

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

BRENDA JAMES,
Appellant

v.

D1-15-64

BOSTON POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

Alan Shapiro, Esq.
Jennifer Smith, Esq.
Saundulli Grace
44 School Street, Suite 1100
Boston, MA 02108

Appearance for Respondent:

Peter M. Geraghty, Esq.
Boston Police Department
Office of the Legal Advisor
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Boston, MA 02120

Commissioner:

Cynthia A. Ittleman¹

SUMMARY OF DECISION

The Boston Police Department has established just cause for the termination of the Appellant as a Boston Police Officer for filing false reports against her commanding officer, seeking a criminal complaint against him for which a Clerk-Magistrate found there was no probable cause, failing to appear for an annual Department hair drug test and failing to report her change of address as required by Department regulations. Although it appears that, to some degree, both parties contributed to an air of distrust and tension between them, Appellant's misconduct is a grave breach of the high standards to which sworn police officers are and must be held accountable and justifies her termination.

¹ The Commission acknowledges the assistance of Law Clerk Barbara Grzonka in the drafting of this decision.

DECISION

The Appellant, Brenda James, (Ms. James or Appellant) acting pursuant to G.L. c. 31, § 43, filed a timely appeal with the Civil Service Commission (Commission or CSC) on March 31, 2015 contesting the BPD's decision to terminate her employment. A pre-hearing conference was held on April 21, 2015 at the Commission. The full hearing was held over three days, June 15, 2015, June 18, 2015 and September 11, 2015 at the Commission.^{2, 3} Witnesses, except for the Appellant, were sequestered. Pursuant to the Appellant's request, the hearing was public. The full hearing was recorded stenographically by the parties. The Commission received a copy of the transcript of the hearing, which is the official record of the hearing.⁴ Both parties submitted post-hearing briefs to the Commission.

FINDINGS OF FACT:

Fifty-eight (58) exhibits were entered into evidence in total. Based on these exhibits, the testimony of the following witnesses:

² At the end of the hearing on June 18, the parties had not completed their cases and a third day of hearing was scheduled for July 16, 2015 by agreement. On July 15, the Appellant requested a continuance because her adult daughter was going to have surgery on July 16. The matter was rescheduled for August 7 by agreement of the parties. On or about August 5, 2015, the Appellant requested another continuance because of her daughter's health. I provided the parties with eight alternative dates for hearing (ending September 30), indicating that there would be no further continuances. On August 7, the parties agreed to continue the matter to September 11. On August 17, the Appellant (herself) sent a letter to the Commission stating that because of her daughter's health and rehabilitation, "I am unable to determine my availability in the immediate future" and that her daughter's medical process was "unpredictable". I sent this to all counsel and indicated that the September 11 hearing would go forward. The Appellant failed to appear on September 11. Counsel for the Appellant requested an additional continuance, which was denied. The Respondent moved to dismiss the appeal, pursuant to the Commission's hearing notice, since the Appellant failed to appear, which request was denied. I informed the parties that the Commission can draw an adverse inference from a party's failure to appear. Counsel for the Appellant requested that the Commission include in its record here the transcript of the Appellant's testimony at the local hearing. Over the objection of the Respondent, the transcript of the Appellant's testimony was admitted into the record, along with the transcript of the entire local hearing. I also included in the record the transcript of the arbitrator's hearing on Ms. James' injured on duty grievance. (The arbitrator's decision is Exhibit 30.) As with all evidence in this case, these transcripts are given the weight they are due. I also informed the parties that transcripts of the Appellant's prior testimony would not be a substitute for the Appellant's testimony in this case at the Commission.

³ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudicatory hearings before the Commission with G.L. c. 31 or any Commission rules taking precedence.

⁴ 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. The hearing was also recorded digitally by the Commission.

Called by the Respondent:

- Captain Paul Russell, BPD
- Lieutenant Steven Sweeney, BPD
- Sergeant Detective Daniel Humphreys, BPD
- Lieutenant Detective Paul Mahoney, BPD
- Maria Osorno, Claims Investigator, Medical Unit, BPD
- Phyllis Walsh, Assistant Director of Occupational Health Services Unit/Medical Unit, BPD
- Linda Mitchell, Administrative Analyst, Medical Unit, BPD
- Sandra Tanner, Administrative Assistant , Medical Unit, BPD
- Sergeant Detective Joseph Gallarelli, BPD

Called by the Appellant:

- Officer John Bergquist, BPD
- Leonard C. Alkins, former President of the NAACP, Boston Branch
- Attorney Hassan Williams
- Attorney Susan Horwitz, Saundulli Grace

and taking administrative notice of all matters filed in the case, as well as the matters in Ms. James' appeals in Commission Docket Numbers D-14-298 and D-13-22, and pertinent statutes, case law, regulations, rules, policies and reasonable inferences from the credible evidence; a preponderance of credible evidence establishes the following facts:

Timeline of Overlapping Events

1. In June 2007, Ms. James injured her knee at work and was considered out/injured on duty.
(Arbitration Testimony of Ms. James, Transcript, Volume 1, pages 41-42)

2. In June 2009, Ms. James was cleared to return to light duty with continuing rehabilitation. (Arbitration Testimony of Ms. James, Id.)
3. In September 2010, Ms. James suffered bursitis in her right hip, which was deemed a recurrence of the 2007 knee injury and she was out of work and considered to be injured on duty. (Id.)
4. In November 2011, BPD's Medical Unit cleared Ms. James for light duty. (Testimony of Captain Russell, CSC Transcript, Volume 1, page 34)
5. On December 22, 2011, Captain Russell filed a report that Ms. James was AWOL, initiating an investigation into her work status. (Testimony of Capt. Russell, Id. at 78)
6. On January 2, 2012, Ms. James returned to work in a full duty capacity. (Arbitration Testimony of Ms. James, Transcript, Volume 1, page 43)
7. In April 2012, the investigation into Ms. James' AWOL status was completed, establishing four charges against Ms. James. (Testimony of Capt. Russell, CSC Transcript, Volume 1, page 35, 90; Exhibit 7)
8. On June 8, 2012, at approximately 1:00 a.m., Captain Russell met with Ms. James on her shift and issued her a five (5)-day suspension for previously being AWOL. (Testimony of Capt. Russell, CSC Transcript, Volume 1, pages 38-39)
9. Later in the day on June 8, 2012, Ms. James went to Beth Israel Hospital asserting that she was injured on duty. (Arbitration Testimony of Ms. James, Transcript, Volume 1, pages 92-93)⁵

⁵ The arbitrator stated in her decision on Ms. James' injured on duty claim that, based on medical notes in the arbitration record, Ms. James did not go to the hospital until about twelve (12) hours after her interaction with Captain Russell. (Arbitrator's decision, page 9) Those medical notes are not in the Commission's hearing record. There is no indication whether Ms. James was admitted to the hospital.

10. On June 15, 2012, Ms. James filed a police incident report⁶ against Captain Russell and an injured on duty report resulting from her interaction with Captain Russell on June 8.
(Exhibits 12, 13)
11. On June 20, 2012, Captain Russell filed a request for an investigation against Ms. James
(Exhibit 14)
12. On or about August 2, 2012, Ms. James submitted documents to the City asserting that she had been in treatment since May 2012 for an anxiety disorder that was exacerbated by events on June 8, 2012. (Exhibit 30, page 15)
13. In August 2012, Sgt. Det. Humphreys opened an investigation into Ms. James' complaint against Captain Russell. (Testimony of Sgt. Det. Humphreys, CSC Transcript, Volume 1, pages 197-198)
14. On September 17, 2012, a grievance was filed on Ms. James' behalf, asserting that the City of Boston violated the collective bargaining agreement (CBA) for failing to carry Ms. James on injured on duty on June 8, 2012. (Exhibit 30, pages 13-14)
15. In June 2013, the BPD reduced Ms. James' five (5)-day suspension to a verbal reprimand and made her whole for lost time. (Testimony of Capt. Russell, CSC Transcript, Volume 1, page 83)
16. On June 13, 2013, Ms. James failed to appear at an appointment to provide a hair sample for the annual BPD hair drug test. (Exhibit 37)
17. On July 1, 2013, Ms. James again failed to appear at an appointment to provide a hair sample for the annual hair drug test. (Exhibits 37 and 38)

⁶ Exhibit 12 is the police incident report filed by Ms. James. Near the top right side of the report, the following appears: "STATUS: UNAPPROVED".

18. On July 3, 2013, an investigation was opened into Ms. James' failure to appear for her drug test appointments. (Testimony of Sgt. Det. Joseph Gallarelli, CSC Transcript, Volume 3, page 39)
19. On July 17, 2013, the Appellant failed to appear at an appointment to provide a hair sample, stating that she did not receive the notice until after the appointment. (Exhibit 38)
20. On August 15, 2013, investigators determined that Ms. James' allegations against Captain Russell were unfounded and the allegations against Ms. James were sustained. (Exhibit 30 (Arbitrator's Decision), page 13)
21. On September 7, 2013, following a review of Ms. James' injured on duty claim, BPD denied Ms. James' injured on duty claim. (Exhibit 30)
22. On September 13, October 4 and October 9 of 2013, an arbitration hearing was held regarding Ms. James' injured on duty claim. (Exhibits 8 and 30)
23. On February 21, 2014, an arbitrator found that the BPD did not violate the CBA by not placing Ms. James on injury on duty leave following her June 8, 2012 interaction with Captain Russell. (Exhibit 30)
24. On September 11, 2014, Ms. James was cleared for light duty by the BPD Medical Unit. (James v. Boston Police Department, 28 MCSR 185 (April 3, 2015)(Docket No. D-14-298)
25. On September 15, 2014, Ms. James was placed on paid administrative leave pending an investigation into her failure to report for a hair drug test. (James v. Boston Police Department, 28 MCSR 185 (April 3, 2015)(Docket No. D-14-298) ⁷

⁷ The BPPA filed two grievances on behalf of the Appellant for having been cleared for light duty and for then being placed on paid administrative leave: Grievance No. 16-2174, related to the September 12, 2014 BPD letter placing her on administrative leave, which the BPPA contended was done without explanation and in violation of the CBA; Grievance No. 16-2175, related to the September 11, 2014 order that cleared Officer James for "light duty", which the BPPA contended was punitive, without medical justification and in violation of the CBA. Each of these grievances were processed through Step 4 and denied. On November 6, 2014, the BPPA submitted these two grievances for expedited arbitration. On April 2, 2015, the Civil Service Commission granted the BPD motion to

26. On September 5, and 24, 2014, BPD held a disciplinary hearing regarding Ms. James' failure to appear for her hair drug test and failure to notify BPD of her change of address. (Exhibit 21)
27. On November 18 and 19, 2014 and December 11 and 12, 2014, BPD held a disciplinary hearing regarding Ms. James' conduct stemming from her June 8, 2012 interaction with Captain Russell. (Exhibit 21)
28. On March 10, 2015, the BPD Hearing Officer issued a report on the disciplinary hearing regarding Ms. James' failure to appear for her hair drug test and failure to notify BPD of her change of address, finding that the related Specifications against Ms. James were sustained. (BPD Hearing Officer's Report, March 10, 2015⁸)
29. On March 11, 2015, the BPD Hearing Officer issued a report on the disciplinary hearing regarding Ms. James' conduct stemming from her June 8, 2012 interaction with Captain Russell, finding that the ten (10) of the eleven (11) Specifications against Ms. James were sustained. (BPD Hearing Officer's Report, March 11, 2015⁹)
30. On March 18, 2015, BPD sent Ms. James a letter sustaining the Specifications in the reports of the BPD Hearing Officer and terminating her employment effective that day for submitting various false reports and testimony in violation of cited BPD rules and statutes, failing to submit a hair sample for annual drug testing, and failing to file a notice of change of address in violation of cited BPD rules. (Exhibit 21)

dismiss Ms. James appeal docket D-14-298 because the Commission lacked jurisdiction to hear Ms. James' appeal since the subject of the appeal had been submitted to binding arbitration, pursuant to G.L. c. 150E, s. 8 and G.L. c. 31, §§ 39 and 41-45. The Commission has not been informed of the outcome of those arbitration requests.

⁸ This document was submitted by BPD at my request post-hearing. The Appellant submitted a supplemental post-hearing brief in this regard.

⁹ This document was submitted by BPD at my request post-hearing. The Appellant submitted a supplemental post-hearing brief in this regard.

31. On March 31, 2015, Ms. James filed a timely appeal of BPD's termination of her employment with the Civil Service Commission. (Administrative Notice; Stipulation)

Events Leading to the Issuance of Suspension to Appellant

32. Ms. James has been employed by the BPD since 1994. (Arbitration Testimony of Ms. James, Transcript, Volume 1, page 35)

33. Throughout her career with the BPD, Ms. James has worked as a Patrol Officer. She was a BPD liaison to the Boston Public Schools and she worked with at-risk youth. Ms. James also participated in mediation training in order to assist in her work with at-risk youth. (Arbitration Testimony of Ms. James, Volume 1, pp. 35-38)

34. At the time of the pertinent incidents, Ms. James was assigned to District E-13. (Testimony of Capt. Russell, CSC Hearing Transcript, Volume 1, page 32)

35. At the pertinent times, Ms. James worked the overnight shift from 11:45 p.m. to 7:00 a.m. (Id. at 38)

36. Captain Russell was the Captain of District E-13 in June 2011. (Id. at 31)

37. Captain Russell first met Ms. James sometime in June 2011 when she introduced herself and said she would soon be coming back to work at District E-13 in a light duty capacity. (Id. at 32)

38. In June 2007, Ms. James suffered a knee injury while on duty. She tore her right anterior cruciate ligament (ACL) and her status was "out injured" (paid) until sometime in June 2009. (Arbitration Testimony of Ms. James, Transcript, Volume 1, pages 41-42)

39. In June 2009, Ms. James returned to work in a light duty status with continuing rehabilitation. (Id. at 42)

40. Sometime in September 2010, Ms. James developed bursitis in her right hip due to complications from her right knee injury. Ms. James was then considered “out injured” (paid) by BPD. (Id.)
41. Ms. James was cleared by the BPD Medical Unit to return to work in December 2010. However, Ms. James asserted that she was improperly returned to work. In January 2011, Ms. James was returned to injured on duty leave. (BPD Disciplinary Hearing, Testimony of Ms. James, Transcript, December 12, 2014, Volume 4, pages 52-54)
42. In October 2011, Ms. James’ physician created a medical treatment plan for her to stay on injured leave but return to duty in December 2011. (Id.)

