

**COMMONWEALTH OF MASSACHUSETTS  
SUFFOLK, SS.**

**CIVIL SERVICE COMMISSION**

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

**ERIC KRAUS,**  
Appellant  
v.  
**TOWN OF FALMOUTH,**  
Respondent

**D1-14-259**

Appearance for Appellant:

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Appearance for Respondent:

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Commissioner:

Paul M. Stein

**DECISION**

The Appellant, Eric Kraus, appealed to the Civil Service Commission (Commission), pursuant to G.L.c.31,§43, from the decision of the Town of Falmouth (Falmouth) terminating him as a Police Officer with the Falmouth Police Department (FPD). A pre-hearing conference was held on January 9, 2015, followed by a full hearing on May 8, 2015, both of which were at the UMass School of Law at Dartmouth<sup>1</sup>. As no written notice was received from either party, the hearing was declared private and witnesses were sequestered. The full hearing was digitally recorded and both parties received a CD of the proceeding<sup>2</sup>. Both parties submitted proposed findings of fact and conclusions.

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

<sup>2</sup> If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, the CD should be transcribed by the plaintiff in the judicial appeal into a written transcript.

## **FINDINGS OF FACT**

Eighteen (18) Exhibits were entered into evidence at the hearing (Exhs. 1-18). By letter dated May 14, 2015, per the Commission's request, Falmouth submitted three additional documents which are marked PHExh.19 [Cover Letter], PHExh.20 [Attached Document 1], PHExh.21 [Attached Document 2] and Exh.11 (Redacted) [Attached Document 3]. Based on the Exhibits and the testimony of the following witnesses:

### **Called By the Appointing Authority:**

- Mark Mancini, FPD Police Officer
- Jeffrey Smith, FPD Police Captain
- Edward Dunne, FPD Police Chief

### **Called by the Appellant:**

- Eric Kraus, Appellant
- Richard Smith, retired FPD Police Officer
- Sgt. J, retired FPD Police Sergeant
- Clifford Harris, FPD Police Officer

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

1. The Appellant, Eric Kraus, fifty-two (52) years old at the time of this appeal, served as an FPD patrol officer from 1994 until his discharge on October 20, 2014, and was a tenured civil service employee. (*Exh.3,p.51; Testimony of Appellant*)

2. Prior to his discharge, Officer Kraus had a good reputation for truth and veracity within the FPD. He had no record of prior discipline. He served in numerous additional specialty positions within the FPD, all of which he has been designated to perform by the Chief of Police or has otherwise volunteered his services. (*Exh.3,pp.51-52; Exh.17; Testimony of J. Smith, Chief Dunne & Appellant*)

3. FPD Capt. Jeffrey Smith, the officer in charge of the operations (patrol) division, considered Officer Kraus an excellent patrol officer:

“Officer Kraus is valued amongst his peers and amongst the supervisors. He’s not someone that generates complaints from the public. . . . He just doesn’t come in and do his normal duties. He’s a special response team member. He’s a field training officer. He’s our vehicle maintenance officer. He’s a firearms instructor. And on the street, I think officers believe that Officer Kraus has a calming influence. He can kind of diffuse calls. That’s probably his greatest strength.”

*(Exh.3, p.30; Testimony of J. Smith)*

#### The July 2014 Episode at 7-Eleven

4. July 6, 2014 was the date of the annual Falmouth fireworks display. The event is a busy one for the FPD and all personnel (more than 50 sworn officers) are required to work that evening. *(Exhs.12 & 17; Testimony of J. Smith, Harris & Appellant)*

5. The FPD logs for July 6-7, 2014 reflect dozens of calls, including seven fireworks complaints. Other fireworks complaints were logged previously that season, as well as in years past. *(Exh. 11 & PHExhs.19 & 21; Testimony of Mancini, J. Smith & Harris)*

6. At 10:45 p.m., on July 6<sup>th</sup>, Officer Mark Mancini, a three-year FPD veteran on cruiser duty, responded to a fireworks complaint and seized a packaged box of “twelve-shot” unexploded fireworks, labeled “Wedding Day”, from a citizen, intending to charge him with unlawful possession of fireworks. *(Exhs.10, 11 & 17; Testimony of Mancini)*

7. Officer Mancini returned to the FPD police station at approximately 11:05 p.m. He put the seized fireworks in the “drive through”, near other fireworks confiscated a few days earlier. Officer Mancini did not secure the box or tag it in any way as evidence. He then returned to patrol. *(Testimony of Mancini & J. Smith; Exhs.1, 8, 17 & 18)*

8. The drive-through (sometimes called the “sally port”) is a secure area into which a cruiser may be driven and is monitored with video cameras. The drive-through is used

to bring prisoners and evidence into the station, and to perform routine vehicle maintenance. (*Exhs.1, 3 & 18; Testimony of J. Smith*)

9. Officer Kraus worked a bike patrol on July 6<sup>th</sup>, 2014. He returned to the police station at 11:27 p.m. and entered the “drive-through” where he hung his bike on the bike rack. He noticed the box of fireworks as he exited the drive-through by the door leading to the break room. (*Exhs.1, 3, 8, 13, 17, 18; Testimony of Appellant & J. Smith*)

10. The drive-through video shows that, at 11:36 p.m., on July 6<sup>th</sup>, FPD Officer B entered via the door from the officers’ break room, picked up the box of fireworks and immediately departed through the same door through which he entered. Officer B placed the box on a table in the break room where a number of FPD police officers were congregating, eating food and conversing. (*Exhs. 1, 3, 8, 17 & 18; Testimony of J. Smith & Appellant*)

