# COMMONWEALTH OF MASSACHUSETTS
# CIVIL SERVICE COMMISSION

100 Cambridge St., Suite 200
Boston, MA 02114
(617) 979-1900

**RAFAEL A. ROCA,**
*Appellant*

v.

**CITY OF HOLYOKE**,
*Respondent*

Case No.: D1-21-213

## DECISION

Pursuant to G.L. c. 31, § 43, the Chair of the Civil Service Commission (Commission) assigned the Commission's General Counsel to serve as presiding officer over a multi-day evidentiary hearing into those issues raised by the Appellant, former Holyoke police officer Rafael Roca, in conjunction with his employment termination appeal.

Pursuant to 801 CMR 1.01 (11) (c), the Presiding Officer released to the Commission the attached Tentative Decision and advised the parties that they had thirty days in which to provide any written objections to the Commission. The Appellant submitted an objection on April 21, 2023, and the Respondent filed a Reply one week later.

After careful review and consideration, the Commission voted to affirm and adopt the Tentative Decision of the Presiding Officer, thus making the attached, with the following observations, the Final Decision of the Commission.

At the outset, the Commission reiterates the Presiding Officer's conclusion that the responsible reporting of suspected misconduct within a police department is to be encouraged and respected. Within a paramilitary organization such as the Holyoke Police Department, such reporting normally should be undertaken in accordance with the chain of command. In cases in which superior officers fail to respect or take appropriate steps in response to legitimate whistleblowing, though, it may be necessary to break from the usual chain of command and even involve civilian authorities by registering complaints publicly.

But, for the reasons stated in the Tentative Decision, the Commission concurs that the Appellant's actions in publicly broadcasting a 43-minute video replete with unsupported statements about fellow police officers and subsequent media interviews conducted in defiance of police department policy, as well as a direct order from a superior officer, were not protected activities insulating him from discipline under the First Amendment.

The Appellant's objections focus heavily on an assertion that the Appellant, in his video and media statements, was commenting on matters of public concern, despite the fact that the Presiding Officer explicitly conceded that many (though not all) of his statements could be viewed as directed toward matters of public concern. There is no question that public comments about, for example, an alleged lack of minority representation in the more desirable positions within the Department are protected by the First Amendment. Here the Appellant, however, went beyond that in making wholly unfounded accusations in his YouTube video that fellow police officers had committed crimes such as stealing money, "beat[ing] their wives," and committing perjury on the witness stand. Publicly referring to the Police Chief, without some proof of misconduct, as "just an overall dirty police officer" is obviously detrimental to the ability of a paramilitary organization to function effectively.

Even after acknowledging that the Appellant most often was speaking as a citizen upon matters of public concern, in entertaining Roca's termination appeal this Commission must still "arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pereira v. Comm'r of Soc. Servs*., 432 Mass. 251, 257 (2000), quoting *Pickering v. Board of Educ*., 391 U.S. 563, 568 (1968). In determining the appropriate balance between these competing interests, the "employee's interest in expressing [himself] on [the] matter must not be outweighed by any injury the speech could cause" to the public employer's interest. *Id.*, quoting *Waters v. Churchill*, 511 U.S. 661, 668 (1994). In other words, public employees "by necessity must accept certain limitations on [their] freedom." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). Police departments in particular have an obvious need to engender discipline, promote efficiency, foster loyalty and obedience to superior officers, maintain harmony among co-workers, and instill public confidence.

In his objections, the Appellant ignores a crucial aspect of the established analysis for balancing a public employer's prerogative of maintaining order and cohesion within the workplace against a public employee's free speech rights. The Appellant erroneously claims that, under the U.S. Supreme Court's so-called *Pickering* balancing test, the managerial prerogative only takes precedence in the face of actual, as opposed to threatened, harm to the public employer's interests. The First Circuit Court of Appeals has clearly held that "[a]n employer need not show an actual adverse effect [from an employee's speech] in order to terminate an employee" without violating the employee's First Amendment rights. *Curran v. Cousins*, 509 F.3d 36, 49 (1st Cir. 2007). *Accord, Pereira, supra,* 432 Mass. at 263. As outlined in the Tentative Decision, the Appellant's actions both threatened and did harm the Holyoke Police Department's interests in efficient and effective policing and so discharge was an appropriate response under these circumstances.

Accordingly, the decision of the City of Holyoke to terminate the Appellant is affirmed and the Appellant's appeal under Docket No. D1-21-213 is hereby ***denied***.

By vote of the Civil Service Commission (Bowman, Chair; Dooley, McConney, Tivnan, and Stein, Commissioners) on May 18, 2023.

Civil Service Commission

*/s/ Christopher C. Bowman*
Christopher C. Bowman
Chair

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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:
Scott A. Lathrop, Esq. (for Appellant)
Russell J. Dupere, Esq. (for Respondent)

**COMMONWEALTH OF MASSACHUSETTS**

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**RAFAEL A. ROCA,**

*Appellant*

*v.* **D1-21-213**

**CITY OF HOLYOKE,**

*Respondent*

Appearance for Appellant: Scott A. Lathrop, Esq.
176 Fitchburg Road
Townsend, MA 01469

Appearance for Respondent: Russell J. Dupere, Esq.
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Presiding Officer: Robert L. Quinan, Jr., Esq.[1]

SUMMARY OF RECOMMENDED DECISION

The Commission shall deny the appeal of a municipal police officer discharged after refusing a direct order to remove a lengthy YouTube video he posted in which he made unsupported allegations, accusing fellow police officers of committing crimes and other misconduct. The extensive disruptions caused by the Appellant's often reckless and sometimes spurious accusations stripped his statements of First Amendment protection.

[1] The Commission acknowledges the assistance of Law Clerk Isaac Margolis in the preparation of this Recommended Decision.

## RECOMMENDED DECISION

On November 18, 2021, the Appellant, Rafael A. Roca ("Appellant"), acting pursuant to G.L. c. 31, § 43, brought this appeal to the Civil Service Commission ("Commission") challenging the decision of the Respondent, City of Holyoke ("Holyoke"), to terminate him from his position as a Police Officer in the Holyoke Police Department ("HPD" or "Department").[2] The Commission first held a pre-hearing conference remotely on December 14, 2021, and then held a full hearing in-person at the Springfield State Building in Springfield, MA on June 3, 2022, and July 29, 2022, both sessions of which were digitally recorded.[3] As neither party requested a public hearing, the full hearing was declared private, with witnesses sequestered. A total of 42 exhibits were received into evidence (Appellant exhibits 1–16, consisting entirely of redacted copies of other HPD officers' social media postings; and Respondent exhibits[4] 1-24 and 26-27). The Commission received Proposed Decisions on January 11, 2023. For the reasons stated below, I recommend that the appeal be denied.

**FINDINGS OF FACT**

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

*Called by the Respondent*:

- David Pratt, Chief of Police, Holyoke Police Department
- Manuel Reyes, Captain, Holyoke Police Department
- Kathleen Degnan, Assistant City Solicitor, City of Holyoke

[2] The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

[3] Audio recordings of the full hearing were provided on CD format to the parties. The parties then supplied the Commission with a stenographic transcript of the hearing in October of 2022.

