

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

JOSHUA A. MOZELESKI
Appellant

v.

D-08-15

CITY OF CHICOPEE,
Respondent

Appellant's Attorney:

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Murphy McCoubrey & Auth
972 Exchange Street
P. O. Box 927
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Respondent's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION

The Appellant, Joshua A. Mozeleski (hereinafter "Mozeleski" or "Appellant"), pursuant to G.L. c. 31, § 43, is appealing the decision of the City of Chicopee (hereinafter "City" or "Appointing Authority") to terminate him from his position as a police officer.

Two days of hearing were conducted. The first day of hearing was conducted at the offices of the Civil Service Commission (hereinafter "Commission") on September 22, 2008 and the second day of hearing was conducted at the offices of the Appellant's

attorney in Chicopee on October 1, 2008. All witnesses, with the exception of the Appellant and Deputy Police Chief Robert Gendron, were sequestered.

Four (4) audiotapes were made of the hearing and both parties subsequently submitted post-hearing briefs in the form of proposed decisions.

FINDINGS OF FACT:

Twenty-five (25) exhibits were entered into evidence at the hearings. Based on the documents submitted and the testimony of the following witnesses:

For the Appointing Authority:

- Yolanda; civilian complainant¹
- Robert Gendron, Deputy Chief of Police, City of Chicopee;
- John R. Ferraro, Jr., Chief of Police, City of Chicopee

For the Appellant:

- Joshua Mozeleski, Appellant

I make the following findings of fact:

1. The Appellant, Joshua A. Mozeleski, was a tenured civil service employee of the Chicopee Police Department since July 14, 2003. He had been employed by the City for approximately four and a half years before being terminated on February 19, 2008. (Testimony of Appellant; Exhibit 19; Stipulated Fact) He has no prior disciplinary record. (Testimony of Appellant)

¹ The last name of the citizen complainant is withheld.

2. The Appellant is thirty-one (31) years old, has been married for one (1) year and is a resident of Chicopee. He obtained a bachelor's degree in criminal justice from American International College in 2000. (Testimony of Appellant)
3. Yolanda, the civilian complainant in this case, is a 1999 graduate of the University of Massachusetts with a bachelor's degree in psychology. She has been employed by the Department of Social Services as a protective social service worker since March 2004. (Testimony of Yolanda)
4. On November 10, 2007, the Appellant was working the 12:00 midnight to 8:00 A.M. shift and was assigned to patrol duties in the Chicopee Falls section of the City. (Testimony of Appellant)
5. On November 10, 2007, at approximately 3:30 A.M., Yolanda, who was the owner and operator of a motor vehicle stopped at the curbside on Broadway Street, allowed a female passenger to exit the motor vehicle. The Appellant was on duty, in full uniform and operating a Chicopee police cruiser. Yolanda testified before the Commission that the Appellant slowly drove by her parked vehicle and looked at her. While the female passenger was exiting, the Appellant drove the cruiser down the street and out of sight. (Testimony of Yolanda)
6. Yolanda testified that she drove from Broadway Street and turned onto St. James Avenue. Shortly afterwards, she observed blue police lights behind her so she stopped her vehicle. (Testimony of Yolanda and Exhibits 2, 11-3a and 17)
7. After initiating this motor vehicle stop, the Appellant failed to notify the police dispatcher and failed to enter this traffic stop on the Daily Report to the Chief. (Testimony of Appellant, Testimony of Gendron and Exhibits 3, 11 and 17)

