

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

One Ashburton Place, Room 503
Boston, MA 02108
617.727.2293

PETER KINNAS,
Appellant,

v.

D1-10-151

TOWN OF SHREWSBURY,
Respondent.

Appellant's Attorney:

Andrew J. Gambaccini
Reardon, Joyce & Akerson, P.C.
4 Lancaster Terrace
Worcester, MA 01609

Respondent's Attorney:

T. Philip Leader, Esq.
34 Mechanic Street
Worcester, MA 01608

Commissioner:

Christopher C. Bowman

DECISION

Pursuant to G.L. c. 31, § 43, the Appellant, Peter Kinnas (hereinafter "Kinnas"), appealed the decision of the Town of Shrewsbury (hereinafter "the Town") to terminate him from his position as a police officer with the Shrewsbury Police Department (hereinafter "the Department") for conduct unbecoming an officer, untruthfulness and violating the Town's sexual harassment policy. The appeal was filed with the Commission on June 21, 2010. A pre-hearing conference was held at the offices of the Commission on July 19, 2010. A full hearing was held on September 30, 2010 and October 1, 2010 at the Shrewsbury Town Hall, 100 Maple Avenue in Shrewsbury, Massachusetts. A digital recording was created of the hearing and both parties were provided with a CD of the proceeding. The hearing was declared to be private, although,

without objection, Assistant Town Manager Michael Hale and Sara Goldthwaite, Kinnas's girlfriend, were present for both days of the hearing. Other than the Appellant, the witnesses were sequestered. Following the close of the hearing, proposed decisions were submitted by both parties on November 15, 2010.

FINDINGS OF FACT

Twenty-seven (27) exhibits were entered into evidence. Based upon the documents admitted into evidence and the testimony of:

Called by the Appointing Authority:

- Daniel Wnek, police officer, Shrewsbury Police Department;
- Amy Wnek, wife of Daniel Wnek;
- Sergeant Michael Cappucci, Shrewsbury Police Department;
- Elaine Seveney, mother of Amy Wnek and mother-in-law of Daniel Wnek;
- Kelly Donahue, fiancée of Sergeant Michael Cappucci;
- Mary Thompson, Town Accountant and Sexual Harassment Officer, Town of Shrewsbury;
- Lieutenant Alfred Pratt, Shrewsbury Police Department;
- Sergeant Randy Holmquist, Shrewsbury Police Department;
- David Faucher, police officer, Shrewsbury Police Department;
- Peter Kinnas, Appellant;
- James Hester, Police Chief, Town of Shrewsbury;
- Daniel Morgado, Town Manager, Town of Shrewsbury;

Called by the Appellant:

- Shawn Valliere, police officer for the Town of Shrewsbury Police Department;
- Joelle Valliere, wife of Shawn Valliere;

- Peter Kinnas, Appellant and former police officer for the Town of Shrewsbury Police Department; *see* footnote one;

I make the following findings of fact:

1. The Appellant is a twenty-eight (28) year-old male who resides in Worcester. He graduated from Taconic High School in Pittsfield in 2001 and received a Bachelors degree in criminal justice from Curry College in 2009. (Testimony of Appellant)
2. The Appellant was a tenured civil service employee in the Shrewsbury Police Department prior to being terminated on June 18, 2010. He had been employed as a police officer in Shrewsbury since August 10, 2006. He has prior law enforcement experience from working in several western Massachusetts communities including Otis, Tyringham, Becket, Williamstown and Pittsfield. (Stipulated Facts)
3. The Town Manager is the Appointing Authority for police officers in Shrewsbury. (Stipulated Fact) Shrewsbury is a community with a population of approximately 35,000 and its police department has forty-two uniformed officers, including a Police Chief, three (3) Lieutenants, five (5) sergeants and thirty-three (33) police officers. (Testimony of Chief Hester)
4. The Appellant has no prior disciplinary record and, prior to the incident which resulted in his termination, was considered to be a good police officer. (Stipulated Facts and Testimony of Chief Hester)
5. At the time of his termination, the Appellant was assigned to the 11:00 P.M. to 7:00 A.M. shift as a patrol officer. He was scheduled to work this shift commencing at 11:00 P.M. on Friday, May 21, 2010 and extending until 7:00 A.M. on Saturday, May 22, 2010. (Testimony of Appellant)

