

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

JOSEPH WOLSKI,
Appellant
v.

D1-17-033

CITY OF GARDNER,
Respondent

Appearance for Appellant:

Kenneth H. Anderson, Esq.
Anderson, Goldman, Tobin &
Pasciucco
50 Redfield Street: Suite 201
Dorchester, MA 02122

Appearance for Respondent:

Jill A. Romer, Esq.¹
City of Gardner
Law Department
Gardner, MA 01440

Commissioner:

Christopher C. Bowman

SUMMARY OF DECISION

There was just cause for the City of Gardner to terminate Mr. Wolski from his position as a police officer based on his violation of various rules and regulations, including those related to truthfulness. Mr. Wolski, without justification, pulled and aimed his Department-issued Taser at a patient at a local hospital and then slapped the patient in the face. He failed to report the incident and then, as part of an internal investigation, falsely stated that he did not pull his Taser. Termination was appropriate given the need for police officers to be truthful in addition to Mr. Wolski's prior disciplinary history.

¹ Subsequent to the full hearing and subsequent to submitting a proposed decision, Attorney Romer retired from the City and submitted a notice of withdrawal of appearance as counsel. A notice of appearance as counsel was simultaneously submitted by Attorney John M. Flick, to whom this decision is being sent.

DECISION

On February 16, 2017, Mr. Wolski, Joseph Wolski (Mr. Wolski), pursuant to the provisions of G.L. c. 31, § 43, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Respondent, the City of Gardner (City) to terminate his employment as a police officer from the City's Police Department. On March 13, 2017, I held a pre-hearing at the Armand P. Mercier Community Center in Lowell, MA. I held a full hearing at the same location on April 24, 2017.² As no written notice was received from either party, the hearing was declared private. All witnesses, with the exception of Mr. Wolski, were sequestered. A CD was made of the hearing.³ Both parties submitted proposed decisions to the Commission on June 23, 2017.

FINDINGS OF FACT:

Based upon the documents entered into evidence (Respondent Exhibits 1-19⁴ and Appellant Exhibits A-C⁵, stipulated facts, the testimony⁶ of:

Called by the City:

- Derek Ferreira, Police Officer, City of Gardner (Officer Ferreira);
- A.R., Security Supervisor, local hospital (A.R.);
- Neil Erickson, Police Chief, City of Gardner (Chief Erickson);

² The Standard Adjudicatory rules of Practice and Procedures, 810 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission, with G.L. Chapter 31, or any Commission rules, taking precedence.

³ Subsequent to the hearing, the City had the recording transcribed and a copy of the transcript was provided to counsel for Mr. Wolski and the Commission. That transcript is deemed to be the official record of the proceedings.

⁴ Exhibits 16 and 17 are the video recorded interviews of Mr. Wolski and Officer Ferreira. They cannot be viewed without downloading a reader. Should this case be subject to judicial review, the City is responsible for ensuring that the DVDs can be viewed by the Court as part of its review.

⁵ At the hearing, counsel for the Appellant stated that he would submit, via email, the entire internal affairs investigation, which would be marked as Exhibit D. I inquired with counsel twice but did not receive the Exhibit. Various Exhibits, however, including Respondent Exhibit 18, appear to include the bulk of the internal affairs investigation, including summaries of interviews with hospital employees, including those who testified before the Commission. I have reviewed all of these documents, and, where appropriate, compared them to the live testimony that these witnesses offered before the Commission.

⁶ Employees from a local hospital who testified before the Commission are referred to by their initials.

Called by Mr. Wolski:

- M.G., Patient Safety Specialist, local hospital (M.G.);
- P.L., Emergency Room Nurse, local hospital (P.L.);
- Joseph Wolski, Appellant (Mr. Wolski);

and taking administrative notice of all matters filed in the case, pertinent statutes, regulations, policies, stipulations and reasonable inferences from the credible evidence, a preponderance of the evidence establishes the following:

1. Mr. Wolski began his employment as a police officer with the City on December 17, 2007. (Stipulated Fact)
2. Prior to his employment with the City, Mr. Wolski served as: a military police officer in the United States Air Force for five (5) years; a Winchendon police officer for approximately two (2) to three (3) years; and a police officer for the Massachusetts Environmental Police (MEP) for approximately one (1) year. (Testimony of Mr. Wolski)
3. On December 28, 2016 at approximately 1:00 P.M., Mr. Wolski, Officer Ferreira and a police sergeant were dispatched to Connors Street in Gardner as a result of a call regarding a male party (the subject) under the influence of drugs and alcohol who was suicidal. (Exhibits 1, 2 and Testimony of Officer Ferreira and Mr. Wolski)
4. The subject became combative causing Officer Ferreira to draw his department Taser as a warning technique while giving verbal commands to the subject. (Exhibit 2 and Testimony of Officer Ferreira)
5. The sergeant at the scene told Officer Ferreira not to engage the Taser. The sergeant and Mr. Wolski grabbed onto the subject and Officer Ferreira re-holstered his Taser. (Testimony of Officer Ferreira)