The Five (5)-Day Suspension

43. On November 18, 2011, Ms. Roberta Mullan, Medical Director of the BPD’s Medical Unit notified Captain Russell that Ms. James was cleared for light duty as of November 21, 2011. (Testimony of Capt. Russell, CSC Transcript, Volume 1, page 34)
44. Ms. James failed to report to work on November 21, 2011. On November 29, 2011, Captain Russell spoke to Ms. James by telephone and told her she was determined to be AWOL since she had not returned to work and that she needed to contact the BPD Medical Unit and have her assignment to the BPD Medical Unit (as “Medically Incapacitated Section (MIS)”) changed to be assigned to District-13. (Id. at 76-77)
45. On December 22, 2011, Captain Russell filed a “Form 1920”¹⁰ because Ms. James was still AWOL despite being cleared for light duty. (Id. at 78)
46. Normally, the Internal Affairs Division (IAD) investigates Form 1920 complaints. However, Captain Russell spoke to BPD Superintendent Fong, who was the Bureau Chief of Internal Affairs at the time, about the matter and they agreed that Ms. James’ AWOL status would be

¹⁰ A Form 1920 is a BPD document requesting an internal affairs investigation.

investigated at the district level instead, where Ms. James would be subject to less severe discipline if the matter stayed at the district level since the maximum punishment Captain Russell could issue to the Appellant was a five (5) day suspension. (Id. at 43-44)

47. On January 2, 2012, Ms. James returned to full duty as a patrol officer. (Arbitration Testimony of Ms. James, Transcript, Volume 1, page 43)
48. Ms. James was aware that she was the subject of an investigation regarding her AWOL status. She was asked to submit a “Form 26”¹¹ regarding her status and she did so in February 2012. Ms. James was also informed by Sergeant Courtney Powell, Ms. James’ squad supervisor, that he was conducting the investigation concerning her AWOL status. (Arbitration Testimony of Ms. James, Transcript Volume 1, page 56)
49. This investigation was conducted by Sgt. Powell. (Testimony of Capt. Russell, CSC Transcript, Volume 1, page 35; Exhibit 7)
50. On April 10, 2012, Sgt. Courtney Powell completed the investigation and submitted a report to Captain Russell, stating four charges against Ms. James. (Testimony of Capt. Russell, Id. at 90)
51. A Notice of Suspension issued to Ms. James, indicating that she was being suspended for five (5) working days without pay and the reason for this suspension was “that on or about 7:30 a.m. Monday November 21, 2011 you failed to return to duty after being cleared for light duty. P.O. James was informed by Captain Russell on November 28th that she was cleared for light duty and instructed to contact the Medical Unit and resolve the issue and she

¹¹ A Form 26 is BPD administrative report and follows a To/From memorandum format. (Testimony of Capt. Russell, CSC transcript, Volume 1, page 96)

failed to do so. As a result P.O. James was carried AWOL until she returned to full duty on January 2, 2012.”¹² (Exhibit 6)

52. The Notice of Suspension states that Ms. James violated Rule 102:10 (Reporting for Duty), Rule 110:27 (Return to Duty), Rule 110: 28 (Failure to Return to Duty) and Rule 102:8 (Directives and Orders). (Exhibit 6)

53. Captain Russell issued a report to then-Police Commissioner Edward Davis detailing the violations. It reads, in part, as follows:

- 1) “Rule 102: 8 Directives & Orders: PO James failed to report for duty when instructed by Captain Russell and failed to contact the Medical Unit as directed.
- 2) Rule 102:10(a) Reporting for Duty: PO James failed to report for duty when instructed by Captain Russell when she was notified that she was cleared to return for light duty.
- 3) Rule 110:27 Return to Duty: PO James failed to return to Duty on Nov. 21st 2011 after being cleared by the (sic) Nurse Zelma Greenstein, who received a completed physical capacity form from PO James doctor, Dr. Mithoefere, that was effective Nov. 9th, 2011 and changed her status from out-injured to modified duty.
- 4) Rule 110:28 Failure to Return to Duty: PO James failed to return to work on modified duty after being cleared by her physician, Dr. Mithoefer and the department’s physician, (sic) Nurse Greenstein. Several attempts were made to contact PO James by the Medical Unit and PO James failed to return to work even after being informed by Captain Russell that she was cleared for light duty.” (Exhibit 7)

54. The five (5)-day suspension was reduced to a verbal reprimand on or about June 7, 2013 by the BPD. (Testimony of Capt. Russell, CSC Transcript, Volume 1, page 83)¹³

¹² In his testimony before the Commission, Captain Russell indicated he spoke to Ms. James by telephone on November 29, 2011 regarding her AWOL status. Exhibit 6 indicates that the date of this conversation was November 28, 2011. This discrepancy does not alter the conclusion here.

¹³ Ms. James had filed an appeal at the Commission about the five (5)-day suspension for being AWOL (Docket No. D-13-22). Ms. James and BPD reached a settlement agreement in which Ms. James was paid back her AWOL time between November 21, 2011 and January 1, 2012 and the five (5) days during which she served her suspension and the appeal was dismissed based on the parties’ settlement agreement.

Issuing the Five (5)-Day Suspension

55. On June 7, 2012, at approximately 11:50 p.m., Captain Russell arrived at the Area E-13 police station to issue the five (5)-day suspension to Ms. James. (Testimony of Capt. Russell, CSC Transcript, Volume 1, page 38)
56. Before arriving at the police station, Capt. Russell called and spoke to Lt. Sweeney at District E-13 to make sure that Ms. James was working that night. (Id. at 35-36)
57. Capt. Russell normally works the day shift Monday through Friday. (Id. at 35) He travelled to the District-13 police station on the evening of June 7, 2012 to issue the five (5)-day suspension to Ms. James because he cannot delegate the responsibility of issuing a suspension to a subordinate pursuant to Special Order 95-55. (Id. at 35, 37-38; Exhibit 8)
58. When he arrived at the police station, Captain Russell spoke to Lt. Sweeney about arranging union representation for Ms. James during a meeting with her. The union representative for the station, Officer Paul Nee, was not working that night and there was no other union representative present at the station. Lt. Sweeney contacted other BPD districts to find another union representative to attend the meeting. (Testimony of Capt. Russell, Id. at 38-39)
59. Officer Paul Nee was Ms. James' union representative at that time. (Arbitration Testimony of Ms. James, Transcript, Volume 1 page 54)
60. Captain Russell told Lt. Sweeney that he was going to suspend Ms. James for five (5) days and that Lt. Sweeney needed to bring Ms. James to Captain Russell's office. Captain Russell told Lt. Sweeney that Ms. James could bring her partner into the meeting if a union representative could not be found. (Testimony of Capt. Russell, CSC Transcript, Volume 1, page 39)

61. It was Captain Russell's understanding that a union representative is not required to be present when an officer is issued a suspension. (Id. at 40)
62. Ms. James was aware of Captain Russell's arrival and she spoke to Lt. Sweeney, who told her the Captain wanted to speak to her. (Arbitration Testimony of Ms. James, Transcript, Volume 1, page 54.)
63. Captain Russell did not issue the suspension at the start of Ms. James' shift. She was out working in the field when Captain Russell arrived for the meeting with Ms. James. Two radio calls were placed over the air asking that Ms. James "return to base." (Exhibit 28)
64. An Internal Affairs investigation related to the issuing of the five (5)-day suspension, it was determined that one call was made by Lt. Sweeney and one call was made by a woman. (Testimony of Sgt. Det. Humphreys, CSC Transcript, Volume 1, pages 200-201).
65. Ms. James mistakenly believed that it was Captain Russell who called for her over the radio. (Arbitration Testimony of Ms. James, Transcript, Volume 1, page 111)
66. When she became aware that Captain Russell wanted to speak to her, Ms. James knew Officer Paul Nee was not working that night and she began making phone calls in order to find a union representative from another District to assist her. She also called the Boston Police Patrolmen's Association (BPPA) and asked someone to call Officer Ronald MacGillivray or Officer Thomas Nee, the President of the BPPA. (Id. at 54)
67. Officer Thomas Nee called Ms. James' cell phone and spoke to her prior to her meeting with Captain Russell. (Id. at 57-58)
68. Prior to meeting with Ms. James, Captain Russell also received a call from Officer Thomas Nee. (Testimony of Capt. Russell, CSC Transcript, Volume 1, page 41)

69. While Captain Russell was speaking with Officer Nee, Lt. Sweeney and Ms. James entered Captain Russell's office. (Id.)
70. Captain Russell explained to Officer Nee the charges against Ms. James and the length of the suspension to be issued. He asked Officer Nee if he wanted to speak to Ms. James. (Id. at 42)
71. Ms. James and Lt. Sweeney overheard Captain Russell talking to Officer Nee since they were now in his office. (Testimony of Lt. Sweeney, CSC Transcript, Volume 1, page 129)
72. Captain Russell asked Ms. James if she wanted to speak to Officer Nee. She declined. (Testimony of Capt. Russell, CSC Transcript, Volume 1, page 42)
73. Lt. Sweeney mentioned that he had arranged for the union representative from District 4, Officer Thomas O' Donnell to attend the meeting but Ms. James said that was not necessary. (Id. at 42; Testimony of Lt. Sweeney, CSC Transcript, Volume 1, page 129)
74. Ms. James refused union representation because she had heard what Captain Russell was intending to discuss with her when he was on the phone with Officer Thomas Nee. (Testimony of Lt. Sweeney, CSC Transcript, Volume 1, page 129)
75. Ms. James told Lt. Sweeney she did not want to wait for Officer Thomas O'Donnell to arrive at the station. She said that if she was only going to be given the suspension paperwork and any necessary instructions she would be fine without union representation as long as she did not have to engage in a conversation or interrogation. (Arbitration Testimony of Ms. James, Transcript, Volume 1, page 64)
76. Captain Russell began explaining to Ms. James the reasons for the suspension; "it was a very difficult conversation." (Testimony of Capt. Russell, CSC Transcript, Volume 1, page 46)
- When asked if she wanted to be seated, Ms. James declined and was otherwise nonresponsive

though, at one point, Ms. James made a flip comment to Captain Russell, telling him that he should “pay my bills.” (Id.)

77. While in Captain Russell’s office, Ms. James’ cell phone rang and she answered it.

(Testimony of Lt. Sweeney, CSC Transcript, Volume 1, page 130)

78. Ms. James advised that the President of the BPPA, Officer Nee, was on the phone and she walked out of Captain Russell’s office and took the call. (Id.)

79. Lt. Sweeney stayed in the Captain’s office for a few minutes and then went to look for Ms. James. He found her in the guard room still on the phone with Officer Nee. (Id.)

80. Lt. Sweeney waited a few more minutes for Ms. James to finish her phone call and told her that they needed to go back into Captain Russell’s office because Captain Russell had some paperwork to give her and that the conversation could be a one-way conversation.

(Testimony of Lt. Sweeney, Id. at 131)

81. Captain Russell went out into the hall and ordered Ms. James back into his office.

(Testimony of Captain Russell, CSC Transcript, Volume 1, page 48)

82. Ms. James and Lt. Sweeney returned to the Captain’s office. (Testimony of Lt. Sweeney, CSC Transcript, Volume 1, page 131)

83. Captain Russell began explaining the details of the suspension to Ms. James and her rights to an appeal hearing and that he did not like issuing the suspension. Ms. James replied, “Why don’t you give me some of your paycheck?” (Id. at 131-132)

84. Captain Russell intended to work with Ms. James to impose the suspension in a manner that would lessen the financial burden on her. He had hoped to issue the suspension in increments of one day. He also intended to have Ms. James finish her shift that night. (Testimony of Capt. Russell, CSC Transcript, Volume 1, pages 47-48)

85. Captain Russell asked Ms. James if she was okay to go back out on the street after their meeting that night. (Testimony of Lt. Sweeney, CSC Transcript, Volume 1, pages 132-133)
86. Ms. James replied, “you know, it is a stressful situation. How would you feel? (Testimony of Lt. Sweeney. (Testimony of Lt. Sweeney, Id. at 133)
87. Captain Russell had considered assigning Ms. James to the station’s front desk for the remainder of her shift that night but decided against it when he saw that, “she was angry, she was non-responsive. I was afraid of her behavior carrying over dealing with the public at the front desk, and I was also concerned that she was probably would have got (sic) hurt at the front desk. She probably would have tripped or fallen off the chair or something and gone back out injured.” (Testimony of Capt. Russell, CSC Transcript, Volume 1, page 47-48)
88. Instead, Captain Russell decided to impose the suspension immediately and ordered Ms. James to take off her badge and give it to Lt. Sweeney, and to give Lt. Sweeney her radio and ID. (Id. at 49)
89. Ms. James told Captain Russell that her ID was outside in her car. (Arbitration Testimony of Ms. James, Transcript, Volume 1, Page 73)
90. Captain Russell also wanted Ms. James to turn over her firearm so he ordered her to take the magazine out of her firearm and to turn it over to Lt. Sweeney. (Testimony of Capt. Russell, CSC Transcript, Volume 1, page 50)
91. Ms. James removed the magazine clip from her weapon. (Testimony of Lt. Sweeney, CSC Transcript, Volume 1, page 136)
92. There was one bullet left in the barrel of the weapon. (Arbitration Testimony of Ms. James, Transcript, Volume 1, page 78)

93. Captain Russell, who was seated at the time, told Ms. James to stop what she was doing and that he would remove her firearm. He did this because he was concerned about a firearm discharge. (Testimony of Capt. Russell, CSC Transcript, Volume 1, page 51)
94. Captain Russell stood up from his seat, walked somewhat quickly around his desk towards Ms. James and attempted to pull the firearm from Ms. James' gun holster. The gun got stuck in the holster briefly and Captain Russell had to push down on the holster and pull the gun forward in order to remove it. (Id. at 52)
95. It appeared to Lt. Sweeney that when Captain Russell was removing Ms. James' weapon it got stuck in her holster briefly, there was "some slight movement of Officer James' body" when Captain Russell removed Ms. James' weapon, and that she appeared to be a bit surprised. (Testimony of Lt. Sweeney, Id. at 141)¹⁴
96. Lt. Sweeney does not recall seeing Captain Russell push Ms. James' hand away from her weapon. (Testimony of Lt. Sweeney, CSC Transcript, Volume 1, page 140)
97. Captain Russell did not touch any part of Ms. James' body, including her breasts. (Testimony of Capt. Russell, CSC Transcript, Volume 1, page 55; Testimony of Lt. Sweeney, CSC Transcript, Volume 1, page 141)
98. Ms. James did not make any noises during this interaction, as if she was hurt; nor did she request medical attention while her weapon was being removed or immediately after it was removed by Captain Russell. (Testimony of Capt. Russell, CSC Transcript, Volume 1, pages 55-56; Testimony of Lt. Sweeney, CSC Transcript, Volume 1, page 141)

¹⁴ In this and other manners, the testimony of Captain Russell and Lt. Sweeney appears to be similar, if not the same, as their testimony at the Commission hearing.

