

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

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

DAMIEN KOZIKOWSKI,  
*Appellant*  
v.

Docket No.: D1-13-32

CITY OF CHICOPEE,  
*Respondent*

Appearance for Appellant:

Michael P. Clancy, Esq.  
NAGE/IBPO  
1299 Page Blvd.  
Springfield, MA 01104

Appearance for Respondent:

Thomas J. Rooke, Esq.  
Associate City Solicitor  
17 Springfield Street  
Chicopee, MA 01013

Commissioner:

Cynthia Ittleman<sup>1</sup>

**DECISION**

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, Damien Kozikowski (hereinafter “Mr. Kozikowski” or “Appellant”), filed an appeal on February 14, 2013 with the Civil Service Commission (“Commission”), regarding the decision of the City of Chicopee (hereinafter “City” or “Respondent”), to terminate his employment from the Chicopee Police Department (“Department”). Mr. Kozikowski filed a timely appeal. A pre-hearing conference was held on March 13, 2013 and a full hearing was held on September 25, 2013, both at the Springfield State Building.<sup>2</sup> As this is a disciplinary matter and neither party requested that the

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<sup>1</sup> The Commission acknowledges the assistance of Law Clerk Ryan Clayton in the drafting of this decision.

<sup>2</sup> The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR § 1.01 and thereafter (formal rules) apply to adjudications before the Commission, with G.L. c. 31 or any Commission rules taking precedence in the event of a conflict.

hearing be conducted in public, the hearing was closed. G.L. c. 31, §41. On June 28, 2013, the parties filed an Order of Dismissal together, moving to stay further action in the case before the Commission pending the resolution of a related criminal proceeding. The Order was denied and the case proceeded. The hearing was digitally recorded and the parties were given a copy of the recording. The Appellant filed a post-hearing brief on November 12, 2013. The Respondent declined to file a brief. For the reasons stated herein, the appeal is denied.

## FINDINGS OF FACT

Twenty-one (21) exhibits were entered into evidence at the hearing. Based on these exhibits and the testimony from the following witness:

*For the Respondent:*

- William R. Jebb, Deputy Chief Chicopee P.D.<sup>3</sup>

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

1. Mr. Kozikowski is a tenured civil service employee and has been employed by the Department since September, 2007 as a patrol officer. (*Stipulated Facts*)
2. Mr. Kozikowski has no disciplinary record. (*Testimony of Jebb*)
3. Sometime in 2010, Mr. Kozikowski began having tension in his own marriage. Although married, Mr. Kozikowski was having a relationship with another woman since October, 2010. On December 22, 2010, Mr. Kozikowski's wife called the police to come to their marital home in response to a domestic dispute. Mr. Kozikowski's wife stated that Mr.

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<sup>3</sup> The Commission may draw an adverse inference when an Appellant fails to testify, and does so here, although the Appellant chose to not testify due to a pending criminal proceeding. (*See Town of Falmouth v. Civil Service Com'n*, 447 Mass. 814, 826 (2006) ("We have long held that a party in a civil case seeking shelter under the privilege against self-incrimination of the Fifth Amendment to the United States Constitution and art. 12 of the Declaration of Rights of the Constitution of Massachusetts may be the subject of a negative inference by a fact finder."))

Kozikowski allegedly said he would shoot any police that came to the house and then shoot her. The Department temporarily seized his firearm for safety. (*Exhibit 5; Exhibit 6*)

4. On December 23, 2010,<sup>4</sup> a restraining order was issued by Chicopee District Court against Mr. Kozikowski regarding his wife. In addition to containing a stay away and no contact orders, Mr. Kozikowski was ordered to surrender his firearm.<sup>5</sup> The Hampden Probate and Family Court issued an order dated January 11, 2011. It states that the firearm surrender order in the Chicopee District Court restraining order is “vacated to the extent that [Mr. Kozikowski] may use his service weapon during work hours and at all other times be locked up at the Chicopee police station in the hope [Mr. Kozikowski] will be able to maintain his employment.” On December 28, 2010, Mr. Kozikowski’s license to carry a firearm was suspended. (*Exhibit 2 – Chicopee Restraining Order; Exhibit 3*)
5. Another restraining order was issued by Holyoke District Court against Mr. Kozikowski relating to his wife.<sup>6</sup> With exception to visitation rights to see his children, Mr. Kozikowski was ordered to not contact his wife. This restraining order required that Mr. Kozikowski surrender his firearm with no exceptions. The order remained in effect until April 30, 2013. (*Exhibit 2 – Holyoke Restraining Order*)
6. On May 3, 2011, a number of text messages were exchanged between Mr. Kozikowski and another individual who worked for the Department. Mr. Kozikowski’s text messages seemed to be suicidal in nature and officers were dispatched to Mr. Kozikowski’s home