6. The sergeant, Officer Ferreira and Mr. Wolski then struggled to bring the subject to the ground. During this struggle, Officer Ferreira scraped his hand on a nearby stone wall. (Testimony of Officer Ferreira)
7. Pursuant to “Section 12” (of G.L. 123 as amended by Chapter 410 of the Acts and Resolves of 2004), the subject was then involuntarily transported and admitted to a local hospital (the hospital). (Exhibit 2 and Testimony of Officer Ferreira and Mr. Wolski)
8. At approximately 1:20 P.M., the subject, accompanied by Mr. Wolski, along with Officer Ferreira and the sergeant (who drove their own cruisers), arrived at the hospital. (Exhibit 1 and Testimony of Officer Ferreira)
9. The subject from the Connors Street incident was admitted to “Room 5” of the emergency room at the hospital. (Testimony of Officer Ferreira and Mr. Wolski)
10. In Room 5, the subject was loud, belligerent and threatening. Mr. Wolski, along with Officer Ferreira and the sergeant, were eventually able to calm the subject in Room 5 down. (Testimony of Mr. Wolski and Officer Ferreira)
11. Earlier that day (December 28th), another individual (the patient), had been involuntarily transported and admitted to “Room 7” of the hospital by the State Police and the Barre Police Department. (Exhibit C)
12. According to the police report, the patient, prior to being involuntarily transported and admitted to Room 7 of the emergency room:
 - was “on a roller coaster of emotions”;
 - had threatened to kill himself;

- had threatened to take the gun from one of the police officers and break his wrist;
 - had threatened to “kick the shit out of” all the police officers present at the scene. (Exhibit C)
13. Also according to the police report, the patient, before being transported, “became irate again and lunged forward in a ‘head butt’ type maneuver, striking [his brother] in the right cheek” (Exhibit C)
14. Eventually the subject was administered three (3) separate injections of sedation medication that calmed him enough to go the hospital, although he still “attempted to break free of [the police] grasp and fight against us” with each injection continuing to threaten the police with physical violence. He was then transported to the hospital and admitted to Room 7 of emergency room. (Exhibit C)
15. Room 7 of the emergency room is in close proximity (two “doors” down) to Room 5. (Chalk A)
16. While the sergeant, Officer Ferreira and Mr. Wolksi were in Room 5 trying to calm the subject down, Officer Ferreira could hear the patient in Room 7 “talking loud enough to hear” but did not know exactly what the patient in Room 7 was saying. (Testimony of Officer Ferreira)
17. On multiple occasions, Officer Ferreira left Room 5 and walked down to the nurses’ station of the hospital to wash his scraped hand. On one of these occasions, a male security guard at the hospital told Officer Ferreira that the patient in Room 7 wanted to fight them; that he did not like police officers; and that the police officers should stay away from the patient in Room 7. (Testimony of Officer Ferreira)

18. Once the subject in Room 5 was restrained, the sergeant and Mr. Wolski left the hospital at approximately 2:25 P.M. while Officer Ferreira remained at the hospital to receive treatment for the hand injury sustained at Connors Street. (Testimony of Officer Ferreira)
19. Mr. Wolski had left the hospital to obtain departmental forms that Officer Ferreira needed to complete due to the injury to his hand. (Testimony of Mr. Wolski and Officer Ferreira)
20. After Mr. Wolski and the sergeant left the hospital, Officer Ferreira was standing near the sink of the nurses' station. (Testimony of Officer Ferreira and Chalk A)
21. Officer Ferreira proceeded to "throw in a chew [chewing tobacco]" at which point the patient in Room 7 engaged him in conversation, mentioning that both men use the same brand of chewing tobacco. (Testimony of Officer Ferreira)
22. The conversation between Officer Ferreira and the patient in Room 7 lasted approximately ten (10) to fifteen (15) minutes. Officer Ferreira was standing at the nurses' station and the patient was sitting on a rolling chair in the doorway of Room 7. The two (2) men were speaking across a hallway, approximately three (3) to four (4) feet away from each other. (Testimony of Officer Ferreira)
23. There was no actual door where the patient was sitting due to a recent incident involving vandalism. (Testimony of Officer Ferreira)
24. Officer Ferreira described his conversation with the patient in Room 7 as a "rollercoaster" in which the patient was calm at times but would then "ramp himself back up" talking about his confrontation with police earlier that day, at one point

telling Officer Ferreira that he is immune to sedatives and Tasers. (Testimony of Officer Ferreira)

25. While the patient in Room 7 was talking to Officer Ferreira, the chair that the patient was sitting on was halfway over the doorway threshold and his legs were just outside the doorway, on the hallway floor. (Testimony of Officer Ferreira)
26. The conversation between Officer Ferreira and the patient in Room 7 ended when a hospital employee walked by and told the patient to get back in his room. At that point, the patient “went irate ... began screaming ... threatening staff. Just yelling at people. He went from a zero to a hundred.” (Testimony of Officer Ferreira)
27. Believing at this point that the patient should be handled by hospital staff (as opposed to police), Officer Ferreira walked away from the patient, down the hallway, near the corner of the nurses’ station. From this position, Officer Ferreira still had the patient in his sight and he observed hospital staff trying to calm the patient down, but the patient continued to scream at and threaten hospital staff. (Testimony of Officer Ferreira)
28. At approximately 2:50 P.M., Officer Ferreira saw Mr. Wolski (who had just returned and re-entered the hospital) walking down the hallway toward the nurses’ station. Officer Ferreira walked a few steps toward Mr. Wolski (and away from Room 7) to greet him at which point Mr. Wolski said words to the effect “what’s this asshole’s problem?”. Officer Ferreira replied by saying words to the effect “leave it alone; it’s the ER’s problem; not ours.” (Testimony of Officer Ferreira)
29. After this brief verbal exchange between the officers, Officer Ferreira walked back to where he was previously standing (in the hallway at the corner of the nurses’ station)

and Mr. Wolski walked toward the patient in Room 7. (Testimony of Officer Ferreira)⁷