99. Ms. James then left Captain Russell's office and returned with her ID badge, which she turned over to Captain Russell. (Testimony of Capt. Russell, CSC Transcript, Volume 1, page 57; Arbitration Testimony of Ms. James, Transcript, Volume 1, page 81)
100. Captain Russell handed Ms. James paperwork regarding her suspension and copies of applicable Massachusetts General Laws. (Arbitration Testimony of Ms. James, Transcript, Volume 1, pages 82-83)
101. Ms. James, Captain Russell and Lt. Sweeney moved out into the hallway and Captain Russell informed Ms. James that she needed to contact the District-13 station clerks to find out how her attendance would be marked for the suspension. (Testimony of Lt. Sweeney, CSC Transcript, Volume 1, page 142)
102. Ms. James never contacted the station clerks regarding her suspension, believing it would be best for her union representative, Officer Paul Nee, to contact them as he had done previously on another time-keeping matter. (Arbitration Testimony of Ms. James, Transcript, Volume 1, pages 84-85)
103. After her meeting with Captain Russell and Lt. Sweeney, Ms. James went to her car. (Id. at 86)
104. Lt. Sweeney approached Ms. James' car and told her she would be paid for that night shift. Lt. Sweeney went back into the station. (Id. at 87)
105. Ms. James returned to the station and asked to speak with Lt. Sweeney about what happened during the meeting with Captain Russell. Lt. Sweeney located Sgt. Courtney Powell, who was the sergeant on duty that night, and the three of them went into the duty supervisor's office to talk. (Testimony of Lt. Sweeney, CSC Transcript, Volume 1, page 145)

106. In that meeting, Ms. James told Lt. Sweeney that she wanted him to know that “she did not decline her union representation and that she did not want to sit while in the captain’s office because her right leg was bothering her. She said she was not trying to be disrespectful.” (Id. at 146) Ms. James also wanted to know if Lt. Sweeney would be documenting what happened in the Captain’s office. Lt. Sweeney said that he would be documenting it with a Form 26. Ms. James replied that she would be documenting it also. (Id.)

107. Ms. James left the station, went back to her car, sat there for five or ten minutes, felt ill and went to the hospital. (Arbitration Testimony of Ms. James, Transcript, Volume 1, pages 91-92)

108. Shortly thereafter, Ms. James decided to drive to District 4 to speak with Officer Thomas O’Donnell, who is a union representative. Ms. James waited in her car outside the station and Officer O’Donnell came out to speak to her. (Arbitration Testimony of Ms. James, Transcript, Volume 1, pages 92-93)

109. After her meeting with Captain Russell and Lt. Sweeney, Ms. James went to Beth Israel Deaconess Medical Center, where she was examined. The Medical Center notes for Ms. James are timed 1:45pm and 3:36pm. (Arbitration Testimony of Ms. James, Volume 1, pages 92-93; Exhibit 30 (p. 9))

Events Occurring Shortly After Issuance of Suspension

110. Ms. James had begun experiencing migraines in May 2012 and was seen by a neurologist. (Id. at 52)

111. While at Beth Israel Hospital on June 8, 2012, Ms. James spoke to a social worker who subsequently contacted BPD’s IAD. (Id. at 94)

112. At 1:55 a.m. on June 8, 2012, Captain Russell sent an email message to BPD Deputy Superintendent Lisa Holmes advising that he suspended Ms. James for five (5) days, union representation was called but declined by Ms. James and that Ms. James was relieved of duty as of 1:30 a.m. and that her firearm, police radio, badge and ID were confiscated and secured. (Exhibit 9) Captain Russell did not mention physically taking away Ms. James' gun because he considered it insignificant. Taking away a weapon is standard procedure when an officer is suspended. (Testimony of Capt. Russell, CSC Transcript, Volume 1, page 61)
113. On June 8, 2012, Lt. Sweeney completed a report regarding the suspension of Ms. James and what occurred that night and submitted it to Captain Russell. Lt. Sweeney's report does not mention taking away Ms. James' gun either. (Exhibit 10)
114. On June 8, 2012, Sgt. Powell also submitted a report regarding Ms. James' suspension to Captain Russell regarding his interaction with Ms. James and Lt. Sweeney (Exhibit 11)
115. On the morning of June 8, 2012, Sgt. Det. Humphreys, who was an IAD investigator, received a phone message from a social worker at Beth Israel Deaconess Medical Center. (Testimony of Sgt. Det. Humphreys, CSC Transcript, Volume 1, pages 185-187).
116. Sgt. Det. Humphreys returned the call and spoke to Ms. Zue, the hospital social worker who left the message for him. She indicated that there was a police officer at the hospital who wanted to file a complaint. Ms. Zue told Sgt. Det. Humphreys that the complaining officer was Ms. James and that the hospital was "managing her pain". Sgt. Det. Humphreys instructed Ms. Zue to give Ms. James his contact information and he said that Ms. James should call him immediately when she is available. (Testimony of Sgt. Det. Humphreys, Id. at 187)

117. Ms. James called Sgt. Det. Humphreys that afternoon and they spoke by phone. They did not discuss the details of the complaint. Ms. James stated that she felt uncomfortable going to police headquarters to talk to Sgt. Det. Humphreys. Sgt. Det. Humphreys said he could accommodate her and meet her at an attorney's office or union hall to discuss her complaint. (Id. at 188)

118. Ms. James did not tell Sgt. Det. Humphreys the nature of her injuries or the name of the person against whom she wanted to file the complaint. (Id. at 189)

Incidents Following Issuance of Five (5)-Day Suspension

119. On June 15, 2012, Ms. James filed a police incident report against Captain Russell. Ms. James typed in the "key situations" box on the incident report form that the incident involved an assault and a gun. She further indicated on the form that the "type of weapon" used was "hands" and that the "suspect relationship to victim" was a superior officer. In the "unusual actions and statement of the perpetrator" box on the form, the Appellant wrote, "I DON'T LIKE YOUR ATTITUDE': SUSPECT LUNGED AT VICTIM, BRUSHED AGAINST VICTIM, AND YANKED HER LOADED FIREARM". (Exhibit 12) Attached to this incident report is Ms. James' statement, approximately one and one-half pages of single spaced text, about what allegedly happened the night she was suspended. Her report states, in part,

"... The captain further explained that I was being given a five-day suspension and that I could have 48 hours to appeal his decision and request a hearing. He also mentioned that he was not sure how he was going to allow me to take the days. The captain cynically commented that he was doing me a favor because Internal Affairs wanted to be harsher with me, but he offered to handle it. ... He handed me papers (stapled) that I folded and put in the side pocket of my uniform pants. ...

... Tommy Nee called me on my cell phone. At which time, I walked out of the captain's office and into the guardroom to have a private conversation. Tommy and I had a brief discussion. Lieutenant Sweeney came into the guardroom. He was cognizant of the fact

that the captain wanted to proceed without union representation and made an attempt to secure my rights under collective bargaining by calling union a union representative from District 4. I adamantly informed the lieutenant [Sweeney] that I did not require any other union representative to come to District 13, as long as the captain did not try to force me to have any extraneous conversation or dialogue with him. I reiterated that as long as I was only being given any additional papers and/or given instructions, I would be fine. ...

... The captain repeatedly asked, 'how I felt' and inferred that I was not in my right state of mind to be on the street. ... Moreover, he began to make comments about whether or not I should work the remainder of the shift. ...

...He exclaimed for the second time, 'I don't like your attitude!' As the captain pointed his finger at me in a very condescending manner, I was ordered to hand over my badge, radio, work identification, and firearm. ...

... I was in fear and scared for my life as the captain/suspect got up from his chair (while seated at his desk) and lunged at me. My heart began to palpitate very rapidly as the suspect violently pushed my hand away while AI was attempting to safely remove my firearm from the holster. He then violently yanked at my gun as my body jerked back and forth several times until my gun came out of the holster. This action caused me to feel a sharp twinge in my lower back and right side. I also felt violated as the suspect came within inches of my personal space and brushed up against me with his body. He continued to remain within inches of my personal space, even after removing my firearm, and yelled, while hovering like an ogre ...

As I was walking down the hallway, the suspect came into the hallway and began yelling with a growl, 'Officer James?' uncontrollably and repeatedly. Then, he yelled out, 'You should contact your clerks who are your fellow officers so I do not have to carry you AWOL again' (sic) He began to laugh and he looked crazed. ...

Captain Russell's approach appeared to be retaliatory and vengeful and impulsive. ... Captain Russell disregarded my right to have union representation. ... Captain Russell/suspect physically assaulted me. Every person present was put in danger when he lunged at me and repeatedly yanked at my firearm"

(Exhibit 12)

120. On June 20, 2012, Captain Russell submitted a memorandum to then-Superintendent William Evans, outlining his meeting with the Appellant to issue the five (5)-day suspension to her, denying the allegations she made against him in her June 15, 2012 incident report, submitting a complaint against Ms. James and requesting that IAD investigate the matter. (Testimony of Capt. Russell, CSC Transcript, Volume 1, pages 67 and 70; Exhibit 14) In

the memorandum, Captain Russell stated that while he and Lt. Sweeney waited for Ms. James to meet them, BPPA Union President Officer Nee called him and Captain Russell explained the charges against Ms. James (for being AWOL previously) and that Ms. James would be suspended for five (5) days. Captain Russell asked Officer Nee if he want to speak with Ms. James and Officer Nee said,

“only if she wanted or needed to speak with him. PO James was informed and she declined. Around that time, Lt. Sweeney informed us that he had made contact with the rep from D4 and he was on his way to Dist.E13 however PO James said that he was no longer needed.”

(Exhibit 14)

Captain Russell’s memorandum also stated, in part,

“PO James remained standing in the doorway to my office and appeared to be taking down notes. I asked PO James to have a seat however she declined and said she’d prefer to stand. At that time, I began to go over the charges outline in the ‘Notice of Suspension’ as well as her rights under the law to a hearing on the matter. I asked her if she understood however she refused to answer my questions. PO James had been assigned to the J101A however I was concerned that she would not be up to the task to work the street and informed Lt. Sweeney to change her assignment and have her work inside for the remainder of the tour.

PO James then abruptly walked out of my office ... I went to the front door to my office and informed PO James that she needed to return to my office in order for me to provide her with a copy of MGL Ch. 31: 41-46 (sic). PO James refused and stated that she would not talk with me without a union rep. I then ordered her again to come back to my office at which time she complied and stood near the doorway. ...

Although I had initially intended her to complete her tour of duty, I had decided to relieve her from duty immediately primarily due to my concern that she’d go out injured. ... I then ordered her to surrender her firearm, badge, radio and police ID.

Due to my concerns over PO James (sic) behavior, specifically that she was defiant, noncompliant and insubordinate; I approached her and ordered her to safely unload her weapon by removing the magazine to her firearm. After she removed the magazine, she went to remove her firearm from the holster but due to my concerns over a discharge, whether accidental or intentional, I informed her that I’d remove the weapon from her holster. ...

Exhibit 14)

In his memorandum, Captain Russell also indicated that he was informed about Ms. James' June 15, 2012 incident report alleging that she was injured in their June 8, 2012 interaction and that he was the cause of her injury. In his memorandum, Captain Russell "unequivocally and emphatically" denied that he was "unprofessional, hostile, disrespectful and impulsive" and that the June 8, 2012 interaction involved "sexual assault", as Ms. James alleged. (Id.)

121. On June 26, 2012, Ms. James delivered a hand-written note to Lt. Brian McEachern in IAD in support of her allegations of her interaction with Captain Russell regarding on June 8, 2012. The note states,

"To: Lt. Mceachern (sic)
Brenda James, ID. No. 11109
June 26, 2012 Charges June 8, 2012
1. Unreasonable Judgment
2. Hostile work environment
3. Indecent Assault
4. Sexual Harrassment (sic)
5. Abuse of Authority
6. Assault & Battery
7. Conduct unbecoming

Additional:
Firearm – fingerprints
Anti-Corruption – loss wages
Any radio transmissions

Brenda James (signature)
Brian McElle (sic)"

(Exhibit 18)

122. By giving this note to Lt. McEachern, Ms. James was requesting that "my firearm be ran (sic) for fingerprints and that Anti-Corruption do an investigation into my wages being taken for two months during the AWOL and I asked that they check any radio transmissions...."

