COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
100 Cambridge Street, Suite 200
Boston, MA 02111
(617) 979-1900

KEVIN SMITH,
Appellant

v.

BOSTON POLICE DEPARTMENT,
Respondent

Docket Number:	D1-22R-138
Appearance for Appellant:	Kenneth H. Anderson, Esq. Anderson, Goldman, Tobin & Pasciucco, LLP 50 Redfield Street, #201 Boston, MA 02122
Appearance for Respondent:	James J. Megee, Esq. Office of the Boston Police Department Legal Advisor One Schroeder Plaza Boston, MA 02120
Commissioner:	Angela C. McConney[1]

SUMMARY OF DECISION

The Boston Police Department had just cause to terminate the Appellant as a police officer where his conduct was violative of the Boston Police Department's Rules and Regulations based on three specific incidents involving misconduct.

[1] The Commission acknowledges the assistance of Law Clerk Noah S. Nelson in the drafting of this decision.

DECISION

Pursuant to G.L. c. 31, § 43, the Appellant, Kevin Smith (Appellant), timely appealed to the Civil Service Commission (Commission) contesting the decision of the Boston Police Department (BPD or Department) to terminate his employment as a permanent full-time police officer.[2]

The Commission held a remote pre-hearing conference on November 1, 2022, and I held two days of evidentiary hearing on August 8 and October 17, 2023, at the offices of the Commission located at 100 Cambridge Street, Suite 200, Boston, MA.[3]

When the Appellant failed to appear for the second day of evidentiary hearing on October 17, 2023, I asked for an explanation for his absence. The Appellant's counsel stated that he received an email from the Appellant on the morning of October 16, 2023, stating that he needed a new hearing date. After the Appellant's counsel requested more information, the Appellant responded via email with just one word, "Personal." After some additional back and forth between the Appellant and his counsel, the latter called the Appellant and left a voicemail that went unreturned. On the morning of October 17, 2023, the Appellant's counsel called the Appellant, again to no avail. The Appellant's counsel then texted his client, who responded that he would not be attending the hearing because he needed a new hearing date.

The Appellant's counsel asked the Commission for a third day of the hearing so that his

[2] The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR § 1.01 (Formal Rules), apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

[3] Copies of the audio / video recordings were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/it wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, the recordings provided to the parties should be used to transcribe the hearing.

client could testify. I ordered the Appellant's counsel to file a motion to reopen within seven days of the hearing, with an accompanying affidavit explaining the reasons for the Appellant's absence. The Commission did not thereafter receive a motion to reopen.

The Commission later learned that the Appellant had two incidents that could have resulted in discipline if he were still employed by the Department. Considering these occurrences, the Respondent's counsel asked the Commission to consider them for the purpose of establishing that even a lengthy suspension, instead of termination, would not properly rehabilitate the Appellant.[4]

The Appellant submitted a post hearing brief on December 7, 2023. The Respondent submitted a post hearing brief on December 15, 2023, whereupon the administrative record closed.

For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

Sixty exhibits were offered into evidence: Exhibits 1-59 by the Respondent; Exhibit 60 by the Appellant. On the first day of the evidentiary hearing, I noted the Appellant's objection to the admission of Exhibit 56, the BPD incident report for the Appellant's January 27, 2023 operating under the influence offense. On the second day of the evidentiary hearing, I noted the Appellant's objections to Exhibits 57 and 58, both related to the Appellant's involvement in a domestic dispute occurring on August 21, 2023, as well as any other exhibits pertaining to the events of August 21, 2023.

[4] As explained in the Analysis, *infra*, I decline to reach the issue of whether the Appellant's post-termination incidents are admissible.

Based on these exhibits and the testimony of the following witnesses:

Called by the BPD:

- Charles Cellucci, BPD Sergeant Detective
- Ms. A[5], Medford Resident
- Darryl Owens, Retired BPD Officer and Former Instructor at BPD Academy
- Lucas Taxter, BPD Sergeant Detective

Called by the Appellant:

- John Hollerbach, BPD Officer

and taking administrative notice of all pleadings filed in the case, pertinent rules, statutes, regulations, case law and policies, and drawing reasonable inferences from the credible evidence, I make the following findings of fact:

1. The Appellant, Kevin Smith, was hired by the BPD on January 23, 2012. (Exhibit 52)

Failure to Timely File an Incident Report

2. At approximately 3:34 a.m. on October 28, 2018, the Appellant responded to a call for a breaking and entering in the City of Boston's Chinatown neighborhood. (Exhibit 14)

3. The victim was an employee of the Miami-Dade Police Department. (Exhibit 7)

4. Upon arriving at the scene, the victim informed the Appellant that she approached her apartment door after hearing a loud noise; and saw an unknown individual attempting to gain entry. The victim and her mother were able to hold the door shut, and the intruder fled the scene. (Exhibit 13)

5. The Unit History for A-426-A, the Appellant's assigned unit for his shift beginning on October 27, 2018 and ending on October 28, 2018, indicates that the Appellant did not receive any other calls for service during the three-hour timeframe from 3:34 a.m. to 6:36

[5] A pseudonym for an alleged victim in this matter.

a.m. (Exhibit 9)

6. Sixteen days later, on November 13, 2018, Sgt. Joe Alvarez of the Miami-Dade Police Department emailed BPD Cpt. Kenneth Fong on behalf of his employee, the victim in the October 28, 2018 attempted breaking and entering. According to Sgt. Alvarez, the victim had made many attempts to obtain a copy of the incident report for insurance purposes. She also had left several messages with the Appellant. (Exhibit 7)

7. The Appellant did not submit a completed incident report until November 15, 2018, which was 19 days after the attempted home invasion. (Exhibit 14)

8. On November 16, 2018, Cpt. Fong ordered the Appellant to submit a Form 26 explaining why he had neglected to write the incident report in a timely fashion. According to the Appellant's Form 26, he "mismanaged [his] time in regards to th[e] incident," due to the high call volume on October 28, 2018. He further stated that he was answering radio calls and backing other units up on their calls on the morning of the attempted breaking and entering. (Exhibit 13 at R0102)

Internal Affairs Investigation – IAD Complaint No. 2018-0533

9. Sgt. Det. John G. Fitzgerald was assigned to conduct an Internal Affairs investigation into the Appellant's failure to timely file the incident report for the October 28, 2018 attempted home invasion. The Internal Affairs investigation was formally designated as IAD Complaint No. 2018-0533. (Exhibit 4)

10. On April 8, 2019, Sgt. Det. Fitzgerald submitted his investigative report to Deputy Superintendent Jeffrey I. Walcott, Assistant Chief of the Bureau of Professional Standards. (Exhibit 4)

11. In his investigative report, Sgt. Det. Fitzgerald provided summaries of: (a) the

Internal Affairs Complaint; (b) Sgt. Alvarez's email to Cpt. Fong on behalf of the victim of the attempted home invasion; (c) the Appellant's Form 26 explaining his actions; (d) the BPD incident report for the attempted home invasion; (e) Sgt. Det. Tse's November 29, 2018 Internal Affairs interview; (f) Lt. Sean McCarthy's December 7, 2018 Internal Affairs interview; (g) the Appellant's December 18, 2018 Internal Affairs interview; and (h) Sgt. Det. Fitzgerald's analysis of the Internal Affairs investigation. (Exhibit 4)

12. In his interview with Internal Affairs, the Appellant stated that – before he cleared the call for the attempted home invasion – he informed the victim that he would memorialize the attempted home invasion and submit a Department incident report. (Exhibit 12)

13. The Appellant also told Sgt. Det. Fitzgerald that officers working a double shift will sometimes wait to write an incident report until the next shift. The Appellant noted that when he cleared the call – indicating that he had already written the incident report – he had the "I" (incident) number and knew he was returning for another shift at 4:00 p.m. that same day. (Exhibit 12)

14. In his Internal Affairs interview, Sgt. Det. Tse stated that he searched the RMS system for the requested incident report on November 14, 2018. He found that there was an "I" number generated for the report, but that the other fields were left blank. After confirming that the report was not stuck in the Appellant's inbox, and that it had never been completed from the start, Sgt. Det. Tse contacted the Appellant that same day. (Exhibit 10)

15. According to Sgt. Det. Tse, the Appellant stated that he remembered the attempted breaking and entering incident but may have forgotten to write the report because it was a busy evening. Sgt. Det. Tse instructed the Appellant to complete the incident report so that he could forward it to the victim the following day. The Appellant complied with that request.

