COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

GLENN LAVERY,
Appellant
v. **D1-15-229**
TOWN OF NORTH ATTLEBOROUGH,
Respondent

Appearance for Appellant:

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Appearance for Respondent:

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Commissioner:

Paul M. Stein

Corrected Copy with Correct Docket Number on final page.

Summary of Decision

A North Attleborough firefighter appealed his termination for "conduct unbecoming" a firefighter, after he engaged in a troubling incident of alleged domestic violence on November 21, 2015 that resulted in serious criminal charges brought against both participants for assault and battery and a 209A restraining order issued against him. Although the criminal charges were dismissed and the 209A order was terminated a few months later, the Town's Board of Selectmen (BOS) rested the termination decision on its own finding that the firefighter did engage in the alleged troubling acts of domestic violence as charged. On January 3, 2016, one month after his termination and while this appeal was pending before the Commission, the firefighter was charged with another incident of domestic violence against a different person, for which the firefighter eventually admitted to sufficient facts and was ordered to serve a one-year term of probation. This additional incident could have formed an independent reason to pursue another separate termination proceeding, but, in April 2016, rather than proceed with another disciplinary hearing and decision necessary to such action, the BOS, by 3-2 vote, decided not to do so at that time. Nevertheless, under the facts of this case, including the close similarity and temporal proximity of both incidents, as well as the unique challenges to fact-finding in cases of domestic violence, the Commission concludes that the second incident may fairly be considered relevant to the credibility assessment and state of mind of the participants to the November 21, 2015 incident. After taking that into account, along with all other credible evidence presented,

the Commission concludes that the Town met its burden to establish just cause, and upholds the termination.

DECISION

The Appellant, Glenn Lavery, appealed to the Civil Service Commission (Commission), pursuant to G.L.c.31,§43 contesting his termination by the Town of North Attleborough (North Attleborough) as a Firefighter/EMT with the North Attleborough Fire Department (NAFD). A pre-hearing was held on December 7, 2015 and five days of full hearings on 5/27/16, 6/3/16, 6/24/16, 12/21/16 & 1/20/17, all at the UMass School of Law in Dartmouth.[1] The full hearing was declared private. The full hearing was digitally recorded and the parties received copies of the CDs.[2] Thirty-eight exhibits were received into evidence (Exhs. 1, 2A-2B, 3, 4A-4B, 5A-5F, 6, 7A-7B, 8 through 13, 14A-14B, 15 through 21, 23 through 25) and one document marked for identification (Exh. 22ID). The NAFD called five witnesses. The Appellant testified on his own behalf and called four witnesses. Both parties submitted proposed decisions on March 21, 2017.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by the Appointing Authority:

- Theodore Joubert, Fire Chief, NAFD
- Shane McKenna, Patrol Sergeant, North Attleborough Police Department
- David Lowe, Patrolman, North Attleborough Police Department
- Craig Jones, Patrolman, North Attleborough Police Department
- Jane Doe

Called by the Appellant:

- Glenn Lavery, Appellant
- Michael Gallagher, North Attleborough Town Administrator (TA)
- John Rhyno, Member, North Attleborough Board of Selectmen (BOS)
- Paul Belham, Member (former Chair), North Attleborough BOS

[1] The unusual six-month hiatus in the hearing schedule was due primarily to continuances requested by the parties..

[2] The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CDs to supply the court with the written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences, I make the findings of facts set forth below.

DECISION

1. The Appellant, Glenn Lavery, was appointed to the position of full-time NAFD Firefighter/EMT on October 15, 1990. Mr. Lavery holds an Associate's Degree in Fire Science and a Bachelor of Science Degree in Criminal Justice. (*Exh. 15, 16 & 24; Testimony of Appellant*)

2. Mr. Lavery was promoted to Fire Lieutenant on or about August 2, 1998. In November 2007, at his request, he returned to the position of Firefighter/EMT, the position he held until his discharge from employment on December 4, 2015 which is the subject of this appeal. (*Exhs. 13, 15, 16 & 24; Testimony of Appellant & Joubert*)

3. During his tenure with the NAFD, prior to the incident which resulted in his termination, Mr. Lavery received one formal written reprimand regarding patient care (Aug. 1999), two written letters of counseling on leadership ability (Feb. 2000 & Sept. 2004) and one memo to the file concerning stress on the job (July 2004). (*Exhs. 8 through 11*)

4. North Attleborough employs approximately 55 firefighters. The town is divided into three (3) fire districts, with one NAFD fire station in each district. NAFD headquarters is located in the Central District, which supports two ALS (Advance Life Support) ambulances, one fire engine and a ladder truck. The ALS ambulances are staffed with four EMT/Paramedics, two for each ambulance, who also "cross-man" the ladder truck. The other two stations – the South End station in the primary commercial area and the Kelly Boulevard station in a primarily residential area – each support one additional fire engine. (*Exhs. 19A & 19B; Testimony of Joubert*)

5. The NAFD responds to approximately 4000 calls for service annually, with most of the calls being requests for emergency medical services requiring an ambulance response. The

majority of NAFD personnel are assigned to the headquarters station and most of the calls for service come from the Central District. NAFD firefighters may be assigned to work at any of the three NAFD fire stations. Although the majority of incidents to which NAFD personnel respond are located within their the fire district, from time to time, NAFD personnel are required to respond to incidents located in a district other than the one in which their assigned station is located. (*Exhs. 19A & 19B; Testimony of Joubert*)

6. NAFD personnel have regular contact with officers of the North Attleborough Police Department (NAPD) in the course of their duties in responding to 911 calls, including domestic abuse complaints where medical aid is requested. When responding to the scene of reported domestic abuse, the NAFD ambulance would be dispatched only after the Police Department reported that it had secured the scene. (*Testimony of Joubert & Jones)*

7. In or about October, 2011, Mr. Lavery met Jane Doe [pseudonym] through his off-duty real estate business and, soon thereafter, began a personal relationship which they maintained "off and on" over the next four years. Ms. Doe lives in North Attleborough, approximately one mile from the NAFD central fire station. (*Exhs. 5 & 19B; Testimony of Appellant & Ms. Doe*)

8. The relationship between Mr. Lavery and Ms. Doe eventually soured. They "frequently" argued and, occasionally, had physical altercations. Ms. Doe "usually" "initiated physical fighting" and Mr. Lavery was the one who "pushed back." (*Testimony of Ms. Doe*)

9. In February 2013, Mr. Lavery attempted to break off his relationship with Ms. Doe. She reacted by physically attacking him, causing bite marks, scratches and bruises that he documented at the time. This incident was typical of the prior history of physical contact between Mr. Lavery and Ms. Doe. (*Exh. 5C; Testimony of Appellant*)

10. For several months thereafter, Mr. Lavery received numerous disparaging and obscene email messages from Ms. Doe. (*Exh. 5C*)

11. On or about August 2, 2013, after learning that Mr. Lavery planned to get a restraining order to "keep me away" while he tried to "patch things up" and reconcile with his family, Ms. Doe called the NAPD. Officer Jones responded and reported:

> ". . . I asked [Ms.Doe] why she called the police. She answered that . . .[s]he doesn't want Glenn to get a Restraining Order against her because she doesn't want that on her record. She then stated that they had physical altercations in the past and she has taken pictures . . . . I asked her to complete a written statement which she did. In her statement she explained about what happened but didn't elaborate on any prior physical altercations. I then offered her a Restraining Order which she declined."