6. Fellow police officer Daniel Wnek was assigned to work a double shift just prior to the Appellant and he worked from 7:00 A.M. until 11:00 P.M. on Friday, May 21, 2010. Daniel Wnek is married to Amy Wnek who, at the time, was within one month of giving birth. Prior to this incident, he considered the Appellant to be a friend of his, although neither of them had ever visited each other's homes. (Testimony of Daniel Wnek)
7. It is undisputed that Shrewsbury police officers are permitted to use the Department's computers to check their personal email accounts while on duty and communicate with their family members.
8. While preparing a report on the Department's computer on the night of Friday, May 21, 2010, Officer Wnek logged onto his wife's "Facebook" account in order to communicate with his young daughter regarding a computer game they were playing involving farm animals. (Testimony of Daniel Wnek)
9. Officer Wnek stayed after the 11:00 P.M. completion of his shift on Friday, May 21st until about midnight in order to complete his case report. As he drove home, he realized that he had forgotten to log out of his wife's Facebook account on the computer, but he was tired from working a double shift and believed that someone on the next shift would log out of the account. (Testimony of Daniel Wnek)
10. At approximately 5:30 A.M. on Saturday morning, the Appellant returned to the police station to work on reports and check his email. When he entered the roll call room, the Appellant noticed that the police department's computer had been left on and that the Facebook account of Amy Wnek was open. (Testimony of Appellant)
11. The Appellant noticed that on the bottom page of the computer screen that a message box was open. He was fairly certain that someone had to be online on the receiving end, but he

had no idea who it was. The Appellant then wrote the message “shut up bitch” in the message box. (Testimony of Appellant) It is now undisputed that the person on the receiving end of that message was Amy Wnek’s mother, Elaine Seveney.

12. The Appellant then engaged in the publishing of several other messages and postings through Amy Wnek’s Facebook account including: 1) posting a status update on Amy Wnek’s Facebook “wall” that stated “oops, I pooped my pants” in the name of Amy Wnek; 2) posted remarks on the Facebook “wall” of fellow police officer Shawn Valliere that indicated that “Amy Wnek” did not know why Shawn Valliere treated Dan Wnek the way the he did because Dan Wnek looked up to Shawn Valliere, stating that Shawn Valliere’s toddler son exhibited more characteristics of maturity than his father; 3) commented on a picture of Sergeant Michael Cappucci, in uniform, indicating that Cappucci looked sexy in his “unibrow”, then correcting the typographical error and indicating that the writer meant “uniform”; 4) posted comments associated with pictures on the Facebook page of Sean Bohdiewicz, a Shrewsbury firefighter, asking if Bohdiewicz had been fired yet and, with respect to a picture of Mark Hester of the Shrewsbury Police Department, commenting “sweet ass”; 5) posted on the Facebook “wall” of Kelly Donahue (the girlfriend of Sergeant Cappucci) that Donahue, Amy Wnek and Joelle Valliere (the wife of Shawn Valliere) should have a “three-way” sexual encounter for Donahue’s birthday; and 6) clicking on a picture showing that an individual named Jen Lacey, who was Amy Wnek’s brother’s ex-wife’s sister, was online and sending her an instant message that indicated words to the effect of “stop being a cunt.” (Testimony of Appellant, Thompson, Dan Wnek, Amy Wnek, Elaine Seveney, Shawn Valliere, Kelly Donahue, Michael Cappucci, Joelle Valliere; Exhibits 1-5; 10, 13, 14.)

13. The Town's sexual harassment policy prohibits the use of "sexual epithets, jokes, written or oral references to sexual conduct, gossip regarding one's sex life; comments on an individual's body, comments about an individual's sexual activity, deficiencies or prowess" and "suggestive or insulting comments" of a sexual or demeaning nature. (Exhibit 12)
14. The Shrewsbury Police Department Rules and Regulations state that "conducting unbecoming an officer should be such as would alert a reasonable officer that his or conduct under the circumstances would be inappropriate." (Exhibit 11)
15. After publishing the above-referenced messages, the Appellant logged out of Amy Wnek's Facebook account, completed his shift and left the police station at 7:00 A.M. on Saturday, May 22nd. (Testimony of Appellant)
16. At approximately 8:00 A.M. that Saturday morning, Amy Wnek was at home and was awoken by a telephone call from her mother, Elaine Seveney. Ms. Seveney asked Amy Wnek if she was alright. When Amy Wnek asked what prompted such an inquiry, Ms. Seveney indicated that she had received a message through Amy's Facebook account stating "shut up bitch" and also that the status updates on Amy's account stated, "oops, I pooped my pants." (Testimony of Elaine Seveney)
17. Ms. Seveney testified before the Commission that when she first read the Facebook posting, which she believed was written by her daughter Amy, her first thought was "what did I do?" She also wondered whether her daughter might be having a diabetic reaction. (Testimony of Elaine Seveney)
18. I found Ms. Seveney's testimony regarding her initial reaction to the postings and messages on her daughter's Facebook account to be credible. I believe that she was sincerely upset and concerned when she saw these postings and messages and that it caused her considerable

stress at the time. While Ms. Seveney appeared to be less than forthcoming under cross examination regarding whether she received a request from counsel for the Appellant for medical records, this did not detract from her credible testimony regarding her reaction to the postings and messages. (Testimony, demeanor of Seveney)