11. The box of fireworks was the subject of some comment among some of the officers in the break room, including a discussion between Officer B (a pseudonym) and Officer Kraus during which Officer B said “we should take them over to 7 Eleven and shoot them.” (*Exhs. 1, 3,p.58; 13, 15 & 17; Testimony of Appellant & J. Smith*)

12. The drive-through video shows Officer Kraus leaving the police station at 12:07 a.m. on July 7, 2014, carrying the box of fireworks under his arm. He proceeded to the 7-Eleven store where he was joined by Officer B and two other FPD officers, Sgt. J (a 15-year FPD veteran) and Officer O (a 2-year FPD veteran). Also present was the proprietor of the 7-Eleven. (*Exhs.1,3,8,13 through 18; Testimony of Appellant, J. Smith & Sgt. J*)

13. The proprietor brought out his own fireworks that he set off himself. Officer O opened the box of fireworks that Officer Kraus had taken from the FPD station and

ignited them as the proprietor and all four FPD officers watched. Several FPD personnel at the police station heard the explosions and an officer on patrol in the area saw the proprietor with fireworks and later heard the explosion, but no one made any report at the time. (*Exhs. 1, 3, 8, 9, 13 through 17; Testimony of Chief Dunne*)

14. Officer Mancini returned to the police station in the early morning hours of July 7, 2014. He wrote an incident report covering the confiscation of the box of fireworks and drafted a criminal complaint, intending to file charges against the citizen. Around 6:30 a.m., he went to retrieve the box of fireworks to log it into evidence and he found it was gone. He did not immediately report the disappearance. The criminal complaint was never filed. (*Exhs.8 & 10, PHExs.19 & 20; Testimony of Mancini*)

#### FPD Investigation of Fireworks Episode

15. On July 9, 2014, in the course of his routine review of recent incident reports, Sgt. James Cummings came upon Officer Mancini's report concerning the seizure of the box of fireworks and a proposed criminal complaint. Sgt. Cummings noticed that no photos of the fireworks were attached to the report as would be expected. (*Exh. 8*)

16. The well-known procedure that FPD officers are trained to follow when fireworks are seized as evidence in a criminal case is to tag the evidence and secure it in the evidence room. Photographs of the evidence would be taken and, whether the fireworks were evidence in a case or not, the explosives would be transported to the State Fire Marshall for disposal as required by law. (*Exh.3, pp.37-40, Exh.8; Testimony of Appellant, Chief Dunne, Mancini, J. Smith & Harris; G.L.c.148,§39*)

17. Sgt. Cummings sought out Officer Mancini who then explained that the fireworks had gone missing. This information was reported up the chain of command and, on July

11, 2014, FPD Chief Edward Dunne ordered Capt. Smith to open an internal affairs investigation into the matter. (*Exhs. 1, 3 & 8; Testimony of J. Smith & Chief Dunne*)

18. Capt. Smith viewed the drive-through videos for July 6-7, 2014 and issued an order to all FPD personnel to report any information they knew about the missing fireworks. As a result of this initial inquiry, Capt. Smith learned that the box of fireworks had been taken into the break room by Officer B, then taken by Officer Kraus to the 7-Eleven, and he identified the four FPD officers involved in detonation of fireworks at the 7-Eleven. All four officers were placed on administrative leave and subsequently submitted to recorded interviews conducted with union representation. (*Exhs. 4, 8, 9, 13 through 16 & 18; Testimony of J. Smith*)

19. In the course of his internal affairs interview, Officer Kraus:

- Admitted he was present at the 7-Eleven when the fireworks were detonated.
- Knew his possession of fireworks was illegal.
- Claimed Officer B had offered him the fireworks as a gift and asked him “Is this gonna be used in a case or is it any kind of confiscation or anything like that” to which Officer B said: “No, it’s all set.”
- “Took the fifth” when asked directly if he had removed the fireworks from the police station.

(*Exh. 13*)

20. Capt. Smith’s internal affairs investigation also established the following facts:

- Officer B’s claim that he was given the box of fireworks by Officer Mancini, which Officer Mancini vehemently denied, was proved to be demonstrably false by the sequence of events shown on the drive-through video.
- FPD Lt. Sean Doyle recalled a conversation in the break room about the fireworks in the drive-through during which he (and other officers) stated they thought they all were spent fireworks, but Officer B said that some had not been exploded. Lt. Doyle told Officer B that if the fireworks were evidence they should be tagged and if they were trash they should be thrown out.
- Officer O was seen examining the box of fireworks in the drive-through and later joined in the joking about taking them and shooting them off.

(*Exhs. 8, 15 & 18; Testimony of J. Smith & Mancini*)

21. Based on his internal affairs investigation, Capt. Smith concluded that the four officers who participated in the fireworks explosion (Sgt. J, Officer Kraus, Officer B and Officer O, as well as Officer Mancini (who failed to properly secure the evidence or report it had gone missing) and Officer M (the patrol officer who had heard the explosions while on patrol and took no action to investigate), had violated various FPD rules and regulations that warranted discipline. (*Exh.8; Testimony of J. Smith*)

22. Sgt. J reached an agreement by which he retired from the FPD. Officer B resigned from the FPD. Officer Mancini, Officer O and Officer M received suspensions and did not contest them. (*Testimony of J. Smith, Sgt. J & Chief Dunne*)<sup>3</sup>

23. By letter dated September 29, 2014, Falmouth Town Manager, the FPD Appointing Authority, notified Officer Kraus that he would conduct a hearing, pursuant to G.L.c.31, §41, for the purpose of determining if there was just cause to discipline him for his unauthorized removal of fireworks from the police station that Officer Kraus had claimed were a gift but, in fact, were evidence in a criminal case and, then, watching (with fellow FPD officers and a civilian) as the fireworks were detonated by one of the FPD officers, knowing that such actions were illegal. The letter alleged these actions, if true, violated FPD rules and regulations governing conduct unbecoming a police officer, neglect of duty, criminal conduct and untruthfulness. (*Exh.2*)

