COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

EDWARD SLOCUM,
Appellant
v.
TOWN OF WHITMAN,
Respondent

D-18-076

Appearance for Appellant:

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Appearance for Respondent:

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Commissioner:

Paul M. Stein

DECISION

The Appellant, Edward Slocum, acting pursuant to G.L.c.31,§43, appealed to the Civil Service Commission (Commission) from the decision of the Respondent, the Town of Whitman (Whitman), suspending him for forty-five (45) days from his tenured position of Police Sergeant. in the Whitman Police Department (WPD) and demoting him from that position to Patrolman.[1] The Commission held a pre-hearing conference in Boston on June 5, 2018, and held a full hearing, which was digitally recorded,[2] on July 26 & 27, 2018 and August 24, 2018 at the UMass School of Law in Dartmouth. The full hearing was declared private, with witnesses sequestered. Forty

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

[2] CDs of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CD to supply the court with the stenographic or other written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

(40) exhibits were received in evidence at the hearing (*Exhs. A; B.1 through B.19; C through L; N through W*).[3] The Commission received Proposed Decisions on November 5, 2018. For the reasons stated below, the Appellant's appeal is allowed. .

FINDINGS OF FACT

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

Called by the Town of Whitman:

- WPD Officer Patrick Burtt-Henderson
- WPD Officer William Balonis, Jr.
- WPD Officer Kevin Harrington
- WPD Officer Robert Stokinger
- WPD Lieutenant Christine May-Stafford
- WPD Detective Eric Campbell
- Raymond A. Scichilone, Municipal Police Training Committee
- WPD Deputy Chief Timothy Hanlon
- WPD Chief Scott Benton
- Whitman Town Administrator, Francis J. Lynam

Called by the Appellant:

- Mr. B, Whitman resident
- WPD Officer Edward Slocum, 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. The Appellant, Edward Slocum, is a tenured full-time permanent sworn police officer with approximately thirty (30) years of service with the WPD. He was promoted to Police Sergeant in 1994 and served in that position until his demotion to Patrolman as a result of the incident that gave rise to this appeal. He also served as Acting Police Chief for about a year after the retirement

[3]One proffered exhibit was excluded on the objection of the Respondent (*Exh.Y-ID*). Two exhibits were marked for Identification (ID), with objections taken under advisement. After considering the objections and the relevant evidence in the record, I now admit those two documents in evidence for what they may be worth. (*Exh.M & Exh.X*)

of a former chief in 2006 and selection of (then Sergeant, now Lieutenant) May-Stafford as the next permanent Chief in 2007. (*Testimony of Appellant & May-Stafford*)[4]

2. Officer Slocum is a certified first-responder trained to render emergency medical care, including CPR, first-aid, and recognizing signs of a wide range of common medical issues, which he had regularly encountered during hundreds of medical emergencies in the line of duty, including drug overdoses, heart attacks and strokes. (*Exh. Q; Testimony of Appellant*)[5]

3. Officer Slocum is re-certified bi-annually as a first responder and receives annual in-service training through the Massachusetts Municipal Police Training Committee (MPTC), which includes, among other things, legal updates on such issues as arrests and searches with and without warrants. He received a copy of the 400-plus page 2016 edition of "Hanrahan's Police Officer's Law Manual" (Hanrahan Manual) distributed to all WPD officers. The Hanrahan's Manual is updated annually and updates distributed to WPD personnel via e-mail. (*Exhs. B.14, M, O through S & U; Testimony of Appellant, Benton, Burtt-Henderson, Balonis & Scichilone*)[6]

4. WPD officers are also required to comply with the "Rules and Regulations for the Government of the Police Department of Town of Whitman" (WPD Rules and Regulations), and all policies issued by the WPD, which include, in particular, a "Towing Policy" (WPD Towing Policy). (*Exhs. B.15 & T; Testimony of Appellant*)

5. Prior to the incident that gave rise to this appeal, Officer (then Sgt.) Slocum was disciplined on two occasions:

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[4] Chief May-Stafford served in that position until 2012, when she voluntarily returned to her current position of Lieutenant. Chief Benton has been the WPD Chief since 2012. (*Testimony of May-Stafford & Benton*)

[5] Whitman reported approximately 40 to 50 drug overdoses (approximately 5 to 10 fatal) annually from 2015 through 2018. (*Exh. V*)

[6] Exh. U contains selected pages from the Hanrahan Manual concerning warrantless searches and, in particular, information about the Protective Custody Law, G.Lc.111B, §1 et seq, as well as the so-called community caretaker function, a judicially-created exception to the constitutional requirement to obtain a warrant for police searches in certain circumstances that will be addressed in further detail elsewhere in this Decision..

- A three-day suspension for sleeping on duty, reduced to a two-day suspension, after grievance, by agreement in November 2017. (*Exhs. C through F*)

- A written reprimand in January 2017 for issuing two firearms licenses with hunting and target restrictions, contrary to Chief Benton's orders to issue the licenses "without restrictions." (*Exhs. G & H*)

6. Also, in or about 2017, the WPD started to provide Sgt. Slocum with accommodations for a long-standing disability, primarily, to better enable him to perform his administrative tasks, such as preparing reports. (*Testimony of Appellant & Benton*)

The November 29, 2017 Incident

7. On November 29, 2017, Sgt. Slocum was the Patrol Supervisor on the overnight shift (12 AM to 8 AM), assigned to Cruiser 305. Also on patrol duty was Officer Balonis, assigned to Cruiser 306, and Officer Burtt-Henderson, assigned as the WPD Dispatcher.[7] (*Exhs. B.2 & B.13; Testimony of Appellant*)

8. At approximately 2:00 AM, an individual later identified as Mr. B, then a Scituate resident, arrived in his pickup truck at the home of a female friend in a residential neighborhood of Whitman. He was a carpet installer who kept tools and materials in the bed of his truck. He had been drinking heavily. After spending two or three hours with his friend, she told him to leave, as she didn't want her children to see him. (*Exh. B; Testimony of Mr. B*)

9. Mr. B realized that he was then in no condition to drive. He backed his truck out of his friend's driveway and parked it on the opposite side of the street, about 30 feet from her home. He took the keys out of the ignition and placed them, along with his license, in plain view on the console of the truck. He then lay back in his seat and went to sleep. His intention was to sleep until he was sober enough to drive to work later in the day. (*Testimony of Mr. B*)

[7] The overnight shift was normally staffed with three officers in cruisers but, on this occasion, one of the regularly scheduled officers had taken a "comp day" and was not replaced, leaving the shift short one officer.(*Exh.B2*)

10. At 6:57 AM, Officer Burtt-Henderson received a call for service on the "non-emergency" line from a resident who reported a truck was parked in front of his house with a party sleeping in it. The caller said he was on his way to work but his wife and kids were home and he thought it was "weird" to see the truck there. Officer Burtt-Henderson asked the caller to provide the license plate which he did. He ran a check on the commercial license plate he was provided, which identified the registered owner as Mr. B. The dispatch officer logged the call as "Suspicious Activity". As Officer Balonis was then occupied with a traffic stop, Sgt. Slocum was dispatched to the scene, provided the name of the registered owner and told the occupant appeared to be asleep in his truck. (*Exhs. B.2, B.3, B.8, B.10, B.12 & B.17; Testimony of Appellant, Burtt-Henderson & Balonis*)

11. Sgt. Slocum arrived on scene at approximately 7:01 AM. He located the truck (a 2002 Chevrolet pickup in poor condition) legally parked in front of the caller's residence. The vehicle was not running and he noticed the tools and carpet material in the bed of the truck. He saw the male occupant (Mr. B) in the driver's seat with his feet on the dashboard to the left of the steering wheel and a "hoddie" sweatshirt with the hood over his head. (*Exhs. B, B.2, B.3, B.7, B.8 & B.17; Testimony of Appellant*)

12. Sgt. Slocum looked closely at Mr. B and, applying his first-responder training, made a visual check of Mr. B's "A,B,Cs" (Airway, Breathing, Circulation). He could see that Mr. B's airway was open by the way his head was positioned (not slumped over), he was breathing normally and his skin color was normal. He looked for other signs of impairment or medical distress, such as urinating, vomiting, frothing around the mouth, or other evidence of drugs or alcohol use, and saw none. (*Exh. B.8; Testimony of Appellant*)

