

# The Commonwealth of Massachusetts

Decision mailed: 10/23/09  
Civil Service Commission

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

CB

**JOSE MARTINEZ,**  
*Appellant*

v.

**CITY OF LAWRENCE,**  
*Respondent*

**Case No.: D-08-95**

## DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on October 22, 2009 to acknowledge receipt of the report of the Administrative Law Magistrate dated July 27, 2009. The Commission received written objections from the Appellant on August 27, 2009. The Commission voted to adopt the findings of fact and the recommended decision of the Magistrate therein.

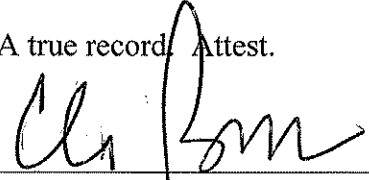
A copy of the Magistrate's report is enclosed herewith. The Appointing Authority's Motion to Dismiss is allowed, thus the Appellant's appeal is hereby *dismissed*.

### SCRIVENOR'S ERROR

On page 16, second paragraph, first line, *Sgt. Martinez* should be substituted for Sgt. DeFusco.

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on October 22, 2009.

A true record. Attest.

  
\_\_\_\_\_  
Christopher C. Bowman  
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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

Notice to:

Jason R. Powalisz, Esq. (for Appellant)  
James M. Bowers, Esq. (for Appointing Authority)  
Richard Heidlage, Esq. (DALA)

THE COMMONWEALTH OF MASSACHUSETTS  
DIVISION OF ADMINISTRATIVE LAW APPEALS  
98 NORTH WASHINGTON STREET, 4<sup>TH</sup> FLOOR  
BOSTON, MA 02114

SHELLY L. TAYLOR  
Chief Administrative Magistrate

Tel: 617-727-7060  
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July 27, 2009

Christopher C. Bowman, Chairman  
Civil Service Commission  
One Ashburton Place, Room 503  
Boston, MA 02108


RECEIVED  
2009 JUL 28 A 9:43  
COMMONWEALTH OF MASS  
CIVIL SERVICE COMMISSION

**Re: Jose Martinez v. City of Lawrence (Police Dept.)**  
**DALA Docket No. CS-08-536**

Dear Chairman Bowman:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c)(1), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

Sincerely,



Shelly Taylor  
Chief Administrative Magistrate

SLT/das

Enclosure

cc: Jason R. Powalisz, Esq.  
James M. Bowers, Esq.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Jose Martinez,  
Appellant

v.

Docket Nos. D-08-95/CS-08-536

City of Lawrence (Police Dept.),  
Appointing Authority

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CIVIL SERVICE COMMISSION

**Appearance for Appellant:**

Jason R. Powalisz, Esq.  
McDonald, Lamond & Canzoneri  
Cordaville Office Center  
153 Cordaville Road, Suite 320  
Southborough, MA 01772-1834

**Appearance for Appointing Authority:**

James M. Bowers, Esq.  
City of Lawrence  
Office of the City Attorney  
200 Common Street  
Lawrence, MA 01840

**Administrative Magistrate:**

Sarah H. Luick, Esq.

**SUMMARY OF RECOMMENDED DECISION**

Police Officer Sergeant, while under investigation for potential misuse of time at work by a fellow Sergeant who headed the Internal Affairs Division, engaged in intimidating and harassing conduct toward the investigating Sergeant by monitoring his comings and goings from Headquarters, and by confronting him verbally outside his home. There was just cause for a thirty (30) day suspension based on this misconduct.

**RECOMMENDED DECISION**

Pursuant to G.L. c. 31, § 43, the Appellant, Jose Martinez, is appealing the April

15, 2008 decision of the Appointing Authority, the Mayor of the City of Lawrence, suspending him without pay for thirty (30) days from his position as a Sergeant in the Lawrence Police Department. (Ex. 2) The appeal was timely filed on April 22, 2008. (Ex. 1) A hearing was held August 21, 2008 for the Civil Service Commission at the offices of the Division of Administrative Law Appeals, 98 North Washington Street, 4<sup>th</sup> Floor, Boston, MA 02114. The hearing was private as no written request was received by either party for the hearing to be public.

