

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

CHARLES ROBICHAU
Appellant

v.

CASE NO: D1-09-175

TOWN OF MIDDLEBOROUGH,
Respondent

Appellant's Attorney:

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Commissioner:

Paul M. Stein

DECISION

The Appellant, Charles Robichau, acting pursuant to G.L.c.31,§43, appealed to the Civil Service Commission (Commission) from a decision of the Town of Middleborough (Middleborough), the Appointing Authority, to suspend him for three months and reduce him in rank from Sergeant to Patrol Officer with the Middleborough Police Department (MPD), for alleged inappropriate conduct, neglect of duty and untruthfulness. A full hearing was held by the Commission at the University Of Massachusetts School Of Law at Dartmouth on August 21, 2009, August 28, 2009 and November 24, 2009. The hearing was declared private as no party requested a public hearing and was stenographically recorded. Witnesses were sequestered. Middleborough called six witnesses and the Appellant called three witnesses and testified on his own behalf. Twenty-four (24) documents were marked in evidence. Post hearing submissions were received from the Appellant on February 17, 2010 and from Middleborough on February 25, 2010.

FINDINGS OF FACT

Giving appropriate weight to the Exhibits, to the testimony of the witnesses (the Appellant, Anna Robichau, Kathleen Robichau, Middleborough Town Manager Charles Cristello, MPD Sergeant Robert Ferreira, MPD Sergeant Stephen Verhaegen, MPD Police Officer Richard Harvey, and Michael Terrell) and to inferences reasonably drawn from the evidence as I find credible, I make the findings of fact set forth below.

The Appellant

1. The Appellant, Charles Robichau held the position of tenured permanent full-time police officer with the MPD for more than thirteen years. After approximately three years as a Patrol Officer, he was promoted to Sergeant, the position he held at the time of the incident involved in this appeal. He had no record of prior discipline. (*Exh. 4; Tr.I:217-219 [Robichau]*)

2. Sgt. Robichau served as a patrol supervisor on the “Late Evening Shift” (12 A.M. to 8 A.M.). There were usually two sergeants assigned to that shift, who shared the duties of holding roll call, making assignments and ensuring that the officers fulfilled the assigned shift responsibilities, as well as personally patrolling in a cruiser. Sgt. Robichau was regularly “out on the street” in his assigned patrol car, especially for the first two or three hours of his shift, when there would be the highest level of activity. He also served as the MPD grant administrator for Homeland Security grants, community policing grants, safety grants, and others grants with budgets up to \$250,000. (*Exhs 1 & 2; Tr.I:219-221, Tr.II:20-27 [C.Robichau]; Tr.I:148-168 [Harvey]; Tr.I:168-172, 184-186 [Verhaegen]*)

3. Prior to his employment with the MPD, Robichau worked for 17 years with the Raytheon Company and served six years (four years active duty) with the U.S. Navy.

(Tr.I:217 [C.Robichau])

The Appellant's Family

4. Since 2001, Sgt. Robichau resided on North Grove Street in Middleborough with his wife Kathleen and two daughters, Emily and Anna. Sgt. & Mrs. Robichau, Emily and Anna each occupied a bedroom on the second floor and shared a common bathroom.

(Exhs. 11 & 11A; Tr.I:217[C.Robichau]; Tr.I:193 [K.Robichau])

5. In May 2008, Mrs. Robichau was diagnosed with a liver condition which caused her to be chronically fatigued. She could take a nap in the afternoon and not awake until the next day. Sgt. Robichau handled significant responsibility for parenting his daughters, especially in matters of discipline and school work.

(Tr.I:222-223,227;Tr.II:72-73[C.Robichau]; Tr.I:193,199-200 [K.Robichau]; Tr.I:117-118 [A.Robichau])

6. The oldest Robichau daughter, Emily, was 19 years of age in October 2008. She completed Middleborough High School where she struggled academically. She earned a varsity letter in high school in wrestling (competing with males in the 125-pound class).

After graduation, she attended Massasoit Community College, where she met Michael Terrell. They dated until she became pregnant in February 2009 and broke up thereafter.

Emily Robichau did not testify. *(Tr.I:193[K.Robichau]; Tr.I:210 [A.Robichau]; Tr.I:227-230; Tr.II:57,134 [C.Robichau]; Tr.I:128-130; Tr.I:128-129[Terrell])*

7. Emily was diagnosed with serious mental health issues at a very early age and was on medication by the age of four. According to Mrs. Robichau, Emily was “very impulsive, very compulsive and her ability to stop and think just doesn’t exist . . . [S]he

was a danger to herself and the other little kids didn't want to play with her. . . .”
(*Tr.I:197-198[K.Robichau]*)

8. As a teenager, Emily started sneaking out of the house (Sgt. Robichau stated that, at age 16, she “ran away on me nine times in, like a month’s period of time”), began shoplifting and associating with others much older than she. She was enrolled in a private tutoring program after her junior year of high school to improve her academic performance. Locks were placed on her door to keep her from sneaking out of the house and harboring unwelcome visitors. Sgt. Robichau once had the MPD apprehend Emily as a “runaway” after he located her staying at a neighbor’s home. At one point she was placed in custody of the Massachusetts Department of Social Services (DSS) as a Child in Need of Services (CHINS). (*Tr.I:194-198 [K.Robichau]; Tr.I:223-229[C.Robichau]*)

9. The younger daughter, Anna, was 15 years old at the time of the incident involved in this appeal. She attended Middleborough High School and worked part-time at the local McDonalds. Her interests gravitated more toward the artistic, as opposed to her sister, who was more of the athletic type. She would “hang out” with Emily occasionally. She had attended summer school to make up two classes. Sgt. Robichau said he believes she smokes. (*Tr.I:101, 116-122 [A.Robichau]; Tr.I:217; Tr.II:106 [C.Robichau]*)

10. In the summer of 2008, at age 18, after several failed attempts, Emily finally obtained a driver’s license. As a reward, Mr. Robichau handed her keys to the family Ford Escort, and imposed conditions under which she could use the car, which included a curfew and restrictions on the passengers she could carry. Emily did not comply with these conditions, staying out later than she was supposed to and otherwise “abusing her use of the car” by “filling it up with kids and driving around.” In fact, Mrs. Robichau

encountered Emily at the local supermarket the day she got her license with “two of the boys that we had forbidden her to see” in the car. In the days leading up to the episode in question, Mr. Robichau said he had been trying to meet up with Emily to confront her about her behavior, and was leaving her notes, asking her to see him, but they had not connected. (*Tr.I:195-196 [K.Robichau]; Tr.I:230-236; TrII:7-13,75-77[C.Robichau]*)