13. Sgt. Slocum attempted to wake up Mr. B by knocking on the driver side window (which was fully closed) and banging with his flashlight, shining the flashlight[8], and shaking the truck. Mr. B was "responsive" to the knocking and "began to move and wiggle in his seat". He "squinted" when the flashlight was shined at him, but never opened his eyes or further acknowledged that he knew of Sgt. Slocum's presence. Sgt. Slocum tried to open the driver's side door, but found it was locked. He walked around to the passenger side and found that door also locked. (*Exhs. B.8 & B.18; Testimony of Appellant*)

14. At 7:08 AM, Officer Balonis cleared the motor vehicle stop and radioed the dispatcher and asked: "What's going on at [address]?" The dispatch officer responded: "homeowner reported truck in front of his house with gentleman sleeping in it." (*Exh.B17*)

15. Sgt. Slocum radioed: "I'm with the party now, trying to wake him up. He's moving in there but not waking up." (*Exh. B.8 & Exh. B17*)

16. Officer Balonis radioed: "Sarge, you need help there?" and Sgt. Slocum replied: "Seems like he will be alright. He's moving. Just trying to get him going here." (*Exh.B17*)

17. At 7:09 Sgt. Slocum confirmed with the dispatch officer that the party in the truck (Mr. B) was the registered owner. (*Exhs. B.8 & B.17*)

18. At 7:14, Sgt. Slocum radioed the dispatch officer to ask: "Who called on this?" and "Would he be at the residence?" The dispatch officer replied with the address and stated: "I would guess he left for work . . . He said he noticed him on his way out. Not sure if he was going to wait for your response or not." No mention was made about other household members who the caller had told the dispatcher were also at the residence. (*Exh. B.17*)

[8] Sunrise in Whitman on November 29, 2017 occurred at 7:49 AM. (*Administrative Notice [http://www.timebie.com /sun/ whitmanma.php]*)

19. Seeing carpet and tools in the bed of the truck, Sgt. Slocum thought Mr. B could be a contractor working for the homeowner. He started to walk to the caller's residence but stopped after the dispatcher said he didn't think anyone was home, which ruled out the hypothesis that Mr. B had business with the homeowner. Due to the early hour, he chose not to disturb anyone or canvass the rest of the neighborhood. (*Exh. B.8 & B.17;Testimony of Appellant*)

20. After approximately 20 minutes on scene, Sgt. Slocum decided that Mr. B was simply in a deep sleep and was not in need of any immediate medical attention. He reported: "Unable to get him awake. Moving around in there. Keys out of the ignition. No Threat. Looks fine at this point." At 7:17 AM, Sgt. Slocum cleared the call and said he would "let the next shift know and they will come by and check on him." (*Exhs. B.2, B.3, B.8 & B.17; Testimony of Appellant*)

21. Meanwhile, Officer Balonis decided on his own initiative to back-up Sgt. Slocum. He did not notice the parked truck as he drove past, as he was looking only for Sgt. Slocum's cruiser who had just cleared. He caught up with Sgt. Slocum and they talked briefly after which Officer Balonis resumed patrol and Sgt. Slocum headed back to the station to attend to administrative duties. (*Exh. B.10; Testimony of Appellant & Balonis*)

22. Mr. B. was "happy" to be left alone. Knowing he was still too drunk to drive, he decided to stay put and went back to sleep. (*Testimony of Mr. B*)

23. At the 8:00 AM change-of-shift roll call, Sgt. Slocum spoke to the day shift commander, Lt. May-Stafford. He advised her about Mr. B, whom he described as asleep in his truck, moving around, with no signs of drug or alcohol use, but he could not get him to unlock the door to the vehicle. (*Exhs. B.2, B8 & B9; Testimony of Appellant & May-Stafford*)

24. At approximately 8:30 AM, after being briefed and reviewing the incident log, Lt. May-Stafford and Patrolman Stokinger proceeded to the scene. Officer Stokinger followed the same

procedures to attempt to wake up Mr. B, banging on the door and shaking the truck, with similar lack of success. (*Exh. B, B2, B.$B.9 & B.17: Testimony of May-Stafford & Stokinger)*

25. At 8:31 AM, Lt. May-Stafford called for a Whitman Fire Department ambulance which carries special tools to access a locked vehicle. These tools are designed to minimize damage caused by a forced entry but they can cause damage that requires replacement of scratched body parts and bent door frames. (*Exhs. B.2 & B.17; Testimony of Appellant, Benton, May-Stafford, Burtt-Henderson, Balonis & Stokinger*)[9]

26. At approximately 8:32 AM, after further knocking on the window, Mr. B "woke up" and opened the truck door, revealing a strong odor of alcohol. He could not say where he was or where he had been that night. A field sobriety test was not performed. The call for a fire department response was cancelled. (*Exhs. B.2 & B.17; Testimony of May-Stafford, Balonis & Stokinger*)

27. At 8:38 A.M., Officer Stokinger radioed that a towing company had been called to remove and store the truck. The rationale for that decision was a concern of the officers on scene that it would not be safe to leave the truck on the street with tools in the bed and cab. (*Exh. B.2, B4, B.7, B.9 & B.17; Testimony of May-Stafford & Stokinger*)

28. Mr. B's identity was confirmed. He was taken into protective custody and placed in Officer Stokinger's cruiser for transport to the police station. The call was cleared at 8:50 AM. (*Exh. B.2 through B4, B.9 & B.17; Testimony of May-Stafford & Stokinger*)

29. At the police station, a PBT breathalyzer test showed a 0.162 level of intoxication. Mr. B. also admitted to using marijuana the day before. A suicide evaluation showed no risk of harm to himself or others. (*Exhs. B.4 through B.6; Testimony of Stokinger*)

[9] The WPD no longer breaks-into vehicles but relies on the fire department to do so when necessary.(*Testimony of Benton & Hanlon*)

30. At 4:25 PM on November 29, 2017, Mr. B. was released to a female acquaintance (the woman he had been visiting) who picked him up at the police station. (*Exhs. B, B.3 & B.4*)

31. The incident caused an immediate buzz within the WPD. Several officers questioned Sgt. Slocum's decision to clear the call, assuming he had left an "unresponsive" individual who presumably may be overdosing or in medical distress. Officer Burtt-Henderson exchanged texts with Officer Balonis (suggesting he was glad Balonis wasn't asked to respond as it gave him cover if the situation turned out badly), and with Officer Harrington (who called Sgt. Slocum "just lazy"). (*Exhs. B, B10 through B12; Testimony of Burtt-Henderson, Balonis & Harrington*)

The Internal Investigation

32. As was his practice upon arriving for duty each morning, on November 29, 2017, WPD Deputy Chief Hanlon reviewed the overnight shift log, and noted that Sgt. Slocum had responded to a call about a "truck parked in front of [the caller's] house with a party sleeping in it" which Sgt. Slocum had cleared at 7:19 AM after he determined that the occupant was "breathing" but could not be roused and the doors of the truck were locked. A few minutes later, Deputy Hanlon heard the radio transmission requesting the fire department assistance to gain access to the same vehicle and the subsequent transmission that the occupant had been placed in protective custody. This prompted Deputy Chief Hanlon to inform WPD Chief Benton that the initial call may have been mishandled. (*Exh. B: Testimony of Benton & Hanlon*)

33. After Deputy Chief Hanlon later learned that Mr. B had failed a breathalyzer test with a reading of 0.162, Deputy Chief Hanlon called Sgt. Slocum and ordered him to report to his office the next day with union representation. (*Exh. B; Testimony of Hanlon*)

34. After consulting with the Whitman Town Administrator, Chief Benton prepared a letter, immediately placing Sgt. Slocum on administrative leave, ordered him to stay away from the

department and refrain from contact with other WPD staff. Chief Benton handed the letter to Deputy Chief Hanlon, to be delivered to Sgt. Slocum the next day. (*Exh. B, Exh. B1; Testimony of Benton, Hanlon & Lynam*)

35. As ordered, Sgt. Slocum reported to Deputy Chief Hanlon at 8:00 AM on November 30, 2017, accompanied by a union representative. Deputy Chief Hanlon handed each of them a copy of Chief Benton's letter and ordered Sargent Slocum to prepare a report about the incident that "included any reasons he had for clearing the call without getting the occupant of the vehicle to become alert." (*Exh. B; Testimony of Appellant & Hanlon*)

36. While waiting for Sgt. Slocum's report, Deputy Chief Hanlon called the female party who had picked up Mr. B from protective custody. She informed him that Mr. B had called and texted her early in the morning on November 29, 2017 and showed up "obliterated" at her home. When he drove off at her request, she assumed he left the area. She next heard from him when he called her from the WPD police station. (*Exh. B; Testimony of Hanlon*)

