

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

RICHARD J. PIERCE, JR.,
Appellant

v.

Case No. D1-11-62

CITY OF ATTLEBORO,
Respondent

Appearance for Appellant:

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Boston, MA 02108

Appearance for Respondent:

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Commissioner:

Paul M. Stein

DECISION

Procedural History

The Appellant, Richard J. Pierce, Jr., duly appealed to the Civil Service Commission (Commission) pursuant to G.L.c.31, §43, from the decision of the Respondent, City of Attleboro (Attleboro) to terminate him from his employment as a Patrol Officer with the Attleboro Police Department (APD). A pre-hearing conference was held on September 8, 2011 at which time the appeal was scheduled for five days of full hearing in October 2011. Upon motion by the Appellant for a Continuance, however, on September 22, 2011, the Commission entered an “Order of Dismissal With Future Effective Date”, to become effective on March 15, 2012 unless reinstated by further Order of the Commission. On March 1, 2012, with Attleboro’s assent, the Appellant moved to revoke the Order of Dismissal, which motion was allowed.

Seven (7) days of evidentiary hearings were held at the Attleboro City Hall on June 5, 2012, June 7, 2012, July 11, 2012, August 2, 2012, August 8, 2012, August 9, 2012 and September 12, 2012. The hearings were declared private and the witnesses were sequestered. The hearings were stenographically recorded and transcribed. Nineteen (19) witnesses were called to testify and ninety-one (91) exhibits were marked into evidence. Each party submitted a proposed decision on December 7, 2012.

On January 9, 2013, Attleboro moved to strike portions of the Appellant's proposed decision, which the Appellant opposed. On February 6, 2013, the Appellant moved to strike portions of Attleboro's proposed decision and, by separate motion, moved to submit an additional exhibit. The points made in the Motions to Strike are noted but the motions are denied. The proposed exhibit is received as Exhibit 92.

FINDINGS OF FACT

Based on the Exhibits (1 through 92), the testimony of the witnesses (Attleboro Mayor Kevin Dumas, APD Chief Kyle Heagney, APD Capt. Barry Brewer, APD Lt. John Otrando, APD Sgt. Brian J. Witherall, APD Sgt. (ret.) Michael McDonnell, APD Sgt.(ret.) Kevin Noble, APD Officer Paul McCann, APD Officer Stephen Graney, APD Officer Richard Woodhead, APD Officer Joseph Ryan, APD Officer Jeffrey Peavy, Attleboro Fire Capt. Keith H. Jackson, Lawrence Quaglia, Kate Jackson, Tracy Pierce and the Appellant) and two expert witnesses (Tewksbury Police Chief (ret.) Alfred P. Donovan and Glastonbury (CT) Police Capt. Dennis Woessner), and reasonable inferences therefrom, I make the following findings of fact:

The Appellant's Employment History

1. The Appellant, Richard J. Pierce, Jr., was appointed to the civil service position of Patrol Officer with the APD on January 5, 2005 and served in that position until his termination on February 22, 2011. (*Exh.31; Tr.V:133-134[Appellant]*)

2. Officer Pierce comes from a family with close ties to the APD. His father is the predecessor Chief of Police. His uncle is a retired APD Police Captain, another uncle is an APD Police Sergeant and a cousin currently serves as an APD Patrol Officer. (*Tr.V:149[Appellant]*)

3. When Richard Pierce, Jr.'s name appeared on the 2004 certification for hiring of seven (7) APD patrol officers, Chief Pierce made a written disclosure of his kinship relationship and withdrew from the decision-making process for that hiring cycle. The disclosure also stated: "I will not have any direct supervision over my son if he were selected as one of the police officer candidates. If my son is selected for a position with the police department, and if assignments and/or disciplinary matters need to be addressed, or any other issues that may arise that may give the appearance of a conflict of interest, I would consult with and defer the matter to the Mayor and be guided by his decision(s)." (*Exh.39;Tr.III:165, 213-215 [Dumas]*)

4. Officer Pierce found it difficult to be the son of the Police Chief. He believed he walked "on eggshells everywhere I went" and "someone was watching everything I was doing". Some colleagues and command staff did perceive that Officer Pierce received special treatment from his father. (*Tr.II:42-43[Brewer]; Tr.IV:40-43[Heagney];Tr.VI:178-179[Appellant]*)

5. Prior to the February 26, 2010 incident that gave rise to this appeal, Officer Pierce had never been the subject of any disciplinary action as an APD Patrol Officer. He had distinguished himself at the police academy (receiving the "Honor Graduate Award" given to the top ranked recruit in the class), served as a team leader and member of the APD SWAT team, and was appointed as a member of the APD honor guard. He had received numerous accolades and commendations for outstanding performance and valor in the line of duty from the APD and other community leaders. (*Exhs. 54 through 63; Tr.I:123 [Otrando]; Tr.IV:158-165[Keith Jackson];Tr.IV:165-170 [Kate Jackson];Tr.II:112-113[Hynes]; Tr.V:5-10[Quaglia]; Tr.V:134-149[Appellant]*)

6. Officer Pierce completed the required training and was proficient in the use of an Electronic Weapons Device (ECD), specifically a Taser®X26 (Taser), and demonstrated his knowledge of the APD policies and practices concerning use of force, including the Taser, and the reporting requirements associated with them. Officer Pierce was issued a Taser and carried it on patrol duty. Prior to the incident involved in this appeal, he had deployed his Taser in the line of duty on two prior occasions in July 2008, once in “drive stun” mode and once in “full deployment” mode.¹ He was fully aware, as were all APD officers, that each Taser had an on-board data recorder that electronically stored the date and time (down to the second) of each use, which data later could be downloaded by the APD Firearms Training Coordinator to determine each time an officer had discharged his Taser. (*Exhs.2 through 4, 15, 64 through 70, 83;Tr.I:117[Otrando]; Tr.II:112-113[Hynes];Tr.V:69[Ryan]; Tr.V:153-155[Appellant]*)

Percipient Witnesses to the February 26, 2010 Incident

7. Barry T. Brewer held the rank of APD “Acting” Captain. He was first on the civil service list for permanent captain when the list expired in 2010 without funding to promote him. He had 25 years of service with the APD. In February 2010, he was a Lieutenant and the 4 pm to 12 midnight Shift Commander. (*Tr.I:175-176; Tr.II:29-30,53-54[Brewer].Tr.III:128[Hynes]*)

8. John Otrando is an APD Lieutenant with 25-plus years of service, assigned as the 4 pm to 12 midnight Shift Commander. Prior to January 2012, he was Detective Commander, a position that carried an additional stipend. Lt. Otrando is the APD’s Firearms Training Coordinator and Taser Instructor, having received specialized training to qualify for that assignment. He has responsibility for training all APD officers in the use of Tasers as well as the responsibility for complying with all mandated reporting regarding Tasers as required by law. (*Tr.I:49-51,121-122[Otrando]*)

¹ The terminology and technology concerning the Taser is more fully explained below.

9. Brian J. Witherell held the rank of APD Sergeant, with 9 years of service in that position and approximately 30 years of service overall. He was working as a patrol sergeant assigned to Unit (cruiser) 1-A on the 4 pm to midnight shift on February 26, 2010. (*Exhs. 51-52; Tr.II:155, 158[Witherell]*)

10. John Hynes is an APD Patrol Officer with over 21 years of service. He is a member of the APD SWAT team. As of February 2010, he and Officer Pierce had a “great” working and personal relationship. He was assigned Unit 6 on the 4pm to midnight shift on February 26, 2010. (*Exhs.51-52;Tr.II:79-89,85,112-113[Hynes];Tr.V:30[Graney];Tr.VI:153[Appellant]*)

11. Stephen Graney became an APD Patrol Officer in 2003. He was assigned the 4 pm to midnight shift as one of the dispatchers on February 26, 2010. (*Tr.V:10-11,22[Graney]*)

Expert Witnesses

12. Alfred P. Donovan is the principal of APD Management, Inc., which he founded in 1998 to provide investigative services, assessment center service and law enforcement training. Mr. Donovan is an experienced law enforcement professional who retired from the position of Police Chief in the Town of Tewksbury in 2009. Attleboro engaged Mr. Donovan on or about September 30, 2010 to conduct two investigations concerning the incident of February 26, 2010 and its aftermath; one investigation focused on the allegations of use of excessive force by Officer Pierce and the second focuses on whether Chief Pierce’s handling of the matter involved a violation of the conflict of interest law that should be referred to the State Ethics Commission. Mr. Donovan was compensated for his time (approximately 130 hours) at the rate of \$65/hour. (*Exhs. 21, 28, 37, 85; Tr.III:7-15, 76-78, 85-87 [Donovan]*)²

² The Appellant sought to impeach Mr. Donovan by offering evidence that he had been accused of misconduct in 2007 while he was the Tewksbury Police Chief in a civil lawsuit brought against him and the Town of Tewksbury that was ultimately settled. I excluded this proffer as too remote and collateral to be allowed into evidence. (*Ex.29ID; 87-98 [Donovan]*)

13. Dennis Woessner is a 24-year veteran of the Glastonbury, CT Police Department, currently holding the rank of Captain and Commander of the Services Division. He is one of twenty-six (26) “Senior Master Taser Instructors” in the United States so certified by Taser International. Capt. (then Lt.) Woessner was engaged by the Appellant’s counsel to provide an opinion about what the officers on scene at the February 26, 2010 incident likely had done and observed about the Taser deployment on that date. (*Exhs. 71 & 72; Tr.VI:5-12 [Woessner]*)