Relevant MPD Police Department Practices and Procedures

11. The MPD’s Police Manual prescribes the rules to which all MPD police officers are expected to conform. Insofar as they are germane to this appeal, these rules state:

- Professional Conduct and Responsibilities. Police officers are professionals, and as such are expected to maintain exceptionally high standards in the performance of their duties. . . . Effective and efficient performance of his duty requires that a police officer maintain the respect and cooperation of his community. This requirement dictates that the conduct of all police officers be above reproach in all matters both within and outside the Department.
- Truthfulness – An officer shall truthfully state the facts in all reports as well as when he appears before any judicial, departmental or other official investigationHe shall cooperate fully in all phases of such investigations . . .
- Criminal Conduct – Commission of any felony or misdemeanor
- Improper or Unsuitable Conduct – Any type of misconduct which reflects discredit upon the member as a police officer, or upon his fellow officers, or upon the police department he serves.
- Neglect of Duty – Being absent from assigned duty without leave or failing to take suitable and appropriate police action when any crime, public disorder or other incident requires police attention.

(*Exh. 2*)

12. All MPD officers on patrol, including patrol supervisors, need to be accessible to contact from the police station. Whenever an officer leaves his cruiser for any reason (and would be out of earshot of the radio on-board the cruiser), the officer is expected to call in to the station to report this situation. As a practical matter, officers do not always strictly follow this protocol. Officers also carry portable radios on their persons. The

MPD had never disciplined an officer for leaving his cruiser without calling in. (*Tr.I:187-191 [Verhaegen]; Tr.III:13-16 [Christello]*)

The October 8, 2008 Incident

13. On October 7, 2008, at approximately 11:30 pm, as was his custom, Sgt. Robichau reported to MPD headquarters in anticipation of his midnight to 8 am shift. Also assigned to work that shift was Sgt. Verhaegen. Although Verhaegen was senior to Robichau, the two men took turns handling the shift supervisory duties. This day, Sgt. Robichau conducted the roll call and handed out the “sector” assignments to the four patrol officers on duty, including patrol cars and assignments for himself and Sgt. Verhaegen as “street Sergeants”, who are not assigned particular sectors, but are available to respond, as needed, to calls anywhere in the town. (Due to Officer Harvey’s scrivener’s error, the police log for the shift erroneously failed to show Sgt. Robichau fulfilling this function.) Sgt. Robichau helped Officer Harvey on administrative matters and then proceeded to his cruiser and went out on patrol. (*Exh.5; Tr.I:148-157,162[Harvey]; Tr.I:169-172,184-186[Verhaegen]; Tr.II:19-25 [C.Robichau]*)

14. Sgt. Robichau stopped for coffee and “took a run down North Grove Street . . . to see if my Ford Escort was there”, meaning to see if his daughter was home, but didn’t see the car. He proceeded to a nearby business establishment’s parking lot where he monitored traffic for about 25 minutes. At about 1:00 am on October 8, 2008 Sgt. Robichau “took another pass down North Grove Street” and saw the Ford Escort in the driveway. He pulled his cruiser into the driveway and felt that the Escort’s hood was warm, indicating to him that Emily had probably come home within the past 10 minutes or so. (*Tr.II:26-29, 82-83 [C.Robichau]*)

15. Sgt. Robichau entered his home with the intent of he and his wife “sitting down and having a talk with Emily.” He woke Mrs. Robichau, who asked for a minute to use the bathroom. While Mrs. Robichau was in the bathroom, Sgt. Robichau knocked on Emily’s door several times, without a response. He opened the door and stated: “Emily I know you’re awake and I know you just got home”, to which she responded loudly: “Get the f—k out of my bedroom.” Emily had, in fact, just arrived home and was awake, in bed, talking on her cell phone with her boyfriend, Michael Terrell. (*Tr.I:128-132 [Terrell]; Tr.I:201-202 [K.Robichau]; Tr.II:28-30, 85-86 [C.Robichau]*)

16. Three eyewitnesses to the ensuing encounter testified – Sgt. Robichau, Mrs. Robichau and Anna Robichau. In addition, third-party accounts of what these individuals recounted to them in the morning, as well as Emily Robichau’s account, were introduced, principally, through the testimony and official reports of the MPD School Officer Sgt. Robert Ferreira and Middleborough High School Adjustment Counselor Tanya Sullivan, among others. These sources present conflicting versions of what occurred inside the Robichau home that night. (*Exhs. 6 through 10; Tr.I:26-81 [Ferreira]; Tr.I:82-100 [Sullivan]; Tr.I:101-110, 121-126 [A.Robichau]; Tr.I:200-203 [K.Robichau]; Tr.II:30-38, 82-104, 144-150 [C.Robichau]; see also Tr.I:130-132 [Terrell]*)

17. According to Sgt. Robichau’s account, he entered Emily’s bedroom and approached the side of her bed, wagging his finger at her and stating in a loud, stern voice that he didn’t like her “speaking to her [swearing] in that way.” He said she uttered something incoherent about babysitting and continued swearing at him. She then rolled over into her “turtle position” on her back and started kicking him in the chest – something she said she learned in wrestling. He backed off and she jumped out of bed.

At this point, Sgt. Robichau noticed Anna Robichau in the room and told her to leave. Anna crossed her arms and refused to move. Sgt. Robichau moved closer to Anna and crossed his arms in front of him as well. As he continued to move forward, Anna backed up, eventually knocking aside Mrs. Robichau who had just entered the room. Sgt. Robichau continued to back Anna into her own room, where she fell onto her bed. As he turned around to leave, he said she jumped off the bed onto his back and started hitting him on his shoulders and his head and, as he backed up, she dropped to her bed. He wagged his finger at her and told her “if she didn’t want to live in this house, she could contact a relative to take her in, if that’s what she wants, and ask that relative if they want a thieving, lying, alcohol-using, smoking, young lady with a foul mouth living in their house”. He then said he turned around and walked back to Emily’s room, asked her for the keys to the Ford Escort, went to the car and loaded her personal belongings into trash bags. All of this took about 15 to 20 minutes. According to him, at no time during this encounter did Sgt. Robichau ever pull the hair of either daughter or punch, slap or strike either of them. (*Tr.II:30-38, 82-104, 144-150 [C.Robichau]*)