19. Ms. Seveney subsequently received a call from her son. He was upset because his ex-wife had called him complaining about a Facebook message purportedly posted by Amy Wnek to her sister which stated, “Why are you being such a fucking cunt?” (Testimony of Elaine Seveney)
20. Upon receiving the early morning phone call from her mother, Amy Wnek became very upset and woke up her husband Dan to ask him if he had left her Facebook account open at work. Dan and Amy Wnek then accessed her Facebook account from their home computer. They saw many of the postings or messages referenced above and deleted those that could be deleted. (Testimony of Dan and Amy Wnek)
21. Amy Wnek testified that she was very upset and embarrassed by the bogus postings and that the incident caused her great stress during the late stages of her pregnancy. (Testimony of Amy Wnek).
22. Amy Wnek was a credible witness. Although she appeared somewhat nervous and appeared to be concerned about giving the “right answers” during her testimony, I have no doubt that she was upset at the time by the messages and postings added to her Facebook account by the Appellant. She candidly acknowledged that she had posted links on her account to websites of a sexual nature, but this did not detract from her testimony that she was concerned and upset about another person sending obscene messages to members of her family under her name. (Testimony, demeanor of Amy Wnek)

23. Sometime between 7:00 and 8:00 A.M. on Saturday, May 22nd, Shrewsbury police officer Shawn Valliere saw a posting on his Facebook account which he believed had been sent from Dan Wnek's wife Amy. As referenced above, the posting indicated that "Amy Wnek" did not know why Shawn Valliere treated Dan Wnek the way that he did because Dan Wnek looked up to Shawn Valliere and that Shawn Valliere's toddler son exhibited more characteristics of maturity than his father. (Testimony of Shawn Valliere)
24. Shawn Valliere testified before the Commission that he was confused and concerned when he read the above-referenced postings and couldn't understand why Amy Wnek would make such statements. He was concerned enough to call Dan Wnek at home that morning and ask him why Amy had authored these postings. Dan Wnek explained that the postings were not from Amy and that he had left her Facebook account open at work the previous night. During that phone conversation, Dan Wnek warned Mr. Valliere that there were other bogus postings that referenced a "three-way" involving Valliere's wife, Joelle. Valliere contacted his wife Joelle and gave her a heads-up that any postings from Amy Wnek on her Facebook account were not actually posted by Amy. (Testimony of Shawn Valliere)
25. Shawn Valliere testified that he is aware of other circumstances where officers have sent prank emails under other officers' email accounts, but could never remember receiving one with vulgar language such as the ones admittedly authored by the Appellant. (Testimony of Shawn Valliere)
26. Once the inquiry to discover content was completed, Dan Wnek telephoned the Shrewsbury Police Department and advised the patrol day watch supervisor, Sergeant Benoit, that he had left his wife's Facebook account open at work and that someone must have accessed it and

published various messages and postings. Dan Wnek has faced criticism from some of his fellow officers for reporting this information to his superiors. (Testimony of Dan Wnek)

27. Dan Wnek was a reluctant witness. He was visibly uncomfortable while testifying and appeared anguished about the personal fallout from this incident, including the negative impact it has had on his personal and working relationships with fellow officers.

Notwithstanding his reluctance and visible discomfort throughout his testimony, Dan Wnek had a good recall of events and much of his testimony regarding how events unfolded was corroborated by other witnesses. I credit his testimony. (Testimony, demeanor of Dan Wnek)

28. Joelle Valliere, Shawn's wife, testified that by the time she found out about the postings referenced here, she knew they had not been posted by Amy and found the postings referencing a "three-way" to be light-hearted and funny. (Testimony of Joelle Valliere)

29. Ms. Valliere's testimony, albeit limited, was credible. Although her comments were geared toward portraying the Appellant in a favorable light, she offered candid, straightforward answers to all questions posed to her. (Testimony, demeanor of Joelle Valliere)

30. Sergeant Michael Cappucci testified before the Commission that he received a message on May 22, 2010 that he believed was from Amy Wnek poking fun at his purported "unibrow". He thought it was a joke but was curious why Dan Wnek's wife would be sending him such an email. (Testimony of Cappucci)

31. Sergeant Cappucci received a telephone call from Dan Wnek that morning explaining that the message was not from Amy and warning him that there was also a posting regarding a "three-way" that referenced his girlfriend, Kelly Donahue. Cappucci later spoke with Ms. Donahue and informed her that any postings from Amy on her Facebook account were not sent by Amy. (Testimony of Cappucci)

