594 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den. (2000); McIsaac v. Civil Service Comm'n, 38 Mass App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 390 Mass. 1102 (1983).

The Appellant, a 33-year veteran of the Marblehead Police Department who currently serves as a sergeant, made inappropriate comments in front of two male police officers and a female ADA. The comments allegedly made one of the male police officers feel uncomfortable. The

Town found that the statement attributed to the Appellant created a hostile work environment which is a violation of the Town's sexual harassment policy. Finally, the Town found that the Appellant fabricated police reports by denying she made the statement attributed to her. As a result, the Town suspended the Appellant for 30 days for fabricating the reports (untruthfulness), 10 days for making the comments (conducting unbecoming a police officer) and 10 days for creating a hostile work environment (violation of the Town's sexual harassment policy).

I address the charges in the reverse order listed above. The Town has not shown, by a preponderance of the evidence, that the Appellant violated its sexual harassment policy. Even if I were to accept that the Appellant made the comments attributed to her, an issue addressed below, the Town has not shown that it resulted in a hostile work environment, as alleged. For the reasons referenced in the findings, Daigle's contention that was he was offended that such comments were made in front of a "female civilian" is preposterous. Even Tarr acknowledges that *she* was not offended by whatever remarks were made by the Appellant. In fact, it was Tarr who initiated the locker-room type banter in the first place. Further, it appears that the Town Administrator wasn't fully aware of the social contacts between Daigle and Tarr or that Daigle himself thinks nothing of posting what some would consider offensive stickers on his Town-issued locker in the Police Department. Much of this information could have been gleaned by the Town Administrator had he followed the written procedures requiring an interview with both the alleged victim and the alleged perpetrator.

Similarly, the Town has not shown, by a preponderance of the evidence, that the Appellant engaged in conduct unbecoming a police officer. Again, even if I were to accept that the comments were made, the Town has dramatically overreached in leveling this charge against the Appellant. There is no dispute that the Appellant joined a conversation where the f word was

being tossed around liberally by all parties, including Tarr's references to individuals being "fucking wasted" at the out-of-state conference where Decker was a presenter. As referenced above, Tarr was not offended by whatever comment the Appellant made. Further, even Sergeant Decker left the police department after the conversation with no intention of filing a report about what occurred until he was approached by Daigle.

That leaves the most substantive charge of untruthfulness. For decades, the Commission has recognized that a police officer must be truthful at all times and that failure to do so constitutes conduct unbecoming an officer. MacHenry v Wakefield., 7 MCSR 94 (1994). Lying in a disciplinary investigation alone is grounds for termination. LaChance v. Erickson, 118 S. Ct. 753 (1998), *citing* Bryson v. United States, 396 U.S. 64 (1969). The Commission has stated that "it is well settled that police officers voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens." Garrett v. Haverhill, 18 MCSR at 381, 385 (2005). Specifically, there "is a strong public policy against employing police officers who are untruthful." Royston v., 19 MCSR 124, 128 (2006). Therefore, "a police officer that has lost his credibility can no longer effectively perform the duties of the position." Pearson v. Whitman, 16 MCSR 46, 50 (2003)

One of the principal functions of police officers is to act as witnesses on behalf of the government in criminal cases. An officer who falsifies a police report of any kind indicates unwillingness or an inability to truthfully report details. Accordingly, such an officer becomes an ineffective witness and his credibility to represent the public interest in court is destroyed. The duty of a police officer to truthfully answer questions about his conduct, reasonably related to her fitness to perform official duties, has been well-established for decades. See e.g., Broderick v. Police Comm'r of Boston, 368 Mass. 33 (1975); Silverior v. Municipal Court of the

City of Boston, 355 Mass. 623 (1969); Mass. Parole Bd. V. Civil Service Comm’n., 47 Mass. App. Ct. 760 (1999). Lying in a disciplinary investigation is typically grounds for termination. See Lachance v. Erickson, 522 U.S. 262, 265 (1998) citing Bryson v. United States, 396 U.S. 64, 72 (1969). For all of the above reasons, the Commission has often upheld a police officer’s discharge based upon the officer’s dishonesty.²

Given the potentially career-ending consequences of finding that a police officer has been untruthful, the fact finder’s decision regarding alleged untruthfulness, including the decision of the local Appointing Authority, should be made with the highest degree of objectivity and supported by a preponderance of the evidence. Based on my review of the sworn testimony and documentary evidence, that is not the case here.