18. Mrs. Robichau’s testimony described a “chaotic scene”. She emerged from the bathroom to see the “kids were on his [Sgt. Robichau’s] back, kicking and punching. There was yelling” As she entered Emily’s room, Anna “came flying out of [Emily’s] room and kind of busted by me and knocked me into the dresser.”. . . His [radio] was hanging . . . The kids had knocked it off and it was hanging on the floor.” She denied ever seeing her husband strike either Emily or Anna. (*Tr.I:202-203 [K. Robichau]*)

19. Anna Robichau was called as a witness by Middleborough’s counsel. She testified that she awoke to Emily’s “really loud-pitched scream” and ran to her sister’s room

where she saw Sgt. Robichau pointing at Emily who was kicking him. His hand was “in her hair”. Anna yelled at him and he told her to “get out of the room, this doesn’t concern you.” She crossed her arms and said “I’m not going anywhere”. Whereupon, she said Sgt. Robichau pushed her out of the room and she ended up in her room and collapsed onto her bed after a “slight push”. She then kicked her father and said she jumped on his back, punching him a couple of times. When asked to explain inconsistencies and lack of recollection with certain prior statements she had made about the incident, Ms. Robichau testified that her memory of the events wasn’t “that good. . . anymore” and she didn’t “remember half the things that happened that day.” (*Tr.I:101-110 [A.Robichau]*)

20. After the altercation ended, Sgt. Robichau departed in his cruiser and resumed patrol duties. He monitored traffic on Route 28 for about 20 minutes and, at about 2:00 am, responded to a call for service concerning a suspicious motor vehicle. When he arrived, Sgt. Verhaegen was already on scene. After the matter was cleared, Sgt. Robichau told Sgt. Verhaegen that was having “difficulties at home with my daughter, Emily, and that I needed to swing by there, and he [Sgt. Verhaegen] said: “Go.” Sgt. Robichau proceeded home, parked at the end of the driveway and sat in the cruiser observing the house. (*Exhs 5 & 5A; Tr.I:38-41 [C.Robichau]*)

21. Sgt. Verhaegen confirmed this conversation, recalling that Sgt. Robichau told him Emily came home late, he took the car keys away from her, she was being disrespectful and his younger daughter Anna was sticking up for her sister. Sgt. Verhaegen described Sgt. Robichau’s demeanor as “agitated” but “normal” and nothing that caused concern. Sgt. Robichau did not tell Sgt. Verhaegen about the physical aspects of the encounter that just occurred. I found Sgt. Verhaegen a self-confident and credible

witness, who strived to be truthful. He was clearly uncomfortable saying anything derogatory about Sgt. Robichau. (*Tr.I:38-41[C.Robichau];Tr.I:178-180 [Verhaegen]*)

22. Meanwhile, Mrs. Robichau had been left at home with her daughters. She told them “it’s best that everybody cools down”. Emily arranged for Michael Terrell to pick her up and stay with him (he lived at home with his parents), and to take Anna to stay with a friend of hers, Kristen Jaco. When Mr. Terrell arrived, he saw a police cruiser and was reluctant to stop until he had called Emily and was told Mrs. Robichau would be coming out to meet him. When he pulled into the driveway, Sgt. Robichau followed him and parked the cruiser behind Mr. Terrell’s pick-up. Up to this point, Sgt. Robichau had never met Mr. Terrell. (*Tr.I:110-112[A. Robichau];Tr.I:132-133[Terrell]; Tr.I:Tr202-203,210-212[K. Robichau]; Tr.II:41-42,104-108[C. Robichau]*)

23. Sgt. Robichau saw Mrs. Robichau and Emily leave the house. Emily got into Mr. Terrell’s pick-up truck. Anna was inside the truck. Sgt. Robichau did not recognize Anna at first. They exchanged harsh words and he reached in the truck and touched her face. He became upset when Mrs. Robichau told him that Anna was going to stay with Kristen Jaco. He explained he would spot Kristin Jaco out while on patrol late at night, that Anna had bragged about shoplifting with her, and that he did not believe Mrs. Jaco was a “fit adult to supervise my child.” At Mrs. Robichau’s request, Sgt. Robichau moved his cruiser, so Mr. Terrell could back out, and left to resume patrol duties. (*Tr.II:41-46 [C.Robichau]; Tr.I:112-113|Tr.I:132-136 [Terrell];Tr.I:211-212 [K. Robichau]*)

24. Sgt. Robichau recalls meeting Sgt. Verhaegen on patrol thereafter and, again, mentioning that “things were very messed up” at home, and that he was returning to the police station to work on administrative matters. Sgt. Verhaegen does not recall having

this conversation. (*Tr.I:46-48 [C.Robichau]; Tr.I:179 [Verhaegen]; See also Exh. 10*)

25. At 6:00 am, after working on grant paperwork, Sgt. Robichau relieved Officer Harvey on the dispatch desk. When Sgt. Verhaegen returned to the station at the end of the shift, he noticed Sgt. Robichau at the department computer, typing, and asked what he was working on. Sgt. Robichau replied he was writing an “ultimatum” to Mrs. Robichau over the incident with his daughters. Sgt. Verhaegen asked “if things had gotten that bad” to which Sgt. Robichau stated that he was tired of his daughters being disrespectful and his wife sticking up for them. (*Tr.I:180-183 [Verhaegen]; Tr.II:48 [C.Robichau]*)

26. At the end of his shift, approximately 8:00 am on October 8, 2008, Sgt. Robichau sought out Sgt. Ferreira, who is assigned to the Middleborough Middle School and High School as a School Resource Officer. Sgt. Robichau told Sgt. Ferreira that he had confronted Emily that night and told her she could no longer live at home and, when Anna got involved he “walked toward her with his arms folded backing her up into the bedroom.” He told Sgt. Ferreira both daughters had left the house and that Anna went to stay with her friend Kristin Jaco. He told Sgt. Ferreira he would not talk with a school counselor but would meet with DSS, in whom he had more confidence, if the DSS became involved. (*Tr.I:28-31 [Ferreira]; Tr.II:50-52 [C.Robichau]*)

27. Sgt. Robichau and Sgt. Ferreira differ on the reason Sgt. Robichau gave for approaching Sgt. Ferreira. Sgt. Robichau stated that he was concerned for Anna’s safety staying at the Jaco home and worried she might not go to school. He said he didn’t “recall the entire conversation” with Sgt. Ferreira, but did ask him to check that Anna was in school and let him know if she wasn’t. He said Sgt. Ferreira had “known my children for a long time” and “when he’s swung by my house, my kids have always run

up to the car and interacted with him Sergeant Ferreira is . . . very good with young kids and he always took the time to talk to my children.” (*Tr.48-52 [C.Robichau]*)