Various documents are in evidence. (Exs. 1 – 15) Three (3) tapes were used. The Appointing Authority presented the testimony of Sergeant Emil DeFusco, Jr., head of the Internal Affairs Unit of the Lawrence Police Department, Lawrence Police Lieutenant Stephen Taskesian, and Lawrence Police Chief John Romero. The Appellant testified on his own behalf. The witnesses were sequestered. Both parties made arguments on the record, and filed briefs by October 1, 2008.

### FINDINGS OF FACT

Based on the evidence presented and the reasonable inferences drawn therefrom, I make the following findings of fact:

1. Jose Martinez has over twenty-two years of service as a Police Officer with the Lawrence Police Department. For the last eight years he has been a Sergeant. He has experience as a Patrol Officer, Narcotics Detective, and Traffic Enforcement Officer. His current assignment is administrative, handling the claims of officers injured on duty as well as doing the courthouse liaison tasks including responsibility for the “911” tapes. (Testimony)

2. While performing the administrative assignment, Sgt. Martinez has a practice he understands is permissible of coming to work and leaving work at other than his regular hours of 7:00 a.m. to 3:00 p.m., and to make up shortfalls of time during particular days on future days. If he is not going to make up time, he informs the payroll office to use his sick or vacation or personal time for the absence. Sgt. Martinez feels that Police Officers holding the rank of Sergeant and above, are able to have flexible hours on the job. (Testimony)

3. Lieutenant Stephen Takesian is Sgt. Martinez's direct supervisor. He has been a Lawrence Police Officer for about twenty-two years and a Lieutenant for the last eight years. (Testimony)

4. Emil DeFusco, Jr., has been a Lawrence Police Officer for about twenty years, and a Sergeant for the last eight years. He has served as the head of the Internal Affairs Unit from about 2002. His father is a Deputy Chief of the Lawrence Police Department. A few years ago, both of them had been the subject of an investigative report done by the local Fox TV station Channel 25 about their alleged misuse of their work time. (Testimony)

5. John Romero has been the Lawrence Police Chief for the last ten years. (Testimony)

6. Chief Romero's office is on the second floor of Police Headquarters as are the offices of Sgt. Martinez and Sgt. DeFusco. The three offices are near one another. Lt. Takesian's office is on the first floor. There are parking spaces in the front of the building, but those are generally left for the public and for short stops by the officers. There are parking spaces at the back of the building where the officers can park their

cars. The second floor of Headquarters has an area with many floor to ceiling glass windows where officers can smoke cigarettes. Sgt. Martinez smokes cigarettes and uses this second floor area to smoke. He also smokes outside the building. (Testimony)

7. The Internal Affairs Unit investigated Sgt. Martinez for abuse of his work time during June through August 2007. The results of the investigation were provided to Chief Romero. Sgt. DeFusco had done about twelve prior Internal Affairs investigations of complaints made against Sgt. Martinez. Only three had resulted in the imposition of discipline and all were suspensions for under five days; the last for three days and that is under appeal. During the course of the investigation of one complaint, Sgt. Martinez showed displeasure at being asked certain questions by Sgt. DeFusco so he slammed a cell phone on Sgt. DeFusco's desk, left for his office, and slammed his office door. Sgt. DeFusco did not take this conduct personally as a threat to him, but as showing Sgt. Martinez's displeasure with the questions being asked. Sgt. Martinez had never used personally threatening language toward Sgt. DeFusco. None of the prior suspensions involved discipline for doing physical harm to anyone. Some of the twelve complaints were withdrawn and some were found to be without merit. (Testimony)

8. On January 28, 2008, Sgt. Martinez met with Chief Romero and Deputy Chief Driscoll "to discuss a comment made to Lt. Bartlett by Sgt. Martinez in a conversation that took place on Wednesday, January 23, 2007(sic)." Sgt. Martinez acknowledged that he told Lt. Bartlett "he had information regarding misconduct by members of this Department." Yet, when ordered by Chief Romero at this meeting to report such possible misconduct, Sgt. Martinez stated that he had no such information. (Ex. 14. Testimony.)