24. At the hearing before the Falmouth Town Administrator on October 17, 2014, Officer Kraus testified under oath. He admitted to taking the fireworks from the police station to the 7-Eleven and knowing that they would be detonated there illegally. He also

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<sup>3</sup> Officer B was the only officer at the 7-Eleven who was still partially in uniform; all other officers had changed into civilian clothes. FPD rules prohibit officers drinking intoxicating beverages on duty or in uniform. (*Exhs. 5, 8 & 15*)

said he took Officer B at his word that the fireworks belonged to him and were not “part of a case or they are not confiscated or anything”, but now knows that wasn’t true. He took “full responsibility for what happened” and stated: “I blame no one. I blame myself. I don’t wish to go out like this . . . I’ve had probably three of the worst months I have ever had in my life. . . . I don’t ever wish to repeat again. I know if I’m given a second chance, I beg and plead of you to give me a second chance if you can, I will come back and give you 100 percent . . . I’m giving you my word. . . .” (*Exh. 3, p.53; Testimony of Appellant*)

25. Officer Kraus knew that the fireworks were illegal to possess and stated that “I was uncomfortable with it [taking fireworks from the police station], but I felt due to the circumstances they were given to me, they were mine, my property if I wanted them. It was told to me that I could have them if I wanted them. I didn’t feel I was doing anything wrong other than being in possession of fireworks, which I know is not right.” (*Exh.3, pp.61-62 (emphasis added); Testimony of Appellant*)

26. By letter dated October 30, 2014, Falmouth’s Town Manager informed Officer Kraus that, regrettably, his employment as an FPD Police Officer was terminated, effective immediately. The reasons for the decision included the following:

“Officer Kraus engaged in criminal behavior on the night of July 6-7, 2014. He acknowledged that he possessed fireworks, which is a crime and he knows it . . . Officer Kraus also committed the felony offense of larceny from a building, which is prohibited by M.G.L.c.266,§20. . . . I do not credit Officer Kraus’s suggestion that he was the owner of the fireworks or that he had a credible reason for such a belief. . . . M.G.L.31,§50 disqualifies those convicted of any crime from appointment for at least one year and M.G.L.c.41,§96 completely disqualifies anyone who has been convicted of a felony from becoming a police officer. The Courts have emphasized that an actual conviction is not required and that commission of the offense is sufficient to offend public policy. . . . Accordingly, the decision regarding Officer Kraus’s employment is, at its core, a fundamental public policy decision.”



“In addition . . . Officer Kraus’s conduct violates various rules and regulations and the code of ethics of the [FPD]. Officer Kraus’ behavior constitutes conduct unbecoming an officer because this behavior unquestionably brings discredit upon him as a sworn officer and upon the [FPD], a fact which Officer Kraus candidly acknowledges. His conduct also constitutes incompetence and neglect of duty in that he knew or certainly should have known enough to leave the fireworks in the station . . . . There was no lawful purpose or appropriate scenario in which he could leave the station with those fireworks. Likewise, Officer Kraus’s . . . involvement in removing evidence from the Police station which was then ultimately destroyed prevented another Falmouth Officer from . . . filing charges against an offender. Kraus admitted that as a senior officer in the department he served as a role model for junior officers.”

“Officer Kraus’s testimony that such an unauthorized display had been going on for at least a few years was not helpful to him. . . . I credit [Captain Smith] that the administration of the police department was not aware of the prior displays . . . Nearly every officer in the department walked past this packaged box of fireworks . . . and . . . did not touch them nor did they take any steps to remove them from the police station. Further, the vast majority of the officers did not participate in the fireworks display at the 7-Eleven. . . .”

“Officer Kraus . . . worked in the police department for over 20 years and has not been disciplined. He is well regarded in the department and . . . has now taken responsibility for a serious error in judgment. . . . [T] his is a challenging decision due to these mitigating factors. I have painstakingly considered all of these matters in weighing the competing public policy issues at stake in this case. Ultimately it comes down to this: continuing to employ a police officer who has engaged in felonious conduct would be inconsistent with the level of responsibility and trust placed in every sworn police officer, and furthermore would undermine the community’s trust and confidence in its police department.”

This appeal duly ensued. (*Exhs.1,5 through 7;Testimony of Chief Dunne; Claim of Appeal*)

27. The FPD conducted a separate criminal investigation into the episode. Criminal charges were sought in District Court against the four officers and the civilian store proprietor, but no complaints were issued. (*Testimony of J. Smith & Chief Dunne*)

#### Evidence Of Alleged Disparate Treatment

28. The July 6-7, 2014 episode was not the first time that FPD officers had gone over to the 7-Eleven after coming off duty after the Falmouth July 4th fireworks display. Capt. Smith concluded that it probably had happened at least once before, although he

had no personal knowledge of it. (*Exh.3, pp.23, 33-34; Testimony of Appellant, J. Smith, Sgt. J & Harris*)

29. The evidence also established that, at some time in the past, FPD officers would drink beers “out back” behind the police station. Chief Dunne recalls doing this himself as a patrol officer, not just on the July 4<sup>th</sup> holiday, but on other occasions during the summer months. This practice stopped on orders of a former FPD Police Chief Cusolito, who retired in 2007. (*Testimony of Chief Dunne, J. Smith, R. Smith & Appellant*)