8. The Rules and Regulations of the Chicopee Police Department require that police officers notify the dispatcher of the following information whenever making a traffic stop: i) location of the stop; ii) description of the vehicle; and iii) if possible, a description of its occupants. (Exhibit 18)
9. The Appellant testified that he had previously been advised not to bring in “stupid arrests” on weekends and that the laptop computers typically “go down” between 4:00 A.M. and 6:00 A.M. (Testimony of Appellant)
10. The testimony of the Appellant and Yolanda diverge on important points in regard to what transpired during the vehicle stop. (Testimony of Appellant and Yolanda)
11. The Appellant testified that he stopped Yolanda because she drove off with her parking lights on after the female passenger had exited. He testified that he gave Yolanda this reason and that she acknowledged to him that this was indeed so. (Testimony of Appellant)
12. Yolanda testified that her headlights were on and that the Appellant did not say anything about only her parking lights. He simply asked her for her license and registration, which she handed over. (Testimony of Yolanda)
13. It is undisputed that the Appellant returned to his police cruiser and conducted a Registry of Motor Vehicles query on Yolanda and her motor vehicle. The Appellant learned that Yolanda’s license was suspended for nonpayment of a traffic fine. The Appellant then returned to Yolanda’s vehicle. (Testimony of Appellant)
14. The Appellant testified that upon approaching the vehicle, he noticed that Yolanda had lip gloss in her hand and he asked her to put it away. (Testimony of Appellant)

15. It is undisputed that at some point while standing at the driver's side window, the Appellant inquired if Yolanda was aware that her license was suspended and she said no. At some point in the conversation, the Appellant informed Yolanda that the suspension was related to a "payment default" related to a citation issued sometime in April which she was appealing. (Testimony of Yolanda and Appellant)
16. It is also undisputed that the Appellant at some point told Yolanda that based on her license suspension, he was supposed to arrest her and tow the vehicle, and that Yolanda stated that she didn't want to be arrested and simply wanted to go home. (Testimony of Yolanda and Appellant)
17. According to the Appellant, Yolanda asked him if he could follow her home as she lived only a short distance away. The Appellant testified that he told Yolanda that he could not follow her home and suggested that someone come pick her up, which she indicated that wasn't possible. (Testimony of Appellant)
18. The Appellant testified that he then suggested to Yolanda that she go stay with her friend whom she had just dropped off on Broadway. Yolanda said that was not an option. (Testimony of Appellant)
19. According to the Appellant, Yolanda again asked if she could just go home or whether the Appellant could report that someone else was driving the vehicle. The Appellant testified that he told Yolanda that he couldn't report that someone else was the driver. (Testimony of Appellant)
20. The Appellant testified that at some point, he returned to his cruiser in order to check Yolanda's criminal history record. According to the Appellant, he found that Yolanda had no criminal history. Based on Yolanda's lack of criminal history and

the fact that there were no issues of sobriety, the Appellant decided to let Yolanda drive home instead of arresting her and/or towing her vehicle. (Testimony of Appellant)

21. The Appellant testified that Yolanda then asked for his name and phone number so that she could call him after she reached home so that he could know that she got home safely. According to the Appellant, he told Yolanda that he could not give out his phone number, at which time she wrote down her cell phone number and gave it to him. (Testimony of Appellant)

22. According to Yolanda, the Appellant told her that he would have to arrest her since he already ran her license on the computer. He stated at some point, “we could take care of that.” He also suggested that he could report that she had been the passenger in the vehicle, not the driver. Yolanda testified that the Appellant then asked her to “think about a way that we could take care of the situation.” She told the Appellant that his suggestion was “inappropriate” and that she just wanted to get home. The Appellant then replied, “come on, think, I think that we could take care of this and I think that you’re thinking of a way to take care of this” and then told her that they could go to another location for her to give him a “blow job.” (Testimony of Yolanda)

23. Yolanda testified that she was shocked by the Appellant’s suggestion and told him that his behavior was inappropriate. (Testimony of Appellant)

24. Asked upon direct if he ever asked Yolanda for sex in return for allowing her to go home, the Appellant stated, “absolutely not; I’ve been a police officer for 4 ½ years ... I’ve never, that night or any other night, brought anything to that effect; I don’t know that woman; I’m a married man; I don’t know who she is; I don’t know

anything about her; how do I know she's not going to go right to the station right after and make a complaint; if something like that was said, or sex or blow job or getting arrested, why would I have let her go? I would have arrested her at that point if that's what was said." (Testimony of Appellant)

25. Yolanda testified that the Appellant then told her that he would let her drive home, but that the *Appellant* asked *her* for her cell phone number so that he could ensure that she got home safely because his "ass was on the line." (Testimony of Yolanda)