9. Lt. Takesian uses a time sheet located on his office door for the staff he supervises to sign in and out each day. This includes Sgt. Martinez. (Exs. 6 & 9. Testimony.)

10. During March 2008, Sgt. Martinez's schedule was a day shift from 7:00 a.m. to 3:00 p.m. Due to discrepancies in the times Sgt. Martinez was signing in and out of work in terms of the time he actually was at work, Sgt. DeFusco began an Internal Affairs investigation of Sgt. Martinez's time at work. This was a typical investigation of officers that Sgt. DeFusco would undertake. By memorandum of March 19, 2008, Sgt. DeFusco informed Chief Romero that he had become aware on March 18, 2008 that "Sgt. Martinez went home sick again as he did on March 13, 2008 after being directed by Deputy Chief DeFusco to move into his new office." Instead, he left work at 11:35 a.m. Sgt. DeFusco explained that he examined the sign in sheet and noted that,

Sgt. Martinez wrote down 7:00 am for sign in time and 3:00 pm for sign out time ... [with] no further indication that Sgt. Martinez used any vacation time or sick time ... payroll clerk ... [had] not been advised by Sgt. Martinez that he was taking time off ... spoke with Lt. Takesian ... and he too was not aware of Sgt. Martinez taking any time off on March 18, 2008.

(Ex. 5) Sgt. DeFusco informed Chief Romero that this kind of conduct in his view violated Lawrence Police Department Rules and Regulations at Chapter 27, Section 1, because Sgt. Martinez left work without the consent of his superiors on March 18, 2008 and wrote down he was at work 7:00 a.m. to 3:00 p.m. (Exs. 5 & 6. Testimony.)

11. In reaction to Sgt. DeFusco's information, Chief Romero ordered Sgt. DeFusco to forward his findings to Lt. Takesian to investigate further. Sgt. DeFusco met with Lt. Takesian on March 20, 2008 with this information. Lt. Takesian next spoke to Sgt. Martinez after this meeting, about his attendance on March 18, 2008. Sgt. Martinez

had previously told Lt. Takesian that his son suffered a concussion during a hockey game over the weekend preceding Monday, March 17, 2008, and he was concerned about his well being. At the meeting with Lt. Takesian, Sgt. Martinez repeated this information and explained that he had to leave work on March 18<sup>th</sup> because he received a call from his son's school that his son had fainted. He also explained how he took his son to see a medical specialist. He told Lt. Takesian about his attendance during the rest of the week starting March 17<sup>th</sup>. Lt. Takesian found Sgt. Martinez to be upset that he was being investigated over his use of time, and told Lt. Takesian he felt he was being singled out. Sgt. Martinez had not made a request to Lt. Takesian to take time off due to his son's health concerns that week. Lt. Takesian had no reason not to believe Sgt. Martinez's information about his son. (Ex. 7. Testimony.)

12. Lt. Takesian produced a report of March 24, 2008 for Chief Romero about his meeting with Sgt. Martinez. He reported that Sgt. Martinez had not been at work his regular hours each day during the week of March 17 - 20, 2008, despite signing the attendance sheet as being in 7:00 a.m. to 3:00 p.m. each work day. He reported learning that the payroll clerk had not been asked by Sgt. Martinez to take time off from his regular work hours. (Exs. 6 & 7. Testimony.) He provided the following details for Chief Romero:

**On Monday, March 17<sup>th</sup>,** Sgt. Martinez arrived at work after 8:30 am due to his son.

**On Tuesday, March 18<sup>th</sup>,** Sgt. Martinez said he received a call around noon from his (sic) while he was at work. He was told his son fainted and they subsequently brought him to a specialist.

**On Wednesday, March 19<sup>th</sup>,** he arrived at work at 8:45 am because he had to drop off his son at school.

**On Thursday, March 20<sup>th</sup>**, he arrived at work at 8:00 am because he had to drop his son off at school.

Sgt. Martinez did inform me about his son's injury, but never requested time off. He would have received time off if he had requested it.