37. Deputy Chief Hanlon also called the homeowner who initiated the incident. The homeowner saw Sgt. Slocum arrive. He and his wife watched from a window as Sgt. Slocum tapped on the truck windows, shined his flashlight, and shook the truck with is foot.. The homeowner was concerned that his 8-year old needed to walk past the truck to get a school bus, something he had not told the dispatcher. No one left the house to speak to Sgt. Slocum. (*Exh. B*)

38. Sgt. Slocum submitted his report at 2:30 PM. He wrote that his "only alternatives were to start yelling or use the siren on my car. Because of the hour of the morning, I didn't think that was appropriate. . . .[Mr. B] had not broken any laws and was not a threat to himself or others . . . [and] was not in any medical distress. I saw no exigency that would justify damaging his personal property or violating his civil rights."(*Exhs. B & B.8;Testimony of Appellant & Hanlon*)

39. Sgt. Slocum's report largely tracked the incident log and radio transmissions but did include one statement not corroborated by other evidence: "After clearing the call at 7:18 AM *it* was my intention to follow-up and check back with [Mr. B] before the end of my shift. At 7:32 AM I was sent to an alarm call and not able to respond back. " (*Exhs. B2 through B.4 & B.8*) [10]

40. Later in the afternoon of November 30, 2017, Mr. B returned a call from Deputy Chief Hanlon, who told Mr. B that he was not in any trouble and there were no criminal charges taken out against him. Mr. B did hear Sgt. Slocum but didn't acknowledge him or give any "thumbs up" or any indication he was "OK". He just wanted the officer to leave him alone. After the officer (Sgt. Slocum) left, Mr. B thought about driving away but decided to go back to sleep. Deputy Chief Hanlon "commended [Mr. B] for not driving any further [than a 'few houses' down]." Mr. B tried to ignore the other officers who arrived later but they were "having none of that", so he opened his eyes and eventually opened the door. (*Exh. B; Testimony of Mr. B*)

41. Deputy Chief Hanlon thereafter requested and received written reports from Lt. Mau-Stafford and Officers Balonis, Harrington and Burtt-Henderson. (*Exhs. B & B.9 thorough 12*)

42. On December 13, 2017, Sgt. Slocum reported to Deputy Chief Hanlon, with union representation, for a recorded investigative interview. Deputy Chief Hanlon, confronted Sgt. Slocum with the concern that, by leaving the scene without rousing Mr. B or otherwise gaining access to the truck, Sgt. Slocum had failed his duty under the community caretaker "doctrine". Sgt. Slocum repeated his position that, having concluded that Mr. B was asleep, "wriggling" with his feet up, breathing, and with no visible signs of medical distress or cause to believe Mr. B had committed any crime, he would be violating Mr. B's civil rights by "assuming the worst" and forcibly entering the vehicle to make physical contact, and that the fire department would have no

[10] The burglar alarm was reported at 7:25 AM and cancelled at 7:32 AM, after the WPD dispatch received a call back from the alarm company that the "homeowner was all set." (*Exh.B17; Testimony of Appellant*)

greater right to break into the truck than he did. He had never before "walked away from somebody that I felt needed medical attention", noting that, in his entire career, he had to break into a vehicle only once, and that was to extricate a disoriented motorist stuck on railroad tracks who wouldn't heed his request to unlock her door. (*Exhs. B & B18; Testimony of Appellant*)

43. Sgt. Slocum acknowledged that Lt. May-Stafford and Officer Stokinger were able to arouse Mr. B and eventually gained access to the truck, causing him to be placed into protective custody. Deputy Chief Hanlon pressed Sgt. Slocum with a series of "What if's", such as what if he were having a "diabetic reaction", "the next shift could [not] arouse him", or "he comes to and puts the keys in the ignition and he gets down the street and kills a bunch of people." Sgt. Slocum repeated that Mr. B did not request or require medical attention and stated: "You're questioning my discretion on this and I don't understand it." (*Exhs. B & B.18*)

44. Deputy Chief Hanlon also conducted recorded interviews with Lt. May-Stafford, Officers Balonis, Harrington Stokinger and Burtt-Henderson, as well as Detective Eric Campbell (another officer on the 8AM to 4PM shift), who professed varying levels of concern with the way Sgt. Slocum had handled the call involving Mr. B. Excerpts from those interviews follow:

- Officer Balonis assumed from the radio calls that the occupant overdosed on heroin or was intoxicated and, either way, Sgt. Slocum would want him for "grunt work", i.e. physical transport for protective custody or "something else". He was not satisfied with the way the call was cleared, but Sargent Slocum was both his supervisor and investigating officer and he "assumed he knew what he was doing." He confirmed that Officer Burtt-Henderson texted him questioning Sgt. Slocum's handling of the call and not requesting back-up.
- Officer Harrington is assigned as the WPD school officer. He did not respond to the call but monitored it. He said he did not question how the call was handled as Sgt. Slocum was

an experienced supervisor and "there may have been some information that Sgt. Slocum had gathered at the scene that wasn't transmitted over the radio."

- Detective Campbell arrived late in the midst of roll call on November 29, 2017. He heard part of the report involving Mr. B and the follow-up assigned to Officer Stokinger. He was not asked to report to the scene but, when he heard the radio request for Fire Department response he "assumed the worst" (injury or overdose which would call for a detective) and started to get up to respond, but stopped when he heard the request was cancelled. When asked if he had any questions about how the call was handled, Det. Campbell said he didn't "want to Monday morning quarterback someone" and without the facts "it's hard sitting in this position", but "it does raise a concern, I guess" .
- Officer Burtt-Henderson (a relatively junior officer then at the top of the list for the next Sargeant position) thought that the calling party had told him he was leaving for work but also knew that the wife and children were home. He confirmed that his log entries were probably not "verbatim" what Sgt. Slocum reported but "in the nature of what Sgt. Slocum relayed" put into his own words. He closed the call with "services rendered", as he didn't think it should be called anything else, although he knew that Sgt. Slocum had requested follow-up by the next shift. He "expressed disbelief" as to how the call was handled in a text to Officer Balonis while they were still on duty.
- When Officer Stokinger went to check on Mr. B, he found him sitting in the truck, still asleep. Officer Stokinger spotted two empty containers of alcoholic beverages on the floor.[11] Although Mr. B was breathing and moving in his seat, Officer Stokinger was

[11]Mr. B did not consume the contents of those containers that night. They had been in the truck for some time and Sgt. Slocum did not see them during his inspection. I infer that they were dislodged during the second round of shaking the truck by Officer Stokinger (a man of considerably larger stature than Sgt. Slocum).. (*Testimony of Appellant, Stokinger, May-Stafford & Mr. B)*

concerned that the inability to get an acknowledgement of his presence or a response to knocks and pounding was an issue. He was about to get something to break the window, but Lt. May-Stafford suggested calling the fire department instead. He thought that the female who came to pick up Mr. B was someone "known to our department."

- Lt. May-Stafford questioned Sgt. Slocum's handling of the call. Mr. B wasn't "turning blue" but she would not have left him asleep at the scene. She thought she had been told by Det. Campbell that Mr. B was a witness to a stabbing at a local bar and that may have been where Mr. B was drinking that night. (Actually it was Mr. B who was the witness).

