

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

DELMONT T. KEYES,
Appellant

v.

D-06-88

CITY OF PITTSFIELD,
Respondent

Appellant's Attorney:

Robert Fuster, Esq.
17 East Housatonic St.
Pittsfield, MA 01201
(413) 499-3100
robertmfustersr@fusterandfuster.com

Respondent's Attorney:

Fernand J. Dupere, Esq.
P.O. Box 373
223 College Highway
Southampton, MA 01073
(413) 527-4716
freddupere@aol.com

Commissioner:

Christopher C. Bowman

PROPOSED DECISION

Pursuant to the provisions of G.L. c. 31, s. 43, the Appellant, Delmont T. Keyes (hereinafter "Keyes" or "Appellant"), is appealing the decision of the City of Pittsfield (hereinafter "City" or "Appointing Authority") to terminate the Appellant's employment as Police Officer for the City of Pittsfield. The appeal was timely filed. A hearing was held on March 7, 2007 at the offices of the Civil Service Commission and on May 22, 2007, May 23, 2007, and July 20, 2007 at the City of Pittsfield City Hall before Commissioner Bowman. As no written notice was received from either party, the hearing was declared private. Ten tapes were made of the hearings. All

witnesses, with the exception of the Appellant, and Anthony Riello, Chief of Police for the Appointing Authority, were sequestered. Both parties submitted post-hearing briefs.

FINDINGS OF FACT:

55 documents were entered into evidence. Upon Appellant's motion, I struck from evidence the following Exhibits as not material to the instant case, Exhibits 23 (portion regarding a "garage" incident), 24, 25 a-d, 26 a and b and 28b as no finding was made against Keyes as a result of the facts alleged or contained therein. Based on the remaining exhibits and the testimony of the following witnesses:

For the Appointing Authority:

- "Officer B", Former Police Officer for the Appointing Authority¹;
- Brian Sayers, Former Police Officer for the Appointing Authority;
- "Officer G", Police Officer for the Appointing Authority;
- "Officer J", Police Officer for the Appointing Authority;
- David Granger, Captain for the Appointing Authority;

For the Appellant:

- Michael McCarthy, Esq., Prior Counsel for the Appellant;
- Gary Herland, Police Officer for the Appointing Authority;
- Mark Lenihan, Sergeant for the Appointing Authority;
- Michael Fitzgerald, Sergeant for the Appointing Authority;
- Michael Winston, Lieutenant for the Appointing Authority;
- Delmont T. Keyes, Appellant;

I make the following findings of facts:

1. Prior to his termination, the Appellant was a tenured civil service employee of the City, and had been employed as an officer for the City since 1988. He was promoted to sergeant in 1999 and was demoted to patrol officer in 2005. (Testimony of Appellant)

¹ The names of three female police officers who testified before the Commission are being withheld for confidentiality reasons given that some of the allegations referred to in their testimony relate to sexual harassment charges. The officers are referred to in this decision as "Officer B"; "Officer G"; and "Officer J" respectively.

2. The Appellant has a bachelors degree in criminal justice. During the course of his employment, the Appellant received an advanced degree in criminal justice, a number of commendations and awards and achieved instructor status in several training categories.
(Testimony of Appellant; Exhibit 52)
3. The Appellant is married and has two young children, ages 5 and 7. (Testimony of Appellant)
4. Prior to his termination, the Appellant was involved in two separate disciplinary actions, both of which, for various reasons, are inexorably tied to the instant appeal.

Prior Disciplinary Action involving former Pittsfield Police Officer Brian Sayers and the SRT

5. In 2003, the Appellant, who was then a sergeant, was serving as Commander of the police department's Special Response Team ("SRT").
6. In October 2003, it was reported by Officer Brian Sayers, a member of the SRT, that Keyes had a conversation with him advising him that some members of the Team were concerned about Sayers' girlfriend, who was suspected of involvement in the local illicit drug trade.
(Testimony of Sayers)
7. According to Sayers, the Appellant made derogatory comments about his girlfriend to him in front of other SRT members. Further, the Appellant informed Sayers that he (Sayers) needed to choose between his girlfriend and being a member of the SRT. (Testimony of Sayers)
8. Keyes made these comments to Sayers despite the fact that the Police Chief had investigated the matter and told the Appellant that Sayers could remain a member of the SRT. (Testimony of Riello)

9. As a result of the above-referenced action by Keyes, the Police Chief removed Keyes as commander of the SRT and replaced him with Lieutenant Michael Winston, an action that was approved by then-Mayor Sara Hathaway. (Testimony of Riello)
10. Mayor Hathaway was defeated for re-election in November 2003, by James M. Ruberto, who took office on January 1, 2004. (Testimony of McCarthy)
11. The head of Mayor Ruberto's City Hall transition team was the father of Sayers' girlfriend, about whom Keyes had made the derogatory remarks. (Testimony of McCarthy)
12. In January 2004, less than two weeks after assuming office, Mayor Ruberto called for a meeting in his office among the parties to the alleged October 2003 conversation, announcing that someone had lied, and that he intended to fire that person. (Testimony of McCarthy)
13. Michel McCarthy, prior counsel for the Appellant, found the Mayor's demeanor and attitude at the meeting to be so biased, that he accused him of prejudging the situation, and requested that the Mayor recuse himself and appoint a "substitute appointing authority for purposes of any further investigation and/or disciplinary action . . .". (Testimony of McCarthy, Exhibit 48)
14. McCarthy's request for recusal was allowed and the investigation proceeded as ordered by the Mayor. (Testimony of McCarthy)
15. Eventually, Keyes and the City, on May 5, 2004, agreed to a discipline which resulted in a three (3) day suspension, in addition to the Chief's previous decision to remove Keyes as commander of the SRT. (Exhibit 49)