30. Chief Dunne has over 38 years of service with the FPD, starting as a police officer, and working his way through the ranks. He became Acting Police Chief in 2012 and permanent Chief in 2013. During his career, he regularly worked the night of the July 4<sup>th</sup> fireworks display. Until the 2014 episode, neither Chief Dunne nor any of his Captains had previous knowledge that FPD officers removed confiscated fireworks from the police station or detonated fireworks at the 7-Eleven or anywhere else. (*Testimony of Chief Dunne, J. Smith, Sgt. J & Harris*)

31. In his prior duties as a Detective in charge of the evidence room and in arson investigations for more than ten years, Chief Dunne was directly responsible for turning over seized fireworks to the State Fire Marshal for destruction in compliance with state law, and he consistently complied with this statute. Capt. Smith and Officer Mancini confirmed this practice. Officer Kraus also knew this was the law. (*Exh.3, pp.54-55,58; PHExh.21; Testimony of Chief Dunne, J. Smith, Mancini & Appellant; G.L.c.148,§39*)

32. Most witnesses heard “rumors” and “chatter” that FPD officers had been known to detonate fireworks in the past. No witness had percipient knowledge of any occasion prior to 2014 on which he, or any named FPD officer, had taken confiscated fireworks

from the police station, whether to be used to detonate, or for any other any reason, since Chief Dunne has been in command of the FPD. (*Exh.3,pp.40-41,57; Exhs.8,13 through 16;Testimony of Appellant, Mancini, Sgt. J. J. Smith, R. Smith, Harris & Chief Dunne*)

33. The evidence established that there had been two prior instances in which an FPD officer had been found to have engaged in “felonious” conduct. In one instance, an officer admitted to removing a bicycle from the drive-through that was stored there as evidence and turned it over to a third party, leading to the officer’s resignation to avoid criminal prosecution. In the other example, a former FPD officer had been charged with felonies for having “keyed” a private party’s motor vehicle in 2002, and was suspended but not terminated. (*Testimony of J. Smith & Chief Dunne*)

34. Chief Dunne understood that he is obliged to disclose certain information to a prosecutor about any FPD officer who would be testifying in a criminal matter, if that information could be exculpatory to the defense, and this duty of disclosure included knowledge of an officer’s commission of a crime, such as conduct in which he concluded Officer Kraus had engaged. Chief Dunne had no personal knowledge that, in fact, any such disclosure had been made about any FPD officer at any time in the past. (*Testimony of Chief Dunne*)

### **APPLICABLE CIVIL SERVICE LAW**

A tenured civil service employee who has been terminated from his position may appeal to the Commission pursuant to G.Lc.31,§43, which provides, in part:

“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."

Under Section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, *on the facts found by the commission*, there was reasonable justification for the action taken by the appointing authority in the circumstances *found by the commission to have existed when the appointing authority made its decision*." Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983) (*emphasis added*). See also Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003); Commissioners of Civil Service v. Municipal Ct., 369 Mass. 84, 86 (1975); Police Commissioner v. Civil Service Comm'n, 39 Mass.App.Ct. 894, 601-602 (1996); McIsaac v. Civil Service Comm'n, 38 Mass.App.Ct. 473, 475-76 (1995); Police Commissioner v. Civil Service Comm'n, 22 Mass.App.Ct. 364, 371, rev.den. 398 Mass. 1103 (1986)

The Commission determines justification for discipline by inquiring "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Serv. Comm'n, 43 Mass.App.Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist.Ct., 389 Mass. 508, 514 (1983). An action is "justified" if "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law." Commissioners of Civil Serv. v. Municipal Ct., 359 Mass. 211, 214 (1971); Cambridge v. Civil Serv. Comm'n,

43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). An appointing authority's burden of proof is met "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956); Selectmen of Wakefield v. Judge of First Dist.Ct., 262 Mass. 477, 482 (1928).

The Commission must weigh all credible evidence in the record, including whatever may fairly detract from the weight of any particular evidence. See, Mass. Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001). It is the purview of the hearing officer to determine the credibility of testimony presented to the Commission. E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003); Doherty v. Ret. Bd. of Medford, 425 Mass. 130, 141 (1997); Herridge v. Board of Registration in Medicine, 420 Mass. 154, 165 (1995); Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); School Committee of Wellesley v. Labor Relations Commission, 376 Mass. 112, 120 (1978)

The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' " and the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in governmental employment decisions.' " Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of "merit principles" of civil service law that discipline must be remedial, not punitive, designed to "correct

inadequate performance” and “separating employees whose inadequate performance cannot be corrected.” G.L.c.31,§1

The Commission must also take into account the special obligations the law imposes upon police officers, who carry a badge and a gun and all of the authority that accompanies them, and which requires police officers to comport themselves in an exemplary fashion, especially when it comes to exhibiting self-control and to adhere to the law, both on and off duty.

“[P]olice officers voluntarily undertake to adhere to a higher standard of conduct . . . . Police officers must comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel. . . . they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.”

Attorney General v. McHatton, 428 Mass. 790, 793-74 (1999) and cases cited.

Off-duty misconduct properly can be the basis for discipline when the behavior has a “significant correlation” or “nexus” between the conduct and an employee’s fitness to perform the duties of his public employment. See, e.g., City of Cambridge v. Baldasaro, 50 Mass.App.Ct. 1, 4, rev.den., 432 Mass. 1110 (2000); School Committee of Brockton v. Civil Service Comm’n, 43 Mass.App.Ct. 486, 491-92, rev.den., 426 Mass. 1104 (1997); Timperly v. Burlington School Committee, 23 MCSR 651 (2010) (misconduct by off-duty school custodian in public park).

