

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT  
PLCV2014-00584-A

ADAM LEVESQUE

vs.

CIVIL SERVICE COMMISSION & another<sup>1</sup>

**MEMORANDUM OF DECISION AND ORDER ON SECOND  
CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS**

Plaintiff Adam Levesque filed this action seeking judicial review of a May 1, 2014 decision of the Civil Service Commission (“the Commission”) affirming the decision of the Town of Middleborough Board of Selectmen (“the Board”) to terminate his employment as a police officer. On September 21, 2015, this Court (Chin, J.) remanded the matter to the Commission for further findings, and the Commission issued a Decision After Remand on March 14, 2019, affirming Levesque’s termination. For the reasons discussed below, Levesque’s Second Motion For Judgment on the Pleadings is **DENIED** and Defendant Town of Middleborough’s Second Cross-Motion For Judgment on the Pleadings is **ALLOWED**.

**BACKGROUND**

Levesque began his employment with the Middleborough Police Department (“the Department”) on July 16, 2001. Following a disciplinary investigation, which is discussed in detail *infra*, Levesque, the Town, and the Union executed a Settlement/Last Chance Agreement (“the Agreement”) on August 6, 2010, under which Levesque was suspended for eight work

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<sup>1</sup>Board of Selectmen for the Town of Middleborough

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shifts without pay. The Agreement provided that if Levesque engaged in conduct warranting a suspension without pay or failed to comply with any term of the Agreement, the Town would have just cause to terminate his employment.

In 2012, the Town received a "Click It or Ticket" Grant from the Massachusetts Executive Office of Public Safety Highway Safety Division. This grant funded overtime shifts to enforce the seatbelt law through high-visibility traffic enforcement. To be reimbursed for overtime, the Department was required to submit Traffic Enforcement Grant Activity Reports. On May 23, 2012, Levesque had a cell phone conversation with his best friend, William Ferdinand, about a broken window in Ferdinand's vehicle. Ferdinand is a special police officer in the Department. Levesque recorded this conversation as a traffic stop in his grant activity report. On May 29, Levesque listed a traffic stop of Ferdinand in his grant activity report after texting Ferdinand that he was "stopping" him for speeding. The same day, Levesque listed as a stop that he gave Fran Cass, a close friend who is the Town Park Superintendent, a warning about a defective shock absorber. This "stop" was based on Levesque observing Cass's vehicle parked in a town lot.

In the summer of 2012, the Town conducted an investigation into whether Levesque had filed false reports in connection with these traffic stops. Police Chief Bruce Gates ordered Levesque not to speak to anyone about the investigation. However, Levesque called Ferdinand and repeatedly asked what Ferdinand had told Department investigators in an interview. Ferdinand then told Levesque the interview questions and his responses.

After a hearing, the Board terminated Levesque on July 23, 2012, finding in an August 6, 2012 written decision that he violated the Agreement, filed a false report, and engaged in conduct unbecoming a police officer. Levesque appealed to the Civil Service Commission

pursuant to G.L. c. 31, §§ 42 and 43. The Commission upheld Levesque's termination on the ground that his conduct in filing a false report, among other things, warranted a suspension under the Agreement and therefore triggered termination under the Agreement.

Levesque then appealed the Commission's decision to this Court. The parties filed cross-motions for judgment on the pleadings. In a Memorandum of Decision and Order dated September 21, 2015, this Court (Chin, J.) rejected Levesque's claims that the Commission committed legal error by failing to find that his termination violated G.L. c. 150E, § 10(a)(1), and by excluding from evidence several exhibits offered to show disparate treatment. The Court further concluded that there was substantial evidence in the administrative record for the Commission's finding that Levesque knowingly filed a false police report.

The Court then addressed Levesque's argument that the Commission erred in upholding his termination under the Agreement without allowing him to challenge the validity of that Agreement. The Court ordered: "this matter is remanded to the Commission for a determination of whether the Agreement should be deemed binding and whether just cause exists independent of the Agreement to terminate Levesque."