[4] Respondent exhibits 1-19 consist of documents, including newspaper articles and various documents relating to the local disciplinary process. Respondent exhibits 20-24 and 26-27 are video and audio recordings of television news stories, a podcast, and social media posts. Respondent exhibit 25 was a duplicative set of audio recordings on CD format.

- Terence Murphy, Former Acting Mayor, City of Holyoke

*Called by the Appellant*:

- Rafael Roca, Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. In March 2016, the Appellant was appointed as a patrol officer employed by the City of Holyoke Police Department. (Testimony of Appellant; Stipulated Facts)
2. The Appellant identifies as Black and Hispanic. (Testimony of Appellant)
3. The Appellant is a veteran. He enlisted in the United States Marine Corps in 2001 and retired in 2016. (Respondent Exhibit 4; Respondent Exhibit 1)
4. The Appellant had no history of discipline before March 8, 2021. (Respondent Exhibit 1; Testimony of David Pratt; Respondent Exhibit 4)

***Department Rules and Regulations***

5. The Holyoke Police Department's Rules and Regulations (Department Rules) include the following provisions (as set out in Respondent's Exhibit 1) relevant to this appeal:

> Rule 1.4.1, Section V: Compliance with Lawful Orders
> The Department is an organization with a clearly defined hierarchy of authority. This is necessary because unquestioned obedience of a supervisor's lawful command is essential for the safe and prompt performance of law enforcement operations. The most desirable means of obtaining compliance are recognition and reward of proper performance and the positive encouragement of a willingness to serve. If there is a willful disregard of orders, commands, directives or policies, retraining of personnel or disciplinary action may be necessary.
> An employee must comply with all lawful orders however received. The employee shall be held responsible for complying with the last or most recent order received.
>
> Rule 7: Unbecoming Conduct
> Members shall conduct themselves at all times, both on and off duty, in such a manner as to reflect most favorable [sic] upon the Department.

Conduct unbecoming an officer shall include that which brings the Department into disrepute or reflects discredit upon the employee as a member of the Department, or that which impairs the operation or efficiency of the Department or employee. Conduct under this rule can be either unbecoming or unprofessional.

Rule 46: Criticism of Department
Members shall not, except on matters of public concern, publicly criticize or ridicule the Department, its policies, or Members by speech, writing or other expression, where such speech, writing, or other expression is defamatory, obscene, unlawful, is intended to undermine the effectiveness of the department, is insubordinate, or is made with reckless disregard for truth or falsity.

Rule 32: Truthfulness In Official Dealings
No member of the Department shall make false official reports, or knowingly enter or cause to be entered in any Department books, or records, any inaccurate, false, or improper entries or registration of police information or matter.

Standing Operating Procedure 10.1.2, Section VII: Guiding Principals, Establishing a Policy For Employee Use of Social Media ("Social media policy")

A. Photographs or other depictions of departmental uniforms, badges, patches, marked units, other departmental property or on-duty personnel, including incident scenes, shall not be posted on internet sites by department personnel without the approval of the Chief of Police.
B. Employees are prohibited from posting, transmitting, and/or disseminating any pictures or videos of official departmental training, activities, or work-related assignments, without the expressed, permission of the Chief of Police.
C. Employees shall treat as confidential, all the official business of the department.
D. No employee shall release, either directly or indirectly, information concerning crimes, accidents, or violations of ordinances and/or statutes to persons outside the department, except as authorized by departmental policy under Public Information Function.
E. No employee should gossip about the affairs of the department with persons outside the department.
F. No sexual, violent, racial, ethnically derogatory material, comments, pictures, artwork, video, or other reference may be posted along with any department approved reference.
G. Employees shall not post any material on the internet that brings discredit to or may adversely affect the efficiency or integrity of the

> Holyoke Police Department. In addition, no employee shall use the internet in any way, shape, or form in order to disparage or harass another department or city employee, as well as any other citizen. …

***March 7, 2021 YouTube Video***

6. On March 7, 2021, the Appellant uploaded a forty-three-minute video on his personal YouTube channel (the Video). At the time of the uploading, the Appellant was off-duty and outside the city limits of Holyoke.
7. In the Video, the Appellant identified himself as a police officer for Holyoke and said: "I am here to make this video to expose the corruption, and the lies, and the injustice" within the Department. The Appellant accused the Department of "corruption and racism . . . for as long as anybody can remember." (Respondent Exhibit 1)
8. Within the Video, the Appellant made multiple unsupported allegations against the Department, individual police officers, and then-Chief of Police Manuel Febo. (Testimony of Appellant; Respondent Exhibit 23)
9. The Appellant alleged that:
    - Chief Febo "[has] been a corrupt chief [and] a corrupt police officer for a very long time. He has covered up crime within the Department, he has protected his friends, he likes to lie. He's just an overall, dirty police officer."
    - Chief Febo has covered up prior incidents of HPD officers losing their weapons and equipment or allowing them to be stolen. Chief Febo "covered up" for an officer whose Department-issued sniper rifle was stolen from his home during a party, and for another officer whose weapons, equipment, and vehicle were stolen.
    - Chief Febo "likes to attack officers who speak out, like myself. I have spoken out about the injustice and the racism and the favoritism that happens on the Holyoke

Police Department and because of that, I've been punished. I've been shunned . . . I've applied to different police departments to transfer out, and I've had that sabotaged by [Chief Febo]."

- Chief Febo supposedly punished the Appellant in response to an informal complaint against him by placing the Appellant in a "per se, administrative role."
- Other police officers "[have been] involved in drunk driving incidents," "assaulted people with their boats," "have been labeled as racists," and "have stolen money."
- There are "municipal police officers [in the Department] who have made in excess of 260 thousand [dollars] a year and nobody has said anything about it. Most people are afraid to speak up about it. People have been threatened. Officers have been punished for speaking up, and I am one of those officers."
- The "straw that broke the camel's back" was another officer ordering the Appellant to attend remedial training on how to apply a tourniquet.
- The Appellant has "had supervisors attempt to tarnish [his] name." The Appellant has also had supervisors who "have lied on the stand" and "have followed the corrupt tendencies of the leadership of the Holyoke Police Department because they're afraid . . . to stand up for the truth. They are afraid to lose their jobs."
- Minority police officers are "vastly misrepresented" in specialized positions and privileges within the Department.
- The Department treats minority police officers as "second class citizens" and they are not rewarded in the same manner as white police officers.
- Department supervisors discourage police officers from engaging in proactive policing.

- Department supervisors "picketed against . . . police reform."
- There are cops in the Department who "like to beat their wives."
- The Department's Internal Affairs division "is as corrupt as can be."
- Department police officers are "allowed to literally get away with murder."
- Holyoke "used to be called paper city. It should be called corrupt city, for its corrupt police department."

10. The Appellant further alleged that:
    - He "tried to sue," "tried speaking with [his] supervisors" about his concerns, and tried discussing his complaints with his union prior to posting the Video. He had also "tried to go to the news, to the press" regarding these allegations, but the media "don't want nothing to do with it."
    - A "dirty state trooper" "decided to sabotage" the Appellant's background investigation when he applied to the Department of the State Police. This "corrupt" and "racist" state trooper "lied about [the Appellant's] background, he made [the Appellant] out to be a horrible person" due to personal bias against the Appellant.
    - When the Appellant applied to be a police officer with the University of Massachusetts Police Department, Chief Febo told the University's Chief of Police that the Appellant "is a bad cop, he's had tons of problems with citizens and other officers, so don't hire him."