(BPD Disciplinary Hearing, Testimony of Ms. James, Transcript, December 12, 2014, Volume 4, page 129)

123. On July 10, 2012, Ms. James applied for a criminal complaint in court against Captain Russell for assault and battery. (Exhibit 15)
124. On July 30, 2012, a Clerk-Magistrate's probable cause hearing was held at West Roxbury District Court regarding Ms. James' application for a criminal complaint against Captain Russell. Ms. James, Captain Russell and Lt. Sweeney all testified under oath. The Clerk-Magistrate found no probable cause to issue a criminal complaint against Captain Russell. Ms. James' attorney, Hassan Williams, requested judicial review of the probable cause determination. (Exhibit 16)
125. After the July 30, 2012 Clerk-Magistrate's probable cause hearing at West Roxbury District Court, Captain Russell sent a memorandum to then-Commissioner Edward Davis, through then-Superintendent William Evans, about the probable causes hearing. Captain Russell wrote, *inter alia*,
- “...the hearing began and PO James, Lt. Sweeney and I all testified under oath. PO James testified first and as with her incident report that she authored on June 15th, 2012 (CC# 120363946), it was filled with untruths, deceit and lies.
- Amongst these lies were that I ‘repeatedly called over the air for’ her ‘to come into my office’ and that I ‘lunged’ at her and ‘yanked forcefully’ on her firearm. In addition, that I ‘violently pushed’ her ‘hand away and repeatedly yanked on’ her ‘gun’ and ‘that caused’ her ‘body to sway back and forth and that this caused an injury’ to her ‘lower back’. PO James also alleged that I ‘brushed up against her breasts’ and invaded her personal space.”
- (Exhibit 16)
126. On September 21, 2012, Captain Russell attended a hearing before Judge Mary Driscoll at the West Roxbury District Court. Ms. James' attorneys, Hassan Williams and Charles Spurlock, filed a motion for a change of venue based on an allegation that Captain Russell

has a business relationship with the Court and/or the Clerk-Magistrate. Judge Driscoll took the matter under advisement and indicated that she would render a decision. (Exhibit 17)

127. In October 2012, the criminal case was transferred to Charlestown District Court and Captain Russell was notified of this change of venue. (Testimony of Capt. Russell, CSC transcript, Volume 1, page 73; Exhibits 25 and 32)¹⁵

128. At the time of the Commission's hearing, the criminal complaint case was still pending. (Testimony of Capt. Russell, *Id.*) The most recent entry on the court record advanced by the parties is dated November 14, 2014 and it states that "Ms. James wants this matter transferred from Suffolk County...." (Exhibit 25)

129. At the time that he testified at the Commission on June 15, 2015, no criminal complaint had been issued by the court against Captain Russell. (Testimony of Capt. Russell, CSC Transcript, Volume 1, page 73)

Injured on Duty Claim

130. On June 15, 2012, the date that Ms. James filed a police incident report against Captain Russell, Ms. James also sent a memorandum to Roberta Mullan, the Director of the BPD Medical Unit, as follows,

"Dear Sir/Madam,

On June 7, 2012 (last half tour of duty) I, Officer Brenda James, reported to work and was ordered to meet with Captain Russell. While in Captain Russell's Office, I was ordered to hand over my equipment and identification. While complying, Captain Russell lunged at me and violently yanked at my firearm, still in my holster, while jerking my body back and forth. I felt a sharp twinge in my back and right side.

Officer James went to the emergency ward at Beth Israel Hospital on June 8, 2012. Internal Affairs was contacted by the hospital. I was instructed to remain out of work until I was evaluated by my primary care doctor's office.

¹⁵ There is no indication that the court reviewed and took any action on the Clerk-Magistrate's ruling that there was no probable cause to issue a criminal complaint against Captain Russell.

I visited my doctor's office (primary care doctor on vacation) and an urgent care doctor instructed me to remain out of work pending an orthopedic evaluation by Thursday, June 21, 2012.

I respectfully submit this information to you.”

(Exhibit 13)

131. On September 17, 2012, the Boston Police Patrolmen's Association (BPPA) filed a grievance on behalf of Ms. James, alleging that BPD violated the CBA averring that BPD failed to place Ms. James on injured leave as a result of her interaction with Captain Russell on June 8, 2012. (Exhibit 30)
132. When an officer is injured on duty, he/she is placed on “injured on duty” status immediately if she can submit any injury paperwork immediately and her supervisors can assess whether the injury occurred on duty and submit follow-up paperwork to the Medical Unit. If an officer is unable to complete the paperwork at the time of the injury, he or she is considered “officer absent pending” investigation and BPD conducts an investigation into the injury. (Arbitration Testimony of Superintendent in Chief Daniel P. Linskey, Transcript, Volume 3, pages 9-11)
133. Because Ms. James did not submit an injured on duty report immediately after she was allegedly injured, she was considered an “officer absent pending” investigation. (Id.)
134. Since Ms. James accused Captain Russell of causing her injury on duty, and the immediate supervisor is the person assigned to assess and report an injured on duty claim, Superintendent Linskey assigned Deputy Superintendent Bernard O' Rourke to review Ms. James' injured on duty claim. (Id. at 25)
135. Deputy Superintendent O'Rourke completed a report on Ms. James' injured on duty claim, concluding that Ms. James was not injured on duty. (Id. at 26)

136. Superintendent Linskey concurred with Deputy Superintendent O'Rourke and determined that Ms. James should be considered out sick and not injured on duty. The Medical Unit was notified of the determination and Ms. James was "carried sick" (using what leave time she had available) until she could be deemed fit for duty by medical staff at BPD. (Id. at 22-28)
137. On September 7, 2013, the BPD Medical Unit wrote to Ms. James advising her that BPD had determined that she was not injured on duty. (Exhibit 30)
138. On September 13, October 4 and October 9 in 2013, an arbitration hearing was held on Ms. James' injured on duty claim. (Exhibit 30)
139. On February 21, 2014, the arbitrator ruled in favor of the City, deciding that the City did not violate the CBA by not placing Ms. James on injured on duty status following the events of June 8, 2012.¹⁶ The arbitrator found that Ms. James' recollections "evolved over time"¹⁷ and aspects of her recollections were "demonstrably wrong" while the testimony of Lt. Sweeney and Russell were "largely consistent" regarding Captain Russell's retrieval of Ms. James' weapon. (Exhibit 30, p. 26) The arbitrator also found, " ... there is no record evidence that, in the immediate aftermath of her meeting with Russell, the Grievant notified any Department or Union official of the asserted assault or her alleged injury." (Exhibit 30, page 9) Additionally, the arbitrator determined that Ms. James' asserted back injury of June 8, 2012 did not occur in the manner she described. To this end, the arbitrator found, "Overall I am not persuaded that Russell's retrieval of the Grievant's firearm caused any twisting or other forceful body movement that could have resulted in an acute low back

¹⁶ The arbitrator noted that Ms. James, " ... has submitted several injured on duty claims, with mixed results. In May 2005, for example, the Grievant claimed that she suffered a back injury while 'attempting to sit down in a defective officer chair' at work. ... On that occasion, the Grievant's injury claim was denied, after an investigation revealed that she was not at work on the date of the alleged accident." (Exhibit 30, page 3) The 2005 claim, like the claim underlying the instant appeal, was also filed late. (Exhibit 30, pages 3 and 23)

¹⁷ See arbitrator's decision (Exhibit 30) at pages 24-27 describing inconsistencies in Ms. Brown's various reports and/or statements of her interaction with Captain Russell on June 8, 2012. The arbitrator also had the benefit of a demonstration of the removal of Ms. James' weapon on June 8, 2012.

sprain. I determine that the reported disability could not have occurred as the Grievant has reported.” (Exhibit 30, page 28) The arbitrator drew a similar conclusion regarding Ms. James’ allegation that her June 8, 2012 interaction with Captain Russell caused or exacerbated a psychological injury. Finally, with respect to the duration of time involved in processing Ms. James’ injured on duty claim, the arbitrator determined,

“For almost three decades, if a delayed or late injury claim is made, the City has carried the affected officer in a (sic) ‘absent or sick pending investigation’ status, while exploring the nature and circumstances of the injury. [Ms. James], who has processed several injury claims, is undoubtedly aware of this undisputed practice. ... the current injury claim, however, is further complicated by the fact that the reported injury is only one aspect of the report. In addition, [Ms. James] alleged ‘extreme and aggressive behavior’ by a superior officer. ... as a result, it was not unreasonable for the investigation into the alleged injury to be postponed, pending an IAD investigation into the overall encounter.”

(Exhibit 30, pages 22-24)

Internal Affairs Investigations Relating to June 8, 2012 Interaction

140. While speaking to Ms. James on June 8, 2012, Sgt. Det. Humphreys made arrangements to meet with her on Monday June 11, 2012 to discuss her complaint. The meeting was to occur at an Attorney Drescheler’s office whom Sgt. Det. Humphreys believed is an attorney for the BPPA. (Testimony of Sgt. Det. Humphreys, CSC Transcript, Volume 1, page 190)
141. This meeting did not occur because Ms. James cancelled it. (Id. at 191)
142. Sgt. Det. Humphreys had subsequent telephone conversations with Ms. James during which he informed her that she should file an injured on duty claim. He also tried to schedule a time to meet with her to take her complaint. Sgt. Det. Humphreys also suggested to Ms. James that he could take her complaint over the telephone. (Id. at 192-196)
143. Ultimately, Sgt. Det. Humphreys proceeded with his investigation without meeting with Ms. James. Sgt. Det. Humphreys was not able to meet with Ms. James but continued to call her and leave voice mails. She would respond to his calls. This went on for almost two

months and Sgt. Det. Humphreys advised Ms. James that he was going to have to move forward in his investigation whether or not she met with him to give her account of the incident with Captain Russell. (Id. at 197-198)

144. In his investigation, Sgt. Det. Humphreys interviewed Captain Russell, Lt. Sweeney and Sgt. Bruce Smith; reviewed the June 26, 2012 note that Ms. James wrote and submitted to IAD with her allegations against Captain Russell (Exhibit 18); reviewed Ms. James' police incident report (Exhibit 12); and reviewed the Form 26 that Ms. James submitted to Ms. Mullan at the Medical Unit (Exhibit 13);(Testimony of Sgt. Det. Humphreys, CSC Hearing Transcript, Volume 1, pages 198-200). Sgt. Det. Humphreys also reviewed the radio transmissions for Boston Police Operations On June 7/8, 2012 on Channel 4 for District E-13 as Ms. James alleged that Captain Russell called for her repeatedly by radio transmission. (Testimony of Sgt. Det. Humphreys, CSC Hearing Transcript, Volume1, pages 200, 211; Exhibit 28) Sgt. Det. Humphreys also attended the interview of Ms. James by Det. Mahoney. (Id. at 203)

145. The focus of Sgt. Det. Humphreys' investigation was to determine if any BPD rules or procedures had been violated by Captain Russell during the incident with Ms. James. (Id. at 199)

146. Lt. Det. Paul Mahoney was assigned to open an IAD investigation into Captain Russell's complaint against Ms. James. (Testimony of Lt. Det. Mahoney, CSC Transcript, Volume 2, page 17) Lt. Det. Mahoney began his investigation by reading Captain Russell's complaint against Ms. James, then he reviewed Lt. Sweeney's report to Captain Russell of what occurred at the June 8, 2012 interaction with Ms. James (Exhibit 10); Sgt. Courtney Powell's report to Captain Russell about his brief meeting with Ms. James and Lt. Sweeney on June 8,

2012 (Exhibit 11); Ms. James' police incident report (Exhibit 12); Captain Russell's report to then-Superintendent Evans on June 20, 2012 regarding events on June 8, 2012 Exhibit 14); Ms. James' application for a criminal complaint against Captain Russell (Exhibit 15); and Ms. James' written note of her charges against Captain Russell provided to IAD (Exhibit 18). Lt. Det. Mahoney conducted the interviews of Ms. James, Captain Russell, and Officer O'Donnell and sat in on Sgt. Humphreys interview of Sgt. Smith; Sgt. Humphreys conducted the interviews of Sgt. Smith and Lt. Sweeney. Sgt. Smith, and sat in on the interview of Sgt. Det. Bruce Smith conducted by Sgt. Det. Humphreys, and Lt. Mahoney and Sgt. Humphreys interviewed Officer O'Donnell. (Testimony of Lt. Det. Mahoney, CSC Transcript, Volume 2, page 19) Lt. Det. Mahoney did not sit in on the interview Lt. Sweeney but read a summary of Lt. Sweeney's testimony. (Id. at 21) Lt. Det. Mahoney wanted to sit in on the Clerk-Magistrate hearing but he was not permitted to do so. (Id. at 45)

147. On September 6, 2012, Ms. James was interviewed by Lt. Det. Mahoney and Sgt. Det. Humphreys, both of IAD. Ms. James was represented by Attorney William Davis who was present at the interview. (Exhibit 19) Ms. James was ordered to appear at this interview because the interview was part of the investigation relating to Captain Russell's complaint against Ms. James. Sgt. Det. Humphreys attended this interview and incorporated the information obtained there as part of his investigation into Ms. James' complaint against Captain Russell. (Testimony of Sgt. Det. Humphreys, CSC Transcript, Volume 1, pages 201-203)

148. Sgt. Det. Humphreys had considered ordering Ms. James to appear for an interview regarding the complaint she filed against Captain Russell. However, he and members of IAD

decided that because she was a complainant, they would “offer[] her the latitude of really any other complainant.” (Id. at 202)

149. Sgt. Det. Humphreys’ investigation concluded that Captain Russell did not violate a department rule when he removed Ms. James’ weapon when issuing her the five (5)-day suspension and that the action he took removing the firearm was reasonable. (Id. at 204)

150. Sgt. Det. Humphrey’s investigation also concluded that Ms. James’ complaint was unfounded, that “there was sufficient evidence to prove that the alleged—the allegation did not take place.” (Id. at 205)

BPD Complaint Against Ms. James Relating to Post-Suspension Conduct

151. On June 27, 2013, Superintendent Frank Mancini, of the BPD Bureau of Professional Standards and Development, sent the Police Commissioner a complaint against Ms. James with eleven (11) specifications:

“SPECIFICATION I

Officer James engaged in a pattern of conduct during and after a June 8, 2012 Meeting with Captain Paul Russell that was disruptive to her superior officers and the Workplace. Such conduct is in violation of Rule 102 § 3 (Conduct) of the Rules and Procedures of the Boston Police Department.

SPECIFICATION II

Officer James was insubordinate and disrespectful to Captain Paul Russell during a meeting on or about June 8, 2012. Such conduct is in violation of Rule 102 § 9 (Respectful Treatment) of the Rules and Procedures of the Boston Police Department.

SPECIFICATION III

Officer James made disparaging and disrespectful statements regarding Captain Paul Russell in a Boston Police Incident report. Such conduct is in violation of Rule 102 § 9 (Respectful Treatment) of the Rules and Procedures of the Boston Police Department.

SPECIFICATION IV

On or about June 15, 2012, Officer James was untruthful during her interview with Internal Affairs, Such conduct is in violation of Rule 102 § 23 (Truthfulness) of the Rules and Procedures of the Boston Police Department.