Officer Jones' Incident Report was closed on August 3, 2013 without any action taken. (*Exh. 5A*)

12. During September 2013, Ms. Doe again contacted the NAPD about Mr. Lavery. Her September 17, 2017 (unsworn) statement alleged that she feared Mr. Lavery would kill her. On September 20, 2013, she provided photographs of injuries she claimed Mr. Lavery inflicted on her in 2012 and 2013.[3] As a result, the NAPD filed numerous criminal charges against Mr. Lavery and also advised Ms. Doe to seek a 209A restraining order, but there is no record that a restraining order was sought or issued at that time. (*Exhs. 5B & Exh. 5D; Testimony of Jones*)

13. On September 19, 2013, Mr. Lavery appeared at the NAPD headquarters with an attorney and completed a (unsworn) statement concerning Ms. Doe and provided copies of the photographs of the "past assault and battery" he suffered in February 2013, along with copies of the Gmail messages he had received from Ms. Doe referenced above. I infer Mr. Lavery took this action after learning that criminal charges had just been brought against him. As a result of

[3] Two photographs coincide with a February 2013 photograph of bite marks on Mr. Lavery that he later showed to the NAPD. (*Exh. 5C & 5D*) Two photographs are dated 5/31/2012, 6/2/2012, one photograph is dated 12/29/2012, and one photograph is dated 9/16/2013. Other than the February 2013 photograph, there is insufficient probative evidence to confirms the date(s) of these injuries or connect them to Mr. Lavery. I note that the 9/16/2013 photograph is dated one day before Ms. Doe's prior 9/17/2013 appearance at the NAPD, but she didn't mention such an incident at that time. I note that Ms. Doe also said she got the May/June 2012 injuries while kick-boxing. (*Exhs. 5B & 5D*; *Testimony of Appellant & Ms. Doe*)

Mr. Lavery's complaint, criminal charges were also filed by the NAPD against Ms. Doe for Assault and Battery and Criminal Harassment. (*Exh.5C*)

14. On September 28, 2013, Ms. Doe again called Mr. Lavery's home and left another message, the third that month. Mr. Lavery reported the call to the NAPD. NAPD Officer Bradley was dispatched and listened to the message, which he described as "vile and vindictive . . . well thought out and delivered for maximum emotional pain." After advising the Laverys of their rights to seek a court order, Officer Bradley spoke by telephone with Ms. Doe. After hearing her out, Officer Bradley secured Ms. Doe's promise that she "won't call [Mrs. Lavery] again". He "informed suspect [Ms. Doe] that if there is any further harassment that she would be taking [sic] to court. She told me she understood." (*Exh. 5E*)

15. During the summer of 2013, NAFD Fire Chief Joubert came to learn that Mr. Lavery was having issues with poor attendance. Chief Joubert had assumed the position of NAPD Fire Chief on August 13, 2013, after serving a term as Fire Chief in the neighboring town of Plainville, MA. He had begun his career in fire service with the NAFD and knew Mr. Lavery well, had mentored him, and considered him a friend. He remained in contact with Mr. Lavery while serving as Fire Chief in Plainville, counseling him, in particular, about how he might go about again becoming a Lieutenant. (*Exh 17; Testimony of Appellant & Joube*rt)

16. After learning of Mr. Lavery's attendance issues (which Chief Joubert considered a "red flag" for other possible issues), he began to meet with Mr. Lavery to discuss this problem and how it might affect his chances to "get his rank back" (i.e., promotion to Lieutenant again). Mr. Lavery initially said his personal life "was a mess", but did not elaborate. Eventually, when attendance problems persisted, Mr. Lavery disclosed his marital issues which, by then, had led

him to move permanently into an apartment that he owned (where he still resided at the time of the Commission hearing). (*Exh. 17; Testimony of Appellant, Ms. Doe & Joubert*)

17. In February 2014, Chief Joubert arranged for Mr. Lavery to take a five-day leave to attend On-Site Academy, a private employee assistance facility specializing in treatment of firefighters and other public safety personnel suffering from substance abuse and other emotional issues. Mr. Lavery completed this treatment. (*Exh. 17; Testimony of Appellant & Joubert*)

18. In April 2014, the charges that had been brought against both Mr. Lavery and Ms. Doe in September 2013 came before the court. Ms. Doe "invoked 5th" and refused to testify. As a result, all pending charges against both Mr. Lavery and Ms. Doe were dismissed. (*Exhs. 5B, 5C & 5D*)

19. By the end of 2014, Mr. Lavery and Ms. Doe had ceased regular contact with each other. (*Testimony of Appellant & Ms. Doe*)

20. In April 2015, the NAFD held interviews to promote four candidates to "temporary" Lieutenant. Mr. Lavery was one of four candidates considered. He received a recommendation from his Captain, Ronald Meyer, who vouched for his leadership skills and decision making ability as Acting Fire Lieutenant in recent months. Mr. Lavery was not selected for promotion. He appealed the bypass to the Commission and, in October 2015, withdrew the appeal. (*Exh. 25: Testimony of Appellant and Joubert; Administrative Notice, CSC Docket No. G2-15-085*)[4]

21. In late September 2015, Mr. Lavery and Ms. Doe crossed paths for the first time in nearly a year since they stopped dating each other. (*Exhs 4A & 12; Testimony of Appellant & Ms. Doe*)

[4] I infer that the appeal was withdrawn, at least in part, after Chief Joubert announced plans to create two new lieutenant promotional opportunities in FY2016, which the Board of Selectmen approved on November 12, 2015. The Commission did not address the merits of that appeal, which asserted that, in addition to providing Mr. Lavey no reasons for his non-selection, the "temporary" promotions were, in fact, unlawful "provisional promotions" made in violation of civil service law. (*Exh. 12*; *Testimony of Appellant & Joubert; Administrative Notice [BOS Meeting on November 12, 2105, cited in North Attleboro's Proposed Decision, p.19-20]*)

22. Mr. Lavery's next contact with Ms. Doe was on October 24, 2015, when she appeared at his apartment. An argument ensued. Mr. Lavery called the NAPD who found Ms. Doe outside leaning on her car and ordered her "to leave and not return." (*Exh. 5F; Testimony of Appellant*)

23. Ms. Doe's version of events and Mr. Lavery's version of events diverge thereafter. What is not disputed is the following:

- Unbeknownst to Mr. Lavery at the time of the October 24, 2015 encounter, Ms. Doe was pregnant as a result of their September liaison. There was no mention of the pregnancy in the October 24, 2015 NAPD Incident Report. (*Exhs. 5F & 12; Testimony of Appellant & Ms. Doe*)
- After learning that Ms. Doe was pregnant, Mr. Lavery resumed seeing Ms. Doe on a regular basis. Mr. Lavery accompanied Ms. Doe to a sonogram appointment on November 3, 2015.
- On or about Thursday, November 19, 2015, after an argument with Ms. Doe, Mr. Lavery blocked Ms. Doe on his cell phone so that he did not receive any messages from her.
- One of Ms. Doe's voice mail messages to Mr. Lavery said she would "hunt you down no matter where you are".
- Mr. Lavery worked his regular 24-hour shift from 8:00 a.m. Friday, November 20, 2015 until he was relieved around 8:00 a.m. on Saturday, November 21, 2015;
- Upon completion of his shift, as was his routine, Mr. Lavery returned to his apartment and went to sleep. As usual, he left the side door to his apartment open;

- Ms. Doe knew Mr. Lavery's schedule and routine. She arrived uninvited at his apartment sometime soon after 8:00 a.m. She entered through the unlocked door and proceeded to the bedroom where she knew Mr. Lavery would likely have been in bed;
- A verbal and physical confrontation ensued between the two parties. There are no other witnesses to the encounter;
- After the confrontation, Ms. Doe departed the apartment;
- After Ms. Doe departed, Mr. Lavery dressed and drove to the NAPD headquarters intending to report the incident and seek what he called a "no contact" order. He was taken to an interview room adjacent to the lobby. Officer Lowe was called to the station and conducted an interview, beginning around 9:16 a.m. and lasting approximately 4½ minutes. Mr. Lavery completed an unsworn statement and a request for a 209A restraining order;
- Twelve photographs were taken by the NAPD showing wounds to Mr. Lavery's hands and face, including several bites and scratch marks;
- Sometime later, Ms. Doe later arrived at the NAPD headquarters. NAPD Officer Jones interviewed her in a lower level conference room, beginning at 9:30 a.m. and lasting approximately 3½ minutes. She completed an unsworn statement and signed a confirmation that she declined to exercise her right to seek a 209A restraining order;
- Two photographs were taken showing Ms. Doe wearing a heavy winter coat, open at the neck, showing red areas around her neck and chest area.[5]