(Exhibit 10)

16. Sgt. Det. Tse explained to Sgt. Det. Fitzgerald that the Department could not initiate an investigation into the attempted home invasion until the incident report was completed. (Exhibit 10)

17. In his Internal Affairs interview, Lt. Sean McCarthy – the Appellant's direct supervisor – conveyed that he had never before dealt with the Appellant on a matter involving a failure to timely file an incident report. (Exhibit 11)

18. Reviewing the Unit History for the A-426-A for the Appellant's shift on October 27, 2018 – October 28, 2018, Sgt. Det. Fitzgerald concluded that the Appellant did not receive any other calls for service during the hours in which he was responding to the attempted home invasion. (Exhibit 4)

19. On April 18, 2019, Lt. Det. Adrian Troy submitted an investigative report to Deputy Superintendent Walcott, in which he summarized the Internal Affairs complaint and offered his analysis of the investigation. Within the investigative report, Lt. Det. Troy reviewed the Internal Affairs interviews of the Appellant, Lt. McCarthy, and Sgt. Det. Tse, as well as the Unit History for the A-426-A on October 28, 2018, the BPD incident report for the attempted home invasion, and the Appellant's Form 26 explaining his failure to timely complete the incident report. (Exhibit 5)

20. Lt. Det. Troy noted that the Unit History for the A-426-A indicated that the Appellant did not receive or respond to any other calls for service from 3:34 a.m. to 6:36 a.m. on October 28, 2018. He also noted that a check of all Incident Histories for Area A-1 in the morning hours of October 28 confirmed that the Appellant did not respond to any of the three other calls for service during the period between 4:26 a.m. and 6:28 a.m., all of which concerned

homeless issues and were handled and "miscel[laneous]ed" by two-man units. (Exhibit 5)

21. Following his analysis, Lt. Det. Troy recommended that the charges of violating Rule 102, § 4 (Neglect of Duty) and Rule 102, § 23 (Departmental Reports – Truthfulness) be sustained. (Exhibit 5)

22. On February 17, 2020, Deputy Superintendent Courtney C. Matthews, assistant chief of the Bureau of Professional Standards, wrote a concurrence after reviewing Sgt. Det. Fitzgerald's investigative report, Lt. Det. Troy's recommended findings report, and all of the Internal Affairs interviews. She agreed with the recommendation to sustain the charges of violating Rule 102, § 4 (Neglect of Duty) and Rule 102, § 23 (Departmental Reports – Truthfulness). (Exhibit 6)

23. In her concurrence, Deputy Superintendent Matthews called attention to the discrepancy between the Appellant's claims in his Internal Affairs interview and the Unit History for the A-426-A. While the Appellant stated in his interview that he was busy taking other calls and backing up other officers after the incident, the Unit History for the A-426-A on October 27 – October 28, 2018 showed that the Appellant did not receive any other calls for service between 3:34 a.m. and 6:36 a.m. (Exhibit 6)

24. Deputy Superintendent Matthews also wrote: "It was determined Officer Smith was untruthful in the (Form 26) reports he submitted regarding this incident as well as during his Internal Affairs interview." She recommended that an additional violation of Rule 102, § 23 (Untruthfulness in *Internal Affairs Interview*) be added to the Appellant's disciplinary record. (Exhibit 6) (emphasis added)

Specifications – IAD Complaint No. 2018-0533

25. On April 11, 2022, in connection with IAD Case No. 2018-0533, the Appellant

was charged with violating BPD Rule 102, § 4 (Neglect of Duty) and BPD Rule 102, § 23 (Truthfulness in Department Reports). (Exhibits 1 and 2)

26. BPD Rule 102, § 4 reads as follows:

> Sec. 4 NEGLECT OF DUTY: This includes any conduct or omission which is not in accordance with established and ordinary duties or procedures as to such employees or which constitutes use of unreasonable judgment in the exercising of any discretion granted to an employee.

(Exhibit 3)

27. BPD Rule 102, § 23 reads as follows:

> Sec. 23 DEPARTMENTAL REPORTS – TRUTHFULNESS: Employees shall submit all necessary reports on time and in accordance with established Departmental procedures. Reports submitted by employees shall be truthful and complete. No employee shall knowingly enter, or cause to be entered, any inaccurate, false or improper information.

(Exhibit 3)

Excessive Force Incident

28. On the evening of January 19, 2019, Ms. A drove to Paddy O's, a Faneuil Hall bar, to socialize with her friend who was the general manager there. It was a snowy evening. She parked at Union Street, across from the bar. (Testimony of A.)

29. Ms. A is a businesswoman, and at the time owned and managed her own restaurant in the City of Boston. (Testimony of A.)

30. During the early morning hours of January 20, 2019, Ms. A entered the women's restroom where she observed two women sharing a stall. One of the women was throwing up, and Ms. A. told them that they needed to vacate the restroom. (Testimony of A.)

31. As someone who works in the service industry, Ms. A was concerned about the potential liability issue to Paddy O's if one of the women were over-intoxicated or abusing drugs. Because her general manager friend was male, he would not have been able to enter the

ladies' bathroom. (Testimony of A)

32. After Ms. A made that comment, one of the two women struck Ms. A in the face with a glass beer bottle and began to push and fight with her. The beer bottle cut Ms. A on the bridge of her nose. The general manager gave her a towel filled with ice for her injury. (Testimony of A)

33. BPD officers Graves, Hollerbach and the Appellant responded to the scene. Officer Graves also requested the presence of patrol supervisor Sgt. Paul Boddy to determine whether any arrests should be made. Ms. A was upset when the police declined to arrest either woman and so telephoned her uncle for advice.[6] The uncle was a head court officer and had served as a police officer. (Exhibits 26-28 and 49)

34. After leaving Paddy O's, Ms. A crossed Union Street to her vehicle. She drove down Union Street and made a U-turn to get to North Street and then on to Route 93N. Ms. A did not clear the snow from her windshield before starting her car. (Exhibit 27; Testimony of A)

35. In the BPD incident report that he co-authored with Officer Graves, the Appellant noted that he observed Ms. A's vehicle fail to stop for a red light at the intersection of Union Street and North Street. He proceeded to stop the car at the intersection of North Street and Blackstone Street. Ms. A recognized the Appellant from the police response at Paddy O's. (Exhibit 49; Testimony of A)

36. The Appellant wrote that Ms. A would not roll down her window, but the latter

[6] In his Internal Affairs interview on March 5, 2019, Officer Graves stated that he conducted an examination of the women's restroom at Paddy O's. He found a partially full beer bottle, unbroken and uncracked, in one of the bathroom stalls. Due to the presence of liquid in the bottle and the bottle's fully intact structure, he decided not to make any arrests. (Exhibit 23)

eventually complied and handed the Appellant her identification.[7] (Exhibit 49)

37. Officer Hollerbach arrived on scene and parked his cruiser behind that of the Appellant. He then opened the front-right passenger-side door of the Appellant's cruiser to confer with him. (Exhibit 31[8])

38. While the two officers were speaking, Ms. A got out of her car and took a snow scraper from the back of the vehicle to brush off the back windshield. Upon seeing Ms. A exit her vehicle, the Appellant and Officer Hollerbach got out of the cruiser. (Exhibit 31)

39. The Appellant stood directly in front of her, and the pair appeared to exchange words. Ms. A then backed away from the Appellant and appeared to reenter the vehicle. (Exhibit 31)

40. After Ms. A refused to exit the vehicle, telling the officers that she did not understand why she was being asked to exit her vehicle in connection with a citation for snow obstruction and that she knew her rights, the Appellant attempted to extract her from the vehicle. (Testimony of Ms. A)

41. As he tried to remove Ms. A from the vehicle, the Appellant's right leg slipped back. When Officer Hollerbach joined the Appellant in trying to remove Ms. A from her car, the

[7] The Appellant's account of the origin of the traffic stop in the co-authored BPD incident report differs substantially from the accounts given in his Internal Affairs Interview and Form 26. In his Internal Affairs interview on April 2, 2019, the Appellant claimed that he pulled Ms. A over after she made an illegal U-turn on Congress Street and later went through a red light. (Exhibit 51). Similarly, in his Form 26, the Appellant wrote that he observed Ms. A's vehicle make an illegal U-turn, but only noted that Ms. A "proceeded *to*" a red traffic light (as opposed to "through" the traffic light) (emphasis added). (Exhibit 28)

[8] Exhibit 31, which consists of the street camera video footage of the traffic stop, does not show Ms. A's vehicle nor does it contain any audio. The street camera is also positioned far enough away that it is difficult to see the hands and arms of Ms. A and the officers. As explained in the Analysis section, *infra*, the street camera video footage nevertheless establishes that the Appellant and Officer Hollerbach had substantial control over Ms. A's body as she was lying on her stomach on the street.

three of them fell to the ground. (Exhibit 31)

42. After he brought Ms. A to the ground, the Appellant dragged her forward by her right hand. Ms. A was positioned flat on her stomach on the ground. (Exhibit 31)

43. Officer Hollerbach hovered over Ms. A's lower body while the Appellant hovered over Ms. A's upper body. The officers had Ms. A's arms secured against her body. (Exhibits 26, 28, 31; Testimony of Ms. A)

44. As he worked to secure his handcuffs on Ms. A's hands, the Appellant delivered a knee strike to Ms. A's face. The cut on the bridge of Ms. A's nose reopened, and she began to bleed profusely. (Exhibit 30 at R0320-R0321, Exhibit 31; Testimony of Ms. A)

45. Approximately 15 seconds elapsed between the Appellant dragging Ms. A forward by her right hand and his delivery of the knee strike. (Exhibit 31 from 35:28 to 35:43)

46. Following the Appellant's knee strike, Officer Hollerbach and the Appellant stopped and looked at each other. Officer Hollerbach recalled thinking at the time that it was an "Oh, crap," kind of moment. (Testimony of Hollerbach)