(Ex. 7)

13. Chief Romero did not meet with Sgt. Martinez after reviewing Lt. Tekesian's report. He did not take any immediate action against Sgt. Martinez over his time away from work during the week of March 17 - 20, 2008. (Testimony)

14. On March 24, 2008, Sgt. Martinez signed in at 6:40 a.m. and out at 2:40 p.m. On March 25, 2008, he signed in at 6:30 a.m. and out at 2:50 p.m. (Ex. 6)

15. About 1:00 p.m. on March 20, 2008, Sgt. DeFusco was in his car in the lot behind the Headquarters building. He saw Sgt. Martinez looking down at him from the second floor area with the floor to ceiling glass windows. As Sgt. DeFusco moved to a different location around the building, he looked up and saw Sgt. Martinez again looking down at him from the large windows on the second floor. This kind of encounter occurred again at about 8:00 a.m. on March 24, 2008, when Sgt. DeFusco was walking into Headquarters from the parking lot and saw Sgt. Martinez in the second floor area with the floor to ceiling glass windows looking down at him. On March 25, 2008, Sgt. DeFusco again saw Sgt. Martinez staring down at him from this second floor area as he left his car to enter Headquarters. Sgt. Martinez was angry at Sgt. DeFusco about the investigation of his work time, and he decided to monitor when Sgt. DeFusco arrived at and left work. He did this monitoring just for his own reasons and never reported he was doing this to any superior officer. (Testimony)

16. March 26, 2008 began a three day vacation for Sgt. DeFusco. Sgt.

Martinez did not know this and decided to drive to Sgt. DeFusco's home to observe when he left for work and when he arrived at work that morning. He had not been to Sgt. DeFusco's home before, but he knew he lived near Deputy Chief DeFusco's home, and Sgt. Martinez knew where that was. (Testimony)

17. Sgt. Martinez drove to the general area where he knew Sgt. DeFusco lived. He entered a street and in the distance saw what looked like Sgt. DeFusco's police car. It was an unmarked Crown Victoria car with tinted windows. Sgt. Martinez was in his personal car and parked it about one hundred feet away to observe Sgt. DeFusco enter his car and leave the area. His car was facing in the opposite direction to Sgt. DeFusco's car. He had no intention of talking to Sgt. DeFusco. (Testimony)

18. About 7:20 a.m., Sgt. Martinez saw Sgt. DeFusco leave his house and get into his car which was parked outside his home on the street, a residential street. Sgt. DeFusco did not drive off as Sgt. Martinez expected. This was because he was waiting for his high school aged daughter to give her a ride to school. After awhile, Sgt. Martinez became concerned that Sgt. DeFusco saw him in his car, and that was the reason he had not driven off. Sgt. Martinez drove up and stopped alongside Sgt. DeFusco's car. The street was a two lane roadway. Until he got closer, Sgt. DeFusco thought the driver of this car was lost and was approaching him to get directions. Sgt. Martinez was not in uniform. Sgt. DeFusco was surprised to see Sgt. Martinez. Both men rolled down their windows to converse. (Exs. 11, 12 & 13. Testimony.)

19. Sgt. Martinez was nervous and asked Sgt. DeFusco if he was all right and if everything was okay. He said this irrelevant and not understandable statement over and over, or words to that effect. Sgt. DeFusco did not understand why Sgt. Martinez

was at his home and what his words meant. Sgt. Martinez appeared to be disheveled and agitated to Sgt. DeFusco, who responded with words to the effect; are you out of your mind coming here, what are you doing here. Sgt. Martinez only repeated the same words again to Sgt. DeFusco, and never offered any explanation why he was at his home. During this exchange, Sgt. DeFusco's daughter was still inside the house, but Sgt. DeFusco became concerned that she might come out and have to hear and see Sgt. Martinez. Sgt. Martinez again repeated the same phrases, asking if he was sure he was all right or words to that effect. Sgt. DeFusco wanted to end the conversation so he told Sgt. Martinez that everything was fine. By this point, Sgt. DeFusco took Sgt. Martinez's words and presence outside his home to be a threat. The conversation ended and Sgt. Martinez drove off at a normal rate of speed away from Sgt. DeFusco and his home. The discussion lasted only a few minutes. (Testimony)

20. Once Sgt. Martinez left, Sgt. DeFusco contacted Chief Romero using his cell phone. It was about 7:30 a.m. He explained what had just happened. Chief Romero told him to come to Headquarters after taking his daughter to school. Sgt. DeFusco took his daughter to school and returned home to shower and dress. He then drove to Headquarters as Chief Romero had ordered. By this time, he was concerned that his wife and children, ages eleven, seventeen and nineteen, could be approached by Sgt. Martinez. (Ex. 15. Testimony.)