#### **SUPPLEMENTAL ADMINISTRATIVE RECORD**

The supplemental administrative record filed by the Commission reveals the following facts. The Magistrate held a remand hearing on April 5 and August 18, 2017 at which Levesque submitted six additional exhibits and the Town submitted thirty additional exhibits. Levesque argued that the Agreement was invalid because he would not have executed it had he been aware of the July 16, 2010 Investigation Letter stating that Internal Affairs had concluded that the charge of interfering with the JP investigation could not be corroborated. Levesque further

argued that without the Agreement, he would not have been terminated, in light of the lenient treatment of other officers who were disciplined but did not have a last chance agreement.

The Magistrate heard the following additional evidence with respect to the negotiation and execution of the Agreement. In January of 2010, Middleborough police discovered that a GPS device they had placed on the car of a suspect, JP, was no longer transmitting information. On January 13, 2010, Sergeant Perkins spoke to JP, who reported that his cousin ("Cousin") told him he was under surveillance, prompting him to check his car and remove the GPS device. Cousin claimed to have received this information from Levesque. JP stated that he and Cousin were afraid of Levesque. On January 29, Chief Gates sent Levesque a letter informing him of an investigation into whether he compromised the JP investigation, and ordering him not to speak to anyone about the matter other than Gates, Lieutenant Mackiewicz, or a legal representative.

On February 9, 2010, Detective Lake conducted a recorded interview of Cousin, who stated that Levesque approached him in uniform in a marked cruiser and told him to stay away from JP because police were watching JP closely and had put a GPS unit on his car. Levesque then told Cousin to have a nice day, returned to his cruiser, and left. Cousin immediately called JP to inform him of the surveillance.

On March 8, 2010, Chief Gates submitted 25 written questions to Levesque in connection with the investigation. Levesque responded with written answers on March 19, admitting that he was aware of the investigation into JP for numerous breaking and entering incidents in the area and knew that police had attached a GPS device to JP's vehicle. Levesque wrote that he "did not recall" having any conversation with JP about his criminal activities or with Cousin about the surveillance of JP and the GPS device.

When police attempted to follow up with Cousin in April, Cousin was uncooperative but denied that anyone had threatened him or instructed him not to speak to police. Police spoke to JP, who said he was not going to make any more statements because he felt he and his girlfriend had been stopped more and given tickets since the incident with Levesque, and one officer told him he should have kept his mouth shut. On April 5, 2010, Chief Gates discussed the Levesque investigation with the State Police and the District Attorney, who advised that the matter did not implicate criminal charges.

On May 7, 2010, Chief Gates conducted a recorded interview of Levesque, which also was attended by Lieutenant Mackiewicz, Labor Counsel Leo Peloquin, and Union Counsel Michael Hanley. Gates noted Levesque's "convenient lapse of memory" about whether he had conversations with JP and Cousin about the GPS. Levesque denied speaking to Cousin about the surveillance of JP or the GPS device, and denied the suggestion that he revealed information to Cousin while trying to cultivate him as an informant. When asked why Cousin would make up the incident, Levesque replied that he and JP have always had an adversarial relationship because he has always worked to break up JP's criminal enterprise. Levesque stated that he answered the written questions by stating he did not recall on the advice of prior counsel.

On June 4, Attorney Peloquin emailed the transcripts of the Cousin interview and the Levesque interview to Attorney Hanley. By email dated June 11, Attorney Peloquin informed Attorney Hanley that Chief Gates had some additional questions and wanted to interview Levesque again on June 17. On July 1, 2010, Peloquin sent Hanley a proposed last chance agreement to avoid a civil service disciplinary hearing against Levesque. Paragraph 1 of the draft agreement stated: "Levesque denies that he intentionally alerted JP about the surveillance. The Middleborough Police Department's internal investigation will find that the charge that

Levesque alerted JP cannot be substantiated.” Paragraph 2 stated: “Levesque admits to the Department finding that he shared with his wife details of the ongoing investigation of JP and that this was a violation of the Department’s rules and regulations.” Paragraph 3 of the draft stated: “Levesque admits to the Department finding that he failed to provide complete and truthful information in the investigation and that this was a violation of the Department’s rules and regulations as well as specific written and verbal directives given to him by the Chief as part of the investigation into whether he had tipped off JP.” The draft agreement stated that Levesque would be suspended without pay for fifteen work shifts.