    (Respondent Exhibit 1)

11. The Appellant testified that he submitted an anonymous complaint to the Federal Bureau of Investigation ("FBI") "two to three years" before posting the Video, complaining about alleged abuse of overtime on federal grant work. He could not identify the date of

this alleged complaint. (Testimony of Appellant)

12. On March 8, 2021, the Appellant contacted The [Springfield] Republican Newspaper and repeated many of his allegations. (Respondent Exhibit 1)
13. On March 8, 2021, the Appellant participated in an interview with the Daily Hampshire Gazette regarding the allegations he made in the Video. (Respondent Exhibit 1)
14. On March 9, 2021, the Appellant appeared on the Bax & O'Brien show on local radio station WQAY, repeating the allegations contained in the Video. When the hosts inquired whether he had attempted to address the allegations with the Department's Internal Affairs unit, the Appellant stated: "No, as far as the internal affairs within my department, they're as dirty as can be, so I have nothing to do with them." When asked for evidence buttressing the allegations, the Appellant stated: "So, whatever evidence there is, needs to be investigated by the federal government, because they're the only ones who are going to be able to go in there and to peel back the onion and look at what happened." (Testimony of Appellant; Respondent Exhibit 1)
15. The Appellant was also interviewed by a local television station, WGGB Channel 40. In the interview, the Appellant stated: "For years, there have [sic] been theft of overtime, especially when it comes to federal grants that are used to patrol the city. There are people that have shown up for shifts that haven't gotten paid for it. . . . I have seen it first-hand. People that are supposed to be working grants are nowhere to be found during these grant[-funded shifts]." (Respondent Exhibit 22; Respondent Exhibit 1)
16. On March 23, 2021, the Appellant was interviewed on a Spanish radio podcast, El Planeta. In this interview, the Appellant claimed that the Department "permitted" officers who were involved in drunk-driving incidents to serve without disciplinary consequences. The Appellant stated: "I'm the type of guy that speaks up and [the

Department] doesn't like that," and so "[the Appellant has] been disciplined [by the Department]." (Respondent Exhibit 24; Respondent Exhibit 1; Testimony of David Pratt)

17. In at least four different media interviews, the Appellant admitted that he received a direct order from a superior officer to remove the Video from the YouTube platform and he "refuse[d] to take it down." (Respondent Exhibit 1; Respondent Exhibit 22; Respondent Exhibit 20)

***Department Investigation***

18. On March 7, 2021, Captain Matthew Moriarty learned about the existence of the Video, reviewed it, and informed Chief Febo of its contents. (Respondent Exhibit 12)
19. On March 7, 2021, Chief Febo issued an order for the Appellant to remove the Video. Captain Moriarty called the Appellant, informed him of the Chief's order, and ordered him to remove the Video from YouTube. (Respondent Exhibit 1; Testimony of David Pratt)
20. The Appellant declined to comply and informed the captain: "If the chief wants the video to be removed, he can [try to remove it from YouTube himself]." (Respondent Exhibit 1; Testimony of David Pratt)
21. On March 8, 2021, Chief Febo placed the Appellant on paid administrative leave. (Respondent Exhibit 1)
22. Captain Moriarty began preparing a Disciplinary Action Notice (DAN) on March 8, 2021, and issued it on April 8, 2021. He later issued a supplemental DAN after the Appellant sent out a press release to the Daily Hampshire Gazette. (Respondent Exhibit 1; Testimony of David Pratt)

23. The DAN quoted the rules and regulations violated by the Appellant: the social media policy, untruthfulness, criticism of the Department, conduct unbecoming an officer, and failure to comply with an order. (Respondent Exhibit 1; Testimony of David Pratt)
24. The Department initiated an Internal Affairs (IA) investigation, led by Captain Denise Duguay. (Testimony of David Pratt; Respondent Exhibit 1)
25. On July 7, 2021, Captain Duguay interviewed the Appellant at the Department. (Respondent Exhibit 1; Testimony of David Pratt)
26. The IA investigators sustained four of the five charges: violation of the social media policy, criticism of the department, conduct unbecoming, and failure to comply with an order. (Testimony of David Pratt; Respondent Exhibit 1)
27. The IA investigators did not sustain the untruthfulness charge, finding that the underlying policy that could have supported such a charge specifically relates to false statements in official written police reports. (Testimony of David Pratt; Respondent Exhibit 1)
28. Chief Febo ordered Captain Manuel Reyes to review the allegations in the Video. Captain Reyes concluded that the Appellant's accusations regarding assault, murder, theft, cover-up, racism, retaliation, and intimidation were demonstrably false or unfounded. (Testimony of David Pratt; Testimony of Manuel Reyes)
29. Captain Reyes spent "upwards of sixty [60] hours" reviewing the Appellant's allegations. (Testimony of Manuel Reyes)
30. Due to the uploading of the Video, the Department and its Chief have had to field a large number of complaints, accusations and threats. (Testimony of David Pratt)
31. The Chief also had to issue a press release rebutting the Appellant's allegations after several hours of preparation. (Testimony of David Pratt; Respondent Exhibit 1)

32. Members of the City Council issued public statements calling for an audit of the Department. (Testimony of David Pratt)
33. In his testimony before the Commission, the Appellant failed to offer any direct evidence or witnesses to corroborate any of the disturbing claims he made in the Video. (Testimony of Appellant)
34. He testified that he had learned of certain incidents he spoke of that predated his employment through "secondhand knowledge." (Testimony of Appellant)

***State and Federal Agency Investigations***

35. The FBI, the Massachusetts Office of the Attorney General ("AG's Office"), and the Hampden County District Attorney's Office ("DA's Office") investigated the allegations contained within the Appellant's video. (Testimony of David Pratt)
36. After conducting a joint interview, the FBI and the AG's Office closed their investigation, concluding that "no articulable factual basis exists to believe a federal crime occurred or [was] occurring" in the Department based on the Appellant's claims. (Respondent Exhibit 4; Testimony of David Pratt)
37. After searching for the Appellant's prior alleged anonymous complaint, the FBI could find no recorded complaint matching the details of Appellant's alleged complaint. The FBI closed its investigation. (Respondent Exhibit 4; Testimony of David Pratt)
38. After examining the Video, the DA's Office informed Chief Pratt that it did not "see any reason to look at [the Appellant's allegations] criminally." (Testimony of David Pratt)
39. Regarding the Appellant's specific accusations, I find the following:
    - <u>On the claim that Chief Febo covered up the theft of a Department-issued sniper rifle and protected the officer involved</u>: The lost sniper rifle incident occurred "roughly five" years before the Appellant became a member of the Department.

