COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

FRANK WILLIAMS, Appellant	)	
vs.	)	Docket NO. D-04-304
BOSTON POLICE DEPARTMENT Respondent	)	

Appellants' Attorney:	Kenneth H. Anderson, Esq. BYRNE & DRECHSLER, L.L.P. Eastern Harbor Office Park 50 Redfield Street Boston, MA 02122 (617) 265-3900
Respondent's Attorney:	David M. Jellinek, Esq. Office of the Legal Advisor Boston Police Department One Schroeder Plaza Boston, MA 02120-2014 (617) 343-4550
Commissioner:	Daniel M. Henderson, Esq.

DECISION

Pursuant to the provisions of M.G.L. c. 31, § 43, the Appellant, Frank G. Williams, Jr., (herein after referred to as "Appellant" or "Williams") is appealing the action of the Respondent, Boston Police Department, (herein after referred to as "Department" or "BPD"), in suspending him for a period of three (3) days without pay from the position of Police Officer, for violation, (Respectful treatment - 2 Counts) of the Rules and Procedures of the Boston Police Department.

The Appellant claims that this action was taken against him without just cause. This decision herein after shall refer to the author of the first letter as the "female motorist" and the author of the second letter as the "male pedestrian". The appeal was timely filed. A full hearing was held on July 30, 2007 at the offices of the Civil Service Commission. As no notice was received from either party, the hearing was declared private. One (1) tape was made of the proceedings. Both parties submitted post-hearing briefs.

FINDINGS OF FACT

Based upon the documents entered into evidence (Exhibits 1-13), a Stipulation that no witnesses testified at the Appointing Authority's disciplinary hearing, the testimony of Deputy Superintendent Darrin Greeley, Lieutenant Detective Arthur Stratford and the Appellant Frank G. Williams, Jr., I make the following findings of fact:

1. The Appellant was charged with the violation of the Rules and Regulations of the BPD, Rule 102§ 9 (2counts) of disrespectful treatment: **Specification I** (Respectful Treatment - Count 1). On or about June 23, 2003, he verbally abused a [*female*] *motorist* who had stopped her vehicle in the Downtown Crossing Area. This conduct constitutes disrespectful treatment of a citizen. **Specification II** (Respectful Treatment – Count 2). On or about June 23, 2003, while interacting with a motorist who had stopped her vehicle in the Downtown Crossing Area, he yelled at a second civilian, (*lost pedestrian*) who approached him seeking directions. It should be noted that this pedestrian is not the same person referred to in this decision as the author of the second letter or "male pedestrian"(Exhibit 1 and testimony)
2. The Parties stipulated orally at this hearing, that no witnesses testified at the Department's disciplinary hearing in this matter. (Stipulation)

3. The discipline against Williams was prompted by a letter dated June 23, 2003, from a female motorist to The Boston Police Commissioner, with a copy sent to Boston Mayor Thomas Menino. The letter describes her encounter with a Boston Police Officer on June 23, 2003 at Downtown Crossing after she became lost and confused. She received a motor vehicle law citation from the officer for two violations, and a civil assessment of $100. This letter was offered into evidence by the Respondent and objected to by the Appellant on the grounds that it was hearsay, its reliability untested by investigation or cross-examination and that it was unsworn. The letter was admitted into evidence *de bene esse*, subject to later qualification and determination of weight. (Exhibit 3 and testimony)
4. This critical letter, allegedly from the female motorist, was not sworn to, was not notarized, and was not written while under oath. This letter was not verified by the Department, either by investigation or direct personal or telephonic contact with the alleged author, the reliability of the substantive contents and allegations were not tested by: interview, oral deposition under oath, written interrogatories under oath, subsequent testimony or any other reasonable means under oath and subject to cross-examination. (Exhibits, stipulation and testimony)
5. The Department did not seek any form of discovery or verification from the female motorist or any other witness; despite having her address(s), her father's address and the address of another alleged percipient witness, the male pedestrian. (Exhibits 3, 4, 5, 6, other exhibits, stipulation, testimony and administrative notice)
6. The Department failed to seek or secure the testimony of the female motorist, her father, Officer Barney Rivers or the male pedestrian, Detective Roy Hechavarria or any other

witness by means of subpoena or otherwise for either the Department's disciplinary hearing or this Civil Service Commission hearing. (Exhibits, administrative notice, stipulation and testimony)

