

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

RAYMOND ORR,
Appellant

v.

D-03-307

TOWN OF CARVER,
Respondent

Appellant's Attorneys:

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Hearing Officer:

John J. Guerin, Jr.¹

DECISION

Pursuant to G.L. c. 31, § 43, the Appellant, Raymond Orr, (hereinafter "Orr" or "Appellant"), filed this appeal with the Civil Service Commission (hereinafter "Commission") of an action taken by the Respondent, the Town of Carver (hereinafter "the Town" or "Respondent") as Appointing Authority, demoting him from the position of police sergeant to police officer. The appeal was timely filed.

¹ John J. Guerin, Jr., a Commissioner at the time of the full hearing, served as the hearing officer. His term on the Commission has since expired. Subsequent to leaving the Commission, however, Mr. Guerin was authorized to draft this decision, including the referenced credibility assessments, which were made by Mr. Guerin.

The Commission held a Full Hearing on April 3, June 4, June 22, and November 27-29, 2007. At the Appellant's request, the hearings were declared public. The witnesses were sequestered. The Appellant filed a Motion in Limine seeking to have the Commission adopt the preliminary findings of a Labor Relations Commission hearing officer in Raymond A. Orr v. Town of Carver, Docket Number MUP-03-3894. The Respondent opposed the motion, the motion was not allowed. The Commission made thirteen (13) audiotapes of the hearings. The record of the hearings was also transcribed and those transcriptions serve as the official record of this appeal. The parties submitted Proposed Decisions.

FINDINGS OF FACT:

Based upon the documents entered into evidence (Joint Exhibits [JE] 1 – 11, Appointing Authority's [AA's] Exhibits 1 – 17, Appellant's [APP's] Exhibits 1 - 12 and the testimony of:

For the Appointing Authority:

- Former Carver Chief of Police Diane Skoog
- Officer Anthony Luca
- Officer David Zadok
- Officer Kathleen Englehart
- Sergeant Michael Miksch
- Former Carver Officer John Mulready

For the Appellant:

- Plympton Deputy Fire Chief Donald Vautrinot
- The Appellant

I make the following findings of fact:

- 1) At all times and during all events relative to this matter, the five-member Board of Selectmen for the Town was the employer and Appointing Authority. (Stipulated Fact)
- 2) The Appellant is a tenured civil service employee employed by the Town. At the time of the incident, the Appellant was the senior Sergeant in the Carver Police Department ("Department"). (Id.)

- 3) The Town employed the Appellant as a part-time police officer in 1984 and hired him as a full-time patrolman in 1988. The Town promoted him to Sergeant on September 2, 1990. The Appellant became the senior Sergeant in 1995. (Id.)
- 4) In 1997, the Appellant's right hand was injured by a tractor-trailer while working a detail. After fighting involuntary retirement due to the injury, he was able to return to work three (3) years later. (Testimony of Appellant)
- 5) On December 18, 2001, the Appellant was suspended for one day for posting an editorial cartoon on the Union bulletin board in the police station, depicting three (3) officers and then-Police Chief Diane Skoog (hereinafter "Chief Skoog") as Osama Bin Laden and three (3) devil caricatures. After a full hearing on March 11, 2003, this Commission upheld the suspension by decision. Orr v. Carver, 19 MCSR 168. (JE 11)
- 6) On or about October 6, 2000, Carver Police Officer John Mulready (hereinafter "Mulready") issued a criminal citation to fellow Officer David Zadok's (hereinafter "Zadok") son for driving over 50 m.p.h. in a 20 m.p.h zone and for operating a motor vehicle to endanger. The next day, Mulready reduced the ticket to a civil citation because Sergeant Michael O'Donnell (hereinafter "O'Donnell") "instructed" him to "think very hard on the fact of issuing a criminal citation against a fellow officer's son." (APP's Exhibits 2 and 3, Testimony of Mulready and Zadok)
- 7) This incident opened a fissure within the Union that would eventually divide its membership. (Testimony of Appellant)

The Fall 2000/January 2001 Union Meeting

- 8) Within a month or two of the citation being issued, the Union held a meeting at Officer David Harriman's (hereinafter "Harriman") house.² The meeting was attended by the Appellant, Officer Kathleen Englehart (hereinafter "Englehart"), Harriman, Officer Anthony Luca (hereinafter "Luca"), Officer Michael Miksch (hereinafter "Miksch") and Zadok. Mulready was not present. During the meeting, Englehart raised the issue of the ticket. At the time of the meeting, Zadok and Englehart were involved in a romantic relationship, common knowledge within the Department. (Testimony of Zadok)
- 9) Englehart was upset, believing that the criminal citation was not justified, and that Mulready had written the citation due a personal vendetta. During her remarks, she referred to Mulready as "a piece of shit." The Appellant laughed, put his arm around Englehart's shoulder and stated, "You go girl. Tell it like it is. Tell me John is not a piece of shit and he doesn't have a personal vendetta against Zadok." The Appellant did not admonish Englehart or indicate in any way that he considered her comments abusive or inappropriate in any manner. (Testimony of Englehart)
- 10) Englehart has been a Carver police officer since July 2000. She transferred to the Department after six (6) years of service as a permanent full-time officer with the New Bedford Police Department. Zadok and Englehart have been married since September 19, 2003. (Testimony of Englehart and Zadok)
- 11) This was Englehart's first Union meeting as a Carver Police Officer. (Testimony of Englehart)

² Some testimonial accounts placed this meeting in the Fall of 2000 and others indicated that the meeting was held in January 2001. Regardless, it is clear from the record that the meeting was convened *after* Mulready issued, and then reduced, the citation to Zadok's son.

