

**COMMONWEALTH OF MASSACHUSETTS**

Decision mailed: 11/7/11  
Civil Service Commission CB

**SUFFOLK, ss.**

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

**Robert Tinker,  
Appellant**

**v.**

**CASE NO: D-10-120**

**Boston Police Department,  
Respondent**

**Appellant's Attorney:**

**Edward J. McNelley, Atty.  
Barnicle, McNelley & Nugent  
101 Tremont St. Suite 700  
Boston, MA 02108**

**Respondent's Attorney:**

**Amanda Wall, Atty.  
Boston Police Department  
Office of the Legal Advisor  
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**Commissioner:**

**Daniel M. Henderson**

**DECISION**

The Appellant, Sgt. Detective Robert Tinker, (hereafter "Appellant" or "Sgt. Tinker") acting pursuant to G.L.c.31 § 43, duly appealed a decision of the Boston Police Department ("BPD" or "Department"), the Appointing Authority, to suspend him from employment without pay for five (5) days as a Police Sergeant, for several BPD rules violation all occurring on or about January 25, 2010 at the BPD warehouse, during a ballistics or firearms audit. The Appellant alleges that the BPD did not have just cause for the action taken. The alleged violations involved violations of Rule 102 §4 (Judgment), 102 §3 (Conduct), and 309

(Procedures for Handling Physical Evidence and Other Property Coming Into Police Custody) of the Department's Rules and Procedures.

The Appellant did not contest the general facts, admitting to his actions on that day. However, he did contest the severity of the punishment under the circumstances and did contest the procedural events pursuant to G.L.c.31 § 41, & § 42. The Appellant raised the alleged procedural violations by way of a Motion for Summary Decision heard at the Pre-Hearing Conference held on February 8, 2011; that Motion was denied. A full hearing was held pursuant to G.L. c. 31§ 43 by the Civil Service Commission (the "Commission") on April 15, 2011 to determine if just cause existed for the action taken by the BPD. The hearing was declared private as no party requested a public hearing. The hearing was digitally recorded with copies provided to the parties. The parties filed post-hearing proposed decisions.

## **FINDINGS OF FACT**

The Parties submitted sixteen (16) exhibits and the pre-hearing conference Stipulation of Facts into evidence and the. Based upon the documents entered into evidence and the testimony of:

For the Appointing Authority:

- Lieutenant Detective John Fedorchuk
- Officer Gary Lewis
- Superintendent-in-Chief Daniel Linskey

For the Appellant:

- Sergeant Detective Marisela Perez
- Sergeant Detective Robert Tinker, the Appellant

**I make the following findings of fact:**

1. The Appellant is employed by the BPD as a Sergeant Detective currently assigned to District E-13 (Jamaica Plain). He has worked for the Department for thirty-one (31) years. At all times relevant to the incident in question, the Appellant was assigned to the audit and review unit. (Testimony of the Appellant).
2. The Appellant's has no prior disciplinary issues during his career and is considered an excellent employee. He has an excellent attitude, proficient in his job, and makes a good appearance. He has been the subject of positive feedback from citizens he has come into contact with as a result of his police duties. (Testimony of Superintendent in Chief Daniel Linskey, Lieutenant Detective John Fedorchuk, Sergeant Detective Robert E. Tinker and Disciplinary Comparative/Determination Report, Exhibit 16)
3. Lt. Fedorchuk holds the Appellant in particularly high esteem regarding work proficiency, attitude, responsibility and professionalism especially in dealing with the public, a sometimes problematic area. The 5 years he has been the Appellant's direct supervisor has been entirely a positive experience for him. (Testimony of Lt. Fedorchuk)
4. On January 25, 2010, the Appellant, Sergeant Det. Tinker was assigned to a team with Officer Gary Lewis to conduct a "ballistics audit" for the Boston Police Department ("BPD") at its warehouse. There was also another team working on an audit or inventory at the warehouse that day. (Testimony of Appellant, Officer Lewis, and Lt. Fedorchuk)
5. Lt. Fedorchuk was in charge of the ballistics audit that day. (Testimony of Lt. Fedorchuk, Officer Lewis, Appellant and Chief Linskey) Lt. Fedorchuk was asked what the purpose of that audit was. He specifically answered that *the purpose of the audit was*

*“looking for missing guns”* and specifically “The Department determined and directed us not to inventory or find missing ammunition, to only inventory ammunition if it was included in a case with a gun and inventoried together with the gun.” Lt. Fedorchuk maintained this specific audit purpose despite being prompted on direct examination to expand it to also include ammunition generally. (Testimony of Lt. Fedorchuk)

6. Lt. Fedorchuk has been employed for 40 years by the BPD. He has been assigned to the audit and review unit for the last 11 years where he currently has 3 Sergeants, including the Appellant under his supervision. The Appellant has been under his supervision for 5 years. He testified that “We mostly do compliance audits throughout the Department” and Lt. Fedorchuk participates directly in these audits. “That day we were auditing ballistics unit firearms.” (Testimony of Lt. Fedorchuk)
7. The purpose of the audit was to “get a handle on what the ballistics unit had in their inventory”. “We were going through the cases year by year, in terms of what they had or didn’t have.” The word “cases” refers to the actual physical cases holding the items and not to criminal or investigative cases. (Testimony of Lt. Fedorchuk)
8. “We started out with a print-out from the ballistics unit identifying their inventory boxes. Each gun is placed in a box with a bar-code on each box. We were going by that print-out or list to see what was listed in the box was indeed in the box. If something was not in the box I would notify Superintendent Fong.” (Testimony of Lt. Fedorchuk)
9. Then followed in response to a leading question Lt. Fedorchuk answered: “In some cases in past audits, we would notify Anti-Corruption”. Then followed a question Q. - “OK, and was that notification done in writing?” A. - “Yes” The witness clearly distinguished the practice of some past audits from the practice in this present audit at issue, He finally

answered “Yes” to the question: If in those past audits the notification was done in writing. He had already testified that in this present audit at issue the records that were being kept were the Evidence Tracker software (“ET”) computer editing based on the previous ballistics print-out list. (Testimony of Lt. Fedorchuk)