7. The Department failed to produce any evidence that the two letter authors, Officer Barney Rivers, Sergeant-Detective Roy Hechavarria or any other witness was "unavailable" for the Department's disciplinary hearing or this Civil Service Commission hearing. (Exhibits, administrative notice, stipulation and testimony)
8. Williams was one of the Boston Police Officers working the day tour on that date. The Appellant has been employed as a Boston Police Officer for 19 years. He has worked in Area A-7 (East Boston), Area A-1 (Downtown Boston), Area D-14 (Brighton), after which he was transferred back to Area A-1 for a period of five years before being transferred to Area C-6 (South Boston).(Testimony)
9. On September 23, 2003, the Appellant was working a day tour in Area A-1 and was assigned with Officer Barney Rivers to the Downtown Crossing area. According to Exhibit 7, there were twenty officers on the day tour in District A-1 that day. Officer Williams testified that there is a kiosk located for the Police Officers at Downtown Crossing, which is a busy commercial district where the roads entering the crossing are barricaded by a blue Boston Police Department saw horse and two large, 3 foot x 6 foot signs which advise non-commercial vehicles to "Keep Out". The Downtown Crossing is a zone prohibiting vehicles. This is a very busy pedestrian zone, allowing for pedestrians to walk fully down the streets, which is clearly demarked by red brick on both the streets and sidewalks. In addition to the shops in the area, there are street vendors and numerous pedestrians coming and going to the various shops and traveling

to the nearby financial district. The MBTA Orange Line and Red Line run through Downtown Crossing. Officer Williams did see MBTA police officers at Downtown Crossing on a daily basis.(Exhibits 7, 11 and testimony)

10. At approximately 10:15 a.m. on June 23, 2003, Officer Williams issued Massachusetts Uniform Citation Number K3959054 to the female motorist in the amount of $100 This ticket included a $50 assessment for driving on a secluded way since she had overlooked or ignored the blue saw horse police barricade and had overlooked or ignored the two large signs keeping vehicles from the area. She was also assessed for speeding. This was one of eight tickets written by Williams on this date in the Downtown Crossing area. (Exhibits 3,4,10, 11 and testimony)
11. The other Boston Police Officer assigned to the Downtown Crossing, Officer Rivers, did not write any citations on this date. (Exhibit 8).
12. When interviewed about this citation almost three months later by the Internal Affairs Division, Officer Williams stated that he did not recall the circumstances surrounding this citation, but he denied yelling at Ms. Clarke, stating "I have not yelled at anyone in Downtown Crossing as long as I've been down there . . .." Officer Williams testified at the Internal Affairs Division that he wrote between 80 and 100 tickets per month at Downtown Crossing. Three months and 240-300 tickets later, he could not recall the specifics of this citation beyond the information recorded on the ticket when questioned by the Internal Affairs Division. (Exhibits 4. 11 and testimony)
13. The recipient of this citation, the female motorist, wrote a letter to the Boston Police Commissioner Paul Evans, with a copy to Mayor Thomas M. Menino dated June 23, 2003. In this letter, she complained that Officer Williams banged on her window and

screamed at her, bringing her to tears and causing the entire street to turn and watch. In this letter, she does not state that the officer swore at her and does not recount a single word the officer said. (Exhibit 3).

