

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108
(617) 979-1900

JOSHUA LUIS,

Appellant

v.

TOWN OF DARTMOUTH,

Respondent

D1-17-248

D1-18-022

Appearance for Appellant:

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Southborough, Massachusetts 01772

Appearance for Respondent:

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Commissioner:

Paul M. Stein

SUMMARY OF DECISION

The Commission upholds the termination of a municipal police officer for just cause who demonstrated a pattern of poor judgment, both on-duty (misuse of the Criminal Justice Information System to check on his girlfriend as well as her employer, family members and other acquaintances and being less than truthful with investigators about the circumstances which led him to get “lost” for two hours on Cape Cod while attempting to transport the girlfriend to her father’s home in Plymouth) and off-duty (displaying a pattern of outbursts that resulted in multiple incidents of private property damage and ultimately resulted in a district court issuing an Abuse Prevention Order against him). This level of misconduct adversely affects the public interest; impairs the efficiency of the public service and fails to meet the high standards required of police officers. The Commission also noted the Appellant’s failure to testify at the appointing authority level hearing and its decision takes account of the adverse inference properly drawn from that failure.

DECISION

The Appellant, Joshua Luis, acting pursuant to G.L. c. 31, § 42 & § 43, appealed to the Civil Service Commission (Commission) challenging alleged procedural irregularity by, and the decision of, the Town of Dartmouth (Dartmouth), Respondent, discharging him from his tenured position of Police Officer with the Dartmouth Police Department (DPD).¹ The Commission held pre-hearing conferences at the UMass School of Law in Dartmouth on January 12, 2018 and February 23, 2018. The appeals were consolidated for full hearing, which was held over six (6) days on June 21, 2018 (Tr.I), June 22, 2018 (Tr.II) and October 26, 2018 (Tr.VI) at that location and digitally recorded; on July 30, 2018 (Tr.III) and August 17, 2018 (Tr.IV) off-site at the Mashpee Police Station; and on September 25, 2018 (Tr.V) via video conference.² The full hearing was declared private, with witnesses sequestered. Thirty-five (35) exhibits were received in evidence at the hearing (*Exhs.1 through 19, 22, 25, 26, 30 thru 35, 44, 45A, 45B & 46, 46-1 & 48*); and fourteen (14) documents were marked for Identification (*Exhs.20ID, 21ID, 23ID, 24ID, 27ID thru 29ID, 37ID thru 43ID & 46*).³ Two (2) post-hearing exhibits was received at the Commission's request and marked (*PH48A & PH49*). The Commission received Proposed Decisions on April 29, 2019. On November 2, 2018, Dartmouth filed a Motion to Reopen Hearing, supplemented by an "Offer of Proof" filed November 16, 2018, which I denied for the reasons stated in the "Appellant's Response and Opposition to Offer of Proof by Town of Dartmouth", filed November 30, 2018. For the reasons stated herein, the Appellant's appeals are denied.

¹ 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.

² A stenographic record was made of the off-site hearings and the digital recordings were transcribed by the parties and are deemed the official record. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal remains obligated to provide an accurate transcript, satisfactory to the court, 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.

³ On the first day of hearing, the Appellant filed a Motion in Limine, which I allowed in part and denied in part; Dartmouth's Motion to Admit Prior Recorded Testimony was denied without prejudice and was not renewed. (*Tr.II-11*)

FINDINGS OF FACT

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

Called by Dartmouth:

- Brian Levesque, DPD Acting Chief of Police
- Shawn Souza, DPD Police Officer
- RD, Appellant's ex-girlfriend
- VD, father of Appellant's ex-girlfriend

Called by the Appellant:

- Joshua Luis, Appellant
- Katie Luis, Appellant's Sister
- Sean McGuire, DPD Detective; President, Dartmouth Police Brotherhood
- Craig Pimental, DPD Police Officer
- Katrina Desroches (formerly Katrina Leite), DPD Dispatcher
- Kenneth Almeida, K-9 Officer, Bristol County Sheriff's Office
- Michelle Princi, Patrol Officer, Mashpee Police Department
- Adam Sassone, Patrol Officer, Mashpee Police Department
- John Motta, Friend of Appellant

and taking administrative notice of all matters filed in the case, pertinent law and inferences from the credible evidence, I find the facts stated below.

1. The Appellant, Joshua Luis, is a life-long resident of Dartmouth. He is a graduate of Dartmouth High School and holds an associate's degree from Bristol Community College.

(Exh.31; Tr.VI:7,20 [Appellant])

2. Prior to August 2015, the Appellant worked about four (4) years for the Bristol County Sheriff's Office as a Correction Officer, working a 4:00 PM to Midnight shift. *(Exh.31;Tr.II:218-*

232 [Almeida];Tr.VI:19-20 [Appellant])

3. In August 2015, the Appellant was appointed by the Dartmouth Select Board (DSB), the DPD's appointing authority, as a full-time permanent DPD Police Officer. He held that position without prior discipline until he was terminated in November 2017 after proceedings which are the subject of these appeals. He worked a "four & two" (four shifts followed by two days off)

starting on the 4:00 PM to Midnight shift and later working the Midnight to 8:00 AM shift. (*Exs. 1 through 6 & 31; Tr.VI:19-21 [Appellant]*)

4. In December 2016, former DPD Chief Robert Szala employed retired Carver Police Chief Arthur A. Parker, Jr. to conduct an independent investigation into allegations of on-duty and off-duty misconduct by Officer Luis. Chief Szala assigned DPD Deputy Chief (now Acting Chief) Brian Levesque as Chief Parker's point of contact. (*Exh.6; Tr.II:65 [Levesque]*)

5. As the allegations included claims against Officer Luis for domestic abuse, he was placed on paid administrative leave pending the completion of the investigation. (*Exhs 6 & 10*)

6. On May 10, 2017, after interviewing Officer Luis and more than a dozen other witnesses, as well as a review of multiple documents, Chief Parker submitted a 67-page report which concluded that Officer Luis should be terminated. (*Exhs. 6 - 19, 25, 30 - 36, 44, 45*)⁴

7. By letter dated June 16, 2017, the Select Board notified Officer Luis that a hearing would be held on July 20, 2017 before a designated hearing officer to determine if there was just cause to impose discipline up to and including termination for alleged misconduct enumerated in ten charges in the letter (later amended to include an 11th charge). (*Exh.1*)

8. The hearing was continued by agreement and held on August 25, 2017 and September 5, 2017. Both parties were represented by counsel. Officer Luis declined to testify. (*Exh.2*)

9. On November 20, 2017, the hearing officer submitted a report to the Select Board, finding seven (7) of the eleven (11) charges were sustained (Charge #1 – Sexual encounter with RB while on duty; Charge #2 and Charge #3– Wanton destruction of property; Charges #4 & #5 – Assault and Battery; Charge #8 – Kidnapping; Charge #9 – Unauthorized use of CJIS system.

⁴ Chief Parker's investigation also included documents from third parties and interviews of persons who were not called to testify at the Commission hearing, which were marked for identification but not received in evidence over objections of the Appellant that I sustained. *See Exhs. 20ID, 21ID, 23ID, 24ID, 27ID, 28ID, 29ID, 37ID through 42ID*. One document proffered by the Respondent (a DPD interview with VD) was withdrawn.