28. Sgt. Ferreira recalled that Sgt. Robichau stated he was recounting the incident to him “in case Anna reported it to school” and that it was he, Sgt. Ferreira, who offered to check to see if Anna had come to school or not. Sgt. Ferreira stated that he checked with the school and was told Anna was present and was then in a meeting with the School Adjustment Counselor. Sgt. Ferreira did not convey this information to Sgt. Robichau. Later that day, he received a call from MPD Chief Russell and Lieutenant Gates, informing him of a recently filed “51A” [abuse complaint] against Sgt. Robichau, which he was ordered to investigate. (*Tr.I:27-31 [Ferreira]; See also Exh. 6*)

29. Of the two rationales, I find Sgt. Ferreira’s account more credible, and more consistent with Sgt. Robichau’s contemporaneous statements, which are undisputed, about refusing to sit down with DSS but not school counselors. I find it far more plausible that Sgt. Robichau wanted a trusted colleague to have a heads up about what he feared his daughters would report (and did not want to confront school officials himself), rather than having concern for Anna skipping classes after her traumatic, late-night ordeal. (*Tr.II:48-52 [C.Robichau]; Tr.I:27-31 [Ferreira]; See also Exh. 6*)

30. Sgt. Robichau returned home to find Mrs. Robichau’s note stating that they needed some “cool down time” and asking him to move out temporarily. Sgt. Robichau was about to go into the hospital for surgery. He agreed and stayed with a friend for a week or two. As he was leaving, he passed the Ford Escort and kicked the car, doing what he later estimated was about \$200 worth of damage to the vehicle. (*Tr.II:125-129 [C.Robichau]; Tr.I:206-207 [K.Robichau]; Tr.I:54-55 [Ferreira]; See also Exhs. 6 & 7*)

Subsequent Investigations

31. Anna Robichau did report to school on October 8, 2008 and, almost, immediately, went to see Tanya Sullivan, the School Adjustment Counselor. (*Tr.I:82-83 [Sullivan]*)

32. Ms. Sullivan served as a counselor at Middleborough High School for 14 years. Her duties include counseling students, primarily crisis counseling. She was responsible for coordinating all child abuse reports made to the Commonwealth's Department of Children and Families (DCF). Ms. Sullivan holds a masters degree in counseling, is certified in school adjustment counseling, elementary guidance counseling and special needs. She presented as a sincere and conscientious person whose experience and demeanor gave her testimony considerable credibility. (*Tr.I:82-100[Sullivan]*)

33. According to Ms. Sullivan, she had counseled both Emily and Anna Robichau in the past, but did not recall the specific issues surrounding those sessions. Early in the morning of October 8, 2008, Anna came to see her, appearing upset, agitated and sad. She was crying. Over the next 90 minutes, Anna recounted the following story:

“[A]proximately 1:15 [am] she had woken up to Emily screaming. . . .She jumped up; went toward Emily's room; witnessed her father pulling Emily out of bed by the hair. There was yelling going on. Emily was screaming. . . .[S]he said that her father had told her this was none of her business, to go back in her room, and he kind of pushed her out of the room with both hands and some kind of a chest thing, pushing against her; grabbed her as some point by the back of the neck; ended up throwing her onto the bed.

“She said she was laying on her back on the bed and he came at her with his hands as if he was going to choke her and she kicked him away and then he did it two more times and then he came at her with a closed fist as if he was going to hit her and she was really scared; kicked him away. At that point he just went away; went back to Emily's room.

“There was other yelling going on. . . .Her father was asking for the keys back to the car . . . He took all of Emily's belongings out of the car.

“At some point the girls and Mom decided that the girls should leave the house, so they called Emily's boyfriend, and Mom knew that they were doing this and he

was coming to pick both girls up. . . . Emily would stay with him that night. He was going to drop Anna at a friend's house. . . .

“She said that there were comments made during the evening like he said to [Mrs. Robichau] that it's a good thing he didn't use a fist on them; he might the next time . . . I'd have to check my notes for another comment that's relevant.

“The boyfriend was coming to the house but he called at one point and said that he wanted to make sure it was okay. . . . He got that reassurance and then he came to the house and picked them up.”

Based on Anna Robichau's report, Ms. Sullivan began drafting a “51A” [child abuse report]. This report was not placed in evidence but portions are quoted in the subsequent police report prepared by Sgt. Ferreira. (*Tr.I:83-85, 98-100 [Sullivan]; See also Exh. 6)*

34. At approximately 1:00 pm that afternoon, Emily Robichau appeared in Ms. Sullivan's office. She had been crying and said she was too upset to drive so her boyfriend had brought her. Emily told Ms. Sullivan what had happened the night before “which was very consistent with what Anna had told me earlier in the day. Everything seemed to match up pretty well.” Emily said:

“[S]he wasn't really asleep when her Dad came home. She was on the phone with her boyfriend, talking very quietly, and had put the phone under the covers without hanging up when. . . she heard her Dad coming and pretended to be asleep. . . . He came in; hit her in the face – she said she didn't know if it was a fist or an open hand but it hurt – and grabbed her by the hair and from there she saw Anna coming into the room.”

(*Tr.I:87-89 [Sullivan]*)

35. Ms. Sullivan observed a “dark red spot” on Emily's right cheek, which she described to be about an inch and a half long, that “looked tender and no doubt was still sore”, “was fairly new” and was “consistent with the kind of hit that she said she had” but “wasn't anything that needed medical attention”. (*Exh. 6; Tr.I:87-91[Sullivan]*)

36. After meeting alone with Emily for about 10 minutes, Ms. Sullivan called for Anna Robichau to join them. The two sisters discussed their living arrangements, with Anna assuring Emily it was safe to come home because their father had moved out. (*Exh. 6; Tr.I:91-92 [Sullivan]; Tr.I:114-115 [A.Robichau]*)

37. Ms. Sullivan prepared a separate memorandum of her conversation with Emily. In this memorandum she noted that Emily said her father frequently called her a “slut” and that Mrs. Robichau had said it was a good thing Sgt. Robichau’s gun didn’t go off that night. She noted that Anna had also attributed a similar comment to Mrs. Robichau during their meeting earlier that day. I find these statements relevant to the extent they suggest the state of mind of Sgt. Robichau, Mrs. Robichau and her daughters, but I do not credit the evidence as proof that there was, in fact, any actual risk that Sgt. Robichau’s firearm would have discharged accidentally, as he presented credible testimony that the weapon was carried in a “level three” holster and was thoroughly secured with three separate safety devices. (*Exh. 6; Tr.I:92, 98-99 [Sullivan]; Tr.II:150-151 [C.Robichau]*)