30. Officer Ferreira then made the following observations:

- “He [Wolski] was trying to have a conversation with the patient in Room 7 and de-escalate the situation ... for a couple seconds.”
- “He [Wolski] came around and came towards me where I was still stationed at the corner.”
- “He [Wolski] was facing me, so away from the patient in Room 7.”
- “At that point, I observed Officer Wolski take his department-issued Taser out of his holster and turned and faced the patient in Room 7.”
- Mr. Wolski was “seven or eight feet” from the patient.
- “He [Wolski] brought it up to the patient in Room 7. Like brought it to [inaudible], bring it in front of you. So he brought it up in front of him instead of like down by his side. It wasn’t down, it was in front of him.”
- “He pointed it at the patient in Room 7.”
- “He began to – he took a couple steps forward and then began to do almost like a swaying, taunting motion with the Taser, he was ducking left and right pointing the Taser at the patient in Room 7.”
- “Officer Wolski re-holstered his Taser and patted the patient on his shoulder.”

(Testimony of Officer Ferreira)

31. A.R., a security supervisor at the hospital, also saw Mr. Wolski remove his Taser from his holster and point it at the patient in Room 7. (Testimony of A.R.)

⁷ This testimony differs from the statement that Officer Ferreira previously gave to the Police Chief and Deputy Police Chief. In his statement to the Police Chief and Deputy Police Chief, Officer Ferreira stated that both he and Mr. Wolski walked toward the patient. Which version is correct does not change my findings regarding what happened next, including whether Mr. Wolski pulled his Taser and when he slapped the patient.

32. The patient, who remained sitting on the rolling stool in the doorway when Mr. Wolski drew his Taser, began to roll the stool back into Room 7 and Mr. Wolski followed him into the room. (Testimony of Ferreira 49:22; 100:22)
33. The patient and Mr. Wolski began yelling at each other inside the room and the patient, who stands about six-foot-six, stood upright using the edge of the hospital bed to prop himself up, and positioned himself face to face with Mr. Wolski while the verbal altercation with Mr. Wolski continued. (Testimony of Officer Ferreira)
34. During this verbal argument, the patient raised his hands up to his chest area and then Mr. Wolski, who was standing with his hands by his side, “open-hand smacked the patient ... in the left side of ... [his] ... face.” Officer Ferreira described this smack as an “open hand, full arm extension across the face, full on” slap which was “extremely loud”. (Testimony of Officer Ferreira)
35. Mr. Wolski and Officer Ferrerira then pushed the patient onto to the bed to restrain him. Once he was on the bed, the patient yelled that he had been assaulted, saying “You punched me in the face, you punched me in the face” to which Mr. Wolski replied: “I didn’t punch you, I open-hand smacked you”. (Testimony of Officer Ferreira)
36. After the patient in Room 7 had been restrained and sedated by hospital staff, Officer Ferreira was medically cleared to leave the hospital. While Mr. Wolski and Officer Ferreira walked out of the ER together, Officer Ferreira asked Mr. Wolski if he was going to “pull a number on the incident” meaning complete a Police Incident Report about what just took place. Mr. Wolski responded: “No, I’m not going to do that –

you know, we came up here, this guy was acting like an asshole and we helped them out.” (Testimony of Officer Ferreira)

37. After Officer Ferreira and Mr. Wolski completed their shift and while off duty later that same evening, Officer Ferreira began a text messaging conversation with Mr. Wolski about this hospital incident and the patient in Room 7. The conversation began at 5:22 PM on December 28, 2016 by Officer Ferreira texting Mr. Wolski a picture of an alcoholic beverage Ferreira was drinking and Mr. Wolski responding as follows:

Ferreira: Almost there Imao

Wolski: Nice! I gonna tell [redacted] when she comes home. How would you describe the slap heard around the world!

Ferreira: Fax machines stopped at the sound that was a grown ass man being smacked by another grown ass man.

Wolski: Haha he asked for it!

Ferreira: Dude fuck yeah he did. He was being a complete [expletive] the whole time. I just love when you were fucking with him with the Taser before all that shit happened haha. He needed to know he wasn't as big as he was pretending

Wolski: That's rite he wasn't running the show, the doctor runs the show and if people don't understand that we explain that to them in the simplest of ways!

(Exhibit 18; Testimony of Officer Ferreira)

38. A.R., the security supervisor at the hospital, completed a Hospital Security Unit Incident Report on December 28, 2016 because she felt the patient's rights were violated when she also witnessed Officer Wolski draw his Taser, point it at the Patient and then slap the Patient. (Exhibit 4; Testimony of A.R.)