(*Exhs. B.19 & C; Testimony of Hanlon, Balonis, Harrington, Stokinger, Burt-Henderson , May-Stafford & Campbell*)

45. On January 8, 2018, Deputy Chief Hanlon submitted a report of his Internal Investigation into Sgt. Slocum's conduct relative to the November 29, 2017 incident. The report concluded that Sgt. Slocum "failed to act in the performance of his duties as a Whitman Police Officer, as a Superior Officer and as a "community caretaker", by failing to take required action to appropriately determine Mr. B's well-being in his initial response and in his failure to follow-up prior to the end of his shift. The report found that this alleged misconduct violated the WPD's Rules and Regulations, 1.F.9 (Required Conduct – Attention to Duty; 1.F.19 (Devotion to Duty); 1.G.10.c (Prohibited Conduct – Incompetence; and 1.G.16 (Neglect of Duty). (*Exh. B & B.15*)

46. By letter dated January 24, 2018, Sgt. Slocum was provided with a copy of Deputy Chief Hanlon's report and informed that a disciplinary hearing on his alleged misconduct as stated in the report would be held before a Hearing Officer (a former Fall River Police Chief), selected by the Whitman Town Administrator upon direction of the Whitman Board of Selectmen (the Appointing Authority) on February 8, 2018. (*Exh. A; Testimony of Lynam*)

47. On April 17, following two days of hearing, the Hearing Officer submitted his report to the Whitman Board of Selectmen. The report found that Sgt. Slocum violated his duty under the "well-established" community caretaking "doctrine", in that (1) he failed to perform "Required Conduct" , i.e., to take appropriate action to ascertain the well-being of Mr. B and, "mitigate or remove a potentially imminent dangerous matter of public concern", which, among other things, included failing to gain access to the truck before leaving the scene, to call for back-up, to speak to neighbors and missing evidence of alcohol consumption; (2) he engaged in "Incompetence", by failing to conform to work standards established for his rank and position, i.e., not being "adequately versed" in, and failing to perform the community caretaking function as understood by all of the other WPD officers who testified; by his "unwarranted concern" for Mr. B's civil rights and his "adamant stance on the issue" in the face of potential danger to others; and (3) engaged in "Neglect of Duty" by failing to take suitable action when an "incident requires police attention or service" by not conducting "an adequate medical evaluation of the unresponsive truck occupant", speaking to neighbors, failing to remove an "imminent threat" from the community and "leaving an unresponsive and unsafe individual" for more than an hour. (*Exh. J*)

48. The Hearing Officer's report noted that the "matter has been a topic of widespread conversation among the rank and file of the Whitman Police Department" where the "consensus is that Sgt. Slocum did not respond appropriately". The report found Sgt. Slocum's persistence that he did act appropriately and assertion that Mr. B's constitutional rights prevented him from breaking into the truck, even after having time to "to reflect or research" the issues, to be an "unconscionable" disparagement of Sgt. Slocum's fellow officers. The Hearing Officer recommended the following discipline:

A. For the violation of the WPD Rules and Regulations – 45 day suspension

B. For the violation of the WPD Rules and Regulations and "clear and convincing evidence of a loss of confidence in the Sgt. that permeates the Whitman Police Department" – reduction in rank from Sgt. to Police Officer;
C. For the lack of working knowledge of the Community Care (sic) Doctrine – retraining as determined by the WPD Chief of Police.

(*Exh. J*)

49. By letter dated April 26, 2018, Sgt. Slocum was officially informed that the Whitman Board of Selectmen, after due notice of an executive session at which Sgt. Slocum was present, unanimously voted to adopt the Hearing Officer's report and imposed the discipline recommended in that report. (*Exhs. K & L; Testimony of Lynam*)

50. Until Sgt. Slocum's demotion, no WPD superior officer had been disciplined by a demotion at any time during the tenure of Chief May-Stafford or Chief Benton. (*Testimony of May-Stafford & Benton*)

51. In 2011, then Chief May-Stafford imposed a one-day suspension on another officer who had failed to appear at a scheduled court hearing so that he could take his daughter to an amusement park and, then, lied to superior officers about the reason for his absence. This officer was later promoted to Sergeant by Chief Benton. (*Exh. X; Testimony of May-Stafford & Benton*)

The Community Caretaker Dispute

52. Chief Benton, Deputy Chief Hanlon, most of the other WPD witnesses held the substantially same opinion of what Sgt. Slocum was obligated to do as a community caretaker upon coming upon a motor vehicle in which an "unresponsive" individual was found. Each witness held the opinion that it was unreasonable for Sgt. Slocum to conclude that Mr. B was sleeping, rather than overdosing or in immediate need of medical attention from an evaluation through the window of the truck and without breaking into the vehicle to verify that Mr. B was merely sleeping. They each believed that, as a community caretaker, Sgt. Slocum was obligated to use force to enter a locked vehicle to ascertain whether or not an "unresponsive" occupant needed such medical

assistance. None of the witnesses could point to any specific training, written policy or other authority that expressly enunciated those conclusions or describe a directly comparable occasion in which they had invoked the "community caretaker" function to break into a locked vehicle (*Testimony of Burtt-Henderson, Balonis, May-Stafford, Stokinger, Hanlon & Benton*)[12]

53. Officer Slocum held a different view. From his perspective, his duty as a community caretaker was to come to the aid of a citizen who was demonstrably in medical distress, and must be tempered with an appreciation for the civil rights of the citizen. Based on the assessment he made of Mr. B, he was not an overdose victim and showed no signs of any need for immediate medical assistance. In the exercise of his discretion, and based on his training and experience, he had already determined that, it was reasonable to leave Mr. B asleep in his truck, for the time being, and that, under the circumstances as he found them, whatever additional information that he could gain by breaking into the truck was outweighed by the risk that such action would be considered use of excessive force and a violation of the constitutional presumption that prohibits "unreasonable" searches and seizures. (*Testimony of Appellant*)

54. In his Commission testimony, Officer Slocum took responsibility for his decision, but continued to maintain that he had acted properly within the discretion he was allowed. He did not deny that many of his peers and superiors reported that they had lost confidence in him, but attributed that to "misinformation." (*Exh. B; Testimony of Appellant*)

55. This Commissioner asked Officer Slocum what he learned during his mandated "retraining" ordered as part of his discipline. The retraining consisted of a five or six hour session with a private attorney experienced in law enforcement law on the first day he returned to duty as

[12] The WPD also called a retired police officer who currently serves as a training instructor at the MPTC Academy which provides in-service training to the WPD. Although he was permitted to testify as an expert, his forte was in "first responder" training and was not responsible for teaching the legal component of the training. (*Exhs N;\ & Q; Testimony of Scichilone*)

a patrol officer after serving his 45-day suspension. Officer Slocum asked many questions during the session. He found much of the information he learned was "consistent" with his prior understanding about the "community caretaker" function. In particular:

- Asked what right he had to ascertain if someone inside a vehicle was intoxicated, he was informed that "unless I have some reasonable suspicion that gets me into the vehicle . . . then I can't."
- Asked what right he had to interact with a person "in charge of", but not operating, a vehicle, he was informed that he would "have the right to interact with them, but my interaction has to be reasonable. I can't force interaction . . . because [that] could lead to an unjustifiable seizure. . . .I could easily converse with him as long as he was willing to converse. But if he refused to converse, then, at that point, my investigation's over."

(*Testimony of Appellant*)

APPLICABLE LEGAL STANDARD

G.L.c.31,§§41-45 requires that discipline of a tenured civil servant be imposed only for "just cause" after due notice, hearing (which must occur prior to discipline other than a suspension from the payroll for five days or less) and a written notice of decision that states "fully and specifically the reasons therefore." G.L.c.31,§41. An employee aggrieved by such disciplinary action may appeal to the Commission, pursuant to G.L.c.31,§42 and/or §43 for de novo review by the Commission "for the purpose of finding the facts anew." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited.

The Commission's role is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). See also Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass.App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, rev.den., 390 Mass. 1102 (1983).

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence[13], when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971); City of 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) See also Mass. Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001).

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 "merit principles" which govern 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.

G.L.c.31, Section 43 vests the Commission with "considerable discretion" to affirm, vacate or modify discipline but that discretion is "not without bounds" and requires sound explanation for

[13] It is within the hearing officer's purview to determine the credibility of live testimony. E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003). *See* Embers of Salisbury, Inc. v. 37 Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Ret. Bd. of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003) (where witnesses gave conflicting testimony, assessment of their relative credibility cannot be made by someone not present at the hearing).

doing so. See, e.g., Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 600 (1996) ("The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio . . . accorded the appointing authority") Id., (*emphasis added*). See also Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983).

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

ANALYSIS

Analysis of the merits of this appeal begins by addressing the role of police officers when acting in what has become generally known as a "community caretaker" function, as opposed to

performing "law enforcement" duties to detect and gather evidence of criminal activity, and, in particular, the judicially-imposed distinctions regarding the rights of citizens and the restrictions placed on police officers to conduct warrantless searches and seizures of persons and property while fulfilling those different functions. The Commission need not decide (and does not decide) which view of the law is the correct one – that espoused by the Appellant or the very different view espoused by the Respondent. The decision that the Commission must make is whether or not the discipline imposed comports with "basic merit principles" of civil service law and is supported by "just cause". As the survey of the jurisprudence below demonstrates, there is considerable uncertainty about the scope of a police officer's duties and responsibilities as a community caretaker, and, under those circumstances, the severe discipline meted out to Sgt. Slocum is not justified as a matter of civil service law and cannot stand.