Prior Discipline Related to 3 Female Police Officers

16. In April 2005, the Appellant received a ninety (90) work day suspension and was demoted from sergeant to patrol officer due to his creating an openly hostile atmosphere in the

workplace, inappropriate touching of 3 female officers (“Officer B”; “Officer G”; and “Officer J”), and for supervision that was abusive to the officers in question. (Exhibit 44)

17. The Appellant appealed the above-referenced suspension / demotion to an arbitrator. On August 7, 2006, the arbitrator upheld the City’s decision. As part of the arbitrator’s decision, he concluded in part that, “Sergeant Keyes created a hostile atmosphere in the workplace, his style and the content of his supervision was abusive to the officers in question and that the evidence and testimony support the position that he did purposefully harass them because they were women.” (emphasis added) (Exhibit 44)

The Appellant’s Return to Duty in September 2006 as a Demoted Police Officer

18. Prior to the Appellant’s return to duty in September 2006 as a demoted police officer, the three female police officers for whom the Appellant was disciplined for sexually harassing, met with Pittsfield Police Chief Anthony Riello, first as a group, then individually.

(Testimony of Riello)

19. During each of the above-referenced meetings with Chief Riello, all three female officers expressed concern about the Appellant’s return to duty as a police officer. Specifically, they expressed concern about working in the same building as the Appellant, whether or not the Appellant would respond to their calls for back up if needed and/or whether the Appellant might seek to retaliate against them or their families (i.e. – issuing speeding tickets to members of their family). (Testimony of Riello)

20. Chief Riello testified before the Commission that he told the three female police officers that he would order the Appellant to “stay away” from the employees and their families.

(Testimony of Riello)

21. There is no dispute that upon, or shortly after, his return to duty in September 2006, the Appellant met with Chief Riello.
22. Although the Appellant argues in his post-hearing brief that he was never ordered by Chief Riello to stay away from Officer Sayers during the above-referenced meeting, the Appellant's own testimony before the Commission contradicts that proposed finding.
23. According to the *Appellant's* testimony, Chief Riello, during the above-referenced meeting, 1) welcomed the Appellant back; 2) conveyed his concerns; and 3) told the Appellant to have no contact with the three female police officers and Officer Sayers. (emphasis added)
(Testimony of Appellant)
24. Conversely, the Town argues in its post-hearing brief that Chief Riello testified before the Commission that he ordered the Appellant to stay away from said officers and their families. However, a careful review of the taped proceedings before the Commission does not support that proposed finding. Rather, the Chief's testimony regarding his conversation with the Appellant during the above-referenced meeting only references telling the Appellant to stay away from "the witnesses". (Testimony of Chief Riello)
25. Chief Riello testified that he subsequently informed the Department's 3 Lieutenants and 2 Captains (subsequently 3) of the above-referenced "stay away" order and he instructed each of the Captains and Lieutenants to send him an email confirming that the order would be carried out. (Testimony of Riello)
26. Exhibits 45A and 45D are two emails to Chief Riello, one from a Lieutenant O'Brien and the other from a Lieutenant Winston, in which they state their understanding of the Chief's order as it relates to the Appellant's return to duty. (Exhibits 45A and 45D)

27. These two emails do not reference staying away from Officer Sayers and/or members of his family. The emails do, however, shed some light on the specifics of how the Chief planned to *implement* the above-referenced “stay away” order against the Appellant, at least in regard to the three female police officers. (Exhibits 45A and 45D)

28. In her September 19, 2005 email to Chief Riello, Lieutenant O’Brien writes in relevant part,

“I told them [dispatchers and sergeants] that [the Appellant] and [Officer B] should be assigned to different sides of the city and should not back each other up unless it’s an extraordinary circumstance. I also told them that if they observe or learn of any troubling interaction between them, they should immediately file reports through the chain of command. They are also to take appropriate action to address the problem. I told them that if I am not on duty at the time, they should make sure the report gets to the Patrol Captain and the Chief without waiting for me to pass it up the chain of command.

They told me they understood what I had told them.

Over the last 3 days, I have also spoken to [dispatchers] who are assigned to Sq C, as well as [dispatcher] who was working OT one morning.

I ordered them not to send [Officer B] and Keyes to the same call, except for the emergency situation. I also ordered them to file reports of any troubling interaction between them immediately with the Desk Sergeant on duty.

They told me they understood what I had told them.” (Exhibit 45A)

29. In an October 25, 2005 email to Chief Riello, written several weeks after the Appellant’s return, Lieutenant Winston writes in relevant part,

“Re: Off Keyes / [Officer B] Situation:

On 10/4/05, Captain Granger and I spoke to the following dispatchers and sergeants regarding the above. [list of sergeants and dispatchers]

They were given the following instructions:

No calls together while working the same or overlapping shifts.

If working the same shift they are to be assigned opposite sides of the city.

[Officer B] will be given the option of working inside or on the street if she works Squad B.

Lt. Winston and the Squad B sergeants will be responsible for monitoring dispatch should the pair work the same shift.

Any negative interaction occurring between the two should be reported to superior Officers immediately.

The same guidelines are to be followed should [Officer G] or [Officer J] work the shift.