26. According to Yolanda, before the Appellant went back to his cruiser, he touched her upper arm with one hand then he leaned down and gave her a kiss on her lips. (Testimony of Yolanda)

27. Yolanda then drove approximately 15-20 minutes to her home, where she lives with her son and her sister. (Testimony of Yolanda)

28. Approximately 5 minutes after arriving home, Yolanda received a call on her cell phone from the Appellant. (Testimony of Yolanda)

29. According to Yolanda, the Appellant, during this phone conversation: i) asked her if she got home safely; ii) asked her what type of lip gloss she had been wearing; iii) told her that he had done her a 'huge favor'; iv) that she 'owed him' for the favor; v) that the two of them would need to get together so she could re-pay him for the favor; vi) that he works the "11-7" shift; and vii) told her that he would call her again. (Testimony of Yolanda)

30. Yolanda testified that she was "in shock" from the phone call. (Testimony of Yolanda)

31. The Appellant offered a different account of the phone call during his testimony. He testified that during this phone conversation he only: i) asked her if she got home safely; ii) told her that she needed to take care of her license; and iii) told her that he would contact Yolanda at a later date to confirm that she took care of her license.

(Testimony of Appellant)

32. After waking up that Sunday morning at approximately 9:00 A.M., Yolanda talked with her sister and her friend (who was the female passenger the night before) about what transpired with the Appellant. Later that day, at approximately 5:00 P.M., Yolanda went to the state police barracks in Springfield to file a complaint.

(Testimony of Yolanda)

33. She was informed that such a complaint would need to be filed directly with the Chicopee Police Department, so she immediately drove to there and informed a supervisor on duty that she wanted to file a complaint against the Appellant. She was given a form and was told to take it home, fill it out and return it to the police department on Tuesday following the Monday (Veterans Day) holiday. (Testimony of Yolanda)

34. Two days later on November 12, 2007, at approximately 3:46 P.M., the Appellant called Yolanda's cell phone number and left her a voice mail. In the voice mail, which was played at the Commission hearing and admitted into evidence, the Appellant says, "Hey, what's up Yolanda? It's Josh. I met you that night. Just calling to see what you are doing. I'll check and call back later. It's Monday around quarter of four. I'll talk to you. Bye." (Exhibit)

35. Asked during his direct testimony why he didn't just check online at the police station to see if Yolanda had had her license reinstated, the Appellant stated that he was unaware of Yolanda's last name or license plate number until she filed a complaint against him. (Testimony of Appellant)
36. On November 12, 2007 Yolanda returned the Internal Affairs Incident Report form to the Chicopee Police Department. Yolanda met with the Chief of Police who reviewed the form in her presence, and assured her that a complete investigation would be conducted by Internal Affairs and that she would be contacted in the future. (Testimony of Yolanda and Chief)
37. Yolanda has a pending civil suit against the Appellant in Hampden Superior Court. (Testimony of Yolanda)
38. Chief of Police John Ferraro (hereinafter "Chief Ferraro") assigned the Internal Affairs Incident Report for a full investigation to Deputy Chief of Police Robert Gendron (hereinafter "Dep. Chief Gendron"). Dep. Chief Gendron telephoned Yolanda and advised her that he would conduct a thorough investigation and advise her of his findings. Yolanda informed Dep. Chief Gendron that she had the November 12, 2007 voicemail message from the Appellant on her cell phone. Dep. Chief Gendron requested the voice mail and her cell phone records. (Testimony of Dep. Chief Gendron, Exhibits 16 and 17)
39. Dep. Chief Gendron reviewed the Daily Report form filed by the Appellant for November 10, 2007. In the report, there was no mention of Yolanda and the stopping of her vehicle at approximately 3:30 A.M. The report listed a 3:16 A.M. entry of a suspicious person on Broadway, and a 3:40 A.M. entry of a motor vehicle stop on St.