SPECIFICATION V

On or about September 6, 2012, Officer James was untruthful during her interview with Internal Affairs. Such conduct is in violation of Rule 102 § 23 (Truthfulness) of the Rules and Procedures of the Boston Police Department.

SPECIFICATION VI

Officer James presented a document to the Internal Affairs Division containing false allegations against Captain Paul Russell. Such conduct is in violation of Rule 102 § 23 (Truthfulness) of the Rules and Procedures of the Boston Police Department.

SPECIFICATION VII

On or about July 30, 2012, Officer James provided untruthful testimony during a Clerk Magistrate's Hearing in West Roxbury District Court. Such conduct is in violation of Rule 102 § 23 (Truthfulness) of the Rules and Procedures of the Boston Police Department.

SPECIFICATION VIII

Officer James sought a criminal complaint against Captain Paul Russell based on false allegations. Such conduct is in violation of rule 102 § 27 (Abuse of Process) of the Rules and Procedures of the Boston Police Department.

SPECIFICATION IX

On or about July 30, 2012, Officer James provided untruthful testimony during a Clerk Magistrate's Hearing in West Roxbury District Court in violation of G.L. c. 268 § 1. Such conduct is in violation of Rule 102 § 35 (Conformance to Laws) of the Rules and Procedures of the Boston Police Department.

SPECIFICATION X

Officer James made a false report of a crime in violation of G.L. c. 269 § 13A. Such conduct is in violation of Rule 102 § 35 (Conformance to Laws) of the Rules and Procedures of the Boston Police Department.

SPECIFICATION XI

Officer James filed a false incident report in violation of G.L. c. 268 § 6A. Such conduct is in violation of Rule 102 § 35 (Conformance to Laws) of the Rules and Procedures of the Boston Police Department.

(Exhibit 1)(emphasis in original)

152. BPD Rule 102 § 3 states,

“**CONDUCT:** Employees shall conduct themselves at all times, both on and off-duty, in such a manner as to reflect most favorably on the Department. Conduct unbecoming an employee shall include that which tends to indicate that the employee is unable or unfit to continue as a member of the Department, or tends to impair the operation of the Department or its employees.”

(Exhibit 2)(emphasis in original)

153. BPD Rule 102 § 9 states,

“**RESPECTFULLY TREATMENT:** Employees shall, on all occasions, be civil and respectful, courteous and considerate toward their supervisors, their subordinates and all other members of the Department and the general public. No employee shall use epithets or terms that tend to denigrate any person(s) due to their race, color, creed or sexual orientation except when necessary in police reports or in testimony.”

(Exhibit 2)(emphasis in original)

154. BPD Rule 102 § 23 states,

“**DEPARTMENTAL REPORTS – TRUTHFULNESS:** Employees shall submit all necessary reports on time and in accordance with established Departmental procedures. Reports submitted by employees shall be truthful and complete. No employee shall knowingly enter, or cause to be entered, any inaccurate, false or improper information.”

(Exhibit 2)(emphasis in original)

155. BPD Rule 102 § 27 states,

“**ABUSE OF PROCESS – WITHHOLDING EVIDENCE:** Officers shall not intentionally manufacture, tamper with, falsify, destroy, or withhold evidence or information nor make any false accusations of a criminal charge or seek to influence the outcome of any investigations.”

(Exhibit 2)(emphasis in original)

156. G.L. c. 268, §1 states, in pertinent part,

“Whoever, being lawfully required to depose the truth in a judicial proceeding or in a proceeding in a course of justice, willfully swears or affirms falsely in a matter material to the issue or point in question, or whoever, being required by law to take an oath or affirmation willfully (sic) swears or affirms falsely in a matter relative to which such oath or affirmation is required, shall be guilty of perjury”

(Exhibit 3)

157. BPD Rule 102 § 35 states,

“**CONFORMANCE TO LAWS:** Employees shall obey all laws of the United States, of the Commonwealth of Massachusetts, all City of Boston ordinances and by-laws and any rule or regulation having the force of law of any board, officer, or commission having the power to make rules and regulations. An employee of the Department who commits any criminal act shall be subject to disciplinary action up to and including discharge from the Department. Each case shall be considered on its own merits, and the circumstances of each shall be fully reviewed before the final action is taken.”

(Exhibit 2)(emphasis in original)

158. G.L. c. 269, § 13A states,

“Whoever intentionally and knowingly makes or causes to be made a false report of a crime to police officers shall be punished by a fine or not less than one hundred nor more than five hundred dollars or by imprisonment in a jail or house of correction for not more than one year, or both.”

(Exhibit 4)

159. G.L. c. 268, §6A states,

“Whoever, being an officer or employee of the commonwealth or of any political subdivision thereof or of any authority created by the general court, in the course of his official duties executes, files or publishes any false written report, minutes or statement, knowing the same to be false in a material matter, shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or by both such fine and imprisonment.”

(Exhibit 5)

160. According to Police Commissioner's Memo, Number CM 10-007, dated January 20, 2010, marked "Post/Mention: Indefinite, with a subject title: "Disciplinary Policy Statement", and signed by then-Commissioner Davis,

"The following statement is issued in an effort to put employees on notice that untruthfulness will not be tolerated by the Department. When an officer is found to be untruthful, it damages the officer's ability to testify in future court proceedings. Testifying in court is a fundamental job requirement for a police officer, and therefore it is essential that an officer's integrity and credibility are intact. Should the Department determine that an employee has been untruthful in any report to the Department, during any sworn testimony or in an internal investigatory interview including interviews at Internal Affairs and Anti-Corruption, termination will be the presumptive disciplinary action, consistent with just cause principles.

This policy will be effective immediately."

(Exhibit 22)

BPD Disciplinary Hearing Regarding Eleven (11) Specifications

161. On November 18 and 19, 2014 and December 11, and 12, 2014 a disciplinary hearing was held before BPD's Chief Administrative Hearing Officer relative to the complaint that the Appellant violated BPD rules and/or policies as indicated in the eleven (11) specifications noted above in incidents following her interaction with Captain Russell on June 8, 2012. At these hearing dates, Ms. James was represented by counsel. (Exhibit 21)

162. Ms. James testified on the last day of the hearing. (BPD Disciplinary Hearing, Testimony of Ms. James, December 12, 2014, Volume 4, pages 48-189)

163. On March 11, 2015, Deputy Superintendent Colm P. Lydon, Chief Administrative Hearings Officer (Hearing Officer Lydon), submitted his report regarding Ms. James' hearing to BPD Commissioner William B. Evans. (BPD Hearing Officer's Report, regarding Conduct, Abuse of Process, Untruthfulness, Respectful Treatment and Conformance to Laws)

164. Hearing Officer Lydon's report states, among other matters,

“Information Officer James told medical personnel has her twisting to keep the gun away and backing away instinctively, which in and of itself is different from what she wrote in her 1.1[incident report], regarding Captain Russell's violently yanking at her gun and her body jerking back and forth several times.”

(BPD Hearing Officer's Report, p. 14)

165. Hearing Officer Lydon's report further states,

“Officer James questioned by [BPD] Attorney Geraghty in the Departments (sic) hearing)(sic)

‘Q. And what part of your upper body did he make contact with?

A. He brushed up against my upper body.

Q. What part of your upper body?

A. Just my upper body.

Q. Above your chest?

A. Above my chest? My upper body.

Q. Did he make contact with your breast?

A. He may have. It's a presumption I've made, because again, his upper body brushed up against my upper body, and women have breasts.”

(Id. at 15-16)

166. Hearing Officer Lydon's report also states that, at the arbitration hearing regarding Ms. James' injured on duty claim,

“Officer James was asked:

Q. What portion of your body did he brush up against?

A. The upper portion of my body, my breast. He was in my personal space.”

(Id. at 16, citing Arbitration Transcript, p. 78-79, James)

167. Hearing Officer Lydon's report also states that Ms. James references Captain Russell in her June 15, 2012 incident report against him saying, for example, that he was “menacing”, he had “extreme and aggressive behavior”, he “assaulted me”, “he lunged at me”, “he repeatedly yanked at my firearm”, “he looked crazed”, he “brushed up against me with his body”, “I was in fear and scared for my life”, he was “hovering like an ogre”, were

descriptions “of an incident that has been discredited by testimony and evidence.” (BPD Hearing Officer’s Report, page 19)

168. The Hearing Officer’s report found that Ms. James’ denial, or failure to recall that she said something to Captain Russell on June 8, 2012 like “give me some of your paycheck” when he suspended her was effectively contradicted by the report of Lt. Sweeney, who was in Captain Russell’s office at the time and recalled that Ms. James made such a statement after Captain Russell stated “several times that he did not enjoy doing this”. (BPD Hearing Officer’s Report, page 27)

169. The Hearing Officer’s report found Ms. James also made false statements at her IAD interview, maintaining that Captain Russell “made contact with her breasts and pushing her hand away”, which evidence was effectively contradicted by the testimony and reports of Captain Russell and supported by Lt. Sweeney’s testimony and reports. (BPD Disciplinary Hearing Report of Hearing Officer Lydon, page 28)

170. Hearing Officer Lydon’s report further states,

“In Lt. Mahoney’s investigation, he found what he believes (sic) multiple false statements in Officer James (sic) IAD interview regarding, her body being jerked back and forth several times, Captain Russell lunging at her, her denial of making a statement regarding his paycheck, her testimony at the Magistrates (sic) Hearing, his behavior relative to yelling and growling, and Captain Russell’s contact with her breast, a physical assault, disregard of Union representation and the yanking of the firearm.”

(BPD Hearing Officer’s Report, page 27)(citation omitted)

171. Hearing Officer Lydon found that the Department’s evidence, including the reports and testimony of Captain Russell, Lt. Mahoney, Lt. Sweeney and Sgt. Humphreys, were consistent and reliable and effectively disputed Ms. James’ assertions. Captain Russell strenuously denied any inappropriate conduct, including touching of Ms. James’ body, which

denials were supported by the testimony and documents of Lt. Sweeney, who was within a couple of feet of Ms. James and Captain Russell in Captain Russell's office when he issued the five (5)-day suspension to Ms. James. Therefore, Hearing Officer Lydon found that Ms. James' incident report and the document she submitted to Lt. Det. McEachern (alleging that Captain Russell committed an indecent assault, sexual harassment and other inappropriate conduct by Captain Russell were false. (BPD Hearing Officer's Report)

172. Hearing Officer Lydon found that Ms. James provided untruthful testimony during the Clerk-Magistrate's hearing in court. Specifically, the Hearing Officer found that Ms. James indicated to the Clerk-Magistrate, when he asked specifically where she said that her body and that of Captain Russell contacted included her breast. Captain Russell testified at the BPD disciplinary hearing that Ms. James lied when she testified in court that he had "slapped her hand, that [he] assaulted her, ... yanked on her firearm and she went from side to side and that [he] injured her back as a result and ... that [he] sexually assaulted her and that [he] intentionally brushed up against her breast." (BPD Hearing Officer's Report, page 32) The Hearing Officer states, "I accept Captain Russell's testimony to represent the bulk of what Officer James had testified to, and couple that with the assertion again, that there was no Indecent (sic) assault, no body to body contact, and no pushing away of hands[]" and "I find Officer James not to be credible." (*Id.* at 33) Having provided false testimony in court, the Hearing Officer found that Ms. James violated G.L. c. 268, § 1, which provides that such false testimony constitutes perjury. Having provided a false report of a crime, the Hearing Officer found that Ms. James violated G.L. c. 269, § 13A, which prohibits such false reports. Having provided a false written report, alleging that Captain Russell committed a physical assault and violent actions upon her and "used this report as an official record to assist in

documenting an incident to help prove a criminal case when she took charges against Captain Russell”, the Hearing Officer found that Ms. James violated G.L. c. 268, §6A, which prohibits such false reports. (Id. at 38)

173. As a result, Hearing Officer Lydon sustained ten (10) of the eleven (11) Specifications in the complaint against Ms. James (*supra*). He did not sustain Specification II, which Specification stated that Ms. James was insubordinate and disrespectful to Captain Russell during a meeting on or about June 8, 2012 in violation of Rule 102 § 9. (BPD Hearing Officer’s Report, pages 19-20; Exhibit 21)

174. By letter dated March 18, 2015 from Commissioner William Evans to Ms. James, Commissioner Evans informed Ms. James that he sustained the report of Hearing Officer Lydon following the three (3)-day hearing regarding the complaint that Ms. James violated BPD Rule 102 sections regarding Conduct, Respectful Treatment, Truthfulness, Abuse of Process and Conformance to Laws and statutes G.L. c. 268, § 1 (perjury), G.L. c. 269, § 13A (false reports to police officers) and G.L. c. 268, § 6A (false written reports by public officers or employees) and the letter stated, in part,

“I have determined that the charges sustained relative to each case are sufficient to warrant termination independent of the other matter. Accordingly, I hereby terminate you from your employment effective March 18, 2015.”

(Exhibit 21) Ms. James was also terminated in the same letter for violating the BPD substance abuse policy and the change of address notification policy as indicated in the next section below. (Exhibit 21)

175. On March 31, 2015, Ms. James filed an appeal of her termination with the Civil Service Commission. (Stipulated Fact)

The Hair Drug Test and Change of Address

176. BPD officers are required to submit to an annual drug test in which they have to provide a hair sample. The test is required to be conducted on or within thirty (30) calendar days of an officer's birthday. (Exhibit 34)
177. In practice, the thirty (30) calendar day requirement gives an officer sixty (60) days to have his or her hair tested since the officer has thirty (30) days before his/her birthday and thirty (30) days after his/her birthday to submit to the test. (Testimony of Ms. Walsh, CSC Transcript, Volume 2, page 217)
178. The hair sample is collected by certified employees of the BPD Occupational Health Services/Medical Unit. (Exhibit 34; Testimony of Phyllis Walsh, CSC Transcript, Volume 2, page 202)
179. Ms. James' birthday is June 29.¹⁸ (Exhibit 48)
180. Maria Osorno of the Medical Unit schedules hair testing appointments for officers that are on medical leave or injured. It is standard procedure for Ms. Osorno to schedule hair testing appointments on the same day in which an officer has an appointment with a doctor in the Medical Unit. (Testimony of Ms. Osorno, CSC Transcript, Volume 2, pages 266-268; Exhibit 57)
181. On March 21, 2013, Ms. James had a medical appointment with Dr. Arnold at the BPD Medical Unit and attended that appointment. After this appointment, Dr. Arnold told Ms. Osorno to schedule a follow-up medical appointment for Ms. James with him in June 2013. Ms. Osorno checked the Medical Unit's injured officer database and determined that Ms.