By email dated July 12, Attorney Hanley asked Attorney Peloquin to amend paragraph 1 by changing “cannot be substantiated” to read “was unfounded,” and to strike paragraph 3 in its entirety because Levesque did not accept that he was deliberately untruthful. On July 14, Peloquin responded that the Town would agree to the requested amendment of paragraph 1. The Town refused to strike paragraph 3 but agreed to amend it to state that Levesque admits that there is sufficient evidence to support a finding of untruthfulness but denies that he purposely withheld information.

On July 16, 2010, Lieutenant Mackiewicz sent Chief Gates an Investigation Letter stating that after a thorough Internal Affairs investigation, the charge that Levesque compromised the JP investigation “should be considered unsubstantiated.”

By email dated July 20, Attorney Hanley requested that the Town remove the reference to truthfulness from paragraph 3 and reduce the length of the suspension to eight shifts. On July 21, the Town agreed to reduce the suspension to eight shifts. However, Levesque refused to execute the Agreement.

By email dated July 26, 2010, Attorney Peloquin informed Attorney Hanley that the Town was prepared to go forward with the formal disciplinary process. On August 2, Peloquin sent Hanley a draft omitting the reference to truthfulness in paragraph 3. Hanley notified Peloquin on August 3 that Levesque would sign the agreement.

After his termination, Levesque filed a charge of prohibited practice under Chapter 150E with the Massachusetts Division of Labor Relations (“DLR”) on January 23, 2013. Levesque alleged that the Union breached its duty of fair representation and violated his due process rights during the termination investigation and hearing, by advising him to execute “an unconscionable and grossly unfair Last Chance Agreement” without revealing to him the July 16, 2010 Investigation Letter. In an April 17, 2013 decision, DLR dismissed this charge as untimely because Levesque admitted that he knew about the Investigation Letter by June 25, 2012. DLR further found that the Union did not breach its duty to Levesque because “[t]here is no dispute that the parties agreed during the negotiations and in the [Agreement] that the Police Department’s 2010 internal investigation would find that the charge that Levesque tipped off a suspect was unfounded.”

Levesque appealed this decision to the Employee Relations Board. In its brief opposing reversal of the dismissal, the Union stated:

Levesque admitted to the Union that he may have had some discussion with the drug dealer’s cousin . . . Levesque also told the union that he was worried that the Department may have video of him speaking to the suspect’s cousin so rather than say he did not do it, he answered that he “didn’t recall” speaking with the man. Based on those facts, and Levesque’s assertion that he wanted to transfer out of the department, Levesque agreed – after extensive negotiation in which he was intimately involved – to sign a last chance agreement. As part of that deal, Attorney Hanley negotiated away any reference that Levesque was untruthful. Moreover, Hanley negotiated a specific finding by the Internal Affairs unit that they find the Untruthfulness charge “unsubstantiated.”

On September 24, 2013, the Employee Relations Board affirmed the dismissal of Levesque's charge against the Union. Attorney Hanley died on September 30, 2013.

The Magistrate heard the following evidence about other officers relevant to Levesque's claim of disparate disciplinary treatment. In October of 2006, while assigned to patrol duty, Sergeant Robichau drove his cruiser home without authorization. In uniform and carrying his service weapon, he entered his 18-year-old daughter's bedroom and struck her face, causing pain and bruising, while yelling that she could no longer live there. When his 15-year-old daughter entered the room, Robichau yelled at her, grabbed her by the neck, and threw her on the bed, raising a closed fist at her as a threat. Ten minutes later, as his daughters sat in a boyfriend's car, Robichau blocked the car with his cruiser, yelled at and threatened his daughters, and attempted to slap his daughter through the car window. Robichau then gave a false account of this incident. At a disciplinary hearing, the Board substantiated charges of improper conduct and untruthfulness, while a charge of criminal conduct was not substantiated because the criminal charges had been dismissed in court. Based on Robichau's lack of prior discipline, the Board did not terminate him but imposed a three month suspension, reduced his rank from Sergeant to patrol officer, and required him to participate in a mental health evaluation and treatment.