32. Sergeant Cappucci testified that officers occasionally send out prank emails to one another with light-hearted jokes poking fun at other officers. (Testimony of Sergeant Cappucci)
33. Sergeant Cappucci was a good witness and I credit the entirety of his testimony. He had a calm demeanor and answered questions posed to him in a thoughtful manner that showed he took his sworn testimony before the Commission seriously. (Testimony, demeanor of Cappucci)
34. Turning back to the progression of events of May 22, 2010, as referenced earlier, at approximately 8:42 A.M. that Saturday, Dan Wnek called the patrol day watch supervisor, Benoit, to report misuse of a departmental computer. (Exhibit 5)
35. At 2:35 p.m. that day, Sergeant Benoit summarized his understanding of the situation in an email to Acting Lieutenant Alfred Pratt. (Exhibit 5)
36. Pratt was scheduled to work the 3:00 P.M. to 11:00 P.M. shift that Saturday and he testified that, shortly before 3:00 P.M., he was approached by Benoit and advised verbally as to the situation. Approximately one hour later, Pratt called Chief Hester on his cell phone to discuss the matter with him. (Testimony of Pratt)
37. During their conversation, Pratt and Chief Hester resolved, given that all indications were that the postings occurred during the 11:00 P.M. to 7:00 A.M. shift and the same officers would be returning to duty that night (Saturday night, May 22nd roll call at 11:00 P.M.), that Sergeant Randy Holmquist, who was the supervisor of that shift, would speak to the members of the shift. (Testimony of Pratt and Holmquist)
38. Prior to the 11:00 P.M. roll call on Saturday, May 22nd, the Appellant received a phone call in the early afternoon from Detective Michael McGinnis. McGinnis was giving the Appellant a heads-up about the budding controversy regarding messages sent from Amy

Wnek's Facebook account. When McGinnis asked the Appellant if he was involved, the Appellant said "no"¹. (Testimony of Appellant)

39. Shortly after receiving the phone call from McGinnis, the Appellant received another heads-up phone call from fellow police officer David Faucher. Faucher asked about the incident and the Appellant denied any involvement. (Testimony of Appellant and Exhibit 10)

40. At the 11:00 P.M. roll call on Saturday, May 23rd, Pratt and Holmquist convened the officers on the shift, namely, Kinnas, David Faucher (whom the Appellant had spoken to earlier in the day), Chris Boudreau and Sean Maynard, in the sergeants' room. (Testimony of Appellant)

41. Pratt, in a written report submitted on May 27, 2010, indicated that he briefly explained the contours of the incident involving Dan Wnek and advised the shift that Holmquist would be speaking with them. (Exhibit 7)

42. Pratt also wrote in his report that he had suggested that the officers be truthful with their answers and testified that he told the officers that dishonesty would come back to bite them more than anything. (Exhibit 7 and Testimony of Pratt)

43. Both Pratt and Holmquist recalled Officer Boudreau, in the presence of the other officers, expressing anger at Dan Wnek, stating that he believed Dan Wnek to be starting trouble and that Boudreau did not believe that anyone on the shift was involved. (Testimony of Pratt and Holmquist) Upon hearing Boudreau's protest, the Appellant did not correct Boudreau's mistaken assertion that nobody on the shift was involved.

¹ Although McGinnis serves as a union representative, he testified that he was not talking to the Appellant in that capacity when he made the heads-up phone call to the Appellant.

44. Lieutenant Pratt was a good witness. He has a no-nonsense, military-like demeanor and it was clear that he takes his job and the duties and responsibilities assigned to him very seriously. I credit his testimony. (Testimony, demeanor of Pratt)
45. Pratt then left the room and Holmquist, keeping the shift members together, pointed at each officer and asked "did you do it?"; to which each officer, including the Appellant, responded "no , I did not." (Testimony of Holmquist and Appellant)
46. Sergeant Holmquist was also a good witness. He had a vivid recollection of what occurred during the roll call referenced above and his testimony was corroborated by other witnesses, including the Appellant. I credit his testimony. (Testimony, demeanor of Holmquist)
47. Immediately after the roll call, the Appellant spoke with Officer Faucher at which time he told Faucher that he did not access Amy Wnek's Facebook account. (Testimony of Faucher)
48. The rules and regulations of the Shrewsbury Police Department require that Department employees to "speak the truth at all times when on duty or when discussing a matter arising out of or related to the employee's duties or the operation, organization or business of the department." (Exhibit 11)
49. At 1:25 A.M. on Sunday morning, Holmquist sent an email to Pratt indicating that he had spoken with the four officers, and separately with a dispatcher, and that all questioned had indicated that each had no involvement. (Exhibit 6)
50. After the completion of his shift at 7:00 A.M.. on Sunday, May 23, 2010, the Appellant was not scheduled to work in the Department again until 3:00 P.M. on Wednesday, May 26, 2010, when he was scheduled to work a double shift from 3:00 P.M. through 11:00 P.M. and then 11:00 P.M. through 7:00 A.M. on Thursday, May 27, 2010. (Testimony of Appellant)