[5] One of the photographs of Ms. Doe appears to show her with a black eye, but neither she nor any other witness said she had such an injury. Her NAPD interview tape does not show a black eye. (*Exhs. 4 & 12*)

- Following the initial interviews, Officer Lowe and Officer Jones conferred and consulted with their supervisor, Sgt. McKenna, and decided to re-interview Mr. Lavery. That interview took place at approximately 10:19 a.m. It began with Mr. Lavery being advised of his "Miranda rights" and lasted about 5 minutes;
- After Mr. Lavery's second interview, the NAPD officers conferred again and decided that Ms. Doe was more believable and Mr. Lavery's version "defied logic" because he did not offer up any plausible explanation for Ms. Doe's "choke marks" (In his initial interview, before seeing Ms. Doe, Officer Lowe had asked if she had "any marks" on her and he said she "shouldn't" and would "never" hit a woman; in the second interview, he said: "No" and "Not True" when he was told Ms. Doe said he had "grabbed her neck" and "choked her") ;
- The NAPD officers concluded that Mr. Lavery and Ms. Doe each had committed assault and battery on the other. The officers decided that Mr. Lavery was the "primary aggressor" and would be arrested and that Ms. Doe would not be arrested but also would be charged with assault & battery at a later date.
- Mr. Lavery was booked at 10:32 a.m. and held in NAPD's lockup until arraignment;
- The NAPD offered to call an ambulance to take Ms. Doe to the hospital for a medical exam which Ms. Doe declined because she was due at work in Bellingham around noon, and said she would be fired if she didn't report on time. After completing her shift at approximately 9:30 p.m. that night, she did go to the local hospital emergency room, was examined, received an ultrasound, and told everything was fine. There are no medical records introduced of this hospital visit;

- On November 22, 2015, Ms. Doe was recalled by Officer Jones and re-interviewed. The primary reason for the second interview was to establish whether or not there was probable cause to charge Mr. Lavery with "strangulation", which the NAPD then ruled out based on the interview.[6] At this time, Ms. Doe stated that she had changed her mind and did want to pursue getting a 209A restraining order.
- On November 23, 2015, Mr. Lavery and Ms. Doe appeared in Attleborough District Court. Mr. Lavery was arraigned and released. The Court denied Mr. Lavery's request for a 209A order and granted Ms. Doe's request for a 209A order which required, in part, that Mr. Lavery not "contact" Ms. Doe, "stay at least 100 yards away" from her and "stay away from [her] residence" and "workplace" for one year.[7]

(*Exhs. 4, 10, 12, 21 & 22; Testimony of Appellant, Ms. Doe, Lowe, Jones, McKenna*)

24. No percipient witness to the November 21, 2015 altercation, other than Mr. Lavery and Ms. Doe, testified at the Commission hearing. The NAPD's witnesses were generally reliable as to what took place during the video-recorded interviews at the police station, but their conclusions and assumptions about the events and motivation leading to and occurring at the scene on November 21, 2015 are based entirely on hearsay (as no officer ever visited the scene). I do not give them the same degree of reliability and persuasiveness as I would give to a police officer's percipient observations. I have considered the NAPD's testimony together with the other credible testimony of all the witnesses and the documents introduced at the Commission's de novo hearing, and take administrative notice of the unique fact-finding challenges presented

[6] At the Commission hearing, Chief Joubert testified that, knowing what he now knew, he "regrets" using the term "strangled" in his disciplinary letter. (*Testimony of Chief Joubert*)

[7] Ms. Doe was not arraigned on November 23, 2015 but was summonsed later on assault and battery charges against her. At the Commission hearing (June 24, 2016), Ms. Doe did not seem to have a clear understating of the status of the charges against her, suggesting they were somehow still "active". (*Exh. 4A; Testimony of Ms. Doe, Officer Lowe, Officer Jones, Sgt. McKenna*)

in domestic violence cases (see Respondent's Proposed Decision, p.24,fnt.11). I make the further findings of facts on these disputed issues by a preponderance of the evidence as set forth below.[8]

25. Mr. Lavery was prepared to take financial and paternal responsibility for the pregnancy, but he had concern that Ms. Doe may not be emotionally stable enough to have another child. He told her she "had a lot on her plate" and he wanted her to "think about" having the baby. Mr. Doe and Mr. Lavery argued repeatedly about that subject. During one such argument just prior to November 21, 2015, Ms. Doe bit Mr. Lavery's arm, leaving one of the wounds shown in the NAPD photographs taken on November 21, 2015. (*Exhs. 4A & 12; Testimony of Appellant*)

26. Ms. Doe arrived at Mr. Lavery's apartment on November 21, 2015 in an agitated state, having been unable to contact him. She found him covered in bed. Acrimonious words were exchanged and, with Mr. Lavery still in bed, she attacked him and he pushed back. I do not find that a preponderance of evidence established that Mr. Lavery "attempted to strangle" Ms. Doe or that he kneed her in the stomach. (*Exh. 12; Testimony of Appellant*)

27. Although some of Ms. Doe's statements are inconsistent with my findings, her initial statement to the NAPD is close to what I believe to be the truth: she stated that Mr. Lavery put *one arm "on her shoulder*" and then, he "*grabbed my neck, because I started scratching him*." (*Exh. 12; Testimony])*

[8] In this regard, I note the distinction between proof by a "preponderance of evidence" that I must apply as the fact finder, and which controls the Commission's decisions, and the lower "probable cause" standard governing the NAPD's threshold decision whether or not to arrest Mr. Lavery. "Probable cause" requires "[t]he officers must have . . . 'more than a suspicion of criminal involvement . . . but not a prima facie case of the commission of a crime, let alone a case beyond a reasonable doubt.' " See Commonwealth v. Ilya, 470 Mass. 625, 627-28 (2015); Commonwealth v. One 2004 Audi Sedan Automobile, 73 Mass.App.Ct. 311, 318 (2009), aff'd, 456 Mass. 34, 45 (2010) "Probable cause", unlike the Commission's de novo findings of fact, can be, and usually are made without a "full evidentiary hearing" because "probable cause to arrest . . . by its nature, focuses on whether the information available to a police officer meets a certain threshold and does not call for testing the information through adversary procedures. This determination 'does not require . . . resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt.' " Commonwealth v. Lester L., 445 Mass. 250, 258 (2005), *quoting*, Gerstein v. Pugh, 420 U.S. 103, 121 (1975). This distinction is particularly apt here, as no NAPD officers viewed the "crime scene", but based their conclusions on a few minutes of interviews of the two "walk-in" complainants.

28. At the Commission hearing, Ms. Doe refused to elaborate on many other specifics regarding her version of the November 21, 2015 incident, invoking her constitutional rights against self-incrimination when asked to confirm such details as, for example:

- She would not testify that her statement about being pushed against the wall was true;
- She refused twice to testify who caused the "red marks" or how she received them;
- She refused to testify to her recollection of where Mr. Lavery was when she first walked into his bedroom, what he was wearing or if he was covered by a blanket.