On March 26, 2010, Officer Collins received a letter of reprimand after he failed to submit a supplemental report about a particular arrest requested by his Sergeant, and then lost the relevant information due to the passage of six months.

In July of 2011, Officer KD refused to obey an order and failed to report for duty on a scheduled shift. KD, who had no prior disciplinary actions, admitted that he forgot about the scheduled shift, went to a bar, and was too drunk to work when ordered by his Sergeant to report



to work. For this incident, KD was suspended for two days, reduced to two extra duty bike shifts, and forfeited a personal day.

In July of 2012, Chief Gates learned that Officer Angelo LaPanna had improperly recorded a stop of William Ferdinand on his traffic enforcement grant activity report. Prior to Gates's order not to speak to anyone about the matter, LaPanna had spoken to his wife and the Union representative. Gates conducted a recorded interview of LaPanna and received written answers from Ferdinand to questions about the incident. LaPanna admitted that he did not conduct a blue light stop of Ferdinand but rather, pulled up next to him and told him to get his car inspected. He got distracted by a different driver not wearing a seat belt, whom he pulled over. LaPanna, the Union, and the Town entered into a Settlement Agreement acknowledging that the Town could suspend him for three shifts without pay, but in consideration of the circumstances of the incident, and LaPanna's lack of any prior discipline, he agreed to relinquish two vacation days and would not be disciplined.

LaPanna testified at the remand hearing that at the time of this incident, he had been disciplined on one prior occasion in 2007. He had received a one day suspension in connection with a complaint that a suspect, Zane Bradley, made against him. However, the disciplinary letter in his file eventually was removed because he got in no further trouble. LaPanna testified that when he stopped Ferdinand, he thought the vehicle was uninspected because it had a broken tail light and a hanging exhaust pipe. He did not scroll all the way down to the end of the computer record to see that it in fact had a valid inspection sticker. The occupants of the car were wearing seatbelts. He told Ferdinand to get his piece of junk fixed, but never mentioned the Click It or Ticket program. He did not write down the stop immediately because he pulled over the other driver, who was not wearing a seatbelt. When he later entered the two stops into

his activity report, he entered them in the wrong order. He admittedly did not fill in Ferdinand's information for the stop and listed an inaccurate location. There were other stops for which he also did not backfill the information, which he admits was sloppy or lazy. Levesque had told LaPanna that he was going to write up Ferdinand and Cass as a joke under the traffic grant. LaPanna did not list Ferdinand on his grant activity report as a joke and did not know it was his car when he first observed the violation and searched the license plate.

Lieutenant Mackiewicz testified that he was involved in Internal Affairs in 2010, investigated the allegations against Levesque, and submitted the Investigation Letter to Chief Gates on July 16, 2010. He conducted the investigation in conjunction with Gates and Attorney Peloquin. No one required him to write in the Letter that the allegation about interference with the JP investigation was not corroborated. However, before the Letter was issued, he attended a meeting with Chief Gates, Attorney Peloquin, and Attorney Hanley, who made suggestions on Levesque's behalf.

Former Chief Gates testified that when he received Levesque's answers to the written questions he was concerned. He thought the repeated answer "I do not recall" was evasive because the questions were very specific, warranting a yes or no answer, and the events in question occurred only two months earlier. Gates believed that Levesque probably told Cousin about the GPS. In addition, Levesque admitted discussing the investigation of JP with his wife, in violation of Department rules. Gates was concerned about this because Levesque lived next door to JP's girlfriend, who waited at the bus stop every day with Levesque's wife. However, he never questioned the girlfriend about whether anything was disclosed at the bus stop, nor did he probe inconsistencies between JP and Cousin about the timing of the information about the GPS.