39. On January 3, 2017 the Chief of Police was contacted by a hospital administrator and given a copy of A.R.'s Security Unit Incident Report relative to the altercation that occurred in the ER involving Mr. Wolski. (Exhibit 4; Testimony of Police Chief Erickson)
40. On January 3, 2017, after reviewing A.R.'s report, Chief Erickson instructed his Deputy Chief to begin an internal investigation of the December 28th incident involving Mr. Wolski. (Testimony of Police Chief Erickson)
41. The Deputy Chief conducted an investigation including telephone and in-person interviews with the patient and various hospital personnel who may have witnessed part or all of the interaction between Mr. Wolski and the patient on December 28th. (Exhibit 15)
42. As reported by the Deputy Chief, the only hospital staff identified above who witnessed the pointing of the Taser at the patient by Mr. Wolski was A.R.. Only one (1) hospital staff member saw Mr. Wolski strike the patient. All of the other staff members interviewed stated they overheard what they believed was a slapping or whacking noise consistent with a slap or punch to human skin. (Exhibit 18)
43. On the afternoon of January 9, 2017 Chief Neil Erickson and Deputy Chief Bernard conducted video recorded interviews of Officer Ferreira and Mr. Wolski as part of the Gardner Police Department's internal investigation. (Testimony of Chief Erickson and Exhibits 16 and 17)
44. Prior to their interviews, Officer Ferreira and Mr. Wolski met and had a conversation in the parking lot of the Police Station where Officer Ferreira told Mr. Wolski words

to the effect: “the Chief and Deputy Chief were poking around at the ER and [you] should pull a number and do a Use of Force about what happened that day.” Mr. Wolski responded with words to the effect: “Those assholes,” meaning the Chief of Police and the Deputy Chief, “don’t know what the fuck they’re talking about, and they probably think that the asshole that fucked [your] hand up (meaning the Subject in Room 5 from the Connors Street incident) was the asshole that we had the issue with”. (Testimony of Officer Ferreira)

45. During that same conversation on January 9th, Mr. Wolski, in reference to drawing his Taser and pointing it at the Patient, told Officer Ferreira “We’re not going to talk about that. You know, we’re just going to say that he was up there and we went hands-on and did what we had to do kind of deal”. (Testimony of Officer Ferreira)

46. During Officer Ferreira’s interview with the Chief of Police and Deputy Police Chief on January 9th, Officer Ferreira initially stated that Mr. Wolski hit the patient, but Officer Ferreira made no reference to Mr. Wolski pulling his Taser and pointing it at the patient. (Exhibits 16 and 18)

47. The interview with A.R., the hospital security supervisor who reported seeing Mr. Wolski pull his Taser and point it at the patient, had been completed days earlier. (Exhibit 18)

48. When Officer Ferreira failed to make any reference to a Taser, the Deputy Chief asked Officer Ferreira what he saw *before* Mr. Wolski hit the patient. Again, Officer Ferreira did not make any reference to Mr. Wolski pulling his Taser. (Exhibits 16 and 18)

49. The Police Chief then specifically asked Officer Ferreira if Mr. Wolski had pulled his Taser to which Officer Ferreira replied: “yes”. (Exhibits 16 and 18)

50. The Deputy Police Chief then stated to Officer Ferreira:

“Don’t get yourself into something here. Alright, slow down a minute. Think carefully young man. You have a long promising career here. You are not the focal point of this, but you are knee deep in some stuff. I don’t want you to miss another thing so take a breath. If he [the Police Chief] has to repeat something that I asked you the first time, I’m not going to be happy.” (Exhibit 16)

51. Following this admonition, Officer Ferreira then explained how Mr. Wolski pulled his Taser and pointed it at the patient. (Exhibits 16 and 18)

52. Immediately after the interview with Officer Ferreira, the Police Chief and Deputy Police Chief interviewed Mr. Wolski. Mr. Wolski was informed that he was being interviewed as part of an internal investigation; he was read his Miranda Rights; and a union representative was present. (Exhibit 17)

53. During his January 9th interview, Mr. Wolski stated that he wanted to “clear the air” regarding what occurred at the hospital on December 28th. Mr. Wolski stated that when he approached the patient to try and calm him down, the patient had swatted at him and, that, when the patient’s hand came up, Mr. Wolski tried to block it, and that is when his hand hit the face of the patient. (Exhibit 17)

54. During this initial statement on January 9th, Mr. Wolski made no reference to pulling his Taser and pointing it at the patient. (Exhibit 17)

55. The Police Chief then specifically asked Mr. Wolski if he pulled his Taser to which Mr. Wolski replied: “No”. The Police Chief then stated: “No?” to which Mr. Wolski replied: “No.” (Exhibit 17)
56. The Police Chief then told Mr. Wolski that he (the Police Chief) was suspending Mr. Wolski immediately and that he (the Police Chief) would be moving to terminate Mr. Wolski from employment. (Exhibit 17)
57. The City’s Mayor, who serves as the appointing authority, appointed the Police Chief to serve as a hearing officer for the local (Section 41) civil service hearing. The hearing was conducted and the Police Chief recommended that the Mayor terminate Mr. Wolski’s employment. (Exhibit 13)
58. The City’s Mayor accepted the recommendation of the Police Chief and terminated Mr. Wolski from his position as police officer. The termination letter to Mr. Wolski, signed by the Mayor, stated in relevant part:
- “I conclude the following:
- A. That when your position of authority is called into question you fail to conduct yourself in a professional manner and in fact, escalate the situation to a minimum of a verbal confrontation and on occasion to a physical confrontation. This is conducting unbecoming a police officer;
 - B. That you have failed to comply with the City of Gardner Police Department Rules and Regulations as noted in the Hearing Notice, specifically that you failed to file a Use of Force Report and to create a Police Department incident report to document your actions regarding the above incident;
 - C. That you provided false statements during the course of the internal investigation and the termination hearing;
 - D. That you have violated your Oath of Office as a Police Officer, by and through your actions in this incident resulting in the filing [of] a criminal complaint against you.” (Exhibit 14)