One charge was sustained in part (Charge #10 – Untruthfulness).⁵ Based on the sustained charges, the hearing officer concluded that: “Officer Luis’s conduct, when viewed in totality, supports a conclusion that it would be inappropriate for him to continue as a police officer in the Town of Dartmouth” and that “there is just cause to terminate him for this misconduct.” (*Exh.2*)

10. On November 27, 2017, at a meeting attended by Officer Luis, the Select Board went into executive session and “voted unanimously [5-0, on a roll call vote] to adopt the Hearing Officers [sic] recommendation to terminate Officer Joshua Luis.” At the public meeting which followed, on advice of Labor Counsel, the Select Board confirmed the vote taken in executive session, and “unanimously voted to accept [the hearing officer’s] report” and “unanimously voted to accept the Hearing Officers [sic] recommendation for disciplinary action *due to misconduct on duty.*” (*Exhs 4 & 5*) (*emphasis added*); *Tr.VI:24-32 [Appellant]*)

11. By letter dated November 28, 2017, signed by the Dartmouth Town Administrator, Officer Luis was informed that the Select Board “accepted” the report of the hearing officer and “adopted his findings . . . and recommendation to discharge you from the Towns [sic] Police Department.” The letter informed him of his right of appeal to the Commission. The signature lines for the members of the Select Board to sign the letter were blank. (*Exh.3*)

12. The November 28, 2017 termination letter listed all eight (8) charges sustained by the hearing officer as the reasons for termination. These charges included five (5) charges of on-duty misconduct: Charge #1 – on-duty sexual misconduct; Charge #4 & Charge #5 – assault and battery and unauthorized use of Taser; Charge #9 – Unauthorized use of CJIS system; and Charge #10 – Untruthfulness during internal affairs interview. Three (3) charges cited in the November

⁵ Three charges were not sustained (Charges #6 & #7 – Kidnapping; Charge #11 – Failure to have license to carry a firearm).

28, 2017 termination letter involved off-duty misconduct: Charge #2 & Charge #3 – wanton destruction of property; and Charge #8 – Kidnapping. (*Exh.3*)

13. On December 6, 2017, the Appellant timely appealed to the Commission on the grounds that Select Board members lacked just cause for discharging him as a DPD Police Officer and that they failed to comply with the procedural requirements of G.L. c. 31. (*Claim of Appeal, D1-17-248*)

14. By letter dated January 15, 2018 (which the Appellant received on January 28, 2018), the Select Board issued a second letter to Officer Luis “to confirm that the Board of Selectmen (sic) voted to terminate your employment as a Dartmouth Police Officer as of November 27, 2017, at a meeting in which you were present.” The letter restated that the Select Board “adopted the findings of fact” contained in the hearing officer’s report. (*Exh.4; Claim of Appeal, D1-18-022*)⁶

15. Following his receipt of the Select Board’s January termination letter on January 28, 2018, the Appellant filed a second timely appeal to the Commission. (*Claim of Appeal, D1-18-022*)

16. On February 8, 2018, the Appellant filed a Motion for Summary Decision in CSC No. D1-17-048, seeking the Appellant’s immediate reinstatement for the alleged procedural violations, which the Respondent opposed. By Procedural Order, I deferred a decision as to whether the November 2017 termination notice or the January 2018 notice established the date on which the Appellant’s termination became effective. (*Exh.5; Procedural Order dated March 2, 2018*).

The Personal Relationship between Officer Luis and RD

⁶ The January 22, 2018, DSB meeting minutes contain a reference under “New Business” to “Re-affirmation of Joshua Luis Termination from Police Dept. The Board is asked to sign this letter confirming their decision from an earlier meeting”, which I infer was the vote taken on November 27, 2017. The minutes do not reflect that the DSB took another vote on January 22, 2018, but the termination letter dated January 15, 2018 (which I infer was the letter presented to the DSB at that meeting and which Officer Luis received on January 28, 2018), bears the signatures of four of the five DSB members present on November 27, 2017, being all four members present at the January 22, 2018 meeting. (*Exhs.4 & 5; Tr.VI:24-39, 167-169 [Appellant]*)

17. Soon after he became a DPD Police Officer in August of 2015, Officer Luis met RD through his sister, Katie, at a restaurant in Fairhaven MA, where both women then worked as bartenders. RD and Officer Luis began a dating relationship shortly thereafter. (*Exhs.31 through 33, 36 & 46-1; Tr.I:45-46 [RD]; Tr.VI:20-21 [Appellant]*)⁷

18. When their relationship began, Officer Luis resided in Dartmouth, staying mostly with his parents or grandparents. RD lived in Plymouth with her father, VD. (*Exhs.31 & 32; Tr.V:7[VD]; Tr.VI:21 [Appellant]*)

19. In or about October 2015, RD moved to Dartmouth to be closer to UMass Dartmouth where she was an undergraduate. For approximately five months, she rented a room from Shawn Souza, a DPD police officer whom she had met a few years earlier. (*Exhs.32 [Desroches] & 33 [Souza]; Tr.I:14,34 [Souza]; Tr.VI:23-24 [Appellant]*)

20. Officer Luis began to visit regularly with RD at Officer Souza's home. The three of them also started to socialize together, along with DPD dispatcher Katrina Leite (now Katrina Desroches), who had known Officer Souza since middle school. (*Exhs.31 through 36; Tr.I:36-37 [Souza]; Tr.I:44-46 [RD]; Tr.2:172-176 [K. Luis]; Tr.II:192-202 [Desroches]*)

21. Officer Souza sometimes heard "loud talk" coming from RD's room when Officer Luis was visiting but never saw bruises or marks on either of them. He never suspected physical abuse by either of them. (*Exh.33 [Souza]; Tr.I:25[Souza]*)

22. Dispatcher Leite (Desroches) socialized with RD, Katie, Officer Luis and, at times, also Shawn Souza, as often as several times a week. She noticed that "RD would drink a lot" and her

⁷ In June of 2016, RD left the restaurant where she had worked with Katie to take a job as a bartender at another Fairhaven restaurant. She left that job in 2017. At the time of the Commission hearing, RD was working as a personal care attendant (PCA) and as a bartender at a sports bar in South Dartmouth. (*Exhs.32 [RD & 46-1 [RD]; Tr.I:44-45 135-135 [RD]*)

drinking would alter her demeanor. She heard RD twice say that if Officer Luis left her, she would call his Chief and claim physical abuse. (*Exh.34; Tr:II;202-209*)

23. Dispatcher Desroches stopped socializing with RD as a result of an incident that occurred around Valentine's Day in February 2016. She was with RD and Officer Luis's sister Katie at the bar where RD and Katie worked. Also present was another female DPD officer. RD had been drinking heavily and was "getting really crazy." (*Exh.34[Desroches]; Tr.II:210-211 [Desroches]*).

24. Katie and Officer Luis also regularly saw RD under the influence in their presence. They also both described the same significant negative change in RD's behavior when she was drinking. Katie stopped socializing with RD a few months after Dispatcher Desroches did and for the same reasons, i.e., RD's drinking and behavior. (*Exhs.31[Appellant] & 36 [K. Luis]; Tr.II:176-181 [K. Luis]; Tr.VI:54-57,65-68 [Appellant]*)⁸

25. In March 2016, Officer Luis and RD began living together, initially renting an apartment on Oesting Street in New Bedford. One of RD's brothers also lived with them at Oesting Street during the summer of 2016. (*Exhs.31[Appellant], 32[RD] & 46-1; Tr.I:46[RD]*)

26. In mid-September, after an argument with Officer Luis, RD left Oesting Street to stay with a brother in Coventry, RI for a week or two. In October 2016, she moved back in with Officer Luis at an apartment on Stephens Street in New Bedford which they had arranged to rent prior to the argument in September. (*Exh.46-1,p.103[RD]; Tr.I:59-60[RD]; Tr.VI:61 [Appellant]*)

27. The relationship ended in December 2016 after an argument that started when Officer Luis was away watching a football game and RD suspected that he was seeing another woman. Officer