14. On June 25, 2003, a male pedestrian wrote a letter to (then) Commissioner Paul Evans complaining about witnessing a police officer berating a female driver at Downtown Crossing sometime on Monday morning. This letter was not sworn to or written under oath. It does not include the time of the alleged incident, and it does not describe the car the female was driving by including its color, type, or license plate number. This letter also does not give the precise location at Downtown Crossing where this alleged incident happened, it does not provide any description of the female or officer in question, and it does not state if the officer in question was a Boston Police Officer, an MBTA Police officer, a Municipal Police Officer, or a private security guard. This letter also does not describe the police officer by height, weight, or race. The letter does not state whether the male pedestrian knew or was associated with the female motorist. Additionally, this letter does not recount a single word the police officer in question said. (Exhibit 6 and testimony)
15. On July 10, 2003, the Boston Police Department opened an Internal Affairs Complaint against the Appellant, and the case was assigned to (then) Sergeant Detective Roy Hecchavaria. Hecchavaria also interviewed the Appellant on September 10, 2003, about this Complaint. Despite the fact that (now) Lieutenant Hecchavaria is still employed by the Boston Police Department, he was not called to testify at either the Department hearing or this Civil Service Commission hearing. (Exhibits 2, 11 and testimony)
16. Boston Police Department Rule and Regulation 109, §50 entitled "Investigative

Techniques" provides that "[t]he investigating [Internal Affairs] officer may use any lawful investigative techniques, including, but not limited to, inspecting public records, questioning of witnesses, interrogation of the member complained of, questioning of fellow employees and surveillance." (Exhibits 11, 13 and testimony)

17. Despite the testimony of Deputy Superintendent Darren Greeley that Internal Affairs investigations should take a few days to complete, the Appellant was not interviewed by the Internal Affairs Division until September 10, 2003, some two months after the Internal Affairs case was opened. (Exhibits 2 and 11).
18. There is some indication in the Department's IAD records that Sergeant Detective Hecchavaria may have interviewed both authors of the letters. However, Hecchavaria did not make any notes of these interviews, never wrote any reports summarizing these interviews, and did not tape record these interviews. The Department called two witnesses at this hearing, Deputy Superintendent Darrin Greeley and Lieutenant Detective Arthur Stratford. Both Stratford and Greeley testified that the investigation of any IAD complaint should include a personal or telephone interview of the witnesses to verify and corroborate the allegations contained in the complaint. (Exhibits 2, 13 and testimony)
19. Both Deputy Superintendent Darren Greeley and Lieutenant Detective Arthur Stratford said reports should be completed summarizing interviews of witnesses, and that it was preferential to tape record these interviews. They both testified that recording or keeping detailed notes of the interview is sound investigative technique. Greeley even opined that issuing discipline based on 2 letters that had not been verified by at least a telephone interview was not a fair enough process. (Exhibits 2, 13 and testimony)

20. A disciplinary Department trial board hearing was scheduled against the Appellant pursuant to Boston Police Department Rules 109, §53-63. See also Rule 109, §60, which discusses "witnesses" at such hearings states that:

> "Both parties may bring witnesses before the hearing. The complainant and the defendant shall be responsible for the attendance of their respective witnesses, but the Office of Internal Investigations may be requested to give reasonable assistance in securing such attendance. Witnesses, before testifying, shall be sworn or make an affirmation. Examination of each witness shall be made separately and apart from other witnesses, and each side shall have the opportunity to cross-examine all witnesses." See Rule 109, §60. (Exhibit 13 (emphasis added).

At this Civil Service Commission hearing, neither letter author testified. The Police Department offered an Affidavit by the female motorist's father, stating that at the time of the June 23, 2003 incident, his daughter was living in Wyoming and was back visiting her family in East Sandwich. This Affidavit is dated April 28, 2004. (Exhibit 5).

21. At the Civil Service Commission, the Department offered no evidence that they had attempted to produce the female motorist to testify, nor did they offer any evidence as to the whereabouts of the male pedestrian, whose letter had a Boston work address. No further information beyond the April 28, 2004 Affidavit of the female motorist's father was offered to justify her failure to testify. (Exhibit 6 and testimony)
22. Although Lieutenant Detective Arthur Stratford testified that an examination of the female motorist's driving record would have been beneficial to determine if she had a motive to lie or fabricate, this was never done by the Department.(Testimony)
23. The Appellant objected to the introduction of Exhibits 3 and 6, since these two letters were not sworn or made under oath and were not subject to cross-examination.