59. Mr. Wolski received a written reprimand in 2012 and a one (1)-day suspension in 2014. (Stipulated Facts)
60. The Gardner Police Department's Policy and Procedure titled Use of Force Reporting, in effect at all material times, provides in pertinent part as follows:
- A. It is the policy of this department to:
2. Require a written report whenever an employee takes action that results in, or is alleged to result in, the injury or death of another person;
 3. Require a written report whenever an employee applies force through the use of lethal or less-than-lethal weapons;
 4. Require a written report whenever an employee applies weaponless physical force at a level required to be reported.
(Exhibit A; Use of Force Reporting at pg. 2)
61. The Gardner Police Department's Policy and Procedure titled Electronic Control Weapons (ECWs) in effect at all material times, provides in pertinent part as follows:
- IX. Internal Reporting: 1. Department members who activate an ECW shall:
- Adhere to Department Policy and Procedure; 1.01 (Use of Force).
 - Report ECW activations to the On-Duty Supervisor(s) available.
 - Ensure that the On Duty Supervisor / Or, Department trained ECW instructor(s) is provided access to ECW for downloading purposes.
 - Submit a Departmental Use of Force Report: The involved member(s) shall:
 - 1.02 Use of Force Report prior to end of shift of the activation, absent an injury, incapacitation, or other exigent circumstance.
(Exhibit B; IX Internal Reporting)
62. In April 2012, Mr. Wolski received a written reprimand regarding two (2) incidents, including "taking off [his] badge to meet the challenge of a civilian that challenged [him]." (Exhibit 6)
63. In 2014, Mr. Wolski received a one (1)-day suspension for escalating a verbal altercation with a department store employee in the presence of an intern. (Exhibit 9)

64. In 2016, the Police Department conducted an investigation into inquiries that Mr. Wolski made to another police department regarding an ongoing State Police murder investigation. At the conclusion of the investigation, the Police Chief informed Mr. Wolski that he planned on suspending Mr. Wolski for three (3) days. Ultimately, it was agreed that Mr. Wolski would do three (3) days of volunteer work and the Police Chief did not suspend Mr. Wolski, as initially planned. (Testimony of Chief Erickson)

Legal Standard

G.L. c. 31, § 43 provides:

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

An action is “justified” if it is “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 Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). The Commission determines justification for discipline by inquiring, “whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service;” School Comm. v. Civil Service

Comm'n, 43 Mass.App.Ct. 486, 488 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983).

The Appointing Authority's burden of proof by a preponderance of the evidence 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).

Under section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew;" Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. However, "[t]he commission's task.. is not to be accomplished on a wholly blank slate. After making its de novo findings of fact, the commission does not act without regard to the previous decision of the [appointing authority], but rather decides 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'," which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority; Falmouth v. Civil Service Comm'n, Id., quoting internally from Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983) and cases cited.

By virtue of the powers conferred by their office, police officers are held to a high standard of conduct. "Police officers are not drafted into public service; rather, they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question, their ability and fitness to

perform their official responsibilities." Police Commissioner of Boston v. Civil Service Commission, 22 Mass.App.Ct. 364, 371 (1986).

Analysis

This decision rests heavily on the credibility of the witnesses, particularly Mr. Wolski and his former colleague, Officer Ferreira, in addition to the hospital employees that testified before the Commission.

As part of the Commission hearing, I listened carefully to the testimony of all percipient witnesses who saw or heard part or all of the relevant interactions between Mr. Wolski and the patient at the hospital on December 28, 2016. I also reviewed their testimony again by reading the written transcript prepared of the hearing. Finally, I reviewed the summary of statements given by the hospital employees as part of the Police Department's investigation of this matter and reviewed (twice) the recorded interviews of Mr. Wolski and Officer Ferreira.

None of the percipient witnesses remember what happened that day exactly the same way. Most of the inconsistencies are easily explainable. For example, in regard to whether or not Mr. Wolski pulled his Taser that day and pointed it at the patient, some of the hospital employees, based on their own testimony and statements, were simply not focused on the patient at the time or possibly were not in the immediate area when this very short interaction (5-7 seconds) occurred.

That is not the case, however, regarding the testimony of M.G., a Patient Safety Specialist at the hospital, whose version of events stands in stark contrast to many of the other witnesses. M.G. testified that, after punching in at 2:55 P.M., she recalls walking down the hallway; seeing Mr. Wolski and Officer Ferreira standing next to each other;

then seeing Mr. Wolski and the patient having a “pleasant conversation” and making “small talk”. She then recalls the patient “escalating”; at which point she and Mr. Wolski walked into Room 7 and tried to de-escalate the patient, who was refusing Mr. Wolski’s repeated requests to have him (the patient) get onto the bed. She then recalls leaving the room out of fear and hearing a loud smacking sound. Most importantly, M.G. does not recall seeing Mr. Wolski pull his taser and aim it at the patient. Although I don’t believe M.G. was trying to mislead anyone with her statement or testimony, I have, based on a review of all the witness testimony, concluded that she either misremembers what happened that day and/or, prior to arriving directly outside Room 7, her attention was drawn to other matters, causing her not to see Mr. Wolski pull his Taser and aim it at the patient that day.