¹⁸ A birthdate is confidential but one of the reasons BPD gave for terminating Ms. James' employment was that she failed to provide a hair sample for BPD's annual hair drug test within sixty (60) days of the officer's birthdate. In order to establish whether Ms. James violated this requirement, her birthdate must be known. Since knowledge of the year of her birth is not necessary to make that determination, it is not included in this decision.

James' birthday was in June so she scheduled both the follow-up appointment and the hair test for June 13, 2013 and so informed Ms. James. (Id. at 268-270; BPD Hearing Officer's Report, page 13)

182. Ms. James requested a written notice of the appointment be mailed to her and Ms. Osorno complied with her request. (Id. at 270)

183. Ms. Osorno searched a computer database for Ms. James' address and sent the notice to the Quincy address that was listed in the database. (Id. at 270-271) The notice was delivered on March 25, 2013. (BPD Hearing Officer's Report, page 7)

184. Ms. James did not appear for the hair test appointment scheduled for June 13, 2013. (Exhibit 37)

185. Ms. James' attorney sent an email message to Roberta Mullan on June 13, 2013 indicating that Ms. James would not be attending her doctor's appointment and the hair test appointment scheduled for June 13, 2013. (Testimony of Ms. Walsh, CSC Transcript, Volume 2, page 209; Exhibit 36; BPD Hearing Officer's Report, page 7)

186. On June 18, 2013, Ms. James spoke with Linda Mitchell at the BPD Medical Unit on the telephone and asked to leave a message for Maria Osorno stating that Ms. James agreed to have her hair sample collection rescheduled to take place on July 1st, 2013. (Testimony of Linda Mitchell, CSC Transcript, Volume 2, pages 242-243; Exhibit 55)

187. Ms. James' appointment was rescheduled to July 1, 2013.¹⁹ (Exhibits 37, 55, 57)

188. Officers can reschedule their hair drug test appointments by contacting the Medical Unit and asking that their test be rescheduled. (Testimony of Ms. Walsh, CSC Transcript, Volume 2, pages 207-208)

¹⁹ BPD did not mail Ms. James notice of the July 1 appointment because Ms. James verbally agreed to the date. BPD appears to send written notices for the initial hair sample appointment but not always for rescheduled appointments.

189. Ms. James did not appear at the July 1, 2013 appointment. (Exhibit 37)
190. On July 2, 2013, Ms. James called the Medical Unit and asked that a certain employee, named Nicole²⁰ in the Medical Unit take Ms. James' hair sample for the drug test. (Exhibits 37, 53)
191. Nicole is African-American, like Ms. James, and sometimes advises the other hair collectors on how to cut African-American women's hair. (Testimony of Ms. Walsh, CSC Transcript, Volume 2, pages 223-224; Administrative Notice)
192. Ms. James stated that Nicole was familiar with cutting African-American hair in order to obtain a viable sample and Ms. James also stated that she was comfortable with Nicole because Nicole had taken Ms. James' hair sample previously. (Exhibit 46, page 10 (July 30, 2013 IAD Interview of Ms. James))
193. It is the Medical Unit's practice that hair samples are collected by the hair sample collectors in a rotation. Thus, the first collector who is available in the morning will take the hair sample from the first arriving police officer's hair, the second collector will collect the hair sample of the second officer who arrives and this process continues throughout the rotation. A normal rotation will have six (6) hair sample collectors taking hair samples in a day. (Testimony of Ms. Walsh, CSC Transcript, Volume 2, pages 204-206)
194. The purpose of the rotation is to guarantee the integrity of the test and to make sure the test is impartial. Police officers are not allowed to request a specific hair collector to collect their hair sample. The rotation has been in place since 1999. (Id. at 206)

²⁰ In order to protect BPD employees' privacy the Commission will only reference to employees who did not testify by their first name.

195. Ms. Walsh tried to explain to Ms. James during a telephone call how the rotation works and that Ms. James could not request a specific Medical Unit hair collector. Ms. Walsh also offered to explain this to Ms. James' attorney. (*Id.* at 213-215; Exhibit 37)
196. Ms. James' appointment was rescheduled to July 17, 2013. (Exhibits 38 and 40)
197. On July 11, 2013, a notice of the July 17, 2013 appointment was sent by regular mail to Ms. James' PO Box and by certified mail to Ms. James' address in Quincy and a copy was sent to Officer MacGillivray, Vice President of the BPPA. (Exhibit 40) The Quincy address is the address provided by Ms. James on her sworn personnel information card.²¹ (Exhibit 35) The July 11 letter stated, *inter alia*, "Be advised that if you fail to appear or submit a sample on this date, it will be considered a refusal to submit to a drug test, and you will be subject to termination pursuant to Boston Police Department rule 111 Section VII." (Exhibit 40)
198. On July 17, 2013, Ms. James did not appear for her scheduled drug hair test appointment. (Exhibits 52, 54)
199. Ms. James did not receive notice of the hair test until July 22, 2013, when she picked up her notice letter from her PO Box in Milton. (BPD Disciplinary Hearing, Testimony of Ms. James, September 24, 2014, Volume 2, page 67; *see also* Exhibit 46 (Ms. James' IAD interview by Sgt. Det. Gallarelli on July 30, 2013)) Ms. James testified in the [BPD disciplinary] hearing that she did not contact anyone from the Department to reschedule an appointment to come in: "I did not, I contacted a union attorney." (BPD Hearing Officer's Report, page 9 (Testimony of Ms. James, Transcript VII, page 87)(citation omitted) Ms.

²¹ Ms. James avers that the address of her brother and father are listed as emergency contacts on her sworn personnel card and that the BPD could have mailed notices to her there. However, their address is not listed as Ms. James' residential address and BPD could not have known that she would have been able to receive notices mailed to her there. It was Ms. James' responsibility, pursuant to BPD rules, to inform BPD of her change of address within twenty-four (24) hours and she did not do so.

James' attorney attempted to contact the BPD on Saturday, July 27, 2013 and Monday, July 29, 2013 about Ms. James submitting a hair sample for the drug test. (Exhibit 48) The BPD did not reschedule an appointment for Ms. James to submit a hair sample.

(Administrative Notice)

200. Ms. James went to the Medical Unit on Friday, July 26, 2013 at approximately between 6:30pm and 7pm to provide a hair sample. The unit was closed since it was after normal business hours for a Friday. (Exhibit 46, pages 15-16 (July 30, 2013 IAD Interview of Ms. James); BPD Hearing Officer's Report, page 10) Ms. James knew that "sometimes the Medical Unit's open at night." (Exhibit 46, page 15)

201. Ms. James' attorney contacted the BPD Labor Relations Office on the afternoon of Saturday, July 27, 2013 asking for Ms. James' hair sample appointment to be rescheduled. By letter dated July 29, 2013 to Deputy Andres, Director of the BPD Labor Relations, Ms. James' attorney asked to reschedule Ms. James' hair sample appointment. By letter dated July 30, 2013, Deputy Andres informed Ms. James' attorney that the matter was being investigated and that the BPD did not agree with Ms. James' Attorney's assertion that Ms. James had made a good faith effort to appear on the dates she was scheduled to appear. (Exhibits 41 and 48; Testimony of Attorney Horwitz, CSC Transcript, Volume 3, pages 79-81)

202. In the summer of 2013, normal business hours for scheduled drug hair test sample collections were 6:00 a.m. to 10:00 a.m. and 3:00 p.m. to 7:00 p.m. on Tuesdays, Wednesdays and Thursdays for general sworn personnel. Officers could also walk in unscheduled and submit a hair sample on Mondays and Fridays. (Testimony of Ms. Walsh, CSC Transcript, Volume 2, pages 224-225) However, hair samples could only be collected

on Mondays and Fridays between the hours of 9:00 a.m. and 2:00 p.m. and the Medical Unit closed at 5:00 p.m. on Fridays. (Testimony of Linda Mitchell, CSC Transcript, Volume 2, pages 247-248)

203. Ms. James' hair sample was not taken during the sixty (60)-day period around her birthday in the summer of 2013. (Testimony of Sgt. Det. Gallarelli, CSC Transcript, Volume 3, page 47)

204. On July 3, 2013, an IAD investigation was initiated regarding Ms. James' failure to appear to provide a hair sample for the hair drug test. (Testimony of Sgt. Det. Gallarelli, CSC Transcript, Volume 3, page 39)

205. As of July 3, 2013, Ms. James had sixteen (16) business days remaining within which she could be tested. (Administrative Notice)

206. When asked if it is unusual for IAD to open an investigation into a police officer missing an appointment to submit a hair sample for the annual hair drug test, Sgt. Det. Gallarelli advised that "it has been done in the past" and that Sgt. Det. Gallarelli himself was the subject of an IAD investigation regarding an appointment to submit a hair sample for the drug test.²² Sgt. Det. Gallarelli is not aware of an officer being investigated for missing a drug test when that officer was still within the sixty (60)-day window of his/her birthday. (Testimony of Sgt. Gallarelli, CSC Transcript, Volume 3 at 58-59).

207. Sgt. Det. Gallarelli began his investigation by attempting to locate Ms. James' address in BPD department records in order to send her a notice to meet with him regarding the investigation. Sgt. Det. Gallarelli attempted to contact Ms. James by phone and certified

²² The investigation into Sgt. Det. Gallarelli was closed when he was able to prove that he had submitted to the drug test on a different day than the one he was originally scheduled for.

mail to her Quincy address; he was unsuccessful at times, though he was ultimately able to reach her. (Id. at pages 39, 42; Exhibit 51)

208. Sgt. Det. Gallarelli checked the Registry of Motor Vehicles (RMV) records in order to determine Ms. James' address. (Id. at 41-42; Exhibits 43-45) As of July 8 and July 26, 2013, the RMV records obtained by Sgt. Det. Gallarelli state that Ms. James' active mailing address was the PO Box in Milton and her active residential address was on a street in Mattapan. (Id.)
209. Sgt. Det. Gallarelli also contacted the clerk at District-13, which was the last place Ms. James was assigned, in order to confirm her address of record on her sworn personnel card. A sworn personnel card is where officers' updated information is kept. (Id. at 43-44)
210. Sgt. Det. Gallarelli was able to interview Ms. James in person about missing her appointment to submit a hair sample for the hair drug test and her current address. (Id. at 42)
211. As part of the investigation, it was discovered that Ms. James did not provide BPD with a current address. (Exhibit 35; Testimony of Sgt. Det. Gallarelli, Testimony of Sgt. Gallarelli, CSC Transcript, Volume 3 at 44-45)
212. Ms. James considered her living situation "in transition" during this time because she was experiencing a financial hardship which caused her to no longer be able to afford her apartment. (BPD Disciplinary Hearing, Testimony of Ms. James, September 24, 2014, Volume 2, pages 75-76)
213. Sgt. Det. Gallarelli's investigation concluded on December 3, 2013. In his investigation, Sgt. Det. Gallarelli found that Ms. James violated Rule 102 § 7, regarding Change of Address Notification, because she did not notify BPD of her change of address within twenty-four (24) hours. He also found that Ms. James had violated Rule 111 § 5, regarding Substance

Abuse, by failing to appear to provide a hair sample for the drug test. (Testimony of Sgt. Det. Gallarelli, CSC Transcript, Volume 3, pages 47-48; Exhibit 51)

BPD Complaint Against Ms. James Relating to Hair Drug Test and Residency

214. On June 24, 2014, Superintendent Frank Mancini, of the BPD Bureau of Professional Standards and Development, sent the Police Commissioner a complaint against Ms. James stating,

“I hereby bring the following complaint against Police Officer Brenda James . . . , presently assigned to the Extended Sick Unit for the following violations of Rule 111 § 5 (Substance Abuse Policy) and 102 § 7 (Change of Address Notification) of the Rules and Procedures of the Boston Police Department.

SPECIFICATION I

After rescheduling her first appointment, Officer James failed to appear for two subsequently scheduled appointments to submit a hair sample for her annual drug test, in violation of Rule 111 § 5.

SPECIFICATION II

Officer James failed to report a change of her residence in violation of Rule 102 § 7.”

(Exhibit 21, Attachment 1)(emphasis in original)

215. BPD Rule 111 § 5 states, in part,

“Sworn personnel of the Boston Police Department will be tested for drugs and/or alcohol under the following circumstances:

G. Annual Drug Testing (Hair) – this provision only applies to those bargaining units that have agreed to such testing. . . .

H. In a joint desire to achieve and maintain a work force that is 100% drug free and in further recognition that the Department has not yet achieved such goal, the parties agree that all sworn personnel shall be subject to an annual drug test to be conducted through a fair, reasonable, and objective hair analysis testing system. Each Officer shall submit to an annual test on or within thirty (30) calendar days of each Officer’s birthday. The Department shall schedule each examination and so notify each Officer as far in advance as practicable. Hair testing does contemplate or include testing for alcohol.”

I. The Department agrees that it will establish and adhere to written collection and testing procedures for hair samples. These procedures shall be fair and reasonable

as to ensure the accuracy and integrity of the test and process. These written procedures will be appended to this rule and incorporated thereto. The union, should it so request, shall meet with the Department in order to discuss issues relative to the collection and testing process. Nothing contained herein alters the current policy as it relates to other drug/alcohol testing, procedures, or requirements.”

(Exhibit 34)

216. Rule 111 § 7, Consequences of Violation of the [Substance Abuse] Policy, states,

in part,

“Any violation of the Substance Abuse Policy shall lead to disciplinary action up to and including termination. The severity of the action chosen will depend on the circumstances of each case. ...

Refusing to submit to a drug or alcohol test ...or switching or adulterating any blood or urine sample, shall result in a recommendation of termination. ...