Moreover, due to the lack of detail contained in the letter from the male pedestrian, to the extent he actually witnessed an incident), there is no "evidence which a reasonable person would be accustomed to relying on and the conduct of their affairs" to indicate that it was the same incident involving the female motorist. (Exhibit 3, 6 and 13, Rule 109, §59 (Evidence).

24. The Appellant also objected to the testimony of Deputy Superintendent Darren Greeley and Lieutenant Detective Arthur Stratford since they did not testify before the Appointing Authority. Although the hearing before the Commission involves "making its de novo findings of fact," see *Town of Falmouth v. Civil Service Commission*, 447 Mass. 814, 823 (2006) and G.L. c. 41, §43, in making its decision, the Commission then determines whether "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." *Id.* at 824, quoting *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983). However I find that these two witnesses did provide relevant and probative testimony regarding BPD practice and procedure, on internal investigations of these types of matter. (Stipulation, testimony and administrative notice).

25. In the present case, the Commission cannot rely upon the two unsworn letters, because they do not possess sufficient indicia of reliability to be the type of evidence a reasonable person would rely on in conducting serious affairs. The two letters are untested and unreliable hearsay, containing obvious peculiarities, inconsistencies and curious omissions. These letters therefore carry no weight of persuasion regarding their contents or the charges against the Appellant. (Exhibits 3, 6 and testimony)

26. The Appointing Authority has offered no reports of any interviews of these individuals, no transcripts of any interviews they made, and nothing to support their naked claims that an officer yelled at a female. No telephone or other contact was documented between the Department and the alleged authors of these two letters, despite addresses and telephone numbers being available to the Department. Even a minimal verification of the letters content had not been made by the Department. Regarding the male pedestrian's letter. Even assuming that its account is (a) reliable and (b) in reference to the same alleged incident, it does not sufficiently corroborate the female motorist's allegations. (Exhibits 3, 6 and testimony)

27. The female motorist's letter could have provided a rich vein to explore, for any attorney conducting cross-examination of her as a witness. A portion of that vein is as follows: She admitted in the letter that she was "…lost and very confused", "…not sure of which way to go" and "…confusing to drive", yet she inconsistently stated earlier that "…I am very familiar with driving in Boston." It is also noted that Downtown Crossing is one of the more familiar locations in Boston, well marked and well known as a pedestrian zone. It also seems odd that she never identified a street or an intersection despite claiming in her letter to be "…Stuck at a very busy intersection". This seems like a deliberate omission, as her route could have been easily retraced later on, by a street map and disclosed in the letter for the sake of identification and clarity. She also claimed several times, to be "following a major line of traffic" but she never protested to Williams that she alone had been picked out of the major line of traffic, for a citation. A reasonable inference from this omission is that no line of traffic existed when she was stopped. She used vehement words and phrases to describe Williams's conduct, such as: "…banging

on my window", "…screaming at me", "…yelled", "…harass", "…embarrassing", "…insulting", "…degrading", "…totally uncalled for", "…a disgrace", and "…such rudeness and disrespect". However, these words and phrases are all subjective or personal state of mind determinations. She admitted in the letter that her state of mind was such as being "lost", "very confused", "startled", "crying", "clearly confused and upset" and other possible factors such as being late for an important, scheduled appointment. She omitted in her letter why she was trying to reach her destination, the Prudential Center. She may have been upset due to the monetary amount of the citation, $100, and possible car insurance premium penalty points accruing from the citation. (Exhibit 3, 4, 5 , testimony, and administrative notice)