At the time of the alleged cover-up incident, Chief Febo was not the Chief of Police. Captain Reyes was the commanding officer the day the sniper rifle was reported missing. The Department conducted a comprehensive investigation into the incident and found that the sniper rifle had accidentally fallen out of the custodial officer's pickup truck. The Department later conducted a supplemental investigation corroborating the original investigation's findings. The weapon was recovered about one year after the incident, and the private citizen then possessing the weapon claimed to have found the weapon on the street, as originally alleged by the officer who lost custody of the weapon. Neither the investigation nor any of the parties involved in the incident substantiated the Appellant's claim that the weapon had been stolen during, or ever present at, a party. The offending officer (to whom the weapon was assigned) was suspended for five days without pay, ordered to pay restitution for the lost weapon, and removed from the Department's firearms program as an instructor. The above-mentioned internal investigation reports would have been obtainable through a public records request prior to the dissemination of the Appellant's YouTube video. (Testimony of Manuel Reyes; Respondent Exhibit 13; Respondent Exhibit 14)

- <u>On the claim that Chief Febo covered up the theft of a Department vehicle and another weapon and protected the officer involved</u>: This incident occurred in 2020, and Chief Pratt had direct knowledge of this investigation. Four different police departments investigated this incident and concluded that neither a Department vehicle nor an officer's weapon were stolen. An HPD officer's vehicle was broken into, and equipment was stolen from the vehicle, but the vehicle itself was not stolen. The Department later recovered some of the stolen

equipment. The Department found no evidence of wrongdoing on the part of any involved HPD officer or the Department itself. Again, documentation relating to this investigation would have been obtainable through a public records request prior to the dissemination of the Appellant's YouTube video. (Testimony of David Pratt; Respondent Exhibit 15; Testimony of Manuel Reyes)

- Regarding the Appellant's statements that he complained to the Department and superior officers regarding his allegations prior to posting the Video: No record evidence sustains the Appellant's claim that he discussed in advance any of the most explosive allegations he had voiced in the Video with any officer of the HPD Internal Affairs unit at any time prior to posting the Video. The Appellant never lodged a written complaint with the Department regarding the allegations in the Video. The Appellant did not report his concerns to Captain Reyes, who managed the Professional Standards Division and was charged with investigating these types of allegations. Other officers had reported concerns of their own to Captain Reyes, and none of those officers had been punished for speaking out. Nor did either Chief Pratt or Acting Mayor Terence Murphy ever hear in advance from the Appellant regarding any of the complaints the Appellant aired in the Video. *After* the Appellant posted the Video, the Appellant asked to meet with Chief Pratt regarding the Appellant's concerns, but Chief Pratt declined to meet with the Appellant at that time. (Testimony of Appellant; Respondent Exhibit 1; Testimony of David Pratt; Testimony of Manuel Reyes; Testimony of Terence Murphy)
- Regarding the Appellant's claim that he was punished for speaking out prior to posting the Video: The Appellant was never "written up," "punished," or

"suspended" by the Department prior to posting the Video. The Appellant had previously requested to be placed in the records officer position and in fact served in that role. The records officer position is highly sought after due to its favorable schedule and right of first refusal for overtime. Serving in the records bureau is viewed favorably for purposes of future promotion and leadership positions. (Respondent Exhibit 1; Testimony of David Pratt)

- Regarding the claim that the Department has condoned HPD police officers driving drunk without incurring disciplinary action: The Appellant presented no evidence to substantiate this claim.
- Regarding the claim that Department police officers engage in domestic abuse: The Appellant presented no evidence to substantiate this claim.
- Regarding the claim that HPD police officers, labeled as racists, have assaulted people with boats and have suffered no consequences: In May of 2020, an HPD incident report cites an alleged altercation between one off-duty Department police officer piloting a boat and a civilian on the Connecticut River. The incident report does not recite any allegations of assault or racism. The officer involved was given a verbal warning by a superior officer (and warned of additional ramifications for any future misconduct). (Respondent Exhibit 16; Testimony of Manuel Reyes)
- Regarding the Appellant's claim that HPD officers have stolen money: No evidence in the record substantiates this claim and the Appellant presented none.
- Regarding the claim that the Appellant had been ordered to undergo remedial first-aid training: On January 31, 2021, the Appellant responded to an alleged stabbing incident. The incident report stated that the victim was bleeding slightly

and that the Appellant had applied a tourniquet, an emergency device used only to address profuse bleeding. Chief Pratt, who was then in charge of the Department's CPR and first responder training, reviewed the report and asked a lieutenant either to correct the report or ask the Appellant to undergo remedial tourniquet training. Shortly before the Appellant posted the Video, the Appellant had been asked to attend remedial tourniquet training. Remedial medical training is not considered a form of discipline, progressive discipline, or corrective action in the Department. (Respondent Exhibit 1; Testimony of David Pratt)

- Regarding the Appellant's claim that HPD officers have lied on the stand in court: No evidence in the record substantiates this claim and Appellant presented none.
- Regarding the Appellant's claim that HPD officers of color are "vastly misrepresented" in specialized assignments: At the time of the Video, twelve (12) of the Department patrolmen with eight years or more of full-time experience identified as minority officers. Seventy-five percent of those more-experienced minority officers were placed in specialized assignments other than patrol operations. This exceeds the percentage of Caucasian patrol officers with similar seniority levels assigned to specialized positions. At the time of the Video, Chief Febo, two HPD lieutenants, and four HPD sergeants identified as members of a racial or ethnic minority group. The Appellant's own records officer position was a sought-after specialized position. (Respondent Exhibit 6; Testimony of Manuel Reyes; Testimony of David Pratt; Respondent Exhibit 18)
- Regarding the Appellant's claim that Chief Febo and other HPD supervising officers interfered with the Appellant's application to other departments: Prior to posting the Video, the Appellant applied for positions with the University of

Massachusetts - Amherst Police Department and the Massachusetts State Police. As part of the application process, a background investigator for the Massachusetts State Police asked Captain Reyes for the Appellant's personnel file. The personnel file contained a report Captain Reyes authored prior to the Appellant's employment with the Department, recommending that the Department not hire the Appellant due to alleged untruthfulness. Prior to his appointment to the HPD, the Appellant had admitted to Captain Reyes that he had intentionally fudged the location of his then-current residence in order to benefit from the Department's Holyoke-resident-preference policy. (Respondent Exhibit 1; Testimony of Manuel Reyes; Respondent Exhibit 17)

- Regarding the Appellant's claim that HPD officers have committed payroll fraud associated with overtime shifts paid for with federal grants: After the Appellant posted the Video, Mayor Murphy initiated an investigation into this claim. Mayor Murphy individually reviewed the overtime data with the City Treasurer and Auditor and met with the current and previous Chiefs of Police to review their documentation regarding weekly overtime shifts. Mayor Murphy concluded that no overtime abuse had occurred within the Department and the Appellant presented no evidence to the contrary. (Testimony of Terence Murphy)

40. On March 22, 2021, three HPD officers responded to a call from the Holyoke Juvenile Court, reporting suspicious persons filming outside the courthouse. The group, named "Mass Accountability," posted their interactions with Juvenile Court employees and the responding police officers to YouTube. When the officers arrived, the group yelled at them and accused them of being "dirty." The group repeatedly asked the officers to comment on the Appellant's accusations and claimed that "[the Appellant] was right"

about corruption in the Department. During the twenty-five-minute video, the group mentioned the Appellant by name at least seven (7) times. The officers advised the group to not enter the Juvenile Court, and the officers left shortly after. (Respondent Exhibit 5; Respondent Exhibit 27; Testimony of David Pratt)