21. Sgt. Martinez drove to Headquarters after leaving Sgt. DeFusco's home. He signed in at 6:59 a.m. He parked his car in front of Headquarters and went inside. He spoke to some fellow officers and had a cigarette and/or coffee. He then walked out of the building to move his car to the back lot. As he entered his car, he saw Sgt. DeFusco

driving to Headquarters. Sgt. DeFusco then saw Sgt. Martinez just sitting in his car in a front parking space. As he drove toward the back lot, Sgt. DeFusco saw Sgt. Martinez drive in the same direction behind him. Sgt. DeFusco parked his car and saw Sgt. Martinez drive by him to park in another area of the back lot. Sgt. Martinez did not exit his car to go into Headquarters. Sgt. DeFusco was concerned, and called Chief Romero again. He said he felt Sgt. Martinez was following him. Chief Romero told him not to have another confrontation with Sgt. Martinez and to stay in his car; that he was on his way to Headquarters. Sgt. Martinez had waited to leave his car to watch Sgt. DeFusco leave his car and go into Headquarters. When Sgt. DeFusco did not leave his car, Sgt. Martinez waited in his car a few minutes before leaving his car and walking to a side entrance that had a landing outside the second floor. He had a cigarette there. He was able from this vantage point to watch Sgt. DeFusco in his car. Sgt. DeFusco watched Sgt. Martinez take these actions. (Testimony)

22. Then Chief Romero arrived. Sgt. Martinez was still on the second floor landing outside. Chief Romero met up with Sgt. Martinez and told him to come to his office with union representation if he wanted. (Testimony)

23. At this meeting, Chief Romero asked Sgt. Martinez why he had gone to Sgt. DeFusco's home. Chief Romero felt there had been no police business reason Sgt. Martinez should have been at Sgt. DeFusco's home that morning. Sgt. Martinez said he would not answer citing his Fifth Amendment rights. Chief Romero informed him he would be put on paid leave, had to surrender his gun and shield, and had to stay away from Lawrence Police Officers. Chief Romero told him to expect a suspension. (Testimony)

24. Sgt. DeFusco produced a report for Chief Romero on March 26, 2008.

He set forth his version of what happened the morning of March 26<sup>th</sup> in front of his home and then later upon arriving at Headquarters. He included in the report how Sgt. Martinez's conduct made him feel he was being threatened and intimidated because he had investigated Sgt. Martinez in the past and was in the midst of investigating any misuse of his time at work. He explained he was concerned about his family having to deal with Sgt. Martinez's conduct, including if Sgt. Martinez came again to the family home. (Ex. 8)

25. Also on March 26, 2008, Sgt. Martinez was sent a letter of contemplated action by Lawrence Mayor Michael J. Sullivan explaining the City's intention to suspend him without pay for thirty (30) days based on his actions on March 26<sup>th</sup> being outside Sgt. DeFusco's home at about 7:25 a.m. "for no legitimate purpose," and producing "an atmosphere of harassment and intimidation toward Sgt. DeFusco, and his family." The letter cited how Sgt. Martinez was "under investigation by the department, as the result of questions that had been raised regarding ... reported work hours." The letter cited various Rules and Regulations of the Lawrence Police Department alleged to have been violated by Sgt. Martinez's conduct toward Sgt. DeFusco. (Ex. 4)

26. On April 4, 2008, an Appointing Authority hearing was held before a designated Hearing Officer. A report was produced containing findings of fact. (Ex. 3)

27. Mayor Sullivan issued his decision on April 15, 2008. He suspended Sgt. Martinez for thirty (30) days, relying upon the findings made by the designated Hearing Officer to demonstrate that the allegations set forth in the March 26, 2008 letter of contemplated action, had been proven. (Ex. 2)

28. Mayor Sullivan found Sgt. Martinez had violated the following Rules and Regulations of the Lawrence Police Department:

Chapter 28, Section 2g: Conduct unbecoming an officer.