47. As the officers transported Ms. A to the police station, Ms. A pleaded for medical attention. Part of Ms. A's nose shattered into her face; she was also spitting blood and could not breathe well. As they placed her in the holding area, she continued to request medical attention. When Emergency Medical Services personnel finally arrived and wanted to transport her to a Boston hospital, Ms. A denied their assistance as she was not comfortable going to a Boston hospital that late at night. (Testimony of A)

48. At the local hospital, Ms. A. learned that her nose was broken in three places and cartilage completely pressed into her nostril on the left side. One eye was slightly fractured and both eyes were black and blue. Ms. A's necessary reconstructive surgery was delayed due to the

severe swelling on her face, and she still suffers from nerve damage. She also suffered a badly strained right arm and multiple body bruises. (Testimony of A)

49. The progression of Ms. A's injuries is well documented in the administrative record. The photographs that Ms. A took of herself at 2:44 a.m. at her home in Medford Square, prior to going to the hospital, show significant bleeding and swelling on her nose. The photograph that Ms. A took of herself at 12:40 a.m. outside of Paddy O's, following the alleged assault and battery, shows only a singular stream of blood appearing to flow from a cut on the bridge of her nose. (Exhibit 30 at R0318). A photograph taken several hours before Ms. A went to Paddy O's reveals the absence of any cuts or bleeding on her nose. (Exhibit 30 at R0317, R0320-R0321)

50. BPD Rule 304, Section 3, entitled, "Municipal Police Training Committee (MPTC) Use of Force Model," delineates five different threat perception categories. In ascending order, the categories of threat perception include: strategic; tactical; volatile; harmful; and lethal. (Exhibit 16)

51. According to the MPTC Use of Force Model:

- A volatile threat features a subject that offers "active resistance"[9] against a police officer. A reasonable police officer uses "compliance techniques"[10] to attempt to gain control of an actively-resisting subject.

[9] During his Internal Affairs interview on May 29, 2019, an erstwhile use of force and defense tactics instructor at the BPD academy, Darryl Owens, defined "active resistance" as "any defiance to the police officers gaining control or any attempt to delay the police officer's ultimate control. It can be – the general definition of active resistance includes things like running away, pulling away or in Ms. A's case resisting being handcuffed." (Exhibit 20 at R0187)

[10] During his Internal Affairs interview, Officer Owens defined "compliance techniques" as "techniques that will distract or cause a temporary sensation of pain in order to fulfill the officer's mission of controlling and arresting the subject. Things like joint manipulation, distraction techniques, which are softer level strikes, and pressure point activation are included in compliance techniques." (Exhibit 20 at R0187)

- A harmful threat involves an assaultive subject that seeks to injure the responding police officer. A reasonable police officer uses "defensive tactics"[11] to attempt to gain control of an assaultive subject.

(Exhibit 16)

52. Former BPD Police Officer Darryl Owens served in the BPD for more than 30 years, including as a use of force and defense tactics instructor at the BPD academy. To teach use of force and defense tactics classes, Officer Owens completed a 96-hour course to obtain the necessary certification; every three years, he completed a three-day course to update his certification. He is also a use of force analyst associated with the Force Science Institute, located in Chicago, Illinois. (Testimony of Owens)

53. Upon reviewing the street camera video footage of Surface Street at North Street, Officer Owens concluded that Ms. A offered active resistance during the struggle with Officer Hollerbach and the Appellant. Officer Owens also noted that Ms. A's resistance did not appear to reach the point where she was attacking the Appellant. (Testimony of Owens)

54. Officer Owens cited several factors that affect the analysis of the severity of a subject's resistance: the number of officers involved in the arrest; the size of the subject; and the size of the officer. (Testimony of Owens)

55. Ms. A is a slight female: approximately 5'0 tall, and 100 – 110 pounds. In contrast, the Appellant is listed as 5'08 and 150 pounds. (Exhibit 34; Testimony of Owens)

56. A knee strike to the shoulder falls outside the scope of officer training on how to control an actively resistant subject. A distraction-technique knee strike is to the common

[11] In his interview with internal affairs, Officer Owens defined a "defensive tactic" as "a higher level strike geared to stop an assaultive behavior by a subject, i.e., the officer is under attack, the subject is striking the officer or poised to strike the officer, which by the video it appears Ms. [A] was not." (Exhibit 20 at R0190)

perennial, which is a nerve on the outside of the thigh. That said, however, a knee strike to the shoulder falls within a gray area; and, while not a trained response, it could be an acceptable maneuver in certain situations. (Exhibit 20; Testimony of Owens)

57. A knee strike intended as a distractive technique merely goes "to" the target. In situations involving actively-resisting subjects, Owens has seen officers deliver knee strikes to the leg or to the hip. The knee strike in the video, however, appeared to feature a windup, with the knee driving toward the target in a manner consistent with a through-the-target knee strike. A through-the-target knee strike is a "hard-and-heavy technique" reserved for assaultive subjects. (Testimony of Owens)

58. Within his portion of the narrative of the co-authored BPD incident report,[12] the Appellant did not explicitly refer to his use of a knee strike in detaining Ms. A. He wrote, in relevant part, "[Ms. A] refused to be handcuffed and got a hold of the handcuffs preventing Officers from completing the arrest. Officers did engage in a physical altercation with [Ms. A] due to the fact that she was not compliant that resulted in the cut on her nose to bleed more." (Exhibit 49 at R0410)

59. When an officer uses force that results in a physical injury, he is supposed to complete a Form 26. (Testimony of Cellucci)

60. Following a request made by Sgt. Boddy, the Appellant completed a Form 26 on January 23, 2019 to document the use of force against Ms. A – three days after the traffic stop. (Exhibit 21 and 51)

[12] After placing Ms. A under arrest, the Appellant did not subsequently write his own incident report regarding the traffic stop. Instead, the Appellant opted to add two paragraphs to the narrative of the incident report authored by BPD Officer Justin Graves, who was tasked with writing a report of the events that unfolded at Paddy O's. (Exhibit 23)

61. Within the Form 26, the Appellant wrote that he "attempted to knee strike the shoulder area and due to the female's erratic behavior moving wildly around [he] missed and may have struck [her] in the head area." (Exhibit 28 at R0313)

62. The Appellant made no mention of the resultant injuries to Ms. A in his Form 26. (Exhibit 28)

63. The Appellant applied for a criminal complaint against Ms. A in the Central Division of the Boston Municipal Court on the charges of disorderly conduct, refusal to produce license, failure to stop / yield and safety glass violation. On January 29, 2019, the Clerk-Magistrate issued a notice of magistrate's hearing for February 19, 2019 at 9:00 a.m. The notice included the following warning for the complainant (the Appellant): "If you fail to appear for the hearing at the date and time noted, your application may be denied." (Exhibit 29 at R0315)

64. Police officers are supposed to notify the court supervisor if they are unable to attend a scheduled hearing. The Appellant never made any such notification. (Testimony of Cellucci)

65. At the scheduled March 5, 2019 arraignment at the Central Division, the court dismissed Charge 1 (G.L. c. 272, § 53, disorderly conduct) and Charge 2 (G.L. c. 90, § 25, refusal to produce license) upon payment of $100.00 in court costs. Ms. A was found not responsible on Charge 3 (G.L. c. 89, §9, failure to stop/yield) and on Charge 4 (G.L. c. 90, § 9A, safety glass violation). (Exhibit 29)

Internal Affairs Investigation – IAD Complaint No. 2019-0020

66. On June 7, 2019, Sgt. Det. Cellucci submitted an investigative report to Deputy Superintendent Walcott regarding the Appellant's alleged violations of Rule 102, § 3 (Conduct Unbecoming) and Rule 304 (Use of Force). (Exhibit 18)

67. In his investigative report, Sgt. Det. Cellucci: (a) summarized Ms. A's complaint; (b) summarized his Internal Affairs interviews with Ms. A on January 25, 2019, with Officer Hollerbach on March 1, 2019, with Officer Graves on March 5, 2019, with Sgt. Boddy on March 8, 2019, the Appellant on April 2, 2019, and former BPD Officer Darryl Owens on May 29, 2019; (c) inserted still frames showing the events of the traffic stop and the interactions with Ms. A at the police station; (d) summarized the audio of Ms. A's 911 call from Paddy O's and the audio of the radio channel used by the responding officers from 12:26 a.m. to 1:11 a.m. on January 20, 2019; and (e) summarized his overall findings. (Exhibit 18)

68. Then-BPD Officer Owens concluded in his Internal Affairs interview that a "knee strike to the head or the shoulder with the amount of windup and force that it appeared Officer Smith use[d] … seems like what we call a defensive tactic." (Exhibit 20)

69. In the summary of his findings, Sgt. Det. Cellucci emphasized one of Officer Owens's quotes from his Internal Affairs interview: "Therefore, I would have to say that **the knee strike seemed to be a force level above what would be trained in that circumstance.**" (Exhibit 18 at R0167) (emphasis in original)

70. Sgt. Det. Cellucci also included another excerpt from Officer Owens's Internal Affairs interview in his findings:

> [A] knee strike to the shoulder… is definitely outside of the scope of that training… to control an actively resistant subject, although the area is gray. Officers also react [to] closest weapon, closest target. It could be that Officer Smith selected a target of the shoulder, although it's not a trained response.