38. At approximately 2:15 pm on October 8, 2008, Sgt. Ferreira was on-duty at Middleborough High School when he was contacted by MPD Police Chief Russell and MPD Lt. Bruce Gates regarding a “51A” filed by a school staff member against Sgt. Robichau. Sgt. Ferreira related his conversation with Sgt. Robichau earlier that morning. His superiors ordered him to investigate the incident. Over the next two days, Sgt. Ferreira interviewed Mrs. Jaco, Kathleen, Anna and Emily Robichau, Tanya Sullivan and Michael Terrell. He also arranged for photographs of the marks on Emily Robichau’s face and legs. (These photographs have been lost and were not placed into evidence.) Based on this investigation, Sgt. Ferreira filed a report which concluded that there was

probable cause to believe that Sgt. Robichau did commit Domestic Assault and Battery. He was ordered to file criminal charges to that effect. (*Exh. 6; Tr.I:26-28,31-81 [Ferreira]*)

39. Lt. Ferreira first spoke with Kristen Jaco and her mother Wendy Jaco at their home. Sgt. Ferreira reported that Mrs. Jaco stated that Anna and Emily arrived there about 3:00 am the previous night. Mrs. Jaco did not notice any injuries on Anna or Emily. She stated that Anna said her father had punched Emily in the face, choked and pushed Anna onto her bed and that Anna kicked her father in defense. I credit this report as an accurate record of what Mrs. Jaco was told, except that I do not credit Anna's hearsay statement about her father punching Emily in the face, as the other evidence presented infers that Anna could not have been present at the time and would not have personal knowledge of that particular fact. (*Exh.6; Tr.I:31-32, 60-62 [Ferreira]; See also Tr.I:83-89 [Sullivan]; Tr.I:101-110 [A.Robichau]*)

40. Sgt. Ferreira returned to Middleborough High School where he spoke to Anna Robichau. She told him she did not want to get her father in trouble and was concerned that he could lose his job. When asked if she had been injured, she said "No", but, as she did, she touched her neck in a manner that Sgt. Ferreira interpreted to be a verbal cue that confirmed the statement he had received from Mrs. Jaco that Anna said she had been choked. When asked if Emily had been injured, she said her sister had complained that her cheekbone was sore, touching her own face in that area as she spoke. Anna Robichau acknowledged during her testimony that she does "talk with her hands". I am persuaded by Sgt. Ferreira's testimony, taken together with the other direct and circumstantial evidence presented, that Anna's reflexive motions to her neck and face observed by Sgt.

Ferreira do confirm that Sgt. Robichau did make, or at least threaten or attempt to make, physical contact with both young women in the areas described. (*Exh. 6; Tr.I:33-39, 63-65 [Ferreira]; See also, Finding of Fact Nos.18-19, 25-26, 30-35,4-42,45*)

41. At 4:30 that afternoon, Sgt. Ferreira got a call from Emily Robichau on an “unrecorded police line”. Emily also stated she didn’t want to get her father in trouble and was afraid he might lose his job. She said she loved him but was angry with him. She then volunteered her story of the encounter, stating that Sgt. Robichau had entered her bedroom swearing at him and “nailed her in her face and pulled her hair” and then pushed Anna out of the room. When asked if she was injured, she said her cheekbone was sore. (*Exh. 6; Tr.I:41-43 [Ferreira]*)

42. The next day, October 9, 2008, Sgt. Ferreira met with Tanya Sullivan. Ms. Sullivan recounted the conversations she had with Anna and Emily Robichau the previous day. She confirmed that when Emily had come to see her, she had a fresh red mark on her face near her right cheekbone. He also met briefly with Anna, and gave her information about the [Ch. 209A] abuse prevention law. At some point, he reviewed the “51A” child abuse complaint prepared by Ms. Sullivan and filed with DCF, and obtained a copy of the supplemental letter she had written. (*Exh. 6; Tr.I:44-47[Ferreira]*)

43. Sgt. Ferreira proceeded to the Robichau residence and spoke to Mrs. Robichau. She told him that the stress level was really bad in the house and that she had asked Sgt. Robichau to leave. She was reluctant to make a statement because she didn’t want her husband to lose his job and “they needed the paycheck.” (*Exh. 6; Tr.I:47-49 [Ferreira]*)

44. Sgt. Ferreira returned to the police station and called Emily Robichau, who put him in contact with Michael Terrell. Mr. Terrell stated that on the night in question, he

was on the phone with Emily when she screamed and the phone then went dead. He later arranged to come pick her up and described how he was afraid to turn into the driveway because he spotted the police cruiser. He recalled Sgt. Robichau stating “Wait ’til I see you next time”, which he assumed was directed at him. He did not repeat this last statement in his testimony. I find the context ambiguous and I do not give that statement any weight as a threat. (*Exh. 6; Tr.49-52 [Ferreira]; Tr.133-136 [Terrell]*)

45. Sgt. Ferreira then spoke again with Emily Robichau. He asked about her injuries. She said the mark on her face was still a little red and also described some bruising on her legs where her father had grabbed her while they were struggling on her bed. She gave permission to take pictures, so long as she did not have to go to the MPD police station. Accordingly, Sgt. Ferreira travelled to the Bridgewater address where Emily was staying. Sgt. Ferreira saw that Emily had a “slight red mark on her right cheekbone”. Eventually, they travelled to the Bridgewater Police Department where photographs were taken of the mark on her face and what Sgt. Ferreira described as several “dime sized” marks on her legs. For reasons neither party sought to explain, these photographs went missing sometime prior to the appointing authority level hearing. (*Exhs. 4 & 6; Tr.I:52-56, 66-68, 74-81 [Ferreira]; See also Tr.I:137-140 [Terrell]*)

46. Over the period from October 14, 2008 through October 20, 2008, MPD Lt. Bruce Gates initiated a separate inquiry into the October 8, 2008 incident, which included interviews of the officers on duty that night (Verhaegen, Harvey, Donahue & Vanesse) after which both Lt. Gates and each officer wrote a memorandum of the events. These memoranda were introduced in evidence. Although only Sgt. Verhaegen and Officer Harvey testified in person, I find these memoranda to contain information that is largely

consistent with the testimony of the witnesses and to carry sufficient indicia of reliability to be credited as statements the declarants believed to be truthful. I also take note that these statements show that each of the officers on duty that night had learned from Sgt. Robichau, directly or through Sgt. Verhaegen, about the problems Sgt. Robichau then was having with his daughter Emily. (*Exhs.7 through 10, 10A*)