(Exhibit 34)

217. BPD Rule 102 § 7 states, in part,

“RESIDENCE AND TELEPHONE: Except as otherwise provided by law, all officers of the Department shall live in the city of Boston. All employees of the Department shall report their places of residence and their telephone number to the Commanding Officer or supervisor of the Bureau, Division, District, Unit or Office to which they are assigned. They shall also report to that person any change of residence or telephone number within twenty-four (24) hours after such change.”

(Exhibit 2)(emphasis in original)

218. On September 5 and 24, 2014, a hearing was held before the BPD’s Chief Administrative

Hearing Officer relative to the violations of the Substance Abuse Rule and Change of

Address Notification Rule, at which Ms. James was represented by counsel. (Exhibit 21)

219. Hearing Officer Lydon’s report states that Ms. James failed to appear to submit a hair

sample for the annual drug test on June 13, July 1 or July 17, 2013, and that,

“[a]lthough Officer James may have personal concerns about too much hair being taken from locations and the integrity of the tests, it is not reasonable that a sworn employee

require a particular person (Nicole) in order to submit to the required annual hair test.” (BPD Hearing Officer’s Report, page 11)(citation omitted)

In addition,

“the Department scheduled and used multiple fair and reasonable methods to make contact with Officer James via Certified mail, her PO Box, (which the Officer has had for 2 years) ... and notifying the Officers (sic) Union also at times to schedule the Officer for the annual drug test.” (Id.)(citation omitted)

“There have been test (sic) taken of her by others successfully and consultations have been made when needed.” (Id.)(citation omitted)

“The argument can also be made that one of the notifications (Certified Mail) sent for the July 17th test was not received by the employee until she went to the Post Office on July 22nd.” (Id.)(citation omitted)

Between July 22 and 26, 2013, “there was no attempt shown by the employee to make any type of contact with the Department by the Officer or through an Attorney up until Friday, July 26th after normal business hours between 6:30 and 7:00pm, when the Officer walks into the front desk at Headquarters.” (Id.)(citation omitted)

220. Hearing Officer Lydon’s report states, with regard to Ms. James’ change of address, that her sworn personnel information card shows a residential address in Quincy, her driver’s license residential address is in Mattapan and her mailing address is a PO Box in Milton, and that her vehicle registration residential address is in Mattapan. The Hearing Officer’s report further states that Ms. James testified at Sgt. Det. Gallarelli’ s investigation interview that she changed the residential address on her driver’s license on June 29th, 2013, that she had moved from the Quincy address a few months earlier and that she was in transition. (BPD Hearing Officer’s Report, pages 12-13)

221. On March 10, 2015, Hearing Officer Lydon submitted his hearing report to BPD Commission William Evans in which he sustained the two (2) specifications against Ms. James. (BPD Hearing Officer’s Report, regarding Residence and Drug Test Specifications)

222. By letter dated March 18, 2015 from Commissioner William Evans to Ms. James, Commissioner Evans sustained the report of Hearing Officer Lydon following the two (2)-day hearing regarding the complaint that Ms. James violated BPD Rule 111 § 5 by failing to appear for her first scheduled appointment to submit a hair sample for the annual drug test and failing to appear for two such subsequently scheduled appointments and violating Rule 102 § 7 by failing to report a change of her residential address and he stated, in part,

“I have determined that the charges sustained relative to each case are sufficient to warrant termination independent of the other matter. Accordingly, I hereby terminate you from your employment effective March 18, 2015.”

(Exhibit 21) Ms. James was also terminated in the same letter for violating BPD Rule 102, sections regarding Conduct, Respectful Treatment, Truthfulness, Abuse of Process and Conformance to Laws and for violating cited statutes as indicated above. (Exhibit 21)

223. On March 31, 2015, as noted above, Ms. James filed an appeal of her termination with the Civil Service Commission. (Administrative Notice; Stipulation)

DISCUSSION

Applicable Legal Standards

A tenured civil service employee may be discharged for “just cause” after due notice and hearing upon written decision “which shall state fully and specifically the reasons therefore.” G.L. c. 31, § 41. An employee aggrieved by the decision may appeal to the Commission. G.L. c. 31, § 43. Under section 43, the appointing authority carries burden to prove to the Commission by a “preponderance of the evidence” that there was “just cause” for the action taken. *Id.* See, e.g., Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823 (2006); Police Dep’t of Boston v. Collins, 48 Mass.App.Ct. 411, *rev.den.*, 726 N.E.2d 417 (2000). In performing its function:

. . .the commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew. . . . [after] a

hearing de novo upon all material evidence and . . . not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer. . . . For the commission, the question is . . . “whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision.”

Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-28 (2003) (quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983)(emphasis added)). See also Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823; Cambridge v. Civil Serv. Comm’n, 43 Mass.App.Ct. 300, 303-05, *rev.den.*, 428 Mass. 1102 (1997).

An action is “justified” if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, *rev.den.*, 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). The Commission must take account of all credible evidence in the 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). 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.” Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003). See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003)(where live witnesses gave conflicting testimony 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) “The Commission is permitted, but not required, to draw an adverse inference against an appellant who fails to testify at the hearing before the appointing authority (or before the Commission). Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006).” Clark v. Boston Housing Authority, 24 MCSR 193 (2011), Clark v. Boston Housing Authority, Suffolk Superior Court, C.A. No. SUCV2011-2554E, *aff’d* (Feb. 13, 2015).

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.

Police are held to a high standard of conduct, as the Commission found in the recent decision in Zorzi v. Town of Norwood, Docket No. D-15-111. In Zorzi, the Commission noted,

“An officer of the law carries the burden of being expected to comport himself or herself in an exemplary fashion.” McIssac v. Civil Service Comm’n, 38 Mass.App.Ct. 473,475 (1995)(negligent off-duty handling of firearm). When it comes to police officers, the law teaches that there is a special ‘trust reposed in [a police officer] by reason of his

employment 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 are required to do more than refrain from indictable conduct. Police officers are not drafted into public service; rather they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.’ Police Comm’r v. Civil Service Comm’n, 22 Mass.App.Ct. 364, 371, *rev.den.*, 398 Mass. 1103 (1986).”

This standard of conduct extends, of course, to truthfulness. In Gonzalves v. Falmouth, 25 MCSR 231 (2012), Gonsalves v. Civil Service Commission and Town of Falmouth, Suffolk Superior Court, C.A. No. 12-2655G (2014) *aff’d*, the Commission articulated the importance of an officer’s obligation to be truthful in that case and as established previously, stating,

“The most serious charge proved against Officer Gonsalves involved his untruthfulness. He left a trail of evasive, incredible and inconsistent statements that began on December 20, 2008, with his original denial to the Oscar 11 Officer that he had pulled 27 into the Granite City Electric parking lot while the officer and Ms. A were meeting. It continued through the FPD investigation and was on display during his two days of testimony at the hearing before the Commission. On these grounds, alone, Falmouth is fully justified to terminate a police officer who repeatedly demonstrates his inability to tell the truth. *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.’) *See also 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).”

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

Service Comm'n, 61 Mass.App.Ct. 796, 800 (2004); Faria v. Third Bristol Div., 14 Mass.App.Ct. 985, 987 (1982) (remanded for findings to support modification)

Credibility

The Respondent has shown by a preponderance of the evidence that it had just cause to terminate Ms. James' employment. I reach this conclusion considering all of the evidence in the record and the weight assigned thereto, including the credibility of the testimony provided by the parties' witnesses. First, although the Appellant attended the first and second days of the Commission hearing, she failed to appear at the third day of hearing, at which time she was to testify, despite the Commission's repeated continuances. The BPD moved to dismiss the appeal pursuant to the Commission hearing notice that states that the failure to appear may result in dismissal of the appeal. This motion was denied. As noted above, when a party fails to appear, the Commission may draw an adverse inference. At the request of the Appellant's counsel, and over the objection of the Respondent, the Appellant was permitted to admit into the record a transcript of her testimony at the BPD disciplinary hearing on the charges against her. At the hearing, I indicated that admission of that transcript would not constitute an appearance and that I would give it the weight that it is due. Also in evidence are, *inter alia*, the transcript of the two sets of disciplinary hearings held by the Respondent, the reports of the Respondent's Hearing Officer following the local hearings, the investigators' determinations, and the decision of the arbitrator regarding the grievance regarding Ms. James' injured on duty claim. The vast weight of this evidence compels the conclusion that the Respondent has established just cause to terminate the Appellant by a preponderance of the evidence. In each instance, the Respondent did not find the Appellant credible. Clearly, one of the reasons for civil service law is to provide review of certain appointing authority decisions, which review was afforded to the Appellant in

the Commission's proceedings. However, the reports of the Respondent's Hearing Officer compared specific statements of those who testified there and explicitly found the Appellant's written and/or oral statements not only inconsistent with the testimony of the Respondent's witnesses, but with her own statements on different occasions and found that Attorney Hassan's testimony at the BPD disciplinary hearing also indicated that she had testified in court about physical contact with Captain Russell, which did not occur. Similarly, the detailed findings of the arbitrator indicate that the Appellant's testimony in the various complaints was inconsistent and 'evolved'.

The Appellant's witnesses were Mr. Alkins, former President of the Boston NAACP, Attorney Hassan Williams and Attorney Susan Horwitz. Mr. Alkins testified that he knows the Appellant and has worked with her on occasion, that she is an upstanding officer and individual who has been treated poorly by the Respondent. Attorney Williams testified about his representation of the Appellant in regard to the criminal complaint Ms. James sought against Captain Russell. His testimony did not undermine the conclusion here that Ms. James testified at the Clerk Magistrate's hearing that Captain Russell had assaulted her. Attorney Horwitz testified about her efforts to arrange another date for the Appellant to provide a hair sample for the annual BPD hair drug test. While I do not doubt her testimony and efforts, they do not contradict the fact that the Appellant made multiple appointments to provide a hair sample for the hair drug test and did not keep them. The Respondent has the discretion to decide when repeated rescheduling of such appointments is no longer acceptable. I draw an adverse inference from the Appellant's failure to testify and give little weight to her testimony in the transcripts of the other proceedings entered into the record here in view of inconsistencies therein and in view of the credibility ascribed to the other witnesses noted herein.

I found the testimony of both Captain Russell and Lt. Sweeney credible. As the only witnesses to the Appellant's suspension on June 8, 2012, their testimony is significant. Captain Russell testified to the extent of his memory, responding directly to examination at the hearing. He did not equivocate in responding to questions, stating his response with certainty. For example, he flatly and repeatedly denied any allegation that he had touched the Appellant while retrieving her weapon when he suspended her for five (5) days. He denied "lunging" at the Appellant when he approached her to retrieve her weapon. When he approached the Appellant to remove her weapon, Captain Russell testified that he simply stood up from his chair, walked around the desk and removed her weapon, albeit with a brief and minimal catch in the process of removing Ms. James' weapon. He further testified that he asked the Appellant to give him her weapon because he was concerned about there being one live round in Ms. James' weapon. If Captain Russell had concerns about his safety in this regard, it would support the testimony of Lt. Sweeney that the Captain got out of his seat and approached Ms. James somewhat quickly. However, this does not constitute "lunging" at Ms. James. Officer Bergquist testified that he had a similar interaction with Captain Russell on another occasion. However, Officer Bergquist did not file a complaint against Captain Russell.

Captain Russell's testimony is affirmed by the testimony of Lt. Sweeney. Lt. Sweeney testified in a thoughtful and considerate manner. This was reflected in the careful way he responded to questions, taking his time to check his memory, stating honestly if he did not recall. The value of Lt. Sweeney's testimony is enhanced by the nuances of it. While he testified, similarly to Captain Russell about their interactions with Ms. James on June 8, 2012, he added that Ms. James moved slightly when Captain Russell removed her weapon and it was stuck briefly and that Ms. James appeared to be somewhat surprised that Captain Russell was going to

remove her weapon. That detail confirms that, at the most, Ms. James was moved in a minimal manner and was somewhat surprised at the Captain's decision to remove her weapon but those actions do not constitute an assault, lunging, or having her body jerked, as the Appellant alleged at different times.

The testimony of Sgt. Det. Humphreys, Sgt. Det. Gallarelli and Lt. Det. Mahoney was consistent with the findings of their investigations, as noted in the BPD Hearing Officer's Reports. The testimony of Ms. Osorno, Ms. Walsh, and Ms. Tanner, all of the Medical Unit, was professional and consistent and supported by Exhibits entered into the record. Therefore, I find the testimony of these witnesses credible.

Incidents Related to the June 8, 2012 Suspension

It has been established by a preponderance of the evidence that Ms. James' conduct following receipt of the five (5)-day suspension violated the cited BPD policies and/or rules and these violations are grounds for termination. In response to Ms. James' complaint against Captain Russell that she was injured when he removed her weapon on June 8, 2012 and Captain Russell's complaint against Ms. James for her conduct and/or untruthfulness thereafter. IAD conducted two investigations. Both investigations found in favor of Captain Russell and that Ms. James' complaint against Captain Russell was unfounded. In addition, the arbitrator of Ms. James' injured on duty claim, which alleged that she was injured when Captain Russell issued her the five (5)-day suspension, found that Ms. James' representations thereof were not valid. Further, Ms. James' pursuit of a criminal complaint against Captain Russell was unsuccessful when the Clerk Magistrate found, after a hearing at which the Appellant alleged, among other things, that Captain Russell assaulted her on June 8, 2012, that there was no probable cause to issue a criminal complaint against Captain Russell. The Appellant sought judicial review of the

Clerk Magistrate's decision, although none is indicated on the court record provided by the parties. The matter was moved to Charlestown District Court and the parties have not informed the Commission that a criminal complaint has since issued against Captain Russell. In addition, Ms. James did not testify before the Commission and the Commission can and does draw a negative inference in this regard. Ms. James forfeited the opportunity to refute the allegations of the BPD as well as to provide alternate explanations of her actions. As a result of her failure to testify at the hearing, the Commission is left to rely on Ms. James' prior testimony in other fora, which has been found to be inconsistent and/or unreliable.

In the Appellant's post-hearing brief, the Appellant suggests that Ms. James was the victim of a violent assault at the hands of Captain Russell and her statements consist of her perceptions of the incident are not untruthful. Further, Ms. James avers that the disciplinary actions taken against Ms. James are retaliation for Ms. James continuing to pursue criminal charges against Captain Russell and that the burden is on Captain Russell to dispute the charges against him. BPD strenuously denies these allegations and avers that it is the Appellant's own actions that resulted in her termination. In the end, the Appellant's arguments are unpersuasive.