(Exhibit 18)

71. In his Internal Affairs interview, Officer Graves stated that there was blood all over Ms. A's face when she first arrived at the booking area; and that if she had been bleeding at Paddy O's, that bleeding would have been limited to the little cut on her nose. He also noted that

when Ms. A returned to the station on the morning of January 20, 2019 to file a citizen complaint regarding the use of excessive force, her facial injuries looked a lot worse compared to her appearance at Paddy O's. (Exhibit 23 at R0249-R0250).

72. The Appellant acknowledged during his interview with Sgt. Det. Cellucci that he received a summons, via email, to attend a court hearing related to the charges pending against Ms. A from the traffic stop. He stated that he must have "just forgot[ten]" to appear. (Exhibit 51)

73. On July 25, 2019, Lt. Det. Fred Williams submitted his investigative report to Deputy Superintendent Walcott regarding the following alleged violations: Rule 304, § 2 (Use of Force); Rule 304, § 7 (Reporting Use of Force); Rule 320, § 2 (Courts); and Rule 102, § 3 (Conduct). (Exhibit 19)

74. In his analysis of the interviews underlying Sgt. Det. Cellucci's investigation, Lt. Det. Williams specifically highlighted the inconsistencies in the Appellant's retelling of the origin of the traffic stop. While the co-authored BPD incident report initially indicates that the Appellant and the other officers watched Ms. A drive away from Paddy O's in a black Volkswagen covered in snow, the Appellant wrote later in the report – and noted during his Internal Affairs interview – that he did not know the driver of the stopped vehicle was Ms. A until he had approached the vehicle. The Appellant also stated in his Internal Affairs interview that he followed Ms. A on Congress Street, which runs parallel with Union Street, from where Ms. A left Paddy O's. (Exhibit 19)

75. Prior to offering his recommendations on whether to sustain the alleged violations, Lt. Det. Williams underscored the testimony of Officer Owens, wherein the latter noted that a knee strike to the head or shoulder area – against the resistance exhibited by Ms. A –

was outside the scope of training taught at the Boston Police Academy. (Exhibit 19)

76. Lt. Det. Williams recommended that all the charges against the Appellant be sustained with the exception of the charge for violation of Rule 102, § 3 (Conduct Unbecoming).

77. In recommending that the charge of violating Rule 304, § 2 (Use of Force) be sustained, Lt. Det. Williams concluded that "Officer Smith did *not* use a reasonable amount of force *suitable to the confrontation* that was necessary to overcome an unlawful resistance to regain control of the situation." (Exhibit 19) (emphasis added)

78. In recommending that the charge of violating Rule 304, § 7 (Reporting Use of Force) be sustained, Lt. Det. Williams specifically noted, "Officer Smith did not write an administrative report documenting the use of force used and resulting injury prior to the end of his tour of duty." (Exhibit 19)

Specifications – IAD Complaint No. 2019-0020

79. On April 11, 2022, in connection with IAD Case No. 2019-0020, the Appellant was charged with violating BPD Rule 304, § 2[13] (Use of Non-Lethal Force); BPD Rule 304,

[13] At the Commission's hearing, counsel for the Appellant raised the point that BPD Rule 304 was modified on May 19, 2021, more than two years after the Appellant's motor vehicle stop of Ms. A. Included in those changes was a new section 3, entitled, "Municipal Police Training Committee (MPTC) Use of Force Model". The new section reads, in relevant part: "The Boston Police Department trains officers based on the approved [MPTC] Use of Force Model. This model consists of five levels with each tier representing an escalation in force from the preceding level … *The Boston Police Department will continue to be guided by Massachusetts standards for use of force*." (Exhibit 16) (emphasis added). I also take administrative notice of a press release issued by the BPD (last updated on October 4, 2021) entitled, "Boston Police Reforms: September 2021 Community Update," which states that Rule 304 Non-Lethal Force was "also updated [in May 2021] *to include a description of* the Use of Force Model." (emphasis added). (https://www.boston.gov/news/boston-police-reforms-september-2021-community-update). Based on the language in the new section 3, as well as the BPD press release, the reasonable conclusion is that the BPD added section 3 to further describe the MPTC Use of Force Model that was already in place. I thus credit former Officer Owens' testimony on redirect that none of

§ 7[14] (Use of Force Reporting); and BPD Rule 320, § 2 (Courts). (Exhibits 1 and 15 at R0109)

80. BPD Rule 304, § 2 reads as follows:

> Sec. 2 GENERAL CONSIDERATIONS: The policy of the Boston Police Department is to use only that amount of force that is reasonably necessary to overcome resistance in making an arrest or subduing an attacker.
>
> The right to use non-lethal force is extended to police officers as an alternative in those situations where the potential for serious injury to an officer or civilian exists, but where the application of lethal force would be extreme. The availability of a variety of non-lethal weapons is necessary to provide the police officer with a sufficient number of alternatives when presented with a physical confrontation. However, since such force will not likely result in serious injury and the close public scrutiny that accompanies the use of deadly force, this availability may also increase the possibility for overzealous and inappropriate use of force. Therefore, application of non-lethal force will generally be limited to defensive situations where (1) an officer or other person is attacked, or (2) an officer is met with physical resistance during an encounter.
>
> An officer may also use non-lethal force if, in the process of making an arrest, the officer is met with passive resistance, i.e., an individual who refuses to get out of an automobile, or a protester who is illegally occupying a particular place. Such force should be a reasonable amount required to move the subject based on the totality of the circumstances. An officer who encounters resistance should be assisted by any other officers present. Two or more officers may effect an arrest, without the use of force which one officer cannot complete without resorting to the use of force.

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the changes to Rule 304 would change his analysis of the force deployed against Ms. A during the traffic stop. (Testimony of Owens)

[14] In connection with IAD Case No. 2019-0020, Specification II states, in part, "Such conduct violates Rule 304, § 7 (Use of Force Reporting)." In BPD Police Commissioner Michael A. Cox's Notice of Termination to the Appellant, the Commissioner noted that the hearing held before the Chief Administrative Hearing Officer involved IAD Case No. 2019-0020, which contained a charge of violating "Rule 304 § *8* Reporting of Use of Force." (Exhibit 1, emphasis added) The Commissioner adopted the recommendation of the Chief Administrative Hearing Officer regarding, among other things, "Rule 304 § *8* Reporting of Use of Force." (Exhibit 1, emphasis added) On May 19, 2021, prior to the issuance of all the specifications across the Appellant's three IAD complaints, Rule 304 was amended; relevant for our purposes: sections 4-8 were renumbered. (Exhibit 16) Prior to the rule change, the provision pertaining to use of force reporting was found in Rule 304, § 7. I find that, despite the discrepancy between the numbering in the relevant specification and the Commissioner's Notice of Termination, the internal affairs department committed a harmless error. Based on the foregoing, internal affairs surely meant to specify Rule 304, § 8 in the relevant specification.

(Exhibit 16)

81. BPD Rule 304, § 8 reads, in relevant part, as follows:

Sec. 8 INVESTIGATION OF USE OF FORCE: This Department will thoroughly investigate every incident in which an officer strikes someone with any object or an incapacitating agent is used on a subject, or when a visible injury occurs with officer(s) on scene.

All such applications of force or visible injury as described above shall be immediately reported verbally to the involved member's patrol supervisor. By the end of the tour of duty, an officer who has used non-lethal force shall make out a written report describing the incident including the names of the officer and any other persons concerned, the circumstances under which such force was used, the nature of any injury inflicted and the care given afterwards to the injured party.

Upon receipt of verbal notification, the Patrol Supervisor shall respond to the scene and make an initial assessment of the incident. During this assessment if the officer(s) involved are assigned to and working in a capacity for a Division/Unit out of the chain of command of the Patrol Supervisor, the Patrol Supervisor shall make contact with a supervisor from that Division / Unit if available and request he/she respond to the scene. The investigation of the incident shall then be the responsibility of that Division/Unit supervisor. Prior to the end of the tour of duty the Patrol/Unit Supervisor shall conduct a complete investigation on the use of such non-lethal force and submit a report to the Commanding Officer of the District or Unit where the officer(s) is assigned. Such report shall include the Supervisor's findings and recommendations based upon the assessment of facts known, as to the justification for the use of force. A complete Supervisor's investigation shall consist of the following, where applicable:

1. Supervisor's investigative report;
2. A copy of the incident report, BPD Form 1.1;
3. Reports from the officer(s) alleged to have utilized non-lethal force;
4. Reports from all Department personnel that were present;
5. Reports on all interviews of civilian witnesses to the incident.
6. Use of Force Tracking Form (0027-BFS-1106), with above information attached.

82. BPD Rule 320, § 2 reads as follows:

Sec. 2. All officers shall be present in court when a court process has been issued for their appearance on a specific date and time. Failure to appear will be sufficient justification for a hearing by the court to determine whether or not the officer should be held in contempt of court. If such a proceeding is initiated against an officer, the officer will have to prove to the satisfaction of the court that the delay in appearance was unavoidable. The burden of proof will be upon the

> officer to convince the justice on the issue before the court. Failure to convince the court in this matter may result in a contempt finding by the court and a money assessment against the officer.
>
> Any officer who receives a notification that he is to appear for such a hearing shall submit a written report to his commanding officer setting forth all of the facts. Departmental disciplinary action may be instituted against an officer who fails to report his receipt of a notice to appear for a hearing.