10. The BPD witnesses were asked some leading or confusing questioning; yet the BPD witnesses only clearly identified the evidence tracking software program (ET) or the initial print-out list as documents or records used or generated by this audit. (Testimony of Lt. Fedorchuk and Officer Lewis)
11. The BPD audit witnesses also clearly testified that only ammunition in cases with a firearm were counted for the ET entries.(Testimony Appellant, Officer Lewis and Lt. Fedorchuk)
12. Lt. Fedorchuk clearly testified to the following: **“No, It was determined by the Department that we were not going to inventory ammunition, unless... we were going to inventory ammunition if it was included in a “gun box”. (interjecting) Q. - “OK” A. - We would not inventory any “loose ammunition”, not in a box with a gun.** (Testimony of Lt. Fedorchuk)
13. Officer Lewis repeatedly testified that he would make additions or deletions to ET as the record keeping he did during this audit. He would account for the discrepancies by adding or deleting, in effect correcting ET. (Testimony of Officer Lewis, reasonable inferences)
14. The BPD witnesses only identified ET and the previous ET print out list as the records used in this audit. If other records were obligated to be kept they could have easily identified same. Especially, **Lt. Fedorchuk the person in charge of this audit could**

**have clearly identified any other documents or forms obligated to be completed by the Appellant and/or Officer Lewis.** (Testimony of Lt. Fedorchuk, Officer Lewis,

Appellant and Chief Linskey, reasonable inferences)

15. Officer Lewis was only familiar with Sgt. Tinker from working with him on this ballistics audit. Officer Lewis considered that his role was assisting the auditing team. Officer Lewis testified that his role and purpose was to “verify” to insure that the number of guns and ammunition in each box audited matched what was in the BPD software program Evidence Tracker, (“ET”). Lewis either operated a fork truck or the computer for ET. Lewis’ assignment was “assisting the auditing team” that day. He described a big fenced in cage, about the size a little bigger than this Commission hearing room, several rows of shelves with pallets and with crates on the pallets. (Testimony of Officer Lewis)
16. Officer Lewis was using a fork truck to pull pallets off the shelves, bringing the pallet up to the desk area they were working at. Boxes were in the crates, a pallet contains 4 crates that After Lewis scanned the box and it came up on ET, at that point Sgt. Tinker would open the box and (only boxes or cases containing a firearm and call out the contents to Lewis) of what the count was in a box and Lewis at the computer would make the changes if any in ET). (Testimony of Officer Lewis)
17. It is noted that the witnesses at various times referred to a physical container holding the related inventoried objects as a “box”, a “case” and an “envelope”. “Case” does not denote a criminal case for prosecution or investigation. (Testimony of Lewis, Tinker, Fedorchuk and Linskey)
18. Officer Lewis provided the following examples of his activities that day. After the box or case was scanned, the listed contents which would come up on the screen, then Sgt.

Tinker would call out the count of what was in it for instance: one gun and ten bullets. Lewis would then make the corrections in Evidence Tracking, if it did not match, by adding or deleting from ET to account for the discrepancy. Officer Lewis gave a further example of the box most relevant in time to the found/ unaccounted for bullet at issue here: "I deleted the one live round" from ET on the box audited before lunch which had listed: 1 firearm, a number of cartridge casings and 1 bullet. (Testimony of Officer Lewis)

19. The Appellant did testify that on the day of the audit, "we filled out our own little forms" for auditing use and also that: "we were putting together our own little data base too". The Appellant implied in this testimony that these were voluntary, informal records and not ordered or required to be kept by the Department. In any event, neither party clarified this testimony any further. (Testimony of Appellant, reasonable inferences)
20. None of the BPD witnesses established any separate obligation on the part of the Appellant or any other person involved with this ballistics audit to create or complete a separate written document to account for the numerous discrepancies found, other than the ET entries or possibly on the print-out list. Officer Lewis, instead of guessing, by stating his belief or assumption could easily have testified specifically to his orders received or his acts and observations that day regarding separate, obligated written forms other than ET entries and print-out list, if they had actually occurred. The BPD offered no exhibit or other documentation like a sample form that had been completed, or was expected and ordered to be completed regarding the numerous discrepancies found in this audit. (Exhibits and testimony and reasonable inferences)