Federal Constitutional Law

The only two cases to reach the U.S. Supreme Court involving the community caretaker function are 5-4 split decisions. In Cady v. Dombrowski, 413 U.S. 433 (1973), after noting that "decisions of this Court dealing . . . warrantless searches. . .of vehicles. . .[are] something less than a seamless web", the majority decided to make an exception for the routine inventory search of a disabled vehicle taken into custody as a public safety concern (as opposed to one lawfully parked), which was conducted pursuant to "standard procedure in [the] department".[14]

[13] Previously recognized exceptions include: (1) "exigency", applied to law enforcement activity, where officers have probable cause to believe that a serious crime has been committed and delay in obtaining a warrant would risked destruction of evidence, enhanced likelihood of a suspect's escape or would put officer or others in harms way, *e.g.,* Michigan v. Tyler, 436 U.S. 1978) (entry to fight a fire of suspicious origin); *but see* Minnesota v. Olsen, 495 U.S. 91 (1990) (no exigency to enter premises to arrest the getaway driver in a murder investigation after weapon was recovered, killer apprehended and police had house surrounded); Welsh v. Wisconsin, 466 U.S. 740 (1984) (exigency exception did not apply to entry and arrest to preserve blood-alcohol evidence of a non-criminal OUI first offense); (2*)* an "emergency", where an officer had "an objectively reasonable basis for believing that an occupant [was] seriously injured or imminently threatened with serious injury", *e.g.,* Michigan v. Fisher, 558 U.S. 45 (2009) (officers entered home after finding evidence of damaged vehicle with bloody hood and clothes) and Hill v. Walsh, 884 F.3d 16 (1st Cir. 16 (2018) (subject of civil commitment order with history of drug overdose justified entry to search for

> "Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute . . . . Particularly in nonmetropolitan jurisdictions such as those involved here, the enforcement of traffic laws and supervision of vehicle traffic may be a large part of a police officer's job. We believe that the Court of Appeals should have accepted, as did the state courts and the District Court, the findings with respect to Officer Weiss' specific [non-investigatory] motivation and the fact that the procedure he followed was 'standard'."

Id., 413 U.S. at 439-42. In his dissent, Mr. Justice Stewart (joined by Justices Brennan, Douglas and Marshall) saw no reason to create another exception to the constitutional presumption that ":"a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant"

> "[T]he fact that the professed purpose of the contested search was to protect the public safety rather than gain incriminating evidence does not of itself eliminate the necessity for compliance with the warrant requirement. Although a valid public interest may establish probable cause to search. . . [the decisions of this Court] make clear that, absent exigent circumstances, the search much be conducted pursuant to a 'suitably restricted search warrant.' [Citations] . . . What the Court does today in the name of an investigative automobile search is in fact a serious departure from established Fourth Amendment principles . . . That departure is totally unjustified . . . ."

413 U.S. at 450-454 (Stewart, J., dissenting).

In South Dakota v. Opperman, 428 U.S. 364 (1976), the Supreme Court justified a routine inventory search, this time, of the unlocked glove compartment of a locked vehicle impounded for parking violations (which turned up illegal drugs). The majority stated that the "authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge" and the routine practice of conducting a warrantless "caretaking search" of a lawfully impounded vehicle was reasonable. Id., 428 U.S. at 365-376.

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him), citing, Brigham City v. Stuart, 547 U..S. 398 (2006) (officers observed a bloody altercation in progress); (3) implied "consent", *e.g.* United States v. Donlan, 909 F.2d 650 (1st Cir. 1990) (defendant, by opening door, effectively gave officers permission to enter). See generally, Hanrahan Manual, pp. 89-90.

In his concurring opinion, Mr. Justice Powell, as the deciding vote, emphasized that, but for the existence of a "standard procedure", he would not have joined in the plurality decision:

> "[T]he unrestrained search of an automobile and its contents would constitute a serious intrusion upon the privacy of the individual in many circumstances [b]ut . . . the search here was limited to the contents of the unoccupied automobile and was conducted strictly in accord with the regulations of the Vermillion Police Department. . . . [If] inventory searches are conducted in accordance with established police department rules or policy and occur whenever an automobile is seized, [t]here are thus no special facts for neutral magistrate to evaluate [in deciding whether a search warrant should be approved]." 428 U.S. at 376-84.

The four dissenting Justices (Marshall, Brennan, Stewart and White) took issue with the implied premise of the plurality, i.e., that "a person's constitutional interest in protecting the integrity of closed compartments of his locked automobile may routinely be sacrificed to government interests requiring interference with that privacy" noting:

> ". . . [that has] never been the law. . . .[O]ur cases have consistently recognized that the nature and substantiality of interest required to justify a search of private areas of an automobile is no less than that necessary to justify an intrusion of similar scope into a home or office . . . The Court's result . . . elevates . .. mere possibilities [of the need to protect property] above the privacy and security interests protected by the Fourth Amendment.. . . On remand it should be clear that this Court's holding does not preclude a [different] resolution of this case or others involving the same issues under any applicable state law." 428 U.S. at 384-96.

In MacDonald v. Town of Eastham,745 F.3d 8 (1st Cir. 2014), police entered a home after neighbors reported the door had been left wide open and discovered a marijuana-growing operation. The Massachusetts state court judge rejected the community caretaker defense and suppressed the evidence (as wrongfully seized in a warrantless search), charges against the homeowner were dropped, and the homeowner sued the town and its police officers for violation of his civil rights. The First Circuit did not question the state-court decision to suppress the evidence but dismissed the civil rights claim before it on a close call of qualified immunity:

"[T]he defendant officers seek shelter in the community caretaking exception. That exception . . . has become 'a catchall for the wide range of responsibilities that police officers must discharge aside from their criminal enforcement activities.' [Citation]. . ."

"*The question is complicated because courts do not always draw fine lines between the community caretaking exception and other exceptions to the warrant requirement . . . decrying the 'contradictory and sometimes conflicting' way in which the community caretaking, emergency, and emergency aid doctrines have been applied.* . . . [Citations]"

"The same sort of *disarray is evident in the manner in which courts have attempted to define the interface between the exigent circumstances exception to the warrant requirement and the community caretaking exception*. . . . ."

"*Given the profusion of cases pointing in different directions, it is apparent that the scope and boundaries of the community caretaking exception are nebulous*. The plaintiff appears to concede that this rampant uncertainty exists. Nevertheless, he strives to convince us that, whatever the parameters of the exception, the circumstances here fall outside of it. We are not persuaded."

"[T]he defendant officers . . . conducted their ensuing search in an unremarkable manner. These actions were at least arguably within the scope of the officers' community caretaking responsibilities and, given the parade of horribles that could easily be imagined had the officers simply turned tail, a plausible argument can be made that the officers' actions were reasonable under the circumstances. . . . ".

" . . . *Manifestly, there is no directly controlling authority. The question thus reduces to whether a consensus of persuasive judicial decisions exists. We think not. . . .The plaintiff places heavy reliance on . . . . two small islands in a sea of confusing case law*. . . . Even if the cases that run contrary to the plaintiff's position were wrongly decided—a matter on which we take no view—they serve to inject a substantial measure of doubt as to whether the Fourth Amendment barred the officers' entry in this case."

"Let us be perfectly clear. *We do not decide today . . . whether or not the circumstances that confronted the officers here come within the compass of the community caretaking exception. These questions are down-to-the-wire close*—but the very closeness of the questions is telling. . . *.[I]t is sufficient to hold—as we do in this opinion—that because these questions are not resolved by clearly established law*, the officers . . . are entitled to the shield of qualified immunity. We need go no further."

Id., 745 F.3d at 12-15.(*emphasis added*) See also, Matalon v. Hynnes, 806 F.3d 627 (1st Cir. 2015) (rejected qualified immunity and refused to apply the community caretaker defense; upholding jury verdict in civil rights lawsuit for unlawful search and use of excessive force brought by homeowner who was sleeping when Boston police officers broke into his residence in search of a thief reportedly headed there and, then, charged him for his unruly behavior for which he was later acquitted); Hunsberger v. Wood, 570 F.3d 546 (4th Cir. 2009), cert.den., 589 U.S. 938 (2010)

(police officer lawfully entered home under an "exigent circumstances" exception to investigate vandalism and a report that missing minor was present and in need of assistance but not the community caretaker exception, noting that "[w]hat community caretaking involves and what boundaries upon it exist have simply not been explained to an extent that would allow us to uphold this warrantless entry based on that justification. This is not to diminish the caretaking function . . . but only to say that it is in no sense an open-ended grant of discretion that will justify a warrantless search whenever an officer can point to some interest unrelated to the detection of crime."); United States v. Rodriguez-Morales, 929 F.2d 780 (1st Cir. 1991) (community caretaker function has a "protean quality" that requires a "search for equipoise" between "the need to search or seize against the invasion the search or seizure entails" and "almost always involves the exercise of discretion" to "chose freely among the available options, so long as the option chosen is within the universe of reasonable choices."); United States v. Dunbar, 470 F.Supp. 704 (D.Conn.), *aff'd*, 610 F.2d 807 (2d Cir. 1979) (table) (although police officer's good faith concern that motorist was lost and might cause a disturbance by seeking directions was "arguable", officer's stopping the motorist did not fit the community caretaker function; officer simply should have "made his presence known" and left it up to the motorist as to whether to stop and seek directions.")