If [Officer J] is working the Big Y detail, Officer Keyes is not to be assigned 302.”
(Exhibit 45D)

Post-Appellant’s Return as a Demoted Police Officer: Two (2) November 2005 Incidents Regarding Officer Sayers and Members of his Family

30. Brian Sayers was hired by the Appointing Authority as a police officer on December 30, 1999 and worked for the Appointing Authority in said capacity for approximately seven years. (Testimony of Sayers)

31. Sayers was appointed as a member of the Police Department’s Special Response Team (SRT) in late 2003 when the Appellant was the SRT’s commander. (Testimony of Sayers)

32. As referenced above, the Appellant was subsequently removed as Commander of the SRT and received a 3-day suspension for an incident that involved Brian Sayers.

I. Arrest of Brian Sayers’ Sister by the Appellant on November 7, 2005

33. On November 7, 2005, a 911 call was received by a dispatcher at the Pittsfield Police Department. The call came from the residence of Officer Sayers’ father, about an “out of control 13 year old female.” (Exhibits 8-10)

34. Keyes was dispatched as the primary officer and Officer Gary Herland as the back-up. The call came from the beat to which Keyes had been assigned. (Testimony of Appellant)

35. Officer Keyes was the first on the scene and Officer Herland arrived moments later.
(Testimony of Appellant)

36. David Sayers introduced himself to the Appellant as Brian Sayers' father and stated that his son, the Pittsfield police officer, had advised him to contact the Pittsfield Police Department for assistance with his daughter. The Appellant never introduced himself to Mr. Sayers as Delmont Keyes. (Testimony of Appellant)
37. According to the Appellant, Mr. Sayers wanted his daughter arrested as a runaway. Again according to the Appellant, the Appellant told Mr. Sayers that he could not arrest his daughter as a runaway as she was present at the home, but that he *could* arrest his daughter if there were allegations of domestic abuse. (Testimony of Appellant)
38. Mr. Sayers then told the Appellant that his daughter had bitten and kicked him. According to the Appellant, Mr. Sayers had evidence of the alleged bite on his arm. Without ever inquiring with the 13-year old daughter, the Appellant proceeded to arrest the 13-year old. The Appellant never informed Mr. Sayers about the option of pursuing a Child in Needs of Services (CHINS) petition or a restraining order. (Testimony of Appellant)
39. Asked by this Commissioner why he didn't turn the matter over to Officer Herland, the backup officer also at the scene when he learned that he was at the home of Brian Sayers' family, the Appellant stated, "because [the Chief's] order was to stay away from [Brian] Sayers, not his family." (Testimony of Appellant)
40. Lt. Michael Winston, the shift commander on the night in question, testified on behalf of the Appellant. Although Winston testified the above-referenced arrest was "appropriate", he also testified that the Appellant should have called him and that the Appellant's actions could be considered a conflict of interest. (Testimony of Winston)
41. The City's hearing officer, as part of a disciplinary hearing regarding this and other incidents relating to the Appellant that resulted in his termination, found that the Appellant should

have “follow[ed] the orders of the Police Chief and stay[ed] away from Sayers and his family thereby eliminating any conflict of interest. (Exhibit 2, Page 16)

42. As referenced above, there is nothing in the record before the Commission, including the testimony of Chief Riello, to show that the Appellant was explicitly ordered to stay away from the family of Brian Sayers. (Testimony of Riello)
43. Based on the Appellant’s own testimony, however, he was ordered by the Chief to stay away from Brian Sayers. (Testimony of Appellant) Given this order, and based on a review of the testimony and exhibits presented before the Commission, I concur with the findings of the City’s hearing officer and find that the Appellant’s arrest of Ms. Sayers on the night in question represented a conflict of interest. The Appellant had ample opportunity to avoid this conflict of interest, including, but not limited to, identifying himself as Delmont Keyes to Mr. Sayers on the night in question and/or turning the matter over to the back-up officer who was on the scene. He chose to do neither and thus created an avoidable conflict of interest, which justifiably formed part of the basis for the City’s decision to terminate him as a police officer.

II. Traffic Stop of Brian Sayers by the Appellant

44. In the early morning hours of November 26, 2005, Keyes was on duty, just finishing his shift, when, while stationary at a red light in his cruiser, he observed a motor vehicle coming toward him in the opposite direction at a high rate of speed. (Testimony Keyes)
45. It is in dispute whether or not the Appellant knew at the time that the vehicle in question was being driven by (off-duty) police officer Brian Sayers.
46. Based on the testimony of the Appellant and Brian Sayers, I am unable to find whether the Appellant was aware that the driver of the vehicle in question that night was off-duty police

officer Brian Sayers. Based on their testimony, however, I do find that Brian Sayers was travelling at a high rate of speed on the night in question, far in excess of the posted speed limit of 30 MPH.

47. It is undisputed that Keyes pursued the offending vehicle, followed the car into a parking lot, and turned his cruiser so that the vehicles were facing each other. It is also undisputed that, at this point, while in the parking lot, Keyes was aware that the driver of the vehicle was Brian Sayers. (Testimony of Appellant and Sayers)
48. Keyes subsequently pulled up to the driver's side of Sayers' vehicle. (Testimony of Appellant and Sayers)
49. According to Sayers, the Appellant sat there and stared at him for a short time, then asked him: a) where he was going; b) why he was driving so fast; and c) how much alcohol he had to drink that night. When the Appellant, who does not drink, told Keyes that he had not had any alcohol to drink, the Appellant then asked Sayers if he was "sure" he hadn't consumed too much alcohol to drive. Sayers then protested to the Appellant that it was common knowledge in the Pittsfield Police Department that Sayers does not drink. (Testimony of Sayers)
50. Keyes did not call in the stop to the station or otherwise log-in the stop. (Testimony of Keyes, Granger)
51. Regarding this incident, the City's hearing officer found that: "a) Keyes should have removed himself from this case as he had a conflict of interest; and b) Keyes violated an order of the Police Chief to call in all motor vehicles stops to dispatch. Further, the City's hearing officer found that, "Keyes did not have a reasonable suspicion that Sayers had been drinking" and that Keyes violated the Rules and Regulations of the Pittsfield Police