⁸ During the time RD and Officer Luis were dating, RD took a prescription stimulant medication on a daily basis which, when mixed with alcohol, tends to reduce the effects of the medication and leads to the perception that the effects of alcohol are not as severe, leading to "over-drinking" and other potentially dangerous side effects, all of which RD acknowledged she knew. The symptoms described by Officer Desroches (and others) above are consistent with these undisputed known side effects of mixing the two substances. (*Exh..46-1,pp.110-112[RD];Tr.I:69-70,82-85[RD];Tr.VI:54-57[Appellant]*)

Luis went to stay with a friend and both RD and Officer Luis sought emergency 209A restraining orders. After both parties appeared in court, the restraining order against Officer Luis was continued for a year (as modified to permit Officer Luis to carry his duty weapons) and the restraining order against RD was dismissed. (*Exhs.2, 7 through 9; PH49; Tr.I:122-123 [RD]; Tr.II:157-170 [Motta];Tr.VI:61-61, 121-122 [Appellant]*)

28. The December 2016 incident is what caused the DPD to place Officer Luis on administrative leave and to initiate the investigation that ultimately resulted in his eventual termination on charges based on his conduct leading up to, but not including, the December 2016 incident. (*Exhs.2 through 4, 7 through 10, 32, 46-1 & PH.49*)

Evidence Regarding Charge #1 – Sexual Encounter with RD While On Duty

29. Officer Luis occasionally exchanged text messages containing romantic and sexual content with RD during down-times when was working the Midnight to 8:00 AM shift, which he described as the slowest shift. He also admitted that he stopped to see RD for meals before and during his shift, as well as briefly visit during down-time on his shifts, consistent with what Chief Levesque confirmed was permitted. He could not provide specific dates that he went to see RD, but he vigorously denied ever having sex with RD while on duty as charged. (*Exhs.12 through 14, 31 & 33; Tr.II:80-83, 105 [Levesque];VI:10-11, 42-44, 100-112 [Appellant]*)

30. Dartmouth relies on one text exchange between Officer Luis and RD to support the charge that they had sex while he was on duty on January 7, 2016. The exchange begins with an undated, partially cut-off text from RD which refers to having just had sex to which Officer Luis replied: “I have to keep cooling off otherwise I get all horny and then you have to go to work. . . . I would have had sex with you until I had to go to work.” (*emphasis added*) (*Exh.12*)

31. RD then texted Officer Luis (time stamp 12:17 AM 1/7/16) with another reference to having sex to which Officer Luis replied at 12:28 AM, acknowledging her text and stating “I’m going to have to come over tonight and have sex with you while on patrol. Lol”. And then: “Babe call me.” RD responded at 12:38 AM stating: “If you ‘show up’ – a beer and fireball would be appreciated.” There were no further exchanges until 2:39 AM when RD again texted Officer Luis and received a reply that is not date stamped. (*Exh.12*).

32. I have carefully reviewed the limited information contained in the trail of the text messages above, as well as other text messages between RD and Officer Luis on January 6 and 7, 2016, that were introduced into evidence, together with the DPD police logs for January 6 and January 7, 2016. I find that the messages place Officer Luis at the Souza residence some time during the afternoon of January 6, 2016 (fixing a broken door, about which more below), that he left for his scheduled shift prior to Midnight on January 6, 2016 (specifically mentioning his appreciation for RD “packing dinner” for him). He also left for his scheduled shift on January 7, 2016 prior to Midnight, as the texts which precede the ones shown for January 7, 2016 (*Exh.12*) must have begun sometime before Midnight and after he left the Souza residence. The only other documented evidence of his activities on January 7, 2016 are a property check at approximately 2:30 AM and several CJIS queries beginning at 2:53 A.M. (*Exhs.11 through 15 &PH48A*)⁹

Evidence Regarding Charges #2 & #3 – Felonious Destruction of Property

33. The first charge of felonious destruction of property over \$250 relates to damage that Officer Luis caused to Officer Souza’s home “sometime in January of 2016”. One incident can be placed to a date on or shortly before January 6, 2016, at which time Officer Luis pushed the closet

⁹ Log entries are made by the dispatcher on duty and are not typically entered in “real time”. The DPD’s cruisers were not equipped with GPD tracking/recording devices at the time. (*Tr.VI: 48-49 [Appellant]*). See email dated 6/18/21 from Respondent’s counsel [confirming status of GPD in cruisers].

door in RD's room off its track. As noted above, a text message from Officer Luis showed that he repaired the door during the afternoon of January 6, 2016. No evidence was introduced to establish that there was any monetary damage caused by this incident. (*Exhs.32[Appellant] & 33[Souza]; Tr.I:15-25, 34-38 [Souza];Tr.I:131-132 [RD] ;Tr.VI:41-48[Appellant]*)

34. The other alleged felonious destruction of property involved damage, also probably on or about January 6, 2016, to a wall in RD's upstairs room and to a wall on the first floor. Officer Luis admitted that he had been arguing with RD and, after she departed, he punched the first-floor wall on his way out.¹⁰ The evidence is inconclusive as to exactly what physical damage Officer Luis actually caused and no monetary value was placed on the damage. Officer Luis repaired the damage to both walls at his personal expense (with a repair kit and approximately \$10 worth of spackling). He apologized to Officer Souza and paid him an extra 500 dollars to cover a month of RD's rent. (*Exhs. 32 [Appellant] & 33 [Souza]; Tr.I:15-25, 34-38 [Souza]; Tr.I:131-132 [RD];Tr.VI:41-48[Appellant]*)

Charges #4 & #5 – Assault and Battery on January 19, 2016

35. Dartmouth charged Officer Luis with an assault and battery on RD while on duty on January 19, 2016, and then an assault with a dangerous weapon by pointing a Taser at her. (*Exhs. 3 & 9*)

36. The assault and battery charges are based on RD's account of an incident at the Souza home, which she described as a time when Officer Luis first pushed her to the floor and, subsequently, aimed a Taser at her while she was seated in her bed. She was unable to specify the date of this alleged incident, first pinpointing it to one of two dates in early January 2016 and later

¹⁰ Officer Luis claims the damage in the bedroom occurred around the same time, during RD's request for physically aggressive sex, and in connection with which he says he apologized for "laying hands on" her as part of an otherwise mutually affectionate text exchange on January 6, 2016. Although the text messages are ambiguous, I find his testimony credible. (*Exh.14;Tr.VI:96-97.116-119[Appellant]*)

recalling that it must have been much later, after they returned from a trip to Texas on or about January 17, 2016. She described seeing a red light, but not a white light, when Officer Luis pointed the Taser and she hid under her bed covers until the Taser was turned off. (*Exhs.32 [RD] & 46-1, pp.7 & 97 [RD];Tr.I:55-56 [RD]*)

37. Officer Luis worked the Midnight to 8:00 AM shift on January 19, 2016. He responded to six calls for service during his shift. His first response was a property check at approximately 1:00 AM and his next call was a residential burglar alarm to which he was dispatched at 3:12 AM and cleared at 3:25 AM. He did a CJIS query at 1:38 AM and two more after 5:30 AM (*Exhs.18 & PH48A*)

38. All officers must carry a Taser on duty, which they check out each shift and return to the “Taser pool” (15 to 18 devices), and I infer that Officer Luis carried a Taser during his January 19, 2016 shift. Eight or more Tasers could be out at any given time, depending on the number of officers on patrol. (*Tr.II:49-52 [Levesque];Tr.II:125-130 [Pimental]*)

39. At the time, the DPD did not assign a specific Taser to a particular officer and maintained no record of which officer checked out which Taser on any given shift. (*Tr.II:49-53, 97 [Levesque];Tr.II:135,155-156 [Pimental]*)