Massachusetts Law

Massachusetts has a well-developed body of case law relating mostly to warrantless searches of premises under the "emergency" and "exigent circumstance" exceptions to the warrant requirement. For example, in Commonwealth v. DiGeronimo, 38 Mass.App.Ct. 714 (1995), the Appeals Court overturned an OUI conviction based on an unjustified warrantless entry into the defendant's residence to ascertain his well-being after an automobile accident

> ". . . [T]he so-called "emergency" doctrine . . . authorizes warrantless entry when a police officer (or other public safety official) reasonably believes that a person within the dwelling

> is in need of immediate assistance because of an imminent threat of death or serious injury, or that prompt intervention is necessary to prevent a threatened explosion, or the destructive accident. [Citations]."
>
> "Police action in such situations is to be viewed under a reasonableness standard in light of the circumstance in the field, not by "Monday morning quarterbacking" . . . [W]e fail to find in this record the requisite compelling reasons, supported by specific and articulable facts [citation] that could have led [the officer] reasonably to believe that DiGeronimo was in dire, life-threatening distress and in need of immediate assistance".
>
> "[The reporting party] did not tell [the officer] that DiGeronimo was injured, only that he appeared drunk. . . . DiGeronimo's telephone call to police gave no hint that he was ailing, only profane and probably inebriated."
>
> . . .
>
> In sum, [the officer's] subjective good faith belief that DiGeronimo might be in need of assistance did not justify either the entry or the subsequent search and arrest. [Citations] The objective circumstances did not reasonably support a genuine concern on [the officer's] part that DiGeronimo might have been so severely injured in the accident as to be in a life-threatening situation requiring immediate, arrantless entry and assistance."[15].

Id., 38 Mass.App.Ct. at 722-75.. See Commonwealth v. Duncan, 467 Mass. 746 (2014) (applying emergency exception to render emergency assistance to animals); Commonwealth v. Peters, 453 Mass. 818 (2009) (initial warrantless entry in search of source of gunshot justified but no "objectively reasonable basis" supported later search to double-check for additional victims); Commonwealth v. Snell, 428 Mass. 766 (1999) (emergency exception applied to warrantless search to ascertain well-being of spouse, whose husband was seen in early morning flight from residence the day he posted bail after being arrested for threatening to kill her);Commonwealth v. Young, 382 Mass. 448 (1981) (approved warrantless search of premises to find murder suspect and victims, noting "whether an exigency exists and whether the response of the police was reasonable and therefore lawful" are to be evaluated "in relations to the scene as it could appear to the officers at the time, not as it may seem to a scholar after the event with the benefit of leisured

[15] The Appeals Court also held that the evidence of the officer's observations and alcohol breath test results that were fruits of the officer's unlawful warrantless entry could not be justified under exigent destruction of evidence exigent circumstances exception and their unopposed admission into evidence constituted ineffective assistance of counsel. 38 Mass.App.Ct. at 725-31.

retrospective analysis"); Commonwealth v. Bates, 28 Mass.App.Ct. 217 (1990) (warrantless entry of apartment to search for missing woman not justified under "emergency" exception); Commonwealth v. Colon, 88 Mass.App.Ct; 579 (2015) (troopers not justified to enter and search home under emergency exception after defendant opened door and surrendered himself); Commonwealth v. Lindsey, 72 Mass.App.Ct. 485 (2008) (checking on elderly woman known to be frail properly based on "evidence known to the police at the time of the warrantless entry" and not inappropriate "20/20 hindsight"); Commonwealth v. Kirschner, 67 Mass.App.Ct. 836 (2006) (emergency exception requires that "[t]he injury sought to be avoided must be immediate and serious, and "mere existence of a potentially harmful circumstance is not sufficient"), *citing* Commonwealth v. Allen, 54 Mass.App.Ct. 719 (2002) (disabled man apparently left alone in front of television who did not respond to knocks and shouts did not justify warrantless entry). .See also Commonwealth v. McCarthy, 71 Mass.App.Ct. 591 (2008) (justified warrantless search of handbag of unconscious woman in medical distress)

Commonwealth v. Townsend, 453 Mass. 413 (2009), is a rare case mentioning the "community caretaker" exception in the context of a dwelling search. The lower court judge applied the exception to deny a motion to suppress evidence obtained during a warrantless search which produced evidence used to convict the defendant of murder. The SJC held that the officer's entry fell within the "emergency" exception to the warrant requirement, not the community caretaker exception, but added that the "emergency" exception is "closely related to community caretaking function. Although Townsend does not involve a motor vehicle, I find it particularly significant because the decision: (1) illustrates how Massachusetts courts and commentators (the MPTC Legal Guide and Hanrahan Manual included, as noted below) sometimes seem to conflate the various exceptions to warrantless searches and incorporate, in effect, the same required "objective facts"

that a citizen be in "immediate need of assistance" in order to justify more than an initial "non-coercive" inquiry and enable an officer to use force to make a warrantless entry, search and seizure of any person, property and/or a motor vehicle, 453 Mass. at 424-26; (2) reinforces the point that actions taken by the police must always be "evaluated in relation to the scene as it could appear to the officers at the time, not as it may seem to a scholar after the event with the benefit of leisured retrospective analysis", 453 Mass. at 425-26; and (3) in Townsend, despite numerous facts to suggest that defendant's wife may have been the victim of foul play, the police responded four times and left the scene without gaining access before a decision was made to force entry, leading to discovery of the murder victim)

Commonwealth v. Leonard, 422 Mass. 504, cert.den., 519 U.S. 877 (1996) is the seminal Massachusetts appellate decision focusing on the community caretaker function as justification for a warrantless entry of a motor vehicle. The lower court suppressed evidence obtained by a State Trooper who approached a motor vehicle in the early morning hours at a breakdown area on Storrow Drive and, after getting no response from the driver after activating blue lights, using his PA megaphone and air horn, he opened the unlocked driver's door, at which point the driver began shouting obscenities, was arrested and convicted of OUI and disorderly conduct.

The lower court judge concluded that, since the trooper was not "acting in accordance with an official policy of the state police . . . and [no] specific facts and circumstances suggesting that the defendant was engaged in criminal activity or injured" and had "no right to open the vehicle", relying on Commonwealth v. Helme, 399 Mass. 289 (1987), in which the SJC questioned an asserted "policy" of approaching a car just to determine "if everything is all right". Without expressly referencing community caretaking, the SJC majority held that the trooper was justified to open the unlocked door because he was "doing his duty as he patrolled the highway", the driver's

"stopping when and where she did suggested that she was in difficulty" and her repeated failure to respond "not with a gesture, a smile or a nod of the head" implied "she might be quite ill." The majority held that the lower court "overreads" the Helme decision to mean that every minimally intrusive, reasonable action is permissible only when taken pursuant to "an explicit and perhaps even invariable policy", as it would be impossible to fashion such rulebook that "sought to anticipate and instruct a trooper . . . just what to do in the circumstance of every such particular case." Id., 422 Mass. at 504-509.

Chief Justice Liacos dissented, stating, it is "clear from our state case law that opening the defendant's door constituted a seizure of the defendant's automobile" and every police intrusion must rest on "specific and articulable facts . . . that follow in light of the officer's experience."

> "*A mere hunch is not enough*. The [lower court judge] was correct when he stated: '*there must be a prior justification either in the form of . . . circumstances suggestive of criminal activity or circumstances suggesting a medical problem or [hazard] to safety or health.' Although "our cases have not explicitly required an established written policy . . . what we have required is some constraint on the discretion of the law enforcer. [citing Cady v. Dombrowski] . . . Standard procedures are universally recognized as a tool to determine the reasonableness of police conduct and to ensure police actions are not a pretext*."