James Avenue for an inspection sticker violation. (Testimony Dep. Chief Gendron, Exhibits 3 and 17)

40. Dep. Chief Gendron reviewed the Chicopee Police Dispatch Log from November 10, 2007 from 12:01 A.M. through November 10, 2007 at 4:56 A.M. There was no entry in the dispatch log showing that the Appellant had radioed in the motor vehicle stop of Yolanda's vehicle. There was a 3:16 A.M. radio dispatch initiated by the Appellant concerning a suspicious person. There was a 3:40 A.M. radio dispatch initiated by the Appellant concerning a motor vehicle stop for an inspection sticker violation. Dep. Chief Gendron verified that the Appellant's motor vehicle query of the 3:40 A.M. motor vehicle stop (inspection sticker) was run at 4:08 A.M. Dep. Chief Gendron testified the time delay (3:40 A.M. stop but not a motor vehicle query until 4:08 A.M.) was inconsistent. Usually, police officers perform a motor vehicle query immediately after stopping a motor vehicle or within several minutes, not twenty-eight (28) minutes later. (Testimony of Dep. Chief Gendron, Exhibits 17, 4, 5 and 6)
41. Dep. Chief Gendron then contacted the registered owner of the motor vehicle that the Appellant had reported to dispatch for a violation of an inspection sticker. The registered owner stated she was never stopped by a Chicopee police officer on November 10, 2007 or on any other date. In fact she had a valid inspection sticker on her vehicle which was good until August, 2008. Dep. Chief Gendron instructed detectives to go to this person's residence and photograph her vehicle, the registration plate, and the inspection sticker. (Testimony of Dep. Chief Gendron, Exhibits 7 and 17)

42. Dep. Chief Gendron's further investigation revealed the Appellant initiated a motor vehicle query on Yolanda's vehicle at 3:31 A.M. on November 10, 2007. That date, time and license suspension status confirmed the information contained in Yolanda's complaint. (Testimony of Dep. Chief Gendron, Exhibits 15 and 17)
43. Dep. Chief Gendron investigated the radio transmissions within the Chicopee Police Department for information on the motor vehicle stops conducted by the Appellant on November 10, 2007. A review of the radio transmissions showed that the Appellant did not call out any motor vehicle stops as required by departmental rules and regulations Number 5:01. Dep. Chief Gendron learned that the police radio dispatcher contacted the Appellant at 3:48 A.M. to request assistance for another Chicopee police officer on Burnett Road. The Appellant responded, "I was supposed to call out a stop, but I could clear real quick and head that way." At 3:51 A.M., the police dispatcher asked the Appellant for his location and the Appellant responded, "I'm on Broadway, I'm clear now, I'll hit my own screen." At this time, however, the Appellant had stopped Yolanda's vehicle on St. James Avenue. (Testimony of Yolanda, Mozeleski, Exhibits 2 and 17)
44. Dep. Chief Gendron's investigation revealed that the Appellant was aware that he was required to call out all motor vehicle stops. Furthermore, Deputy Gendron concluded that the Appellant's failure to document on the daily police log the stop of Yolanda's motor vehicle for a suspended driver's license in addition to listing a minor inspection sticker violation created a false report. (Testimony of Dep. Chief Gendron, Exhibits 3, 4, 5, 6 and 17)

45. Based upon the above, Dep. Gendron concluded that the Appellant intentionally concealed the motor vehicle stop of Yolanda's vehicle. Dep. Chief Gendron discussed his investigation and his findings with Chief Ferraro. They discussed the next step and the best procedure to ensure that accurate information would be received without jeopardizing the Internal Affairs investigation. Chief Ferraro determined that notifying the Appellant of the allegations contained in the Internal Affairs Incident Report would jeopardize the investigation. The Chief authorized Dep. Chief Gendron to continue the investigation by requesting information from the Appellant, without disclosing information that may jeopardize the Internal Affairs investigation. (Testimony of Chief Ferraro, Dep. Chief Gendron, Exhibits 2 and 18, III(b)(a)(IV) page 9)

46. On November 29, 2007, Dep. Chief Gendron submitted a written request to the Appellant indicating (though untrue) that he had been contacted by an area police chief concerning Yolanda as the subject of a major ongoing investigation. The Appellant was told that this chief revealed that Yolanda was stopped by the Chicopee police on November 10, 2007, and the Appellant ran her name through the system at 3:30 A.M. Deputy Gendron requested a written report before December 5, 2007 concerning this motor vehicle stop with specific answers to the following questions: 1: Reason for stop, 2: Was she alone or did she have any other passengers? If so, do you have their information?, 3: Did you notice any other vehicles that might have been traveling with her?, 4: Did you notice any large boxes or computer equipment in her vehicle?, 5: Do you have any knowledge of where she was coming from or going to?, 6: Have you had any prior dealings or any contact with her since that m/v stop?,

7: Did you obtain any updated contact information on her? Her rmv info is outdated.