## **ANALYSIS**

Falmouth proved just cause for its decision to discharge Officer Kraus from the FPD for his mishandling of fireworks that he knew, or should have known, was unlawful. To be sure, the evidence of his previous unblemished record and FPD’s inattention to other officers who may have possessed and detonated fireworks in the past made the decision

whether or not to give Officer Kraus a second chance a hard one and not, necessarily, inevitable. Yet, even with all the mitigating factors taken into account, as Falmouth clearly did, the Commission agrees that, in the circumstances presented, Falmouth had good reason to conclude that the loss of public confidence and trust resulting from this conduct could not be repaired. Falmouth acted with sound judgment, consistent with basic merit principles, in setting the highest level of conduct expected from its municipal police officers.

#### Officer Kraus's Unlawful Misconduct

Officer Kraus's misconduct on July 6-7, 2014 encompassed three unlawful acts:

- Unlawful possession of fireworks (and accomplice to unlicensed and unsupervised fireworks display), in violation of G.L.c.148,§39, ¶1 (“Whosoever shall have in his possession or control . . . or cause to explode any fireworks . . . shall be punished by a fine of not . . . more than one hundred dollars”)
- Larceny (less than \$250) in violation of G.L.c.266,§30(1) “Whoever steals<sup>4</sup> . . . the property of another . . . shall be guilty of larceny, and . . . if the value of the property stolen . . . does not exceed two hundred and fifty dollars, shall be punished by imprisonment in jail for not more than one year or by a fine of not more than three hundred dollars”)
- Larceny from a building (a felony) in violation of G.L.c.266,§20 (“Whosoever steals in a building . . . shall be punished by imprisonment in the state prison or by a fine of not more than five hundred dollars or by imprisonment in jail for not more than two years.”)

He also violated the following FPD rules of conduct:

- Violation of the FPD's Code of Ethics 2.0 (“I will keep my private life exemplary as an example to all . . . . Honest in thought and deed in both my personal and official life, I will be exemplary in obeying the laws of the land and the regulations of the [FPD]”) (*Exh. 7*)
- FPD Regulations (Prohibited Conduct) 1 & 9 (“Conduct Unbecoming an Officer – The commission of any specific act or acts of . . . personal conduct which reflects discredit upon the officer himself, upon his fellow officers or upon the Police Department” & “Neglect of Duty – [f]ailing to take suitable and

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<sup>4</sup> G.L.c.277,§39 defines “stealing” as “[t]he criminal taking, obtaining or converting of personal property, with intent to defraud or deprive the owner permanently of the use of it. . . .”

appropriate police action when any crime, public disorder or other incident requires police attention or service.”) (*Exh. 5*)

- FPD Regulations (Required Conduct) 9 (“Attention to Duty – All officers shall at all times be alert and vigilant in the performance of their duties and respond prudently by [sic] decisively when police action is required.”) (*Exh. 6*)<sup>5</sup>

The preponderance of the evidence established that, by taking the box of fireworks into his personal possession for the purpose of bringing it to the 7-Eleven where he knew it would be detonated in his presence, Officer Kraus committed a crime in violation of G.L.c.148,§39. This conduct also violated the FPD’s Code of Ethics, as well as FPD Regulations regarding Conduct Unbecoming an Officer and Neglect of Duty.

Whether Officer Kraus’s conduct also implicated the crime of larceny or larceny from a building (a felony), is more problematic, because, in order to be guilty of committing those crimes, Officer Kraus would need to have the requisite criminal intent, i.e., that he knew he was “stealing” a box of fireworks belonging to another. Officer Kraus vehemently denied have any such intent. I do not accept his explanation and agree with Falmouth that there is simply no credible basis to believe that Officer Kraus did not know he was taking property held by the FPD, possibly as evidence, that lawfully could be released only to the State Fire Marshal.

Officer Kraus did not act in a vacuum. The totality of the evidence established, from multiple sources, that all four officers involved in the 2014 fireworks incident engaged in some banter amongst themselves and/or with others about the fireworks that they all had noticed, both in the drive-through and in the break room. Whether these officers acted in concert, or with what might be called “conscious parallelism”, they all had a specific

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<sup>5</sup> Falmouth also asserted that Office Kraus violated FPD Rules prohibiting “Incompetence” (Prohibited Conduct 9) and “Care and Custody of Property” (Required Conduct 28). (*Exhs. 5 & 6*) which I find less clear-cut. As the misconduct involved fits squarely into the laws and regulations listed in the text, these additional regulatory standards, even if applicable, simply would be cumulative to my conclusions.



intent that someone would be taking the box of fireworks over to the 7-Eleven and they all would rendezvous there in short order.

Chief Dunne and the Falmouth Town Administrator had sound reasons to find not credible, as do I, Officer Kraus's claim that he reasonably relied on Officer B's alleged representations about ownership and believed he had "done nothing wrong" except "possess" the illegal fireworks he took. By his own admission, Officer Kraus was "uncomfortable" and suspicious that the fireworks were "part of a case" or "confiscated". I draw the inference that, the alleged colloquy between Officer Kraus and Officer B, if it occurred at all,<sup>6</sup> more likely than not, was a ruse or means to enable these officers to cover for each other; Officer B could not be accused of stealing the box as he didn't take it out of the station and Officer Kraus could not be accused of stealing because he lacked the requisite criminal intent. I infer that both officers knew exactly what the truth of the matter was. Indeed, to believe Officer Kraus's version of the chain of custody merely would add incompetence, neglect and/or inattention to duty to the offenses he committed, an outcome that would lead to no different result. The basic facts remain that Officer Kraus was less than truthful about his role in the incident, admitted to misdemeanor larceny, committed acts that probably constitute a felony, and engaged in conduct unbecoming an officer and unethical behavior that violated core FPD Regulations and the FPD Code of Ethics.