(Exhibit 17)

OUI Incident

83. At approximately 9:00 p.m. or 10:00 p.m. on June 18, 2020, the Appellant began drinking an unknown quantity of vodka. (Exhibit 46)

84. Shortly after 11:00 p.m., M.I.T. Officer Robert Aurilio observed the Appellant attempting to make an illegal U-turn on Memorial Drive in Cambridge. The Appellant turned his vehicle into oncoming traffic, forcing another vehicle to stop to avoid a collision. The Appellant then abruptly stopped perpendicularly across the roadway; and subsequently, proceeded to back over a curb before completing the U-turn. (Exhibit 36)

85. After requesting the assistance of the State Police, Officer Aurilio exited his cruiser and approached the vehicle's driver-side door. The Appellant asked Officer Aurilio, "What are [you] doin' pulling us over?" He then handed Officer Aurilio his BPD identification. (Exhibit 36)

86. According to Officer Aurilio, the Appellant had "difficulty speaking, making no sense and saying phrases unrelated to [his] questions and commands." Officer Aurilio asked the Appellant for his driver's license; the Appellant produced his license but, due to the inability to exercise fine motor skills, the Appellant ended up tossing his driver's license into the backseat of his vehicle. (Exhibit 36 at R0368)

87. Officer Aurilio directed the Appellant to stay in his vehicle. The Appellant defied

Officer Aurilio's directive, attempting to exit the vehicle. Officer Aurilio commanded the Appellant to return to his vehicle, but instead of returning, the Appellant continued his attempt to exit the vehicle – exiting only with great difficulty and using the door to hold himself up before swaying into traffic. (Exhibit 36)

88. Officer Aurilio escorted the Appellant back into his vehicle and explained that they needed to wait for the State Police to arrive at the scene. M.I.T. Officer Don Miller then arrived to provide Officer Aurilio with backup. (Exhibit 36)

89. The Appellant once again defied Officer Aurilio's directive to remain in the car, making his way unsteadily into oncoming traffic. He indicated to the officers that he needed to use the bathroom. Officer Aurilio grabbed the Appellant's arm and began to escort him towards a grassy area alongside Memorial Drive. The Appellant pushed off from Officer Aurilio and began to walk away. (Exhibit 36)

90. Officer Miller then grabbed the Appellant's other arm and continued to guide him towards the grassy area. Officer Aurilio told the Appellant that he could use the bathroom but would need to return to the vehicle. (Exhibit 36)

91. Instead of using the bathroom, the Appellant started to walk towards the embankment leading down to the Charles River. Officer Aurilio grabbed one of the Appellant's arms and ordered him to return to the vehicle. The Appellant resisted, grabbing onto Officer Aurilio's left arm and twisting in an attempt to get away. Officer Miller grabbed the Appellant's right arm, and the officers struggled trying to return the Appellant to his vehicle. (Exhibit 36)

92. The officers eventually ordered the Appellant to sit on the curb; after several attempts, the Appellant finally succeeded in sitting down. At this time, State Trooper Brian Donaghey arrived at the scene. As Officer Aurilio started to update Trooper Donaghey on the

situation, the Appellant began to stand up from the curb and argue with the officers. (Exhibit 36)

93. The Appellant began to walk away towards the Charles River. After guiding the Appellant back to the scene, Trooper Donaghey instructed him several times to sit on the curb. In light of the Appellant's refusal to comply, Trooper Donaghey placed his right hand on the Appellant's left arm to physically lower the Appellant to the ground. (Exhibit 37)

94. The Appellant then used both of his arms to strike Trooper Donaghey's arm, leading the trooper to perform a modified arm-bar take down. Once the Appellant was on the ground, he continued to resist, and a physical struggle ensued before he was ultimately handcuffed and placed under arrest. (Exhibit 37)

95. Officer Aurilio relayed to Trooper Donaghey that he suspected the Appellant was operating under the influence of intoxicating liquor. According to Officer Aurilio, the Appellant "spoke with a thick-tongue, had blood-shot (red) eyes, and was unable to stand still (swaying from side-to-side)." Trooper Donaghey observed the same behaviors during his interaction with the Appellant. (Exhibit 37 at R0373)

96. Officer Aurilio sustained an injury to his wrist or arm from the struggle with the Appellant. (Exhibit 37; Testimony of Sgt. Det. Taxter)

97. After placing the Appellant into his cruiser, Trooper Donaghey noticed a strong odor of alcohol. Attempting to converse with the Appellant, Trooper Donaghey noticed that the Appellant "continued to speak with a thick tongue and had trouble articulating words." He also noticed that the odor of alcohol grew increasingly stronger as he transported the Appellant for booking. (Exhibit 37)

98. Once at the police station, the Appellant was given the opportunity to take a chemical breath test to determine his blood alcohol content (BAC). The Appellant refused to take

the test and was entered into the breathalyzer test machine as a refusal. (Exhibit 37)

99. While the Appellant was at the police station, Trooper Donaghey noticed that the Appellant's eyes remained glassy, that he continued to speak with a thick tongue, and that the odor of alcohol emanating from his person remained strong. (Exhibit 37)

100. The Appellant was arraigned in Cambridge District Court on July 20, 2020, on the charges of (1) Assault and Battery on a Police Officer; (2) Disorderly Conduct; (3) Operating Under the Influence of Intoxicating Liquor; and (4) Marked Lanes Violation. (Exhibits 38 and 39)

101. On August 4, 2020, the charges for assault and battery on a police officer and disorderly conduct were dismissed. The Appellant admitted to sufficient facts on the OUI charge, which was continued without a finding (CWOF) for a period of one year. (Exhibits 38 and 39)

102. On August 4, 2021, the CWOF for the OUI charge was dismissed after the Appellant complied with all necessary conditions. (Exhibit 39)

Internal Affairs Investigation – IAD Complaint No. 2020-0212

103. On October 22, 2020, Sgt. Det. Lucas E. Taxter submitted an investigative report to Deputy Superintendent Matthews in connection with IAD Complaint No. 2020-0212. The IAD complaint investigated whether the Appellant had violated Rule 102, § 3 (Conduct); Rule 102, § 14 (Use of Alcohol Off Duty); and Rule 102, § 35 (Conformance to Laws). (Exhibit 34)

104. As part of his investigation, Sgt. Det. Taxter: (a) analyzed the M.I.T. Police incident report, the Massachusetts State Police arrest report, and the Massachusetts State Police booking report; (b) examined the Appellant's driver history through a search of the Massachusetts Registry of Motor Vehicles on October 22, 2020; (c) reviewed the September 30, 2020 email from the Middlesex District Attorney's office regarding the criminal complaint

brought against the Appellant for the OUI incident; (d) interviewed the Appellant on August 19, 2020; and (e) made findings regarding the OUI incident. (Exhibit 34)

105. In his Internal Affairs interview, the Appellant acknowledged that his behavior with the M.I.T. police officers and Trooper Donaghey on the evening of June 18, 2020 was "completely out of line." He also recognized that his behavior that night was impacted by the alcohol that he had consumed prior to departing his home, and that he did not recall many of the details surrounding the incident. (Exhibits 34, 35, and 46)

106. In his findings, Sgt. Det. Taxter italicized several of Officer Aurilio's observations from his incident report:

> Officer Aurilio made several observations of Officer Smith that lead him to believe Smith was operating under the influence of liquor. Those observations included unintelligible phrases, speaking with a "*thick tongue*," a lack of motor skills, and failure to follow simple commands such as "*Stay in your vehicle*" and "*Sit on the Curb*." Aurilio also observed Smith's eyes were bloodshot and he had "*great difficulty*" standing when he exited his vehicle and swayed into traffic twice.