21. This hearing officer inquired from each witness regarding the detailed capacity and parameters of ET. It was pointed out to the BPD that it did not make sense to only obtain a snap-shot of the gross number of firearms with related ammunition on a given day of the audit. None of the witnesses knew of the detailed entries in ET or this program's capacity for keeping this information with a chronology, (who, what, when why of discrepancies found on this date or any prior audits). The evidentiary chain of custody is rendered meaningless if this detailed chronology of contents and changes, are not kept. This hearing officer specifically pointed this out to the BPD that the contents, possibly modified on a particular day, without detailed reference to the previous contents is meaningless in an evidentiary sense. (Exhibits and testimony, inquiry of hearing officer, reasonable inferences)
22. This hearing officer made specific inquiry of Chief Linskey, Lt. Fedorchuk and Officer Lewis regarding the parameters and capacity of ET for preserving information and chronology of changes or discrepancies found in this audit in relation to previous entries. None of these witnesses could provide any definite information in response to this inquiry. (Testimony of Chief Linskey, Lt. Fedorchuk and Officer Lewis)
23. The cases that Officer Lewis and the Appellant were working on, on the date in question, contained evidence from cases that were between thirteen (13) and twenty (20) years old. The Appellant was not aware of whether the items were evidence from open or closed criminal cases. (Testimony of the Appellant).
24. Prior to breaking for lunch, the Appellant opened a case in which the contents did not match what was in ET. ET listed a firearm, four (4) shell casings, and one (1) live round



(bullet). The live round was missing from the box. Officer Lewis noted the discrepancy in ET. (Testimony of Officer Lewis).

25. Officer Lewis returned from lunch and began cleaning up and rearranging things on the desk, because it was kind of a “mess”. He pushed everything on the desk to one side, moving the tables, power cords and lamps. While rearranging the work area, so that he could move the fork truck in. Officer Lewis found a bullet on the floor and pointed it out to the Appellant. The Appellant was then sitting at the other table in the corner, used by the other audit team, looking at the computer monitor. Officer Lewis picked up the bullet, brought it over to where the Appellant would be seated after lunch and placed it on the table. Officer Lewis asked the Appellant what he wanted to do with it; the Appellant did not respond. (Testimony of Officer Lewis and the Appellant).

26. Officer Lewis and the Appellant resumed working on the cases. At some point, the Appellant leaned towards Officer Lewis and said “you didn’t see this,” and made a throwing motion toward the blue tote being used for trash. Officer Lewis then heard the bullet land in the blue tote. (Testimony of Officer Lewis and the Appellant).

27. Officer Lewis offered no comment or cautionary statement to the Appellant following the throwing of the bullet into the trash; for instance, as suggested by this hearing officer: That was a stupid thing to do; perhaps we should report it as found and log it in that way? Officer Lewis also did not bring the matter to the attention of Lt. Fedorchuk, the supervisor of the audit. (Testimony of Officer Lewis, Inquiry by hearing officer)

28. The Appellant found a very high error rate on the firearm cases audited that day when compared to the ET entry, possibly as high as 65% to 75% had bullets missing. He knew the “cases” were old, 13-20 years old. He did not know if they were open or closed

criminal or investigative cases. Some of the cases had holes in them and some of the older cases were kept in envelopes which had holes which he had to tape up. He did not believe he could determine where the found bullet originated and that is why he threw it away. He did not know if it had fallen at some previous time from one of the crates, pallets, cases or envelopes his team or the other audit team working in the area had moved. He testified that he was "joking" when he said to Officer Lewis "you didn't see this," He did not believe that throwing the bullet away was "significant" under these circumstances. However, he admitted his actions were a lapse of judgment. (Testimony of Appellant)

29. Chief Linskey was asked if any statistics were kept on the number or per cent of erroneous entries found in ET for this audit. He answered *that it was a problem and that "numerous erroneous entries" were found. "There were a lot of evidence data input entry errors."* He deferred to Lt. Fedorchuk on any per cent of errors found. (emphasis added)(Testimony of Chief Linskey)

30. Officer Lewis and the Appellant continued to work on the ballistics audit for the rest of the day. When they finished, Officer Lewis returned to Boston Police Headquarters where he reported the incident with the bullet to Superintendent Bruce Holloway. (Testimony of Officer Lewis).

31. On or about January 26, 2010, Lt. Det. Fedorchuk went to the BPD warehouse, as directed to do and located the bullet that the Appellant had discarded in the blue tote being used for trash. Lt. Det. Fedorchuk delivered the bullet to the Anti-Corruption Division. (Testimony of Lt. Det. Fedorchuk).

32. The BPD possessed all of the available facts and circumstances surrounding the finding of the unaccounted bullet and actually secured it the next day. Yet, that bullet's origin still remains unknown at the time of this Commission hearing and it presumably still remains at the Anti-Corruption Division.( Testimony of Lt. Fedorchuk and Chief Linskey)
33. At the BPD disciplinary hearing in this matter, Lt. Fedorchuk was questioned regarding the repercussions on the audit of throwing away a bullet. Q.-“And just so-you know, you said you have a candor (sic) of audit and review. If there is a bullet that's thrown away are there any repercussions that could have on the audit?” A.-“Well, it could depending on what case it is. *Some of the stuff down there has been pretty badly handled* and in this particular incident there's a possibility that this bullet could never have been- the identification of this bullet to whatever case it came from might have been impossible to determine.” (Emphasis added) (Tr. 1, p.36-37) (Exhibit 13)
34. The Appellant admitted at this hearing that throwing the bullet in the trash was a lapse in judgment. The proper procedure for handling the found bullet was for the Appellant to write a report which identified it as found evidence. That report should have been submitted to Lt. Det. Fedorchuk. (Testimony of the Appellant).
35. The “Department” through its Rule 109, employs a system of “Progressive Discipline” in dealing with infractions committed by its employees. This system is a tiered system starting with Oral Reprimands progressing to Written Reprimands and finally Suspension. Progressive Discipline “serves as a training function, in that for a first time violation, an employee may be warned or given a relatively light sanction as an indication that the Department does not condone such action. Upon repetition, then, it is assumed

that the employee knows that the violation is wrong, and will receive more harsh sanction.”(Emphasis added) (Exhibit 8)