40. The DPD maintains a log that records “Armed” every time a Taser is turned on ready for use; records “Trigger” every time the trigger is pulled, and records “Safe” when the Taser is shut off. (*Exhs.22 & 26; Tr.II:52-53 [Levesque]; Tr.II:127-135[Pimental]*)

41. When a Taser is “Armed”, a visible white light comes on that illuminates the target which is “impossible to miss”. A small red “aiming” laser directed at the point of impact is visible on the target but, under normal atmospheric conditions, is not visible to the target. (*Tr.II:92-93 [Levesque];Tr.II:127-139[Pimental]*)

42. Officers are expected to check the operation of their Taser after checking out the device at the commencement of a shift. Sometimes an officer does not test the Taser for an hour or more into the shift, depending on the length of roll call and the activities an officer performs at the police station before going on patrol. For example, the DPD Taser Log for January and February 2016, shows a taser test on the Midnight shift as late as 02:21 AM on January 2, 2016, and another at 01:02 AM on January 21, 2016. (*Tr.II:51 [Levesque]; Tr.II:128-157 [Pimental]*)

43. The DPD Taser Log indicates that a DPD Taser was “Armed” at 1:55:24 AM on January 19, 2016 and, three seconds later, at 1:55:27 AM, returned to “Safe” mode. As indicated above, Officer Luis was required to carry a Taser while on duty, but nothing in the log or other DPD records can tie this Taser event to Officer Luis or any other DPD officer. (*Exhs.22 & 26; Tr.II:49-53, 97 [Levesque];Tr.II:135,155-156 [Pimental]*)

44. Officer Luis is not certain if he visited RD on January 19, 2016, but denies assaulting her. He is certain that he never pointed a Taser at her. (*Ex.31[Appellant];Tr.VI:50-54 [Appellant]*)

Charge #8 - Kidnapping

45. On January 7, 2016, Officer Luis “went out that night” with RD and “she [got] pretty drunk.” RD wanted to go to Plymouth to see her father (VD) but she was too intoxicated to drive. Officer Luis and RD left together sometime in the early morning hours of January 8, 2016. (*Exhs.31[Appellant];32[RD];&36[K.Luis];Tr.II:185-187[K.Luis];Tr.VI:66-70 [Appellant]*).¹¹

46. RD has her own version of her condition, claiming that she went out with Officer Luis and his sister (and maybe others) that night and frequented several bars (whose names she did not

¹¹ At the Commission hearing, Officer Luis and his sister gave a different version of how they wound up at the night club, claiming that Katie had been at the club with friends of her own, had seen RD with her boss from another club (where RD did not start working until the summer of 2016), and called her brother to retrieve RD. For reasons I explain in my analysis, I do not credit this *post hoc* explanation over how Officer Luis, his sister and RD all initially described the event during their investigative interviews. (*Exhs.31, 32 & 36; Tr.I:145-146 [RD]; Tr.II:183-184 [K.Luis];Tr.VI.64-65[Appellant]*)

recall). She said she had three or four drinks which made her “buzzed” but not as many as six which would be her limit before she considered herself “hammered” or “drunk.” RD’s version of how the evening started carries a ring of truth, except for her self-assessment of the state of her intoxication or her father’s lack of recollection that RD ever had problems with drinking alcohol, which I do not find credible. (*Ex.32 [RD];Tr.I:77-84,115-119 [RD]; Tr.V:46-50[VD]*)

47. Officer Luis drove from Fairhaven along Route I-195 East, with RD in the passenger seat. He had been to VD’s home only once and RD was unable to provide directions. Officer Luis turned south on I-495 rather than north. He crossed the Bourne Bridge and drove to Mashpee, which is approximately 15 miles from the Bourne Bridge, where he pulled over into the parking lot of a shopping mall at about 2:00 AM. (*Exhs.25 &31 [Appellant]; Tr.VI:70-71 [Appellant]*)

48. RD exited the car and walked up a flight of stairs to an upper level of the shopping mall and then returned to the car. (*Exh.32 [RD]; Tr.I:90-95 [RD]*)

49. At 2:13 AM, Andrew Sassone, a Mashpee police officer on routine cruiser patrol, noticed the car parked in the shopping mall parking lot and he saw RD walking up the stairs. He was familiar with the location, known as Deer Crossing, a well-lit location. He knew all the stores would have been closed, save for the 24-hour fitness center located near where the car was parked. He turned in to investigate and radioed dispatch which sent Officer Michelle Princi in a second cruiser for backup. (*Exh.25; Tr.III:5-9 [Princi]; Tr.IV:5-10, 13-14 [Sassone]*)

50. By the time Officer Sassone approached the car, RD had returned. Officer Sassone stood at the driver’s side where Officer Luis was seated and requested identification. Officer Luis complied and, as he provided his driver’s license, Officer Sassone noticed Officer Luis’s police ID and inquired what department Officer Luis worked for, to which Officer Luis told him “Dartmouth”. (*Tr.III:11-12 [Sassone]*)

51. Officer Princi did not learn that the driver [Officer Luis] was a police officer until Officer Sassone told her after they had cleared the call. (*Tr.III:10-12, 18 [Princi]*)

52. When Officer Princi arrived, she checked the upper level and, finding no one, returned to the vehicle and approached the passenger side where RD had “got back in the vehicle or was in the vehicle of her own free will.” (*Tr.III:5-8,11-12 [Princi]; Tr.IV:10-11 [Sassone]*)

53. Officer Princi had “minimal” conversation with RD. She observed an open container “either a cup of liquid or an open can of beer” in the car and directed RD to “dump it out” which she did. (*Tr.I:90[RD]; Tr.III:9[Princi]; Tr.IV:12-13[Sassone]; Tr.VI:91 [Appellant]*)¹²

54. During the 15 to 20 minutes he was at the scene, Officer Sassone saw no sign that suggested “criminal abduction or kidnapping.” RD never called out for help, did not appear restrained in any way, and did not appear to have been the victim of any physical violence. Officer Princi testified that “nothing criminal occurred that evening.” (*Tr.III:18 [Princi]; Tr.IV:13-14 [Sassone]*)

55. Officer Sassone and Officer Princi did find it odd that Officer Luis and RD had gone so far out of their way. (*Tr.III:19-25 [Princi]; Tr.IV:21 [Sassone]*)

56. Officer Luis told Officer Sassone that he and RD had been arguing, which prompted Officer Sassone to tell Officer Luis “you should be smarter about what you’re doing because as a police officer, you can get yourself in trouble if you . . . engage in arguments with people and draw attention to yourself” and things can “spin out of control at some point. . . .” (*Tr.III:18, 26-27 [Sassone];Tr.VI:91-92 [Appellant]*)

57. Officer Princi did not know Officer Luis and RD had argued, but she reached that conclusion based on her observation of their body language. (*Tr.III:21-25 [Princi]*)

¹² RD recalled that she was sitting in the back seat when the open container was discovered, which she said was empty and she got out and threw the container into a nearby trash barrel and re-entered the car. (*Tr.I:90 [RD]*). I do not credit these details of her version, which is inconsistent with the testimony of both Mashpee officers and Officer Luis.