The Chief Justice also noted: "[I]n this Commonwealth . . . ordinarily, a citizen need not comply with a police request and is free to walk away." Id., 422 Mass. at 510-514. [16]

[16] Other state's courts echo the concern that the community caretaker function become a source of unfettered discretion, which, as Chief Justice Liacos put it, would make "policing the police" difficult and, therefore, impose restrictions to keep it tethered to its "health and well-being" moorings. The Supreme Court of South Dakota found that community caretaking was often indistinguishable from the "emergency" and "emergency aid" functions and the same rules should apply to all three, namely, an "actual and immediate need" to protect persons from "serious" harm: "If the warrant requirement is to retain its viability, a merely officious concern that someone might conceivably need assistance to avoid some undefined peril should not justify police intrusion . . .." State v. Deneui, 2009 SD 99, 775 N.W.2d 221 (2009). In State v. Coffman, 214 N.W.2d 240 (Iowa 2018), the Iowa Supreme Court questioned whether the community caretaking exception property extends beyond emergency situations and inventory searches into the "amorphous category of police officers acting as public servants". Concerned that such an exception "would swallow up constitutional restrictions on warrantless searches altogether", the Court "tightly cabin[ed]" community caretaker "first party assistance" situations with a requirement that an officer coming upon a parked vehicle must demonstrate by "specific and particularized facts" that the occupants have *manifested a desire for needed assistance*, so as to limit the "potential for abuse" that would otherwise arise.

In Commonwealth v. Murdough, 428 Mass. 760 (1999), the SJC clarified the Leonard decision, holding that a police officer's authority when performing the community caretaker function justifies an initial approach to make a "non-coercive" well-being check (there, a vehicle parked for an extended period with its brake lights on at a highway rest stop) only "so long as they do not implicitly or explicitly assert that the person inquired of is not free to ignore their inquiries. . . . It was only when the officer opened Leonard's door that a justification for that action had to be offered". As soon as the officers suspected he was under the influence of narcotics "they went beyond the caretaking function and were look for evidence of a narcotics violation." 428 Mass. at 762-64.

Massachusetts appellate decisions have justified justify a warrantless inquiry of the operator of a motor vehicle under a community caretaker exception when there was reason for concern about the fitness or well-being of the operator, but none have directly decided how the community caretaker duty applies to a forcible entry of a parked, locked and occupied vehicle under the circumstances involved here.. See, e.g., Commonwealth v. Evans, 436 Mass. 369 (2002) (initial "non-coercive" of motorist stopped in breakdown lane was justified but, when an officer "by means of physical force or show of authority, has in some way restrained the liberty of a citizen . . . we conclude that a 'seizure' has occurred" citing Leonard and Murdough); Commonwealth v. McDevitt, 57 Mass.App.Ct. 733 (2003) (vehicle in breakdown lane at night with motor running, noting that community caretaker function covers "concern for a vehicle's occupants" and "the safety of the public using the roadway", citing Murdough); Commonwealth v. Colburn, 86 Mass.App.Ct. 1112, *rev.den.*, 470 Mass. 1101 (2014) (Rule 1:28) (vehicle parked late at night with engine running and totally non-responsive driver at the wheel, citing Leonard); Commonwealth v. Fisher, 86 Mass.App.Ct. 48, rev.den., 469 Mass. 1109 (2014) (driver seated in vehicle with door

open, slurred speech, eyes closing and head nodding are "objective facts that a person may be in need of medical assistance", citing Murdough); (Commonwealth v. McHugh, 41 Mass.App.Ct. 906 (1996) (rescript) (officer asked driver of vehicle stopped in traffic lane of highway if he needed assistance, got "strange gaze" and "incoherent' reply)

Some Massachusetts case law expressly questioned the applicability of the community caretaker exception. See, e.g., Commonwealth v. Sanborn, 477 Mass. 393 (2017) (community caretaker function does not justify a motor vehicle stop to serve a 209A abuse prevention restraining order on the operator); Commonwealth v. Knowles, 451 Mass 91 (2008) (no objective basis to believe that the defendant's well-being or the safety of the public was in "immediate jeopardy" at the time the defendant was "seized" and his open trunk searched); Commonwealth v Eckert, 431 Mass. 591 (2000) (after initial stop of motor vehicle and affirmative response by operator that he was "all set" his community caretaker function was accomplished and officer's further questioning driver's sobriety triggered the heightened constitutional requirement of "reasonable suspicion"); Commonwealth v. Smigliano, 427 Mass. 490 (1998) (motorist report that vehicle was "all over the road", coupled with officer's person observations that supported conclusion that operation was in "immediate need of assistance" enough to justify stop under the "emergency" exception but not the "community caretaker" exception); Commonwealth v. Lubiejewski, 49 Mass.App.Ct. 212 (2000) (anonymous report of erratic driving without direct corroboration by officer did not support a stop under community caretaking exception); Commonwealth v. Canavan, 40 Mass.App.Ct. 642 (1996) (community caretaker exception did not authorize motor vehicle stop to assist operator that officer thought was lost). See also Commonwealth v. Quezada, 67 Mass.App.Ct. 693 (2006) (community caretaker function ended

after citizen ran away from officer after being asked if he needed assistance, as his action constituted a "non-verbal response" that he declined assistance);

Finally, Massachusetts has enacted specific legislation that overrides the judicially-defined constitutional exceptions to warrantless searches and seizures when it comes to determining impairment of a motorist under the influence of alcohol for purposes of arrest and or protective custody decisions. G.L.c.111B,§8 authorizes a police officer to take a person who is "incapacitated" by alcohol into protective custody, to "use such force as necessary to carry out his authorized responsibilities" and to hold such person until no longer incapacitated, but not more than 12 hours. G.L.c.111B,§3 defines "incapacitated" as "the condition of an intoxicated person who, by reason of the consumption of intoxicating liquor is (1) unconscious, (2) in need of medical attention, (3) likely to suffer or cause physical harm or damage property, or (4) disorderly. In exercising the authority under the protective custody statute, the applicable standard requires "reasonable suspicion" that a person is incapacitated; the community caretaker exception does not apply. See Commonwealth v. Eckert, 431 Mass. 591,596-97 (2000); Commonwealth v. Quezada, 67 Mass.App.Ct. 693.695-97 (2006).

WPD Officer Training on Warrantless Searches

The training that WPD officers receive in the law of warrantless searches, in general, and the community caretaker function, in particular, do not explicitly address the issue that confronted Sgt. Slocum at the scene on November 29, 2017. Both the Hanrahan Manual (Exh. U) and the 2016-2017 MPTC Legal Issues Guide (Exh. P) conflate the community caretaker exception and the emergency exception as essentially equivalent.. The Hanrahan Manual refers to "Warrantless Emergency Entry Under Community Caretaking (often called the Emergency Circumstances Exception)" and define the community caretaking exception as applicable when police "encounter

a person in need of immediate care", citing mostly cases of "emergency" warrantless searches of residential property. Similarly, the MPTC Legal Issues Guide teaches that the community caretaking function "applies when the purpose of the police [intrusion] is not to gather evidence of criminal activity but rather *because of an emergency, to respond to an immediate need for assistance for the protection of life or property*" (*emphasis added*), citing Commonwealth v. Bates [a case in which the SJC held unconstitutional a warrantless search of a residence]. Neither training materials make any reference to the SJC's decision in Leonard.

The account of Officer Slocum's five-hour "remedial" retraining confirms the fine line between what may be a "reasonable exercise of discretion" and what a "dereliction of duty" when it comes to a warrantless search in furtherance of the community caretaker function. In fact, during that training, Officer Slocum was advised that: (1) by forcing an entry into Mr. B's locked vehicle to ascertain whether he needed immediate medical assistance, without any objective basis to conclude that he did, or "reasonable suspicion" of impairment, he risked committing an "unjustified seizure" and (2), he could not "force interaction" with Mr. B and, "if he refused to converse, then, at that point my investigation's over."

Sgt. Slocum's Handling of the Call

In assessing Sgt. Slocum's handling of his interaction with Mr. B, I give testimony substantial weight, as the only percipient witnesses to what they actually saw, heard, knew or did. While I have considered all of the evidence, the testimony of others was based on less reliable hearsay information gleaned from recollection of the radio calls or after-the-fact and third-hand assumptions, including inferences and conclusions that fit the sort of "20/20 hindsight" and "Monday morning quarterbacking" that courts have strictly eschewed.