(Testimony of Ms. Doe)

29. While incarcerated at the NAPD, Mr. Lavery called his Captain and informed him that he had been arrested, was in jail, and would not be released in time to report for his shift on Sunday, November 22, 2015. This information was passed up the chain of command to Chief Joubert who was then out-of-town. (*Exh. 18; Testimony of Appellant & Joubert*)

30. Meanwhile, the NAPD Police Chief contacted North Attleborough Town Manager Michael Gallagher and informed him that the NAPD had "a [unnamed] NAFD firefighter in custody." Mr. Gallagher relayed this information to Paul Belham, Chair of the North Attleboro Board of Selectmen (BOS), who instructed Mr. Gallagher to inform other members of the BOS, which he did by phone that same day (Saturday). (*Testimony of Gallagher, Belham & Rhyno*)

31. Chief Joubert returned to work on Monday, November 23, 2015. He directed the Deputy Fire Chief to procure copies of the court records. He spoke to the NAPD Police Chief. After a series of telephone conferences and meetings that day and the next, two letters were drafted and delivered to Mr. Lavery on November 24, 2015. One letter, signed by Chief Joubert, imposed a five-day suspension (November 27, 2015 through December 3, 2015) and recommended that Mr. Lavery be terminated from employment; the second letter, signed by BOS Chair Belham, gave notice that the BOS would consider the Chief's recommendation for termination at an executive session on December 3, 2015. Each letter recited essentially the same reasons for discipline:

1. On or about November 21, 2015, you assaulted Ms. [Doe] . . . ;
2. On or about November 21, 2015, you attempted to strangle this female by placing your hands around her neck and kneeling on her stomach;
3. On or about November 23, 2015, the court issued an order prohibiting you from any contact with Ms. [Doe] for the period of one year and requiring that you stay away from Ms.[Doe] at her home in the Town of North Attleborough MA.
4. On or about November 23, 2015, you were arraigned in Attleborough District Court and charged with the following:
    a. Aggravated Assault and Battery on a . . . female by placing your hands around her neck and kneeling on her stomach; and
    b. Witness Intimidation.

Your actions listed in #1 & #2 above constitute conduct unbecoming a Firefighter and are in violation of Article XXIV Section 1 of the Rules and Regulations of the North Attleborough Fire Department. Your actions reflect negatively on the Fire Department and its reputation.

Your misconduct is an extremely serious matter and cannot be tolerated. Your actions together with your prior disciplinary record which includes several reprimands and warnings, constitute just cause [for discipline].

Furthermore, as the court has issued an order prohibiting you from having any contact with Ms. [Doe] including contact with her at her home in the Town of North Attleborough, MA you are incapable of working as you would be unable to respond to emergency calls in certain areas of Town where Ms.[Doe] resides.

(*Exhs. 2A & 2B & 18; Testimony of Joubert, Gallagher & Belham*)

32. On December 3, 2015, the BOS met in executive session to consider the recommended termination of Mr. Lavery. Selectman Rhyno objected that the hearing had been scheduled without consultation and approval of the full BOS. No witnesses were called to testify. Chief Joubert recommended discharge based on the contents of the police records. Mr. Lavery, his personal attorney, labor union attorney and labor union representatives and labor union attorney were present. All were given the opportunity to "speak" and Mr. Lavery "chose" not to speak but relied on his counsel to address the statements of Chief Joubert and North Attleborough labor counsel. The BOS rejected Mr. Lavery's request for an administrative leave pending the result of his criminal case and voted 3-1 (Rhyno opposed) to terminate him, effective December 4, 2015. (*Exhs. 3, 4A-4B, 5A-5F & 7; Testimony of Joubert, Rhyno & Belham*)

33. The December 3, 2015 termination letter stated, in part:

After considering all of the evidence presented at the hearing, the Board finds that:

1. On or about November 21, 2015, you assaulted Ms. [Doe] . . by attempting to strangle this female by placing your hands around her neck, kneeling on her stomach and covering her mouth with your hand; and
2. The conduct referenced in paragraph #1 took place at your residence in North Attleborough and constituted the seventh domestic incident involving you and Ms. [Doe] in the past few years; and
3. On or about November 23, 2015, the court issued an order prohibiting you from any contact with Ms. [Doe] for the period of one year and requiring that you stay away from Ms. [Doe] at her home in North Attleborough, MA; and
4. On or about November 23, 2015, you were arraigned in Attleborough District Court and charged with the following:
   a. Aggravated Assault and Battery on a . . . female by placing your hands around her neck and kneeling on her stomach; and
   b. Witness Intimidation.

Your actions listed in #1 & #2 above, together and individually, constitute conduct unbecoming a Firefighter, are in violation of Article XXIV Section 1 of the Rules and Regulations of the North Attleborough Fire Department. Such behavior is inherently incompatible with your continued employment as a firefighter.

Furthermore, as the court has issued an order prohibiting you from having any contact with Ms. [Doe] including contact with her at her home in North Attleborough, you are incapable of working as you would be unable to respond to emergency calls in certain areas of Town where Ms.[Doe] resides.

Together with your prior disciplinary record, the above-cited inability to perform you duties and the violations of the Rules and Regulations . . . are just cause to discharge you from your employment with the Town.

(*Exh. 3*)

34. The Rules and Regulations referenced in the termination letter state, in relevant part:

"The following acts, actions or activities by members of the Fire Department are prohibited or restricted.

A. Conduct Unbecoming of a Firefighter, Officer or Member of the Fire Department – The commission of any specific act or acts of immoral, improper, disorderly or intemperate personal conduct which reflects discredit on the member; upon fellow members or upon the reputation of the Fire Department.
B. Criminal Conduct – The commission of any felony or misdemeanor, or the violation of the criminal laws or statutes of the United States or any local jurisdiction.

(*Exh. 1; Testimony of Chief Joubert & Belham*)

35. On January 3, 2016, one month after his termination, Mr. Lavery was involved in another incident in which he allegedly assaulted another woman, which resulted in additional criminal charges against him and a second notice of "Intent to Terminate – Second Discharge" issued by

the North Attleborough Town Manager on April 19, 2016. This incident was brought to the Commission's attention on April 22, 2016, just prior to commencing the hearing of this appeal. (*Administrative Notice* [*Email to Commission from Appellant's Counsel dated 4/22/2015*)

36. On March 29, 2016, the 209A restraining order issued against Mr. Lavery on November 23, 2016 was terminated "at plaintiff's [Ms. Doe's] request. With counsel." (*Exh. 20*)[9]

37. On that same date, all charges in the pending criminal case against Mr. Lavery involving the November 21, 2015 incident were dismissed for failure to prosecute, after "5th amendment priv. asserted" by Ms. Doe. (*Exh. 21; Testimony of Appellant & Ms. Doe*)

38. On April 28, 2016, the BOS voted (3-2) to drop the second termination proceedings. The Commission was informed of this action on or about May 6, 2016, also prior to the first day of hearing of the appeal. (*Administrative Notice [Email to Commission from Appellant's Counsel dated 5/6/2016; Emails to Commission from Respondent's Counsel dated 8/18/2017 & 8/31/2017, with April 28,2016 BOS meeting minutes attached]*)

39. Neither party offered further evidence about the January 3, 2016 incident during the hearing of this appeal. In August 2017, I requested the parties to provide further details about the status of that matter. (*Emails from Commission to Counsel dated 8/18/2017 & 8/21/2017*)

40. As a result, the parties informed the Commission that, on July 29, 2016, Mr. Lavery admitted to sufficient facts on the 2016 assault and battery charge and the case was continued without a finding of guilt (CWOF) with one year's probation and other conditions (now completed). (*Administrative Notice* [*Commonwealth v. Lavery, Docket No. 1634CR000001; Email to Commission from Respondent's Counsel dated 8/18/2017; Email to Commission from Appellant's Counsel dated 8/23/2017]*

[9] The court docket is stamped "VACATED", but I infer that is most likely a scriverner's error or a misnomer, as the record does not reflect any indication that the court intended the action to be "nunc pro tunc", rather than what would traditionally be expected to be prospective relief from such an order.

APPLICABLE CIVIL SERVICE LAW

A tenured civil service employee may be disciplined for "just cause" after due notice and hearing upon written decision "which shall state fully and specifically the reasons therefore." G.L.c.31,§41. A person aggrieved by a decision of an appointing authority made pursuant to G.L.c.31,§41 may appeal to the Commission under G.L.c.31,§43,¶2, which provides, in part:

> "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 makes a de novo review "for the purpose of finding the facts anew." Town of 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." City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, 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 (1983).

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 (1971); City of 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 Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in governmental employment decisions.' " Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of "merit principles" which govern civil service law that discipline must be remedial, not punitive, designed to "correct inadequate performance" and "separating employees whose inadequate performance cannot be corrected." G.L. c.31,§1.