***Disciplinary action taken against the Appellant***

41. Upon Manuel Febo's retirement, David Pratt succeeded him as Holyoke's Chief of Police on August 1, 2021. (Testimony of David Pratt)
42. Based upon the findings of the Internal Affairs investigators, on October 22, 2021, Chief Pratt suspended the Appellant for five (5) days and recommended termination to Mayor Murphy. (Testimony of David Pratt; Respondent Exhibit 3)
43. Mayor Murphy sent the Appellant a local disciplinary hearing notice. (Respondent Exhibit 8)
44. The HPD patrol officers' union appealed on the Appellant's behalf. (Respondent Exh. 9)
45. Mayor Murphy appointed Kathleen Degnan, Assistant City Solicitor, as the hearing officer. (Testimony of Kathleen Degnan)
46. Ms. Degnan initially scheduled the disciplinary hearing for October 29, 2021. (Testimony of Kathleen Degnan; Respondent Exhibit 9)
47. On October 26, 2021, the Appellant asked to postpone the hearing to a later date. Ms. Degnan offered to hold the hearing on November 5, 2021, and asked the Appellant to execute an extension agreement seeing as how the Appellant still remained on the HPD payroll. (Testimony of Kathleen Degnan; Respondent Exhibit 12)
48. The Appellant did not execute the extension agreement. (Testimony of Kathleen Degnan; Respondent Exhibit 11)

49. On October 29, 2021, the Appellant's attorney informed Ms. Degnan that the Appellant had been hospitalized and was unable to attend the hearing. Ms. Degnan agreed to postpone the hearing to November 5, 2021. (Testimony of Kathleen Degnan; Respondent Exhibit 11)
50. Prior to the November 5 hearing, Ms. Degnan attempted to confirm the Appellant's planned appearance at the hearing with the Appellant's attorney multiple times. The Appellant's attorney claimed that the Appellant was receiving medical treatment and was unable to attend the hearing. Ms. Degnan requested a doctor's note and documentation proving that the Appellant was unable to attend the hearing. For several days she received no response. (Testimony of Kathleen Degnan; Respondent Exhibit 10; Respondent Exhibit 12)
51. On November 4, 2021, Ms. Degnan again attempted to confirm the Appellant's attendance at the hearing. The Appellant's attorney claimed that the Appellant was hospitalized for a serious (but unspecified) condition and requested an additional extension. Ms. Degnan offered the Appellant the opportunity to attend the hearing via telephone and requested a note from the Appellant's attending health care provider. Ms. Degnan explained to the Appellant's attorney that if the Appellant did not participate in the November 5, 2021 hearing, Ms. Degnan would not conduct a hearing and would instead render a recommendation to Mayor Murphy based on the documents available to both the Appellant and Respondent. (Testimony of Kathleen Degnan; Respondent Exhibit 10; Respondent Exhibit 12)
52. On November 5, 2021, the Appellant's attorney submitted a note by a social worker to Ms. Degnan. The note was not written by a physician, contained no diagnosis or prognosis, did not contain a signature, and did not explain that the Appellant was unable

to attend the hearing. For these reasons, Ms. Degnan explained to the Appellant's attorney that the note was insufficient to warrant another extension. (Testimony of Kathleen Degnan; Respondent Exhibit 12)

53. The Appellant did not attend or participate in the November 5, 2021 hearing. (Testimony of Kathleen Degnan; Respondent Exhibit 12)
54. Ms. Degnan did not conduct the hearing, out of concern that holding a hearing with only the Respondent present would be one-sided and unfair to the Appellant. (Testimony of Kathleen Degnan; Respondent Exhibit 12)
55. Ms. Degnan reviewed the documents available to both parties, including Chief Pratt's suspension letter, the DAN, and the IA investigative report. (Testimony of Kathleen Degnan)
56. Based on her review, Ms. Degnan recommended that Mayor Murphy terminate the Appellant. (Testimony of Kathleen Degnan; Respondent Exhibit 12)
57. On November 10, 2021, Mayor Murphy reviewed Ms. Degnan's findings and terminated the Appellant. (Testimony of Kathleen Degnan and Terence Murphy; Respondent Exhibit 12)
58. At the time of the Appellant's termination, another HPD police officer had been found to have violated the Department's social media policy. That officer was given a warning and complied with an order to remove the posting. (Respondent Exhibit 7)

**APPLICABLE LEGAL STANDARD**

Sections 41 to 45 of Chapter 31 allow discipline of a tenured civil service employee for "just cause" after due notice of charges, a hearing (which must occur *prior* to imposition of discipline, with the exception of a suspension from the payroll for five days or less), and a written notice of the decision that states "fully and specifically the reasons therefor." G.L. c. 31,

§ 41. An employee aggrieved by such disciplinary action may appeal to the Commission, pursuant to G.L. c. 31, § 42 and/or § 43, for de novo review by the Commission "for the purpose of finding the facts anew." Town of Falmouth v. Civ. Serv. Comm'n, 447 Mass. 814, 823 (2006), and cases cited. As prescribed by G.L. c. 31, § 43, ¶ 2, the Appointing Authority bears the burden of proving by a preponderance of the evidence that there was "just cause" for the discipline imposed:

> *If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority,* otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee, by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.

Id. (*emphasis added*).

The Commission determines whether there was just cause 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. Civ. Serv. Comm'n, 43 Mass. App. Ct. 486, 488, rev. den., 426 Mass. 1104 (1997); see also Doherty v. Civ. Serv. Comm'n, 486 Mass. 487, 493 (2020); 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, 447 Mass. at 823. An appointing authority must provide "adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law" to sustain the discharge of a civil service employee. Comm'rs of Civ. Serv. v. Municipal

Ct., 359 Mass. 211, 214 (1971), citing Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) (stating that justification for discharge of public employee requires proof by a preponderance of evidence of "proper cause" for removal made in good faith). It is also a basic tenet of the "merit principles" at the core of the civil service laws that discipline must be remedial, not punitive, designed to "correct inadequate performance" and "[only] separating employees whose inadequate performance cannot be corrected." G.L. c. 31, § 1.

Section 43 of G.L. c. 31 also vests the Commission with "considerable discretion" to affirm, vacate, or modify discipline, but that discretion is "not without bounds" and its exercise requires sound explanation. See Police Comm'r v. Civ. Serv. Comm'n, 39 Mass. App. Ct. 594, 600 (1996) ("The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio . . . accorded the appointing authority"); Town of Falmouth, 447 Mass. at 823, quoting Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983).

**ANALYSIS**

As a preliminary matter, I do not question the right of police officers to participate in legitimate whistleblower activity. Police officers should be encouraged to speak out publicly when they encounter wrongdoing that has gone unaddressed in their departments. Regrettably, police departments occasionally harbor unlawful activity or other wrongdoing, and it is often police officers who possess the firsthand knowledge needed to report any such nefarious activity through internal channels. Further, in cases where department leadership is hostile to legitimate whistleblowing, taking those complaints to other public officials may be the only way to draw attention to the issues and keep civilian authorities informed.[5] However, this is not one of those

[5] *See, e.g.*, Civil Service Commission Investigation regarding the prior use of non-civil service intermittent police officers in the Methuen Police Department, FINDINGS, CONCLUSIONS, ORDERS AND RECOMMENDATIONS, CSC case no. I-20-182 (January 26, 2023).

cases. As discussed below, the Appellant failed to report his concerns through the chain of command, lacked a reasonable basis for many of his accusations, and directly refused to follow a superior officer's direct order. For those reasons, I distinguish the Appellant's actions from those of a legitimate whistleblower and, after a thorough review of the evidence presented to the Commission, I find that the Respondent had just cause to terminate the Appellant based on his conduct associated with the March 7, 2021 YouTube video and subsequent media interviews.