Department by acting to discredit another officer (i.e. implying that Sayers was driving drunk). (Exhibit 2; Pages 16 and 18)

52. Every police officer who testified before the Commission testified that the routine and customary practice when a stop is made on a fellow police officer, is to show professional courtesy and not call in the stop. As such, unlike the City's hearing officer, I am unable to find that Keyes violated an order to call in all motor vehicle stops on the night in question.
53. I do find, however, that Keyes did indeed act to discredit another police officer, and created yet another conflict of interest, by implying, without any evidence or reasonable suspicion, that Sayers had been drinking on the night in question. I base this finding on the testimony before the Commission by both the Appellant and Brian Sayers.
54. Although I found it troubling that Brian Sayers refused to acknowledge that he was speeding on the night in question, I found his overall testimony before the Commission to be credible. Specifically, I believe his testimony that the Appellant twice inquired whether Sayers had been drinking on the night in question even though there was no evidence or reasonable suspicion to suggest this was the case. (Testimony, demeanor of Sayers)
55. Much like the entirety of his testimony before the Commission discussed later in this decision, I found the Appellant's testimony to be less than forthcoming regarding this incident, as well as the previous incident involving the arrest of Officer Sayers' sister. Specifically, the Appellant suggests that his actions were nothing more than a "by the book" officer, untainted by the prior disciplinary actions against him and/or the role that particular individuals had in those disciplinary proceedings. Based on his own testimony before the Commission, the Appellant acknowledged that it is not his practice to ask every driver pulled over for speeding if they haven been drinking. Further, the Appellant acknowledges that he

did not smell alcohol on Sayers' breath on the night in question; he did not notice if Sayers had blood-shot eyes; and/or whether Sayers had any signs that would indicate that Sayers had consumed alcohol. I find that the Appellant's actions were retaliatory in direct response to the role that Brian Sayers played in the discipline which led to the Appellant's prior 3-day suspension and the Appellant's removal as commander of the City's Special Response Team.

Post-Appellant's Return as a Demoted Police Officer: Incidents Regarding Three Female Officers who were Complainants in Prior Disciplinary Action Against Appellant that resulted in his demotion / suspension

56. After the Police Chief became aware of the above-referenced traffic stop and the prior arrest involving Sayers' sister, he ordered Captain Granger of the Pittsfield Police Department to conduct an investigation of these matters, which was completed by Captain Granger approximately 1 ½ weeks later. Based on Captain Granger's findings regarding the Sayers' incidents, in addition to a new complaint by Officer B regarding an incident regarding shift bidding (described below), Chief Riello asked Captain Granger to expand his investigation to determine if Keyes had violated any other aspects of his verbal order as they pertained to the three female police officers. (Testimony of Granger)

57. As part of Captain Granger's investigation, he interviewed the three female officers who were the complainants in the prior disciplinary action against the Appellant. He interviewed them to determine if Keyes had violated other aspects of Chief Riello's above-referenced "stay-away" order. (Testimony of Granger)

58. All three female officers ("Officer B"; "Officer G"; "Officer J") testified before the Commission regarding incidents involving the Appellant that occurred subsequent to his return as a patrol officer.

I. Allegations of “Officer B”

59. Officer B was a police officer for the City from approximately November of 2002 to April of 2006. She is no longer employed by the City, but is still employed in a law enforcement-related career for another employer. (Testimony of Officer B)
60. As part of the Appellant’s prior demotion / suspension, which was upheld by an arbitrator, Officer B made allegations against Keyes regarding inappropriate touching, including putting his hand on top of her hand, putting his hand on her shoulder, putting his hand on her waist and putting his hand on her buttocks. In addition, Officer B alleged that Keyes had pointed his finger directly in her face and had backed her into a corner. Lastly, Officer B alleged that the Appellant had gone to her home while he was on duty and pulled into her driveway for no reason when she was home. (Testimony of Officer B)
61. Officer B was a credible witness. She offered candid, straightforward answers to all questions posed to her. Further, even though it has been determined that the Appellant previously harassed Officer B, she never sought to overreach when answering questions about the Appellant’s actions. Officer B had a calm demeanor while testifying before the Commission and her answers, both during direct and cross-examination, were consistent with the documentary evidence entered into the record in this case. (Testimony, Demeanor of Officer B)

Shift-Bid Allegation of Officer B

62. When Keyes returned from the suspension due to said incidents, Keyes chose to work the 4:00 p.m. to 12:30 a.m. shift. (Testimony of Appellant)
63. Chief Riello gave Officer B the option to work the 8:00 a.m. to 4:30 p.m. day shift or the midnight to 8:00 a.m. shift in an attempt to make Officer B comfortable continuing to work

with the City after Keyes returned from his suspension. Officer B decided to work the day shift. (Testimony of Officer B)

64. A shift bid list is posted annually, and employees of the police department were required to sign their names to the particular shift they wish to work no later than December 19, 2005. (Testimony of Officer B)

65. Officer B stated to Patrol Captain Granger that she did not wish to be on the same shift as Keyes and that she wished to choose a shift after Keyes had chosen his shift. (Testimony of Officer B)

66. Patrol Captain Granger told Officer B that she could bid the day after the deadline for signing the shift bid list (i.e., December 20). (Testimony of Officer B)

67. Keyes did not sign the shift bid list until the night of December 19 after he was ordered to bid. (Testimony of Officer B)

68. Keyes chose the 4:00 p.m. to midnight shift. (Testimony of Officer B)

69. Officer B saw Keyes' bid, and she bid the 8:00 a.m. to 4:00 p.m. day shift. (Testimony of Officer B)

70. Keyes testified that he waited to bid for two reasons (1) he wanted to bid opposite Officer B and (2) if he was successful in the Arbitration (which decision had not yet been rendered), he wanted to bid his prior shift of 8:00 a.m. - 4:30 p.m. (Testimony of Keyes, see also, Exhibit 4, p. 10 regarding a rebid if Keyes was reinstated as Sergeant).