- 12) Zadok has been a Carver Police officer since 1986 and a detective since 1995. He has been an active member of the Carver Police Union for many years, serving as both an officer and a union steward. (Testimony of Zadok)
- 13) Mulready was employed as a Carver police officer from October 1994 until May 2005, and is currently a police officer for the Town of Plympton. He served as union president in 2001. During his employment in Carver, Mulready was suspended for five (5) days for violating several department policies. He credibly testified that he voluntarily resigned from the Department due to “in-house and political fighting.” (Testimony of Mulready)
- 14) Harriman has been a Carver Police officer since May 5, 1997. (Testimony of Harriman)
- 15) Luca has been a Carver police officer since 1974. (Testimony of Luca)
- 16) The Appellant testified that he heard Englehart make comments about leg breaking at the Union meeting to the effect that, if Mulready had ticketed a fellow officer’s son in New Bedford, his legs would be broken. Englehart also said that Mulready should be mindful that his own children would be getting their licenses soon. (Testimony of Appellant and APP’s Exhibit 4)
- 17) The Appellant stated that he did not take the leg breaking comment seriously, and thus did not bring it to anyone’s attention. He also stated that Englehart’s statements became common knowledge within the Department shortly after this meeting. (Testimony of Appellant)
- 18) Zadok and Englehart both testified that Englehart neither threatened Mulready nor uttered a statement about New Bedford practice. Miksch stated at the hearing that he did not recall a

threat by Englehart to break Mulready's legs, but that Englehart did speak about Zadok's son getting a ticket. (Testimony of Zadok, Englehart and Miksch)

19) Although Englehart denied making the statement, it is very likely that Englehart did make that statement because of the weight of the evidence, including the following:

- Other Union members who were present consistently describe the statement at the meeting as not being a direct threat by Englehart to harm Mulready. (Testimony of Harriman and Orr, APP'S Exhibit 4 - statements by Harriman, Dorian Lapworth, and Bruce Pollitt. Englehart testified, however, that she had been "accused of threatening somebody." (Testimony of Englehart)
- Two other officers who did not attend the meeting — Mulready and Officer Donald Vautrinot (hereinafter "Vautrinot") — testified to hearing about Englehart's statement within a short time after the meeting ended. (Testimony of Mulready and Vautrinot)
- In addition to the Union members, two Department employees later submitted signed statements for the Appointing Authority hearing. (APP's Exhibit 4 - statements by Margaret Pelletier and Charlotte Marando) The retired clerk for the Department, who was unavailable to testify, did not attend the Union meeting, but she submitted a signed statement and testified at the Appointing Authority hearing that Englehart repeated the leg-breaking statement to her, and that she did not understand Englehart to be making a real threat. (Appellant Exhibit 4 - statement by Pelletier)
- Zadok testified that he first heard about the New Bedford statement when he read the Appellant's report well over two years after the fact. But, on cross-examination, Zadok admitted to having heard that other officers (Harriman, Lapworth, and Pollitt) plus the clerk and dispatcher knew about Englehart's statement. (Testimony of Zadok)
- Credible testimony by two of the Appointing Authority's witnesses establishes that the New Bedford statement was common knowledge within the Department shortly after this Union meeting. Luca testified that he attended only the beginning of the meeting and that he did not recall hearing Englehart discuss Mulready's ticketing of Zadok's son and did not recall hearing the leg-breaking statement. Luca also testified that her leg-breaking statement was "common knowledge that she had made those statements" because "[p]eople were talking about it" and "[t]here was a lot of talk." Also, Miksch testified that he attended the meeting, but did not recall Englehart making the New Bedford statement. Miksch, however, testified that he recalled hearing other officers, including Orr, Harriman, and Zadok, talk about Englehart's statement "quite a while afterwards." (Testimony of Luca and Miksch)

Englehart's Seniority Change

- 20) The Department hired Englehart by a letter dated June 27, 2000, with a start date of July 10, 2000. The letter further stated that she would be second-to-last in seniority. (Testimony of Englehart, AA's Exhibit 9)
- 21) The Appellant trained Englehart. Englehart said that she and the Appellant had a "working relationship," and that Orr seemed "friendly and cordial" toward her. She testified that the Appellant's only criticism of her performance was her speaking too softly on the radio. (Testimony of Englehart)
- 22) In April 2001 - nine months after starting her job - Englehart went to the Union President, O'Donnell, to request that the Board of Selectmen move her hire date back to July 2, 2000, so that she could keep her daytime shift. (Id.)
- 23) On April 13, 2001, the Board changed Englehart's status so she would be senior to Officer Dennis Rizzuto (hereinafter "Rizzuto"). (Id.)
- 24) Englehart testified that this issue formally divided the Union, and that Orr supported Rizzuto's position. The Union would eventually address the split at a September 2001 meeting in the Carver Town Hall. (Id.)
- 25) Englehart further testified that she went to the Town's administrator, Richard LaFond (hereinafter "T. A. LaFond"), because of the heated disagreement over the seniority change. T. A. LaFond noted the complaint and told her to go to the Chief in the future. (Id.)