The Other Witnesses

14. Kevin Dumas is the Mayor of Attleboro, having served in that office since 2003. He is the “Appointing Authority” for all civil service personnel in the APD. (*Tr.III:143-144[Dumas]*)

15. Kyle P. Heagney is a 13-year APD veteran. He rose quickly through the ranks and succeeded Richard Pierce as Chief of Police in November 2010. Chief Heagney and Officer Hynes are cousins. (*Tr.II:129-130 [Hynes]; IV:21-23 [Heagney]*)

16. Michael McDonnell retired from the APD in November 2011. He had been a Sergeant since 2004. He had been Officer Pierce’s regular supervisor but was not on duty the evening of February 26, 2010. (*Tr.IV:116-117,15-146 [McDonnell]; Tr.VI:129-130[Appellant]*)

17. Kevin Noble retired from the APD in January 2011 as Sergeant, a position he held since 2009, with approximately 15 years of service. (*Tr.VII:6[Noble]*)

18. Richard Woodhead became an APD Patrol Officer in 1985. He had held the position of police prosecutor for the past seven (7) years. He was called to testify that, to his knowledge, the APD had lost two witness statements and an unknown number of tow sheets (vehicle inventories) out of the thousands of documents he handled as a police prosecutor. (*Tr.V:49-55[Woodhead]*)

19. Paul McCann became an APD Patrol Officer, employed since 2007, and serves with Officer Pierce and Officer Hynes as a member of the APD SWAT team. (*Tr.IV:171-172,187 [McCann]*)

20. Jeffrey Peavey became an APD Patrol Officer in 2001. In January 2012, he became the President of the Attleboro Police Association, the police union to which all sworn APD officers from Captain to Patrol Officer belong. In 2010 he worked as a detective on the 4pm to midnight shift but was not the detective directly involved with the February 26, 2010 incident. (*Exh.21[Internal Exh.7- Det. Campion's Incident Report]; Tr.V:97-99,127-128[Peavey]*)

21. Joseph Ryan became an APD Patrol Officer in 2008, assigned to the day shift (8am to 4pm). He served as the Secretary of the police union to which the Appellant belonged. (*Tr.V:60-61,69[Ryan]*)

22. Keith H. Jackson served as a Captain with the Attleboro Fire Department. His wife Kate Jackson is a former Attleboro City Councilor. They have known the Appellant since he was born. Capt. Jackson vouched for his good police work at emergency response scenes and they both vouched for his upstanding character respectively. (*Tr.IV:165-171[Kate Jackson]*)

23. Lawrence Quaglia owns an Attleboro insurance agency and is a long-time friend of the Appellant's family who has known the Appellant since his birth. (*Tr.V:6-7[Quaglia]*)

24. Tracy Pierce is the Appellant's wife. She gave birth to their first child on May 15, 2010. Mrs. Pierce had seen her doctor on February 25, 2010 to receive treatment associated with her pregnancy. (*Tr.V:55-59 [T.Pierce]; Tr.VI:161-163[Appellant]*)

Taser Technology and Use

25. The Taser is an air cartridge-driven type of ECD that generates a 50-thousand volt pulse of electricity capable of affecting sensory and motor nervous systems to subdue a subject. The Taser is carried in a holster and can be used in four modes: (a) two non-discharge modes in

which the Taser is displayed to the subject and a laser beam and/or “spark TEST” is released by switching from “safe” to “fire” mode as a warning deterrent; and (b) two discharge modes: in “drive stun” mode, the device is placed in direct contact with the target’s clothing or body and the trigger is pulled, producing a clicking noise and discharges a five-second jolt into the body to gain “pain compliance” over an actively resisting subject; in “full deployment” mode, the Taser is fired from a distance, releasing two hooked probes at high velocity which embed into the subject’s skin to complete a circuit that discharges an electric shock that incapacitates an assaultive subject’s muscular systems. A verbal warning is required prior to sue in “full deployment mode” before the trigger is pulled and the probes released. It is not required in “drive stun” mode. The level of audible noise and visible light made by firing the Taser can vary depending on the manner of deployment, such as distance from the target and whether the Taser is applied directly to a person’s skin or through clothing. (*Exhs.4,15,72; Tr.I:64-75,115,132*[Otrando]; *Tr.I:73,119-121,139-144* [*Demonstrative Firings of Taser*]; *Tr.:II:62* [*Hynes*]; *Tr.III:23-24*[*Donovan*]; *Tr.VI:15-20,29-31,61-62,94-105*[*Woessner*])

26. ECDs were first authorized by statute (St.2004 c.170) for use by specific law enforcement agencies in the Commonwealth in 2004 amidst considerable controversy about “how it should be used, reporting standards, accountability, and things of that nature”. Its use has been the subject of considerable litigation. The Massachusetts statute and regulations require, among other things, that an ECD must be equipped with a means of recording each time the device fired.³ (*Exhs, 15, 72 & 78;Tr.I:52* [Otrando];*Tr.IV:27-29*[Heagney];*Tr.III:22-23,25,67-68*[Donovan];*Tr.VI:62-69, 107-110*[Woessner])

³ Section 2 of St.2004,c.170 required the establishment of a protocol for collection of ECD use data including the race and gender of the person fired upon, and annual analysis of the data.

27. The APD started using Tasers in 2006. In recognition of the concerns for potential misuse, the APD implemented a Taser-specific Policy and Procedure (PP-01-06-0) entitled “Electronic Control Devices” that prescribes in detail the requirements for Taser training, post-deployment responsibilities and reporting. This policy supplements the APD’s general Policy and Procedure regarding “Use of Force” (PP-01-01-01) and the APD’s General Order on “Reporting and Reviewing Use of Force” (GO-01-01-13). (*Exhs. 2 through 4*)

28. As required by law, all APD Tasers have an internal clock that records each time the Taser is fired in either drive stun or full-deployment mode. The internal clock is subject to “drift” (of as much as several minutes per month) and needs to be synchronized to a computer clock, which is done periodically each time the Taser information is downloaded by the Firearms Officer, Lt. Otrando, who also periodically checks the computer clock to the website for the Atomic Clock. The Taser is not specifically calibrated to the APD Dispatch Center’s clock. (*Exh.6; Tr.I:52-55,148-154[Otrando];Tr.III:22-23, 40-61[Donovan]*)

29. Officer Pierce’s Taser was downloaded and the internal clock reset to Lt. Otrando’s computer on February 18, 2010. Lt. Otrando did not remember the last time he had checked his computer clock to the Atomic Clock. (*Exh. 6 [lines 0181-0182]; Tr.I:54-55, 115, 126,155-157[Otrando]Tr.VI:40-53,105-106 [Woessner]*)

30. An extensive, redundant reporting system comes into play each time an APD officer uses a Taser in drive-stun or full-deployment mode.

- The officer who uses the Taser is expected to make a verbal report to his Shift Commander “as soon as possible after use”, which is often by radio from the scene.
- This verbal report is followed up by a written Taser Use Report delivered to the Shift Commander or left in the completed box for his attention.

- The Shift Commander submits a Commanding Officers Use of Force Report and, also, in the case of a full-deployment use or if injury is reported or treatment is required, a Prisoner Injury Report. Copies of this report are to be provided to the Firearms Training Coordinator, as well as to the Chief of Police through the chain of command.
- In addition to the Taser-specific report, the APD requires the officer who used the Taser to complete a separate Officer's Use of Force Report (used to report all instances of use of force by any means).
- The two forms of use of force reports are independent from the Incident Report that is required from the arresting officer at the incident scene (which may or may not be the same officer who used the Taser or other force).
- When an officer other than the arresting officer who submits the Incident Report has used force, both officers typically confer prior to submitting their respective reports. Each officer is responsible to deliver their reports to the Shift Supervisor, usually by handing it to them or placing them in the "completed box" for the supervisor's attention.