Off-duty misconduct properly can be the basis for discipline when the behavior has a "significant correlation" or "nexus" between the conduct and an employee's fitness to perform the duties of his public employment, i.e. "the conduct is reasonably related to the fitness of the employee to perform in his position." G.L.c.31,§43,¶2. See, e.g., City of Cambridge v. Baldasaro, 50 Mass.App.Ct. 1, 4, rev.den., 432 Mass, 1110 (2000) (no nexus between motor equipment operator's duties and off-duty tirade against city employee who had ticketed him for illegal parking); School Committee of Brockton v. Civil Service Comm'n, 43 Mass.App,Ct. 486, 491-92, rev.den., 426 Mass. 1104 (1997) (no evidence that school custodian's sexual misconduct in public park was "reasonably related to the fitness of the employee to perform in his position")

G.L.c.31, Section 43 also vests the Commission with "considerable discretion" to affirm, vacate or modify discipline but that discretion is "not without bounds" and requires sound explanation for doing so. See, e.g., Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 600 (1996) ("The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio . . . accorded the appointing authority")

> "[T]he *power to modify is at its core the authority* . . . *to temper, balance, and amend. The power to modify penalties permits the furtherance of uniformity and equitable treatment of similarly situated individuals*. *It must be used to further, and not to frustrate, the purpose of civil service legislation, i.e., 'to protect efficient public employees from partisan political control'* . . *and 'the removal of those who have proved to be incompetent or unworthy to continue in the public service*' [Citations]"

Id., (*emphasis added*). See also Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983).

ANALYSIS

North Attleborough has met its burden to show by a preponderance of evidence just cause to terminate Mr. Lavery as an NAFD firefighter. Although the alleged acts amounting to a violent criminal assault against Ms. Doe and an attempt to intimidate her that formed the basis for termination were not proved, North Attleborough did prove that Mr. Lavery engaged in an intolerable act of domestic violence that fits well within the definition of "conduct unbecoming" a firefighter that justified his termination.

Job Nexus of Off-Duty Conduct By A Firefighter

This appeal is distinguishable from cases in which off-duty conduct followed, or accompanied, some similar on-duty acts of misconduct. E.g., Caira v. City of Waltham, 28 MCSR 574 (2015) (termination of motor equipment operator based on largely undisputed evidence of selling drugs both on- and off-duty); Timperly v. Burlington School Committee, 23 MCSR 651 (2010) (misconduct by off-duty school custodian with extensive prior record of

discipline for similar violent on-duty behavior justified termination). Nor is this a case in which off-duty criminal misconduct and untruthfulness posed a direct and unreasonable risk that the same unacceptable misconduct would be repeated in the workplace. cf., Everton v. Town of Falmouth, 26 MCSR 465 (2013) (police officer properly terminated for off-duty criminal driving violations and untruthfulness, including failure to stop for a police officer and driving to endanger); Costa v. City of New Bedford, 24 MCSR 368 (2011) (discipline of firefighter for off-duty animus, taunting and physical altercation with another firefighter at an arbitration hearing); LeCompte v. Department of Correction, 24 MCSR 534 (2011) (discipline of correction officer for violently resisting arrest that resulted in his being Tasered).

Here, Mr. Lavery's prior reprimands (1999 - EMS knowledge, 2000 & 2004 – leadership) bear no relationship to the violent behavior alleged in this appeal. A 2004 memorandum in the file, along with Chief Joubert's 2013-2014 counseling and subsequent referral to treatment, are the only indicia that his personal life ever came up at work, which mainly manifested through colleagues overhearing him arguing on the telephone (with person(s) unknown) and his absenteeism in the past. Those issues, however, did not percolate into any workplace confrontations. By November 2015, but for the chance encounter with Ms. Doe, these personal issues appeared to have been behind him. Thus, his prior on-duty history does not warrant finding an existing pattern that implicates a nexus to present fitness to perform his job.

North Attleborough correctly argues that discipline may be based on violation of a "zero tolerance" rule that the employee knew clearly covers both on-duty and off-duty behavior. See, e.g., Schiavone v. Civil Service Comm'n, 83 Mass.App.Ct. 1118 (2013) (Rule 1:28), affirming, 21 MCSR 464 (2008), on remand, 22 MCSR 672 (2009) (sexual harassment policy) Here, North Attleborough relies on two sections of the NAFD's Rules and Regulations:

"A. Conduct Unbecoming of a Firefighter – "The commission of any specific act of immoral, improper, disorderly or intemperate personal conduct which reflects discredit on the member; upon fellow members or upon the reputation of the Fire Department" and

"B. Criminal Conduct – "The commission of any felony or misdemeanor or the violation of the criminal laws or statutes of the United States or any local jurisdiction." [10]

A rule prohibiting "conduct unbecoming" is usually, although not exclusively, associated with armed police officers who are held to a "higher standard" than other public employees and "carr[y] the burden of being expected to comport himself or herself in an exemplary fashion" See, e.g., McIsaac v. Civil Service Comm'n, 38 Mass.App.Ct. 473 (1995) McIsaac upheld the discharge of a police officer who mishandled his firearm while intoxicated off-duty in public.

> "In that context [i.e. a police officer's higher standard], the adjectives "immoral", 'improper", "disorderly" and "intemperate" have meaning. Negligent handling of a firearm while drunk and aggressive verbal abuse . . . is surely an embarrassment to a police force and, hence, does not become a police officer." Id., 38 Mass.App.Ct. at 475.

The term "conduct unbecoming", however, does not "render virtually any public indiscretion sufficient to support discharge . . . . " See School Committee of Brockton v. Civil Service Comm'n, 43 Mass.App.Ct. 486, 492, rev.den., 426 Mass. 1104 (1997). Even with police officers, "conduct unbecoming" can be considered so "impermissibly vague" as to be unenforceable. McIsaac, *supra*, 38 Mass.App.Ct. at 495-96.[11]

Here, unlike Schaivone, the evidence did not show that NAPD Firefighters were expressly trained on the "conduct unbecoming" rule or told what it covered even when not in uniform or not on-duty. Nearly all other NAPD "Prohibited Conduct" relates just to on-duty conduct, save

[10] I need not address the "Criminal Conduct" rule as a basis for the required nexus, as Mr. Lavery was not convicted of any crimes and I do not find that he committed any criminal misconduct. I do note that the NAFD rule appears to cover virtually any federal, state or municipal offense anywhere in the nation, and may not pass constitutional muster, as written, when relied upon to regulate "an interest as fundamental and important as an employee's work tenure." See School Committee of Brockton v. Civil Service Comm'n, 43 Mass.App.Ct. 486, 492-93, rev.den., 426 Mass. 1104 (1997); cf. McIsaac v. Civil Service Comm'n, 38 Mass.App.Ct. 473, 475 (1995).

[11] I limit the unpublished dicta in Schiavone, holding him to "any standard of decency" to the facts of that case. Mr. Schiavone was an "uncouth bigot", had been disciplined for harassing co-workers, and then made public, derogatory homophobic remarks about a private citizen while among his on-duty, unformed, colleagues whom Schiavone encouraged to join in harassing the citizen. Schiavone, *supra*, 83 Mass.App.Ct. 1118*2.

for "Use of and or Possession of Intoxicating Beverages or Drugs" that prohibits a firefighter "while off duty [to] render [themselves] unfit for normal scheduled duty through the use of any narcotic drug or controlled substance . . ." (*Exh. 1*) Thus, the NAFD's "conduct unbecoming" rule does not unequivocally describe the type of off-duty private "unbecoming" conduct intended to be covered by the rule. Nevertheless, even in the absence of an explicit "zero tolerance" policy, it is entirely consistent with civil service law, and common sense, to hold a firefighter responsible, at a minimum, for some level of unacceptable off-duty behavior that would be intolerable in any civilized society. See G.L.c.31,§59 (prohibition against retaining employees "habitually using alcohol" or "convicted of any crime"); PAR.23 (Smoking Prohibition Rule for most public safety employees).

Conduct Unbecoming of a Firefighter

As noted above, a rule prohibiting "conduct unbecoming" covers some, but not all off-duty misconduct. The violent criminal acts with which Mr. Lavery was charged surely would meet that standard but the evidence does not warrant a finding that he committed those specific acts.