Other than Mr. Wolski, the person who testified before the Commission who was in the best position to hear and see the interaction between Mr. Wolski and the patient at the hospital that day was Officer Ferreira, making his credibility central to this case. I considered all factors that could potentially detract from Officer Ferreira’s credibility including:

- When first asked by the Police Chief and Deputy Police Chief to give his account of what occurred at the hospital that day, Officer Ferreira did not state that Mr. Wolski had pulled his Taser and aimed it at the patient;
- During that same interview, when given the opportunity to clarify his statement, Officer Ferreira again did not state that Mr. Wolski had pulled his Taser and aimed it at the patient;
- Only after being specifically asked whether Mr. Wolski pulled his Taser did Officer Ferreira state that Mr. Wolski pulled his Taser at the hospital;
- Officer Ferreira’s testimony before the Commission was more detailed than his statement to the Police Department, including references to seeing Mr. Wolski in a “swaying, taunting” motion while holding the Taser and pointing it at the patient;

- Other parts of Officer Ferreira’s testimony before the Commission differed from his statement to the Police Chief and Deputy Police Chief including: he referenced having a 45-minute conversation with the patient in his statement to the Police Department, while stating that the conversation was only 15-20 minutes during his testimony before the Commission; and he stated that both he and Mr. Wolski walked toward the patient when Mr. Wolski returned to the hospital in his statement to the Police Chief and Deputy Police Chief, while stating that only Mr. Wolski walked toward the patient during his testimony before the Commission;
- Officer Ferreira, prior to his testimony before the Commission, had never stated that Mr. Wolski, in a meeting prior to the internal investigation, had suggested that the officers not disclose that Mr. Wolski had pulled his Taser that day.
- Officer Ferreira’s testimony was given after receiving a written reprimand that could be removed from his file within one (1) year.

Based on all of the above factors, I struggled regarding whether, and to what extent, I should credit Officer Ferreira’s testimony before the Commission. Based on his own testimony before the Commission, he met with Mr. Wolski shortly before his interview with the Police Chief and Deputy Police Chief. Again, based on Officer Ferreira’s own testimony, he and Mr. Wolski discussed whether the officers should disclose if Mr. Wolski pulled his Taser at the hospital. After this pre-meeting, Officer Ferreira then met with the Police Chief and Deputy Police Chief. Upon entering the interview room, the Deputy Police Chief made it clear that the interview involved a serious matter and had Officer Ferreira acknowledge receipt of his “Garrity Rights”. Despite this, Officer Ferreira recounted the events at the hospital on December 28th without stating that Mr. Wolski pulled his Taser. Even after being given the opportunity to clarify his statement, he again failed to mention the pulling of the Taser. Only after being directly asked about the Taser did Officer Ferreira state that Mr. Wolski pulled his Taser that day. In short, Officer Ferreira was either untruthful by omission (by twice failing to reference the

pulling of the Taser) or he was untruthful by stating that Mr. Wolski pulled his Taser at the hospital that day.

Ultimately, after reviewing *all* of the testimony and evidence, including that referenced above, I have credited Officer Ferreira's testimony that he witnessed Mr. Wolski pull his Taser and aim it at the patient in the hospital on December 28th for the following reasons. First, I do not believe that Officer Ferreira would offer damaging testimony against his former colleague if it was not true. To me, it appeared obvious that Officer Ferreira's initial omissions to the Police Chief and Deputy Police Chief were made as part of a troubling and ill-advised attempt to protect his colleague. Second, Officer Ferreira's testimony regarding the pulling of the Taser corroborates the independent statement and testimony of a hospital employee (A.R.) who was in close proximity at the time. Third, Officer Ferreira's testimony is bolstered by the text message exchange between him and Mr. Wolski shortly after the officer left the hospital that day. As referenced in the findings, Officer Ferreira specifically referenced Mr. Wolski "fucking with" the Patient with a Taser and Mr. Wolski replies with a message starting with: "That's rite ...". Fourth, Officer Ferreira's testimony was bolstered by the fact that he did not offer simple "yes or no" answers to the questions posed to him. Rather, he offered specific, detailed answers and he was quick to correct any incorrect premises underlying the question, including where he was standing at different times during the incident at the hospital on December 28th.

In contrast, on many key points, I did not credit the testimony of Mr. Wolski. Many of his answers appeared to be equivocal, contradictory and/or simply unbelievable. For example, the following questions and answers, listed in chronological order as they were

asked and answered before the Commission, are part of Mr. Wolski's own direct testimony:

Appellant Counsel: As you sit here today, do you remember drawing your Taser?

Mr. Wolski: No, not particularly, no. I do not remember. I know for a fact, I didn't take it out, I didn't point it, hold it up, turn it on like is being alleged. That is not true. That did not happen. There is no proof that that did happen, okay. If at all, I took the thing out, it was very brief unclipped and turned as a reaction because I didn't know what this guy was going to do, it was reholstered and that's when I approached him, you know.

...

Appellant Counsel: How come you didn't do any documentation regarding the incident in Room 7?

Mr. Wolski: Well, first of all, I would say, and it's not a very good excuse, but it's not unlike I said before, it's not unusual for us to assist them with restraining somebody and not necessarily doing a report. I know that there's some discussion about whether or not the Taser was used. My interpretation of the Taser being used is turned on or deployed. Just taking it out of the holster is not using it unless you point it at somebody and give verbal commands, which I did not do. So as far as I was concerned, I did not use the Taser.

...