In December 2009, the parties were in the midst of settling what was apparently a protracted civil suit that the Appellant had brought against the Town. It appears that the suit was common knowledge among the rank and file of the Police Department and some police officers had been required to provide depositions as part of that litigation. During this same month, the Appellant engaged in a conversation with two fellow police officers and an ADA that ultimately resulted in the charge of untruthfulness.

As referenced in the findings, the conversation had little to do with official business. A female ADA (Tarr) was sitting in the Officer in Charge (OIC) office of the police department bantering with Sergeant Decker. The Appellant eventually joined the conversation and Decker

² See Royston v. Billerica, 19 MCSR at 128-29 (upholding discharge of police officer who “knowingly lied to the Chief during a departmental investigation to cover up” his own misconduct); Garrett v. Haverhill, 18 MCSR at 385-86 (reasonable justification for discharge of police officer who repeatedly presented false testimony during departmental investigation of officer’s misconduct); Meaney v. Woburn, 18 MCSR 129, 133-35 (discharge upheld for police officer based, in part, on officer’s consistent dishonesty and “selective memory” during departmental investigation of officer’s misconduct); Pearson v. Whitman, 16 MCSR at 49-50 (appointing authority’s discharge of police officer who had “a problem with telling the truth” upheld); Eisenbeiser v. West Springfield, 7 MCSR 99, 104 (discharge upheld based, in part, on officer’s dishonesty as his misconduct was ongoing, intentional and showed no signs of improvement).

and Tarr showed the Appellant some humorous pictures taken as part of that trip, with Tarr making reference to some individuals on the trip being “fucking wasted.” At some point, the conversation between Decker and Tarr moved to the hallway and Decker began talking about a local woman who used to walk around Town saying “fuck you” to police officers. When he said he couldn’t remember the woman’s name, the Appellant walked out and refreshed his memory. At some point, Officer Daigle joined the conversation and the good-natured joking about the local woman continued. Tarr then said words to the effect of “that’s alright, Daigle tells me to fuck myself at court all the time.” Although both the Appellant and Daigle agree that Tarr made this remark, Decker has no memory it. His inability to accurately remember a key part of this verbal exchange is troubling. Put simply, he has no recollection of remarks that would paint Tarr in a bad light, but he has a vivid recollection of a reply made less than a second or two later that would paint the Appellant in a bad light.

Decker then turned away and began leaving the area through a nearby door. It was apparently at this point that the Appellant made a remark that Daigle found offensive. According to Daigle and Decker, the Appellant replied to Tarr by saying words to the effect of “No, Emily, he’s not stating ‘fuck you’, he’s saying he wants to fuck you.” According to the Appellant, she did not say these words. According to her, she stated words to the effect of “Oh nice. *I don’t think that’s what he meant*” (with no profanity being used).

For the reasons referenced above, I have difficulty crediting Decker’s recollection of this conversation. For many of the reasons cited in the findings, I also have difficulty relying on Daigle’s testimony to support the Town’s determination that the Appellant was untruthful. Daigle appeared to be less than candid about his prior social contacts with Tarr and his assertion that he would be offended by such comments is absurd for the reasons cited in the findings.

Further, despite being told by Tarr that she was not offended by whatever comments were made by the Appellant, Daigle ultimately decided to file a complaint against the Appellant.

The Town's handling of Daigle's complaint has convinced me that the ultimate decision to discipline the Appellant was retaliatory and based on pretext. After Daigle told Decker how offended he was by the Appellant's comments, Decker quickly penned an email directly to the Chief stating in part that the complaint, "involves something I believe you will want to address directly." In sharp contrast to how he would handle a similar complaint that the Appellant would soon file against Decker, Chief Picariello met personally with Daigle about his complaint and advised him that he had the right to file a complaint. A day or two later, Decker filed a report with his recollection of the event. In the interim, Chief Picariello met personally with Tarr.