51. While the Appellant was out of work, on Monday, May 24, 2010, Chief Hester consulted with Bishop, the Department's computer support specialist, to learn if Bishop could determine the identity of the user who had posted the content through Amy Wnek's Facebook account. (Testimony of Chief Hester)
52. Bishop conducted a preliminary search which, Chief Hester testified, led to an identification of the Appellant as having been on the computer at a time close to when the content was published, although it could not be said with certainty that the Appellant was the publisher. (Testimony of Chief Hester; Exhibit 8)
53. Chief Hester asked that the computer be removed from the roll call room, since further forensic inquiry would need to take place and outside resources potentially would have to be secured. (Testimony of Chief Hester)
54. On Wednesday, May 26, 2010, the Appellant returned to work and saw that the roll call room computer was missing. He was aware that the Department's computer expert had removed the computer to conduct a further investigation. (Testimony of Appellant)
55. After noticing that the Department's computer had been removed for further investigation, the Appellant spoke to Detective McGuinness and admitted his involvement. McGuinness told the Appellant to report this directly to Lieutenant McCarthy which the Appellant did. McCarthy told the Appellant to submit a written report to the Police Chief and the Appellant did so. (Testimony of Appellant)
56. Chief Hester collected and evaluated the reports of his supervisors and made a recommendation to the Town Manager that the Appellant be charged with untruthfulness, conduct unbecoming a police officer and violation of the Town's sexual harassment policy. (Testimony of Chief Hester)

57. Chief Hester has been employed by the Town's police department for twenty-three years, working his way up the ranks from the position of police officer. He was a good witness and I credit his testimony. He has a quiet and serious demeanor and his sincere concern for the well-being of the police department was palpable during his testimony before the Commission (Testimony of Chief Hester)

58. Chief Hester testified that, prior to this incident, he always considered the Appellant to be a good police officer with no disciplinary history. He also testified that the Appellant showed remorse when he finally admitted to accessing Amy Wnek's Facebook account and sending the messages or postings in question. Chief Hester was deeply troubled, however, by the Appellant's untruthfulness, including his untruthful statements to superior officers as part of this investigation. "Lying is not a mistake" said Hester and recounted the number of times that the Appellant had lied about the incident. He spoke with conviction about the need for police officers to be truthful at all times and testified that he considered the Appellant to be "damaged goods" as a result of his untruthfulness which could potentially need to be disclosed as part of court proceedings in which the Appellant is required to testify as a witness. (Testimony of Chief Hester)

59. Chief Hester testified that by accessing the Facebook account of Amy Wnek without authorization and by creating and sending what he considers offensive postings and messages to individuals outside the Department, the Appellant engaged in conduct unbecoming a police officer. (Testimony of Chief Hester)

60. Chief Hester was questioned about a prior investigation of another police officer regarding a different incident that involved the police officer being absent from duty for two hours in order to visit a woman with whom he was having an extramarital relationship. That officer

received a five-day suspension. Chief Hester testified that the circumstances regarding the other police officer were distinguishable from the instant matter as the other officer was truthful during the investigation and was not charged with untruthfulness. (Testimony of Chief Hester)

61. Michael Hale is the Assistant Town Manager in Shrewsbury and he is the designated person to investigate potential violations of the Town's sexual harassment policy. Mary Thompson has been the Town Accountant in Shrewsbury for twenty-four (24) years. She assisted Mr. Hale with the investigation regarding whether the Appellant's actions violated the Town's sexual harassment policy. (Testimony of Thompson)

62. As part of her investigation, Ms. Thompson reviewed the various messages and postings made by the Appellant on Amy Wnek's Facebook account and interviewed individuals including the Appellant, Officer Wnek and his wife Amy, Officer Shawn Valliere, Sergeant Michael Cappucci, Kelly Donahue, Jennifer Mills Lacey, Darcy Oberg Gauthier and Firefighter Sean Bohdiewicz. (Testimony of Thompson and Exhibit 14)

63. Mr. Hale and Ms. Thompson submitted a report to the Town Manager regarding their findings on June 1, 2010. (Testimony of Thompson and Exhibit 14)