Ms. James spoke to Sgt. Det. Humphreys on June 8, 2012, alleging that she was injured that day in her interaction with Captain Russell. Thereafter, Sgt. Det. Humphreys contacted Ms. James and she indicated a willingness to speak to him. However, Ms. James did not reveal the nature of her allegations to Sgt. Det. Humphreys despite his repeated efforts to obtain this information from her. Although Ms. James would not tell Sgt. Det. Humphreys this information, she filed a police incident report on June 15, 2012 and an application for a criminal complaint against Captain Russell based on her allegations. Captain Russell filed a complaint against Ms. James and two IAD investigations ensued on these matters.

The IAD investigations were completed and both found in favor of Captain Russell and against Ms. James. There is nothing in the record that indicates that BPD did not take Ms. James' allegations against Captain Russell seriously. If anything, the contrary is true. IAD conducted a thorough investigation into her allegations and afforded her considerable leeway in presenting her claims to them. While it seems odd that the BPD would have a Sergeant investigate a Captain, rather than a more senior superior, there were so many proceedings involving these matters that it is hard to imagine that they could have been more thoroughly vetted.

After the IAD investigations were concluded and the local hearings were held, BPD was well within its authority to discipline Ms. James for her untruthfulness and the disruptions her allegations caused the BPD. BPD has a zero tolerance policy for untruthfulness. BPD's rules of conduct and procedure indicate that officers shall conduct themselves in such a manner as to reflect most favorably on the Department and that employees shall on all occasions be civil and respectful towards their supervisors. A preponderance of the evidence establishes that Ms. James violated these rules and procedures when she filed the false reports and falsely testified against Captain Russell.

In addition to having found that the Appellant violated BPD rules and/or polices, the Respondent also alleges that the Appellant violated Massachusetts General Laws by perjuring herself under G.L. c. 268, s. 1 at the Clerk Magistrate's hearing regarding the criminal complaint she sought against Captain Russell, that her filing of a false report of a crime against Captain Russell constituted a violation G.L. c. 269, s. 13, and by filing a false police incident report the Appellant violated G.L. c. 268, s. 6A. There is no indication that the Appellant was charged, prosecuted and convicted of violating these statutes. However, "[i]t is the felonious misconduct,

not a conviction of it, that is determinative.” DiBartolomeo v. City of Revere, 25 MCSR 480 (2012)(citing City of Boston v. Boston Police Patrolmen’s Ass’n., 443. 813, 820 (2005) In addition, in a para-military organization like the BPD and in view of the fact that it is essential for police officers to maintain their credibility through truthful reporting of events, it is within the BPD’s discretion to determine that Ms. James’ actions establish just cause for her termination.

There can be little question that the Appellant’s conduct in providing false reports against Captain Russell and seeking a criminal complaint against him after their interaction on June 8, 2012 constitutes substantial misconduct which adversely affects the public interest by impairing the efficiency of public service. Captain Russell was required to defend himself against Ms. James’ claims and retain counsel in regard to the criminal matter. It also required him to respond to investigators investigating Ms. James’ complaint and report to his superiors what occurred during these events. Following the investigation, BPD held a multiple-day disciplinary hearing, and the BPD Hearing Officer issued reports, based upon which the Police Commissioner decided to terminate Ms. James’ employment. Following BPD’s decision, the Appellant filed the instant appeal. In none of the BPD investigations involved in this case, the BPD Hearing Officer’s reports, or the arbitrator’s decision regarding Ms. James’ injury on duty claim was there a ruling that Ms. James’ claims and complaints concerning her interaction with Captain Russell on June 8, 2012 were valid. In addition, while these processes were on-going, BPPA also filed grievances in two other related matters. The effect of the Appellant’s complaints against Captain Russell and other actions related to her alleged injury on June 8, 2012 are not easily weighed but it most directly affected Captain Russell. Clearly other members of the BPD knew of Ms. James’ false, embarrassing allegations and responding to the allegations likely encumbered a

certain amount of Captain Russell's time and energy, detracting from his ability to respond to the requirements of his position. Similarly, BPD expended considerable time and resources to responding to, and processing Ms. James' complaints, conducting the related investigations and disciplinary hearings, and defending Ms. James' appeals to various fora.²³ There can be no question that the Appellant's false claims that Captain Russell injured her on June 8, 2012 constitute misconduct and that they absorbed significant resources by all involved, adversely affecting the public interest by impairing the efficiency of BPD's public service.

Failure to Submit to Hair Drug Test and Report Change of Address

BPD has shown by a preponderance of the evidence that it had just cause to impose discipline in the form of termination of Ms. James' employment for her failure to submit to a hair drug test and her failure to notify the BPD of her change of address. Under Rule 111, the BPD can issue discipline, up to and including termination of employment, to an officer who fails to provide a hair sample for the annual hair drug test.

There appears to be no question that the Appellant failed to report her change of address to the BPD at all, as required, let alone within twenty-four hours of moving. This issue arose when BPD was investigating Ms. James' repeated failure to appear to submit a hair sample for the annual hair drug test. The address Ms. James provided to BPD on her sworn personnel card was the Quincy address. On July 11, 2013, the BPD Medical Unit mailed the notice for Ms. James' rescheduled hair test appointment on July 17 to her at the Quincy address and the PO Box in Milton. Ms. James asserted that she did not receive this notice until July 22, 2013, which is

²³ At the Commission's hearing, the parties indicated that the Appellant also filed a discrimination claim at the Mass. Commission Against Discrimination against BPD. About the time I was drafting this decision, I called MCAD to find out the status of the Appellant's MCAD claim and was informed that no determinations have been rendered in that cases. In an arbitrator's decision on Ms. James' injured on duty claim, the arbitrator also noted that she had filed for Family Medical Leave (FMLA) but that the paperwork therefor was not "brought to the City's attention until after the asserted period of incapacity has (sic) passed." Exhibit 30, p. 15.

the day that she retrieved it from her P.O. Box. Therefore, she avers, she was not properly notified of this appointment and could not have appeared on July 17. The Appellant testified at an IAD interview that her residence in the summer of 2013 was “in transition”, that because BPD did not place her on paid injured on duty leave she lost her apartment and, therefore, she does not have an address to report. When she was asked at the interview when she moved, Ms. James stated that she did not recall. Given the significance of losing one’s apartment, it is difficult to understand how a person would not recall when that occurred. As discovered at the investigation interview, the address on Ms. James’ driver’s license is the address for her father in Mattapan, not the Appellant’s former apartment address in Quincy. Ms. James asserts that BPD has her father’s address in it emergency contact information and, therefore, it should have mailed her notice to her at her father’s address. It is the job of an officer to provide his or her current address to the BPD. The BPD cannot be expected to contact an officer if he or she fails to provide it with an accurate address. Rule 102 § 7 requires officers to report any change of address within twenty-four (24) hours of moving, which the Appellant did not do. Consequently, the Respondent has proved by a preponderance of the evidence that the Appellant violated the BPD rule requiring officers to inform BPD of a change of address within twenty-four (24) hours, warranting discipline for such a violation.

The Respondent also has established by a preponderance of the evidence that it had just cause to terminate the Appellant’s employment for not providing a hair sample for the 2013 hair drug test. Ms. James avers in this regard that since her birthday is June 29, under BPD Rule 111, she had until Monday, July 29, 2013 to have her hair sample taken for the annual BPD hair drug test. She appeared at BPD on Friday, July 26, 2013 between 6:30 and 7pm without an appointment. The officer there called the Medical Unit to see if someone could take her hair

sample but no one in the Medical Unit answered the phone. The Medical Unit hours of operation in the summer of 2013 were 9:00 a.m. to 5:00 p.m. on Fridays. Ms. James testified in her investigation interview that she was aware that the Medical Unit was sometimes closed in the evenings. On Saturday, July 27, 2013, the Appellant's attorney contacted the BPD Labor Relations Office asking to reschedule the hair sample appointment and was told on Monday, July 29, 2013 that the appointment would not be rescheduled.

By this time, the Appellant had already missed two other appointments. Specifically, in March 2013, Ms. James was in the Medical Unit to see a physician. At the time of her March appointment, she was scheduled for her next medical appointment on June 13 and Ms. James was informed that her hair sample for the hair drug test would be collected the same day, for her convenience and as is the Medical Unit's practice. Ms. James asked for the Medical Unit to send her a notice of these appointments, which the Medical Unit did. Despite having three (3) months' notice, Ms. James failed to appear on June 13. Ms. James' called the Medical Unit and asked to reschedule; her appointment was rescheduled with Ms. James for July 1. Again, Ms. James failed to appear and she called again to ask to reschedule the appointment, also asking if Nicole, a Medical Unit staff person, could take her hair sample since Ms. James had a bad experience with a staff person whom Ms. James alleged was unfamiliar with taking hair samples from female African-American officers with certain hair styles and that Nicole would be able to take the hair sample in an acceptable manner. The Medical Unit staff informed Ms. James that to ensure a valid hair sample, officers are not allowed to select the person who takes their hair sample, that staff are assigned in rotation to take hair samples as officers arrive. As noted above, on July 11, 2013, the Medical Unit mailed the notice of appointment for July 17 to Ms. James. Ms. James did not retrieve the notice from her P.O. Box until July 22, by which time the

Appellant had missed her July 17 appointment. The Appellant argues that she cannot be accountable for missing the July 17 appointment since she did not receive notice of the appointment until thereafter and that BPD was wrong to deprive her of the opportunity to reschedule her hair sample appointment on Monday, July 29. She avers further that on July 3, well before the time period within which to have her hair sample taken, the BPD initiated an investigation into her missed appointments, implying that this evinces the Respondent's bias against her.

The Appellant is mistaken. As noted above, the Appellant had an obligation to inform BPD of her changed address, which she failed to do. Secondly, if the Appellant was relying solely on the PO Box to receive mail, knowing that she was due to give a hair sample within thirty (30) days before and after her June 29 birthday, it was her responsibility to retrieve her mail sooner. Third, even if she was unable to retrieve her mailed notice in a more timely manner, she could have called the Medical Unit to reschedule her appointment when she received the notice on July 22, as she had done twice previously. Instead, on Saturday, July 27, Ms. James' attorney called the BPD Labor Relations Office to reschedule Ms. James' appointment. On Monday, July 29, 2013, Attorney Horwitz was informed by the BPD Labor Relations Office that Ms. James would not be allowed to reschedule her hair sample appointment. The 29th was the last day of the sixty (60)-day time period surrounding her birthday within which she was obliged to provide a hair sample. The BPD indicated that it would not do so. It was within the discretion of the Respondent to determine that the Appellant was given multiple opportunities to provide a hair sample, of which she was fully aware on two occasions, and she failed to appear on each occasion. The Appellant is a seasoned officer with nineteen years of experience. She should have been fully aware of the rules and procedures of

the BPD hair drug testing process and she had successfully submitted hair samples in past years. Had she acted in a more timely manner, as required, the investigation begun on July 3 may have ended differently. For these reasons, BPD had just cause to discipline Ms. James.

In rendering this decision, I have also considered a number of detracting factors. Specifically, the Appellant was off the payroll for approximately two (2) years, during which time the Appellant pursued an injury on duty claim, along with the other reports, claims and/or appeals noted herein. However, I note that the arbitrator found that, in view of BPD's decades old practice of investigating an injured on duty claim asserted after the injury was reportedly sustained, and in view of the very serious allegations against a superior officer, the amount of time involved was not unreasonable. I note that the process was also complicated as Ms. James filed of a number of reports, appeals and/or claims, there were a number of investigations involved, multiple grievances were filed on her behalf, there was an arbitration hearing, and the BPD held local multiple-day hearings regarding the Specifications against Ms. James.

Similarly, I note that BPD began its investigation of Ms. James failure to submit a hair sample approximately two (2) weeks prior to the end of the sixty (60)-day period and that such an investigation was unusual. However, the responsibility falls on the officer to submit a timely hair sample. By July 2, 2013, Ms. James had missed two appointments to submit a hair sample. Further, when Ms. James realized on July 22 that she had missed the third such appointment, she did not call the BPD, as she had done previously, to reschedule the appointment. Rather, she waited until Friday evening of that week to go to the BPD Medical Unit, knowing that on some evenings it would be closed. While there is no limitation in Rule 111 to the number of times an officer can make an appointment to submit a hair sample for the drug test, it was within BPD's

discretion to initiate an investigation with the knowledge that Ms. James had missed multiple scheduled appointments.

I also considered other factors but found that they do not affect the outcome here. Although the five (5)-day suspension issued to Ms. James on June 8, 2012 was ultimately reduced to a verbal reprimand, it was the false claims and reports of Ms. James, her failure to submit a hair sample for the annual drug test as required and her failure to notify the BPD of her changed address that resulted in her termination. In addition, I found it unusual that neither Captain Russell's nor Lt. Sweeney's reports indicated that Captain Russell had removed Ms. James' weapon when Captain Russell issued the five (5)-day suspension to her. Asking an officer to surrender her or his firearm when receiving a suspension would seem to be the normal course. Neither the BPD Hearing Officer's reports nor the arbitrator's decision found it concerning. Based on all of the evidence adduced and the credibility assessments in the case before the Commission, I find that it is more likely than not that, at the time Captain Russell and Lt. Sweeney wrote their reports about the events on June 8, 2012, the events were not sufficiently noteworthy and the lack of such notation in their reports does not affect the outcome. Finally, the BPD termination letter states that each of the specifications sustained against Ms. James provides just cause for termination. While termination of employment for false reports and testimony may be viewed in this manner, it is unclear that Ms. James' violation of either the BPD substance abuse rule or of the change of address rule, individually, would provide just cause for termination. However, the cumulative effect of Ms. James' violations is that BPD had just cause to discipline Ms. James by terminating her employment.

Conclusion

For all of the above-stated reasons, Appellant's appeal under Docket No. D1-15-64 is *denied*.

/s/ Cynthia A. Ittleman

Cynthia A. Ittleman
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan Commissioners) on March 31, 2016.

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

Alan Shapiro, Esq. (for Appellant)
Jennifer Smith, Esq. (for Appellant)
Peter Geraghty, Esq. (for BPD)