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<sup>4</sup> This is the presumed date the restraining order was issued. The only part of the initial order that is legible reads “23/10.” The Commission came to the conclusion that the order reads December 23<sup>rd</sup> due to the domestic dispute police incident report dated December 22, 2010, and the expiration of the restraining order dated January 6, 2011.

<sup>5</sup> There appears to be a possible clerical error on the restraining order. On the one hand, the first modification states “Delete #... 12” which involved Mr. Kozikowski surrendering his firearm. On the other hand, throughout the restraining order under every modification and extension it states “Firearm surrender order continued.”

<sup>6</sup> It is unclear when this restraining order was first issued but the first extension of the restraining order is dated January 4, 2011.

immediately. There was a small amount of fresh blood on the floor from a wound on his left wrist. There was a moderate odor of an alcoholic beverage on his breath and he seemed to be stressed, due to his impending divorce. Mr. Kozikowski was taken to the hospital and was later released that day. (*Exhibit 8*)

7. On May 12, 2011, the husband of Ms. A (Mr. Kozikowski's girlfriend), Mr. B, filed a complaint with the Department against Mr. Kozikowski for harassment and threats due to a series of text messages. Although only Mr. Kozikowski's half of the text messages are attached to the complaint, they contain numerous obscene comments and sexual innuendos about Ms. A, as well as comments in which Mr. Kozikowski stated he tried to get Ms. A to leave Mr. Kozikowski and his family alone. (*Exhibit 5*)
8. Later on May 12, 2011, Officer O'Shea called Mr. Kozikowski about the text messages Mr. Kozikowski had sent to Mr. B. Officer O'Shea informed Mr. Kozikowski that he was going to be removed from his position as midnight shift steward until the issues were resolved. Mr. Kozikowski responded angrily, stating that he did not threaten Mr. B but rather he was the one who had been threatened and that he was not going to resign from his position as midnight shift steward. Mr. Kozikowski told Officer O'Shea he was going to the Department to settle the matter in person. Mr. Kozikowski texted Lieutenant Pronovost, "I'm going [to the Department] and I need someone to hold me back." When Mr. Kozikowski arrived at the Department, the police station was on lockdown and Officer O'Shea was ordered to stay inside his office due to concerns that Mr. Kozikowski meant to harm Officer O'Shea. Officer O'Shea chose to not file criminal charges against Mr. Kozikowski stating, "I just want [Mr. Kozikowski] to seek help with a psychiatrist or counselor to put his life back together." (*Exhibit 9; Exhibit 15*)

9. On May 17, 2011, Ms. A obtained a restraining order against Mr. Kozikowski in Chicopee District Court. The restraining order expired on May 24, 2011. (*Exhibit 5*)
10. On May 28, 2011, a complaint was filed with the Department against Mr. Kozikowski by his sister-in-law. The complaint alleged that Mr. Kozikowski sent her text messages that she felt were inappropriate and scared her. They contained lewd and inappropriate comments about Mr. Kozikowski's wife. (*Exhibit 10*)
11. On August 25, 2011, another complaint was filed with the Department against Mr. Kozikowski. Mr. C filed the complaint upon learning that Mr. Kozikowski had posted something on Facebook about Mr. C. The post read, "I was reminded of an old 'friend' recently. Anyone wish a horrible death befalls [Mr. C]?" (*Exhibit 11*). Mr. C stated to the police that he had not seen Mr. Kozikowski in at least fifteen (15) years. He had dated Mr. Kozikowski's wife when they had attended high school together but did not understand why Mr. Kozikowski was "threatening his life after all these years." (*Exhibit 11*). The police incident report stated that Mr. C had "always thought [Mr. Kozikowski] was crazy." (*Exhibit 11*). When Mr. Kozikowski was called into the Department internal affairs office in this regard, with his union representative, Mr. Kozikowski seemed amused about the posts, shrugged them off, and then became confrontational. Another Facebook post read, "The pain is once again becoming deafening, I wish it to cease permanently by any means." (*Exhibit 11*). When the Department internal affairs officer asked Mr. Kozikowski about this, Mr. Kozikowski "smirked." (*Exhibit 11*). Another Facebook post read, "At least I have my dreams, disemboweled enemies all around with their faces frozen with a look of 'oh shit.' While I relax and enjoy life. Thank you for the small things." (*Exhibit 11*). The internal affairs officer told Mr. Kozikowski that the