(Exhs. 2 through 5, 8[Appellant,pp.8,20,37-41],13-14,16-17,25[Witherell,pp.7-8,19], 26[Cook, p.5], 28 [Chief Pierce,pp.29-30]; Exh.50-51,53,65-70,83--90;Tr.I:55-63,77-78[Otrando]; Tr.I:179-183,193-194,201-202,207-208[Brewer];Tr.II:54[Brewer];Tr.II:83-85,125-128[Hynes]; Tr.II:155-157,165-166 [Witherell]; Tr.IV:34-35 [Heagney]; Tr.IV:121-131,157 [McDonnell]; Tr.IV:176-188,193-194 [McCann]; Tr.V:26-27,33-35,40-43 [Graney]; Tr.V:67-71 [Ryan]; Tr.V:156-157,163-175 [Appellant]; Tr.VI:163,212-213,224,238 [Appellant])⁴

⁴ These findings about use of force reporting are supported by consistent testimony from most witnesses.. The few statements by some witnesses that procedures were flexible and each supervisor has his or her own preferences is not conclusive to show otherwise. (See Tr.IV:122-125[McDonnell]; Tr.V:42[Graney]; Tr.V:72[Ryan]; Tr.V:99[Peavey]; Tr.VIII:11-12,17[Noble]) Nor does the single example from 2006 that the Appellant proffered (in which he said he handed a use of force form involving pepper spray to a fellow police officer for delivery to the supervisor) discredit these findings, as that case, assuming the Appellant recalled it accurately, clearly involved different and unusual circumstances. (Tr.V:168-169[Appellant]; Tr.VI:212-213[Appellant])

31. From inception in 2006 through January 2011, a total of eighty-four (84) incidents were reported in which a Taser was used by an APD officer. The APD's records show that all three of the required reports (Incident Report, Officer's Use of Force Report and Taser Use Report) were completed by the responsible officers in each instance, save for one incident in 2006 (when the Taser Use Report and Officer's Use of Force Report were not filed but the Incident Report could not be found), two incidents in 2007 (when the Incident Report was on file but no Taser Use Report or Officer's Use of Force Report could be found), and two instances in 2008 (one in which the Taser Use Report could not be found and one in which neither the Taser Use Report or Officer's Use of Force Report could be found). In none of the instances in which a Taser had been used was it not mentioned in the arresting officer's Incident Report. Since 2008, until the incident involved in this appeal, all Taser use was reported in all three required reports. (*Exhs.53,83,84A,84B,86,88-90; Tr.I:106-108 [Otrando]; Tr.IV:33-34 [Heagney]; Tr.IV:157 [McDonnell]; Tr.V:30-39 [Graney]; Tr.V:77-79 [Ryan]*)

The Phillips Street Incident

32. At approximately 7:56 pm on February 26, 2010, the APD received a 9-1-1 call reporting a breaking and entering in progress at a residence on Phillips Street. Capt. (then Lt.) Brewer was the Shift Commander. Sgt. Witherell, patrol supervisor, and Officers Dufort, Russas, Pierce and Hynes were dispatched to the location. Officers Hynes and Dufort were first on scene. The suspect attempted to flee out the back door where Officer Dufort confronted him firearm drawn. The unarmed suspect withdrew back into the home. The suspect then emerged out the front door where Officer Hynes was positioned with the distraught homeowner who was in the process of opening the door. (*Exhs. 18, 19, 21[3-Dufort;6-Photos]; 23[Hynes, pp.6-15],51,52;Tr.I:175-177[Brewer]; Tr.II:86-94,138-139[Hynes]; Tr.II:158[Witherell]*)

33. Officer Hynes recognized the suspect as a person known to have a history of substance abuse and violent behavior. Officer Hynes struck the suspect's face with his flashlight and pushed him back into the house and radioed: "I got him in the house." While attempting to handcuff him, Officer Hynes then struck the suspect's lower thigh with his flashlight which brought both men to the floor of the narrow entry landing where they continued to struggle. At this point, the homeowner tried to retrieve the jewelry the suspect had stolen and was ordered to step away by Officer Hynes. (*Exhs.18,19,21[6-Photos];Tr.II:94-96,104, 115-117[Hynes]*)

34. Moments later Officer Pierce arrived and they gained control of the suspect and handcuffed him. At some point during this struggle, Officer Pierce struck the suspect's thigh with his knee (a "knee strike"). Officer Pierce also deployed his Taser and administered a five-second drive stun to the suspect. Officer Pierce radioed: "We're off, we're all set here." This transmission was made approximately one minute after Officer Hynes's prior transmission. (*Exhs. 1A, 6, 27 [Suspect, pp. 6-9, 13], 51,52; Tr.I:64-68 [Otrando]; Tr.II:96-101, 117-119, 138-142 [Hynes]; Tr.VI:130-139 [Appellant]*)

35. Sgt. Witherell and Officer (now Sergeant) Cook both arrived at the scene and observed Officers Hynes and Pierce struggling to gain control over the suspect as they rushed to the front door of the house. Officer Cook and Officer Monterosso, who had arrived about the same time, took custody of the suspect after he had been handcuffed, pat-frisked him (retrieving stolen jewelry in his possession), and placed him in a cruiser. Sgt. Witherell ordered a search of the house to determine if there were any other accomplices hiding. Det. Campion also reported to the scene and began his investigation of the crime scene. (*Exhs.12, 21[3-Dufort; 7-Campion;.8-Cook;17-Monterosso],23[Hynes,p.13],25[Witherell,pp.10-14],51,52;Tr.II:119-120,139-142, 146[Hynes]; Tr.II:158-161,176-177,182-184[Witherell]; Tr.VI:139-143 [Appellant]*)

36. The suspect had been injured in the struggle to arrest him, and his face was bleeding. An ambulance was called to transport him to Sturdy Memorial Hospital under surveillance of Officer Monterosso. The suspect continued to be verbally threatening and abusive and belligerent in the ambulance and at the hospital, requiring 4-point restraints, which caused Officer Monterosso to request additional support at the hospital, to which Officer Pierce, Det. Campion, Sgt. Witherell and Capt. (then Lt.) Brewer responded. Lt. Brewer was concerned to learn that Officer Hynes used his flashlight to subdue the suspect and to see the serious injuries inflicted on the suspect, in part, by Officer Hynes. Chief Pierce had told his son when he joined the APD “you just never hit anyone with your flashlight, you just don’t do it.” (*Exhs.20,21*[7-Campion;17–Monterosso],25[Witherell,pp.14-19];*Tr.I:187-189*[Brewer]; *Tr.II:57-59* [Brewer]; *Tr.III:162, 177-179* [Witherell]; *Tr.VI:145-146, 154-155, 195-201*[Appellant])

37. The suspect’s hospital records show that he had not consumed alcohol but had tested positive for marijuana and benzodiazepines (tranquilizers). He presented with symptoms of suicidal ideation and a history of depression, diabetes and asthma for which he takes a variety of medications. Physical examination showed multiple facial bone fractures, a tear of the left ear and a 3 cm long laceration behind the ear. After treatment he was released into police custody and transported to the APD police station for booking. (*Exh.20*)

38. At no time during the incident, either on-scene, in any radio transmission, at the hospital or later at the police station, did Officer Pierce (or any other officer) mention that a Taser drive stun had been administered. (*Exhs.9,10,12,25*[Witherell,p.19],52; *Tr.I:185-187,189* [Brewer]; *Tr.II:101-102,107*[Hynes]; *Tr.II:162-164*[Witherell];*Tr.VI:147,154-155,190-191*[Appellant])

39. Officer Hynes cleared the scene and returned to the police station. As the arresting officer, he prepared an Incident Report that night. The report described, among other things, how he had struck the suspect with his flashlight in the face and later on his leg. He also described a

“single knee strike to the suspect’s right thigh” by Officer Pierce that he had seen that caused the suspect to say “OK I give up” and “gave up his hands” and was handcuffed. Officer Hynes also prepared a Use of Force Report that reiterated these same facts. Neither report makes any mention of Officer Pierce’s use of a Taser. Officer Hynes completed his reports and turned them in to the supervisor then on duty before leaving the station. (*Exhs. 5, 16, 23 [Hynes, pp.11-12,14], 26[Witherell, pp.16-17,19]; Tr.II:105-108,113-114,125-129,133-134 [Hynes]*)

40. Officer Pierce returned to the police station after leaving the hospital. He was anxious to get home to attend to his wife who was going through a difficult pregnancy and had been to see her physician the day before. He left the station after some conversation with other officers and with Officer Hynes, who was still working on his arrest report, without turning in a Use of Force Report or a Taser Report to his shift commander. He admitted that APD officers “have to be on our A game with reports, especially in incidents like this [the Phillips Street incident]” and that he “screwed up” in that case. (*Exh.8[Appellant, pp.34-41]; Tr.I:185-186,206-207 [Brewer]; Tr.II:105-108,133-134 [Hynes]; Tr.VI:146-149,152-156,161-163,237-238 [Appellant]*)

41. Capt. (then Lt.) Brewer, reviewed Officer Hynes reports and prepared his own Commanding Officer’s Use of Force Report, dated March 1, 2010 that tracked Officer Hynes reports to him and was submitted through the chain of command to Chief Pierce. Lt. Brewer had received no notice that Officer Pierce had used a Taser on the suspect and made no mention of that fact in his report. (*Exh. 17; Tr.I:185-186, 206-207[Brewer]*)

The Presentment Letter

42. On July 12, 2010, more than four months after the incident occurred, Attleboro Mayor Dumas and Police Chief Pierce received a presentment letter under the Massachusetts Tort Claims Act written by Attorney Joseph Chancellor, an attorney retained to represent the suspect arrested in the February 26, 2010 Phillips Street incident (the “Presentment Letter”). The

Presentment Letter alleged that the suspect was the victim of excessive and unreasonable force by APD Officers Hynes, Pierce, Cook and Dufort, including Officer Hynes hitting him in the face with a metal flashlight, Officer Cook kicking him in the face with his boot, Officer Pierce tearing his ear lobe, and being Tasered twice (by an unnamed officer) while handcuffed, in violation of Massachusetts civil rights and tort law as well his rights under the Massachusetts and U.S. Constitutions. The Presentment Letter also alleged that Police Chief Pierce was negligent in his supervision of the officers. The Presentment Letter demanded \$400,000 damages in compensation for the physical and emotional injuries suffered by the suspect as a result of the alleged violations. (*Exhs.1, 27 [Suspect, pp. 6-9, 13-20], 38; Tr.III:144 [Dumas]*)