47. Neither Lt. Gates nor Officer Ferreira interviewed Sgt. Robichau although he testified he was willing to talk and had written up his own version of the events. This was done due to Chief Russell's orders and the advice of Sgt. Robichau's counsel, whom he had retained once he was informed he was the target of a criminal domestic abuse complaint. The outcome of the criminal charges was not disclosed and the criminal proceedings were not mentioned as reasons for the decision to discipline Sgt. Robichau. (*Exhs. 3 & 4; Tr. II:117-118, 135-136 [Robichau]*)

48. Following due notice and hearing before the Middleborough Board of Selectmen, the Board concluded that Sgt. Robichau had committed five specific acts of misconduct: (1) Driving his cruiser to his home without following proper procedures; (2) An assault upon Emily Robichau, specifically striking her in the face and pulling her by the hair; (3) An assault upon Anna Robichau, specifically pushing her and grabbing her by the neck; (4) Threatening Anna and Mr. Terrell as they sought to leave; and (5) Giving a false account of the incident. The Board decided that such behavior was unacceptable for a Middleborough police officer and "especially egregious for a police sergeant, who should lead by example and is responsible for the supervision of subordinate officers." Although the Board stated that the violations were, in their view, independently and together, sufficient to warrant termination, it chose to mitigate the discipline due to the unique

circumstances in the matter and an otherwise clean record. Sgt. Robichau was suspended for three months, demoted to Patrol Officer, and ordered to undergo a mental health examination. The discipline was carried out. Officer Robichau was evaluated and found fit to return to duty as a patrol officer. This appeal duly ensued. (*Exh.4; Tr.I:142-146 [Christello]; Tr.III:11-21 [Christello; Tr.II:108, 151-154 [C.Robichau]*)

CONCLUSION

A tenured civil service employee aggrieved by a disciplinary decision of an appointing authority made pursuant to G.L.c.31,§41, may appeal to the Commission under G.L. c.31, §43, which 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.

Under Section 43, the role of the Commission is to determine, under a de novo “preponderance of the evidence” test, “whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). Compare Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev.den., 440 Mass. 1108 (2003) (affirming de novo decision to reject appointing authority’s evidence of appellant’s failed polygraph test and prior domestic abuse orders and crediting appellant’s exculpatory testimony) with Town of Falmouth v. Civil Service

Comm'n, 447 Mass. 814,823 (2006) (inconsequential differences in facts found did not make appointing authority's justification unreasonable). See also Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411 (2000); McIsaac v. Civil Service Comm'n, 38 Mass. App.Ct. 473, 477 (1995); Watertown v. Arria, 16 Mass.App Ct. 331, rev.den., 390 Mass. 1102 (1983). See generally Villare v. Town of North Reading, 8 MCSR 44, reconsid'd, 8 MCSR 53 (1995) (discussing need for de novo fact finding by a "disinterested" Commissioner in context of procedural due process); Bielawski v. Personnel Admin'r, 422 Mass. 459, 466, 663 N.E.2d 821, 827 (1996) (same)

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." E.g., Commissioners of Civil Service v. Municipal Ct. 359 Mass. 211,214 (1971); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477,482 (1928); Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). 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, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983). The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in governmental employment decisions.'" " Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet

of the “merit principle” which governs 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 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); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1982). The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001). The Commission is guided by, but is not obliged to follow strictly, the rules of evidence applied in a judicial proceeding, and may credit, in its sound discretion, reliable hearsay evidence that would be inadmissible in a court of law. See, e.g., Doe v. Sex Offender Registry Board, 459 Mass. 603 (2011); Costa v. Fall River Housing Auth., 453 Mass. 614, 627 (2009).¹

It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance.” E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v.

¹ In view of the Commission’s authority to accept hearsay evidence, the Appellant’s citation to the Model Jury Instructions, for the proposition that a witness’s prior inconsistent hearsay statements accepted into evidence cannot be considered for their truth, is misguided. (See *Appellant’s Post-Hearing Brief*, pp. 8-9)

Dep't of Social Services, 439 Mass. 766, 787 (2003) (where live witnesses gave conflicting testimony at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing)

G.L.c.31, Section 43 also vests the Commission with authority to affirm, vacate or modify the penalty imposed by an 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. See Faria v. Third Bristol Div., 14 Mass.App.Ct. 985,987 (1982) (no findings to support modification)

In deciding to exercise discretion to modify a penalty, the commission's task “is not to be accomplished on a wholly blank slate.” Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983).

“After making its de novo findings of fact, the commission must pass judgment on the penalty imposed, a role to which the statute speaks directly. G.L.c.31,§43. . . 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. See also 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). (“The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded to the appointing authority.”)

Thus, when it comes to the 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" for that of the appointing authority, 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 factual findings by Commission and appointing authority did not justify a modification of 180 day-suspension to 60 days). See, e.g., Town of Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct. 796 (2004) (modification of 10-day suspension to 5 days unsupported by material difference in facts or finding of political influence); Commissioner of MDC v. Civil Service Comm'n, 13 Mass.App.Ct. 20 (1982) (discharge improperly modified to 20-month suspension); cf. School Committee v. Civil Service Comm'n, 43 Mass.App.Ct. 486, rev.den., 426 Mass. 1104 (1997) (modification of discharge to one-year suspension upheld); Dedham v. Civil Service Comm'n 21 Mass.App.Ct. 904 (1985) (modification of discharge to 18-months suspension upheld); Trustees of the State Library v. Civil Service Comm'n, 3 Mass.App.Ct. 724 (1975) (modification of discharge to 4-month suspension upheld)

Applying these principles to the facts of this appeal, Middleborough has provided reasonable justification for the discipline it imposed on Sgt. Robichau. Not all of the facts upon which Middleborough relied to mete out that discipline have been proved by substantial evidence, but the core misconduct that formed the basis for imposing discipline upon him has been proved and reasonably justifies the action taken.

First, the Appellant does not dispute that he violated proper MPD procedure by leaving his police cruiser for an extended period of time without reporting his whereabouts and intentions to Sgt. Verhaegen. (*Tr.I:24; Tr.II:121-124; Appellant's Post-Hearing Brief, p.8*) It is true that no MPD officer has ever been disciplined for this type of breach of protocol. The Appellant also points out that there was no evidence that Sgt. Robichau's home diversion impacted effective public safety coverage during his shift. Had nothing else happened after he left his cruiser, Middleborough would be hard pressed to justify any significant discipline for this minor misconduct, standing alone.