(Testimony of Dep. Chief Gendron and Exhibit 9-1)

47. The Appellant responded on December 6, 2007 in a written report to Deputy Gendron. The Appellant stated that he stopped Yolanda's vehicle in front of the apartments at 70 Broadway Street. The Appellant stated that he pulled in behind the vehicle with the take down light only in front of 70 Broadway Street. The Appellant stated that the vehicle was suspicious with at least two occupants in it at an early hour in front of 70 Broadway Street. The Appellant stated that Appellant did not have any contact with Yolanda since the motor vehicle stop on November 10, 2007.

(Testimony of Dep. Chief Gendron and Yolanda, Exhibits 2, 9-2 11-3a and 17)

48. On December 7, 2007, Dep. Chief Gendron requested follow-up information, asking why the Appellant had not charge Yolanda for operating with a suspended license on November 10, 2007. On December 10, 2007, the Appellant submitted a report to Dep. Chief Gendron stating he was aware Yolanda had a suspended license after conducting a check on his cruiser laptop. Instead he only observed her vehicle parked on the side of the road, he did not observe Yolanda operating the motor vehicle. The Appellant's report of December 10, 2007 also stated that he informed Yolanda of her suspended license status and the consequences of driving on a suspended license, but that she stated she would be staying with friends at 70 Broadway Street for that night and he did not observe her driving the vehicle. (Testimony of Dep. Chief Gendron, Mozeleski and Yolanda, Exhibits 2, 10-2, 11-3a, and 17)

49. On December 11, 2007, Dep. Chief Gendron requested the Appellant to explain why call number 07-29819 on the dispatch log for November 10, 2007 (Exhibit 4) was

entered at 3:40 A.M., but all documentation related to that call indicates his involvement after 4:00 A.M. Dep. Chief Gendron further requested that the Appellant provide a detailed account of these actions and the reason for initiation for the stop, any interaction with the driver through to the end of the stop? (Exhibit 11-1) Also, on December 11, 2007, Dep. Chief Gendron requested the Appellant to submit a detailed report concerning a redacted complaint filed by Yolanda including any and all information concerning any interaction the Appellant had with her. The redacted copy of Yolanda's complaint redacted the portion of her complaint regarding the subsequent Monday voice mail message. He was further requested to explain why this motor vehicle stop as indicated on the dispatch log was not listed in the Appellant's daily report dated November 10, 2007 (see Exhibit 11-2) (Testimony of Dep. Chief Gendron, Exhibits 11-1, 11-2, 4 and 3)

50. On December 19, 2007, the Appellant responded in writing to Dep. Chief Gendron's requests of December 11, 2007 concerning the redacted Yolanda complaint and call number 07-29819 (see Exhibit 3).

51. The second paragraph of the Appellant's above-referenced December 19, 2007 letter to Dep. Chief Gendron states, in its entirety:

"I would like this letter to be an amendment to my previous letters. The original letter I thought was focused criminal conduct (sic) by [Yolanda] that was not apparent to me at the time. The second letter I received I was concerned that I would get in trouble for not charging [Yolanda] with operating with a suspended license. I thought I was doing a good deed for someone who claimed she knew nothing about her license being suspended over an unpaid ticket and even called her to make sure she had gotten home without further incident and tried following up with her to see if she had taken care of her license. At no time did I try to pick her up or ask for any type of sexual favors as

she claimed.” (Exhibit 11-3)