43. As was the usual practice, Mayor Dumas forwarded the Presentment Letter to Attleboro Legal Counsel and assumed that the department head (i.e. Chief Pierce) would conduct an initial investigation. He did take note that the allegations in the Presentment Letter asserted misconduct by Officer Pierce and Chief Pierce, but considered them mere “allegations” at the time and saw no reason that he, personally, needed to take any other action in the matter. (*Tr.III:145-147, 162-164 [Dumas]*)

44. Chief Pierce retrieved the arrest records for the incident and issued a memo to Officers Hynes, Pierce, Cook and Dufort to inform them of the receipt of the Presentment Letter and to alert them to expect contact from Attleboro’s insurance carrier. He also spoke to each officer and provided them with copies of the Presentment Letter. (*Exh.28 [Chief Pierce, pp.4, 28], 38;*

45. On July 12, 2010, Chief Pierce also spoke with Lt. Otrando and informed him that the Presentment Letter alleged the use of a Taser but the arrest report made no mention of it. Lt. Otrando confirmed that his own file copies of the Taser Use reports submitted to the Commonwealth Executive Office of Public Safety showed no report had been filed indicating that a Taser had been used on February 26, 2010, and Lt. Otrando concluded that suspect’s

allegations could not be true. Chief Pierce ordered Lt. Otrando to download all Tasers issued to the officers on scene during the incident to confirm the conclusion that a Taser had not been used on the suspect. (*Exhs. 28 [Chief Pierce, pp.7-8,11] & 38; Tr.I:63-64, 75-82 [Otrando]*)

46. Officer Pierce was on duty at the time and was the first officer to have his Taser data downloaded. As Lt. Otrando prepared to download the data on Officer Pierce's Taser, he explained that the suspect had alleged he was Tasered but there was no report of any Tasing and asked if Officer Pierce remembered if anyone had Tasered the suspect. Officer Pierce initially responded: "I don't know. If anyone did it was [Officer] Hynes, probably in the ambulance." (*Exh. 8 [Appellant, pp.24-31],Tr.I:82-83[Otrando]; Tr.VI: 164-166 [Appellant]*)

47. As both officers watched Lt. Otrando's computer screen while the data from Officer Pierce's Taser was being downloaded, something jogged Officer Pierce's memory and he said: "Oh shit, Lieutenant, I think I tased him". Lieutenant Otrando, seeing there was no discharge shown on the data coming up on the computer screen for February 26, 2010, initially responded: "No, you didn't". He then realized that the data was reported in Greenwich Mean Time (GMT) and when translated to EST, the download did confirm that, indeed, Officer Pierce had discharged his Taser on February 26, 2010 at approximately 8:02 pm. (*Exh. 6 [Entry 0184]; Tr,I:84-86 [Otrando]; Tr.VI:167-168, 170-171 [Appellant]*)⁵

48. Lt. Otrando asked Office Pierce if he had prepared a use of force report and Officer Pierce said he did. Lt. Otrando reported this information to Chief Pierce who asked his son what he had done with the report. Officer Pierce said he had "put it with the other paperwork that [Officer Hynes] was working on, and that's the last I saw of it." (*Exh.8 [Appellant, pp. 18-19, 34], 10, 28[Chief Piece, p. 12; Tr.I:86, 94 [Otrando]; Tr.VI:213,222[Appellant]*)

⁵ Subsequent downloads of all the Tasers issued to other officers on scene confirmed that Officer Pierce's Taser was the only one discharged during that incident. (*Tr.I:144-147 [Otrando]*)

49. On July 13, 2010, Officer Hynes and Officer Cook were at the Wood Farms Range for SWAT Team tactical training. Officer Cook expressed concern about the Presentment Letter that had named them. Officer Hynes responded: “Relax . . . did you read it? [The suspect] says he was Tasered . . . He was never Tasered. This whole thing is going to go away, don’t worry about it.” Officer Pierce, who had been nearby, overheard the conversation and informed his colleagues that, in fact, he had Tasered the suspect. Officer Hynes was very upset to learn this fact from Officer Pierce for the first time. (*Exh.9; Tr.II:109-110, 130-132 [Hynes]*)

50. Officer Hynes also learned soon thereafter, from Lt. Otrando, that Officer Pierce had initially named Officer Hynes as the officer who had Tasered the suspect. Lt. Otrando was certain that Officer Hynes had given him no indication that he had known about the Taser in any prior conversations about the Phillips Street incident. (*Tr.I:79-81, 101-102 [Otrando]; Tr.II:110-111,131-132 [Hynes]*)

51. On or about July 14, 2010, when no use of force or Taser use report had been found, Officer Pierce was ordered by Chief Pierce, through Lt. Otrando, to prepare such reports, which he did. (*Exhs. 7, 10, 13, 14, 28[Chief Pierce,p.12], 38; Tr.I:94 [Otrando]; Tr.VI: 171-172, 217-220, 257-260 [Appellant]*)

Lt. Brewer’s Investigation

52. When Lt. Brewer first learned that the suspect in the Phillips Street incident alleged he was Tasered, he “laughed it off”, as he had a clear, active memory that a taser had not been used and the allegation would be easily discredited. When he later learned that, in fact, Officer Pierce had Tasered the suspect, Lt. Brewer reviewed all the APD records to see if any of them mentioned the Taser in, which they did not. Lt. Brewer also came to learn sometime in late July, in a chance encounter with Lt. Otrando, that Officer Pierce had named Officer Hynes as the

officer who had used the Taser before admitting that he was the one who had done so. (*Tr.I:189-193, 203-204 [Brewer]; Tr.II:15-16[Brewer]*)

53. At some point in August (Chief Pierce was on vacation from July 19 through July 26 and August 9 through August 23), Chief Pierce came to Lt. Brewer, after hours, and requested what Lt. Brewer assumed would have required back-dating his signature on two documents relating to the Phillips Street incident, so Lt. Brewer said he refused to sign, causing a fracture to his relationship with Chief Pierce but no disciplinary consequences. The specific documents were not clearly identified but I find no reason to discredit Lt. Brewer's testimony that such a meeting occurred. (*Exh.28[Chief Pierce, pp.30-31];Tr.I:192-193, 209-210, 224-231 [Brewer]; Tr.II:16, 21-22,34-35[Brewer]*)⁶

54. Lt. Brewer found himself in an "especially uncomfortable" situation. He was the Shift Commander at the time of the Phillips Street incident and "the buck stops at my desk". He was concerned that "somebody had to do something. . . .the city was getting sued. I was not aware of anybody doing anything about it." He sincerely believed he could be criticized and held liable for his failure to take action, so he initiated an investigation on his own, something he had never done before. He knew it would not be easy to be looking into misconduct involving the son of the Police Chief, and called it the "one of the most nerve-wracking things I've ever done. . . . As far as career moves, it's typically not one suggested." (*Tr.I:194-196, 212-217, 222-223 [Brewer]; Tr.II:21[Brewer]*)

55. On August 23, 2010, at Lt. Brewer's request, Sgt. Witherell informed Officer Pierce that he was required to provide Lt. Brewer with a To/From on the use of his Taser at the Phillips

⁶ Chief Pierce (who did not testify before the Commission) claimed in his recorded interview conducted as part of Attleboro's internal investigation that his August conversations with Lt. Brewer and Lt. Otrando had to do with checking whether the use of force reports had been located and being told they would check into it. I do not find this credible. Officer Pierce had already prepared the (substitute) reports on July 14th, and the search for the missing reports had long been concluded.

Street incident and why there was no use of force report turned in. Officer Pierce asked Sgt. Witherell to clarify what he wanted. Sgt. Witherell said the question was why give a use of force report to a patrolman and not turn it in to the CO, to which Officer Pierce responded with a “shoulder shrug” and left to write the report which is dated August 24, 2010. At this point, Officer Pierce knew he was facing possible disciplinary action. Lt. Brewer received Officer Pierce’s report on September 6, 2010. (*Exhs.10, 11, 12; Tr.I:202-203 [Brewer]; Tr.II:166-170, 181-182 [Witherell]; Tr.VI:172-174, 215-217, 220-223 [Appellant]*)

56. After requesting and receiving additional reports from Officer Hynes on September 13, 2010 and Lt. Otrando on September 14, 2010,⁷ Lt. Brewer prepared a To/From memorandum to Capt. (now Chief) Heagney dated September 21, 2010, entitled “Unreported Use of A Taser On February 26th, 2010 By Officer Richard Pierce, Jr.” Lt. Brewer’s report focused exclusively on Officer Pierce’s Taser use. (*Exhs. 7, 9, 11; Tr.I:212-215 [Brewer]*)

57. Lt. Brewer knew of, but had not seen the Presentment Letter prior to preparing his September 21, 2010 memorandum. (*Tr.II:55, 69-70 [Brewer]*)

58. Lt. Brewer’s memorandum concluded that Officer Pierce had violated APD procedures governing Taser use and reporting use of force and had made inconsistent and untruthful statements about the matter. Lt. Brewer recommended that Officer Pierce receive additional training in Taser use, use of force reporting and ethics, be removed from special teams for two years and perform 15 days of punishment duty. This memorandum was the first time Lt. Brewer had submitted a written investigation and disciplinary recommendation regarding an APD officer. (*Exh. 11; Tr.I:216, 222 [Brewer]; Tr.II:17, 21[Brewer]*)

⁷ Lt. Otrando submitted a supplement, dated October 8, 2010, to his initial memorandum, in which acknowledged his error in recalling his work schedule on the date he downloaded Officer Pierce’s Taser and in which he “wanted to go into greater detail in writing as to the conversation that occurred” during the downloading. (*Exh. 7; Tr.I:92-94 [Otrando]*)

59. On September 27, 2010, after speaking with Chief Pierce, Capt. Heagney submitted a memorandum to Chief Pierce entitled “Lt. Brewer’s Investigation of an Unreported Use of a Taser during Incident 310021858”. Capt. Heagney’s memorandum summarized the information in Lt. Brewer’s memorandum to him and the associated documentation that accompanied it. He concluded: “This matter is problematic on several levels for the City of Attleboro, the police department, myself and you.” Specifically, Capt. Heagney stated that the matter “needs to be investigated further” and identified these areas of concern:

- Ethical impropriety that required Chief Pierce to remove himself from further involvement in the matter and also precluded him from delegating responsibility to a subordinate.
- Potential compromise of the civil and criminal proceedings involving the Phillips Street incident pursuant to police department obligations under *Brady v. Maryland* and *Giglio v. United States*, among other things, to disclose exculpatory and impeachment evidence to a defendant.
- Capt. Heagney’s own prior experience with the “recent overtime investigation involving [a former APD Police Captain]” that he said had caused him to be wrongfully “ostracized” and “blamed for breaking the code of silence” by the police union, which was the subject of a pending unfair labor practice (ULP) grievance.