58. Officer Sassone's incident report stated: "Checked on a vehicle, everything okay." He listed RD as the owner but his report did not list Officer Luis as the operator. (*Exh.25*)¹³

59. Officer Souza recalled a call from RD early on January 8, 2016. He talked to Officer Luis who said he was bringing RD home. Officer Souza talked to Officer Luis "like friendly" and told him "don't do anything that'll hinder your job . . . all she has to do is say . . . you hit her and you're under investigation." (*Exh.33 [Souza]; Tr.I:31[Souza]*)

60. At some point, RD called her father, VD. Officer Luis spoke to VD and they eventually arrived at VD's home around 4:00 AM. RD exited the car and went inside. (*Ex.31[Appellant];Tr.I:47 [RD]; Tr.V:11, 41-42 [VD]; Tr.VI:71-73, 92[Appellant]*)

61. Just before arriving at VD's home, Officer Luis hit the touch screen of RD's car radio so hard that it cracked. He spent approximately \$50 to replace the touch screen. (*Tr.I.48 [RD];Tr.:12 [VD]; Tr.VI:72-73, 94 [Appellant]*)

62. VD gave Officer Luis a ride back to Dartmouth. VD said that, during the ride, he asked Officer Luis if he had hit his daughter and Officer Luis told him "No". Officer Luis and VD spoke again, but it is not clear when or what was said. (*Exh.31[Appellant]; Tr.I:48[RD]; Tr.V:12-14,58-62[VD]; Tr.VI:73-74 [Appellant]*)

63. RD was back in Dartmouth on January 9, 2016, and texted Officer Luis. I do not credit these texts for their truth. She wrote she was treated like "s—t" (she was drunk); Officer Luis threw her keys away; she complained about listening to music on earphones after he "ruined" her radio and would not replace it; she added she cancelled the trip they were planning to take to Texas

¹³ When Officer Sassone was interviewed by the DPD investigator, he explained that he did not list Officer Luis as the operator as a "professional courtesy" because "I didn't want him to get jammed up for something that was so minor." (*Tr.IV:20-21 [Sassone]*) The DPD investigator did not interview Officer Princi as part of his investigation, reporting to Chief Levesque: "I'm not sure if second officer needs to be interviewed as I'm not sure what she can contribute except [RD] at no time said she was being held against her will." (*Tr.II:73 [Levesque]*)

(although this trip did unfold about a week later); and claimed she had been “kidnapped.” (*Exhs. 16, 17; Exh.31[Appellant]Tr.VI:72-73, 94 [Appellant]*).

Charge #9 – Unauthorized Use of CJIS

64. Officer Luis received formal and in-service training on the use of the Criminal Justice Information System (CJIS) to query information regarding criminal and motor vehicle history of individuals required in the performance of his official duties as a police officer. (*Exhs.30 & 47; Tr.II.46-47,114-117 [Levesque]; Tr.VI:77-78 [Appellant]*)

65. CJIS training includes instruction on the “criminal justice purposes” for which CJIS may be used, i.e., “detection, apprehension, pre-trial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of accused persons or criminal offenders.” CJIS “shall not be accessed for any non-criminal justice purpose”, except training on “test records provided by the CJIS personnel. Users shall not run test records or train with their own personal information or with the personal information of another individual.” (*Exh.30; Tr.II.43-44 [Administrative Notice, 803 CMR 7.09 (emphasis added); Tr.II;47 [Levesque]*)¹⁴

66. Rule 640.00 of the DPD Rules and Regulations states, in relevant part: “**Use of Official Position** – Officers shall not use their official position, department identification cards or badge: (a) for personal or financial gain” or “for obtaining privileges not otherwise available to them except in the performance of duty.” (*Exh.19*)

67. During his sixteen-month tenure with the DPD, Officer Luis accessed CJIS on a regular basis, making more than 3,600 CJIS queries, typically ten (10) to twenty (20) per shift. On occasion, he would enter as many as 60 queries per shift, sometimes as frequently as 20 per hour.

¹⁴ Although Officer Luis received an overall passing score on his CJIS exam, he actually incorrectly answered the question on the definition of “criminal justice purposes.” When asked at the Commission hearing whether he was informed as part of his CJIS training that the CJIS system was “not to be used for personal use”, the Appellant stated: “I don’t recall.” (*Tr.VI.77 [Appellant]*)

Most queries were initiated by entering a motor vehicle plate number to retrieve a typical “bundle” of information about the vehicle and its owner (Q2SX). Relatively few queries were made for other specific “bundles” of information or queried through an individual’s driver’s license number, social security number or by entering an individual’s name. (*Exhs.30 & 31 [Appellant];Tr.II:20-42,118-121[Levesque];Tr.VI.145-150[McGuire];Tr.VI:77-79[Appellant]*).

68. The DPD’s review of Officer Luis’s CJIS inquiry records disclosed that he made the following specific CJIS inquiries of RD and several of her other acquaintances “just for my own personal use” without any “criminal justice purpose”.

- 11/21/2015 – RD – three specific queries
- 12/08/2015 – RD - ten specific queries
- 07/28/2106 – NAME [redacted] RD’s brother – four specific queries
- 08/22/2016 – NAME [redacted] RD’s former boyfriend – four specific queries
- 09/24/2016 – VD’s license plate – typical (Q2SX) query and one specific query (BOP2)
- 11/04/2016 – NAME [redacted] RD’s boss – four specific queries

(*Exhs.31[Appellant],48; PH48A; Tr.II.22-38 [Levesque];Tr.VI:80-89 [Appellant]*)

69. RD claimed that Officer Luis also ran the plates on another acquaintance, her friend AD, “because I was using his cars”. (See footnote 17.) That seems plausible to me, but the DPD did not identify AD’s plate numbers and I am unable to draw an inference that Officer Luis did or did not run AD’s plates. (*Exhs.30,32[RD] & 47A*)

70. Prior to Officer Luis’s termination, no DPD officer had been disciplined for misuse of CJIS. Officer Luis and some other DPD officers, including the Dartmouth Police Brotherhood (DPD Union) President, had made CJIS queries using their own names or names of relatives for “training” purposes. Officer Luis said he was encouraged to make random queries during slow time on his shift. The DPD Union President confirmed that he had encouraged officers to do this, but when asked directly whether he would advise officers to access someone’s “ex-boyfriend’s

information”, he said “No . . . it doesn’t look appropriate” and “I wouldn’t do it.” (*Tr.II:114 [Levesque]; Tr.VI:124-125 [Appellant]; 142, 152-154,163-164 [McGuire]*)

Charge #10 – Conduct Unbecoming an Officer & Untruthfulness

71. Officer Luis was charged with eight (8) counts of “Conduct Unbecoming an Officer” and violating the DPD Rules for “Truthfulness” for lying during his investigatory interview by denying misconduct for which he was charged, namely: (1) denying that he had sex with RD while on duty in the early hours of January 7, 2016; (2) denying that he ever struck RD while she was living at Officer Souza’s house; (3) initially giving Officer Souza a false reason for how the damage to the wall happened; (4) denying that he caused damage to a door in RD’s room; (5) denying that he held RD against her will at Officer Souza’s house (determined after the appointing authority hearing to be unfounded); (6) denying that he held RD against her will while driving her around the Upper Cape Cod area; (7) denying that he went to RD’s residence on January 19, 2016 and pointed a Taser at her RD while on duty; and (8) denying he called a person named [DA] and left a “distasteful” voice mail encouraging DA to commit suicide. (*Exhs.1 through 4*)

72. At his investigatory interview, Officer Luis: (a) denied having sex with RD while on duty on January 7, 2016, or at any other time; (b) when asked did he “ever strike” RD while she lived at Officer Souza’s house, responded “No”; (c) didn’t remember whether he visited RD during his shift on January 19, 2019, but denied pointing a Taser at her on that date or any other time; (d) admitted that he “punched a hole in a wall” at Officer Souza’s house’ because he “was mad” and denied that he “damaged” a door, stating that the door had come off its “springs” and he fixed it; (e) knew who DA was – someone RD had dated in Texas – and stated that he never used RD’s phone to contact DA and never used his own phone to contact DA. When asked specifically if he

ever called DA and told him “Go f---ing kill yourself”, Officer Luis said: “Not that I recall”.
(*Exh.32*)¹⁵

73. At his investigative interview, Officer Souza stated that Officer Luis said he put a hole in the downstairs wall when he “tripped over the dog.” Officer Luis then quickly admitted that he hit the wall because he was angry with RD. As far as the hole in RD’s room, at his investigative interview, Officer Souza didn’t know “how that hole got there” and had less recollection of the event at the Commission hearing. (*Exh.33; Tr.II2-25 [Souza]*)

74. Officer Luis was not directly asked by the DPD investigator if he gave a phony reason for causing damage to Officer Souza’s home. At the Commission hearing, the Appellant confirmed that he first said he tripped over the dog and then corrected himself “in the same conversation.” (*Exh.31*]; *Tr.VI:44-48[Appellant]*)

75. The relevant colloquy at the investigative interview with Officer Luis about holding RD against her will during the trip to Cape Cod on January 8, 2016 is as follows:

Q. Now at any point while you and [RD] were in the car . . . did [RD] tell you to let her out of the car or to let her go?