Nevertheless, it was reasonable for Middleborough to take into account this undisputed failure to adhere to the rules when assaying the totality of the circumstances involved. Sgt. Robichau wanted to confront his daughter for some time and had every intention of periodically checking his residence that night. (She presumably was overdue her 11:00 curfew when he left for his shift.) Certainly, as a shift supervisor, Sgt. Robichau could assume he would be granted permission to leave his cruiser, but he also understood it was important to know how to reach any officer on patrol and to know how many officers may be out of their cruisers at any given time. The MPD is also reasonably justified to expect Sgt. Robichau to "lead by example". His transgression in this regard was both a lapse of judgment and a failure of leadership that cannot be discounted completely.²

Second, and most troubling, the preponderance of the evidence established that, more likely than not, the encounter between Sgt. Robichau and his family on October 8, 2008 did not go down as he recalls. I do not doubt that, in his own mind, Sgt. Robichau is

² The Respondent further argues that, had Sgt. Robichau told Sgt. Verhaegen of his intentions to "confront" his daughter (while in uniform and armed), Sgt. Verhaegen would have told him not to do so. While there may be some force to that argument, on this record, I find the assertion it to be speculative, at best.

convinced that his actions on October 8, 2008 amounted to a self-controlled, verbal dressing down by a father of his insolent children, and that he behaved at all times in a manner wholly appropriate to the situation in which he found himself. The weight of the credible evidence, however, leads me to conclude otherwise.

To be sure, the “fog of battle” muddled the recollection of all the participants to the events of October 8, 2008. Yet, what emerges from the evidence as a whole is a clear and consistent picture of an intensely “chaotic” confrontation in which lines between aggressor and victim cannot be conveniently drawn. The tumultuous conflict between Emily and her father left her with a fresh red mark on her face, vouched for by both Tanya Sullivan and Sgt. Ferreira, among others, for which no credible exculpatory explanation was offered. Whether directly inflicted by a punch or other physical contact from Sgt. Robichau, or as a result of Emily’s own struggling to be free and/or her own counter-attack, this evidence, taken with other evidence of the events, is consistent with a prolonged physical conflict between them. Even in the Robichau women’s toned-down subsequent version of events given in their (self-serving and less than credible) testimony before the Commission, Sgt. Robichau was said to be holding Emily by the hair, and Emily (an accomplished wrestler) physically retaliating in ways consistent with someone acting in self-defense to ward off an attacker. I find this picture to be compelling reason to infer that Sgt. Robichau used more physical force, and the threat of physical force, than he claimed and that his actions reasonably placed Emily, Anna and Mrs. Robichau all in fear of physical harm. Sgt. Robichau’s subsequent conversation with Sgt. Ferreira, in which he anticipates a report to school officials and DSS, and the ready agreement with

Mrs. Robichau by which he moved out of the house immediately, further supports the inference that there was more to this episode than a father's stern rebuke of his daughters.

Middleborough also pointed out in cross-examination that, when Sgt. Robichau woke Mrs. Robichau for the avowed purpose of having a talk with Emily, Mrs. Robichau asked for a few minutes before they went to see Emily. Rather than wait for the three of them to start "sitting down" together, Sgt. Robichau elected to proceed immediately on his own to Emily's bedroom. (*Tr.II:28-30,84-86[C.Robichau]*) Mrs. Robichau did not appear until the initial altercation with Emily had nearly ended, to find Sgt. Robichau pushing Anna out of the room, knocking Mrs. Robichau aside in the process. As an experienced, ranking police officer, Sgt. Robichau must have known, or should have known, that he was about to engage a rebellious daughter in an unpleasant, and potentially unpredictable confrontation, and that to do so, alone, was comparable to confronting a potentially volatile criminal suspect without "back up". While extenuating circumstances – namely, the personal nature of the confrontation – distinguishes the situation from a routine police encounter, Middleborough and the Commission are justifiably entitled to consider the risk that the type of poor judgment exercised by Sgt. Robichau (albeit triggered by a family conflict) could be replicated in an explosive law enforcement situation as well.

I have less certainty that Sgt. Robichau "choked" or otherwise physically assaulted Anna Robichau or intended to do so. No witness saw or reported seeing any physical marks of an assault left on Anna. The preponderance of evidence infers that Anna's own physical responses to her father's behavior were prompted mainly from anger with what was happening to her sibling, and meant primarily to keep him away from Emily. Thus, unlike the encounter with Emily, in the confrontation between Anna and her father, she is

more conclusively shown as initiating it and escalating it. The evidence does reasonably infer, however, that Sgt. Robichau did gesture in a manner that put Anna in fear. I am also troubled by Sgt. Robichau's testimony that he told Anna "if she didn't like living here, she could contact a relative . . . and ask . . . if they want a thieving, lying, smoking and alcohol drinking 15-year old at their house". There is no clear context to explain this outburst of indignation at Anna. It infers that, in the heat of the moment, he was misdirecting some of his anger against Emily toward Anna, which is not indicative of a person in full control of his emotions.

I do not find the evidence sufficient to establish that the confrontation in the driveway later that night, between Sgt. Robichau and Mr. Terrell, or the alleged "dope slap" of Anna Robichau, in the presence of Mrs. Robichau, amounted to an assault or threat of any kind. On the preponderance of the evidence, I cannot conclude that Sgt. Robichau's ambiguous remarks and gestures were intended to threaten Mr. Terrell or Anna, or that they could reasonably believe they were then at risk of any imminent physical harm.³

Third, Middleborough's conclusion that Sgt. Robichau breached the duty of truthfulness in his accounting of the October 8, 2008 incident also has merit, in part. The duty imposed upon a police officer to be truthful is one of the most serious obligations he or she assumes, because, among other things, it may compromise the officer's ability to serve as a credible witness in the prosecution of a criminal case. See, e.g., City of Cambridge v. Civil Service Comm'n, 43 Mass. 300, 303 (1997); Gallo v. City of Lynn, 23 MCSR 348 (2010). Since there is some discretion as to what, and for how long, a prosecutor may be required to make disclosure of indicia about a police officer's

³ I reach this conclusion, despite Sgt. Robichau's subsequent "knee-jerk" reaction in kicking the Ford Escort as he left home later in the day, and Mrs. Robichau's plea for a "cooling off" period, which do add to the doubt that Sgt. Robichau was in control of his emotions, even hours after the initial confrontation.

truthfulness under the so-called “Brady Rule”, claims of untruthfulness against a police officer carry serious consequences and must be carefully scrutinized, but the Commission generally must defer to the judgment of a law enforcement agency on this point, which is lawfully grounded in constitutional law. Compare Orr v. Town of Carver, CSC Case No. D1-08-242, 24 MCSR --- (2011) with Gallo v. City of Lynn, 23 MCSR 348 (2010). See generally, United States v. Agurs, 427 U.S. 97, 108, 96 S.Ct. 2392, 2400 (1976), citing Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). See also Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375 (1985); “*Police Officer Truthfulness and the Brady Decision*”, 70 POLICE CHIEF, No. 10 (Oct. 2003) reprinted at policechiefmagazine.org.