64. Mr. Hale and Ms. Thompson, based on their review of the documents and statements of those interviewed, concluded that the Appellant violated the Town's sexual harassment policy by sending the following messages or postings on Amy Wnek's Facebook account: 1) a message to Jennifer Mills Lacey that stated, "stop being a fucking cunt"; 2) a posting on Kelly Donahue's "wall" wishing her a happy birthday and suggesting that Kelly, Joelle Valliere and Amy Wnek engage in a three-person sex act; 3) a message to Elaine Seveney (Amy Wnek's mother) that stated, "shut up bitch"; 4) a posting on Sean Bohdiewicz's

Facebook page that stated “sweet ass” under a photograph of Officer Mark Hester. (Exhibit 14)

65. Ms. Thompson struck me as a dedicated public employee who understood the seriousness of her task here which she approached with an open mind. I credit her testimony. (Testimony, demeanor of Thompson)

66. On June 16, 2010, the Town Manager, acting as the Appointing Authority, held a hearing to determine whether disciplinary action should be taken against the Appellant. The Town Manager heard from the same witnesses that testified before the Commission, with the exception of Officer Faucher, Joelle Valliere and Elaine Seveney, who did not testify at the Town hearing, but testified before the Commission. (Exhibit 1)

67. The Town Manager found that the Appellant violated the Department’s rules and regulations regarding truthfulness, engaged in conduct unbecoming a police officer and violated the Town’s sexual harassment policy. (Exhibit 1)

68. The Town Manager found that the Appellant inappropriately assumed the identify of Amy Wnek on her Facebook account and sent postings and messages that ranged from what the Town Manager considered “sophomoric in the form of bathroom humor to what [he found] to be seriously disturbing in the form of a vulgar insult in a sexual context.” (Exhibit 1)

69. The Town Manager also found that the Appellant lied to his immediate supervisor when questioned about his actions and lied to fellow officers who inquired with him about his involvement. (Exhibit 1)

70. The Town Manager also found that the Appellant’s actions “caused emotional distress, physical harm and a resulting hostile home environment which was brought into the

workplace since [the Appellant] chose to prey upon Officer Wnek's failure to close his wife's Facebook account on a workplace computer." (Exhibit 1)

71. The Town Manager found that the Appellant's behavior relative to the postings and messages discredited him as a police officer; that he further discredited himself by lying to a superior officer; and that only after the Appellant anticipated that his actions would be discovered, did the Appellant tell the truth regarding his involvement. (Exhibit 1)

72. The Town Manager found that some of the Appellant's messages were a direct violation of the Town's sexual harassment policy which prohibits sexual epithets, jokes or written references to sexual conduct which created a hostile workplace. (Exhibit 1)

73. The Town Manager terminated the Appellant leading to the Appellant's instant appeal to the Commission. (Exhibit 1 and Stipulated Facts)

74. The Town Manager was a good witness and I credit his testimony. He appeared to give considerable thought to his final decision after conducting a thorough hearing on the matter. I credit his testimony that he was not influenced by a letter he received from Amy Wnek's mother prior to issuing a decision. Although he focused multiple times in his testimony about how a "reasonable taxpayer" would view this matter, he was clearly aware of the need for any decision to be defensible under the "just cause" standard of the civil service law.

(Testimony, demeanor of Morgado)

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).

By a preponderance of the evidence, the Appointing Authority has shown that it had reasonable justification for disciplining the Appellant for untruthfulness, conduct unbecoming a police officer and violation of the Town’s sexual harassment policy.

Untruthfulness

The Appellant was untruthful on multiple occasions regarding whether he accessed the Facebook account of Amy Wnek and sent various messages and postings under her name. In the early afternoon of Saturday, May 22nd, several hours after accessing the Facebook account, the Appellant received a phone call from Detective Michael McGinnis. When McGinnis asked the

Appellant if he was involved in the Facebook incident, the Appellant said no. Shortly after receiving the phone call from McGinnis, the Appellant received another phone call from fellow police officer David Faucher. Faucher asked about the incident and the Appellant denied any involvement. At an 11:00 P.M. roll call that night, Officer Boudreau expressed anger at Dan Wnek, stating that he believed Dan Wnek was “starting trouble” and that Boudreau did not believe that anyone on the shift was involved. Upon hearing Boudreau’s protest, the Appellant did not correct Boudreau’s mistaken assertion that nobody on the shift was involved. During that same roll call, Sergeant Holmquist asked each officer present, "did you do it?"; to which the Appellant responded “no , I did not.” Immediately after the roll call, the Appellant spoke with Officer Faucher again at which time he told Faucher that he did not access Amy Wnek’s Facebook account.

In summary, the Appellant repeatedly lied to or misled his fellow officers regarding whether he accessed Amy Wnek’s Facebook account. Further, he lied to his commanding officer when queried about his involvement in this matter.