The June 2001 Interim Union Election

- 26) In June 2001, the Union held an interim election for the purpose of removing the leadership which had supported Englehart's seniority change and electing new officers. Vautrinot was

elected Union president and Mulready was elected steward. Zadok testified that the change in leadership was “contentious.” Englehart testified that the Union had become divided among other issues, the issue of her seniority date. (Testimony of Zadok and Englehart, APP’s Exhibit 8)

27) Zadok testified that the ousted Union leadership never filed a charge about the interim elections with the Labor Relations Commission or lodged a grievance with the Union. (Testimony of Zadok)

28) On June 27, 2001, the newly elected Union president, Vautrinot, wrote to T. A. LaFond asking that he rescind Englehart’s seniority and enhanced benefits until the Union could negotiate over these matters. (AA’s Exhibit 12)

29) Englehart did not file a charge with the Labor Relations Commission about the Union’s action to change her seniority back to July 10, 2000. Instead, she filed a complaint with the Massachusetts Commission Against Discrimination (hereinafter “MCAD”) against the Union in November 2001. (Testimony of Englehart)

The September 2001 Union Meeting

30) In September 2001, the Union met in the basement of Carver Town Hall to address the division within its ranks. Zadok testified that the meeting was very tense and members were boisterous. The Appellant testified that Englehart “got totally out of control” during the meeting and had to be held back. In their testimony, Zadok and Englehart denied this occurred. However, both Harriman and Vautrinot recall Zadok holding Englehart back. (Testimony of Appellant, Zadok, Englehart, Harriman and Vautrinot)

- 31) The meeting was attended by the Union’s attorney, Gerald McAuliffe (hereinafter “Attorney McAuliffe”), and Attorney David Scott (hereinafter “Attorney Scott”), who had been retained to represent the officers who had been voted out of office in June. (Testimony of Englehart and Zadok)
- 32) All witnesses testifying at the Commission hearing remembered that the meeting became very heated with several officers raising their voices and using profanity. At one point during the meeting, Englehart stood up and voiced her support for O’Donnell and the other officers who had been voted out of office for supporting her on the seniority issue. Englehart admitted that she used profanity during the meeting stating, “This is fucking bullshit.” While she was speaking, the Appellant interrupted her and yelled at her to “sit down and shut up.” Zadok testified that the Appellant then turned to Vautrinot and stated, “Gee, Donny, you swore and [had] to see a psych, maybe she needs to see one.” (Testimony of Englehart and Zadok)
- 33) The meeting became increasingly contentious and at one point, in an angry outburst, the Appellant got up to leave the meeting. Englehart testified that, as he left, he stated in a threatening manner, “Remember, I am the senior sergeant and will be when I leave this room.” She stated that the Appellant then angrily left the meeting. (Testimony of Englehart)
- 34) The Appellant refuted Englehart’s account of what he said and denied making any statement about his still being a superior officer when they all left the Union meeting. The Appellant asserted that the quote that Englehart had attributed to him was “not something [I] would even say.” (Testimony of Appellant)
- 35) On September 26, 2001, the Appellant sent an email to Chief Skoog stating:
- “Chief, it is my displeasure to advise you of a problem with one of our officers. For the third time in less than a year, Officer Englehart has been verbally abusive

during Union meetings with several officers. She has been verbally abusive including swearing at officers and yelling in a loud and offensive tone. Yesterday it was f_____ this and F_____ that which according to Mr. LaFonds (sic) letter is completely unacceptable behavior for a police officer. I had to verbally try and control her to no avail and then officer Zadok physically controlled her but she continued to swear and yell. This was done in the presence of two attorneys which I believe brought discredit upon the department. I am concerned about this officer seeing she has only been on this department a little over a year and has had three outbursts that some would consider violent. She has a long career ahead of her and so I think some type of anger management is in line for her before something serious happens. I am concerned for the public as well as department members and would recommend [sic] administrative leave until she can control her anger.”

Respectfully submitted:
Sgt. Raymond A. Orr
(AA’s Exhibit 3)

- 36) The Appellant testified that he referenced three (3) verbally abusive outbursts on the part of Englehart in his e:mail to Chief Skoog because he was citing incidents at the 2000/2001 meeting, a meeting in the Summer of 2001 and the outburst at the September 2001 meeting. (Testimony of Appellant)
- 37) On September 28, 2001, Skoog e:mailed all Carver officers telling them that she did not intend to get involved in Union matters and that they should treat each other with courtesy and professionalism. (AA’s Exhibit 3)
- 38) On October 3, 2001, Skoog sent an e:mail back to the Appellant saying that she would investigate the matter of Englehart’s conduct. (Id.)
- 39) Skoog testified that she called the Union’s and the Town’s lawyers and both attorneys advised her that management could not get involved because Englehart’s comments were made at Union meetings. (Testimony of Chief Skoog)