A. She was telling [me] to take [her] home, and then she was saying she was going to jump out of the car which several times she tried to jump out of the car. I had to pull over and I was like what are you doing --

Q. Did you hold [RD] in the car against her will, by driving around to places that included Cape Cod?

A. No, no. Just trying to go from Falmouth, get back on the highway, go to Plymouth. She called . . . her dad. We pulled over. I talked to her dad on the phone, telling him, hey, who I was, and I was coming by to drop her off.

Q. Okay. Any idea why [RD] would say that you held her against her will?

A. She was intoxicated.

Q. Okay. But do you know why she would tell us during an interview that you held her that night against her will?

A. No.

. . .

¹⁵ At her investigative interview (*Exh.36*) RD said DA told her Officer Luis had been calling pretending to be RD, but she did not repeat or adopt those statements in her Commission testimony. (*Tr.I.44-146 [RD]*). The investigator apparently had contacted DA and obtained telephone records of calls DA said he received in April 2016. The records were not authenticated, DA did not testify, and the records were excluded along with other unauthenticated text messages allegedly exchanged between RD and DA in December of 2016. (*Exhs.23ID & 23ID*).

Q. Okay. So you . . . have no recollection of Shawn Souza telling you that you weren't allowed to drive [RD] around and hold her against her will.

A. No.

Q. You don't recall that?

A. I wasn't driving around trying to hold her against her will.

Q. Okay. But that's not my question. . . . Do you recall telling Shawn Souza that?

A. No.

Q. Okay. Could it have happened, and you just don't recall it?

A. Maybe . . . but I don't recall talking to him about holding her against her will.¹⁶

Q. Okay. Can you explain why, again, [RD] would say that you held her against her will and that you drove her to places like the Cape?

A. No, besides getting lost.

(Exh.31)

December 2016 Restraining Orders

76. On December 12, 2016, Officer Luis and RD were living at Stephens Street in New Bedford. Officer Luis spent the evening at the home of a fellow DPD officer watching a football game, during which he talked or texted with a female friend whom he had known since high school.

(Tr.II:158-163 [Motta]; Tr.VI:131-132 [Appellant])

77. Unbeknownst to Officer Luis, RD intercepted the messages. She was angry. When he arrived home, they got into a physical altercation which left Officer Luis with a swollen eye and visible marks on his neck. He went to spend the night with another high school friend, John Motta, who testified to these injuries. *(Tr.II:163-164 [Motta]; Tr.61-62 [Appellant])*

78. The following Friday, December 16, 2016, RD filed a Citizen's Complaint with the DPD against Officer Luis, which was received by DPD Sergeant Stanton and assigned to Capt. Zielinski for investigation. The DPD incident report states: "Today, [RD] presented with visible minor swelling to her right cheekbone and a small mark just below her right eye. This was photographed by Det. F. OLIVEIRA." No evidence was introduced to suggest the DPD conducted any further

¹⁶Officer Souza recalled a call from RD in the early hours of January 8, 2016. He talked to Officer Luis who said he was bringing RD home. He talked to him "like friendly" and told him "don't do anything that'll hinder your job . . . all she has to do is say . . . you hit her and you're under investigation." *(Exh.33 [Souza]; Tr.I:31[Souza])*

investigation or interviewed any witnesses. No criminal charges ensued. (*Exhs.7, 8 & 44: Tr.II:165 [Motta]; Tr.VI:76 [Appellant]*)¹⁷

79. It is undisputed that RD also filed a Complaint for Protection from Abuse (seeking a G.L. c. 209 Order) on December 16, 2016 in the New Bedford District Court, which scheduled a hearing on the Complaint for December 19, 2016. Although the Complaint was not introduced in evidence, the Affidavit (dated December 19, 2016) recited a year-long history of alleged abuse, culminating in the physical altercation on December 12, 2016. (*Exh.9*)

80. On December 16, 2016, Officer Luis was served with notice of RD's complaints against him and placed on paid administrative leave. (*Exh.10; Tr.VI:134-138 [Appellant]*)

81. After being placed on administrative leave, Officer Luis sought advice from his Union President, Sean Maguire. As a result of that advice, he filed a Complaint for Protection from Abuse (pursuant to G.L. c. 209A) in the New Bedford District Court, alleging that he was physically assaulted and injured by RD on December 12, 2016. A hearing on Officer Luis's Complaint was set for December 19, 2016. (*PH.49;Tr.VI:121,132-138[Appellant]: VI:154-157 [Maguire]*)

82. At the hearing on December 19, 2016, Officer Luis's c. 209A Complaint was dismissed. A one-year Abuse Prevention Order was entered on RD's c. 209A Complaint against Officer Luis. (*Exh.9; Tr.VI:122-124 [Appellant]*)

83. At the Commission hearing, three photographs of RD were introduced, one taken by the DPD on December 16, 2016, and two others purportedly taken by her friend, AD, a week or more after the December 12, 2016 altercation with Officer Luis, to substantiate her claims that she

¹⁷ During the time that RD lived at the Souza home, RD would sometimes arrive alone driving a Corvette or a pick-up truck belonging to a "close" male friend named AD, instead of her own car. She told Officer Souza that AD let her use his cars when hers was "in the shop". (*Exh.32 [RD] & 33[Souza]*) The internal affairs investigator did interview AD, who interacted with RD soon after the December 12, 2016 incident, but no record of that interview was introduced. (*Tr.68-70 [Levesque]*) During the Commission hearing, I issued a subpoena to AD to attend at a deposition at the offices of Appellant's counsel, but he failed to appear. (*Subpoena on file, dated 6/29/2018*)

received a black eye and other injuries during that altercation. These photographs were not produced during the December 19, 2016 district court hearing (although the district court judge would have seen both RD and Officer Luis in person on that date). Other than RD, no witness -- neither DPD officer assigned to the case nor AD (who allegedly took the pictures and brought RD to court) testified. Given the uncertainty about when AD took his pictures, as well as the difficulty I have discerning what vestige of injuries, if any, they actually show, I give AD's photographs little weight. (*Exhs.44, 45A & 45B; Tr.I:65-69 [RD]*)¹⁸

APPLICABLE LEGAL STANDARD

Sections 41 to 45 of G.L. c. 31 allow discipline of a tenured civil servant for "just cause" after due notice, a hearing (which must occur prior to discipline other than a suspension from the payroll for five days or less) and a written notice of the decision that states "fully and specifically the reasons therefor." G.L. c. 31, § 41. An employee aggrieved by such disciplinary action may appeal to the Commission, pursuant to G.L. c. 31, § 42 and/or § 43, for de novo review by the Commission "for the purpose of finding the facts anew." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006). As prescribed by G.L. c. 31, § 43, ¶ 2, the Appointing Authority bears the burden of proving "just cause" for the discipline imposed by a preponderance of the evidence:

"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."