Police Chief would be briefed on the incident and that the internal affairs officer's recommendation would be termination. (*Exhibit 11*)

12. On September 8, 2011, Mr. Kozikowski and his union representative met with Chief Ferraro. In a handwritten note by Chief Ferraro, it warned that Mr. Kozikowski's employment may be terminated if his inappropriate conduct continued. (*Exhibit 12*)

13. On January 24, 2012, Mr. Kozikowski was admonished for inappropriate behavior in a Hampden Probate and Family Court Order relating to his wife and children. The order states that Mr. Kozikowski "is admonished concerning his inappropriate behavior with the Probation Officer such that a Court Officer's intervention was required and the Dispute Intervention was terminated – this admonition includes his repeated and inappropriate use of the 'F word' which he incredibly said is 'one of the tools in my belt' for his job as a police officer." (*Exhibit 4*)

14. On November 29, 2012, another complaint was filed with the Department against Mr. Kozikowski by his wife. Mr. Kozikowski's wife had deep concerns about her safety due to his behavior and posts on Facebook. One Facebook post quoted an Insane Clown Posse song "If I was a Serial Killer," and another post said "To whom it may concern, fuck you." (*Exhibit 14*) When asked on his Facebook post to whom was he referring, he stated, "One word, [his wife]." (*Exhibit 11*). Further, Mr. Kozikowski's wife's allegations stated that Mr. Kozikowski had created a fake Facebook account in his wife's name and used it to make numerous inappropriate and lewd posts. A warrant was soon issued to obtain Mr. Kozikowski's cell phone, as the Facebook posts had been posted from a mobile device. One piece of evidence suggesting that Mr. Kozikowski had created the fake Facebook account was a text message exchange between Mr. Kozikowski and his

wife involving a movie he wanted to buy for their eldest child. Two hours after this text message exchange, a post appeared on the fake Facebook account which discussed the same movie. Also of concern, Mr. Kozikowski's contact name in his phone for his wife was "[Redaction] Who I Wish Would Get Dissemboweled [sic]." (*Exhibit 14; Exhibit 21*)

15. The Department did not have a social media policy in place at that time. (*Testimony of Jebb*)

16. Once, while off duty in 2008, Mr. Kozikowski was cut off by another vehicle while he was driving and Mr. Kozikowski used an obscene hand gesture in response. While both cars were stopped at a red light, Mr. Kozikowski ran up to the car that had cut him off and yelled at the elderly couple inside. Deputy Chief Jebb verbally advised Mr. Kozikowski to be more professional and to be more polite. (*Exhibit 1; Testimony of Jebb*)

17. On January 7, 2013, Mr. Kozikowski received notice of Police Chief Charette's recommendation to the Mayor that Mr. Kozikowski's employment with the Department be terminated (*Exhibit 16*)

18. A local hearing was held relative to Mr. Kozikowski's continued employment on January 24, 2013. On February 4, 2013, the findings of the designated hearing officer recommended termination of Mr. Kozikowski's employment citing the incidents stated above. (*Exhibit 17*)

19. On February 7, 2013, Mr. Kozikowski received notice of termination of his employment stating "I find that your behavior over the past several years and your refusal to change said behavior renders you unsuitable to serve as a police officer in the Chicopee Police Department." (*Exhibit 18*)

20. Mr. Kozikowski filed an appeal at the Commission on February 14, 2013.

*(Administrative Notice)*

21. Shortly before the date of this decision, the criminal prosecution of the Appellant referenced in the introduction herein was still pending.<sup>7</sup> *(Administrative Notice)*

## DISCUSSION

### *Applicable Civil Service Law*

G.L. c. 31, § 43, provides:

“If the commission by a preponderance of the evidence determines that there was just cause for an action taken against 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.”