28. It is common knowledge that there is an appeal process to the courts on traffic citations and this process is explained on the citation itself. The female motorist never explains in the letter whether she intended to pursue this appeal process and have her day in court. The Department did not present any evidence on the exercise of the appeal process here or its outcome. However the evidence in the record shows that she used addresses on Cape Cod, California and Wyoming. It is believed that she previously lived on Cape Cod, was living California at the time of this event but planning on moving to Wyoming, which move eventually did occur. A reasonable inference is that at the time she wrote the letter, she was unsure that she would be available in the Boston area, in the future to contest the citation in court. This state of flux in her life may also have influenced the severity of the language she used in the letter. (Exhibit 3, 4, 5 , testimony, and administrative notice)

29. She admitted that she was crying and was upset about receiving the $100 citation.

Williams testified that it is his practice to always issue a citation under these conditions and that he never varies his practice, even if the woman driver is crying. He stated that he believed that some women expect that crying would void the citation. There is the unexplored possibility that Williams' indifference to her crying may have further upset her. Williams is charged, (Count 1) with verbally abusing the female motorist. Abusive means the use of harsh words. It implies the use of insulting or scathing language. However, she did not identify one single word that Williams allegedly used in verbally abusing her. She did not even employ the commonly used catch-all words *swearing or swore*. She used more than a dozen subjective adjectives to describe the verbal assault without identifying a single word that could be objectively determined to be abusive, harsh, insulting or scathing. I find this omission very peculiar since most people remember at least a single word or phrase from a traumatic verbally abusive experience. The common experience for many people, is for a traumatic word or phrase to become imprinted in the brain. This is especially curious since she wrote the letter on the day of the event, when it was fresh in her mind. (Exhibit 3, 4, 5 and testimony)

30. The final incongruity in her letter that I note is that in the second to last paragraph of the letter, she complains that after receiving the citation from Williams, he turned his back on her and walked away, without explaining the citation to her. She further expresses displeasure that he walked away without explaining to her exactly what and how she has gone wrong, so that it would not happen again. The obvious incongruity here is that based upon her earlier description of Williams' alleged verbal maltreatment of her and her emotional reaction to it, the reasonable inference is drawn that she would have then strongly preferred distance from Williams and not further dialogue. (Exhibit 3, 4, 5 and

testimony)

31. The female motorist was able to identify Williams by his identification number which is written clearly in the appropriate box on the citation, given to her by Williams. I find the reasonable inference; that this identifying citation and a potential resulting court appearance for Williams, is another factor, that bodes against the probability that Williams was verbally abusive to her.(Exhibit 4 and testimony)

32. I also find the male pedestrian's letter lacks sufficient indicia of reliability. I also find that it lacks sufficient indicia of corroboration of the female motorist's letter. There are several anomalies, omissions and curiosities in this letter that undermine its reliability. The letter is alleged to be authored by a high level businessman. However there is no serious attempt in the letter, to identify: the driver, the vehicle, the police officer or the exact time and location of the event. Curiously he addresses the time and location issue but only in a vague manner; "*I was not alone on the street corner Monday morning*…" Why did he omit the identity of the street corner and even the approximate time? This omission is similar to the female motorist's letter in which she claims to be "*Stuck at a very busy intersection*…" but omits to identify the intersection. There is also no statement of the exact words allegedly used by the officer, but like the female motorist's letter, employs only subjective, conclusory words. The male pedestrian's letter is allegedly written two days after the event with no evidence of the date it was received by the Police Commissioner. This letter also employs the same subjective descriptive words, such as: "…lost or confused" "berating", "upsetting", "degrading". This letter employs the same contrast description to demonstrate inappropriate treatment by Williams. "…Although I did not see the beginning of the exchange. It appeared very

obvious that this was a case of a lost driver, not one of some dangerous or criminal activity." However, he fails to identify any of the factors that indicated to him, that it was "*very obvious*" that the driver was lost and not a criminal. However, a third alternative is also possible; that is the driver is a Scofflaw, previously caught or warned by the officer, for the same infraction. .(Exhibits 3, 4, 6 and testimony)