71. In regard to this shift bid incident, the City's hearing officer found that, "it is more likely than not that Keyes may have been engaging in intimidating behavior against [Officer B]." (emphasis added) (Exhibit 2, Page 16)

72. Based on the evidence and testimony presented before the Commission, however, I am unable to find that Keyes' action regarding the shift bid list constituted intimidating behavior. Keyes, like all other officers, had until December 19, 2005, to sign the shift bid list. From the outset, it was agreed that Officer B would be able to bid the day after, on December 20, 2005. The Appellant submitted his bid on December 19, 2005 and Officer B submitted her bid for an opposite shift the day after. The Appellant was never ordered to submit his bid earlier and, other than speculation, there is nothing to suggest that his waiting until December 19th to submit his bid was meant to intimidate Officer B.

Spare Key to Cruiser Incident involving Officer B

73. There were four primary beats on the day shift during 2005. As referenced above, Officer B went to the day shift in the middle of 2005 due to the issues with Keyes, so she was not assigned one of the four primary beats. Instead, Officer B would find out her assignment the day before or the day of the shift. (Testimony of Officer B)

74. The officers working the four primary beats were assigned a specific cruiser. Officer B would look for a backup cruiser each day as she was not assigned to a specific cruiser. (Testimony of Officer B)

75. There was a cruiser keyboard, which had two sets of keys for each backup cruiser. Each officer was given a blue peg which had the officer's number and name attached. An officer wishing to take a backup cruiser would take a set of keys from the key board for the backup cruiser, and place the blue peg on the corresponding place on the key board. (Testimony of Officer B)

76. It is undisputed that an officer coming onto a shift (i.e. – Keyes coming onto his shift at 4:00 P.M.) would be aware, via this keyboard system, who had been assigned to the cruiser on the

most recently completed shift (i.e. – Officer B leaving her shift at 4:00 P.M.) (Testimony of Appellant and Officer B)

77. Officer B testified that on up to 5 occasions, Keyes, arriving for his 4:00 P.M. shift, took the second set of keys to the cruiser she had just used. (Testimony of Brown)

78. On one occasion after the Appellant's return as a patrol officer in 2005, Officer B had a late arrest (i.e., after 3:00 p.m.) that occurred toward the end of her shift. When Officer B returned to the station with the prisoner, she left all of her belongings in the cruiser and brought the prisoner into the station. Processing the prisoner took her past 4:00 p.m. (Testimony of Officer B)

79. At some point while Officer B was processing the prisoner on the day in question, she became aware that the Appellant had taken the second set of keys for the cruiser to which she was assigned but had not yet removed her gear. (Testimony of Officer B)

80. Officer B asked someone to take custody of her prisoner while she went to get her gear out of the cruiser. Nobody was in the cruiser at the time and Officer B removed her gear without incident. (Testimony of Officer B)

81. In regard to this incident, and up to five other occasions in which the Appellant allegedly took the same cruiser that had been assigned to Officer B on the previous shift, the City's hearing officer found that, "in light of the fact that Keyes was ordered to stay away from Brown and that by using Brown's key to the backup cruiser he creates the potential for contact, I am of the opinion that it is more likely than not that Keyes is acting to intimidate Brown, or at least create an uncomfortable situation for her." (Exhibit 2, pp. 16-17)

82. Based on a review of the testimony and exhibits at the Commission hearing, I find that the Appellant did indeed violate the Chief's no contact order in regard to the above-referenced

incident(s). Notwithstanding the previously referenced dispute regarding the scope of Chief Riello's "stay-away" order, there is no dispute that the Appellant repeatedly assured Chief Riello that there would be no problem in regard to the Chief's order to stay away from the three female complainants involved in his prior discipline. Yet, despite these repeated assurances to Chief Riello, the Appellant, in this case, never took any action to avoid such contact. Upon discovering, via the keyboard system, that the cruiser assigned to him was still in use by Officer B, the Appellant did not seek to be assigned to another cruiser. I find that the Appellant made this decision fully aware that it would create an uncomfortable work environment for Officer B

Garage Incident involving Officer B

83. In December 2005, Officer B had another incident involving the Appellant where she arrived to the station after 4:00 p.m. She went into the dispatch area at 4:42 P.M. and inquired with the dispatcher about an accident report. Officer B then went downstairs to change.

(Testimony of Officer B)

84. Officer Keyes, who was assigned to the next shift, was waiting to use the same cruiser that had been used by Officer B. (Testimony of Granger)

85. It is not in dispute that Keyes was in the dispatch room at 4:42 P.M., saw Officer B return, and hence, was aware that the cruiser he was going to drive that night was now available.