36. Sergeant Detective Marisela Perez (hereinafter referred to as “Sgt. Det. Perez”) is employed by the Department in the Audit and Review Unit. Her responsibilities also include reviewing cases where charges have been sustained against an officer and creating a list of discipline cases she believes to be comparable. This list includes the discipline imposed on each of the cases Sgt. Det. Perez compiles. This recommendation is a tool which is helpful in determining the appropriate level of discipline. (Testimony of Sgt. Det. Perez).
37. Sgt. Det. Perez’s report is a synopsis that is used to start a discussion at the Department’s discipline or “green folder” meeting. It is helpful in determining if there are any comparable cases regarding the amount of discipline to impose in a given case. (Testimony Chief Daniel Linskey).
38. The Police Commissioner, Edward F. Davis, (hereinafter referred to as the “Police Commissioner”) has the appointing authority’s sole discretion to determine what level of discipline is appropriate. (Testimony of Chief Linskey and Sgt. Det. Perez).
39. Sgt. Det. Perez conducted a comparison of four (4) cases that she believed to be similar to the Appellant’s case. In her analysis, the officers involved in the cases Sgt. Det. Perez found received discipline ranging from a written reprimand in one case to a one (1) day suspension in the three other cases. (Testimony of Sgt. Det. Perez, Exhibit 16).
40. Sgt. Det. Perez considered cases where the officers had violated Rule 102 §4 (Judgment), and 309 (Procedures for Handling Physical Evidence and Other Property Coming Into Police Custody) in addition to Rule 102 §4 (Judgment). (Testimony of Sgt. Det. Perez).

41. Chief Linskey has worked for the Department for twenty-five (25) years. His responsibilities include overseeing the daily operations of the Department through the Bureau of Field Services, the Bureau of Investigative Services, and the Bureau of Intelligence and Analysis, as well as overseeing disciplinary matters and recruitment through the Internal Affairs Division. (Testimony of Chief Linskey).
42. Chief Linskey did not find the cases identified in Sgt. Det. Perez's report to be closely comparative to the facts and circumstances surrounding the Appellant's case. (Testimony of Chief Linskey).
43. Sgt. Det. Perez forwards her report to Deputy Superintendent Michael Cox (hereinafter referred to as "Deputy Cox") and Superintendent Kenneth Fong (hereinafter referred to as "Superintendent Fong") of the Bureau of Professional Standards. (Testimony of Sgt. Det. Perez).
44. Superintendent Fong, Deputy Cox, the Legal Advisor, and Chief Linskey then have a "green folder" meeting to discuss the appropriate discipline based on the circumstances of each case. (Testimony of Chief Linskey and Sgt. Det. Perez).
45. The cases listed in Sgt. Det. Perez's report identified mostly civilians and patrol officers and only one supervisor, (Sgt.). The Police Commissioner and Chief Linskey believe that supervisors, like Sgt. Det. Tinker, must be held to a higher standard based on the nature of the position as a supervisor. (Testimony of Chief Linskey).
46. At the "green folder" meeting a discussion of the Appellant's case with Sgt. Dt. Perez's comparative cases ensued. However, Chief Linskey believed that two other cases were comparable to the Appellant's and had those two cases brought in for comparison and discussion. Those two additional cases where supervisors who had been disciplined for

issues relating to handling of evidence and lack of judgment. *In those two cases, the supervisors involved each received a discipline of a written reprimand.* (Emphasis added)(Testimony of Chief Linskey).

47. Chief Linskey described what he believed was the Police Commissioner's reasons for the amount of discipline in this matter: "The thing that set this apart is the nature of the assignment and the mission the unit was tasked with; along with interaction of the other subordinate involved. We had a process in which we were doing an audit and review of *all* of our ballistics items; to determine that every firearm *and every piece of ammunition was where it was supposed to be.* Those cases can be very mundane; *it could be a weapon that was turned in with ammunition that isn't linked to a crime* and would have no more repercussions if it's not properly recorded. It could be a homicide case, where that bullet could indict somebody or could exculpate somebody from a homicide. So there is a whole range and to have an audit function that was undermined; that was a serious concern. *The audit function should be ... all of our functions should be above reproach, but when we are conducting an audit, it should be even more above reproach.* And to have that audit undermined was concerning. To have the audit undermined and to..., Sgt. Detective Tinker made a decision to take that piece of evidence and throw it away, as opposed to determining what should happen to it, or counting it and what have you and that was a bad decision. But, if I separate from that, when you then look at a police officer who is assigned to work for you *and you direct that police officer to abdicate his duty that 'you didn't see that'* and you put that police officer in the position that where he has to now violate rules and regulations, abdicate his duty to do his job in the audit function and *essentially cover-up a potential misdeed;*

that's what made this case stand out from the others. And that's what the Police Commissioner determined what is the reason for the discipline he gave.(Emphasis added)  
(Testimony of Chief Linskey)