***Insubordination***

First, I agree with Holyoke Mayor Terence Murphy's conclusion that the Appellant was insubordinate in refusing to take down the Video after being ordered to do so. Public employees are expected to obey lawful direct orders from their superiors, even if the employee believes the order is inappropriate. See Beal, et al. v. Boston Public Schools, 18 Mass. Civ. Serv. Rptr. 57, 60 (2005) (finding that storekeeper's refusal to follow supervisor's directive was not justified when formal outlet for grievances existed). Employees who disagree with a direct order from a superior should obey the order and subsequently file a grievance through appropriate channels. See LaFlamme v. City of Holyoke, 21 MCSR 673, 675 (2008) (upholding termination of repairman for insubordination when repairman could have obeyed the order and later complained to the union); Ouillette v. Cambridge, 19 MCSR 299, 303 (2006) (affirming plant operator's five-day suspension where operator willfully disobeyed an order he believed violated his labor rights). The Appellant at no point disputed the fact that he disobeyed a direct order from a superior. Captain Moriarty, who relayed the order on behalf of Chief Febo, issued the order to the Appellant, who clearly ranked below both superior officers. As Department Rule 1.4.1 recognizes, police departments are comprised, by necessity, of a "clearly defined hierarchy of authority." Without "unquestioned obedience of a supervisor's lawful command," the Department would find it extremely challenging to ensure even the most basic degree of public

safety. As the Appellant is aware from his tenure in the United States Marine Corps, disobeying a direct order from a superior officer threatens a paramilitary organization's ability to keep the public safe and operate efficiently. In this case, the Appellant violated Department Rule 1.4.1, Section V(I), by refusing to obey Chief Febo's lawful order to take down the Video.

The Appellant argues he was not obligated to follow Chief Febo's order because he posted the Video while he was off duty and physically located outside of Holyoke's city limits. This argument lacks any support in precedent. The Commission has previously held that "[o]ff-duty misconduct properly can be the basis for discipline when the behavior has a 'significant correlation' or 'nexus' between the conduct and an employee's fitness to perform the duties of his public employment." Kraus v. Town of Falmouth 29 MCSR 340, 344 (2016). As discussed below, the Appellant's video and subsequent media interviews exclusively concerned matters related to his work for the Department. Police officers do not execute their duties—or even live their private lives—in a vacuum. Failing to comply with a superior officer's directive, whether or not it relates to conduct engaged in off-duty, undermines the "clearly defined hierarchy of authority" necessary for successful policing. By posting the Video, the Appellant publicly lambasted the Department and its officers with many serious accusations without ever submitting those concerns through the chain of command. Instead of giving the Department notice of these issues and enabling the Department to properly address them, the Appellant forced the Department to endure the public fallout while he further disrupted the chain of command by refusing to remove the Video. Not only did the Appellant refuse Chief Febo's removal order, but he also admitted to four different media outlets that he had disobeyed a direct order to take the Video down. Open admissions of such insubordination may suggest to the public that the Department is unable to manage its own ranks, and therefore may not be reliable in combatting crime. The Appellant's conduct, both in disobeying a direct order and broadcasting that refusal

in interviews with news outlets, clearly undermined his ability to perform his duties as a Holyoke police officer. See Kraus, 29 MCSR at 344. That the Appellant was physically outside Holyoke's boundaries for much of this activity does not exempt him from placing foremost his duties to his employer, which in normal circumstances at least, include a duty of loyalty. See Everton v. Town of Falmouth 26 MCSR 488, 494 (2013) (commanding police officers on duty "have the prerogative, essential to a paramilitary organization … to expect that their lawful orders will be obeyed.")

***Conduct unbecoming***

I also agree with Mayor Murphy's determination that the Appellant engaged in conduct unbecoming of an officer, and thereby violated Department Rule 7. Rule 7 requires officers to refrain from engaging in conduct that "brings the Department into disrepute . . . or that which impairs the operation or efficiency of the Department or employee." "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." Kinnas v. Town of Shrewsbury, 24 MCSR 67, 73 (2011). Police officers take an oath subjecting themselves to a higher standard of conduct than the citizens they are sworn to protect, and must remain truthful in all dealings to maintain the public's trust in the police. See Garrett v. Haverhill, 18 MCSR 381, 385 (2005); Royston v. Billerica, 19 MCSR 124, 128 (2006). The Appellant made numerous allegations against the Department and its officers, many of which were proven to be false or lacked a good-faith factual basis. For example, the Appellant charged fellow police officers with stealing federal grant monies intended to pay for officer overtime shifts. Later investigations proved this accusation to be unfounded and Appellant furnished no evidence to sustain his charge.

Both in the Video and while testifying before the Commission, the Appellant claimed that he had tried to discuss his allegations with his supervisors and union before posting the Video. The Appellant provided no evidence to establish that he had notified his superiors or the union before airing his accusations to a wide public audience. In fact, the Appellant admitted during a radio interview that he never approached HPD's Internal Affairs unit with any of his concerns because, allegedly, that unit was "as dirty as can be." Captain Reyes, who managed the Professional Standards Division and was charged with investigating these types of allegations, testified that neither the Appellant nor anyone else reported any of the Appellant's specific charges to him. Nor did either Chief Pratt or Mayor Murphy hear directly from Appellant regarding any of the complaints he aired in the Video. The Appellant claimed that he had approached Captain Reyes regarding his concerns but, when pressed for details, the Appellant testified that he had never submitted any formal complaint to Captain Reyes and could not recall any details of the alleged conversation. The Appellant failed to offer any evidence or credible testimony that he had contacted his union, supervisors, the press, or the Mayor's office at any time prior to posting the Video. The only credible evidence of contact between the Appellant and Chief Pratt regarding the Appellant's concerns arose after the Appellant had published the Video. Thus, I do not credit the Appellant's testimony that he had attempted to follow the chain of command prior to releasing the Video.

The Appellant was also untruthful, or at least spoke recklessly about matters he lacked personal knowledge of, in relaying most of his more serious allegations. Here are some clear examples of Appellant making allegations that he has failed to provide any evidence to support:

- The Appellant was punished for speaking out against the Department: Not only did the Appellant not speak out within the Department, there is no evidence that the Appellant was ever disciplined prior to posting the Video. The "per se, administrative role" that the

Appellant claimed was imposed on him by Chief Febo for speaking out was actually a sought-after records officer position. Rather than punishment, officers vied for the records officer position due to its favorable schedule and additional overtime opportunities. Additionally, the Appellant had voluntarily requested this position. As the Appellant noted in the Video, he had never been disciplined during his employment with the Department. Yet, the Appellant claimed that he was the victim of retaliation for speaking out. Though I did not examine any evidence relating to the Appellant's applications with other departments, his HPD employment file contained Captain Reyes's recommendation against employment with the Department as a result of the Appellant's pre-hire misrepresentation of his residency. Since the Appellant did not complain to the Department about his concerns, I find it more likely that his falsehoods regarding his prior residence undermined his transfer applications than any coordinated effort by the Department to sabotage his future career prospects. Therefore, the Appellant was not punished for voicing his concerns to the Department prior to posting the Video, and he either intentionally lied or spoke recklessly on this point without regard for truth or falsity.