¹⁸ VD did testify that he saw RD's black eye "shortly after" December 12, 2016, which was the only evidence of physical abuse he had ever seen. (*Tr.V:23-24,57 [VD]*)

The Commission determines just cause 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. See also Town of Brookline v. Alston, 487 Mass. 278 (2021) (analyzing broad scope of the Commission’s jurisdiction to enforce basic merit principles under civil service law); Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971) (appointing authority must provide “adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law” for discharge of public employee), citing Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) (justification for discharge of public employee requires proof by a preponderance of evidence of “proper cause” for removal made in good faith). 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 “[only] separating employees whose inadequate performance cannot be corrected.” G.L. c. 31, § 1.

Section 43 of G.L. c. 31 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”). 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).

The Commission takes into account the special obligations imposed upon police officers, who carry a badge and a gun and all of the authority that accompanies them, and which requires them to comport themselves in an exemplary fashion, especially when it comes to exhibiting self-control and to adhere to the law, both on and off duty. “[P]olice officers voluntarily undertake to adhere to a higher standard of conduct . . . [and] must comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement [T]hey implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.” Attorney General v. McHatton, 428 Mass. 790, 793-74 (1999) and cases cited. See also Falmouth v. Civil Service Comm’n, 61 Mass. App. Ct. 796, 801-802 (2004); Spargo v. Civil Service Comm’n, 50 Mass. App. Ct. 1106 (2000), rev. den., 433 Mass. 1102 (2001); Police Commissioner v. Civil Service Comm’n, 39 Mass. App. Ct. 894, 601-602 (1996); McIsaac v. Civil Service Comm’n, 38 Mass. App. Ct. 473, 475-76 (1995); Police Commissioner v. Civil Service Comm’n, 22 Mass. App. Ct. 364, 371, rev. den. 398 Mass. 1103 (1986).

The duty imposed upon a police officer to be truthful is one of the most serious obligations he or she assumes. Thus, an appointing authority has just cause to discipline and/or terminate a police officer who repeatedly demonstrates his “willingness to fudge the truth”.¹⁹ “[P]olice work

¹⁹ See, e.g., Desmond v. Town of West Bridgewater, 27 MCSR 645 (2014); Ung v. Lowell Police Dep’t, 24 MCRS 567 (2011); Gallo v. City of Lynn, 23 MCSR 348 (2010). See also Minoie v. Town of Braintree, 27 MCSR 216 (2014); Everton v. Town of Falmouth, 26 MCSR 488 (2013), aff’d, SUCV13-4382 (2014); Gonsalves v. Town of Falmouth and cases cited, 25 MCSR 231 (2012), aff’d, SUCV12-2655 (2014); Keating v. Town of Marblehead, 24 MCSR 334 (2011).

frequently calls upon officers to speak the truth when doing so might put into question a search or might embarrass a fellow officer.” Falmouth v. Civil Service Comm’n, 61 Mass. App. Ct. 796, 801 (2004) citing City of Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 303-305, rev. den., 428 Mass. 1102 (1997) (“It requires no strength of character to speak the truth when it does not hurt.”)

The corollary to the serious consequences that flow from a finding that a law enforcement officer or applicant has violated the duty of truthfulness requires that any such charges must be carefully scrutinized so that the officer or applicant is not unreasonably disparaged for honest mistakes or good faith mutual misunderstandings. See, e.g., Boyd v. City of New Bedford, 29 MCSR 471 (2016) (honest mistakes in answering ambiguous questions on NBPD Personal History Questionnaire); Morley v. Boston Police Dep’t, CSC No. G1-16-096, 29 MCSR 456 (2016) (candidate unlawfully bypassed on misunderstanding appellant’s responses about his “combat” experience); Lucas v. Boston Police Dep’t, 25 MCSR 420 (2012) (mistake about appellant’s characterization of past medical history).

ANALYSIS

A preponderance of the evidence establishes just cause for Dartmouth’s decision to discharge the Appellant from his position as a DPD police officer. His self-admitted, repeated misuse of the CJIS system to query the criminal history of his ex-girlfriend and other persons with whom she worked or associated, represents substantial misconduct which adversely affects the public interest by impairing the efficiency of public service and, alone, justified his termination. In addition, although I conclude that direct evidence of the other alleged incidents of misconduct was sparse, I cannot conclude that Officer Luis was entirely truthful in all of his statements to investigators and before this Commission. This, together with the Appellant’s failure to testify at his appointing

authority hearing, along with the December 2016 judicial adjudication which resulted in a one-year abuse prevention order against him, warrants the application of an adverse inference and provides an additional independent reason to uphold the decision to discharge him from his position of a DPD police officer.

Section 42 Claim

The Appellant contends that procedural flaws in the process leading to the Select Board's decision to terminate him and the imperfect notice of that decision require that the termination be vacated and he must be reinstated, effective November 27, 2016. I do not find this argument persuasive.

Section 41 of Chapter 31 requires that, after receiving the recommendation of the hearing officer designated by the appointing authority to conduct a disciplinary hearing regarding a tenured employee, "the appointing authority [here the DSB] shall give to such employee a written notice of his decision, which shall state fully and specifically the reasons therefor." G.L. c. 31, § 41, ¶ 1. Section 42 of Chapter 31 provides that if "an appointing authority has failed to follow the requirements of section forty-one in taking action which has affected [a tenured employee's] employment or compensation . . . *and that the rights of said person have been prejudiced thereby*, the commission shall order the appointing authority to restore said person to his employment immediately without loss of compensation or other rights." G.L. c. 31, § 41, ¶ 1 (emphasis added).

Here, the Dartmouth Select Board fully complied with the requirements of Section 41 of Chapter 31. The Appellant duly received a "written notice" of the DSB's decision on November 27, 2016, which "fully and specifically" stated the reasons for his termination. The flaws in the process were limited to the fact that (1) the written notice (on DSB letterhead) was signed by the Dartmouth Town Administrator but was not signed by any of the members of the DSB; and (2)

the notice of termination referred to both on-duty and off-duty misconduct, while the DSB's vote, as reflected in its meeting minutes, is ambiguous as to whether or not the DSB had voted to terminate Officer Luis solely "due to misconduct on duty". (See Finding of Fact ¶10) or for both on-duty and off-duty misconduct (See Findings of Fact ¶¶11-14).

The first alleged violation is plainly a ministerial error that did not adversely affect the Appellant's civil service rights. The error was corrected by the subsequent notice dated January 15, 2017. Officer Luis attended the DSB meeting and he was not prejudiced by the receipt of a written notice that did not bear the signatures of the members of the DSB.

The second procedural flaw is more problematic. The DSB's public vote on November 27, 2016 was to terminate Officer Luis for "misconduct on duty". In fact, the plain intent of the DSB was to adopt the hearing officer's report, finding him guilty of both on-duty and off-duty misconduct. This ambiguity was not clarified until the second termination letter issued on January 15, 2017. I find that this delayed confirmation did not prejudice the Appellant for two reasons: (1) he failed to testify at the appointing authority hearing, despite full prior notice of all of the allegations against him, including both on-duty and off-duty misconduct; and (2) as explained below, the Appellant's on-duty misconduct, alone, provides just cause for his termination. Thus, the Appellant's Section 42 procedural claims must be denied.

Misuse of CJIS.

The preponderance of the evidence established that Officer Luis queried CJIS repeatedly to seek information on RD, her father, her brother, her employer, and other personal acquaintances. This misconduct, which the Appellant admits, provides just cause, by itself, for his termination. See, e.g., Lima v. City of New Bedford, 32 MCSR 98 (2019); Ung v. City of Lowell, 24 MCSR 567 (2011).