The Commission also must take into account the case law that imposes special obligations 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 refrain from unjustified threatening and intimidating conduct and use of force.

“[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. See Falmouth v. Civil Service Comm’n, 61 Mass.App.Ct. 796, 801-802 (2004); Police Commissioner v. Civil Service Comm’n, 22 Mass.App.Ct. 364, 371 (1986)

On the record presented in this case, the assessment of Sgt. Robichau’s truthfulness is a complicated one. I cannot agree with Middleborough’s conclusion that he “lied” to Sgt.

Ferreira. Their brief conversation in the police station at shift change was more personal in nature than official. Sgt. Robichau had no duty to “report” the incident in detail to Sgt. Ferreira. The account of the incident, insofar as he related it, was essentially factually accurate. He mentioned that both daughters left the house for the night, he thought Anna Robichau might report the matter at school and DSS might become involved. Taken as a whole, his statements cannot fairly be called a “sanitized version” of the incident.

Sgt. Robichau’s alleged untruthfulness in the subsequent investigation and appointing authority level hearing of the matter is a closer call. Sgt. Robichau prepared a written statement of his version of the incident, which he intended to deliver to Chief Russell, but it was destroyed after he was told not to submit it. He was never interviewed. His testimony before the Board of Selectmen took place five months after the incident of October 8, 2008 and there is no verbatim record of that testimony in the evidence. According to the Notice of Decision issued by the Board of Selectmen following the hearing before them, the Board found Sgt. Robichau’s claims that he acted calmly and never hit his daughters were materially false statements, based on a credibility assessment of him, third-hand accounts of his daughter’s initial reports, and disbelief of their testimonial retraction of those earlier descriptions of Sgt. Robichau’s attacks on them.⁴

Based on the evidence before the Commission, I am not persuaded that Sgt. Robichau “lied” about his conduct. I am convinced, however, that self-serving bias did seriously distort his perception and ability to take responsibility for his actions, to a degree that the testimony he gave to the Commission – and by inference to the Board of Selectmen – was

⁴ There are also discrepancies on certain details, such as what Sgt. Robichau recalled Emily saying about her babysitting job, or whether Sgt. Ferreira to checked Anna’s attendance at Sgt. Robichau’s request, as he recalled. The conflicting testimony on these minor collateral matters, given months after the events transpired, has been given no weight in my determination of Sgt. Robichau’s “truthfulness”.

seriously flawed, lacked candor, and, understandably, was not fully credible. The MPD is as equally entitled to impose discipline upon a police officer who fails to serve as a credible percipient witness when the truthfulness of his testimony is discredited by lack of objectivity as upon an officer who intentionally distorts the truth through lying. See City of Cambridge v. Civil Service Comm'n, 43 Mass. 300, 303 (1997) (“The city was hardly espousing a position devoid of reason when it held that a demonstrated willingness to fudge the truth in exigent circumstances was a doubtful characteristic for a police officer. . . . It requires no strength of character to speak the truth when it does not hurt.”)

Finally, since the facts established before the Commission do vary from those upon which the Middleborough Board of Selectmen relied, the Commission must consider whether to exercise discretion to modify the penalty imposed. The Appellant points out that he has been found “fit for duty” and his demotion from Sergeant to Patrol Officer is unduly strong discipline. Middleborough counters, absent the mitigating circumstances it took into account – influence of unique personal factors and Sgt. Robichau’s prior clean record of performance – the Board would have been justified to discharge Sgt. Robichau from employment for his poor judgment, failure of leadership and untruthfulness in taking responsibility for his actions. See, e.g., 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); Mozeleski v. Chicopee, 21 MCSR 676 (2008) (lying to cover-up inappropriate conduct during a late-night traffic stop); Rizzo v. Town of Lexington, 21 MCSR 634 (2008) (police officer failed to report use of force and later misrepresented level of force

used); Layne v. Town of Tewksbury, 20 MCSR 372 (2007) (police officer denied using profanity directed to accident victims)

After careful consideration, this case does not present the occasion for the Commission to exercise its discretion to modify the penalty. A demotion, while severe, is clearly less “draconian” than a termination. The material facts found by the Middleborough Board of Selectmen and those established before the Commission do not present sufficiently different pictures of the essence of the misconduct involved. The Selectmen considered the key mitigating circumstances in arriving at the discipline imposed. By choosing demotion, rather than termination, the Selectmen appropriately applied the remedial nature of the merit principle to “correct inadequate performance” and to leave termination, appropriately, to “employees whose inadequate performance cannot be corrected.” G.L.c.31,§1. Their acceptance of the premise that Sgt. Robichau had the potential for remediation signals they are receptive to leaving the door open for him to advance himself in the future, provided he fulfills the expectation that the discipline imposed has duly ensured he will not repeat his mistakes. Although an argument could be made that Sgt. Robichau was equally “fit for duty” as a Patrol Officer as a Patrol Sergeant, that was not the conclusion reached by the Middleborough Board of Selectmen. When an appointing authority arrives rationally at a suspension and demotion as the appropriate remedial discipline, the Commission is not disposed to change that determination. See Pellot v. City of Haverhill, 21 MCSR 205 (2008) (demotion from sergeant to patrol officer for associating with a relative engaged in drug dealing); Dodge v. Town of Montague, 17 MCSR 20 (2004) (demotion from sergeant to patrol officer for poor off-duty judgment)

Accordingly, for the reasons stated above, the appeal of the Appellant, Charles Robichau, must be *dismissed*.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell & Stein, Commissioners) on June 30, 2011.

A True Record. Attest:

Commissioner

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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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

Notice to:

Michael F. Hanley, Esq. (for Appellant)

Daniel C. Brown, Esq. (for Appointing Authority)