- "I've had supervisors, um, attempt to, um, tarnish my name. I've had supervisors that have lied on the stand." The Appellant provided no evidence to substantiate either of these claims. For a police officer to commit perjury on a witness stand is one of the gravest offenses they could commit. The Appellant could not provide any example or evidence of such egregious misconduct ever having actually occurred.
- "You have officers who have, um, assaulted people with their boats, who have been labeled as racists." The Appellant alleged that private citizens have been assaulted by Department officers utilizing their boats. The only relevant police report in the record

involved one HPD officer driving a boat on the Connecticut River who allegedly berated another boatload of citizens; this report, however, contained no allegation of assault. While the Appellant framed this incident as an example of the Department failing to discipline officers engaged in misconduct, the officer in question in fact was given a verbal warning, a form of discipline. Further, contrary to the Appellant's allegation, this officer, although given a verbal warning, was never accused of racism.

- "You have had people who have stolen money." In context, the Appellant clearly is referring to fellow police officers—but, once again, he furnished no evidence to substantiate this claim.
- Appellant allegedly worked with "cops that like to beat their wives." Again, the Appellant provided no evidence to substantiate this allegation.

Whenever the Appellant was asked to back up his allegations, he would argue that other people or agencies bear the burden of proving the truth or falsity of his claims. I do not find this explanation satisfactory. Without any evidence countering the Respondent's witnesses and exhibits, the Appellant was unable to provide any basis for his allegations. By posting the Video and repeating the unsupported allegations numerous times to the media, without any basis or adequate justification, I find that the Appellant engaged in conduct unbecoming of a police officer.

***Unwarranted Criticism and the Appellant's Social Media Policy Violations***

Finally, I agree with Mayor Murphy's determination that the Appellant violated Department Rule 46 and Section 10.1.2 of the HPD's Standing Operating Procedure. Rule 46 is unambiguous and prohibits public criticism of the Department and its officers if it is "defamatory, obscene, unlawful, is intended to undermine the effectiveness of the department, is insubordinate, or is made with reckless disregard for truth or falsity." Respondent's Exhibit 1.

As discussed above, the Appellant made numerous grave accusations against the Department or its sworn personnel with, at the very least, a gross and reckless disregard for truth or falsity. Even if some of the claims reflected a kernel of truth, or could be accepted as a matter of mere personal opinion, the Appellant's stubborn refusal to remove (even temporarily, pending investigation) the Video and his subsequent media tour transformed potentially acceptable criticism into insubordination after the Appellant had been ordered to take the Video down. Similarly, the Appellant violated the HPD's social media policy by posting "material on the internet . . . adversely [affecting] the efficiency or integrity of the Holyoke Police Department." (Respondent Exhibit 1). Clearly, allegations of murder, assault, theft, racism, and corruption will tend to discredit the integrity, professionalism, and efficiency of a police department. Regardless of whether the Appellant knew some of the allegations were false, he should have considered the broader impact of his statements. In the past few years, police departments have been forced to deal with the aftermath of highly-publicized and large-scale incidents of police brutality and misconduct. Regardless of the Appellant's intent, a reasonable citizen of Holyoke could accept at least some of the Appellant's allegations at face value.[6] After seeing the Video, it is entirely plausible that a Holyoke civilian might honestly believe the Appellant's claims about the racist, corrupt, and unlawful department, and choose not to cooperate with or notify the Department of criminal activity. Because the Appellant could not demonstrate any merit to his accusations, I

[6] The Appellant made a number of inartful claims that could reasonably be misconstrued by ordinary citizens of Holyoke. The Appellant's assertion that Department police officers are "literally allowed to get away with murder," while likely not an explicit accusation of homicide, is an additional illustration of the Appellant's recklessness in posting the Video. In the context of making unsupported accusations of corruption on the part of the Department's Hispanic police chief, and then claiming without evidence that Latinos are deliberately targeted for discriminatory treatment, the Appellant undermined the local citizenry's trust in their municipal police department, which is proper grounds for discipline. "A police department and the public must be able to trust that officers will not justify the use of unlawful force or other illicit disparate treatment or targeting of individuals because of their race and backgrounds." Hussey v. City of Cambridge, No. 21-CV-11868-AK, 2022 WL 6820717, at *5 (D. Mass. Oct. 11, 2022).

find that the Appellant violated the Department's social media policy and Rule 46, Criticism of Department.

***The Appellant's First Amendment Defense***

The Appellant's sole defense to violating the Department's social media and criticism policies is that the statements he made in the Video and subsequent interviews were protected by the First Amendment. The Appellant repeatedly argues that his public accusations were matters of public concern, and thus could not form the basis for disciplinary action. Specifically, Appellant points to the Department's social media and criticism policies' exceptions for "matters of public concern." Several of the Appellant's most problematic statements, however, do not qualify for First Amendment protection as matters of public concern. The Appellant argues that because his statements involved matters of "*inherent* public concern," he is automatically protected from all disciplinary actions relating to the statements. This is incorrect. In Pickering v. Board of Ed., the United States Supreme Court recognized that while public employees do not "relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest," government employers still retain a strong interest in regulating the speech of their employees. 391 U.S. 563, 568 (1968). Courts in the First Circuit (authoritative local interpreters of First Amendment rights), following this binding Supreme Court precedent on freedom of speech, employ a three-step inquiry when examining matters of public concern:

> First, a court must determine 'whether the employee spoke as a citizen on a matter of public concern.' Second, the court must 'balance … the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' Third, the employee must 'show that the protected expression was a substantial or motivating factor in the adverse employment decision.' If all three parts of the inquiry are resolved in favor of the plaintiff, the employer may still escape liability if it can show that 'it would have reached the same decision even absent the protected conduct.'

Decotiis v. Whittemore, 635 F.3d 22, at 29-30 (1st Cir. 2011) (citations omitted).

Speech addresses a matter of public concern if the topic is a matter of political, social, or other concern to the community. Connick v. Myers, 461 U.S. 138, 145 (1983). If the topic relates only to a matter of personal interest to the speaker, "a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency." Taylor v. Town of Freetown, 479 F. Supp. 2d 227, 236 (D. Mass. 2007) (citing Connick, 461 U.S. at 147).

The analysis used to determine whether a public employee was speaking as a citizen or pursuant to their official duties centers on identifying the duties the employee is "expected to perform" and then determining if the speech in question was made "pursuant to those responsibilities." Decotiis, 635 F.3d at 31-32. This requires "a hard look at the context of the speech," and courts may consider the following non-exclusive factors:

> whether the employee was commissioned or paid to make the speech in question; the subject matter of the speech; whether the speech was made up the chain of command; whether the employee spoke at her place of employment; whether the speech gave objective observers the impression that the employee represented the employer when she spoke (lending it "official significance"); whether the employee's speech derived from special knowledge obtained during the course of her employment; and whether there is a so-called citizen analogue to the speech.

Stuart v. City of Gloucester, Civil Action No. 18-cv-11877-ADB, 12 (D. Mass. Jul. 15, 2019).