He did not do so because those witnesses stopped cooperating and the parties were resolving the disciplinary issue by agreement without a full investigation.

Gates conducted a brief second interview of Levesque on June 17, also attended by Lieutenant Mackiewicz, Attorney Peloquin, and Attorney Hanley. At the end of this interview, Levesque left but Attorney Hanley stayed and proposed that the matter be resolved with some kind of agreement that would preserve Levesque's job while not admitting untruthfulness. Chief Gates told Hanley to draft a proposed agreement. At that point, Gates had not reached a conclusion about whether the Department could substantiate the charges against Levesque. If the parties did not reach an agreement, he was prepared to bring charges to the Board for a hearing and to subpoena the uncooperative witnesses. Gates would have recommended to the Board that Levesque be terminated.

Gates further testified that Attorney Hanley drafted a last chance agreement based on the parties' discussion at the end of the June 17 meeting. Thereafter, the parties exchanged emails and negotiated several counterproposals. Gates agreed to Hanley's request to change the language of paragraph 1 because he did not perceive any distinction between "unsubstantiated" and "unfounded." Gates told Lieutenant Mackiewicz to issue the Investigation Letter to accord with the last chance agreement. If the parties had not signed the Agreement, Gates would have "shredded" the Letter and proceeded in front of the Board. The Department did not make the finding in the Letter that the charge was unsubstantiated independently of its concession to make that finding in the Agreement.

Gates testified that the Letter was placed in the Internal Affairs file. Neither Attorney Hanley nor Levesque requested a copy at that time. Hanley requested the Internal Affairs file two years later, when Levesque was investigated for falsifying the traffic enforcement grant

activity reports. The Letter was turned over to Hanley before the Board's hearing on July 23 to determine whether to terminate Levesque. At no time during the Board proceedings did Hanley ever suggest that the Agreement was induced by fraud because of the failure to disclose the Letter.

On December 19, 2018, the Magistrate issued a seventeen page Decision Upon Remand concluding that the Agreement was valid and Levesque's conduct warranted termination independent of the Agreement. The Magistrate incorporated by reference Findings of Fact 1-51 as set forth in her original May 1, 2014 decision. She then made supplemental findings of fact. The Magistrate concluded that Levesque was not fraudulently induced into signing the Agreement by non-disclosure of the Investigation Letter because he was represented by counsel, the Agreement was the product of extensive negotiation with the Town, and the Agreement and Letter both stated that the charges relating to JP could not be substantiated.

The Magistrate further concluded that the Town was warranted in terminating Levesque even in the absence of the Agreement, because he submitted false information on his grant activity report, coerced Ferdinand to reveal information during the investigation, then used that information when testifying during the second day of his disciplinary hearing. Specifically, Levesque testified that he mistakenly listed the location of the May 29, 2012 stop of Ferdinand as Plympton and Thompson Streets instead of Plympton and Plymouth Streets. The Magistrate inferred that this testimony was a lie and differed from his activity report because he had spoken to Ferdinand and learned that Ferdinand told the Department's investigators that he travelled to Levesque's home via Plymouth Street that day.

The Magistrate concluded that unlike LaPanna, Collins, KD and Sergeant Robichau, Levesque was the only officer with prior disciplinary action. Moreover, whereas those officers

cooperated with their investigations, Levesque showed a pattern of dishonesty, warranting termination independent of the Agreement. The Magistrate thus found just cause for Levesque's termination. On March 14, 2019, the Commission unanimously voted to adopt the Magistrate's decision in full, affirm the Town's decision to terminate Levesque, and dismiss the civil service appeal.