52. The Appellant’s three-page letter states that Yolanda first asked him for his cell phone number and omits the fact that he left a voice mail on Yolanda’s cell phone on November 12, 2007. (Testimony of Yolanda and Mozeleski and Exhibits 2, 9-2, 10-2, 11-3 and 17)
53. Based upon the above investigation by Dep. Chief Gendron, on January 11, 2008, Chief Ferraro suspended the Appellant pursuant to M.G.L. ch. 31, §41 for five days effective January 12, 2008, for the following reasons: violation of Chicopee Police Department Rules and Regulations Number 200-13 (courtesy), Number 200-67 (truthfulness), Number 300-13 (false information on records), Number 300-19 (incompetence), Number 300-31 (neglect of duty) and Number 5.01 Traffic Safety III-3 (motor vehicle stops) (b), failure to notify the dispatcher). (Exhibit 1)
54. The Appellant appealed the five day suspension to the appointing authority, Mayor Michael Bissonnette (hereinafter “Mayor Bissonnette”. On February 7, 2008, Mayor Bissonnette conducted a disciplinary hearing which lasted two and a half hours and included testimony of Yolanda, Dep. Chief Gendron and Chief Ferraro. The Appellant did not testify at the disciplinary hearing before Mayor Bissonnette. (Exhibit 19)
55. In a February 19, 2008 letter, the mayor informed the Appellant that he was discharged and terminated him from employment with the Chicopee Police Department. The mayor based this determination on the testimony of Yolanda, Dep. Chief Gendron and Chief Ferraro whom he found to be credible, accurate and truthful. The mayor based his decision to terminate the Appellant on eighteen exhibits

introduced over the two and half hour hearing, together with the testimony of the above individuals. The mayor found that the Appellant's conduct on November 10, 2007 and subsequent reports to Dep. Chief Gendron were false and in violation of Chicopee Police Department Rules and Regulations Number 200-13 (courtesy), Number 200-67 (truthfulness), Number 300-13 (false information on records), Number 300-19 (incompetence), Number 300-31 (neglect of duty) and Number 5.01 Traffic Safety III-3 (motor vehicle stops) (b), failure to notify the dispatcher). (Exhibit 19)

56. Mayor Bissonnette concluded that the Appellant's submission of five false reports eliminated the Appellant's trustworthiness as a police officer and undermined the credibility and integrity of his continued role as a police officer. Furthermore, the mayor found that any future testimony in a criminal court would be subject to cross examination and jeopardize the successful prosecution of criminal defendants. The mayor concluded by finding just cause for a five day suspension imposed by Chief Ferraro and termination from the Chicopee Police Department retroactive to January 12, 2008, the date of the original suspension imposed by Chief Ferraro and the Appellant's agreement to postpone the original disciplinary hearing scheduled on January 17, 2008. (Exhibit 19)

57. The City never made a final determination as to whether the Appellant sought sex from Yolanda in exchange for not arresting her and/or towing her car on the morning in question. (Testimony of Chief Ferraro)

58. There has been no criminal referral of this matter. (Testimony of Chief Ferraro)

59. Chief Ferraro has worked for the Chicopee Police Department for thirty (30) years and has been the City's police chief since 1992. (Testimony of Chief Ferraro)

60. Chief Ferraro testified before the Commission that he found the most egregious charge against the Appellant to be that of untruthfulness, stating, "it goes to the core of everything that a police officer stands for; how could I ever put him on a witness stand?...it comes down to credibility, being able to testify in court, being able to have public confidence and a public trust...You don't expect officers to be perfect...but, boy, you better be honest." (Testimony of Chief Ferraro)

Argument regarding possible disparate treatment

61. In a matter unrelated to this appeal, another police officer working for the Chicopee Police Department was disciplined for submitting a false report. Police Chief Ferraro testified before the Commission regarding why he believed that incident, and the discipline issued, was distinguishable from the instant matter. According to Chief Ferraro, this other police officer, while on a paid detail, left the assigned detail for a period of time and went to a local night club. When he submitted his slip to be paid for the detail, he did not account for leaving the detail for 30-45 minutes. As a result, he was suspended for five (5) days and required to work the detail again for no pay. (Testimony of Chief Ferraro)

62. Chief Ferraro testified that the above-referenced other officer acknowledged his wrong doing and was truthful to him when confronted about the matter. (Testimony of Chief Ferraro)

63. I find that the above-referenced incident regarding this other officer is distinguishable from the far more serious charges against the Appellant.