The Appellant argues that his untruthful statement to Sergeant Holmquist was a knee-jerk reaction to what he thought was an informal inquiry which, according to the Appellant, should not have occurred in front of other officers, but, rather, one-on-one. Police officers, including Mr. Kinnas, are not permitted to establish the conditions upon which they will be truthful. Rather, they must be truthful at all times.

Further, any suggestion that the Appellant was caught off-guard by the question posed to him by Sergeant Holmquist is contrary to the undisputed facts in this case. Prior to the roll call at which Sergeant Holmquist asked each officer whether he accessed Amy Wnek’s Facebook account, the Appellant received two “heads-up” phone calls from fellow officers regarding the

budding controversy. He lied to these officers about his involvement and, hours later, lied directly to his commanding officer in the presence of additional officers about his involvement. Finally, just moments before Holmquist's inquiry, another commanding officer reminded all officers about the importance of telling the truth. In short, Mr. Kinnas had ample time to check his moral compass here -- and chose to continue lying.

The Appellant's decision to come forward and acknowledge his actions did not occur until days later, after he learned that the computer he used to access the Facebook account had been removed for forensic investigation. Remarkably, the Appellant seeks to portray this decision to come forward at this late date as admirable and selfless, as, according to him, it prevented the Department from having to pursue its investigation any further. The Appellant's revisionism defies logic and common sense and undermines his credibility. Knowing that the Town would soon have an airtight case against him, he had no choice but to come forward.

An appointing authority is well within its rights to take disciplinary action when a police officer has "a demonstrated willingness to fudge the truth in exigent circumstances" because "[p]olice work frequently calls upon officers to speak the truth when doing so might put into question a search or embarrass a fellow officer." See Falmouth at 796, 801; citing Cambridge, *supra* at 303.

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 Billerica, 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). As a result, the Commission has often upheld a police officer’s discharge based upon the officer’s dishonesty.²

Chief Hester also offered credible testimony that the Appellant’s dishonesty would cause him to be “damaged goods” if he were to continue in his role as a police officer. I concur. The United States Supreme Court has decided that criminal prosecutors can be required to disclose to the defense certain information about the “untruthfulness” of a potential police witness or supervisor, in some cases, even if the defense does not specifically request it. E.g., United States v. Agurs, 427 U.S. 97, 108, 96 S.Ct. 2392, 2400 (1976), citing Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). See also Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375 (1985); “*Police Officer Truthfulness and the Brady Decision*”, 70 POLICE CHIEF, No. 10 (Oct. 2003) reprinted at policechiefmagazine.org. While there is some discretion as to what, and for how long a disclosure of indicia of untruthfulness is required or appropriate under the so-called “Brady Rule”, I defer to the Chief of Police here, whose reasonable judgment is that Officer Kinnas’s untruthfulness could compromise a future criminal prosecution.³

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); Rizzo v. Town of Lexington, 21 MCSR 634 (2008); (discharge upheld based partially on officer’s dishonesty regarding a use of force incident); Desharnias v. City of Westfield, 23 MCSR 418 (2009) (discharge upheld based primarily on officer’s dishonesty about a relatively minor infraction that occurred on his shift).

³I considered and found no merit to the Appellant’s argument that the Town’s decision to allow him to continue serving as a police officer while the disciplinary proceedings at the Town level were ongoing somehow undermines the Chief’s testimony that he is “damaged goods”.

Conduct Unbecoming an Officer

By accessing Amy Wnek's Facebook account without permission and sending vulgar messages and postings under her name, the Appellant engaged in conduct unbecoming an officer as his conduct was inappropriate under the circumstances.

I reject the Appellant's argument that his actions here were similar to others who sent out "prank" email messages under another officer's email account without his permission. While accessing another officer's email account without his or her permission should be prohibited under all circumstances and subject to appropriate discipline, there is a stark distinction regarding the actions of the Appellant here.

First, the Appellant was accessing the Facebook account of a police officer's wife, who is not a co-worker, without her permission. Second, the postings and messages were in some cases sent indiscriminately to unknown individuals on Ms. Wnek's "friends" list without any knowledge of their gender or age. In this case, two of the messages were sent to Amy Wnek's mother and an in-law. Finally, the postings and messages, sent under Amy Wnek's name, without her permission to her relatives, were vulgar in nature, referring to Ms. Wnek's mother as a "bitch" and her in-law as a "cunt". While such language is sometimes used as part of gallow humor between friends and/or co-workers, the context in which these vulgar messages were sent, under another person's name, was reckless and constitutes conduct unbecoming an officer.