I do not accept the Appellant's excuse that he was merely following instructions to stay current by making CJIS queries for "training" purposes, even though there was no criminal justice purpose involved. In the first place, those instructions were wholly unauthorized and could subject him and the DPD to state and federal civil and criminal sanctions. See, e.g., G.L. c. 6, § 178; 803 CMR §§ 7.09, 7.10 & 7.14; 28 C.F.R. § 20.38. Moreover, the Appellant's self-admitted use of CJIS for "personal use" to query those with whom he had personal conflicts raises his impropriety to a level that even his colleagues thought was inappropriate. Finally, the Appellant's claim that he used friends and family merely to stay current on his CJIS proficiency is not credible, given his extensive, repeated use of CJIS virtually every day on the job.

Other Alleged On-Duty Misconduct

The evidence that Officer Luis engaged in other misconduct while on duty (having sex with RD on January 7, 2016 and threatening her with a Taser on January 19, 2016) turns on circumstantial evidence of allegations which were not reported to anyone for nearly a year, and the credibility of the testimony of RD, Dartmouth's sole "percipient" witness. No witness, other than RD, not even VD, her father, corroborated those charges or had any percipient knowledge of such alleged misconduct.

I do not credit the testimony of RD or her father, VD, standing alone, as sufficient proof of these charges. The well-documented evidence of RD's frequent impairment through the abuse of alcohol, coupled with the denial of both RD and VD that she ever drank to excess, leads me to doubt her truthfulness, perception of events and memory. I am unable to find her uncorroborated testimony credible.

The diminished weight that must be given, and which I give, to the unreliable testimony of RD and VD, together with the limited circumstantial evidence of misconduct found in selected, often

ambiguous, text messages exchanged between RD and Officer Luis, is far too insufficient a combination to meet Dartmouth's burden to establish the alleged on-duty misconduct involving RD by a preponderance of the evidence, save for the misuse of CJIS noted earlier.

Other Off-Duty Misconduct

The facts underlying the alleged off-duty misconduct (destruction of property and kidnapping) are largely undisputed. The preponderance of the evidence, however, falls well short of proof that Officer Luis's action in any of those off-duty episodes rose to the level of the serious (felonious) misconduct with which he was charged. As my decision to uphold this termination does not turn on Officer Luis's off-duty behavior, I address these incidents briefly.

As to the damage to Officer Souza's home, the preponderance of the evidence failed to establish that Officer Luis had a felonious "intent", as charged, to cause that damage. Officer Luis admitted his misconduct and paid to repair the relatively minor damage at his own expense. Together with the other evidence of a pattern of failure to control his off-duty temper, this behavior is troubling and would justify remedial suspension and remedial counseling, but not termination.

The charge that Officer Luis "kidnapped" RD on January 8, 2016 (also a felony) falls short of proof by a preponderance of the evidence. I credit Officer Luis's testimony that he always intended to transport RD to her father's house. I find it troubling a middle-of-the-night trip of approximately 30 miles should go so seriously off-course and take some 2 ½ hours to accomplish, but I also find troubling that the DPD investigator chose not to interview both Mashpee police officers on the grounds that to do so would only produce evidence to refute RD's claim that she was "kidnapped". Again, with only RD's unreliable word on this matter, and given RD's intoxicated state at the time, the preponderance of the evidence does not support the serious charge of felonious misconduct.

Untruthfulness

I find that when it comes to the January 8, 2016 incident, Officer Luis was less than truthful about his behavior during that evening and into the early morning. I do not credit the curiously consistent story he and his sister related during their testimony at the Commission hearing. Rather, I find that, as Officer Luis initially told the DPD investigator, they all “went out” together that night. He and his sister either invented a story that he only went to that Fairhaven adult entertainment club after his sister called him, or, perhaps, they have that incident confused with another similar episode. The problems with that story are threefold: RD did not start working for the boss she was allegedly out drinking with that night until the summer of 2016, Officer Luis testified that he saw RD “gulp” at least three Fireballs while at the club that night, and there was no explanation for how he got to that Fairhaven club (but later was taken directly home to Dartmouth by VD). I find that Officer Luis was more truthful about his behavior when he said they all “went out” at his investigative interview than he was in his testimony at the Commission hearing. The discrepancies in his Commission testimony, and his persistence in maintaining a suspicious narrative of his conduct on January 8, 2016, cast doubt on whether he has told the full story about getting lost for a good hour after he clearly must have known he erred by crossing the Bourne bridge over the Cape Cod Canal, if he truly intended to drive straight to Plymouth from Fairhaven, and yet he still proceeded for approximately 15 miles deep into Upper Cape Cod. These circumstances lead me to find that the Select Board was justified to conclude that Officer Luis was “fudging the truth” about his behavior on January 8, 2016.

The remaining charges that Officer Luis was untruthful when questioned during the internal affairs investigation about his behavior largely collapse with Dartmouth’s failure to prove the underlying misconduct (giving Officer Souza a false story about causing damage to his home when

he did, in fact, quickly revise and tell him the truth, as he admitted to the investigators; dissembling about sex with RD on duty on January 7, 2016, and “kidnapping” RD on January 8, 2016, neither of which was proved; and physically striking and pointing a Taser at RD on January 19, 2016, as to which RD’s testimony was discredited by the discrepancies in her story and the lack of any credible corroborative evidence of this very serious charge). Concerning the final, “stand-alone” charge of untruthfulness (i.e., not coupled with any charge that he committed misconduct), Dartmouth relied entirely on totem-pole hearsay (from the unreliable mouth of RD) about one alleged telephone message a former boyfriend told her he received in April 2016. This hearsay evidence, which I do not find reliable, leaves Officer Luis’s denial that he left such a message even further from the level of proof required to prove untruthfulness of a police officer.

The December 2016 Restraining Orders

Dartmouth did not include as a reason for Officer Luis’s termination the fact that, after a hearing and the opportunity for a district court judge to view both parties, RD was granted a one-year Abuse Prevention Order against Officer Luis on December 19, 2016, and that the restraining order he sought against RD was dismissed. (Dartmouth originally charged Officer Luis with an inability to perform his duty because he lost his ability to carry a firearm and then withdrew that charge when RD’s restraining order was modified to allow him to carry his duty weapon). I cannot ignore, however, the fact that the district court judge concluded that there was sufficient evidence of the risk of abuse to RD that a long-duration court order that Officer Luis stay away from, and not abuse, RD, but not vice-versa, was called for. This judicial finding, in combination with the adverse inference drawn from Officer Luis’s failure to testify at the appointing authority hearing and my findings that the Appellant has demonstrated pattern of difficulty controlling his temper, and his untruthfulness about his actions on January 8, 2016, provides a further independent reason

to conclude that Dartmouth has shown, by a preponderance of the evidence, that Officer Luis failed to “comport [himself] in accordance with the laws that [he is] sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement.”

In sum, the picture that is painted here is one of a police officer with poor judgment, both on-duty and off-duty, who is prone to “fudging the truth” about his personal conduct and is prone to outbursts that ultimately resulted in a district court judge entering a one-year restraining order against him. This level of misconduct adversely affects the public interest and impairs the efficiency of the public service. It fails to meet the high standards required of police officers. Thus, just cause has been established for Dartmouth’s decision to terminate Officer Luis from his position as a DPD police officer

CONCLUSION

For these reasons, the Appellant’s appeals, under Case Nos. D-17-248 and D1-18-022, are hereby **DENIED**. The Appellant’s termination is sustained, effective November 27, 2016.

Civil Service Commission

/s/ Paul M. Stein
Paul M. Stein
Commissioner

By a 4-0 vote of the Civil Service Commission (Bowman, Chair; Ittleman, Stein and Tivnan, Commissioners [Camuso – Absent]) on July 15, 2021.

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

Daniel M. Baumel, Esq. (for Appellant)

Howard L. Greenspan, Esq. (for Respondent)