CONCLUSION

The role of the Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300,304 (1997). See Watertown v. Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civ. Serv. Comm'n, 38 Mass. App. Ct. 473, 477 (1995); Police Dep't of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is "justified" when it is done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Id. at 304, quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civ. Serv. v. Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of 44444by impairing the efficiency of public service." Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Comm. of Brockton v. Civ. Serv. Comm'n, 43 Mass. App. Ct. 486, 488 (1997).

The Appointing Authority's burden of proof is one of a preponderance of the evidence which is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956). In reviewing an appeal under G.L. c. 31, §43, if the Commission finds by a preponderance of the evidence that there was just cause for an action taken

against an Appellant, the Commission shall affirm the action of the Appointing Authority. Falmouth v. Civ. Serv. Comm'n, 61 Mass. App. Ct. 796, 800 (2004).

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision." Watertown at 331, 334. See Commissioners of Civ. Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster at 726, 727-728 (2003).

The Appellant is a likeable, well-mannered individual. He was recently married and, until November 2007, had an unblemished record during his 4 ½ years as a Chicopee police officer. Unfortunately, the Appellant, in a series of reports submitted to his superiors, was repeatedly untruthful about the traffic stop that is the subject of this appeal.

After a careful review of all the exhibits and witness testimony, I conclude that the Appellant's written reports in response to Dep. Chief Gendron's requests contain several inconsistencies and false statements. In the Appellant's written report dated December 6, 2007, the Appellant states the reason for stopping Yolanda's vehicle was that it "was parked with its parking lights on in front of the apartments at 70 Broadway Street... This is where I pulled behind the vehicle with my take down lights only..." This is false because the Appellant later amended this report and testified that he stopped Yolanda's vehicle on St. James Avenue. The Appellant further lied in his report dated December 6, 2007 when he wrote, "...I have not had any prior dealings with her or contact with her

since the date of 11/10/07...I do not have any new information on her..." When, in fact, the Appellant telephoned her shortly after allowing her to drive away and he further telephoned her on November 12, 2007 and left a voice mail on her cell phone.

The Appellant's December 10, 2007 report to Dep. Chief Gendron is false wherein he wrote, "It was revealed to me that Yolanda...had a suspended license status through my cruiser laptop. Her vehicle was parked on the side of the road and I did not observe operation of the vehicle. Yolanda was advised of her suspended license status and also advised of the consequences of driving on a suspended license. Once informed, Yolanda stated she would be staying at her friend's house at 70 Broadway Street for the night and that her friend would give her a ride home in the morning." This report is false as evidenced by the Appellant's own testimony before the Commission and his submitted report dated December 19, 2007 wherein he admits stopping the vehicle on St. James Avenue, observing Yolanda's operation of the vehicle and allowing her to drive away with a suspended license.

In the Appellant's third written report to Dep. Chief Gendron dated December 19, 2007, he requests that this be an amendment to his previous reports and attempts to excuse his earlier report as being focused on criminal conduct by Yolanda and later being concerned he would get into trouble for not charging Yolanda with operating with a suspended license. This appears to be a blatant attempt by the Appellant to cover up his conduct in the early morning hours of November 10, 2007 by submitting false reports.

Consideration must also be given to the adverse inference that the Town Manager drew against the Appellant as a result of his declining to testify at the underlying disciplinary hearing. As the courts have held, the Appellant's refusal to tell his side of

the story at the disciplinary hearing and the adverse inference that the Town Manager drew therefrom is an integral part of the circumstances that existed when the Town made its decision. *See Falmouth* at 826-27.

It is the function of the hearing officer to determine the credibility of the testimony presented before him. *See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n*, 401 Mass. 526, 529 (1988); *Doherty v. Retirement Bd. Of Medford*, 425 Mass. 130, 141 (1997). *See also Covell v. Dep't of Social Services*, 439 Mass. 766, 787 (2003); (In cases where live witnesses giving different versions do testify at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing); *Connor v. Connor*, 77 A. 2d. 697 (1951) (the opportunity to observe the demeanor and appearance of witnesses becomes the touchstone of credibility). I conclude that the Appellant was untruthful in regard to the events that occurred on November 11, 2007.