(Exhibit 34)

107. Sgt. Det. Taxter ran a Registry of Motor Vehicles (RMV) check of the Appellant's driver's license number on the date that he submitted his report to Deputy Superintendent Matthews. He placed the Appellant's driver history into his findings; specifically highlighting – in a bright yellow color – that the Appellant's driver history reflected that the Appellant had refused take a chemical breath test to determine his blood alcohol content on the evening of June 18, 2020. (Exhibit 34)

108. On October 26, 2020, Lt. Det. Michael J. Connolly submitted his investigative report to Deputy Superintendent Matthews in connection with IAD Complaint No. 2020-0212. He noted in his report that the Appellant had previously been interviewed, and that he was

considering the M.I.T. Police incident report, the Massachusetts State Police arrest report, a copy of the Massachusetts State Police booking report, and a letter from the Middlesex District Attorney's Office. (Exhibit 35)

109. Lt. Det. Connolly recommended that the charges for violating Rule 102, § 3 (Conduct), Rule 102, § 14 (Use of Alcohol Off Duty), and Rule 102, § 35 (Conformance to Laws) be sustained. (Exhibit 35)

110. In recommending that the charges for violating Rule 102, § 3 (Conduct) and Rule 102, § 14 (Use of Alcohol Off Duty), Lt. Det. Connolly noted that a review of the M.I.T. and State police reports revealed that the Appellant physically struggled with law enforcement during the incident, and that the Appellant admitted during his Internal Affairs interview that he was intoxicated while operating his vehicle at the time of the incident. (Exhibit 35)

111. Lt. Det. Connolly recommended that the violation of 102, § 35 (Conformance to Laws) be sustained, on the grounds that the Appellant received a continuance without a finding on August 4, 2020 with respect to the charge of operating a motor vehicle while under the influence of alcohol. (Exhibit 35)

Specifications – IAD Complaint No. 2020-0212

112. On April 11, 2022, in connection with IAD Case No. 2020-0212, the Appellant was charged with violating BPD Rule 102, § 3 (Conduct Unbecoming), BPD Rule 102, § 14 (Use of Alcohol Off Duty), and BPD Rule 102, § 35 (Conformance to Laws). (Exhibits 1 and 32 at R0331)

113. BPD Rule 102, § 3 reads as follows:

> Sec. 3 CONDUCT: Employees shall conduct themselves at all times, both on and off duty in such a manner as to reflect most favorably on the Department. Conduct unbecoming an employee shall include that which tends to indicate that the employee is unable or unfit to continue as a member of the Department, or

tends to impair the operation of the Department or its employees.

(Exhibit 33)

114. BPD Rule 102, § 14 reads as follows:

> Sec. 14 USE OF ALCOHOL OFF DUTY: Officers while off duty shall refrain from consuming alcoholic beverages to the extent that it results in obnoxious or offensive behavior which would tend to discredit them or the Department or render them unfit to report for their next regular tour of duty. Employees shall not consume alcoholic beverages in public places while wearing the uniform of the Department or while wearing any part of the uniform which could indicate that they are employees of the Department.

(Exhibit 33)

115. BPD Rule 102, § 35 reads as follows:

> Sec. 35 CONFORMANCE TO LAWS: Employees shall obey all laws of the United States, of the Commonwealth of Massachusetts, all City of Boston ordinances and by-laws and any rule or regulation having the force of law of any board, officer, or commission having the power to make rules and regulations. An employee of the Department who commits any criminal act shall be subject to disciplinary action up to and including discharge from the Department. Each case shall be considered on its own merits, and the circumstances of each shall be fully reviewed before the final action is taken.

(Exhibit 33)

Disparate Treatment Argument

116. The Appellant's counsel submitted a settlement agreement[15] for another BPD officer who had been arrested on charges of OUI and Failure to Use Care in Stopping, as a means of establishing a reference point for an appropriate suspension for the Appellant for the OUI incident. Per the terms of the settlement agreement, the BPD officer agreed to accept a 30-

[15] Paragraph 7 of the settlement agreement reads, "This Agreement shall not be introduced in any other forum, for any reason, except for enforcement of its terms and except in any future similar matters involving Officer…". I decline to rule on whether this language renders the settlement agreement inadmissible. As explained in the Analysis section, *infra*, I find that the settlement agreement cannot be considered for other reasons.

day suspension, with 10 days to serve and the balance to be held in abeyance for one year from the execution date of the agreement. In similar fashion to the Appellant's case, the other BPD officer was also charged with violations of BPD Rule 102, § 14 (Alcohol Off Duty) and BPD Rule 102, § 35 (Conformance to Laws). (Exhibit 54).

BPD Disciplinary Process

117. On April 19, 2022, the Chief Administrative Hearing Officer conducted a hearing on the specifications for IAD Case No. 2018-0533, IAD Case No. 2019-0020, and IAD Case No. 2020-0212. (Exhibit 1)

118. The Chief Administrative Hearing Officer issued a report finding that there was just cause to sustain all of the charges except for the charge pertaining to the alleged violation of Rule 102, § 23 (Truthfulness in Department Reports). (Exhibit 1)

119. On September 30, 2022, BPD Commissioner Michael A. Cox sent a Notice of Termination to the Appellant, in which he sustained each of the findings made by the Chief Administrative Hearing Officer. In terminating the Appellant's employment, the commissioner emphasized the "serious nature of the above-referenced rule violations," and his "alarming escalating pattern of conduct." (Exhibit 1)

APPLICABLE LEGAL STANDARD

A tenured civil service employee may be discharged for "just cause" after due notice and hearing upon written decision "which shall state fully and specifically the reasons therefor." G.L. c. 31, § 41. An employee aggrieved by the decision may appeal to the Commission. G.L. c. 31, § 43. Under section 43, the appointing authority carries the burden to prove to the Commission by a "preponderance of the evidence" that there was "just cause" for the action taken. *Id. See, e.g., Falmouth v. Civil Serv. Comm'n*, 447 Mass. 814, 823 (2006); *Police Dep't of*

Boston v. Collins, 48 Mass. App. Ct. 411, *rev. den*., 726 N.E.2d 417 (2000).

> In performing that function, the commission does not view a snapshot of what was before the appointing authority. Were that determinative, this case would resolve in favor of the city…
>
> In performing its § 43 review… the commission hears evidence and finds facts anew. Examining an earlier but substantially similar version of the same statute, the court in *Sullivan v. Municipal Ct. of the Roxbury Dist*., 322 Mass. 566, 572, 78 N.E.2d 618 (1948), said: "We interpret this as providing for a hearing de novo upon all material evidence and a decision by the commission upon that evidence and not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer.

Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003).

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the [C]ommission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the [C]ommission to have existed when the appointing authority made its decision." *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983). The Commission determines just cause 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. Civ. Serv. 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 must take account of all credible evidence in the entire administrative record, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law, including whatever would fairly detract from the weight of any particular supporting evidence. *See Commissioners of Civil Service v. Municipal Ct. of Boston*, 359 Mass. 211, 214 (1971) citing *Selectmen of Wakefield v. Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928); *Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 264-65 (2001). It is the purview of the hearing officer to determine

credibility of testimony presented to the Commission. "[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance." *Leominster v. Stratton,* 58 Mass. App. Ct. at 729. *See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n*, 401 Mass. 526, 529 (1988); *Doherty v. Retirement Bd. of Medford,* 425 Mass. 130, 141 (1997).

"The Commission is permitted, but not required, to draw an adverse inference against an appellant who fails to testify at the hearing before the appointing authority (or before the Commission). *Falmouth v. Civil Service Comm'n*, 447 Mass. 814, 823 (2006)." *Clark v. Boston Housing Auth.*, 24 MCSR 193 (2011), *aff'd,* No. SUCV2011-2554E (Suff. Sup. Ct., Feb. 13, 2015). In a civil case, the Massachusetts courts have held that even a party asserting his or her rights against self-incrimination under the U.S. or Massachusetts Constitutions "may be the subject of a negative inference by a fact finder where the opposing party … has established a case adverse to the person invoking the privilege. *Quintal v. Commissioner of the Dep't of Employment & Training,* 418 Mass. 855, 861 (1994), quoting *Custody of Two Minors*, 396 Mass. 610, 616 (1986)." *Falmouth, supra,* at 826-27 (citations omitted). While the adverse inference may not be required, in *Falmouth,* the Supreme Judicial Court found that the Commission erred when it failed to factor into its decision to reduce the Appellant's suspension from 180 days to 60 days that the Appellant failed to testify at the Town's hearing, invoking the privilege against self-incrimination. *Id.*

Experts' conclusions are not binding on the trier of fact, who may decline to adopt them in whole or in part. *See, e.g., Police Dep't of Boston v. Kavaleski,* 463 Mass. 680, 694 (2012); *Daniels v. Board of Registration in Medicine*, 418 Mass. 380, 392 (1994), *quoting Commonwealth v. DeMinico*, 408 Mass. 230, 235 (19990) ("The law should not, and does not,

give the opinions of experts… the benefit of conclusiveness.").

The Commission has also consistently held police to a high standard of conduct even in the absence of indictable conduct or a criminal conviction. For example, in *Zorzi v. Town of Norwood*, 29 MCSR 189 (2016), the Commission noted:

> An officer of the law carries the burden of being expected to comport himself or herself in an exemplary fashion." *McIsaac v. Civil Service Comm'n*, 38 Mass. App. Ct. 473, 475 (1995) (negligent off-duty handling of firearm). "When it comes to police officers, the law teaches that there is a special 'trust reposed in [a police officer] by reason of his employment …. 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 are required to do more than refrain from indictable conduct. Police officers are not drafted into public service; rather they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.' *Police Comm'r v. Civil Service Comm'n*, 22 Mass. App. Ct. 364, 371, *rev. den.*, 398 Mass. 1103 (1986).

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.

Section 43 of G.L. c. 31 also vests the Commission with the authority to affirm, vacate or modify a penalty imposed by the appointing authority. The Commission is delegated "considerable discretion" in this regard, albeit "not without bounds" so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. *See, e.g., Police Comm'r v. Civil Service Comm'n*, 39 Mass. App. Ct. 594, 600 (1996) and cases cited; *Falmouth v. Civil Service Comm'n*, 61 Mass. App. Ct. 796, 800 (2004); *Faria v. Third Bristol Div.*, 14 Mass. App. Ct. 985, 987 (1982) (remanded for findings to support modification). However, the Supreme Judicial Court has added that, in the absence of "political considerations, favoritism, or

bias," the same penalty is warranted "unless the commission's findings of fact differ significantly from those reported by the town or interpret the relevant law in a substantially different way." *Falmouth v. Civil Service Comm'n*, 447 Mass. at 824.