The second part of the analysis requires a court to "balance the value of an employee's speech—both the employee's own interests and the public's interest in the information the employee seeks to impart—against the employer's legitimate government interest in preventing unnecessary disruptions and inefficiencies in carrying out its public service mission." Decotiis, 635 F.3d at 35 (citations omitted). This inquiry is fact-intensive and will consider "(1) 'the time, place, and manner of the employee's speech,' and (2) 'the employer's motivation in making the adverse employment decision.'" Id. (quoting Davignon v. Hodgson, 524 F.3d 91, 104 (1st Cir. 2008)). If a court finds that the employer's restrictions are only those "necessary for [public]

employers to operate efficiently and effectively," the public employee's First Amendment rights have not been violated. Additionally, "[t]he First Circuit and other courts have recognized that the government's interest [in regulating employee speech] is 'particularly acute in the context of law enforcement,' where there is a 'heightened interest' in 'maintaining discipline and harmony among employees.'" Hussey 2022 WL 6820717, at *5.

In this case, I will assume that, in most instances, the Appellant spoke as a citizen on matters of public concern.[7] The City argues that false and defamatory statements are not protected at all as matters of public concern. I decline to endorse this proposed principle. Neither the Supreme Court nor the federal appellate courts have resolved the issue of whether false or reckless statements can qualify as matters of public concern. In Brasslet v. Cota, the First Circuit Court of Appeals refused to find that erroneous statements by public employees are per se unprotected by the First Amendment. 761 F.2d 827, 844 (1st Cir. 1985). Instead, the Court held that "erroneous statements of public concern will be protected *unless* they are shown to have interfered with the employee's performance or the regular operation of his governmental agency." Id. (emphasis added). Therefore, I need only to determine if the Holyoke Police Department's interests in maintaining efficient and effective operations outweighed the Appellant's interests in free expression.

The City has proven legitimate government interests that substantially outweigh the Appellant's personal interests in speaking loosely, colloquially, and arguably misleadingly as a citizen on matters of potential public concern. When balancing both parties' interests in a public employee's speech, courts should consider:

> (1) whether [the allegedly protected activity] was directed against those with whom plaintiff is regularly in contact such that it might impede harmony among

[7] Whether the Appellant properly was ordered to undergo remedial training in applying a tourniquet is one example, however, of an issue of purely personal concern that the Appellant inappropriately discussed publicly.

> coworkers or the ability of supervisors to maintain discipline; (2) whether plaintiff's activity has a detrimental impact on those with whom he must maintain personal loyalty and confidence for the fulfillment of his job responsibilities; and (3) with regard to erroneous statements concerning matters of public concern, whether such statement impedes plaintiff's performance of his daily duties or the regular operation of [the Department] generally.

McDonough v. Trustees of Univ. Sys. of New Hampshire, 704 F.2d 780, 784 (1st Cir. 1983).[8]

Publicly accusing one's coworkers and employer of engaging in unlawful activity, without any basis, substantially undermines the trust and comradery needed for effective policing. Loose allegations of racism, corruption, and theft of overtime seriously disrupt the efficient day-to-day operations necessary for a functioning police department. By sharing his largely unfounded theories on a widely accessed online platform using inflammatory language, the Appellant "maximized the potential disruption" for the Department. Antonellis v. Dep't of Elder Affairs, 98 Mass. App. Ct. 251, 262 (2020) (holding that substantial disruption from state employee's repeated use of "injudicious language" in statements to media outlets about an agency's ongoing business outweighed employee's interests in speaking as a citizen on matters of public concern, warranting discipline). At least some of the Appellant's most serious charges are unfounded and lacked a reasonable basis in fact. Multiple high-ranking officers had to devote considerable time to investigating and responding to the Appellant's claims. Additionally, the Appellant was aware of likely negative repercussions from his statements, given that he acknowledged in the Video that he would likely be fired. The Appellant hurled many serious accusations directly against Chief Febo and other officers with whom he worked on a daily basis. If the Appellant were to resume his work with the Department, few officers

[8] Although I am relying principally on federal court precedents to analyze the Appellant's First Amendment defense, Massachusetts appellate courts have signaled that a very similar analysis governs review of disciplinary action in the face of disruptive public employee speech under the Massachusetts Declaration of Rights. In MacDonough v. Bd. of Directors of Massachusetts Hous. Fin. Agency, the Appeals Court of Massachusetts explicitly adopted the McDonough court's articulation of the free speech versus efficient operations balancing test. 28 Mass. App. Ct. 538, 544 (1990).

would likely feel comfortable serving alongside someone who had openly disobeyed the chain of command and failed to follow internal procedures. Despite his awareness of the great potential for disruption from posting the Video, the Appellant later boasted about his outright refusal to remove the Video after receiving a direct order from a superior officer.

The Appellant's insubordinate, defamatory, and reckless conduct also caused actual disruptions in the Department's operations. As discussed above, the Appellant's conduct threatened the Department's interests in effectively preventing crime and ensuring public safety with the public's support. The allegations in the Video also forced the Department to divert resources and officers away from public safety efforts in order to investigate wild accusations. After the Video was posted, Chief Pratt noted several disruptions that took time away from officers' regular patrol duties. On one occasion, officers were dispatched to the Juvenile Court in Holyoke after reports of individuals being disruptive on site and filming persons entering and exiting the courthouse. When officers arrived at the scene, the individuals, part of a group called "Mass Accountability," yelled at the officers and referenced Appellant by name at least seven times. Respondent's Exhibit 27.[9] By accusing the Department of deep-seated corruption and serious criminal activity, the Appellant significantly undermined the public's trust in the Department. The consequences of the Appellant's actions were not only real, but demonstrably harmful to the efficiency to be expected of a police department. I find that the Department's termination of the Appellant based on the Appellant's speech was justified notwithstanding the exercise of his First Amendment rights.

[9] Mass Accountability posted on the YouTube platform a video of their representatives' interactions with Holyoke police officers showing that their protest was driven in large part by the Appellant's earlier YouTube accusations.

***No Disparate Treatment***

Finally, the Appellant argues that the Department unequally applied its social media policy, given that the Department has not previously (or since) terminated an officer for violating the policy. This argument lacks merit. First, the Appellant was not terminated solely for violating the social media policy. Mayor Murphy terminated the Appellant after finding the Appellant had violated four distinct Department policies. Second, other officers who violated the social media policy were given verbal warnings and removed the postings immediately after a superior officer instructed them to do so. Third, the Appellant's Video was significantly more disruptive than any other officer's posting. For the most part, the other officers merely posted pictures of themselves in uniform with police paraphernalia (see Appellant's Exhibits 1-10, 12-16), while the Appellant posted a forty-three minute video containing numerous unfounded claims against the Department and then refused to take it down despite a superior officer's direct order. The Appellant's conduct was far more disruptive.

**CONCLUSION**

For above-stated reasons, I recommend that the Appellant's appeal in Case No. D-21-213 be ***denied***.

Civil Service Commission

*/s/ Robert L. Quinan, Jr., Esq.*

Robert L. Quinan, Jr., Esq.
General Counsel and assigned Presiding Officer

Date: March 24, 2023

Notice to:
Scott A. Lathrop, Esq. (for Appellant)
Russell J. Dupere, Esq. (for Respondent)