I have not overlooked the fact that the FPD sought, unsuccessfully, to initiate a criminal prosecution against Officer Kraus and others for their actions in the 2014 fireworks incident. The decision of the Falmouth District Court not to issue any criminal

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<sup>6</sup> Officer B's claim that he was given the box by Officer Mancini is unequivocally contradicted by the drive-through video (*Exh. 18*).

complaints is not dispositive of the issue before the Commission and does not detract from the conclusion that the misconduct was established by the preponderance of the evidence in this civil administrative proceeding and independently supports the just cause for discipline under civil service law. See, e.g., Gonzales v. Massachusetts Dep't of Correction, 27 MCSR 325 (2014); Yukl v. Town of Montague, 14 MCSR 131 (2001); Spicer v. City of Newburyport, 11 MCSP 108 (1998)<sup>7</sup> See also Everton v. Town of Falmouth, 26 MCSR 465 (2013) (off-duty officer terminated for misconduct constituting motor vehicle misdemeanor offenses); Phillips v. Town of Hingham, 24 MCSR 267 (2011) (police officer terminated for untruthfulness about inappropriate “horseplay” with civilian employee while on duty); Desharnais v. City of Westfield, 23 MCSR 418 (2010) (officer damaged cruiser in “cowboyish” spins and then untruthfully denied his antics)

#### Automatic Disqualification

Falmouth argued that Officer Kraus’s discharge was mandated because (a) his “felonious” misconduct and (b) diminished credibility represented automatic disqualifiers that do not merely support, but require, his termination from the position of a municipal police officer. I address these contentions separately.

First, Falmouth argues, correctly, that, as a matter of public policy, when a police officer has committed acts that rise to the level of “felonious misconduct”, that officer may be subject to termination from his position, regardless of the “seriousness” of the felony or whether or not the officer was actually charged or convicted of the implicated offense. See G.L.c.41,§96A; City of Boston v. Boston Police Patrolmen’s Ass’n, 443

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<sup>7</sup> In Spicer, the District Attorney’s office did not prosecute despite sufficient evidence to do so, stating that administrative sanctions were the appropriate resolution. Id., 11 MCSR at 109. According to Chief Dunne, a similar rationale might be a motivating factor in District Court’s decision in the present case. (*Testimony of Chief Dunne*)

Mass. 813, 818-823 (2005); Town of Swansea v. Swansea Coalition of Police Local 220, 86 Mass.App.Ct. 1123,fn.3 (2014) (Rule 1:28 decision); City of Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182, 188,fn.12 (2010); City of Boston v. Boston Police Patrolmen’s Ass’n, 74 Mass.App.Ct. 379, rev.den., 545 Mass. 1109 (2009). See also, In re Segal, 430 Mass. 359, 363-64 (1999) and cases cited; Hill v. Boston Police Dep’t, 20 MCSR 679 (2007).

Here, the conclusion that Officer Kraus engaged in “felonious misconduct” turns on a question of fact, namely, whether or not the preponderance of evidence presented to the Commission, as the fact-finder, established that Officer Kraus had the necessary specific criminal intent to commit a felony, i.e., “stealing” from a building prohibited by G.L.c.266,§20 (as opposed to the general intent required to commit the misdemeanor offense of “possession” of illegal fireworks, to which Officer Kraus eventually admitted). Compare Town of Swansea v. Swansea Coalition of Police Local 220, 86 Mass.App.Ct. 1123,fn.3 (2014) (Rule 1:28 decision) (arbitrator’s conclusion that officer’s conduct was felonious) with O’Brien v. New England Police Benevolent Ass’n, Local 911, 83 Mass.App.Ct. 376, rev.den., 465 Mass. 1107 (2013) (reinstatement permitted when arbitrator found that officer did not engage in felonious misconduct); City of Boston v. Boston Police Patrolmen’s Ass’n, 32 Mass.L.Rptr. 664 (Sup.Ct. 2015) (same)

I previously concluded that Falmouth had reason to conclude, and the preponderance of evidence before the Commission proved, that Officer Kraus knew he was taking a box of fireworks from FPD premises that did not lawfully belong to him. Thus, in this civil administrative proceeding, the preponderance of evidence of misconduct and intent is sufficient to establish the act of felonious misconduct of larceny from a building. Thus,

Falmouth was warranted to conclude, although in the absence of a conviction not required to conclude, that Officer Kraus be disqualified, as a matter of public policy, from continued service with the FPD.

Second, Falmouth argues that, having engaged in felonious misconduct and fabricated a false defense for his conduct, his future value as a police officer is irreparably compromised because this behavior can be used to impeach his credibility as a witness should he be called to testify in future criminal prosecutions. This concern flows from a line of federal cases beginning with Brady v. Maryland, 373 U.S. 83 (1963) that oblige a prosecutor to disclose to the defense “exculpatory” evidence known to the government, including the police, an obligation which has been extended to include evidence relevant to the credibility and/or impeachment of government witnesses. See also Kyles v. Whitley, 514 U.S. 419 (1995); United States v. Bagley, 473 U.S. 667 (1985); United States v. Agurs, 427 U.S. 97 (1976); Giglio v. United States, 405 U.S. 150 (1972)

The Appellant points out that the jurisprudence of the Commonwealth has taken a similar, but not precisely identical path, when it comes to requiring disclosure of exculpatory evidence to the defense in a criminal prosecution. See, e.g., MASS.R.CRIM.P. 14(a)(1)(A); Commonwealth v. Laguer, 448 Mass. 585 (2007); Commowwealth v. Tucceri, 412 Mass. 401 (1992); Commonwealth v. Daye, 411 Mass. 719 (1992); Commonwealth v. Gallerelli, 399 Mass. 17 (1987); Commonwealth v. Wilson, 381 Mass. 90 (1980)

In particular, evidence “beyond information held by agents of the prosecution team”, including, in particular, internal affairs investigatory material, is not generally considered within the sweep of the disclosure requirements but is subject to other, stricter rules.