(Testimony of Keyes and Officer B)

86. According to the dispatch log, Keyes was dispatched to a call at exactly 4:42 P.M. regarding a "cat stuck in a sub floor". (Testimony of Granger and Exhibit 22)

87. Officer B proceeded downstairs to change out of her uniform. After approximately 10 – 15 minutes, Officer B, accompanied by Captain Granger, walked outside toward the parking

garage. Keyes, despite having been dispatched to a call 10-15 minutes earlier, was still sitting in the cruiser right next to the exit on School Street. Keyes then exited the cruiser and went back into the building. (Testimony of Officer B and Captain Granger)

88. In regard to this garage incident, the City's hearing officer found that, "I am of the opinion that there was no reason for Keyes to wait for [Officer B] to leave, especially since he knew the he was ordered to stay away from [Officer B]". Further, the City's hearing officer found that, "Keyes was acting in a manner to intimate [Officer B]". (Exhibit 2, page 17)

89. At the hearing before the Commission, the Appellant had no recollection as to why, after having been dispatched 10-15 minutes earlier, he was still sitting in the cruiser near the exit of the police station and/or why he went back into the police station after Officer B exited on the day in question. (Testimony of Appellant)

90. Based on a review of the testimony and exhibits at the Commission hearing, I find, similar to the above-referenced keyboard incident, that the Appellant did indeed violate the Chief's no-contact order in regard to the garage incident. The Appellant, in this incident, witnessed Officer B return to the police station at 4:42 P.M. At the same time, he was dispatched to a call. By any reasonable standard, the Appellant, in order to ensure compliance with the Chief's stay-away order, should have promptly taken the call and left the building. This would have avoided any further contact with Officer B during the change-over time in which officers return to the station, change into civilian clothes and leave the building. Instead, for reasons the Appellant was unable to explain, he waited 10-15 minutes before responding to the call and sat in his cruiser outside the employee exit until Officer B exited. Based on a review of the testimony of both the Appellant and Officer B, I find that the Appellant intimidated Officer B on the day in question, thus violating the Chief's order.

II. Allegations of “Officer J”

91. Officer J has been a police officer for the Appointing Authority for over six years. As part of the Appellant’s prior demotion / suspension, which was upheld by an arbitrator, Officer J made allegations against Keyes alleging that Keyes came up behind Officer J at the scene of a motor vehicle accident and, without her permission, grabbed her by her belt with his hands between her shirt and the inside of her pants. As part of this prior disciplinary matter, Officer J also alleged that Keyes screamed and yelled in her face on two different occasions.

(Testimony of Officer J)

92. Officer J was noticeably nervous while testifying before the Commission. She was fidgety, yawned repeatedly and appeared uncomfortable. I attributed her nervousness, however, primarily to the fact that she was once again being called to testify in the presence of the Appellant who had previously harassed her. Her testimony, however, much like Officer B, was straightforward and consistent. She candidly acknowledged that there was no physical contact or verbal exchanges with the Appellant upon his return, even knowing that this answer may not be helpful to the City’s case against the Appellant. (Testimony, Demeanor of Officer J)

Post-Appellant’s Return: Incidents involving Officer J

93. In the Fall of 2005, Officer J was walking up the stairs at work with her duty bag. Keyes was standing at the top of the stairs in between a garbage barrel and the railing. Keyes was staring down at Officer J. Due to where Keyes was standing, Officer J could not get between Keyes and the garbage barrel without bumping her duty bag into Keyes. (Testimony of Officer J)

94. There were also two other incidents on the stairs where Keyes was standing at the top of

the stairs staring at Officer J, and Officer J had to turn sideways to get past Keyes.

(Testimony of Officer J)

95. On another occasion, Officer J was assigned to the front desk. There is a half door to enter the area where the front desk is located. (Testimony of Officer J; Exhibits 42 & 43)

Keyes was standing in the doorway to the room, staring at Officer J. Officer J looked up at him, and Keyes continued to stare at Officer J for approximately a minute. Officer J looked down and went back to work. On two occasions, Keyes entered the room, and walked directly behind where Officer J was sitting. Officer J did not see Keyes performing any work related task while in the room and did not speak with anyone in the room. (Testimony of Officer J)

96. Asked at the Commission if he would behave the same way today in light of Riello's orders, Keyes stated he would still go into the dispatch room if the female officers were in the room because Chief Riello didn't say "don't go into a room or don't do your job". In response to this Commissioner's question regarding what Keyes felt would be appropriate in light of Riello's order if he was at the top of the stairs while one of the 3 female officers was walking up the stairs with a bag on her shoulder, Keyes stated he would "not say a word and make sure there was sufficient room for her to pass", but he would not leave the hallway. Keyes disagreed that he should have to do everything possible to stay away from the female officers in question in light of the Chief's order. (Testimony of Appellant)

97. The City's hearing officer, as part of a disciplinary hearing regarding this and other incidents relating to the Appellant that resulted in his termination, found that it was "more likely than not" that the Appellant was "acting in a manner so as to intimidate [Officer J]" in regard to the above-referenced incidents involving the stairwell and staring at her. According

to the hearing officer's findings, the Appellant "acted in a manner that evidences a pattern of intimidation against [Officer JJ]". (Exhibit 2, Page 17)

98. I find that the Appellant violated the Chief's no-contact order in regard to the staring and stairwell incidents related to Officer J. Specifically, I find that the Appellant created a hostile work environment in regard to the above-referenced incidents and, through his actions, he intimidated Officer J. I base this finding primarily on Officer J's credible testimony before the Commission. Moreover, I base this on the Appellant's testimony in which, even several months after the incidents in question, he misconstrues the nature of the Chief's order ordering him to stay away from the female officers in question.