33. Besides the peculiar use of the same adjectives ("embarrassing", "degrading", "lost or confused", "upset", "upsetting") and the same contrast description (lost driver not a criminal), the two letters carry other indicia of unreliability. The factual inconsistencies between the two letters. The failure of the male pedestrian's letter, to describe the writing of and handing over of the citation scenario that she claimed in her letter, occurred at the end of her interaction with Williams. The male motorist's letter also fails to mention the alleged *berated "lost pedestrian" incident,* (Count 2), which also supposedly occurred at the end of her interaction with Williams. It should be noted that the berated lost pedestrian (Count 2) is not the same person referred to in this decision as the male pedestrian, letter writer.(Exhibits 3, 4, 6 and testimony)

34. There are several other questionable curiosities deserving of inquiry by investigation or cross-examination. Why didn't the male pedestrian get the registration number of the vehicle or the officer's ID #? Why didn't he intervene or inquire while the allegedly "embarrassing and degrading" event was occurring? Why didn't he at least give his business card or phone number to the driver and ask her to call him later? The lack of any follow up or investigation of these letters by the Department further emphasizes the need for the opportunity of cross-examination of the alleged authors by the Appellant. The Appellant then could have inquired into the possibility of some relationship between

the two letter writers. The above outlined anomalies, incongruities, inconsistencies and omissions are some of the factors that render both letters to be unreliable and uncorroborated hearsay. These two letters are therefore given minimal if any weight of persuasion. (Exhibits 3, 4, 6 and testimony)

35. The Appellant is a credible witness. His demeanor as a witness is cool, calm, confident, deliberate and professional. His answers were forthright and direct. He wrote at least 8 citations on the day of this event at Downtown Crossing and many more there, both before and since this event. This event occurred on June 23, 2003 and he was not interviewed by the Department until September 10, 2003. He could not then recall the particulars of this event or the citation other than the information contained on the citation. However he admitted, at both the Department interview and this hearing that the citation was issued by him. He admitted that it is his practice to knock on the car window or car roof and speak loudly to get the driver's attention, if the window is rolled up, as in this case. He clearly and emphatically denied ever yelling at or swearing at the female motorist that day. He testified here that – "It is not my nature to yell." He further categorically denied ever yelling at anyone in Downtown Crossing for as long as he has been down there. This blanket denial made by the Appellant, at the Department interview on September 10, 2003 provided the Department with the time and opportunity to attempt to impeach his credibility. The Department could have attempted to winnow out prior yelling incidents, if they existed, from the numerous citations, (many hundreds), he issued in the Downtown Crossing. The Department also could have called as a witness, the Appellant's partner that day, Officer Barney Rivers, if it was believed that Officer Rivers would diminish the Appellant's assertions. The Appellant's

testimony is found to be truthful. (Exhibits, testimony and demeanor)

36. These two letters are hearsay and do not carry sufficient indicia of reliability to be admitted into evidence, for the purpose of proving the truth of the matters asserted in the statements contained therein. The only clear unrebutted conclusion that can be drawn from the Clarke letter in conjunction with the testimony here is that she was very upset after receiving a $100 citation from Williams in Downtown Crossing, on June 23, 2003. The Appellant has never had the opportunity to cross-examine these two individuals and their (letters) testimony was never tested by questioning prior to this hearing. The Department's discipline of the Appellant was based almost entirely on these two letters. Therefore it is determined that the Department's decision to discipline the Appellant was not supported by sufficient, reliable evidence. Minimal if any weight of persuasion is attributed to these two letters.(Exhibits 3 & 6, Exhibits, stipulation, demeanor and testimony)

Conclusion

The role of the Civil Service Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997). The issue to determine in this case therefore is whether the Respondent, at the time of the Section 41 hearing, had reasonable justification for suspending the Appellant for a period of three (3) days. Town of Watertown v. Arria, 16 Mass. App. Ct. 331 (1983). McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995). Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000). City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). The proper inquiry for determining if an action was justified

is, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service." Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983). School Committee of Brockton v. Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997).