First, the preponderance of evidence established that Mr. Lavery never "attempted to strangle [Ms. Doe]" as North Attleborough's charge letter claimed and the termination letter concluded. In fact, neither Ms. Doe nor any NAPD witness or document supported that conclusion. Chief Joubert later regretted using the term "strangle" to describe what happened.

Second, finding that Mr. Lavery's "conduct [on November 21, 2015] . . . constituted the seventh domestic incident involving [Mr. Lavery] and Ms. [Doe] in the past few years" is also patently inaccurate. Since 2013, there had been one prior "incident" involving them on October 24, 2016 that involved Mr. Lavery's call to police that she was harassing him, which resulted in

the police ordering her to leave and stay away. The other prior "incidents" established by the evidence, included five complaints Mr. Lavery brought or was about to bring against Ms. Doe.

As to other alleged criminal acts – "Aggravated Assault and Battery" and "Intimidation" of Ms. Doe by "choking her", "grabbing her neck", pushing her against a wall", "kneeling on her stomach", and "covering her mouth" – the only evidence comes from Ms. Doe's hearsay out-of-hearing statements and the "red marks" on her neck. On many of these critical facts, Ms. Doe invoked her constitutional rights against self-incrimination and refused to answer a number of specific questions at the Commission hearing, including:

- She would not testify that her statement about being pushed against the wall was true;
- She refused twice to testify who caused the "red marks" or how she received them;
- She refused to testify to her recollection of where Mr. Lavery was when she first walked into his bedroom, what he was wearing or if he was covered by a blanket.

Ms. Doe's refusal to answer these questions, together with my observations about her demeanor, both during her testimony at the Commission hearing and during the video-taped NAPD interviews which I watched carefully, persuade me to discount most of Ms. Doe's testimony as not credible. At the Commission hearing, Ms. Doe was polite but uncommonly nervous and often tentative. She spoke so softly that she was asked several times to raise her voice.

I do not completely discount all of the testimony provided by Ms. Doe. When it comes to physical violence, however, under the preponderance of the evidence test which I am obliged to apply, along with Ms. Doe's own admissions, I am persuaded that, although they both argued acrimoniously and they both received physical injuries, as in most of their past encounters for which Ms. Doe admitted that she started the physical confrontation and Mr. Lavery had reacted to ward off her attack on him, I find that, by a preponderance of all of the evidence that was presented to me, that pattern is what played out on November 21, 2015.

I do remain seriously troubled by the undisputed fact that Ms. Doe appeared with a red mark on her neck. The photograph in evidence is not crystal clear as to the actual nature of the injury, and the NAPD interviews only approached the surface of this subject. During the brief interviews at the NAPD, Mr. Lavery offered up a plausible explanation as to how he got the injuries the NAPD saw on him, specifically, the "teeth marks" on his body, which would be consistent with his version of how Ms. Doe attacked him while still in bed. The NAPD officers never explicitly told Mr. Lavery that they saw "red" marks on Ms. Doe and never probed him with particularity about those injuries during the interview. Thus, I cannot conclude from the NAPD interviews and testimony alone, on which North Attleborough principally relied, that North Attleborough met its burden to prove that it was "more likely than not likely" that Mr. Lavery "attempted to strangle" Ms. Doe or inflicted the specific injuries she had alleged and on which North Attleborough based its decision to termination his employment.

Had Mr. Lavery not been involved in another incident of alleged domestic abuse, for which he admitted to sufficient facts to warrant a finding of guilty on charges of assault and battery, my assessment would have been limited to the evidence presented through the NAPD to the Commission on the November 21, 2015 incident. I would have been inclined to conclude that North Attleborough did not prove by a preponderance of evidence that Mr. Lavery had used a degree of force that would have left any "red" marks on Ms. Doe's neck during their struggle.

To be sure, it would have been preferable for the NAPD to have conducted more thorough interviews to flesh out all of the complete details on this critically conflicting, and strenuously disputed, version of events while the altercation was still fresh. Nevertheless, every NAPD police officer credibly testified to seeing some sort of a red mark on Ms. Doe's neck. This undisputed fact, together with the fact that Mr. Lavery admitted to domestic violence in an incident barely

one month after his very similar altercation with Ms. Doe, tips the calculus on this very close call. I conclude that Mr. Lavery's testimony that he would "never" hit a woman is not credible. In addition, I find Mr. Lavery's other quick, self-serving responses to the NAPD, and failure to elaborate, about how Ms. Doe "shouldn't" have "any" marks on her and it was "Not True" that he grabbed her neck, were also a prevarication, intended to avoid having to acknowledge the degree of force that he did, in fact, know, or should have known, he had employed. Thus, I conclude, as did the NAPD and North Attleborough, that (although he did not "attempt to strangle" Ms. Doe), it is "more likely than not likely" that Mr. Lavery did, intentionally or recklessly, grab Ms. Doe by the neck and employ some unreasonable degree of force during his physical altercation with Ms. Doe that, despite his denials, did, indeed, put her at risk of serious harm. This misconduct, while it may not rise to what is necessary to prove criminal assault, and even if viewed through the lens of "self-defense", established that Mr. Lavery was involved in an act of intolerable domestic violence and, therefore, engaged in behavior that North Attleborough can fairly consider to meet its definition of "conduct unbecoming" a firefighter.

I am mindful that, as a general rule, the Commission is charged with conducting a de novo hearing to "finding afresh the facts upon which the employment action was based." E.g., City of Leominster v. Stratton, 58 Mass.App.Ct. 726, rev. den, 440 Mass. 1108 (2003). The authority to inquire into "after acquired" evidence is somewhat uncertain. See City of Springfield v. Civil Service Comm'n, 469 Mass. 370, (2014) Under the particular circumstances of this case, including the close similarity and temporal proximity of both incidents, as well as the unique challenges to fact-finding in cases of domestic violence, common sense dictates that I do not overlook the second incident. Rather, I am persuaded that it is fair to consider the January 3, 2016 incident, together with Mr. Lavery's subsequent admission to facts sufficient to find him

guilty of domestic violence, at least, for the limited purpose of informing my own credibility assessment of Mr. Lavery's testimony and state of mind concerning the November 21, 2015 incident that occurred one month earlier. My consideration of the January \3, 2016 incident is limited to its relevance to the decision about the issues presently before the Commission. I have not reached any conclusion as to whether the merits of that incident would, or would not, support independent, alternative reasons for termination of Mr. Lavery's employment, something that would have required North Attleborough to have proceeded with the second disciplinary proceeding and rendered a further decision imposing such conditional discipline. See generally City of Springfield v. Civil Service Comm'n, 469 Mass. 370, 374, 377 fnt.13 (2014) (employee's initial termination overturned but second termination based on conviction while first termination appeal pending upheld); Walsh v. City of Worcester, 89 Mass.App.Ct. 1128 (1:28 decision), rev. den. 475 Mass. 1105 (2016), on remand, 29 MCSR 590 (2016) (layoff upheld after notice and hearing during pendency of appeal of prior termination that was eventually overturned)

The Restraining Order as Grounds for Termination

North Attleborough also argues that Mr. Lavery was disqualified for duty as an NAFD firefighter when Ms. Doe obtained a 209A restraining order on November 23, 2015 that ordered him "not to contact [Ms. Doe] . . . to stay at least 100 yards away" from her and "stay away from [her] residence" and her "workplace" for one year. I do not find merit to that argument.