As stated in Commonwealth v. Wanis, 426 Mass. 639, 643-44 (1998):

“We reject any suggestion that all records of internal affairs division investigation, even if arguably relevant and material, are to be produced automatically . . . . A defendant may not obtain information in the possession of an internal affairs division, other than statements of percipient witnesses, without seeking a summons for the production of that information and, if production is opposed, without making a showing to a judge . . . that there is a specific, good faith reason for believing that the information is relevant to a material issue in the criminal proceeding and could be of real benefit to the defense.”

See also, Reporter’s Notes – Revised, 2004, *Subdivision (a)(1)(A)*, MASS.R.CRIM.P. 14(a)(1)(A); Commonwealth v. Thomas, 451 Mass. 451 (2008) (defendants not entitled to record of traffic stops purporting to show “profiling” relevant to trooper’s alleged bias)

In addition, exculpatory evidence must be admissible, and “[t]he general, but not inflexible, rule is that a witness may not be impeached by extrinsic evidence of prior misconduct not material to the case in which he testifies.” E.g., Commonwealth v. Mayfield, 398 Mass. 615 (1986). Thus, impeachment of a witness’s credibility is limited to proof of bias, general reputation for veracity and introduction of a court record of a criminal conviction. See, e.g., G.L.c.233,§21; Commonwealth v. Walters, 472 Mass. 680, 705 (2015) (excluded evidence of criminal conviction without certified record); Commonwealth v. Daley, 439 Mass. 558 (2003) (rules for impeachment of credibility must be strictly followed); Commonwealth v. Connor, 392 Mass. 838 (1984) (bias of a government informant); Commonwealth v. Cheek, 374 Mass. 613 (1978) (bias vs. general credibility); Commonwealth v. Haywood, 377 Mass. 755 (1979) (same)

The Commission has noted the applicability of Brady principles in disciplinary appeals and, in general, has deferred to local authority in assessing if an officer’s untruthfulness or other misconduct has reached the level that it automatically requires that the officer be discharged, or whether, despite the Brady principle, the officer may

continue his employment subject to lesser discipline. See Pierce v. City of Attleboro, 27 MSCR 329 (2014) (termination); Robichau v. Town of Middleboro, 24 MCSR 352 (2011) (demotion); Kinnas v. Town of Shrewsbury, 24 MCSR 67 (2011) (termination); Gallo v. City of Lynn, 23 MSCR 348 (2010) (bypass for promotion)

In the present appeal, I agree with the Appellant that there is considerable doubt that his misconduct reasonably can be viewed as “Brady material”. There is no criminal conviction, the undisputed evidence established that Officer Kraus’s general reputation for veracity was good, and it seems remote that his “felonious” misconduct or prevarication about his role in one isolated incident would meet the standard for admission of evidence to show bias or to impeach Officer Kraus’s credibility in testifying as to the facts of any future, unrelated criminal case. Chief Dunne knew of no instance in which the FPD had made such disclosure to a prosecutor. I conclude, therefore, that, a without a more thoroughly developed justification on this complicated subject than appears in this record, Falmouth did not prove that Officer Kraus’s termination was mandated by Brady principles.

#### Modification of Penalty

Since my conclusions do vary somewhat from those upon which Falmouth relied in this appeal, I consider whether G.L.c.31,§43 vests the Commission with the authority to affirm, vacate or modify the penalty imposed by the appointing authority. The Commission has been delegated with “considerable discretion” albeit “not without bounds” to modify a penalty imposed by the appointing authority, so long as the Commission provides a rational explanation for how it has arrived at its decision to do so.

E.g., Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594,600 (1996) and cases cited.

“The power to modify penalties permits the furtherance of uniformity and equitable treatment of similarly situated individuals. It must be used to further and not to frustrate, the purpose of civil service legislation, i.e., ‘to protect efficient public employees from partisan political control’. . . and ‘the removal of those who have proved to be incompetent or unworthy to continue in the public service’.” *Id.*

The authority accorded to the commission to modify penalties “must not be confused with the power to impose penalties ab initio, which is a power accorded to the appointing authority.” Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct. 796, 800 (2004) quoting Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 600 (1996).

Thus, when it comes to review of the penalty, unless the Commission’s findings of fact differ materially and significantly from those of the appointing authority or interpret the relevant law in a substantially different way, the Commission is not free to “substitute its judgment” and “cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation.” Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited (minor, immaterial differences in facts found by Commission and appointing authority did not justify modification). See, e.g., Town of Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct. 796 (2004) (suspension improperly modified); Commissioner of MDC v. Civil Service Comm'n, 13 Mass.App.Ct. 20 (1982) (discharge improperly modified)

I have carefully reviewed the evidence to determine whether there are any reasons upon which the Commission would be warranted to reconsider and reduce the discipline imposed to a suspension. I conclude that the decision to discharge comports with basic merit principles of civil service law and must not be modified by the Commission.

First, there is no indication that personal or political animus or undue influence influenced the decision in this matter. Indeed, by all indications, neither the Town Administrator nor Chief Dunne took any pleasure terminating the Appellant.

Second, I reject the argument that Officer Kraus's discharge was unduly harsh and disparate when compared to how Falmouth treated other officers who engaged in similar behavior. The three FPD officers with significant tenure (Officer Kraus, Sgt. J and Officer B) involved in the 2014 fireworks incident lost their jobs, and Officer O (a junior officer with two years on the FPD) was suspended. Falmouth justified lesser remedial discipline of Officer O, short of termination, based on his junior status and limited role in comparison to the other three participants. This judgment was a reasonable one within the proper compass of an appointing authority.