In this case, it is not just a matter of determining whether the two counts of disrespectful conduct that the Appellant has been charged, if shown, rises to the level of deserving the discipline imposed. It is also a matter of determining the nature, sufficiency and reliability of the evidence relied upon by the Department in imposing the discipline. The just cause standard is premised upon the Appointing Authority's decision to discipline the Appellant being based upon a preponderance of the credible evidence in the record. In this case, the Department relied almost exclusively upon two letters that had not been verified or tested in any way by an investigation or interview of the two named authors of the letters. The Appellant was also denied the opportunity to test the reliability of the two letters, through cross-examination of the two authors, under oath, as witnesses in a hearing. The authors of the two letters did not testify at either the Department's disciplinary hearing or this Civil Service Commission hearing.

The two are hearsay and do not carry sufficient indicia of reliability to be admitted into evidence, for the purpose of proving the truth of the matters asserted in the statements contained therein. The only clear unrebutted conclusion that can be drawn from the female motorist's letter and this hearing testimony is that she was very upset after receiving a $100 citation from Williams in Downtown Crossing, on June 23, 2003. It is difficult to determine with any certainty, the purpose of the male pedestrian's letter. This letter is deliberately vague, especially in light of the author's claimed stature as a high level businessman. This letter is devoid of any specific information on which a reasonable person could rely, to identify the: participants,

location, time or even the *actus reus* of the two counts of verbal abuse charged, the words used during the charged event. The informational sparseness of this letter, taken in conjunction with the other peculiarities outlined in the findings of fact, leads one to believe that the purpose of the letter was not the identification of a specific event, the participants or the eventual discipline of a police officer.

The Appellant faced with the two accusing letters did the only thing he could do under these circumstances. He denied the two charges both in his testimony at the Departmental interview and at this hearing. Since it is difficult to prove a negative, except by denial, he made the strongest denial possible under these circumstances. He vehemently denied the two specific charges, then, he went on to state his conformity to his own particular habit and practice of issuing citations, under similar circumstances. The Appellant further augmented his specific denial with a categorical denial of ever yelling at or swearing at anyone, while assigned to Downtown Crossing. Since he has issued many citations at Downtown Crossing, this considerable experience provided the Department with the opportunity to seek out and obtain some evidence of the Appellant's inconsistency on this issue. The Department never attempted to introduce such evidence.

The Appellant has never had the opportunity to cross-examine these two individuals and their (letters) testimony was never tested by questioning prior to this hearing. The Department's discipline of the Appellant was based almost entirely on these two letters, determined here to be unreliable hearsay. The Department's decision to discipline the Appellant was not supported by credible and reliable evidence. Minimal if any weight of persuasion is attributed to these two letters.

The hearsay rule forbids the admission in evidence of extra-hearing statements offered to

prove the truth of the matters asserted in the statements. A "statement is defined as: (1) an oral or written statement; or (2) nonverbal conduct of a person, if it is intended by him to be an assertion. See Handbook of Massachusetts Evidence, Liakos, Brodin and Avery, Seventh Edition, (1999), Aspen Pub., Gaithersburg, NY, § 8.1, page 463. The common-law exceptions to the hearsay rule in almost every case are based on two elements: (1) a strong necessity for the evidence the rule would otherwise exclude; and (2) a guarantee of trustworthiness in the circumstances surrounding the making of the particular declaration for which an exception is created. However, the burden should not create an unjustifiably onerous burden on the party seeking an exception to the hearsay rule. Id, Handbook, § 8.4.1, page 477. The State Administrative Procedure Act, G.L. chapter 30A, which applies to most state administrative agencies, boards and commissions, including the Civil Service Commission declares that only privileged evidence is inadmissible and allows the adjudicatory body wide discretion in ruling on the admission of evidence. See G.L. chapter 30A and Massachusetts Automobile Rating & Accident Prevention Bureau v. Commissioner of Insurance, 401 Mass. 282, 285-286, (1987). However the Commission's evidentiary discretion is restrained by fundamental principles such as fairness, equity and due process. The two allegedly percipient witnesses here, who allegedly wrote the two letters, which the Department determined to be *prima facie* evidence at its disciplinary hearing, never appeared as witnesses. Their "unavailability" as witnesses, is a preliminary requirement in establishing an exception to the hearsay rule and it was never established for either witness. The "unavailability" of a witness may be established by a showing of death, Commonwealth v. Mustone, 353 Mass 490 (1968), or an inability to locate the witness after a due and diligent search. Commonwealth v. Charles, 428 Mass 672, 678, (1999). Neither situation is found here.