48. The Appellant did not attempt to influence or direct Officer Lewis to abdicate his duty as a police officer. The Appellant committed a simple physical act of throwing the bullet away on his own, a judgment call, without attempting to enlist Officer Lewis in any complicity, involvement or cover-up. The Appellant was obvious in his act and even called Officer Lewis' attention to his act by saying: "You didn't see that". The Appellant believed his statement to be a joke. If the Appellant believed that his act was in anyway improper under the circumstances; he would have tried to hide it, instead of calling attention to it. It is highly unlikely that the Appellant would consciously act in a way to stain his thirty-one year blemish-free career, by calling an unfamiliar witness's attention to his act. The Appellant's statement that he thought his act was insignificant, under the described circumstances of this audit is believable. (Exhibits and testimony, testimony and demeanor of Appellant)

49. Chief Linskey was asked by this hearing officer: ***Q.-Were you aware that Lt. Fedorchuk ordered; he testified that he ordered that loose ammunition not be inventoried, only ammunition in a box with a gun was inventoried, did you know that? A.-"I did not; I know that the Police Commissioner's order was that if we were going to open boxes we were going to inventory everything."*** Q. - Does that change your opinion on the discipline? Discerning ammunition as only ammunition in a box with a firearm was to be inventoried, not ammunition alone, (loose) in a box without a firearm? (Emphasis added)  
(Testimony of Chief Linskey)

50. Chief Linskey answered as follows: A. - I don't think you can separate the two, if there is *a piece of evidence* there and we are going through 25 cases and it could be from one of those cases. I think we have to look to determine whether we are missing a round from the Linskey homicide case and this round is similar; it must have fallen out of the box. It doesn't change my opinion of it. The issues that would come up at court proceedings for every case involving ballistics down the road that process is... (hearing officer interjected that uniformity in processing is understood) Yes, He was aware that these the oldest 13-20 year old cases. This hearing officer inquired Q. - Not inventorying loose ammunition complicates the difficulty in tracking down where that one found bullet originated from? (Testimony of Chief Linskey)

51. Chief Linskey answered: A. - I'll leave it to audit and review, as to how they would do it. **The mission was to identify each piece of ballistics evidence we have and determine what if anything is missing in its place, and what is not in inventory.** We haven't completed the audit; it is probably 95% done. It has been an exhausting process and that might be something that has to be dealt with at the end of the audit. If we have ammunition that isn't where it is supposed to be or accounted for. But, I don't know what judges and lawyers would say if we said, well, since we didn't know where it came from so we just discarded the ammunition. I think that would cause a host of... problems. This hearing officer interjects again on the problem of no inventory of separate "loose ammunition"? A. - I'd have to check with Lt. Fedorchuk for what his directions were. It might have been that it was to be inventoried at a later time that all the loose ammunition that couldn't be identified to a case would be counted later on. It's kind of contrary to



what we were trying to do with this audit.”(Emphasis added) (Testimony of Chief Linskey).

52. Chief Linskey’s prior understanding was that this audit was thorough, detailed and complete regarding all ammunition and firearms held at the warehouse. However, his prior understanding of this audit is unfounded by the evidence presented and the facts found here. None of the Department witnesses testified that “loose ammunition” was inventoried at all. None testified that make, model, serial number or caliber was verified; only the number of guns and rounds of ammunition in a case with a gun was verified. None testified that any of the numerous erroneous entries found in ET, were set aside and later reconciled. The witnesses consistently testified that a simple deletion or addition to the count of firearms and ammunition was entered in ET to account for the numerous discrepancies found in the audit. (Exhibits and Testimony)
53. It has also been found that the items inventoried at that time were “cases” that were 13-20 years old and it was not known if they were related to open or closed prosecution or investigation matters, or just items that came into the possession of the Department. The way that the items were only partially inventoried with no clear reference to changes or discrepancies indicate a lack of adherence to proper chain of custody aspects in a forensic evidentiary sense. This buoys against the items being currently evidentiary items, but merely potential evidence if found in the future to be related to a crime. The title of **Department Rule 309 Procedures for handling physical evidence and other property coming into police custody** also indicates the mixed status of the items held and inventoried. (Exhibits and testimony, Exhibit 1)

54. Chief Linskey believed that this ballistics audit was done to determine if every firearm and piece of ammunition was where it was supposed to be. *The cases being audited ranged from firearms that were taken for safekeeping to firearms and ammunition that were used in homicides, [13-20 years old]. The implications of each piece of evidence ranged from insignificant to crucial.* (Emphasis added) (Testimony of Chief Linskey).
55. Chief Linskey also believed that having an audit function undermined is extremely concerning. (Testimony of Chief Linskey).
56. Chief Linskey further believed that the origin of the bullet was not important in determining the severity of the punishment to be imposed. Throwing the bullet away, regardless of where it came from, undermined the entire audit function. (Testimony of Chief Linskey).
57. The Department held a disciplinary hearing on June 4, and December 7, 2010. After reviewing all of the evidence presented, Deputy Lydon found that there was just cause to uphold the suspension of the Appellant. (Exhibit 6).
58. On January 13, 2011, the Police Commissioner served the Appellant with a Notice of Decision which informed him that the charges against him had been sustained and the suspension upheld. (Exhibit 12).
59. The Appellant, Sgt. Detective Robert Tinker is a distinguished looking black male in his fifties. He appeared in a suit and tie. He has a neat, professional appearance; yet also, an easygoing and likeable presentation. His solid reputation for high job performance, proficiency and professionalism earned over his 31 year career with the BPD is reflected in his demeanor and presentation. He is not a breaker or bender of rules, as his blemish free 31 year career affirms. He admitted to his act of throwing away the found bullet,