### **DISCUSSION**

Pursuant to Chapter 31, section 44, a person aggrieved by a decision of the civil service commission may seek judicial review in accordance with Chapter 30A, section 14. G.L. c. 31, § 44. In reviewing the Commission's decision, the court must defer to the Commission's experience, technical competence, and specialized knowledge, and cannot substitute its judgment on questions of fact or the exercise of discretion. Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 356, 263 (2001); Worcester v. Civil Serv. Comm'n, 87 Mass. App. Ct. 120, 123 (2015). The court will uphold the Commission's decision unless it is unsupported by substantial evidence, arbitrary and capricious, or legally untenable. Boston Police Dep't v. Civil Serv. Comm'n, 483 Mass. 461, 469 (2019); School Comm. of Brockton v. Civil Serv. Comm'n, 43 Mass. App. Ct. 486, 490, rev. den., 426 Mass. 1104 (1997). The plaintiff bears the heavy burden of demonstrating the invalidity of the decision. Boston Police Dep't v. Civil Serv. Comm'n, 483 Mass. at 469; Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. at 263.

#### **Last Chance Agreement**

Levesque challenges the Magistrate's conclusion that the Agreement is valid and enforceable. He contends that the Magistrate erred in finding that he was not fraudulently

induced to enter the Agreement. Fraudulent inducement requires proof that one party made a false statement of material fact to induce the other party to enter into a contract, and that party reasonably relied on the false statement to his detriment. Hogan v. Riemer, 35 Mass. App. Ct. 360, 365 (1993). Levesque argues that the Magistrate erred in finding that the Town did not withhold the Investigation Letter from him and the parties, in effect, negotiated the Letter's conclusion that the charge that he compromised the JP investigation "should be considered unsubstantiated."

This Court concludes that there is substantial evidence in the record to support the Magistrate's conclusion that Levesque was not fraudulently induced to sign the Agreement. Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion, taking into account whatever in the record detracts from that conclusion. Boston Police Dep't v. Civil Serv. Comm'n, 483 Mass. at 471. An agency's conclusion fails the substantial evidence test if the record evidence points to no appreciable probability of the conclusion or points to an overwhelming probability of the contrary. Police Dep't of Boston v. Kavaleski, 463 Mass. 680, 692 (2012). In reviewing the record for substantial evidence, the court cannot weigh the evidence, engage in fact finding, or substitute its own judgment for that of the Commission. Boston Police Dep't v. Civil Serv. Comm'n, 483 Mass. at 474.

Levesque insists that Chief Gates lied when testifying about the circumstances surrounding the drafting of the Investigation Letter and Agreement. However, assessing the credibility of witnesses is the purview of the hearing officer, and this Court must defer to her factual findings even if it would have come to a different conclusion. McGuinness v. Department of Corr., 465 Mass. 660, 669 (2013); Andrews v. Civil Serv. Comm'n, 446 Mass. 611, 616 (2006). The Commission, not the court, is the sole judge of the credibility and weight of the

evidence before it. Police Dep't of Boston v. Kavaleski, 463 Mass. at 694. It was proper for the Magistrate to rely on Chief Gates's account because the record does not point to an overwhelming probability to the contrary. The Magistrate's conclusion that Levesque was aware of the Investigation Letter's finding because it had been part of the parties' negotiations is supported by substantial evidence and is not arbitrary and capricious. See Cambridge v. Civil Serv. Comm'n, 43 Mass. App. Ct. 300, 303 (1997) (decision is arbitrary and capricious when it lacks any rational explanation that reasonable persons might support). Thus, the Agreement is not invalid due to fraud and was a proper basis for termination. See Davis v. Newton, 29 MCSR 402, 405 (2007) (noting that Commission should give great weight to provisions of voluntary last chance agreement).

Levesque further contends that the Magistrate erred in upholding the Agreement because it violates public policy. The Agreement provided: "Any appeal of the discharge will be limited to the issue of whether the conduct resulting in the suspension without pay of any length occurred. If it is determined in any appeal proceeding that the conduct occurred, dismissal will be the appropriate level of discipline and it is not subject to appeal. The Union and Levesque waive all other rights of appeal, including without limitation any claim under the Union Contract, M.G.L. c. 31 or any other state or federal law." The Commission has concluded that last chance agreements violate public policy if they require an employee to waive all future civil service rights. See Lizette v. Department of Corr., 2017 WL 2912429 at \*8 (Civ. Serv. Comm'n 2017); Kenney v. Cambridge Hous. Auth., 20 MCSR 160, 163 (2007). Here, Levesque did not completely waive all his civil service appeal rights. Cf. Kenney v. Cambridge Hous. Auth., 20 MCSR at 163 (refusing to enforce last chance agreement that required employee to commence

one year probation period during which he waived his rights to civil service, arbitration, union representation during any just cause proceeding, and unemployment if terminated for just cause).