The Appellant argues that most of the recipients of the bogus messages and postings were not offended by them and, in the case of the Appellant's mother, argues that she has stretched the truth regarding her reaction to the message sent to her. I carefully considered the testimony of Elaine Seveney and found her testimony regarding her initial reaction to the bogus email to be credible. Ms. Seveney was genuinely perplexed and concerned to get an online message from

her daughter, then eight months' pregnant, that stated "shut up bitch". Her concern was heightened when she read the sophomoric posting stating, "oops, I pooped my pants" which was out-of-character for her daughter. I credit her testimony that she thought her daughter might be having a diabetic reaction that prompted her to make the early-morning phone call.

Even Police Officer Shawn Valliere, who testified on behalf of the Appellant, acknowledged that he was confused about the Facebook posting he received, questioning why "Amy Wnek" purportedly believed that Valliere was mistreating her husband Dan, who "looked up to" Valliere. Although this message did not contain the vulgar language that was sent to Amy Wnek's relatives, it nonetheless had a sinister undertone to it. It was clear from the testimony that Shawn Valliere has a much closer friendship with the Appellant and his girlfriend than he does with Dan Wnek and his wife. Nothing in the Appellant's bogus email to Valliere could lead him to conclude that the email was a prank or hoax. Rather, it was a message of a personal nature that prompted Shawn Valliere to immediately call Dan Wnek at his home and question why his wife would make such statements. The Appellant was either unaware of, unconcerned about or eager to see the seeds of discontent sown between Valliere and the Wneks.

While it is not pivotal to the outcome of this appeal, the Appellant's inability to grasp the consequences of his actions was palpable throughout his testimony. Although Chief Hester found the Appellant to be "remorseful", I did not. Mr. Kinnas appeared unwilling or unable to distinguish his actions from those of others who had engaged in good-natured albeit immature pranks with each other. Further, after having several weeks to reflect on his behavior, he described his actions as "an incident of opportunity" that would not have occurred if *Dan Wnek* had not left his wife's Facebook account open. These statements are not indicative of someone with genuine remorse for his actions.

Violation of the Town's Sexual Harassment Policy

The Town's sexual harassment policy prohibits the use of "sexual epithets, jokes, written or oral references to sexual conduct, gossip regarding one's sex life; comments on an individual's body, comments about an individual's sexual activity, deficiencies or prowess" and "suggestive or insulting comments" of a sexual or demeaning nature.

After a thorough and impartial review that included a review of the postings and messages created by the Appellant on Amy Wnek's Facebook account and the recipients and/or readers of those postings and messages, two senior managers of the Town concluded that five of these postings or messages violated the Town's sexual harassment policy. After reviewing the same information and many of the same witnesses, I reached the same conclusion.

Having determined that it was appropriate to discipline the Appellant, the Commission must determine if the Town was justified in the level of discipline imposed, which, in this case, was termination.

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.'" Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. Even if there are past instances where other employees received more lenient sanctions for similar misconduct, however, the Commission is not charged with a duty to fine-tune an employee's discipline to ensure perfect uniformity. See Boston Police Dep't v. Collins, 48 Mass. App. Ct. 408, 412 (2000).

"The 'power accorded the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded the appointing authority.'"

Falmouth v. Civ. Serv. Comm’n, 61 Mass. App. Ct. 796, 800 (2004) quoting Police Comm’r v. Civ. Serv. Comm’n, 39 Mass.App.Ct. 594, 600 (1996). Unless the Commission’s findings of fact differ significantly from those reported by the appointing authority or interpret the relevant law in a substantially different way, the commission is not free to “substitute its judgment” for that of the appointing authority, and “cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation” E.g., Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006).

I have, based on the testimony of credible witnesses and the documentary evidence submitted, reached essentially the same findings as the Town. Specifically, I have found that the Appellant engaged in conduct unbecoming an officer, that he was untruthful and that he violated the Town’s sexual harassment policy.

Although the Appellant has no prior disciplinary history, that does not warrant the Commission’s intervention in terms of a modified penalty. The serious nature of the charges, including untruthfulness, warrants the discipline imposed by the City – termination.

Finally, I carefully reviewed the Appellant’s argument that another officer, engaged in similar misconduct, received a suspension, rather than termination. The facts and circumstances regarding this incident is distinguishable from the matter involving the Appellant for many reasons, including the fact that Chief Hester determined that the other officer was truthful at all times during the investigation which is not the case here.

For all of the above reasons, the Appellant's appeal under D1-10-151 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Stein and McDowell, Commissioners [Marquis – Absent]) on February 10, 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)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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

Notice to:

Andrew J. Gambaccini, Esq. (for Appellant)
T. Philip Leader, Esq. (for Appointing Authority)