III. Allegations of "Officer G"

99. Officer G has been a police officer for the Appointing Authority for approximately seven years. As part of the Appellant's prior demotion / suspension, which was upheld by an arbitrator, Officer G made allegations against Keyes alleging that Keyes squeezed her shoulder without her permission on one occasion, grabbed both her shoulders without her permission on another occasion and screamed at her on two other occasions. (Testimony of Officer G)
100. Officer G was a credible witness. Although her testimony before the Commission was limited, none of her answers appeared to be geared toward portraying the Appellant in a bad light. Rather, she listened to the questions carefully and offered consistent and plausible answers. (Testimony, demeanor of Officer G)
101. On January 12, 2006, after Keyes' return, Officer G had locked herself out of the training room. Therefore, Officer G was rushing to prepare for the training session. Keyes was standing at the top of the stairs and Officer G went past Keyes to go down the stairs.

Keyes started to go down the stairs and stayed side by side with Officer G. Officer G tried to go faster, almost to the point of running but Keyes stayed right by her side.

(Testimony of Officer G)

102. The City's hearing officer, as part of a disciplinary hearing relating to this and other incidents regarding the Appellant that resulted in his termination, found that "Keyes should have complied with the Chief's order and removed himself from the situation, i.e. back up and allow her to pass. Keyes' failure to do so causes me to opine that he intentionally blocked the stairwell in order to intimidate [Officer G]." (Exhibit 2, Page 18)

103. The Appellant testified that had no recollection of the above-referenced stairwell incident involving

Officer G. (Testimony of Appellant)

104. Having found Officer G to be a credible witness, I find that the Appellant did indeed follow her down the stairs on the day in question and intimidated Officer G.

Discipline of Other Officers

105. The record was left open for the City to provide information relative to the City's prior discipline of other police officers for the preceding ten (10) year period. That information was subsequently entered as Exhibit 54. (Exhibit 54)

106. In the past ten years, there have been four (4) terminations as a result of misconduct involving police officers in the City of Pittsfield including:

Officer 1: inappropriate physical and verbal contact with a civilian at her residence, while on duty, including criminal conduct and filing false reports;

Officer 2: creating a fictitious person to complain about police actions, having a criminal complaint issued against him, filing false reports and myriad other violations;

Officer 3: failure to follow direct orders on thirteen (13) occasions; and

Officer 4: charged with Domestic Assault and Battery on his wife.

(Exhibit 54)

107. During Riello's tenure as Chief, approximately six (6) members of the department have been suspended. (Testimony of Riello)

Other Findings and Credibility Assessments

108. Chief Riello was a credible witness. He did not attempt to couch his testimony in order to paint the Appellant in a negative light. Rather, he acknowledged the prior positive contributions of the Appellant and appeared to sincerely regret that the Appellant failed to comply with his orders. Moreover, I found that Chief Riello had no ulterior motive beyond the best interests of the Pittsfield Police Department. (Testimony, demeanor of Chief Riello)
109. In his post-hearing brief and throughout the hearing before the Commission, the Appellant argued that Captain David Granger, who was the lead investigator, was biased and that he was predisposed to make negative findings about the Appellant. It is clear that Captain Granger has ruffled some feathers within the Pittsfield Police Department, including Lt. Winston, who testified on behalf of the Appellant. Winston testified that Captain Granger, during his investigation, had "railroaded" the Appellant. Lt. Winston's conclusion, however, appears to be driven more by his personal animosity for Captain Granger, testifying before the Commission that, "from day one, Granger has been critical of me (Winston)". While I did not find that Captain Granger was biased, I gave far

more weight to the testimony of Officer Sayers and the three female complainants, simply because they were the percipient witnesses whom the Appellant was ordered to stay away from. (Testimony, demeanor of Captain Granger)

110. In regard to the Appellant, I had the opportunity to observe his demeanor during his testimony, which was completed over a two-day period. Further, I also observed his demeanor over a period of four days of hearings, one day of which took place at the offices of the Commission in Boston and three of which took place at Pittsfield City Hall, directly behind the Pittsfield Police Department. On each day, Mr. Keyes was always the first to arrive for the hearing, appearing well-dressed, polite and respectful. When listening to others testify, the Appellant maintained an intensely serious, pensive demeanor. Next to his family, it is clear that a career in law enforcement is paramount to the Appellant. He has both a bachelors and masters degree in criminal justice and speaks with pride about his service as a police officer. He also appears to have developed core friendships among the ranks of the Pittsfield Police Department. (Testimony, Demeanor of Appellant)
111. During his testimony, however, the Appellant displayed a disturbing inability to comprehend the consequences of his actions. Despite the unequivocal conclusion of an arbitrator in a prior disciplinary proceeding that the Appellant had harassed three female officers and despite listening to these same female officers offer credible testimony before the Commission that they felt intimidated by the actions of the Appellant upon his return, Mr. Keyes continues to believe he has done nothing wrong. He blames the victims for trying to “ruin his life”; complains that he has never had the opportunity to state his case directly to the female officers; and, remarkably, suggested that, should he

be reinstated as a police officer by the Commission, he should be granted the opportunity to state his case to them via an in-person meeting immediately upon his return. This ethical blind spot was apparent throughout the Appellant's testimony before the Commission and tainted almost all of his answers as he was unable to acknowledge that his actions were intimidating to the three female officers in question. (Testimony, Demeanor of Appellant)

CONCLUSION:

The role of the Civil Service Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300,304 (1997). See Town of Watertown v. Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995); Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is "justified" when 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." Id. at 304, quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of 44444by impairing the efficiency of public service." Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Committee of Brockton v. Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997). The Appointing Authority's burden of proof is one of a preponderance of the evidence which is satisfied "if it is made to appear more likely or probable

in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there.” Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956). In reviewing an appeal under G.L. c. 31, §43, if the Commission finds by a preponderance of the evidence that there was just cause for an action taken against an Appellant, the Commission shall affirm the action of the Appointing Authority. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 800 (2004).