In any event, it does not appear that Levesque asserted a public policy argument during his appeal to the Commission. Failure to raise an argument before the administrative agency results in waiver. Springfield v. Civil Serv. Comm'n, 469 Mass. 370, 382 (2014); Lincoln v. Personnel Adm'r of the Dep't of Personnel Admin., 432 Mass. 208, 213 n.6 (2000); Coletti v. Civil Serv. Comm'n, 2003 WL 21435514 at \*1 (Mass. App. Ct. Rule 1:28), rev. den., 440 Mass. 1101 (2003). Accordingly, this Court need not address the waived public policy argument on appeal under G.L. c. 31, § 44.

#### **Independent Just Cause For Termination**

Levesque further contends that the Magistrate erred in concluding that there was just cause for his termination independent of the Agreement. The Commission's task is to determine whether the appointing authority's action was justified, which means made upon adequate reasons and sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and correct rules of law. Boston Police Dep't v. Civil Serv. Comm'n, 483 Mass. at 469; Cambridge v. Civil Serv. Comm'n, 43 Mass. App. Ct. 300, 304, rev. den., 426 Mass. 1102 (1997). Here, the Commission was required to determine whether the Town proved by a preponderance of the evidence that there was just cause for terminating Levesque's employment. See Police Dep't of Boston v. Collins, 48 Mass. App. Ct. 408, 411, rev. den., 726 N.E.2d 413 (2000). Just cause means "substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service." Doherty v. Civil Serv. Comm'n, 486 Mass. 487, 493 (2020); Police Dep't of Boston v. Collins, 48 Mass. App. Ct. at 411. In making



this determination, the Commission must focus on the fundamental purpose of the civil service system, to guard against political considerations, favoritism, and bias in government employment decisions, but not to prevent the removal of one who has proved to be unworthy to continue in public service. Police Dep't of Boston v. Collins, 48 Mass. App. Ct. at 412.

The Magistrate concluded that there was just cause for Levesque's termination because he knowingly submitted false grant reports, interfered with a witness during the ensuing investigation, and testified falsely during his disciplinary hearing. This Court recognizes the high standard of conduct required of police officers. See Police Dep't of Boston v. Collins, 48 Mass. App. Ct. at 413. Public policy supports terminating police officers for lying because truthful conduct is integral to an officer's duties. Pittsfield v. Local 447 Int'l Brotherhood of Police Officers, 480 Mass. 634, 640 (2018). The Commission consistently has recognized that appointing authorities are entitled to hold police officers to a particularly high standard of truthfulness. See, e.g., Royston v. Billerica, 19 MCSR 124, 128-129 (2006) (noting strong public policy against employing police officers who are untruthful, and upholding termination of officer who purchased marijuana, lied about it during department investigation, and violated Chief's order not to associate with certain individual); Meaney v. Woburn, 18 MCSR 129, 135 (2005) (concluding there was just cause to terminate police officer, who had prior disciplinary action, for lying and obstructing investigation into his wrongdoing); Pearson v. Whitman, 16 MSCR 46, 49-50 (2003) (concluding there was just cause to terminate police officer who ordered subordinate to alter reports, failed to tell truth during investigation, and generally "had a problem with telling the truth," because "an officer that has lost his creditability can no longer effectively perform the duties of the position."); MacHenry v. Wakefield, 7 MCSR 94, 96 (1994) ("A police officer must be truthful in all his conversations with his fellow officers and with his superiors. In

addition, untruthfulness rises to the level of conduct unbecoming a police officer.”). The Magistrate found that Levesque engaged in a pattern of dishonesty which constituted substantial misconduct adversely affecting the public interest. See Doherty v. Civil Serv. Comm’n, 489 Mass. at 493. This conclusion is supported by substantial evidence in the record and is not arbitrary and capricious.