The Commission must affirm the decision of the appointing authority if the appointing authority can demonstrate just cause by a preponderance of the credible and reliable evidence in the record. M.G.L. c. 31, §43. A party's contention satisfies the preponderance standard "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, 39 (1956), quoting Sergeant v. Mass. Accident Co., 307 Mass. 246, 250 (1940). Whoever shoulders the burden of proof must convince the trier of fact that a proposition is more than simply possible, but that it is more likely to be true. See Sergeant, 307 Mass at 251. Continental Assurance Co. v. Diorio-Volungis, 51 Mass. App. Ct. 403, 408 (2001). The burden of proof may be satisfied "either by direct evidence or rational inference of probabilities from established facts." Zezuski v. Jenny Manufacturing Co., 363 Mass. 324, 329 (1973), quoting Bigwood v. Boston & No. St. Ry. Co., 209 Mass. 345, 348 (1911).

In this case, the Appellant was suspended for three days for allegedly being disrespectful to a female motorist and a second individual, a male pedestrian, while policing in the Downtown Crossing area of Boston on June 23, 2003. At the Departmental disciplinary hearing and then again at the hearing before the Civil Service Commission, the Appellant was deprived of the fundamental right to cross-examine witnesses when the Department merely produced two letters against him.. The Appellant's inability to cross-examine witnesses -- a right described by Dean Wigmore in his famous treatise on evidence as "one of the greatest engines that the skilled man has ever invented for ascertaining the truth of the matter," 6 *Wigmore on Evidence*, §1838 (Chadbourn Rev. Ed. 1976) -- deprived the Appellant of the opportunity to explore the alleged percipient witnesses' self-interest, to question their motives to lie, fabricate or exaggerate, to

explore their ability to perceive and recollect, to determine if they held biases, and to question their veracity. By denying the Appellant the basic right to cross-examine witnesses, a right specifically provided to the Appellant under Boston Police Rule and Procedure 109, §60, the Department failed to afford the Appellant fundamental fairness and due process in its disciplinary process. The Commission has determined that the Department's suspension of the Appellant was not justified, as it was based upon untested and unreliable hearsay evidence.

For all of the above stated reasons, it is determined that The Department has failed to demonstrate by a preponderance of the credible evidence in the record that the Appellant committed the two acts of disrespectful treatment of two citizens, while on duty at Downtown Crossing, on June 23, 2003.

Therefore the Department was not justified in suspending him for a period of three (3) days. The appeal on Docket No. D-04-304 is hereby ***allowed.*** The Department shall return the Appellant to his position, without any loss of compensation or other benefits.

Civil Service Commission

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Daniel M. Henderson, Esq.
Commissioner

By vote of the Civil Service Commission (Bowman; Chairman, Guerin, Henderson, Marquis and Taylor; Commissioners) on September 13, 2007.

A True Record. Attest:

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Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with MGL ch. 30A sec. 14(1) for the purpose of tolling the time of appeal.

Pursuant to MGL ch. 31 sec. 44, any party aggrieved by a final decision or order of the Commonwealth may initiate proceedings for judicial review under MGL ch. 30A sec. 14 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 To:

Kenneth H. Anderson, Esq
David M. Jellinek, Esq. BPD.