- 40) Although Chief Skoog told the Appellant she would look into his complaint, she admitted that the matter “fell through the cracks” due to the demands of caring for her seriously ill mother. (Id.)
- 41) Englehart testified to learning about the Appellant’s e:mail to Skoog “within a couple of days” from O’Donnell and testified that she was “outraged” because the e:mail was a “complete lie” because she “was never threatening to anybody.” After she found out that the Appellant had written a memorandum accusing her of abusive behavior and requesting that she be placed on administrative leave, she drafted a detailed account about what happened and began keeping notes. (Testimony of Englehart and AA’s Exhibit 10)
- 42) After the September 2001 union meeting, the relationship between Englehart and the Appellant became increasingly bitter. Englehart testified that the Appellant refused to acknowledge her and, during shift changes, he would not speak to her, even about work issues. Englehart reported her concerns about the Appellant’s treatment to the Town Administrator again in October 2001. (Testimony of Englehart)
- 43) On October 24, 2001, Englehart met with T. A. LaFond about the Appellant’s September 26th e-mail to Chief Skoog. T. A. LaFond wrote that Englehart believed that the Appellant was motivated by her “recent complaint about Officer Vautrinot.” T. A. LaFond also urged Englehart to report her future complaints to the Chief. (Testimony of Englehart and AA’s Exhibit 11)
- 44) On November 9, 2001, Englehart filed a complaint with the MCAD. In ddendum “A” to the complaint, Englehart substantiated her charges of sexual discrimination by the Town and the Union because, among other reasons, the Union elected leadership on June 25, 2001, that challenged her seniority adjustment. Even though Englehart names specific actions or

inactions by both Chief Skoog and the Appellant, Englehart's complaint does not mention the Appellant's September 26, 2001, e:mail to the Chief. Englehart's attorney, Attorney Scott, also attended the same Union meeting, and he does not include the Appellant's statement as part of Englehart's complaint. (Testimony of Englehart and Zadok, APP's Exhibit 7)

- 45) Englehart testified that her MCAD complaint against the Union was resolved in mediation on February 3, 2003, after the Union filed its reply to her complaint in January 2002.

(Testimony of Englehart)

- 46) On May 7, 2002, Chief Skoog asked the Appellant to more closely supervise Mulready. Chief Skoog testified that she had received complaints from several sources about Mulready's limited knowledge of police procedures as well as his emotional outbursts towards other officers. Chief Skoog stated that her primary concern, however, was how Mulready handled police service calls and, therefore, she wanted him under the supervision of an experienced officer. She asked the Appellant to inform her of any adverse issues regarding Mulready immediately. (Testimony of Chief Skoog, AA's Exhibit 17)

The June 19, 2002 Booking Room Incident

- 47) On either June 16 or 19, 2002,³ the Appellant was in charge of the 4:00 p.m. shift and was in the booking room at the Police Station preoccupied with the shift change. Luca was shift commander of the shift that ended at 4:00 pm and was also present in the booking room. Harriman was also present. (Testimony of Appellant, Luca and Harriman)

³ The parties and even the record are unclear as to when this incident occurred, but the exact date is not relevant as all percipient witnesses were present in or near the Booking Room at the time relevant. For the sake of administrative efficiency, June 19, 2002 will serve henceforth as the date of the "Booking Room Incident."

- 48) The booking room is an approximately ten (10) by twenty (20) feet. Two doors lead into the booking room from interior corridors within the station. The “rear” doorway exits into a short hallway that leads to the garage and the dispatch area. The “front” doorway exits to a small anteroom that connects with another doorway that leads from the anteroom to a central corridor. The room has no interior partitions or walls. (Testimony of Appellant, AA’s Exhibit 16)
- 49) On the day before the Booking Room incident, Zadok told Mulready that he had audiotape of a phone call between Mulready and Chief Skoog making a deal on a Union issue, and that Zadok accused Mulready of lying about that deal. (Testimony of Mulready)
- 50) Just before the beginning of the shift, Mulready encountered Chief Skoog at the telephone recording machine just a few feet outside the front door to the booking room. Mulready testified that he then learned from Chief Skoog that Zadok did not have a tape of the phone call regarding the Union and compensation time issues, and that Chief Skoog was searching for the tape at Zadok’s request. Zadok’s request incensed Mulready who believed that Zadok had lied to him about already having a copy of the tape. (Testimony of Mulready and Chief Skoog)
- 51) The Appellant testified that he saw Chief Skoog go to the recording equipment just outside the Booking Room. The Appellant remembered her presence because the Chief was now “in the officers’ end of the building.” He also remembered seeing Mulready talking with the Chief outside the entrance to the Booking Room. (Testimony of Appellant)
- 52) Harriman testified that he remembered the Chief outside the Booking Room because it was significant if the Chief were “there ... looking for something ...” (Testimony of Harriman)