immediately upon questioning by the BPD. He never wavered from that admission and the further admission that it was a lapse of judgment on his part. However, he seems genuinely puzzled by the BPD's exaggerated characterization of this thoughtless act and the resulting amount (5 day suspension) of discipline he received. He believes that he has not been treated fairly; that is treated as others similarly situated have been treated. He believes that the principles of progressive discipline were not properly applied to him, given his 31 year blemish free career and the purpose, nature, factors and circumstances of this particular audit. He believes that those factors and circumstances as found here, mitigate against his single act being determined to be "significant". His testimony was direct and responsive. He explained his thinking at the time of throwing away the bullet. He honestly believed then, that he could not determine where the bullet originated and trying to place the bullet in a case would be a mistake. He admitted that upon reflection he should have completed a "found" item report and submitted it with the found bullet to Lt. Fedorchuk. He did not try to enlist or encourage Officer Lewis to break any rule nor commit any improper act. I find the Appellant to be a reliable and credible witness.

(Demeanor and testimony of Sgt. Detective Tinker)

60. Chief Linskey responded to many questions regarding the purpose and implementation of this ballistics audit/inventory and the capabilities and use of the "Evidence Tracker" ("ET") program, by stating what his general belief or understanding was. However, when questioned more closely, he conceded a lack of specific knowledge or understanding and deferred to Lt. Fedorchuk as the person in charge of the audit, with the knowledge of the capabilities and use of ET. (Exhibits and testimony of Super. Linskey)

61. Of all the witnesses who testified here it appears that Lt. Fedorchuk had the most actual knowledge and understanding of the nature, limitations and purpose of this particular “ballistics audit or inventory”. It also appears that he possessed the most knowledge and understanding of the practical implementations and limitations of the “Evidence Tracker” computer software program. However, even Lt. Fedorchuk’s had only a limited knowledge of the capabilities and use of ET. The use of the name “evidence tracker” here is not taken to connote that it did actually track forensic evidence kept in a true chain of custody sense for even potential adjudicatory purposes. (Exhibits and testimony and reasonable inferences)
62. No documentary evidence (e.g. a print-out) was produced to illustrate the capacity, use and purpose of the evidence tracker software. No documentary evidence was produced to illustrate or substantiate any other recording or documentation requirement for the extensive amount of discrepancies found during this audit/inventory. (Exhibits and testimony)
63. There was no definitive evidence presented at this hearing to show that the audit or inventory conducted here of the contents of the “physical cases” pertained to either open or closed criminal prosecution or investigation cases. The Appellant testified specifically that he did not know whether these were open or closed criminal cases or another type. However, he did know that the physical cases being audited or inventoried that day were between 13 and 20 years old. There was some inference from the testimony of Chief Linskey, that he, Linskey believed the case contents could potentially be later determined to be related to particular crimes. (Exhibits and testimony and reasonable inferences)

64. Lt. Fedorchuk specifically answered that the purpose of the “audit” was “looking for missing guns” and specifically the Department determined and directed us not to inventory or find missing ammunition, to only inventory ammunition if it was included in a case (box or envelope) with a gun and inventoried together with the gun. (Testimony of Lt. Fedorchuk)

## CONCLUSION

Under G.L.c.31, §43, a tenured civil service employee aggrieved by a disciplinary decision of an appointing authority made pursuant to G.L.c.31, §41, may appeal to the Commission. The Commission must determine, under a “preponderance of the evidence” test, whether the appointing authority met its burden of proof that “there was just cause” for the action taken. G.L.c.31, §43. 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); *McIsaac v. Civil Serv. Comm’n*, 38 Mass App.Ct.473,477 (1995); *Watertown v. Arria*, 16 Mass.App Ct. 331,334, rev.den.,390 Mass. 1102 (1983).

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 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). It is a basic tenet of the “merit principle” of Civil Service Law that discipline must be remedial, not punitive, designed to “correct inadequate performance” and “separating employees whose inadequate performance cannot be corrected.” G.L.c.31, §1.

An action is "justified" if "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law." *Commissioners of Civil Serv. v. Municipal Ct.*, 359 Mass. 211, 214 (1971); *Cambridge v. Civil Serv. 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). An appointing authority's burden of proof is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." *Tucker v. Pearlstein*, 334 Mass. 33, 35-36 (1956); *Selectmen of Wakefield v. Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928) The Commission must take account of all credible evidence in the record, including whatever may fairly detract from the weight of any particular evidence. See, e.g., *Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 264-65 (2001)

It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. "[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance." E.g., *Leominster v. Stratton*, 58 Mass.App.Ct. 726, 729 (2003) See *Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n*, 401 Mass. 526, 529 (1988); *Doherty v. Retirement Bd. of Medford*, 425 Mass. 130, 141 (1997). See also *Covell v. Dep't of Social Services*, 439 Mass. 766, 787 (2003) (where live witnesses gave conflicting testimony, decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing)

In performing its appellate function, “the commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew. . . . [after] ‘a hearing de novo upon all material evidence and . . . 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’ . . . For the commission, the question is . . . ‘whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision.’ ” *Leominster v. Stratton*, 58 Mass.App.Ct. 726, 727-728 (2003) See also *Falmouth v. Civil Serv. Comm’n*, 447 Mass. 814, 823; *Cambridge v. Civil Serv. Comm’n*, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997); *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334, rev.den., 390 Mass. 1102, (1983). See generally *Villare v. North Reading*, 8 MCSR 44, reconsidered, 8 MCSR 53 (1995) (discussing de novo fact finding by “disinterested” Commissioner in context of procedural due process)

G.L.c.31, Section 43 also vests the Commission with the authority to affirm, vacate or modify the penalty imposed by the appointing authority. The Commission has been delegated with “considerable discretion”, albeit “not without bounds”, to modify a penalty imposed by the appointing authority, so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. E.g., *Police Comm’r v. Civil Serv. Comm’n*, 39 Mass.App.Ct. 594,600 (1996) and cases cited.