The only relevant restrictions in the 209A order that could plausibly impact Mr. Lavery's duty as an NAFD firefighter is the restriction that he keep "100 yards away" from her and "stay away" from her residence in the center of North Attleboro.[12] I do not find that these restrictions pose any "reasonably foreseeable, specific connection between an employee's . . . conduct and

[12] Mr. Lavery would have no reason to "contact" Ms. Doe except in the company of another firefigher in the course of his duties (in the remote chance of an emergency in which she was involved) or to go to her "workplace", which was in Bellingham.

the efficiency of the [public] service." School Committee of Brockton v. Civil Service Comm'n, 43 Mass.App.Ct. 486, 492, rev.den., 426 Mass. 1104 (1997) (no nexus to school custodian's job and his public sexual liaison in nearby park) See also, Fuertes v. City of New Bedford, 25 MCSR 485 (2012) (hypothetical risk that EMT's off-duty motor vehicle accident could possibly implicate future injury to the public insufficient to justify termination)

First, none of the three NBFD fire stations are located within 100 yards of Ms. Doe's residence. According to Chief Joubert, the NAFD receives approximately 4000 calls for service annually. The NAFD provided maps showing the location of incident responses for each fire station, one map (Exh. 19A) showing all incident responses to which Mr. Lavery responded in 2015 and one map (Exh. 19B) showing all NAFD incident responses for 2015. These maps establish that of the thousands of calls for service, no more than about 12 incidents, if any, were located near Ms. Doe's residence and, of those, no more than three were incidents in which Mr. Lavery was one of the firefighters who responded. The Central Station, closest to Ms. Doe's residence, and the only station with ALS apparatus, is regularly staffed with four to six firefighters and a lieutenant (not including command staff). All incident responses require a minimum of two NAFD personnel. Under these circumstances, I cannot conclude that North Attleborough proved beyond a speculative level that Mr. Lavery would be in a position to be called upon in his capacity as an NAFD firefighter to respond alone to any incident that would rationally be viewed to rise to the level of "contempt" of his obligations under the 209A restraining order.

Second, Mr. Lavery points out that a court has the power to modify a 209A restraining order to permit a defendant to engage in activities in the ordinary course of his or her employment, proffering a 209A order entered against an NAPD police officer that was modified to allow him

to carry his firearm in his capacity as a police officer. Ms. Doe testified she would not have had an objection to such a modification if she had been asked. Eventually, in March 2017, the 209A order was terminated in its entirety at Ms. Doe's request and upon advice of her counsel. While the burden rested on Mr. Lavery to pursue such a modification, as a practical matter, he never had that opportunity, given the haste with which Chief Joubert and the BOS decided to act to terminate him.

Procedural Error

Mr. Lavery contends that he was treated disparately from other North Attleborough employees who were criminally charged, but who were allowed to remain employed on administrative leave pending the outcome of the criminal charges. Mr. Lavery also points to alleged hasty, procedural irregularities in the way Chief Joubert and the BOS handled the disciplinary process. I did not find the other examples sufficiently comparable to rise to the level of disparate treatment and I do not find the alleged procedural irregularities materially significant. I do consider the limited investigation that North Attleboro conducted and the speed with which Mr. Lavery was charged and dismissed (essentially on one day's investigation), standing on its own, was one reason that Chief Joubert and the BOS conflated a (legitimate) five-day suspension into the more problematic termination decision, having reached the pre-determined, erroneous conclusions about many crucial underlying facts which, ultimately, North Attleborough did not substantiate at the Commission hearing. It certainly might have been prudent for North Attleborough to have taken some time to conduct a more thorough investigation and consider all intermediate options (such as paid or unpaid administrative leave)

to allow time for a more deliberate consideration of Mr. Lavery's fate. I do not find, however, that procedural error here, if any, adversely affected Mr. Lavery's civil service rights.

Adverse Inference

North Attleborough demands that the Commission draw an adverse inference against Mr. Lavery because he didn't "testify" at the BOS "hearing." North Attleborough correctly points to Town of Falmouth v. Civil Service Comm'n, 447 Mass.814, 826-27 (2006), which stands for the proposition that the Commission must account for the negative inference that may be drawn from a "refusal" of an employee to testify at his appointing authority disciplinary hearing. Id., 447 Mass. at 816, 825. The present appeal is distinguishable.

I acknowledge that Mr. Lavery did not "testify" at the BOS executive session on December 3, 2015. The "Notice of Intent to Discharge" (*Exh. 2B*) acknowledged that Mr. Lavery was entitled to a "full hearing" before the BOS and to "answer personally, by counsel, and/or union representative the charges", but, also stated that the hearing would be held in "executive session" and that Mr. Lavery was permitted to be "present" and "to speak", and "*to have counsel or a representative of your own choosing present and attending for the purpose of advising you and not for the purpose of active participation* in the executive session." Under these conditions, Mr. Lavery's "testimony" or cross-examination of North Attleborough's witness, would have been virtually impossible. In fact, no witnesses were called to testify by either side. Thus, it is plain that the BOS executive session was not the "full hearing" by an appointing authority with evidence taken under oath as the civil service law contemplated. See G.L.c.31,§41-§43. I also note that Mr. Lavery was fully cooperative with the NAPD in the video-recorded interviews they conducted, even after he was given his Miranda rights. Thus, unlike Officer Deutschmann in Town of Falmouth case, there was no evidence that Mr. Lavery invoked his Fifth Amendment

privilege and "refused" to testify at a "full hearing" before the BOS, which seems to be the legal predicate to the required adverse inference.

Even if the principle of Town of Falmouth were extended to a case such as this one, and I took into account that North Attleborough could have drawn an adverse inference from Mr. Lavery's choice not to speak at the BOS "hearing" (although the termination letter does not state that it did so), I do not believe that fact alters my conclusion. Mr. Lavery was represented by counsel at the BOS hearing. Mr. Lavery previously freely waived his Miranda rights while still a subject of a criminal investigation, and he testified credibly before the Commission. Under all of the circumstances, I do not believe his "choice" not to "speak", to rely on counsel and to rest on his prior statements at the appointing authority hearing when the appointing authority called no witnesses either, rises to the level of "silence" or "refusal" to testify sufficient to override all the other credible, probative evidence in his favor offered to the Commission. See also, Packard v. Massachusetts State Police, CSC No. D-15-223, 30 MCSR --- (2017) (Decision of the Majority, fnt. 14).

Modification of Penalty

The facts I find credible based on the evidence presented at the Commission hearing differ somewhat from those on which North Attleboro relied to justify its discharge of Mr. Lavery and calls for the Commission to consider whether to modify the penalty imposed.

This appeal aligns closely with Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 825-27 (2006). That case overturned a Commission decision to modify a police officer's suspension from 180 days to 60 days because the difference in the Commission's findings were "too inconsequential to justify the reduction of the penalty". Id., 447 Mass. at 84-26.

Here, there was no proof of an "attempt to strangle" Ms. Doe or other criminal behavior and no witness intimidation; the alleged pattern of "seven" prior incidents of domestic abuse was a mischaracterization; nothing in the 209A restraining order necessarily precluded Mr. Lavery from continuing to work as an NAFD firefighter; and the only documented work-related consequence from the November 21, 2015 incident and the "efficiency of the public service" was evidence of one missed shift due to Mr. Lavery's arrest and incarceration.

Nevertheless, after considering Mr. Lavery's subsequent admission to domestic violence in an incident a month after his very similar altercation with Ms. Doe, I have concluded that Mr. Lavery employed a degree of force during his physical altercation with Ms. Doe that, either intentionally or recklessly, did put her at risk of, or did cause her serious physical harm. I find that the difference in the degree and intent in the use of the force that Mr. Lavery did, in fact, employ, and what North Attleborough characterized as an "attempt to strangle", is too inconsequential to be distinguishable. Both are equally intolerable acts of violence that a firefighter would know, or should know, to be "conduct unbecoming" a person in the public safety service.

Thus, after careful consideration, I conclude that the facts as found by the Commission do not differ significantly from those on which Mr. Lavery's termination was based. Therefore, it is appropriate for the Commission to uphold the five-day suspension and the termination decision. This Decision in no way reflects the Commission's judgment on the merits of the subsequent January 2016 incident. Should this Decision be appealed, nothing precludes North Attleborough from taking further appropriate action in the meantime to resurrect the disciplinary proceedings in that matter, provided that the Town affords Mr. Lavery the required prior notice and procedural civil service rights before issuing any further, contingent discipline in that matter.