The preponderance of the evidence established that Sgt. Slocum acted within his discretion in his handling of the initial response to the call for service regarding a "suspicious" person sleeping in a vehicle parked in a residential neighborhood of Whitman. He promptly established that the vehicle was legally parked, the motor was not running, and nothing gave rise to reasonable suspicion or probable cause to believe that laws had been broken. He noted that Mr. B was sitting upright in his seat, not slumped down, had his his head back and feet up and was breathing normally. His skin color was normal. There was no drug paraphernalia in the truck and no indicia that Mr. B had recently ingested drugs or consumed alcohol. Mr. B intentionally placed the keys and his driver's license so that they were in plain view for the express purpose of negating any inference that he had operated his truck while impaired (although I infer he most likely knew that he had done so to get to his girlfriend's house). He was asleep when Sgt. Slocum arrived and was awoken by Sgt. Slocum's efforts to make contact, squinting when Sgt. Slocum shined his flashlight at him. He watched Mr. B for five minutes or more, noting that he had moved around several times..[17] Sgt. Slocum tried to gain access to the truck but found the doors were locked. Sgt. Slocum was headed to get input from the homeowner who had initiated the call, but, when the dispatcher provided somewhat misleading and incomplete information that led Sgt. Slocum to conclude that no one was home, he considered it futile to do so.

Sgt. Slocum had reached a critical decision point. He was running an understaffed shift. By remaining on scene or calling Officer Balonis to join him would continue to leave no other officer available to cover the entire town for the remainder of the shift. Based on his training and

[17] Had Sergeant Slocum realized that Mr. B knew that he was trying to make contact but didn't want to interact with the officer, that "non-verbal" expression that he didn't want or need assistance, alone, could have justified, indeed, arguably mandated the end of a "community caretaking" function. See, e.g., Commcnwealth v. Murdough, 428 Mass. 760 (1999); Commonwealth v. Leonard, 422 Mass. 504, 510 (1996) (Liacos,C.J., dissenting); Commonwealth v. Quezada, 67 Mass.App.Ct. 693 (2006). See also, State v. Coffman, 214 N.W.2d (Iowa 2018).

experience as a first responder and career police officer, he had concluded, correctly, that there was nothing "suspicious" about Mr. B's presence and that, in particular, he had no "reasonable suspicion" that Mr. B had or would be committing any crime or was impaired by alcohol within the meaning of the protective custody statute. There was absolutely no indicia of a drug overdose. Mr. B.'s physical condition confirmed the "ABCs", i.e., his airway was clear, he was breathing and his circulation was normal. Mr. B was not so "completely unresponsive" (as Whitman later assumed) that such further efforts to make physical contact were necessary to reasonably conclude that Mr. B did not require "immediate" emergency medical assistance.

Sgt. Slocum also acted appropriately, and consistent with the law, when he paused to take into account that further effort to interact with Mr. B required the use of force to break into the truck, and elected, instead to brief the next shift (starting within the hour) to follow up. His instincts were sound that there was a greater level of uncertainty associated with a decision to break into a locked vehicle to access a passenger inside than if he were able to gain access to Mr. B through an unlocked door. In exercising his judgment about what to do, and In the absence of "objective facts" that Mr. B. was in "immediate" jeopardy of serious injury and no "reasonable suspicion" of impairment or criminal behavior, he was entitled to consider that uncertainty. The case law involving motor vehicle (or property) "well-being" checks is mostly focused on entry via an unlocked door or an operator's voluntary consent to a request to open the door or exit the vehicle. See, e.g., Commonwealth v. Leonard, 422 Mass.504(1996); Commonwealth v. Fisher,86 Mass.App.Ct. 48, rev.den., 469 Mass.1109 (2014); Commonwealth v. Canavan, 49 Mass.App.Ct. 642 (1996) The cases that justify forced entry rely on the fact that the entry was made pursuant to a routine inventory search or other well-established policy. See, e.g., South Dakota v. Opperman, 428 U.S. 364, 376 (1976) (Powell, J., concurring); Cady v. Dombrowski, 413 U.S. 433 (1933);

Commonwealth v. Leonard, 422 Mass. 504 (1996 (Liacos, C.J., dissenting). Although Commonwealth v. Townsend is not on all fours (that case involved far more serious, and ultimately justified, concern about foul play), Sgt. Slocum's judgment here tracks closely to how the police officers and their supervisor handled the response in that case, in which officers returned four times before deciding to force entry.

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Loss of Confidence as a Supervisor

The speed within which the WPD command staff and its rank and file uniformly came to the consensus that Sgt. Slocum's actions on November 29, 2017 showed that he could no longer be trusted to serve in a supervisory capacity raised my eyebrow. At no time during his tenure as a superior officer, had Sgt. Slocum's supervisory ability ever been questioned. Upon careful consideration, I concur with Sgt. Slocum's assessment that the conclusion was based, at least in substantial part on "misinformation" and "Monday morning quarterbacking", both as to the facts presented at the scene (Mr. B was not "totally unresponsive" and displayed no indicia of "immediate need" for medical assistance) and the law (there was a rational basis for Sgt. Slocum to decide that prompt follow-up, rather than an immediate forced entry was the appropriate community caretaker response and to conclude that he then had no "reasonable suspicion" upon which to proceed under the protective custody law or any other criminal statute. In addition, I am unable to reconcile the decision to severely discipline and permanently demote Sgt. Slocum when Chief Benton had no issues promoting another officer to Sergeant soon after he had received (surprisingly minor) discipline for a blatant dereliction of duty (essentially AWOL) by taking his

daughter to an amusement park when he was due to appear in court and then lying to his supervisors about it.[18]

Allowance of the Appeal

My de novo review of the facts that were known, or should have been known, to the WPD at the time, and the applicable law, demonstrate that the WPD was materially mistaken as to both. As a result, the WPD has failed to meet it burden to establish "just cause" for the discipline imposed on Sgt. Slocum. Even after giving the WPD the benefit of all doubt, the only justifiable criticism of Sgt. Slocum's performance, perhaps, was his failure to take additional measures, such as using his blue lights, siren or other devices to get Mr. B to acknowledge his presence but not for electing to circle back rather than use immediate force.

I do not miss the point that constitutional law is not a matter that falls within the sphere of the Commission's "expertise", and that a police department has considerable discretion to hold its officers to a higher standard. Nor do I mean to suggest that, as a matter of law, Sergeant Slocum had no legal right to break into Mr. B's truck, but only that, because of the legitimate uncertainty in his mind about that issue and his otherwise reasonable assessment of the scene, his decision not to break into the truck was a fair exercise of his discretion at the time.

The Commission is vested with a duty to enforce "basic merit principles" of civil service law, which mandate that discipline must be remedial, not punitive, designed to "correct inadequate performance" and removing an employee from his or her position only when "inadequate performance cannot be corrected." In particular, Sgt. Slocum's discretionary, and honest judgment

[18] I have also considered the Appellant's argument that witnesses were motivated by self-interest or bias: (1) Officer Burtt-Henderson, who was in line to fill the next opening for Sergeant; may have realized that he had not been as clear as he could about the information he conveyed to Sgt. Slocum, and (2) Lt. May-Stafford's order to have Mr. B.'s car towed could be questioned under the WPD Tow Policy (Exh.T) and the law. (See Commonwealth v. Oliveira, 473 Mass. 10 (2016) (inventory search of impounded vehicle that posed no public safety risk held invalid when police failed to let owner make his "one phone call" to arrange for a girlfriend to retrieve it). The Appellant's contention may have some force, but I find that misinformation, rather than self-interest, played the major role here.

that his duty to protect the civil rights of an apparently innocent citizen outweighed the uncertainty of exceeding his authority by use of excessive force, especially when another plausible, albeit not perfect, alternative was available, is not that type of "substantial misconduct which adversely affects the public interest by impairing the efficiency of public service."

In sum, I find no just cause for the severe discipline imposed on Sgt. Slocum. Nothing in this decision is intended to preclude the WPD from, prospectively, clearly and expressly articulating and enforcing a policy (if that, indeed, is its policy) to use all available means to rouse a sleeping motorist, including the use of force to break into a vehicle, in any similar situation.

CONCLUSION

For the reasons set forth above, the appeal of the Appellant, Edward Slocum, Docket No. D-18-076 is hereby ***allowed***. His discipline, including the 45-day suspension and demotion is vacated. He shall be restored to his position as Sergeant and receive all other pay and benefits to which he has been entitled..

Civil Service Commission

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

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 23, 2020.

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:
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