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, 682, 923, *rev. den.*, 426 Mass. 1102 (1997). *See also* City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, *rev. den.*, 440 Mass. 1108 (2003); Police Dep’t of Boston v. Collins, 48 Mass.App.Ct. 411, *rev. den.*, 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm’n, 38 Mass.App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, *rev. den.*, 390 Mass. 1102, 453 N.E.2d 1231 (1983).

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<sup>7</sup> This information was provided by the parties in response to my request.



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., 359 Mass. 211, 214, 268 N.E.2d 346 (1971); Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, *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 ...." 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.

By virtue of the powers conferred by their office, police officers are held to a high standard of conduct. "Police officers are not drafted into public service; rather, they compete for

their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question, their ability and fitness to perform their official responsibilities.” Police Commissioner of Boston v. Civil Service Commission, 22 Mass.App.Ct. 364, 371 (1986).

### *Analysis*

By a preponderance of the evidence, the City has shown it had just cause to terminate Mr. Kozikowski’s employment with the Department. Police officers are held to a higher standard in the eyes of their peers and colleagues as well as in the eyes of the public. Although Mr. Kozikowski had never been disciplined prior to his termination, he had a series of incidents of highly inappropriate conduct over a two year period, with one off duty incident prior to this period in 2008, given as the reasons for his termination. The 2008 incident involved a car that cut off Mr. Kozikowski’s car, and led to Mr. Kozikowski’s obscene hand gesture towards the elderly couple in the other car, followed up by yelling at them while he was off-duty. In 2010, Mr. Kozikowski’s conduct in the same time period as his pending divorce had a direct effect on his ability and fitness to perform his official responsibilities as a police officer. At one point, Mr. Kozikowski was forced to surrender his firearm, and, at another time he was removed from his position as midnight shift steward. Mr. Kozikowski had three different restraining orders issued against him, by Ms. A and his wife, and numerous complaints filed with the Department against him.

In the instance where Mr. B filed a complaint with the Department of harassment against Mr. Kozikowski, there was a series of text messages, of which the Commission only has Mr. Kozikowski’s half. However, Mr. Kozikowski’s half of the messages fell far below the high standard of conduct that police officers are expected to meet. Further, Mr. Kozikowski’s actions

led to the Department being on lockdown at one point and a fellow officer being ordered to stay inside the Department due to concerns that Mr. Kozikowski was going to harm him. In addition, Mr. Kozikowski was admonished by the Hampden Probate and Family Court for inappropriate conduct in court regarding his pending divorce and he was warned by the Department that any more of such conduct was going to lead to termination of his employment. Thereafter, Mr. Kozikowski created a fake Facebook account under his wife's name and posted inappropriate and lewd posts. The Appellant argues that there is no way to prove it was he who created the account but the argument is unsupported and Mr. Kozikowski did not testify in this regard or otherwise. However, at one point Mr. Kozikowski wished to buy his and his wife's eldest child a movie and exchanged text messages with his wife in that regard. Soon after their text message exchange, a post on the fake Facebook account for his wife relating to the movie Mr. Kozikowski wanted to buy for their eldest child, indicating, more likely than not, that it was Mr. Kozikowski who made the post on the fake Facebook page. Given all of the cited reasons, the City had just cause to terminate Mr. Kozikowski from his employment as a police officer.

### CONCLUSION

Based on the facts and the law and rules herein, the Appellant's appeal under Docket No. D1-13-32 is hereby *denied*.

Civil Service Commission

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Cynthia A. Ittleman, Esq., Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on June 26, 2014.

A true record. Attest:

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Commissioner

Either party may file a motion for reconsideration within ten (10) days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty (30) day time limit for seeking judicial review of this Commission order or decision.

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

Notice:

Michael P. Clancy, Esq. (for Appellant)

Thomas J. Rooke, Esq. (for Respondent)