“It is well to remember that the power to modify is at its core the authority to review and, when appropriate, to temper, balance, and amend. The power to modify penalties permits the furtherance of uniformity and equitable treatment of similarly situated

individuals. It must be used to further, and not to frustrate, the purpose of civil service legislation, i.e., ‘to protect efficient public employees from partisan political control’ . . . and ‘the removal of those who have proved to be incompetent or unworthy to continue in the public service’.”

Id., 39 Mass.App.Ct. at 600. (emphasis added). See *Faria v. Third Bristol Div.*, 14 Mass.App.Ct. 985, 987 (1982) (remanded for findings to support modification)

In deciding whether to exercise discretion to modify a penalty, the Commission’s task “is not to be accomplished on a wholly blank slate”. Unless the Commission’s findings of fact differ materially and significantly from those of the appointing authority or interpret the relevant law in a substantially different way, the Commission is not free to “substitute its judgment” for that of the appointing authority, and “cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation.” E.g., *Falmouth v. Civil Serv. Comm’n*, 447 Mass. 814, 823 (2006) and cases cited (minor, immaterial differences in factual findings by Commission and appointing authority did not justify a modification of 180 day-suspension to 60 days). cf. *School Comm. v. Civil Serv. Comm’n*, 43 Mass.App.Ct. 486, rev.den., 426 Mass. 1104 (1997) (modification of discharge to one-year suspension upheld); *Dedham v. Civil Serv. Comm’n* 21 Mass.App.Ct. 904 (1985) (modification of discharge to 18-months suspension upheld); *Trustees of the State Library v. Civil Serv. Comm’n*, 3 Mass.App.Ct. 724 (1975) (modification of discharge to 4-month suspension upheld)

The preponderance of the evidence and the prior Commission’s decisions support the BPD’s decision to impose some discipline upon Sgt. Detective Tinker for the act of throwing



away a found bullet of unknown origin, instead of completing a “found” item report and submitting the report and the bullet to his supervisor, Lt. Fedorchuk.

However, the Appellant’s contention that similarly situated employees, holding a similar supervisory position received much less discipline than he received has merit. The BPD’s own witness on the issue of the amount of discipline relayed that two supervisors, both Sergeants charged with similar offenses received only “written reprimands” as discipline. Chief Linskey who participated in the BPD’s “green folder” meeting to determine the appropriate discipline, specifically sent out for the files on those two supervisor cases because he believed they were comparable, and more in line than the four cases cited by Detective Perez for comparison. Chief Linskey also was operating under erroneous assumptions regarding the thoroughness and completeness of this particular audit, at the time discipline was determined. He mistakenly believed then that this was a complete and detailed audit to determine that “every firearm and every piece of ammunition was where it was supposed to be”. He did not know then that “loose ammunition” or ammunition not in a case with a firearm was ordered not to be inventoried. Although, Chief Linskey was aware of a high rate of errors found in this audit; he believed that the errors were attributed to details of identifying: the make, model, caliber and serial number of the items inventoried. Yet, the consistent evidence and testimony here was that the audit aimed only at the total number of firearms and secondarily at the amount of ammunition found in a “case” with a firearm. In effect it was gross count audit. Chief Linskey also believed then that a detailed audit occurred, with any error or discrepancy found, being put aside until later reconciled.

None of the witnesses participating in this audit testified to any detailed audit or a reconciliation process for the numerous discrepancies found in this gross count audit. Chief

Linskey based his decision on the amount of discipline on what he erroneously believed was a high level, detailed and complete audit of all ballistic items. Based on his mistaken belief, he felt that the Appellant failed the purpose and mission of the audit and the ballistics unit. Chief Linskey believed that the audit was dotting every "I" and crossing every "T" on detail and therefore tossing a found bullet was a clear violation of that high expectation he had in his mind at the time.

Chief Linskey also mistakenly believed that the Appellant was attempting to encourage his subordinate, Officer Lewis to abdicate his duty and obligation as an officer. However, that has not been found to be the Appellant's intent or purpose. The Appellant was open, jocular and obvious; not attempting to enlist Officer Lewis in a misdeed or a cover-up of it as Chief Linskey believed at the time of issuing discipline. The Appellant honestly believed his comment: "you didn't see that" was a joke, after he just blatantly committed a single act, which he later realized was bad judgment or thoughtlessness.