- 53) Luca testified that Chief Skoog was about “[f]our or five” feet from the front door of the Booking Room. Mulready testified that she was about two feet away from the Booking Room door. (Testimony of Luca and Mulready)
- 54) Luca testified that Mulready entered the booking room and was quite upset and red-faced and was speaking about the compensation time issue and about Zadok at a clearly elevated volume. (Testimony of Luca)
- 55) Luca, who was standing within several feet of Mulready during the outburst, testified that he heard Mulready use the words “Zadok” and “knees being broken” and “Zadok” and “kill” being used in the same sentence. Luca, who had witnessed Mulready lose his temper on several prior other occasions, stated that he had never seen Mulready as angry as he was in the booking room that day and was concerned he might harm Zadok. (Id.)
- 56) Luca testified that a day or two later, he informed Zadok and Englehart about Mulready’s comments and told Zadok to “watch his back.” (Id.)
- 57) The Appellant was seated at a desk and was using the phone at the time of Mulready’s rant. He was situated furthest away from where Mulready entered the room among those who were in the room at the time. (Testimony of Luca, Mulready and Appellant)
- 58) Shortly after Mulready began yelling, the Appellant told him to stop by saying “knock it off” and “I’ve had enough.” (JE 5)
- 59) Harriman testified that he remembered Mulready entering the Booking Room and being “loud — not obnoxious, but loud.” (Testimony of Harriman)
- 60) Chief Skoog testified that she did not hear Mulready at all after he went into the Booking Room. (Testimony of Chief Skoog)

- 61) Mulready testified that, after learning what Chief Skoog was doing at the recording machine when he entered the booking room, he was upset that he had been accused by Zadok of lying. He testified that he was “ranting and raving” about lies and mistruths when he entered. He asserted that he does not recall making a threat against Zadok but certainly never would have carried it out. Mulready testified that the Appellant told him to “knock it off.” (Testimony of Mulready)
- 62) The Appellant testified that he heard Mulready yelling as Mulready walked into the booking room, but he did not recall the specifics of what Mulready was saying. He stated that he told Mulready to “knock it off” in part because he knew the Chief was just outside the door and in part because he wanted to maintain control of his shift. The Appellant testified that he most likely failed to remember the content of Mulready’s statements because Mulready was yelling at him while he was yelling back at Mulready. (Testimony of Appellant)
- 63) The Appellant did not report Mulready’s behavior in the booking room to Chief Skoog. He testified that if Mulready had said something specific he certainly would have reported it. (Id.)
- 64) Chief Skoog testified that she did not hear Mulready’s outburst in the Booking Room and believes she may have left the tape recorder to go to the dispatch area shortly before the incident. She testified that she could hear voices in the booking room but did not hear Mulready after he went into the room. Chief Skoog testified that if she had heard Mulready’s outburst she would have investigated the incident. (Testimony of Chief Skoog)
- 65) I found the Chief’s testimony that she failed to hear the outbursts in the Booking Room to be unconvincing. Mulready testified that she was standing at the entrance of the room immediately prior to his emotional eruption, which lasted “less than a minute.” She could

not have gone far in less than a minute. A more credible explanation would be that she ignored the outburst rather than failed to hear it. In effect, she had recently placed Mulready into the Appellant's remedial care and it is reasonable to infer that she was content to let the Appellant handle Mulready's outburst.

- 66) One of the disputes in this matter was whether the Appellant was using a telephone when Mulready entered the Booking Room in a state of heightened agitation. The Appointing Authority charges that the Appellant was not on the phone and, therefore, should have clearly heard and specifically recalled Mulready's alleged threats against Zadok. The Appellant contends that his ability to clearly hear and specifically recall the words used by Mulready was impaired, in part, by his listening to a phone conversation at the time. I find that, regardless of whether he was on the phone at the time, the Appellant had three strong motivations to move quickly and overwhelmingly to suppress Mulready's outburst. First, he was aware that the Chief was in close proximity to the room. Secondly, the Chief had very recently assigned the Appellant to keep Mulready's behavior under close scrutiny. Lastly, the Appellant wished to maintain control of the work shift for which he was responsible as Shift Commander. Of course, if the Appellant *was* involved with a phone conversation, having that conversation interrupted by Mulready's rant would reasonably provide a fourth motivation to admonish Mulready. It is more than reasonable to make the inference that the Appellant, immediately upon hearing Mulready's voice at a high volume, acted to drown Mulready out and extinguish his tantrum with greater volume in his own voice. Testimony of those in the room supports this inference. In so doing, it is also reasonable to conclude that the Appellant would not have heard or recalled any specific statements from Mulready regarding threats against Zadok.