All Chicopee police officers assigned to routine patrol are required to submit daily reports. On the Appellant's daily report to the chief for November 10, 2007, he specifically omits any motor vehicle stop or interaction with Yolanda, while citing interaction with a suspicious person at 3:16 A.M. and a motor vehicle stop for an inspection sticker at 3:40 A.M. The Appellant's specific omission is contradicted by the Appellant's RMV query of Yolanda's motor vehicle and license as reported by Dep. Chief Gendron in Exhibits 15 and 17. Furthermore, the Appellant's report of a 3:40 A.M. motor vehicle stop for an inspection sticker is false as evidenced by Dep. Chief Gendron's report and photographs of the motorist's vehicle (Exhibit 7).

An appointing authority is well within its rights to take disciplinary action when a police officer has “a demonstrated willingness to fudge the truth in exigent circumstances” because “[p]olice work frequently calls upon officers to speak the truth when doing so might put into question a search or embarrass a fellow officer.” *See Falmouth* at 796, 801; *citing Cambridge, supra* at 303.

The Commission has recognized that a police officer must be truthful at all times and that failure to do so constitutes conduct unbecoming an officer. *MacHenry v.*, 7 MCSR 94 (1994). Lying in a disciplinary investigation alone is grounds for termination. *LaChance v. Erickson*, 118 S. Ct. 753 (1998), *citing Bryson v. United States*, 396 U.S. 64 (1969). The Commission has stated that “it is well settled that police officers voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens.” *Garrett v. Haverhill*, 18 MCSR at 381, 385 (2005). Specifically, there “is a strong public policy against employing police officers who are untruthful.” *Royston v.*, 19 MCSR 124, 128 (2006). Therefore, “a police officer that has lost his credibility can no longer effectively perform the duties of the position.” *Pearson v. Whitman*, 16 MCSR 46, 50 (2003). As a result, the Commission has often upheld a police officer’s discharge based upon the officer’s dishonesty.²

By a preponderance of the evidence, the appointing authority has proven that the Appellant falsely attempted to conceal the fact that he even stopped Yolanda’s vehicle in the early morning hours of November 10, 2007. The Appellant’s attempt to cover up and

² *See Royston v. Billerica*, 19 MCSR at 128-29 (upholding discharge of police officer who “knowingly lied to the Chief during a departmental investigation to cover up” his own misconduct); *Garrett v. Haverhill*, 18 MCSR at 385-86 (reasonable justification for discharge of police officer who repeatedly presented false testimony during departmental investigation of officer’s misconduct); *Meaney v. Woburn*, 18 MCSR 129, 133-35 (discharge upheld for police officer based, in part, on officer’s consistent dishonesty and “selective memory” during departmental investigation of officer’s misconduct); *Pearson v. Whitman*, 16 MCSR at 49-50 (appointing authority’s discharge of police officer who had “a problem with telling the truth” upheld); *Eisenbeiser v. West Springfield*, 7 MCSR 99, 104 (discharge upheld based, in part, on officer’s dishonesty as his misconduct was ongoing, intentional and showed no signs of improvement).

explain his actions further implicated the Appellant in submitting false reports to Dep. Chief Gendron on December 6, 2007, December 10, 2007 and December 19, 2007.

In conclusion, the Commission finds that the conduct of the Appellant on November 10, 2007 in interacting with Yolanda and his subsequent conduct in falsifying reports in an attempt to cover-up his interaction justifies his termination from the Chicopee Police Department for violating department rules and regulations regarding truthfulness, false information on records, courtesy, incompetence and neglect of duty.

Finally, as referenced in the findings of fact, the Appellant has not shown any situation in which the City, based on a similar incident, failed to terminate a police officer. The one example raised by the Appellant is clearly distinguishable from the far more serious allegations against the Appellant.

For all of the above reasons, the Appellant's appeal under Docket No. D-08-15 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman, Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on December 11, 2008.
A true record. Attest:

Commissioner

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:

Thomas John Rooke, Esq. (for Appointing Authority)

John C. Bryson, Esq. (for Appellant)