Accordingly, Capt. Heagney recommended that the situation be immediately forwarded to the City of Attleboro’s Personnel Director for further handling. (*Exhs. 28 [Chief Pierce, pp. 15, 32-33, 35], 35, 37, 38; Tr.IV:54-58 [Heagney]*)

60. Chief Pierce received Capt. Heagney’s report sometime in the mid-afternoon on September 27th. He decided to recuse himself from the matter. He then went to his son’s home that evening, gave him a copy of Capt. Heagney’s reports, explained he would not participate in

the investigation due to the conflict of interest, and recommended that Officer Pierce contact his union due to the “seriousness of the matter”. He intended to see the City’s Personnel Director the following day. (*Exh.8 [Appellant, pp. 40-42], 28 [Chief Pierce, pp. 34-36, 43]*)

61. On September 28, 2010, before Chief Pierce made contact with the Personnel Director, he was summonsed to a meeting with Mayor Kevin Dumas, at which Capt. Heagney and the Personnel Director were also present. Mayor Dumas had just completed a telephone conversation with Attorney Chancellor (the author of the Presentment Letter) in which Attorney Chancellor revealed to Mayor Dumas that he knew that his client had, in fact, been Tasered by Officer Pierce and that an investigation had been conducted in which Officer Pierce had been less than truthful to his superiors. The source of Attorney Chancellor’s “inside information” was never identified. Chief Heagney believed the most likely source was the same Captain who had been implicated in the on-going overtime abuse matter. (*Exh. 28 [Chief Pierce, pp.44-47], 37, 38, 39; Tr.III:145-147, 161-163, 184-189, 240-247 [Dumas]; Tr.IV:104-115 [Heagney]*)

62. As a result of the meeting, Mayor Dumas ordered Chief Pierce to have no more involvement in the investigation of his son and placed responsibility for the matter with the Personnel Director. Due to the pending labor dispute in which Capt. Heagney was involved, the Mayor designated another superior officer, Lt. Scott Killough, as the APD liaison. On September 30, 2010, Mayor Dumas requested a written report from Chief Pierce which he provided on October 3, 2010, and decided to retain Al Donovan, former Police Chief in Tewksbury, to conduct an independent investigation. (*Exhs. 37, 38; Tr.III:11-12, 79:79 [Donovan]; Tr.III:147-149, 160-161, 183-184 [Dumas]*)

The Overtime Labor Dispute

63. In December 2009, as a result of a directive from Mayor Dumas, Chief Pierce and Capt. Heagney initiated an investigation into an apparent scheme to misappropriate money from the

APD in the form of unearned overtime. The investigation focused on the two officers who then administered the APD payroll system, Captain X and Officer Y. On January 29, 2010, Captain X was placed on administrative leave and, on July 1, 2010, he elected to resign rather than face charges of embezzling approximately \$100,000 worth of unearned overtime. After Officer Y claimed his “Carney” rights (against self-incrimination) he, too, was placed on administrative leave that same day. Officer Y was later granted transactional immunity, and returned to full duty on or about July 1, 2010. As a result of the investigation, Chief Pierce made changes to the procedures for reporting overtime demanded by Mayor Dumas and received a written reprimand from the Mayor. (*Exhs. 32 through 34; Tr.III:165-183, 208-210, [Dumas]; Tr.IV:58, 62 [Heagney]*)

64. The overtime investigation was a divisive force within the APD and resulted in a variety of charges of unfair labor practices being filed by the police union against the APD and Capt. Heagney, whom certain members believed was the “rat” who instigated the investigation. The upshot of these charges was not introduced and their merits are not before the Commission, but it bears notice that the acrimony generated by the controversy against Mayor Dumas and Capt. Heagney, and the perception that Capt. Heagney was a driving force behind the investigation, clearly persisted within some circles, even through the Commission hearings in this appeal. (*Exhs.34,92;Tr.III:169-183, 223-229 [Dumas]; Tr.IV:57-79, 104-115 [Heagney]; Tr.V:106-126 [Peavey]; Tr.VIII:13-16, 20-23 [Noble]*)⁸

The Donovan Investigation

65. After meeting with Chief Pierce on September 30, 2010 and reviewing Chief Pierce’s October 3, 2010 report to Mayor Dumas, Al Donovan pursued a two-pronged investigation and

⁸ I accept Exhibit 92, which is charge of unfair labor practice filed in September 2012 by the Attleboro police union, and the finding of probable cause, in part, and dismissal, in part, for the fact that it was filed, but not for the truth of the matters asserted.

prepared a report concerning: (1) the allegation that unreasonable use of force was used by one or more APD officers during the Phillips Street incident as stated in the Presentment Letter; and (2) the potential ethical issues concerning Chief Pierce's actions in handling the investigation of the Presentment Letter allegations that, in part, involved his son, Officer Pierce. The Donovan investigation took a period of several weeks in October 2010, during which recorded interviews were conducted of Chief Pierce, Officer Pierce, and numerous other parties, and culminated in two written reports at the end of that month. (*Exhs.8, 23 through 28, 38 through 40; Tr.III:11-15, 35-36100-101,105 [Donovan]; Tr.III:159-161[Dumas]*)

66. As to unreasonable or excessive use of force, the Donovan report concluded that (1) Officer Hynes "did not use unreasonable force" by striking the suspect with his flashlight; (2), "there is insufficient evidence to prove or disprove the allegation" that Officer Cook kicked the suspect in the face; (3) Officer Dufort "did not use unreasonable excessive force" on the suspect; (4) Officer Pierce did deploy his Taser in drive-stun mode twice striking the suspect in his back and "there is insufficient evidence to prove or disprove the allegation that this force was unreasonable or excessive due to the fact that the suspect was alleged to be handcuffed and/or compliant", and (5) the claim that Officer Pierce tore the suspect's ear was "not sustained." (*Exh. 21, 27[Suspect, pp. 18-19]; Tr.III:18-20, 51-52,118-130[Donovan]*)

67. The Donovan report also concluded that Officer Pierce had violated APD policies and procedures in three respects: (1) failure to contact his Shift Commander and or otherwise verbally report that he had deployed his Taser on February 26, 2010; (2) failure to file a fully documented written report on his use of force and Taser use; and (3) untruthfulness in statements made to Lt. Otrando, Sgt. Witherell and Mr. Donovan during the investigation of the February 26, 2010 Taser incident. (*Exh. 21; Tr.III:20-34,38-49 [Donovan]*)

68. As to Chief Pierce, the Donovan report concluded that he had violated his ethical obligations by remaining personally involved in the investigation of the Presentment Letter allegations on and after July 12, 2010 and in failing to inform Mayor Dumas of the situation in a timely manner in compliance with the terms of his September 2004 disclosure letter to the Mayor. (*Exhs. 28, 39*)

69. Mayor Dumas found “troublesome” and was “disappointed” that Chief Pierce knew in July 2010 that it was his son who had Tasered the suspect involved in the Presentment Letter matter, and the Mayor only came to learn about it in the telephone conversation with Attorney Chancellor in September 2010. After receiving the Donovan report, Mayor Dumas told Chief Pierce that he had lost confidence that the Chief was capable of running the Police Department. On November 1, 2010, Mayor Dumas offered Chief Pierce the option to resign or face disciplinary charges for his handling of the Presentment Letter matter. (*Exh. 28 [Chief Pierce, p. 34,40], 39; Tr.III:165-166, 194-200, 216-217 [Dumas]*)

70. On November 2, 2010, Chief Pierce informed Mayor Dumas that he had decided to retire, effective November 26, 2010. His departure was reported as a personal decision unrelated to other issues in the department (a recently settled police brutality lawsuit, the overtime scandal and the investigation of his son’s Taser incident) and was lauded at his February 5, 2011 retirement party attended by Mayor Dumas and other officials. (*Exhs. 41, 47; Tr.III:199-200 [Dumas]*)

Disciplinary Proceedings Against Officer Pierce

71. Also by letter dated November 2, 2010, Mayor Dumas informed Officer Pierce that he was placed on administrative leave with pay pending the outcome of the departmental investigation into his role in the Taser incident on February 26, 2010 and subsequent events. Officer Pierce was on route to the hospital to visit the APD union President who had just suffered a heart

attack when he was called to the police station by Capt. Heagney who handed him Mayor Dumas's letter and took his badge and gun. (*Exh.36; Tr.III:1995-196, 198 [Dumas]; Tr.VI:177-178 [Appellant]*)

72. Mr. Donovan interviewed Officer Pierce on October 13, 2010. Among the statements that Officer Pierce made during the interview, he said the following about the struggle with the suspect and his preparation of the use-of-force report:

MR. PIERCE: I remember grabbing a hold of him [the suspect] . . . I remember he kept trying to get out, so I gave him a few knee strikes in the legs, I don't know exactly how many, trying to keep him on the ground. . . . And then at one point I deployed my taser and I gave him a drive stun.