- 67) Reporting about one month after the incident, Mulready denied making any actual threats that day, but wrote that he “ranted and raved letting off steam about the untruths, lies and the stories....” He also wrote that he “did make the comment how it is alright (sic) for others to make statements about how I should have my knees broken for writing an officers (sic) a citation and that I have kids that will have a license shortly.” (JE 8)
- 68) Mulready also wrote in his report and also testified that he did not threaten anybody in his ranting and raving, especially just having seen the Chief outside the Booking Room. Mulready testified that his comments were probably less than a minute in duration “as Sergeant Orr said to knock it off.” (Testimony of Mulready and JE 8)
- 69) Only Luca actually quoted Mulready, but he did not hear whole sentences, only that Mulready said “Zadok” and “knees” in one sentence and he heard “Zadok” and “kill” in another sentence. In testimony, Luca said that he heard not just “knees” but “knees being broken” in one sentence. Luca also testified that he is not “100-percent sure” about these quotations. (Testimony of Luca)
- 70) Luca, who reported the most detail about Mulready’s ranting and raving that day, contradicted himself in his testimony before this Commission when confronted with his earlier sworn statement before the Labor Relations Commission in September 2005. In this hearing, Luca attempted to testify that he considered Mulready’s rant to be a threat against Zadok, even saying that he considered Mulready “dangerous.” On cross-examination, however, Luca admitted that he had truthfully told the Labor Relations Commission in September 2005 that:
- Luca did not perceive Mulready’s statement as a threat because it “wasn’t a big deal,”
 - “It was just [Mulready] blowing off steam,” and

- “Even if I heard [Mulready] say, ‘I’m going to kill that fucking Zadok,’ I wouldn’t think that was a threat ...” (Id.)

- 71) Several days after the incident, Luca approached Zadok in the station and told him what had happened in the booking room. Zadok asked Luca what had he done to make Mulready so angry. Luca then told Zadok that Mulready had threatened to “kill him and break his fucking knees.” Luca warned Zadok to “watch his back” because Mulready was serious. Luca also informed Zadok that the Appellant had witnessed the incident and told Mulready to “knock it off”. A few days after the incident, Zadok also told Englehart that Mulready had threatened to break Zadok’s legs and to kill him. (Testimony of Luca and Zadok)
- 72) Approximately a week after the initial conversation with Luca about the incident, Zadok and O’Donnell encountered Luca in the police station parking lot. After a brief discussion over some pending union matters, Zadok, referring to Mulready’s threats stated “I guess my leg’s are in good shape” prompting Luca to respond “I wasn’t kidding you, I’m serious. He said he’s going to fucking kill you.” (Testimony of Zadok)
- 73) I find that Luca’s testimony was perhaps the most inconsistent and unreliable of a host of such testimony offered by him and others in this proceeding. He contradicted his own testimony relative to his assessment of Mulready’s alleged threats against Zadok. His stated belief that Mulready would in no way actually carry out any threat to do physical harm to Zadok was in stark contrast to his actions in warning Zadok of what he perceived as Mulready’s sinister intentions. In the context of this case, Luca was a paragon of unreliability, yet, his statements and actions appear to be the axis upon which this incident revolves. As tainted as any of the testimony in this appeal may be due to management/labor animus and Union in-fighting and factionalism, I find that Luca’s role in this matter was the straw that stirred the drink. If he truly believed that Mulready was just letting off steam (as

most others did and as he subsequently concluded, himself) this case might not be being considered by this Commission right now.

- 74) As a result of Luca's cautionary advice, Zadok subsequently reported Mulready's alleged threats to T.A. LaFond who advised Zadok that he would have Chief Skoog look into the matter. On July 9, 2002, Zadok went to Chief Skoog to determine the status of the investigation. Chief Skoog told Zadok that she was unaware of the incident. (Testimony of Zadok)
- 75) On July 16, 2002, Zadok sent a memorandum to the Chief about their July 9, 2002 meeting and again insisted that the Chief investigate the matter and take disciplinary action against Mulready. (AA's Exhibit 2)
- 76) After receiving Zadok's letter, Chief Skoog contacted the Carver Town Counsel and was advised to obtain reports about the incident in the booking room from anyone who may have witnessed it. (Testimony of Chief Skoog)
- 77) On July 18, 2002, Zadok's lawyer, Attorney Scott, faxed a letter to T. A. LaFond demanding an investigation. The letter states that only Luca was a witness to Mulready's rant — not Orr or Harriman. Zadok testified that only Luca claimed to have heard Mulready, not that Orr must have heard it as well. (Testimony of Zadok, AA's Exhibit 5)
- 78) Also on July 18, 2002, Zadok's doctor gave him a note for four days of rest because of headaches, chest pains, loss of sleep, and being "nervous for my safety." (Testimony of Zadok, AA's Exhibit 6)

The Booking Room Incident Reports

- 79) On July 18, 2002, Chief Skoog ordered reports about the booking room incident. She stated that she asked the Appellant to write a report because he was present and was a supervisor. (Testimony of Skoog, JE's 5, 6, 7 and 8; APP's Exhibits 10 and 12)
- 80) The Appellant testified that he did not initially know the subject matter of Chief Skoog's order for a report and asked her to explain. (Testimony of Appellant)
- 81) Chief Skoog testified that she instructed the Appellant to write what he remembered of the June 19, 2002 booking room incident. She stated that the Appellant told her in their initial conversation that he was on the phone. However, he did not mention being on the phone in his report. (Testimony of Chief Skoog, Joint Exhibit 5)
- 82) Sometime during the late morning of July 18, 2002, Town Counsel David Jenkins (hereinafter "Attorney Jenkins") contacted Luca at the police station, to interview him about the booking room incident. Luca, who admitted he did not want to see Mulready get into trouble, told Attorney Jenkins that he heard Mulready use the words "kill Zadok" and "Zadok" and "knees" in the same sentence, but was not sure of exactly what Mulready had said. (Testimony of Luca)
- 83) Luca testified that the Appellant stopped by his house July 18, 2002 while on duty to ask about the investigation. Luca stated that he and the Appellant did not go over their stories or try to harmonize the facts. Luca stated that he was in no way intimidated by the Appellant. (Testimony of Luca)
- 84) The Appellant's report stated as follows:
- "On 7-16-02 at apprx. 1700hrs. I Sgt, Raymond Orr, have been ordered by the chief of police to write a report on an incident that allegedly occurred on June 16 2002 at shift

change. This date is a month ago and my recollection of events may not be perfect but I will attempt as much as possible to recall events.