ANALYSIS

The BPD, by a preponderance of the evidence, has proven that the Appellant engaged in misconduct on multiple occasions that adversely impacted the public interest warranting his termination as a police officer.

IAD Case No. 2018-0533

Specification I (Neglect of Duty)

The Appellant does not contest that he violated BPD Rule 102, § 4, as detailed in Specification I, when he failed to promptly write an incident report following an attempted home invasion.

While the Appellant's failure to file an incident report for an attempted home invasion may not, by itself, constitute a terminable offense, it is nonetheless a serious breach of BPD Rule 102, § 4 (Neglect of Duty). As Sgt. Det. Tse communicated to the internal affairs unit, a crime cannot be investigated without an incident report. The record reflects that 19 days elapsed between the call to respond to the attempted home invasion and the Appellant's completion of the incident report. Attempted burglary is a felony in Massachusetts, and each day without an incident report was another day that the suspect remained at large. *See* Mass. Ann. Laws c. 274, § 6 (attempt); Mass. Ann. Laws c. 266, § 15 (unarmed burglary). Before its completion, the victim had also left several messages with the Appellant to obtain a copy of the report. I find it troubling that the Appellant generated an "I" number for the incident report on the morning of the attempted home invasion, figuring that he would be returning to work at 4:00 p.m. that same

day and could write the report during that shift, but 19 days passed until the report's completion. It is also concerning that the victim left several messages with the Appellant to obtain a copy of the report, and yet he never got in touch with her. Although the evidentiary record does not specify the dates on which the victim left the messages for the Appellant, her employer notified BPD Captain Fong of the issue with contacting the Appellant on November 13, 2018 – 17 days after the attempted home invasion on October 28, 2018. The Appellant surely would have worked at least one shift during that 17-day period. Even if the neglect of duty charge does not constitute a terminable offense by itself, it is nevertheless a very troubling incident that supports the Commission's view that the Appellant repeatedly engaged in serious misconduct that warranted his termination.

IAD Case No. 2019-0020

Specification I (Use of Non-Lethal Force)

In connection with IAD Case No. 2019-0020, the Appellant contests the charge of violating Rule 304, § 2 (Use of Non-Lethal Force). I agree with the BPD Chief Administrative Hearing Officer's finding that there was just cause to sustain the charge. The street camera video footage, coupled with the credible expert testimony of former Officer Owens, supports the conclusion that the Appellant used an unreasonable and excessive degree of force when he delivered a knee strike to Ms. A's face.

The events of the evening are regrettable, and the Appellant caused an escalation for no good reason. Ms. A sustained an injury to her nose in the bathroom at Paddy O's and was reasonably upset when the responding officers failed to make an arrest. The officers' conclusion that a partially full glass beer bottle could not cause an injury to an individual's face and nose makes no sense. An empty beer bottle is capable of causing injury. It was understandable that

Ms. A, a young woman, would not be pleased with an injury to her face.

When he saw Ms. A pull away with snow on her windshield, the Appellant's response was excessive. I find that the Appellant recognized her from the Paddy O's incident and was still annoyed at her reaction to the officers' refusal to make any arrests. He escalated a simple traffic stop, which only should have led to a traffic ticket, into a serious exacerbation of the facial injury that the Department had already ignored, leading to further (indeed, permanent) injury to Ms. A's face. The fact is that a simple traffic stop led to two brawny officers taking down a petite woman in the snow; the result is a testament to their failure to follow through on their training and Department procedures.

According to BPD Rule 304, § 2: "The policy of the Boston Police Department is to use only that amount of force that is *reasonably necessary to overcome resistance in making an arrest* or subduing an attacker" (emphasis added). Section 2 also provides that application of non-lethal force is generally limited to "*defensive situations* where (1) an officer or other person is attacked, or (2) an officer is met with physical resistance during an encounter" (emphasis added). The rule's "Statement on Use of Force," which precedes its various sections, defines the "reasonableness" of a particular use of force as being calculated from the perspective of a reasonable police officer. It further instructs that such determinations must account for the fact that police officers are often forced to make "split-second decisions about the amount of force necessary in a particular situation" (citing to *Graham v. Connor*, 490 U.S. 386 (1989)).

Through the video footage captured on the street camera positioned at Surface Street at North Street, it is evident that the Appellant and Officer Hollerbach – working side by side – had substantial control over Ms. A while she was lying on the street. There can also be no question that Ms. A was not attacking the officers, or in a position to reasonably attempt to do so. The

street camera footage alone is enough to conclude that the Appellant exhibited unreasonable force when he delivered a knee strike to Ms. A's face.

The street camera video footage of the traffic stop illustrates that, prior to the Appellant's delivery of the knee strike, the officers had Ms. A effectively trapped on the ground. Although she resisted being handcuffed, Ms. A's body was otherwise effectively restrained by Officer Hollerbach and the Appellant for a period of approximately 15 seconds. This was not a situation in which the Appellant had only a split second to deploy a knee strike, where failure to use such force would have allowed Ms. A to get off the ground or physically assault the Appellant or Officer Hollerbach. Based on the street camera video footage, Ms. A would have been incapable of striking either of the officers.

I found the internal affairs interview and credible testimony of former BPD Officer Owens to be particularly instructive on the allegation of the Appellant's use of excessive force. According to Officer Owens, the general definition of "active resistance" includes actions such as pulling away or resisting being handcuffed. Per the MPTC Use of Force Model diagrammed in BPD Rule 304, § 3, a subject displaying active resistance embodies a "volatile" threat level; a reasonable police officer uses "compliance techniques" to attempt to gain control of an actively-resisting subject. Officer Owens defined "compliance techniques" as techniques intended to distract or cause a temporary sensation of pain in order to fulfill the officer's objective of controlling and arresting the subject. Compliance techniques encompass joint manipulation, distraction techniques – which are softer level strikes – and pressure point activation. The next highest level on the MPTC Use of Force Model features an "assaultive" subject seeking to injure the responding police officer. An assaultive subject corresponds to a "harmful" threat level; a reasonable police officer uses "defense tactics" to attempt to gain control of an assaultive

subject. Officer Owens defined a "defense tactic" as a higher-level strike geared to stop an assaultive behavior by a subject, who might be poised to strike, or in the process of striking, the responding officer.

As Officer Owens credibly testified, Ms. A was offering active resistance during the struggle with the Appellant and Officer Hollerbach. Crucially, Officer Owens noted that Ms. A's resistance never appeared to reach the point where she was attacking the Appellant. Thus, a reasonable police officer would have perceived the situation as an actively-resisting subject embodying a volatile threat – and so a compliance technique should have been used to effect Ms. A's arrest. There is a critical distinction between a knee strike that goes "to" the target as a distraction technique and a knee strike that drives "through" the subject. The former is employed with actively-resisting subjects at the volatile threat level, while the latter is reserved for assaultive subjects in the harmful threat category. As Officer Owens indicated, a knee strike to the head or shoulder with the Appellant's degree of windup and force would qualify as a defensive tactic. Given that Ms. A's arms were neutralized by the two officers, the Appellant could have used a knee strike sans windup – directed at Ms. A's lower body – that stopped as soon as it reached Ms. A's body. Moreover, as approximately 15 seconds had elapsed between the Appellant dragging Ms. A's right hand forward and the knee strike, the Appellant could reasonably have shifted his body to the left and delivered the knee strike to her hip or leg to temporarily distract her. The Appellant was not in a defensive situation and had considerable time to employ a compliance technique that would have avoided inflicting more than temporary discomfort to Ms. A.

The instant case bears similarities to *Grasso v. Town of Agawam*, 30 MCSR 347 (2017). In *Grasso*, an arrestee was placed in a cell and subsequently engaged in a physical altercation

with multiple police officers. 30 MCSR at 352. After the physical struggle concluded, the arrestee was laying on his back on the cell bench, while one of the officers left the cell and another officer began heading towards the cell exit. *Id.* at 354. One of the appellants remained in the cell and looked down at the arrestee, with his baton in his hand. *Id.* After the arrestee ignored orders to remain on the cell bench and stood up, the aforementioned appellant shoved him violently backward onto the cell bench. *Id.* at 355. The arrestee then stood up and appeared to stand with his weight bent backward to fend off any strikes from the appellant's baton. *Grasso,* 30 MCSR at 364. The appellant subsequently used his baton to strike the arrestee's upper legs twice and shoved him back onto the bench yet again. *Id.* at 355. The Commission found that the arrestee was not an assaultive subject during the second cell incident, and thus deemed that appellant's use of force to be excessive. *Id.* at 365.