Third, neither example of prior allegedly comparable "felonious misconduct"<sup>8</sup>, nor the anecdotal evidence that Falmouth had never before disciplined officers for detonating fireworks,<sup>9</sup> requires that Falmouth treat the 2014 offenders leniently. As stated in City of Boston v. Boston Police Patrolmen's Ass'n, 443 Mass. 813, 822,fn.9 (2005):

That other police officers may have received lesser sanctions for their serious misconduct avails nothing here. Each case must be judged on its own facts, and the factual record in those cases is not before us. . . . Nor do we credit the association's argument that the prior dispositions worked an estoppel of the department's termination in this case. Leniency toward egregious police misconduct in the past (assuming such leniency occurred) cannot lead a police officer to commit reprehensible actions in the expectation that he will receive a light punishment. (emphasis added)

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<sup>8</sup> The evidence showed that these prior incidents were not truly comparable examples of disparate discipline. One had occurred more than a decade earlier and the other resulted in the officer's resignation. (*Testimony of Chief Dunne*)

<sup>9</sup> I do not find credible the testimony that FPD illegal fireworks displays were "the norm", as Richard Smith, who retired in 2007, claimed. I also discount Officer Kraus's testimony that the practice was a "rite of passage" at the "end of summer" that moved to the 7-Eleven when Chief Cusolito banned it from the police station parking lot. July 4<sup>th</sup> is plainly not the "end of summer" on Cape Cod and there was no evidence that more than a few officers ever gathered at 7-Eleven and that they had done so only recently and without Chief Dunne's knowledge.



Fourth, I am fully aware of the Appellant's long history of honorable service with the FPD and his unblemished prior record. I also appreciate that his off-duty misconduct can be distinguished from other cases involving more egregious "conduct unbecoming" an officer while in uniform and on duty that have come before this Commission. I can fully understand, given the mitigating circumstances here, how difficult the decision to terminate Officer Kraus must have been, and that a compelling argument can be made that Falmouth reasonably could have concluded that lesser discipline was justified as a sufficient penalty to remediate his bad behavior and ensure that neither he, nor any other FPD officer, ever repeated this bad behavior. Falmouth's Town Manager, and Chief Dunne, however, did fully consider all of these factors before concluding that, notwithstanding these mitigating factors, in their judgement, termination was the appropriate choice. The Commission's power to modify a discipline does not extend to substituting its judgment on substantially similar fact finding, which is the case here.

Fifth, although I have rejected Falmouth's legal argument that Officer Kraus's felonious conduct mandated his automatic disqualification as a matter of law, that error of law does not change the result. If Falmouth's decision was made solely on the basis of that error of law, I would have recommended a modification of the termination to a significant suspension. I do not construe Falmouth's decision rejecting the option of imposing such remedial discipline, however, to turn on the conclusion that, despite the mitigating factors that were presented, Falmouth was required to terminate Officer Kraus as a matter of law, but, rather, that was the result Falmouth chose, in the exercise of sound discretion, after fully weighing all of facts and circumstances involved. The fact that Falmouth could have reached a different result and may, even now or at any time,

reconsider its decision, does not allow the Commission, ab initio, to order that an otherwise justified termination be modified to a suspension.

## **CONCLUSION**

For the reasons stated, the appeal of the Appellant, Eric Kraus, under Docket No. D1-14-259, is hereby *dismissed*.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein  
Commissioner

By 3-1 vote of the Civil Service Commission (Bowman, Chairman [AYE]; Ittleman [AYE], Camuso [NO], Stein [AYE], and Tivnan [Absent], Commissioners) on June 23, 2016.

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:

Douglas I. Louison, Esq. (for Appellant)

Tim D. Norris, Esq. (for Appointing Authority)

**COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, SS.**

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

**ERIC KRAUS,**  
Appellant  
**v.**

**D1-14-259**

**TOWN OF FALMOUTH,**  
Respondent

**DISSENTING OPINION OF COMMISSIONER CAMUSO**

I respectfully dissent. I agree with the majority that Officer Kraus, as an experienced veteran police officer should have known better than to participate in an illegal display of fireworks, and deserved to be disciplined for that misconduct. I do not agree, however, that the facts of the case can in any way be read to support the conclusion that Officer Kraus is guilty of “substantial misconduct” that warranted his termination.

Under basic merit principles of civil service law every employee must be given a fair chance for “correcting inadequate performance” and a termination is justified only when “inadequate performance cannot be corrected.” G.L.c.31, §1. Officer Kraus comes before the Commission with an unblemished record of nearly two decades as a highly-regarded, valuable member of the Falmouth Police Department. His single misstep of off-duty misconduct does not call into question his abilities to perform any of the core duties of a police officer. His offense was of the most minor nature and, while there was some dispute about how often others had been allowed to get away with similar conduct, or how much the current FPD command knew about it, common sense dictates that this was not the first time a FPD officer had shot off fireworks in violation of the law. I do not discount the impact of this incident on the good standing of the FPD in the

community, but I am troubled that Officer Kraus has been singled out as a scapegoat for the actions of others over which he had no control. I cannot find any basis on which his termination can be reasonably justified. A suspension of six months would have been more than enough to suffice to send the proper message, preserve the good will of the FPD with the community and avoided ruining the career of a loyal, hard-working public servant. The FPD has not made the case to show how it was not possible that level of discipline could not have been applied for a first, one-time and minor transgression.

/s/ Paul Camuso  
Paul Camuso, Commissioner