I did not recall the date so I asked the chief for any information that would recall my memory as a date was not enough. The Chief indicated to me it was about Mulready threatening to break Zadoks legs. I do not recall any incidents on any specific dates where officer Mulready threatened to break Officer Zadok's leg. I told the Chief the only incident I recall on anyone ever threatening to break a leg is at a Union meeting a while ago, when Officer Englehart referred to breaking Officer Mulready' legs for issuing Officer Zadok's kid a criminal citation. I asked the Chief to investigate this incident as well as two other incidents at Union meetings where Englehart was yelling and screaming and I have yet to hear from the Chief on these.

The Chief then indicated it was when Luca, Harriman and I were in the booking room and I stopped Mulready from saying something. I do recall a date when Officer Luca, Harriman and I were in the booking room when Officer Mulready came into the room yelling and complaining and he may have referred to the leg breaking remarks from the past incident, but I do not recall specifics, when I interrupted him and told him to knock it off I've had enough. I did not hear all of what he was saying but his loud tone caught my attention. The Chief was standing right by the door to the tape machine and I did not think he should be yelling.

Several times in the past months I have heard members talking about the threat to break legs made by Englehart and why nothing has been done about it. I did indicate that I would be willing to go to the Attorney General seeing nothing was done here. Perhaps this is the reason for this report.” (JE 5)

- 85) In Mulready's report, he wrote that he “ranted and raved letting off steam about the untruths, lies and the stories ...” He also wrote that he “did make the comment how it is alright for others to make statements about how I should have my knees broken for writing an officer's son a citation and that I have kids that will have a license shortly.” (JE 8)
- 86) Harriman testified that he did not hear specific comments made by Mulready or that he was inappropriate; merely that he was loud in the booking room. After being directed to write a report, Harriman telephoned Mulready, who had just returned from vacation, and told him that he had been ordered to write a report about the booking room incident. (Testimony of Harriman)

87) Harriman's report stated:

"On July 18, 2002 at approximately 5:10 p.m. I Officer David Harriman was given a letter by Sgt. Orr, requesting in writing what I had witnessed on Wednesday June 16, 2002 in the booking room, during shift change.

I am unsure on the date or not in question, but I do recall a day when Officer Mulready was upset about some ongoing Union issues and Sgt. Orr, Officer Luca, and myself were present in the booking room. Chief Skoog was in the hall way (reviewing the recorded phone tapes) during this time. I do not recall the comments that were made during this time.

Note: Chief it is very common for an Officer to enter the booking room and clear their thoughts out loud."

(JE 6)

88) Harriman's testimony concerning the booking room incident was credible although he demonstrated poor recall throughout his testimony.

89) In Luca's report, he stated that Mulready was making threatening comments about Zadok and that he heard Mulready say "kill" and "Zadok" and "break legs" in the same sentence but that there was a lot going on at shift change. (JE 7)

90) Chief Skoog testified that she found the Appellant's report to be vague. She stated that prior to July 18, 2002, the Appellant had never informed her that Englehart had threatened to break Mulready's legs during a Union meeting and she had not previously heard of the Appellant's requests to investigate Englehart's comments. (Testimony of Chief Skoog)

91) The Appellant testified that he understood the memorandum from Chief Skoog about "leg breaking" to be about Englehart, not Mulready. (Testimony of Appellant)

92) After reviewing the Appellant's July 18, 2002 incident report, Chief Skoog issued the Appellant a directive on July 22, 2002 requesting that he provide the names of the officers who were present at the union meeting where "leg breaking" comments were made She wrote:

“Sgt. Orr;

As per our conversation today, you are ordered to write a full and complete report as to who was present when, as you allege, Off. Englehart made remarks about breaking legs.

Also, as we discussed, you said you needed to check the Union meeting minutes to refresh your memory about those present.

If, you are unable to view those minutes, you are to submit this report by the 29th of July with the names of those officers that you remember as being present.

You may add this information to incident #0205202. A copy of this new information is to be given to the officer taking my place.”

(JE 9)

- 93) Sergeant Robert Malonson (hereinafter “Malonson”) became acting-Chief of Police when Chief Skoog retired on July 24, 2002. Malonson became acting-Chief because the Appellant, the senior sergeant in the Department, was then under investigation in the instant matter.