Appellant Counsel: Now, at the time when you met with him [Officer Wolski] on the 9th [before the interview with the Chief and Deputy Police Chief], did you recall that you had taken your Taser out?

Mr. Wolski: We never discussed that.

Appellant Counsel: As you sit here today, do you recall having your Taser out?

Mr. Wolski: No, no.

The following exchange then took place during cross-examination:

City Counsel: And help me out here. Was your testimony: I did not take out my Taser? Is that your testimony, that you did not take out your Taser on the 28th?

Mr. Wolski: I don't believe that I did.

City Counsel: You don't believe you did?

Mr. Wolski: No.

City Counsel: So you did not take your Taser out?

Mr. Wolski: What I'm saying is that I don't believe I did.

City Counsel: You don't believe you did?

Mr. Wolski: And I don't recall taking it out.

City Counsel: Well, is it you don't believe and you don't recall?

Mr. Wolski: Correct.

Standing alone, this testimony made me question Mr. Wolski's credibility as he went from: a) not remembering – at all – pulling out his Taser at the hospital on December 28th ; to: b) then offering specific details about re-holstering the Taser; to c) then stating that he didn't file a report because he believed that simply pulling his Taser out of his holster, as opposed to pointing it and giving verbal commands, did not require the filing of a report; and finally, to: d) then reverting to a statement that he doesn't recall taking the Taser out.

Versions a and d (no memory of pulling the Taser) of Mr. Wolski's testimony, in addition to contradicting versions c and d, are not believable considering the text messages referenced above. Other key parts of Mr. Wolski's testimony before the Commission appeared to evolve, further undermining his credibility. For example, in regard to what occurred just before he slapped the patient in the hospital, Mr. Wolski first testified that the patient:

“ ... stands up, he made like a swatting motion, like towards my gear, towards my face, and at that point I smacked – I hit his hands out of the way and I did strike him with my hand. As I hit him – as I was hitting his hands out of the way, my hand struck his face and he went back, and it was almost like it caught him on surprise, you know.”

Regarding this same timeframe, Mr. Wolski later testified that:

“I think that’s when he [the patient] tried to attack me and threw his hands at me, whatever it was he did.”

In summary, I found the testimony of Officer Ferreira to be more credible regarding the key events relevant to this appeal. Thus, based on Officer Ferreira’s testimony, and after assessing the testimony of all other witnesses and reviewing the entire record, I have concluded that the City, by a preponderance of the evidence, has proven the following:

- I. Mr. Wolski, without justification: a) drew his Taser from his utility belt and pointed it directly at the patient; and b) struck the patient with an open hand across his face. I do not credit Mr. Wolski’s testimony that the patient was grabbing at his duty belt and his shirt or that the patient tried to attack him or throw his hands at Mr. Wolski.
- II. I make no finding or conclusion as to whether this use of force rose to the level of a commission of an assault and battery as alleged in an Application for a Criminal Complaint filed by Chief Erickson.⁸ A full reading of the Police Department Rules, however, leaves little doubt that the City’s decision to terminate Mr. Wolski did not hinge on a criminal complaint being issued by a Clerk Magistrate, as the Police Department Rule regarding engaging in this type of conduct is violated “regardless of the outcome of any criminal court case”. (Exhibit 12)

⁸ According to the Police Chief, the Court did not find probable cause, but, rather, decided to “hold” the complaint for six (6) months and, if nothing happened during those six (6) months, the complaint would “go away.”

- III. Mr. Wolski failed to notify his commanding officer and submit the required reports indicating that he engaged in a use of force. Even Mr. Wolski acknowledges that he made physical contact with the patient on the day in question and “hit him with an open hand”. Even if I accept Mr. Wolski’s version of events, which I do not, he was still required to comply with department policy and report that he used force against a citizen.
- IV. Mr. Wolski violated the Police Department Rules and Regulations when he was untruthful at his interview with the Police Chief and Deputy Police Chief on January 9th when he said he did not pull his Taser at the hospital on December 28th. I do not credit his testimony that he could not recall whether or not he pulled his Taser.

An appointing authority is well within its rights to take disciplinary action when a police officer has “a demonstrated willingness to fudge the truth in exigent circumstances” because “[p]olice work frequently calls upon officers to speak the truth when doing so might put into question a search or embarrass a fellow officer”. Falmouth v. Civil Service Comm’n, citing Cambridge v. Civil Service Comm’n, 303.

Dozens of Commission decisions have held that untruthfulness by a police officer warrants discipline, up to and including termination.

In Ryan v. Needham Police Department, 20 MCSR 133 (2007), the Commission upheld the termination of a police officer for failing to speak the truth in Court and perjuring himself.

In Layne v. Town of Tewksbury, 20 MCSR 372 (2007), the Commission upheld the discharge of a police officer for rudeness and profanity in his dealing with the public and his subsequent lying and filing false reports to avoid the consequences of his conduct.

In Grinham v. Town of Easton, 20 MCSR 534 (2007), the Commission upheld the discharge of a police Sgt. who beat up a prisoner in custody, suborned his fellow officers to testify on his behalf, filed false reports and lied about his conduct.

In Rizzo v. Town of Lexington, 21 MCSR 634 (2008), the Commission upheld the discharge of a police officer for excessive force, lying, conduct unbecoming and failure to follow procedures.

In Mozeleski v. City of Chicopee, 21 MCSR 676 (2008), the Commission upheld the discharge of a police officer who conducted a late-night traffic stop involving a sole female and his subsequent conduct in falsifying a report in an attempt to cover up his interaction.