Decker filed his above-referenced report and, upon the Chief's return from vacation, Daigle decided to file his complaint. Both Decker and Daigle spoke with Tarr and informed her that they were filing these reports. 17 days after the conversation in question and after Daigle, Decker and Tarr had spoken with each other about filing their reports, the Appellant was finally informed that a complaint was being lodged against her. Although Chief Picariello met personally with the other percipient witnesses, he did not meet with the Appellant "on the advice of counsel". Rather, he instructed Captain Mills, who is responsible for internal investigations, to get a written statement from the Appellant. I found Captain Mills to be a highly credible witness and an individual with high integrity. His recollection of events was thorough, candid and objective.

Mills met with the Appellant at 8:00 A.M. on January 7, 2010 and informed her that she needed to write a report about the conversation that occurred 17 days ago by 12:00 Noon. The Appellant responded with a written request to see the complaint that had been filed against her. At approximately 1:08 P.M. that same day, Mills received a call from the City attorney who asked Mills if he had received the Appellant's report. Mills informed the City Attorney of what he had received and was then instructed to call the Appellant back in and hand her a copy of the complaint and order her to file a report by 4:00 P.M. that day, which she did.

Chief Picariello then forwarded the reports to the Board of Selectmen through the Town Administrator, asking them to conduct a hearing to determine if the Appellant had been untruthful and engaged in conduct unbecoming a police officer. Chief Picariello stated that he didn't want to make any final determination or recommendation regarding discipline (including a possible 5-day suspension he was authorized to order) because of the pending civil suit.

Upon reviewing the information from the Chief, the Town Administrator added on a charge of violating the Town's sexual harassment policy, asked the Board of Selectmen to appoint him as a hearing officer and then conducted a hearing after which he found that the Appellant was untruthful, had engaged in conduct unbecoming a police officer and had violated the Town's sexual harassment policy.

In short, the Appellant never stood a chance here. A complaint was brewing against her for 17 days and she was never informed about it. During that time, the Police Chief met with the other percipient witnesses and deemed them credible. He did not meet with the Appellant. The other percipient witnesses had many days to write their reports and they spoke to each other about the filing of their reports. The Appellant was given four hours to remember an incident

that occurred 17 days ago. When she asked for more information, the internal investigator was instructed by the City attorney to give it to her, but to give her a hard deadline of just under 3 hours to read the additional information and submit her report. After Chief Picariello forwarded the report to the Board of Selectmen to determine if the Appellant should be disciplined for untruthfulness and conducting unbecoming a police officer, the Town Administrator then added a charge of sexual harassment and failed to follow his own written regulations about investigation such an allegation. The Town Administrator then served as the hearing officer and accepted the rather preposterous assertion that Daigle was deeply offended by the Appellant's remarks and concluded that the Appellant, among other things, had created a hostile work environment.

This biased, predetermined process undermines the Town's determination that the Appellant was untruthful. Further, based on the de novo hearing at the Commission, I am unable to credit the testimony of Decker and Daigle regarding what the Appellant did – or did not – say on December 22, 2009. Also, although I accept that Tarr was an unavailable witness, and I could give weight to her report, I do not. In this particular case, I would need to hear her live testimony before crediting any of her statements.

It is the function of the hearing officer to determine the credibility of the testimony presented before him. 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); (In cases where live witnesses giving different versions do testify 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);

Connor v. Connor, 77 A. 2d. 697 (1951) (the opportunity to observe the demeanor and appearance of witnesses becomes the touchstone of credibility).

That leaves a credibility assessment of the Appellant. I am under no false illusions about the Appellant's propensity to engage in locker room banter with employees within the predominantly male police force. I was troubled in particular by the incident described by Officer Alex which appears to be a case in which the Appellant made inappropriate statements to Alex in front of others. Here, however, I am presented with two equally plausible recollections of a conversation that occurred on December 22, 2009. As referenced above, I do not credit the key portions of the testimony of the other two percipient witnesses who testified. I credit the Appellant's testimony.

For all of the above reasons, the Appellant's appeal under Docket No. D-10-46 is hereby ***allowed***. The Appellant's 50-day suspension is overturned and she is to receive all appropriate back pay and benefits due to her.

Civil Service Commission

Christopher C. Bowman, Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and McDowell, Commissioners) on June 30, 2011.
A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case.

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

Notice:

Douglas Louison, Esq. (for Appellant)

Marc Miller, Esq. (for Appointing Authority)