Levesque argues that the more lenient punishment received by Officer LaPanna for a false entry on his grant activity report demonstrates that Levesque’s wrongdoing did not rise to the level of just cause for termination. However, the Magistrate found that unlike Levesque, LaPanna did not have any prior disciplinary action against him, did not make multiple improper entries on his grant activity report, and cooperated with the investigation. In contrast, Levesque violated Chief Gates’s order not to discuss the investigation with witnesses, attempted to interfere with Ferdinand who was a critical witness, and then testified falsely at the disciplinary hearing. The Magistrate’s conclusion that Levesque was not similarly situated to LaPanna is supported by substantial evidence in the record, as is her conclusion that Levesque was not similarly situated to Collins, KD, or Sergeant Robichau. See Ratta v. Civil Serv. Comm’n, 2009 WL 3460432 at \*2 (Mass. App. Ct. Rule 1:28) (termination decision was not arbitrary and capricious where Commission reasonably found that situations of other disciplined employees were distinguishable, in part because they were forthcoming and had no prior disciplinary history).

Thus, the Commission did not err in determining that the Town proved by a preponderance of the evidence that Levesque’s pattern of dishonesty rendered him unworthy to continue in public service, furnishing just cause for terminating his employment independent of the Agreement.

### **Due Process**

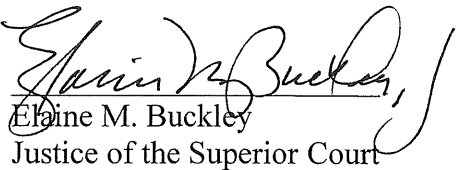
Finally, Levesque argues that he has been denied his right to due process because: one year passed between the original appeal hearing and the Commission's proposed decision on February 24, 2014; after the remand, the Magistrate took no action for fifteen months until January 24, 2017; and the Magistrate did not issue a proposed remand decision until December 19, 2018. Levesque contends that this unjustified delay violated his right to due process, and requests that this Court "provide an appropriate remedy."

The Standard Adjudicatory Rules of Practice and Procedure provide that they "shall be construed to secure a just and speedy determination of every proceeding." 801 Code Mass. Regs. § 101(2)(b). Undue delay in the conduct of an administrative hearing and issuance of a decision warrants the setting aside of that decision only if the appellant shows that his substantial rights were prejudiced by the delay. Amherst-Pellham Reg'l Sch. Comm. v. Department of Educ., 376 Mass. 480, 497 (1978); L.H. v. Department of Children and Families, 2016 WL 609012 at \*2 (Mass. App. Ct. Rule 1:28). Levesque has failed to show substantial prejudice from the lengthy delay in this case. He was not deprived of the right to seek judicial review under G.L. c. 31, § 44 and to the extent he claims prolonged stigma or other intangible harm, he has shown no prejudice insofar as the Commission upheld his termination. See Wilson v. Department of Soc. Serv., 65 Mass. App. Ct. 739, 748 (2006) (two and a half year delay). Cf. Arcand v. Board of Registration in Nursing, 2007 WL 1977950 at \*3-4 (Mass. Super. Ct.) (Connolly, J.) (7 year delay in processing disciplinary complaint prejudiced nurse and rendered board's decision illegal where during delay, applicable agency regulations changed, requiring nurse to report reprimand that would not have had to be reported if board had acted in timely manner). This Court does not condone the repeated and unexplained delays that occurred in this case. Nonetheless, absent

a showing of prejudice, this Court will not reverse the Commission's decision for procedural delay.

**ORDER**

For the foregoing reasons, it is hereby **ORDERED** that Levesque's Second Motion For Judgment on the Pleadings be **DENIED** and Defendant Town of Middleborough's Second Cross-Motion For Judgment on the Pleadings be **ALLOWED**. The Commission's March 14, 2019 Decision After Remand is **AFFIRMED**.

  
Elaine M. Buckley  
Justice of the Superior Court

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**DATED:** March 17, 2021