As in *Grasso*, where the arrestee displayed mere active resistance that did not reach the point where a reasonable police officer would have anticipated an attack, here, Ms. A was laying on her stomach on the ground while two larger male police officers were holding onto her arms. And in similar fashion to the appellant in *Grasso*, who had ample time to utilize a compliance technique to place the arrestee back on the cell bench, here the Appellant had a good 15 seconds to formulate a proper compliance technique on Ms. A, such as a knee strike to the hip or leg. Ms. A was not a combative subject, as she merely resisted having her hands placed in the Appellant's handcuffs. She posed no risk of serious injury to the officers. I conclude, therefore, that the Appellant exercised an unreasonable and excessive degree of force in delivering a knee strike to Ms. A's face.

Specification II (Use of Force Reporting)

BPD Rule 304, § 8 requires that:

> All such applications of force or visible injury as described above shall be immediately reported verbally to the involved member's patrol supervisor. By the end of the tour of duty, an officer who has used non-lethal force shall make out a written report describing the incident including the names of the officer and any other persons concerned, the circumstances under which such force was used, the nature of any injury inflicted and the care given afterwards to the injured party.

The alleged violation of BPD Rule 304, § 8 boils down to whether the Appellant satisfied the requirement of making a "written report" describing the use-of-force incident by including a scant two paragraphs in the co-authored BPD incident report. In *Johnson v. Boston Police Dep't*, 23 MCSR 631, 634 (2010), the Commission construed the requirement of a "written report" as impliedly meaning a separate "Use of Force report." The Appellant did not complete a Form 26 until three days after the traffic stop, and only at the request of Sgt. Boddy. Moreover, as Sgt. Det. Cellucci testified, an officer who uses force that results in a physical injury is supposed to complete a Form 26. The Appellant, by this point, had been employed by the BPD for nearly seven years. He would have surely been familiar with the proper protocol for documenting an incident involving the use of force. Based on the foregoing, a preponderance of the evidence establishes that the Appellant did not comply with Rule 304, § 8.

Even assuming arguendo that the "written report" requirement is satisfied by appropriate documentation of the use of force in the general incident report, the Appellant would nonetheless still fail to meet the requirement. Rule 304, § 8 states:

> Prior to the end of the tour of duty the Patrol/Unit Supervisor shall conduct a complete investigation on the use of such non-lethal force and submit a report to the Commanding Officer of the District or Unit where the officer(s) is assigned. Such report shall include the Supervisor's findings and recommendations based upon the assessment of facts known, as to the justification for the use of force.

In the co-authored incident report submitted by Officer Graves, the Appellant wrote of the altercation with Ms. A:

> A. refused to be handcuffed and got a hold of the handcuffs preventing Officers

> from completing the arrest. Officers did engage in a physical altercation with A. due to the fact that she was not compliant that resulted in the cut on her nose to bleed more.

The term "physical altercation" is objectively vague and would defeat the ability of Sgt. Boddy, the patrol supervisor that night, to conduct a "complete investigation" of the Appellant's use of force. Moreover, Sgt. Boddy would not be able to meaningfully comply with his obligation to submit a report to the commanding officer of the A-426-A, as his findings and recommendations would be based on an incomplete set of facts. In addition to there being no mention of the knee strike in the incident report, the Appellant's characterization of Ms. A's injury was grossly understated. The dependent clause, "that resulted in the cut on her nose to bleed more", does not reflect the significant difference in bleeding attested to by Officer Graves, nor does it align with the photographs taken by Ms. A. Although the dependent clause is technically a true statement – the cut on her nose did bleed more as a result of the Appellant's knee strike – it is misleading because it obscures the change in bleeding from minimal at Paddy O's to substantial bleeding following the knee strike.

Whether viewed through the lens of the Appellant's failure to file a separate use of force report or from the vantage point of the Appellant's vague and misleading characterization of the physical altercation, it is evident that the BPD was justified in sustaining the charge of violating Rule 304, § 8 against the Appellant.

Specification III (Courts)

In his post-hearing brief, the Appellant does not contest the finding that he violated BPD Rule 320, § 2 (Courts). He asserts that his failure to appear in court is not a terminable offense.

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The Appellant has proposed that a suspension of forty-five days, with fifteen days to be

served, would be an appropriate disciplinary measure under the circumstances. To justify the suggested suspension, the Appellant submitted a settlement agreement for another BPD officer who had been arrested on charges of OUI and failure to use care in stopping. Per the terms of that settlement agreement, the BPD officer agreed to accept a 30-day suspension, with 10 days to serve and the balance to be held in abeyance for one year from the execution date of the agreement.

The settlement agreement, which does not make any mention of the details of the underlying incident, cannot be considered because the implicated BPD officer and the Appellant have different disciplinary histories. The Commission cannot make a reasonable comparison between BPD officers who are not similarly situated, particularly where one officer has received discipline for an aggregated array of incidents and the other has not. Even if the settlement agreement could be considered, I nevertheless decline to formulate a suspension for the Appellant's OUI charge arising from the events of June 18, 2020. The Appellant's substantial violations of BPD rules that evening marked the third time – in less than two years – that he broke departmental rules. This third incident was of a particularly egregious nature; its magnitude similar to the second incident involving the excessive use of force against Ms. A.

Commission's Authority to Modify a Penalty

The Commission's decision in *Green v. City of Lawrence*, 32 MCSR 405, 405 (2019), dictates that an officer's unrelated infractions may be aggregated by the appointing authority in meting out discipline. Furthermore, the "power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded to the appointing authority." *Town of Falmouth v. Civil Service Comm'n*, 61 Mass. App. Ct. 796, 800 (2004), quoting *Police Comm'r v. Civil Service Comm'n*, 39 Mass. App. Ct. 594, 600

(1996). When the Commission passes judgment on an appointing authority's selected disciplinary measure, it does not "act without regard to the previous decision of the [appointing authority]." *Town of Falmouth v. Civil Service Comm'n*, 447 Mass. at 823, quoting *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983).

If the Commission were to modify the Appellant's termination – which was decided on the basis of aggregated events – and opt instead for individual suspensions for each incident, it could legitimately be accused of impermissibly substituting its judgment for that of the BPD.

Post-Termination Incidents

In its closing argument, the BPD urged the Commission to evaluate the Appellant's two post-termination incidents for the purpose of determining whether a lengthy suspension, as opposed to termination, could possibly have adequately rehabilitated the Appellant. On the other hand, the Appellant objected to inclusion of the post-termination incidents as beyond the scope of the incidents that formed the basis of the appeal. As the Commission presently finds that the BPD proved by a preponderance of the evidence that there was just cause to terminate the Appellant for the three incidents that occurred prior to his termination, I decline to go further and rule on the admissibility of the post-termination incidents.

Adverse Inferences Against the Appellant

I draw adverse inferences from the Appellant's failure to appear at the second day of his hearing before the Commission and his decision not to testify. Drawing an adverse inference is "particularly appropriate" where it is the "dubious behavior of a police officer, who is expected to comport himself in an exemplary manner, that put himself in the position of being unwilling or unable to tell his version of events." *D'Andrea v. City of Everett*, 34 MCSR 369 (2021). In the instant appeal, the Appellant failed to file a motion to reopen, accompanied by a supporting

affidavit explaining the reasons for his absence on the second day of the Commission's hearing, within the ordered timeframe. Based on his attorney's statements at the second day of the hearing, the Appellant did not offer his attorney any specific, credible reasons for his absence – he merely indicated that it was for "personal" reasons. The Appellant had more than two months to request a continuance from the Commission, and yet he waited until 24 hours prior to the second day of the hearing to inform his attorney that he needed a new hearing date. I thus draw adverse inferences from the Appellant's failure to appear at the second day of the Commission's hearing and his failure not to testify.

The Upshot of this Analysis

I find that, based on the substantial credible evidence present in the record, the Boston Police Department proved by a preponderance of the evidence that it had just cause to terminate the Appellant based on his violation of various departmental rules across three serious underlying incidents. When considered as a whole, the Appellant's conduct demonstrates an alarming and escalating pattern of behavior. As the Appellant did not contest the charges sustained against him on IAD Case No. 2018-0533 (failure to timely file incident report) and IAD Case No. 2020-0212 (OUI on June 18, 2020), I only needed to address his contention that separate suspensions should be formulated for each internal affairs complaint. Based on the *Town of Falmouth* cases, discussed *supra*, the Commission does not have the power to impose penalties without regard for the decision of the appointing authority. It also does not possess the power to modify penalties as though it were imposing discipline ab initio. Similarly, *Green*, discussed *supra*, stands for the proposition that an appointing authority may terminate an employee based on an aggregated array of unrelated charges. In light of *Town of Falmouth* and *Green*, I decline to formulate suspensions for IAD Case No. 2018-0533 and IAD Case No. 2020-

0212, where the Boston Police Department terminated the Appellant in consideration of three separate incidents involving serious misconduct.

CONCLUSION

For all of the above reasons, the discipline appeal of the Appellant filed under Docket No. D1-22R-138 is hereby *denied*. I find that the Boston Police Department has proven by a preponderance of the evidence that it had just cause to terminate Kevin Smith.

Civil Service Commission

/s/ Angela C. McConney
Angela C. McConney
Commissioner

By vote of the Civil Service Commission (Bowman, Chair; Dooley, Markey, McConney and Stein) on June 27, 2024.

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 C.M.R. 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration 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:
Kenneth H. Anderson, Esq. (for Appellant)
James J. McGee, Esq. (for Respondent)