MR. DONOVAN: . . . Was he or wasn't he handcuffed when you tasered him?

MR. PIERCE: He was not handcuffed.

. . .

MR. DONOVAN: Okay. What did you do next?

MR. PIERCE: I know we – I know I put my taser away, because it didn't work. I administered the drive stun, trying to get his arms out from underneath him, because he wouldn't comply, getting his – you know, I'm trying to get him in handcuffs. He was fighting with us, and then I remember I had to put the taser away and then, I mean, physically we had to grab his arms and pull them up from underneath him. I mean, it was a pretty good struggle.

. . .

MR. DONOVAN: Okay. Did you file a use-of-force report on 2/26/10?

MR. PIERCE: Yes.

MR. DONOVAN: And what did you do with it?

MR. PIERCE: When I finished the report, I remember before I walked out of the report room, I put it down on the table. I don't remember exactly if I handed it to John [Hynes] and said, "Here's the use-of-force-report," or I said, "Hey, put this with your paperwork." . . . I remember doing it and then sending it over to his way. I don't remember the exact words that were said or exactly where I put it, . . .

. . .

MR. DONOVAN: Why didn't you give them to the supervisor?

MR. PIERCE: Well, a lot of times I would just hand paperwork in to the arresting officer and then it would make its way to the C.O., kind of past practice, hoping that it would get there.

MR. DONOVAN: Okay. And you're saying that that's a past practice?

MR. PIERCE: Yeah, its been done before, yes.

MR. DONOVAN: Okay. What's the known procedure.

MR. PIERCE: Well, the policy states you have to give it to the C.O.

. . .

MR. DONOVAN: Okay. You told [Lt.Otrando] that you placed the use-of-force with the other paperwork. Where exactly did you put it?

MR. PIERCE: That's – exactly, I don't know, but I thought I, you know, I handed it to [Officer Hynes]. And, you know, I don't know if – like, the way the report room was, he was sitting kind of in the corner with his back turned to me, and I think I just threw it down on the table and said, "Hey, throw this with your paperwork." And then – and that was it.

(Exh. 8 [Appellant, pp. 18-21, 34])

73. On January 13, 2011, a hearing was held before the Attleboro Personnel Director, whom Mayor Dumas had appointed as the hearing officer to conduct the appointing authority level hearing pursuant to Section 41 of the Civil Service Law. Testimony was received from Officer Pierce and other witnesses called by his counsel and by Attleboro's counsel. On or about February 3, 2011, the hearing officer submitted a written report of her findings and conclusions to Mayor Dumas. *(Exhs. 30, 45, 46; Tr.III:150-152 [Dumas])*⁹

74. The Hearing Officer concluded that Officer Pierce had not disclosed the use of his Taser or filed any use-of-force or Taser use reports on February 26, 2010 and was untruthful when he claimed he did so as well as in making other untruthful statements about what happened during the struggle with the suspect at the scene and his initial statements that attributed the Taser use to Officer Hynes before acknowledging that he was the officer who had done so. *(Exhs. 30, 46)*

75. By letter dated February 17, 2011, after a review of the Hearing Officer's report and the underlying evidence, Mayor Dumas informed Officer Pierce that his employment as an APD police officer was terminated effective immediately. Mayor Dumas provided the following reasons for his decision:

. . .[T]his is not a minor case of where you forgot to submit the required reports regarding the use of force and deployment of a Taser during an arrest, or what most persons would consider ministerial duties relating to a police officer's job. Nor is this a case wherein you cannot recall what you said to your fellow officers and supervisors regarding the

⁹ The evidence contains two versions of the hearing officer's report, an 8-page signed, but undated, version (Exh. 30) and a 7-page version that is signed and dated "2/3/11" (Exh.45). The parties did not dispute that the 8-page version was the final one delivered to the Mayor and subsequently attached to the termination letter he wrote (Exh. 31) and the Commission infers that the shorter version was a draft. The evidence does not permit any inference as to who made the changes from one draft to the other. The differences are annotated in Exh. 46 and are not material to the Commission's decision. *(See Tr. 155-157 [Dumas]; Tr.IV; 5-19[Colloquy])*

event. This is not an incident in which your actions, behavior and statements have been mischaracterized, misquoted or misunderstood by those involved.

. . .[T]his is a case about a police officer who, in the performance of his official duties and under the color of law, acted unprofessionally, inappropriately and in violation of the City of Attleboro Police Department standards of conduct; policies and procedures governing the use of force and the use of an electronic control device (ECD). This is a case about a police officer who was dishonest about the deployment of his Taser. This is a case of you repeatedly making patently false and untruthful statements about the use of your Taser. This is a case wherein you have manufactured a story to justify your actions. You have repeatedly lied to supervisors and to Mr. Donovan regarding your actions on the night of February 26, 2010. You have lied about the fact that you completed the required reports after the incident and gave them to Officer Hynes. Despite your admitting that you are familiar with the policies and procedures regarding the deployment of a Taser and the mandatory duties and responsibilities you are required to follow, you did not notify your supervisor either verbally or in writing that the Taser was deployed; nor did you take photographs of the affected area; nor did you inform the Attleboro Fire Department EMT's or medical staff at Sturdy Hospital that a Taser was deployed. This is a case of which your version of events regarding your Taser deployment are not corroborated by any of the police officers' testimony or reports submitted as part of this investigation.

I conclude your actions and conduct in this incident call into question your usefulness as a police officer because your untruthfulness has caused irreparable damage to your integrity. Your untruthfulness has raised reasonable doubt about your competence and trustworthiness as a police officer. . . .

. . .Furthermore, in light of numerous precedent setting court cases, you are also unfit for duty because of the serious concerns about your ability to testify in court.

. . .
Your dishonesty in this incident prevents your useful service as a law enforcement officer because your credibility is immediately impeached any time you would be called upon to testify and as a matter of public policy.

(Exh. 31; Tr.III:151-155[Dumas])

76. After the decision to terminate Officer Pierce became public, the media sought and obtained the investigative materials related to the termination and the prior investigation that lead to Chief Pierce's retirement, and articles appeared in which the Mayor acknowledged that former Chief Pierce's retirement was not entirely voluntary on his part. *(Exhs. 42 through 44, 48, 49; Tr.III:201-208, 217-223 [Dumas])*

77. On April 18, 2012, the Massachusetts State Ethics Commission and former Chief Pierce entered into a Disposition Agreement by which he stipulated to certain facts and consented to a conclusion that he had “repeatedly violated” G.L.c.268A, §19 and “twice violated” G.L.c.268A, §23(b)(2)(ii), provisions of the State Ethics Law, for which he was assessed a \$3,500 penalty. I take administrative notice of the Disposition Agreement and the admission by Chief Pierce of his violations of the ethics law, but I did not rely upon and have not adopted the finding to which he stipulated, to the extent they are not otherwise supported by the other evidence presented at the Commission hearing, in making the Findings of Facts set forth above in this Decision. (*Exh.22*)

Capt. Woessner’s Expert Testimony

78. Capt. Woessner explained that, although the download of Officer Pierce’s Taser showed a deployment time of 8:02 pm, that time could not be said to be the actual time of deployment in the “atomic clock” world, since the Taser device clock can “drift” for as much as four minutes a month. In addition, the Taser clock is only as accurate as the computer to which it is synchronized. Thus, since the APD did not have a documented policy of synchronizing Lt. Otrando’s computer to the “atomic clock” or the dispatch clock, no definitive conclusion is possible as to how close the recorded time of 8:02 on Officer Pierce’s Taser is to the actual time of deployment. (*Tr.VI:43-60, 105-106, 117-118 [Woessner]*)

79. Capt. Woessner also offered a number of reasons that, in theory, might explain why Officer Hynes would not have seen or heard Officer Pierce deploy his Taser in the struggle with the suspect on February 26, 2010. He explained the generally accepted scientific phenomena known as “auditory exclusion” and “tunnel vision”, experienced in combat and stressful law enforcement situations, in which a person is so highly focused on the specific task at hand and the narrowly immediate perceived threat to the exclusion of other events. Capt. Woessner did not have sufficient percipient or indirect knowledge of the events of February 26, 2010 and could not

opine with reasonable scientific certainty as to whether or not Officer Hynes actually experienced these phenomena on scene during the Phillips Street incident. (*Exhs. 72 through 78; Tr.VI:32-42, 69-72, 88-94, 122-126 [Woessner]*)

CONCLUSION

Summary

Attleboro has proved just cause for the decision to discharge Officer Pierce from his employment as an APD Patrol Officer. By his own admissions, Officer Pierce failed to follow important APD policies and procedures for reporting and justifying the use of a Taser and, in so doing put himself, his fellow officers and the City of Attleboro at unnecessary risk of defending a civil lawsuit alleging that unreasonable force had been used. This misconduct, combined with his subsequent lack of candor and efforts to downplay the serious nature of his lapse of judgment, including pointing fingers at fellow officers – whether intentionally or negligently – justifies termination. Although Office Pierce claimed that ulterior motives were also in play, the credible evidence falls short of proving those suspicions to be true.