CONCLUSION

Accordingly, for the reasons stated, the appeal of the Appellant, Glenn Lavery, under Docket No. D-15-229 is ***dismissed***:

Civil Service Commission
/s/ *Paul M. Stein*
Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein & Tivnan, Commissioners) on September 28, 2017.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 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-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 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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:
Paul T. Hynes, Esq. (for Appellant)
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COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

GLENN LAVERY,
Appellant
v.
TOWN OF NORTH ATTLEBOROUGH,
Respondent

D1-15-229

CONCURRING OPINION OF COMMISSIONERS ITTLEMAN, BOWMAN, TIVNAN AND CAMUSO

We concur in the ultimate decision to deny the appeal. While we defer to Commissioner Stein's credibility determinations as the hearing officer and we note the great difficulties presented by the case, there are a number of issues in the decision that we believe must also be considered.

The Commonwealth's policies against domestic violence are evident across all three branches of government. The legislature has repeatedly enacted legislation to respond to domestic violence. Governor Baker's Executive Order No. 563, "Re-Launching the Governor's Council to Address Sexual Assault and Domestic Violence", dated April 27, 2015, affirms and furthers the state's long-standing commitment to addressing domestic violence. It states, in pertinent part,

… Whereas, … the Governor's Office also acknowledges that sexual assault and domestic violence often go unreported …;
Whereas, acknowledging the progress made by previous administrations, important work remains to be done to improve safety in our homes and throughout the Commonwealth; …

Section 4. … the Council shall be charged with assessing the implementation of those parts of Chapter 260 of the Acts of 2014 that establish new programs and introduce training and education targeted at reducing sexual assault and domestic violence in the Commonwealth …

…4. Determine and report on the progress made by the Massachusetts District Attorneys' Association in commencing a course of training on the issues of domestic violence and sexual assault violence for all district attorneys and assistant district attorneys …;

5. determine and report on the progress made by the trial court department in implementing a training program on domestic violence and sexual violence for trial court employees ….
(Id.)

The Executive Office of Public Safety & Security (EOPSS) issued the revised "Domestic Violence Law Enforcement Guidelines" in 2017 pursuant to Chapter 260 of the Acts of 2014, An Act Relative to Domestic Violence. http://www.mass.gov/eopss/docs/eops/2017-dv-law-enforcement-guidelines-final-07-06-2017.pdf These lengthy and detailed Guidelines provide, in pertinent part,

… anyone can be a victim; anyone can be an offender regardless of gender and/or sexual orientation. Always consider who is the dominant aggressor and make that determination based on the totality of the facts and circumstance, not on the victim/offender's gender, size etc. …

Many victims of domestic violence never file a report with law enforcement, get a restraining order/injunction, or connect with a domestic violence program. … Furthermore, many victims may regret calling 911 once they are thrust into the criminal justice system, which can bring increased financial burdens due to lost income, defense attorney fees, embarrassment for having to publicly testify to the abuse, and pressure to recant. …

Be aware that trauma may influence a victim's interactions with law enforcement officers responding to domestic violence calls. Do not assume a victim is uncooperative ….
(Id. at pp. 16-17)(emphasis added)

The state's Trial Court's website contains a wealth of information for those seeking civil domestic abuse restraining orders and those who are the subject of such orders. *See, e.g.,* http://www.mass.gov/courts/selfhelp/abuse-harassment/received-order.html. In addition, since 1996 (last updated in 2011), the Trial Court has established a lengthy volume entitled "Guidelines for Judicial Practice: Abuse Prevention Proceedings" (Trial Court Guidelines). They provide, for example,

Previous versions of the Guidelines, certain forms and case law have used the term "vacate" or "vacated order" to describe those orders that have been terminated upon motion of either party or because the plaintiff did not appear at a scheduled hearing. In contexts other than c. 209A [domestic violence], the word "vacate" carries the connotation that the order should not have been originally issued. In the instance of c. 209A orders … vacating an order merely terminates the order ….
(Trial Court Guidelines, p. 8)

The Trial Court Guidelines also provide that Clerks are to ensure privacy for plaintiffs seeking relief under G.L. c. 209A. (Id. at 38) Affidavits in support of a request for a restraining order are not required by statute but the filing of an affidavit is "highly recommended." (Id. at 39) Further, "'[a] defendant has a general right to cross-examine witnesses against him. There may be circumstances in which the judge may deny that right in a G.L. c. 209A hearing, and certainly a judge may limit cross-examination for good cause in an exercise of discretion.' Frizado v. Frizado, 420 Mass. at 597 (1995)." (Id. at 98)

On its website, the Massachusetts District Attorneys Association notes, in pertinent part,

Prosecutors who handle domestic violence cases know that very few go to trial. There are many obstacles that confront prosecutors trying domestic violence cases; including, trial delays, Fifth Amendment claims by the victim, and accord and satisfactions on the day of trial.
…
http://www.mass.gov/mdaa/trainings-and-conferences/obstacles-in-trying-domestic-violence-cases.html (emphasis added)

Thus, the Commonwealth has established its desire and commitment to address and prevent domestic violence.

Further, the decision appears to state that there is no nexus between the restraining order issued against the Appellant and his employment. However, firefighters may be called to the scene of domestic violence by police to provide medical care, indicating that firefighters need to be able to respond appropriately to domestic violence. Consequently, there is a nexus between the restraining order issued against the Appellant and the Appellant's employment.

With regard to restraining orders, Ms. Doe previously declined to seek one when police informed her that she could request one. As the above authorities indicate, that is not unusual in domestic violence matters. Ms. Doe later sought a restraining order, following the police interview of Ms. Doe and the Appellant. When she sought the order, the police acted pursuant to the EOPSS Guidelines, determining, under the circumstances, who was the "dominant aggressor". The Appellant's request for a restraining order was denied.

The decision here refers to the police reports generated as a result of the police interviews of both parties regarding events related to the restraining order and criminal charges as hearsay, since the police were not called to the scene of the reported incident. Unfortunately, police often do not witness the violence as they arrive after it has occurred. In addition, at least one of the police officers who conducted the interviews testified at the Commission hearing where the credibility of their reports could be tested.

The decision finds that Ms. Doe's credibility was flawed because, *inter alia*, she failed or refused to respond to some of the questions posed to her at the Commission hearing. The Commissioner informed Ms. Doe at the outset of her testimony that she could refuse to answer questions with which she was uncomfortable and/or to invoke her right in the 5th Amendment of the U.S. Constitution against self-incrimination. Having informed Ms. Doe that she could decline to

respond, it seems inconsistent to draw any conclusions based, in part, on her failure to respond to certain questions.

Both the Appellant and Ms. Doe were criminally charged for their conduct relating to the restraining order against the Appellant. Months later, the restraining order was terminated and the criminal charges against both were dismissed, both having invoked their 5th Amendment rights against self-incrimination. As noted above, it is not unusual for criminal charges involving domestic violence to be dismissed because a party invokes his or her 5th Amendment right.

In view of the foregoing, we believe that the Appellant was the subject of a domestic violence restraining order, for which there is adequate nexus to his employment, which constitutes conduct unbecoming and that the Respondent had just cause to discipline the Appellant. To us, such conduct is alarming and highly offensive, not just "unbecoming"[13] and the Appellant's employment was appropriately terminated by the Respondent, which was not required to prove that the Appellant was convicted of the criminal charges against him. That the Appellant admitted to sufficient facts to support a finding of guilty for a domestic assault and battery that occurred one month later, with a different woman, renders his assertions regarding Ms. Doe that "I'd never hit a woman", meaningless at best. While we have concern for the manner in which the Respondent conducted its civil service hearing, barely allowing the Appellant to present a case in his own behalf, the Appellant was afforded a hearing at the Commission, rendering such concern moot.

/s/
_____
Cynthia Ittleman
Commissioner

/s/
_____
Christopher Bowman
Chairman

/s/
_____
Kevin Tivnan
Commissioner

/s/
_____
Paul Camuso

[13] There is apparently no evidence that the Fire Department has a domestic violence-related policy which more explicitly indicates that domestic violence is unacceptable.

Commissioner