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision." Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). See Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003). Furthermore, it is the function of the Commission to determine the credibility of testimony presented before it and what degree of credibility should be attached to a witnesses testimony. See School Committee of Wellesley v. Labor Relations Commission, 376 Mass. 112, 120 (1978); Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission, 401 Mass. 526 529 (1988); Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 141 (1997). The hearing officer must provide an analysis as to how credibility is apportioned amongst witnesses. Herridge v. Board of Registration in Medicine, 420 Mass. 154, 165 (1995).

The Appellant has shown a history of intimidating, inappropriate and harassing behavior. During his tenure as a police officer in the City of Pittsfield, the Appellant has received two (2) serious disciplines for said behavior, including a ninety-(90) day suspension and a demotion from sergeant to patrol officer.

In the instant case, there were numerous incidents which all relate to the Appellant resuming his intimidating, inappropriate and harassing behavior upon his return to work from the above-referenced 90-day suspension. By a preponderance of the evidence, the City has shown that Delmont Keyes, upon his return, knowingly acted in a manner to intimidate those police officers who had testified against him in previous disciplinary matters. In doing so, he violated the orders of Pittsfield Police Chief Anthony Riello; engaged in substantial misconduct which adversely affects the public interest; and showed that he is not fit to be a police officer in the Pittsfield Police Department.

In all matters, the Commission is charged with ensuring that decisions made by Appointing Authorities are consistent with basic merit principles and free of political or personal bias. I listened carefully to the testimony regarding the actions of Pittsfield Mayor James Ruberto and his involvement with disciplinary matters pertaining to Delmont Keyes. Based on a review of the credible testimony of Michael McCarthy, former attorney for the Appellant, I conclude that Mayor Ruberto, based on factors other than basic merit principles, sought to terminate Delmont Keyes shortly after Mr. Ruberto became mayor in January 2004. Fortunately, however, Mayor Ruberto subsequently decided to recuse himself in January 2004 and the matter was settled by the parties. The question before the Commission, however, is whether or not the decision to terminate the Appellant two years later was based on political and/or personal bias. Based on a review of all of the testimony and exhibits, I conclude that the 2006 termination was not influenced by political or personal bias by Mayor Ruberto. I base this conclusion on the fact that Mayor Ruberto had virtually no involvement in either the subsequent ninety (90) day suspension and demotion, or the instant termination. The hearing officer in both cases was Assistant City Solicitor, Kathleen Degnan, and the Mayor merely adopted her findings. Further, the prior

demotion and ninety (90) day suspension and demotion was upheld by an arbitrator. Had Mayor Ruberto continued to be predisposed to terminating the Appellant, he could have done so in 2005, instead of adopting the recommendation of the City's hearing officer to demote the Appellant and suspend him for 90 days.

Having concluded that the Appellant engaged in much of the conduct that led to his termination, the question before the Commission is whether the City had reasonable justification to terminate the Appellant in this case. If the Commission decides to modify a penalty, it must provide explanation of its reasons for so doing, because a decision to modify shall be reversible if unsupported by the facts or based upon an incorrect conclusion of law. Faria v. Third Bristol Division of the Dist. Ct. Dep. 14 Mass. App. Ct. 985, 987 (1982). Police Commissioner of Boston v. Civil Service Commission. 39 Mass. App. Ct. 594, 602 (1996). When the Commission modifies an action taken by the Appointing Authority, it must remember that the power to modify penalties is granted to ensure that employees are treated in a uniform and equitable manner, in accordance with the need to protect employees from inappropriate actions such as partisan political control. Id. at 600. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 801 (2000).

The prior disciplinary records of the City indicate that terminating Keyes for his prior conduct with the female officers, rather than demoting and suspending him for 90 day, would have been consistent with prior terminations in the City. (Exhibit 54; officer terminated for inappropriate physical and verbal contact). Keyes' prior actions, which resulted in the ninety-(90) day suspension and demotion to patrol officer, were serious and consistent with the allegations currently against Keyes. Instead of terminating Keyes due to his previous serious infractions, the City demonstrated leniency and determined to give Keyes a last chance to

maintain his employment with the City. Chief Riello ensured that Keyes would have as little contact as possible with the witnesses, and informed Keyes that he could go to him if he had any issues or concerns. It appears that the City made every attempt to allow Keyes to continue his employment with the City. Keyes failed to take advantage of said opportunity, and instead used almost every opportunity available to intimidate and harass fellow officers.

The City of Pittsfield has proven, by a preponderance of the evidence, that it had just cause for terminating Delmont Keys from the Pittsfield Police Department and there is no evidence in the instant matter of inappropriate motivations or objectives that would warrant the Commission modifying the discipline imposed upon him.

For all of the above reasons, the Appellant's appeal under Docket No. D-06-88 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman
Chairman

By a 4-1 vote of the Civil Service Commission (Bowman, Chairman-YES; Guerin, Commissioner- YES; Henderson, Commissioner – NO; Marquis, Commissioner – YES; and Taylor, Commissioner - YES) on January 31, 2008.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or 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.

Notice:

Fernand J. Dupere, Esq. (for Appointing Authority)

Robert Fuster, Esq. (for Appellant)