Applicable Legal Standards

A tenured civil service employee may be discharged for “just cause” after due notice and hearing upon written decision “which shall state fully and specifically the reasons therefore.” G.L.c.31,§41. An employee aggrieved by the decision may appeal to the Commission. G.L. c.31, §43. Under Section 43, the appointing authority carries the burden to prove to the Commission by a “preponderance of the evidence” that there was “just cause” for the action taken. *Id.* See, e.g., Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823 (2006); Police Dep’t of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den., 726 N.E.2d 417 (2000).

In performing its function:

. . .the commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew. . . . [after] a hearing de novo upon all material evidence and . . . [t]here is no limitation of the evidence to that which was before the appointing officer. . . . For the commission, the question is . . . “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.”

Leominster v. Stratton, 58 Mass. App.Ct. 726, 727-28 (2003) (quoting Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983) (*emphasis added*)). See also Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823; Cambridge v. Civil Serv. Comm’n, 43 Mass.App.Ct. 300, 303-05, rev.den., 428 Mass.1102 (1997). See generally Villare v. North Reading, 8 MCSR 44, recons’d, 8 MCSR 53(1995) (de novo review by “disinterested” Commission in context of procedural due process).

The Commission determines justification for discipline by inquiring, “whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service.” School Comm. v. Civil Service Comm’n, 43 Mass. App.Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983); The Commission is guided by “the principle of uniformity and the ‘equitable treatment of similarly situated individuals’ [both within and across different appointing authorities]” as well as the “underlying purpose of the civil service system ‘to guard against political considerations, favoritism and bias in governmental employment decisions.’ ” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of the “merit principle” which governs Civil Service Law that discipline must be remedial, not punitive, designed to “correct inadequate performance” and “separating employees whose inadequate performance cannot be corrected.” G.L.c.31,§1.

An action is “justified” if “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules

of law." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928).

The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001). It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. "[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance." E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) 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) (where live witnesses gave conflicting testimony 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)

Section 43 also vests the Commission with authority to affirm, vacate or modify a penalty imposed by the appointing authority. The Commission is delegated with "considerable discretion" in this regard, albeit "not without bounds", so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. E.g., Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 600 (1996) and cases cited; Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct. 796, 800 (2004); Faria v. Third Bristol Div., 14 Mass.App.Ct. 985, 987 (1982) (remanded for findings to support modification)

Applying these principles to this appeal, I conclude that Attleboro has met its burden of proof to establish just cause to terminate Officer Pierce.

On-Scene Performance

The Phillips Street incident was, without doubt, a highly stressful event, both emotionally and physically for all of the APD officers who responded to that scene. Here, the police caught a burglar in the act who resisted arrest and was subdued only after a violent struggle. I am quite skeptical that any of the officers who were involved in that incident and who testified had total recall and provided the true picture of the events. I must concur with Mr. Donovan's assessment that many uncertainties remain as to what actually happened in the struggle to subdue the suspect and in what order, as well as what the officers on scene actually saw and didn't see. There is no doubt, however, that Officer Pierce deployed his Taser in drive stun mode on the suspect's back during the struggle in the entry hall. I also conclude that, under the circumstances, Officer Pierce was not obliged to have given the suspect (or his fellow officers) either verbal or visual warning prior to deployment. Thus, I cannot find by a preponderance of evidence that Officer Pierce's decision to deploy his Taser, per se, was unreasonable or that any of his actions at the scene necessarily rose to the level of a violation of any APD rule that warranted discipline.

However, given the conflicting stories from the various reports filed and the percipient witnesses testimony, as Mr. Donovan stated, the evidence does not permit any definitive conclusion as to whether or not the drive stun was made before, during or after the suspect "gave up" and became compliant or was handcuffed and whether or not the suspect was "booted" (kicked) and has his ear torn by an officer (which, although the suspect claimed it was Officer Cook, if it did happen, it would more likely have been Officer Hynes or Officer Pierce). These ambiguities in the alleged facts, whether or not true or untrue, do become relevant to the subsequent failure to make contemporaneous documentation and reporting of the events as explained below.

Reporting the Use of Force

No other non-lethal use of force requires the special degree of notification and reporting as does a Taser deployment. Although a drive stun deployment involves a less severe procedure than a full deployment (in which the skin is physically penetrated by metallic hooks), the State protocols and APD rules require strict adherence to an intentionally redundant verbal and written reporting system after every deployment of either type. These requirements respond to the controversial debate over the potential for abusing the Taser, which, as evidenced in this case, can lead to civil claims that the deployment was unnecessary and an unreasonable use of force. Whether or not Officer Pierce's Taser deployment was reasonable, or caused any harm, is not the issue. By failing to follow any of the reporting requirements to document what he did, Officer Pierce created a substantial credibility problem that he knew, or should have known, made prosecution of the suspect and the defense of the suspect's civil rights claims much harder to defend. The APD is entitled to construe this lapse of judgment as serious matter that warranted appropriate discipline.

First, Officer Pierce does not deny that he failed to make any verbal report to a supervisor as required. I cannot find any rational basis to believe that Officer Pierce did not have the opportunity to report his Taser deployment to Sgt. Witherell on the scene. Sgt. Witherell came to the front of the residence just as the scuffle with the suspect had concluded and remained on scene with Officer Pierce for some time. Other officers attended to the custody of the suspect. No adequate explanation was provided that persuades me that Officer Pierce did not have the time or opportunity to comply with the verbal reporting requirement. Had he done so, Sgt. Witherell would have had the opportunity to be more proactive about ascertaining the effect of the deployment, ordering photographs if necessary and further managing the incident by emphasizing to both Officer Pierce and Officer Hynes that they meet the requirements to follow

up with a written report. With that opportunity lost, an important piece of potentially exculpatory percipient evidence was lost.

Second, the omission was compounded by Officer Pierce's failure to prepare timely written reports on the use of force and Taser use. I do not find credible the testimony that he prepared these reports on February 26, 2010, and left them for Officer Hynes without seeking any comment or acknowledgement from him, or that the reports simply went missing. This is not the "A-game" police work that Officer Pierce acknowledges was required and that the APD is entitled to expect from its officers. Even were I to believe this explanation, his conduct remain problematic and still warranted discipline.

I do not agree with the contention that the APD had a spotty record of Taser use reporting. To the contrary, the evidence demonstrated that the present case is unique in that it is the only time that a Taser was deployed and NO mention of it appears anywhere in any official APD report. I am not persuaded by the somewhat imprecise explanations that Officer Pierce "handed" the report to Officer Hynes or, alternatively, "threw it down" on the table and by the fact that he had no clear recollection that he even mentioned that it was a Taser or use of force report. Officer Pierce had no explanation, when asked by Sgt. Witherell, why he didn't turn these reports in to his supervisor as he knew he was supposed to do. I also find Officer Pierce's alleged actions especially implausible in view of the fact that he was coming off what witnesses called a most unusual and violent arrest, in which a fellow officer, with whom he had a good relationship, had been obliged to take the rarest of measures to employ a flashlight as a weapon that caused significant head and facial injuries, and, yet, these two experienced officers purportedly did not take care to ensure that all the reports of the incidents were carefully documented and the reported duly filed. This latter misstep, to be sure, implicates both Officer

Hynes and Officer Pierce, but, it was Officer Pierce who bore the primary and ultimate responsibility to ensure that his Taser use was duly and accurately reported.

The lack of contemporaneous reports to describe and justify the Taser use created a number of problems. As to the Taser deployment itself, there is not a single contemporaneous record that documents the use – in every other instance that a Taser was used, there was, at least, one contemporaneous report, either the Taser use report, the standard use-of-force report or the incident report to document the APD's actions. Here, however, nothing but Officer Pierce's personal recollection of an event that occurred months earlier, and which, by his own admission, his memory had faded, stands against the suspect's claims that the Taser was an unreasonable use of force because it was deployed after the suspect had been handcuffed or otherwise given up the struggle.