The Appellant found erroneous entries regarding the ammunition count on 65-75% of the cases he audited that day. Officer Lewis testified that the area was "a mess" prompting him to rearrange and clean up the area after lunch that day. Officer Lewis further testified that he simply made additions or deletions or a change to the count in the computer program evidence tracker (ET) when he found an error. Chief Linskey admitted to the problem with "numerous erroneous entries" found in the audit. Lt. Ferdochuk testified at the BPD disciplinary hearing that it might not be possible to properly identify the origin of the found bullet which the Appellant had tossed, since some of the stuff down at the warehouse had been pretty badly handled. Indeed the BPD recovered the tossed bullet the following day and

had knew all of the relevant circumstances then yet, the bullet's origin still remained unknown at the time of this Commission hearing.

Although, there were frequent references to the items inventoried in this audit as "evidence"; it has been found in these items were not determined to be evidence in any current criminal prosecution or investigation. However, it was left open that these items had at least potential evidentiary value, if subsequently found after examination to be related to a crime.

This hearing officer inquired from each witness regarding the detailed capacity and parameters of ET. It was pointed out to the BPD that it did not make sense to only obtain a snap-shot of the gross number of firearms with related ammunition on a given day of the audit. None of the witnesses knew of the detailed entries in ET or this program's capacity for keeping this information with a chronology, (who, what, when why of discrepancies found on this date or any prior audits). The evidentiary chain of custody is rendered meaningless if this detailed chronology of contents and changes, are not kept. This hearing officer specifically pointed this out to the BPD that the contents, possibly modified on a particular day, without detailed reference to the previous contents is meaningless in a forensic evidentiary sense.

In consideration of the above, the Appellant's Appeal shall be allowed in part and modified for the reasons set forth below.

The evidence has not shown by a preponderance of the credible evidence in the record that the Appellant, under the totality of the circumstances found, proved that the appellant violated all of the BPD rules and policies, with which he was charged. He admitted his simple act from the beginning. Yet, under the facts and circumstances found here, it

cannot be said that by this single act he “[Sgt. Detective Tinker...is] guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service.” *School Comm. v. Civil Service Comm’n*, 43Mass.App.Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); *Murray v. Second Dist.Ct.*, 389 Mass. 508, 514 (1983). Therefore, I find Fall River had just cause to discipline Mr. Burns.

As noted above, the Commission is authorized to modify the discipline imposed after conducting its “de novo hearing for the purpose of finding facts anew” *Town of Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823 (2006) and cases cited. The Commission also must consider “the principle of uniformity and the ‘equitable treatment of similarly situated individuals’ [both within and across appointing authorities]” as well as “the underlying purpose of the civil service system [which is] ‘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. Furthermore, in reviewing appeals under G.L. c. 31 § 43,

The evidence warrants a finding that similarly situated BPD employees other than the Appellant have violated similar policies and rules of the BPD, yet received a much lower discipline of a written reprimand. There was no evidence that those other employees had as long a career as the Appellant without any prior discipline, thirty-one years. As such, I find that the Appellant’s five (5) day suspension, under the circumstances found here, solely on the basis of a single act of bad judgment, would result in his disparate treatment.

The BPD through its **Rule 109** employs a system of “**Progressive Discipline**” in dealing with infractions committed by its employees. This system is a tiered system starting with Oral Reprimands progressing to Written Reprimands and finally Suspension.

**Progressive Discipline** “serves as a training function, in that for a first time violation, an employee may be warned or given a relatively light sanction as an indication that the Department does not condone such action. Upon repetition, then, it is assumed that the employee knows that the violation is wrong, and will receive more harsh sanction”

The Massachusetts Appeals Court has acknowledged that progressive discipline policies are “designed to correct employee misconduct by informing the employee of the consequences of such misconduct and imposing incremental discipline.” Chief Justice for Admin. & Mgmt. of the Trial Ct. v. Nat’l Ass’n of Gov’t Emps./Serv. Emps. Int’l Union, No. 06-P-1234, 2007 WL 1437706, at \*2 n.3 (Mass. App. Ct. May 16, 2007) (unpublished). See also Leola Watson v. Boston Police Department, D-4350, 7 MCSR 260, (1994)

In the present appeal, a reduction of the discipline imposed from a five (5) day suspension would remove any disparate treatment and situate the Appellant to other similarly situated BPD employees and ultimately supports the merit principle imbedded throughout the civil service law.

Accordingly, for the reasons stated above, the appeal of the Appellant, Robert Tinker, shall be and hereby is ***allowed, in part***. His five (5) day suspension is vacated and a written reprimand shall issue in its place. He shall be entitled to be restored to his position without loss of pay or any other benefit.

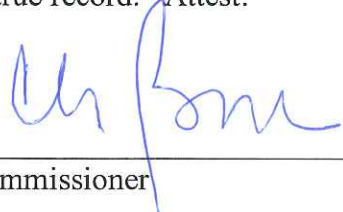
The Appellant’s appeal Docket No. D-10-120 is hereby ***allowed in part***. The BPD shall vacate the five (5) day suspension and replace it with a written reprimand and return the Appellant to his position, without any loss of pay or other benefits.

Civil Service Commission,

  
\_\_\_\_\_  
Daniel M. Henderson  
Commissioner

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman voted Yes; Henderson voted Yes, Marquis voted No, McDowell voted Yes, and, Stein voted No, Commissioners) on November 3, 2011.

A true record. Attest:

  
\_\_\_\_\_  
Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), 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 a Civil Service Commission's final decision.

Under the provisions of MGL c. 31 S. 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the commission's order or decision.

Notice sent to:

Edward J. McNelley, Atty. (for Appellant)

Amanda Wall, Atty. (for Appointing Authority)