In Desharnias v. City of Westfield, 23 MCSR 418 (2010), the Commission upheld the discharge of a police officer who damaged his cruiser and then untruthfully denied that he had damaged the cruiser.

In Kinnas v. Town of Shrewsbury, 24 MCSR 67 (2011), the Commission upheld the discharge of a police officer who accessed the Facebook account of a colleague's wife and subsequently being untruthful by denying it.

In Ung v. Lowell Police Department, 24 MCSR 567 (2011), the Commission upheld the discharge of a police officer who filed false stolen motor vehicle reports on the automobile of a woman he was apparently trying to seduce.

In Gonsalves v. Town of Falmouth, 25 MCSR 231 (2012), the Commission upheld the discharge of a police officer for negligent handling of evidence and repeated untruthfulness.

In Freitas v. City of Somerville, 25 MCSR 259 (2012), the Commission upheld the discharge of a police officer for giving confiscated marijuana to a friend and then lying about the incident in a deposition while under oath.

In Hadis v. Town of Oxford, 27 MCSR 200 (2014), the Commission upheld the discharge of a police officer for seeking to conceal from his superiors his involvement in a traffic stop that had resulted in vehicle damage.

In Pierce v. City of Attleboro, 27 MCSR 329 (2014), the Commission upheld the discharge of a police officer who failed to file the required reports governing the use of his Taser and subsequently failed to be truthful during the investigation.

In Desmond v. Town of West Bridgewater, 27 MCSR 645 (2014), the Commission upheld the discharge of a police officer who lied at a hearing to determine whether a temporary restraining order sought by his girlfriend against her husband should be extended.

Having determined that Mr. Wolski did engage in some misconduct, the Commission must now determine whether the level of discipline (termination) was warranted.

As stated by the SJC in Falmouth v. Civ. Serv. Comm'n, 447 Mass. 814 (2006):

“After making its de novo findings of fact, the commission must pass judgment on the penalty imposed by the appointing authority, a role to which the statute speaks directly. G.L. c. [31], s. § 43 (‘The commission may also modify any penalty imposed by the appointing authority.’) Here the commission does not act without regard to the previous decision of the [appointing authority], but rather decides 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. citing Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983).

“Such authority to review and amend the penalties of the many disparate appointing authorities subject to its jurisdiction inherently promotes the principle of uniformity and the ‘equitable treatment of similarly situated individuals.’” citing Police Comm’r of Boston v. Civ. Serv. Comm’n, 39

Mass.App.Ct. 594, 600 (1996). However, in promoting these principles, the commission cannot detach itself from the underlying purpose of the civil service system— ‘to guard against political considerations, favoritism and bias in governmental employment decisions.’ Id. (citations omitted).

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“Unless the commission’s findings of fact differ significantly from those reported by the town or interpret the relevant law in a substantially different way, the absence of political considerations, favoritism or bias would warrant essentially the same penalty. The commission is not free to modify the penalty imposed by the town on the basis of essentially similar fact finding without an adequate explanation.” Id. at 572. (citations omitted).

My findings do not differ significantly from those reported by the City. Like the City, I have concluded that Mr. Wolski was untruthful during a departmental investigation, that he violated the City’s Use of Force Policy, and that he failed to file the required reports regarding his use of force.

In regard to whether the City’s discipline has been uniformly applied, the Police Chief was questioned during his testimony before the Commission about two (2) other police officers who were previously found to be untruthful. Based solely on the Police Chief’s testimony, and absent any additional evidence, Mr. Wolski has not shown that these individuals were similarly situated and treated differently. One of the police officers referenced was ultimately terminated and the circumstances regarding the other officer’s alleged misconduct appears to be distinguishable from the array of charges against Mr. Wolski here.

It is a (much) closer call regarding whether Officer Ferreira, who lied by omission (twice) in his statements to the Police Chief and Deputy Police Chief as part of this investigation, was treated differently than Mr. Wolski. Officer Ferreira received only a reprimand, to be removed from his personnel file at some point, apparently for failing to

report the force he witnessed at the hospital, as opposed to his untruthfulness. Further, the tone and tenor of the interviews with these two officers was noticeably different. The interview with Officer Ferreira appeared to be more of a counseling session, whereas the interview with Mr. Wolski appeared to be more geared toward potential discipline.

There are, however, important distinctions between the actions of Mr. Wolski and Officer Ferreira. Most importantly, when Officer Ferreira was specifically asked whether Mr. Wolski pulled his Taser at the hospital, he stated, truthfully, and without hesitation: “yes”. When Mr. Wolski was asked the same question, he stated, untruthfully, and without hesitation: “no” (twice). Second, Officer Ferreira is not the person who pulled his Taser and/or struck the patient that day without reporting it. In fact, Officer Ferreira, after the incident earlier that day, actually did file a report documenting his altercation with the subject, including that he pulled his Taser at that earlier incident. Third, there was no evidence presented to show that Officer Ferreira has a disciplinary record comparable to that of Mr. Wolski. For all of these reasons, a modification in the penalty imposed here is not warranted.

Conclusion

Mr. Wolski’s appeal under D1-17-033 is hereby *denied*.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 1, 2018.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration

does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d)

Notice to:

Kenneth Anderson, Esq. (for Appellant)

John Flick, Esq. (for Respondent)