Chapter 28, Section 2i: Discourtesy or insolence to the public or to any officer of rank.

Chapter 28, Section 2m: Insubordination or disrespect toward an officer of rank.

Chapter 28, Section 2x: Any other act contrary to good order and discipline or constituting neglect of duty or a violation of the rules of the Department.

Chapter 29, Section 17: Members of the Department shall treat all officers of rank with respect and in their demeanor toward their associates in the Department shall be courteous and considerate, guarding themselves against envy, jealousy, or other unfriendly feelings; and refrain from all communications to their discredit, except to their superior officers when it is their duty to inform of every neglect or disobedience of orders that may come to their knowledge.

Chapter 29, Section 55: Members shall obey all Rules and Regulations both on and off duty.

Chapter 29, Section 59: Members shall conduct themselves in a manner that will foster the greatest harmony and cooperation between the various bureaus. Undue familiarity between officers of rank and subordinates is not permissible at any time. Members shall avoid any conduct or speech that is detrimental to good order and discipline. Members shall not gossip about any other officer to his discredit. Grouchiness, sarcasm, wise cracks, or flares of temper shall be avoided.

(Exs. 4 & 10.)

29. Sgt. Martinez filed a timely appeal of the suspension to the Civil Service

Commission for a G. L. c. 31, § 43 hearing. (Ex. 1)

### **Conclusion and Recommendation**

The Appointing Authority must satisfy a preponderance of the evidence standard to show just cause for suspending a civil service employee. *Gloucester v. Civil Service Commission*, 408 Mass. 292 (1990). Just cause is found when an employee has engaged in "substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." *Murray v. 2<sup>nd</sup> District Court of Eastern Middlesex*, 389 Mass. 508, 514 (1983); *School Committee of Brockton v. Civil Service Commission*, 43 Mass. App. Ct. 486, 488 (1997). On appeal, the Civil Service Commission determines

whether or not the Appointing Authority had a reasonable justification for the action it took. *Watertown v. Aria*, 16 Mass. App. Ct. 331, 334 (1983). This means the Appointing Authority's action had to be "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law." *Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300, 304 (1997), quoting *Wakefield v. 1<sup>st</sup> District Court of Eastern Middlesex*, 262 Mass. 477, 482 (1928); *Civil Service Commission v. Municipal Court of Boston*, 359 Mass. 211, 214 (1971). In making this determination, the Civil Service Commission cannot simply substitute its decision for that of the Appointing Authority. *Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. at 304; *School Committee of Salem v. Civil Service Commission*, 348 Mass. 696, 699 (1965). The briefs and closing arguments of the parties show they do not dispute this is the proper standard for determining the outcome of Sgt. Martinez's appeal.

Based on the evidence presented I conclude there is a reasonable justification for this discipline. The City of Lawrence has met its burden of proof to show just cause for its decision.

No evidence establishes that Sgt. DeFusco was harassing Sgt. Martinez by investigating his use of time at work. The findings show Sgt. Martinez knew or should have known that his conduct toward Sgt. DeFusco was misconduct for which he could be disciplined. It does not matter that there was no specific rule or policy within the Lawrence Police Department to forbid a fellow officer from driving by and confronting in any way a fellow officer outside his family home. That was just a means used by Sgt. Martinez to intimidate and harass Sgt. DeFusco. In this regard, I do not find as a defense

for his actions his claim of conducting his own unofficial and only personal investigation of Sgt. DeFusco's time; an investigation he did not reveal he was doing to any of his superior officers.