Even more troubling is the fact that Officer Pierce's failure to make and report of the Taser use adversely affects the credibility of the other reports of that incident and the credibility of the officers at the scene, particularly Officer Hynes and Officer Cook. According to Officer Hynes' report, on which Lt. Brewer relied to prepare his commanding officer's report, the suspect "gave up his hands" after "a single knee strike" from Officer Pierce. According to the narrative provided by Officer Pierce when he wrote his use of force report in July, and the testimony he gave to Mr. Donovan and the Commission, he stated that he gave the suspect "several" knee strikes and the suspect never gave up resisting before he was handcuffed. This conflicting evidence of the struggle raises doubt about the truth of the reports, suggests that Officer Hynes was not truthful in all respects either and allows for inferences to be drawn that would not be favorable to him or the APD. For example, while I do believe Officer Hynes that he did not see the Tasing (although he said he didn't know how he could have missed it), then, it also could be inferred that he also missed seeing, and could not credibly deny that the suspect had been

kicked in the face, as the suspect also alleged with far greater certainty than his recollection of the Taser¹⁰. On the other hand, if Officer Hynes did see the Taser but chose not to mention it, it could be inferred that was because he wanted to conceal the fact that it was done after the suspect had surrendered and/or that he was concealing other unfavorable evidence. Although neither I nor Mr. Donovan have drawn a firm conclusion as to any such inferences, and even if the allegations were not true, the important point for purposes of this appeal is the clear fact that, by failing to follow protocol and make timely and complete reports, Officer Pierce's negligence allowed these ambiguities to be plausibly presented in the Presentment Letter, and left the APD to defend the claims solely on conflicting memories of the officers.¹¹ Had proper and credible paperwork been submitted, the likelihood that suspect's claims could be impeached would have been significantly enhanced. In sum, Mayor Dumas' letter properly noted that the failure to meet the reporting requirements was not merely a lapse of a ministerial duty, but undermined an essential function of effective law enforcement responsibility that justifies severe discipline, up to and including termination.

Truthfulness

The evidence also supports Mayor Dumas's conclusion that Officer Pierce's failure to be forthcoming and take responsibility for his actions had irreparably compromised his ability to continue to serve as a sworn APD police officer. The duty imposed upon a police officer to be

¹⁰ The suspect thought he was kicked by Officer Cook but the reports indicated that officer may not have been in the area when the struggle occurred. The suspect could be wrong about who kicked him but not lying that someone did. Mr. Donovan was unable to reach any conclusion to "prove or disprove" the suspect's allegation of being kicked in the face.

¹¹ It is certainly possible that Officer Pierce and Officer Hynes collaborated in the decision not to report the Taser use, thinking that it would not have been noticed and would complicate the otherwise already complicated use of force involved. A skillful advocate for the suspect might well hammer on the poor documentary records and the poor memories of witnesses to prevail on such a theory. That possible explanation, however, is mere speculation, and, in my view, contrary to the more credible testimony that, more likely than not, Officer Hynes was not aware of the Taser until July 2010 and the fault in reporting is entirely a matter of negligence on the part of Officer Pierce.

truthful is one of the most serious obligations he or she assumes, because, among other things, it may compromise the officer's ability to serve as a credible witness in the prosecution of a criminal case. See, e.g., City of Cambridge v. Civil Service Comm'n, 43 Mass. 300, 303 (1997) ("The city was hardly espousing a position devoid of reason when it held that a demonstrated willingness to fudge the truth in exigent circumstances was a doubtful characteristic for a police officer. . . . It requires no strength of character to speak the truth when it does not hurt.") Since there is some discretion as to what, and for how long, a prosecutor may be required to make disclosure of indicia about a police officer's truthfulness under the so-called "Brady Rule", claims of untruthfulness against a police officer carry serious consequences and must be carefully scrutinized, but the Commission generally must defer to the judgment of a law enforcement agency on this point, which is lawfully grounded in constitutional law Compare Orr v. Town of Carver, 24 MCSR 222 (2011) with Robichau v. Town of Middleboro, 24 MCSR 352 (2011) and Gallo v. City of Lynn, 23 MCSR 348 (2010). See generally, United States v. Agurs, 427 U.S. 97, 108, 96 S.Ct. 2392, 2400 (1976), citing Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). See also Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375 (1985); "*Police Officer Truthfulness and the Brady Decision*", 70 POLICE CHIEF, No. 10 (Oct. 2003) reprinted at policechiefmagazine.org.

In the present case, Officer Pierce's dissembling ranged from reckless statements to outright misrepresentations. The preponderance of the evidence establishes that he did not complete the Taser use and Use of Force reports until July 2010. Yet, he repeatedly claimed he did. Moreover, even giving him all benefit of the doubt about telling Lt. Otrando that Officer Hynes was "quick to use the Taser" and, so it was "probably" Hynes who Tasered the suspect in the ambulance, these statements were reckless comments, at best. To profess a memory sufficient to remember that the suspect was taken by ambulance, Pierce should have known that Officer

Hynes did not go in the ambulance, and he, not being there either, had no percipient knowledge. Moreover, I find it difficult to reconcile how Officer Pierce would have no initial recollection of having Tasered the suspect, then, on reflection, stating “I think I tased him”. Yet, a moment later, he was quite definitive, stating, with clear recollection, that he most certainly completed all required reports. In addition, the inconsistencies in the report that Officer Pierce eventually wrote with Officer Hynes’s own contemporaneous report means that Officer Pierce’s later memory was faulty or, alternatively, that what he told Officer Hynes about his own use of force on the night in question was not accurate. Finally, the Appellant’s readiness at the Commission hearing to contend that Officer Hynes’s use of his flashlight was unreasonable –was disturbing, as he had no percipient knowledge upon which to reach that conclusion. Similarly, his claims that reports were routinely passed on to supervisors through other officers and often got lost, turned out to be wholly unsupported by the preponderance of evidence to the contrary. This trail of false statements rightly can be viewed as a willingness to “fudge the truth” that cannot be tolerated in a police officer and justifies the termination of such an officer from the APD.

Ulterior Motives

The Appellant argued that he was collateral damage in an ongoing feud between Mayor Dumas and former Chief Pierce, in which Capt. (now Chief) Heagney collaborated, that culminated in the Chief’s ouster in November 2010 and elevation of Capt. Heagney to Acting, and eventually, permanent Police Chief. While the Appellant admits that his actions warranted some discipline, he claims that the Mayor’s decision to terminate him was an over-reaction fueled by the Mayor’s animus toward his father, Chief Pierce. This claim is mostly speculation without credible evidentiary foundation and, in some respects, simply is not plausible.

First, the alleged complicity between Mayor Dumas and Chief Heagney in concocting an overtime investigation of the APD as a means of discrediting Chief Pierce so that he could be

terminated has no credible evidentiary basis. The overtime abuse was clearly a very real, and serious, issue in which Mayor Dumas, Chief Pierce and Capt. Heagney collaborated to achieve an immediate end to the abuse as well as a mutually acceptable long-range solution. The fact that the police union had pressed ULPs against Mayor Dumas and Capt. Heagney as to their roles in the process, the upshot of which was not established, at the same time as the Presentment Letter was being investigated, was proved to be no more than a coincidence. If anything, it showed that the union held a grudge against Mayor Dumas and Chief Heagney for perceived retaliatory meddling in overtime privileges, than it corroborated any animus Mayor Dumas allegedly held against the Pierces.

Second, a causal nexus between the breakdown between Mayor Dumas and Chief Pierce, and the discipline of Officer Pierce, was not proved. What precipitated Chief Pierce's termination was Mayor Dumas' loss of confidence following his blindsiding over the Presentment Letter investigation and Chief Pierce's questionable ethical behavior in that regard, for which he was ultimately sanctioned by the State Ethics Commission. I am convinced that Mayor Dumas' decision to terminate Officer Pierce, months after Chief Pierce had retired, for Officer Pierce's own misconduct, stood on its own.

Third, although aspects of the timing of the investigation of Officer Pierce and the alleged leak of information of a police investigation to an outside adverse party leave some unanswered questions, questions are not proof, and the Commission cannot reach conclusions based on speculation without credible percipient or other reliable evidence to substantiate it. For example, the hiatus between the initial, but limited mid-July inquiry by Lt. Otrando until Lt. Brewer began his own *sua sponte* investigation in late August, is somewhat perplexing, but quite likely due to the fact that the matter languished without Chief Pierce's impetus and he was on vacation for much of July and August. Similarly, neither Mr. Donovan's engagement in other work for the

City of Attleboro nor his alleged involvement in the abuse of force claim while serving as Tewksbury Police Chief (which I excluded), in my view, impeaches his credibility or impartiality with respect to the reliability of the information he gathered in his investigation or the conclusions he reached. Finally, although objectivity is always preferable, civil service law does not require that the appointing authority hearing be conducted before an “impartial” hearing officer. See, e.g., McIsaac v. Civil Service Comm’n, 38 Mass.App.Ct. 473, 476-77 (1995); Howard v. Town of Nahant, 25 MCSR 379, 384 (2012); Villare v. Town of North Reading, 8 MCSR 44 (1995).

In sum, I find by a preponderance of the evidence that Officer Pierce’s termination was the result of fair and considered judgment by Mayor Dumas that the misconduct involved – i.e., failing to file critically important reports and being less than truthful about it - supported just cause for discharge from the AFD. I do not overlook the fact that both Chief Pierce and Officer Pierce had given many years of distinguished service to the City of Attleboro. Although the punishment of the son meted out by Mayor Dumas was harsh and others might think he deserved leniency, I cannot find that the Mayor’s decision was unlawfully tainted by his prior disappointment with the father. Nor is this a case where the Commission ought to substitute its own discretion to modify the penalty, when the City has sustained the just cause for termination on substantial grounds, including lapses in truthfulness of a law enforcement officer.

For the reasons stated, the appeal of the Appellant, Richard J. Pierce, Jr., is hereby ***dismissed***.

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners) on May 29, 2014.

A True Record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by 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.

Notice:

Leigh A. Panettiere, Esq. (for the Appellant)

Brian E. Simoneau, Esq. (for the Respondent)