I found credible the testimony of Sgt. DeFusco about how Sgt. Martinez's conduct made him feel. I note that Chief Romero supported this reaction by Sgt. DeFusco, and did not find Sgt. DeFusco was intentionally overreacting to retaliate against Sgt. Martinez. Although the reason for the imposition of the thirty (30) day suspension does not include a finding of any misuse of time by Sgt. Martinez in March 2008, evidence that his time was under investigation as an official Internal Affairs matter is of significance. At the time he engaged in his misconduct with Sgt. DeFusco on March 26<sup>th</sup>, Sgt. Martinez was well aware that his time was being officially investigated. He knew this from the time Lt. Takesian spoke with him on March 20, 2008. The findings made show his reaction to this investigation was to start watching the comings and goings of Sgt. DeFusco, including being sure Sgt. DeFusco saw him staring at him from the second floor windows as he smoked cigarettes. I conclude Sgt. Martinez took advantage of being in the second floor smoking areas between March 20<sup>th</sup> and March 26<sup>th</sup> to observe Sgt. DeFusco enter and leave Headquarters. I also conclude he did not try to hide his surveillance of Sgt. DeFusco, and that he was trying to intimidate Sgt. DeFusco.

Sgt. DeFusco knew Sgt. Martinez was watching him from the second floor windows at Headquarters before he and Sgt. Martinez spoke outside his home on March 26<sup>th</sup>. Sgt. Martinez decided Sgt. DeFusco may have recognized him sitting in his car near his home, so Sgt. Martinez made a decision to confront Sgt. DeFusco. He did not need to do that. He could have driven off. And, he could have approached Sgt. DeFusco,

explained why he was at his home, and even apologized. Instead, he decided to talk to him in an intimidating and harassing manner, asking him if he is okay over and over. Given the setting he was in and the lack of any reason given to Sgt. DeFusco for showing up at his home this way, I conclude that Sgt. Martinez engaged in conduct that understandably left Sgt. DeFusco feeling Sgt. Martinez was harassing him for investigating his use of work time, and intimidating him to give up the investigation. This conclusion is bolstered by Sgt. Martinez continuing his surveillance of Sgt. DeFusco later that morning when Sgt. DeFusco drove into Headquarters. Sgt. Martinez continued to watch Sgt. DeFusco and not enter Headquarters until after Sgt. DeFusco went inside. Even when he decided to leave his car, Sgt. Martinez only went to the outside landing so he could continue to watch Sgt. DeFusco.

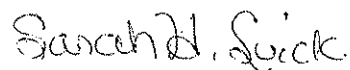
What is puzzling is that Lt. Takesian had known about Sgt. Martinez's son having been hurt and that he accepted Sgt. Martinez's reasons for not putting in full-time working hours March 17 – 20, 2008. His report to Chief Romero makes this clear. He also testified that he would have permitted Sgt. Martinez time off to address his son's needs if he had asked for such time off. No testimony was presented that Sgt. Martinez had any underlying issues with Lt. Takesian concerning his use of time. And, by March 26, 2008, Chief Romero had taken no action against Sgt. Martinez concerning use of time between March 17 - 20, 2008. He had not even spoken to Sgt. Martinez by then about any concerns about his use of work time. Sgt. Martinez's conduct simply was targeting Sgt. DeFusco who was performing his duties. Sgt. DeFusco did nothing wrong in reporting his investigation results about Sgt. Martinez to Chief Romero.

It is also no defense for Sgt. Martinez whether or not he was being singled out for the investigation or whether other Lawrence Police Officers with ranks of Sergeant and above were using their time the same way he was. If Sgt. Martinez had nothing to hide - that this was an accepted practice among officers with ranks - then it is hard to appreciate why he was so antagonistic and so uncontrolled in his conduct in targeting Sgt. DeFusco.

In terms of the degree of discipline, even though Sgt. DeFusco has prior discipline, those prior suspensions were under five days, and no evidence was presented that the reasons for them had any connection to the kind of conduct he engaged in regarding Sgt. DeFusco. Nevertheless, I do find there is sufficient justification for the Appointing Authority's large discipline of a thirty (30) day suspension against Sgt. Martinez. I do find he violated the Lawrence Police Department Rules and Regulations the Appointing Authority relied upon and as set forth in the letter of contemplated action (Exhibit 4).

For these reasons, I recommend that the Civil Service Commission affirm the thirty (30) day suspension imposed by the Appointing Authority.

**DIVISION OF ADMINISTRATIVE  
LAW APPEALS**

  
Sarah H. Luick, Esq.  
Administrative Magistrate

**DATED: JUL 27 2009**