(Testimony of Englehart)

- 94) The Appellant sent the following e-mail to acting-Chief Malonson on July 28, 2002:

“I was told to write a report on an incident that occurred at the Union meeting that occurred in the fall of 2000. I do not know who was present at the meeting however I do recall Englehart yelling out of control about Mulready giving Zadok' (sic) kid a ticket and that something to the effect of breaking his legs. I spoke with Mulready and he advised me that he issued Zadok' (sic) son a criminal citation for a motor vehicle accident that had occurred. After the Union meeting he changed the ticket to a civil infraction. Mulready then said that the ticket was appealed to a Judge after a clerk found him responsible and that he never got notified of the judge appeal so the ticket was thrown out. I was also asked to provide the minutes of the meeting so we can show who was present. Officer Vautrinot tells me that O'Donnell stole all the Union records, bank books, check books, including blank checks cd's and has refused to turn them over to the Union. I think this should be investigated as well.”

(JE 10)

- 95) In early September 2002, the Union elected the Appellant to serve as its president.

(Testimony of Appellant)

The Aftermath

- 96) On September 26, 2002, the Board of Selectmen sent notice of a hearing, pursuant to G.L. c. 31, § 41, to the Appellant to determine whether there was just cause to discipline him for the reasons below:

“On or about July 16, 2002, you were directed by Chief Skoog to issue a report regarding an incident that took place in the booking room involving Officer Mulready. In the report you wrote "I told the Chief the only incident I recall on anyone ever threatening to break a leg is at a Union meeting a while ago, when Officer Englehart referred to breaking Officer Mulready's legs for issuing Officer Zadok's kid a criminal citation." This report was false, and you submitted the report knowing that it was false, in violation of department rules and regulations.

On or about July 16, 2002, you were directed by Chief Skoog to issue a report regarding an incident that took place in the booking room involving Officer Mulready. You wrote that you did "not recall any incidents or any specific dates where Officer Mulready threatened to break Officer Zadok's leg". This report was false, and you submitted the report knowing that it was false, in violation of department rules and regulations.

In the report you falsely reported that Officer Englehart had threatened Officer Mulready. This false statement was made against Officer Englehart in retaliation for the exercise of her rights under the Massachusetts General Laws and constituted retaliation against officer Englehart for the exercise of these rights.

Since July 16, 2002, you have interfered with the internal investigation of this matter by improperly questioning witnesses with respect to the incident with the intent of obstructing the investigation.

On or about July 22, 2002, you were ordered to write a full and complete report as to who was present when you alleged Officer Englehart threatened Officer Mulready. On July 28, 2002, you submitted an e-mail asserting that you did not know who was present at the time of the threat. You failed to file a report as ordered by Chief Skoog, a violation of department regulations. Your assertion that you did not know who was present is false and was submitted to Chief Skoog with knowledge of its falsity, a violation of department regulations. Your submission of this second false statement is a further attempted retaliation by you against Officer Englehart for her exercise of her statutory rights.”
(JE 4)

- 97) The Appellant was placed on administrative leave without pay. (Id.)

- 98) It is noted that the Town did not discipline anyone in the booking room for writing a false or inaccurate report except for the Appellant. Indeed, the record indicates that the Town did not even interview anyone regarding this incident except for Luca. (Testimony of Harriman, Appellant and Mulready)
- 99) On October 1, 2002, Harriman wrote a statement concerning the Union meeting held at his house toward the end of 2000. He wrote that Englehart commented, “if this was New Bedford he would have his legs broken.” Sergeant Dorian Lapworth also provided a statement attesting to Englehart’s alleged threats. (APP’s Exhibit 4)
- 100) On April 22, 2003, the Board of Selectmen informed the Appellant of its decision to demote him. The Appellant filed an appeal with the Commission by letter dated that day. (JE 2)
- 101) By letter dated May 1, 2003, the Town demoted the Appellant from the rank of Sergeant to the rank of Patrolman (police officer), citing the following three reasons:

“Orr allegedly knowingly submitted a false report in response to an order by Chief Skoog about the booking room incident by stating, ‘I told the Chief the only incident I recall on [sic] anyone ever threatening to break a leg is at a Union meeting a while ago, when Officer Englehart referred to breaking Officer Mulready’s legs for issuing Officer Zadok’s kid a criminal citation.’

Orr allegedly knowingly submitted a false report in response to the same order by Chief Skoog about the booking room incident by stating that Orr did ‘not recall any incidents or any specific dates where Officer Mulready threatened to break Officer Zadok’s leg.’

Finally, Orr allegedly knowingly submitted a false report in response to a July 28, 2002, order by Chief Skoog by stating that he did not know who was present at the Union meeting when Officer Englehart made her statement in reference to Officer Mulready. The Appointing Authority added that this statement by Orr is ‘a further attempted retaliation by you against Officer Englehart for her exercise of her statutory rights.’”

(JE 3)

- 102) By letter dated May 5, 2003, the Appellant timely sent a supplementary appeal to the Commission incorporating the Appointing Authority’s May 1, 2003, letter. (Attachment A)

- 103) There was a substantial attempt by counsel for both parties to affect a settlement of this appeal. Regrettably, that attempt failed.
- 104) It was extremely difficult to assess witness credibility in this matter because it was so lacking. As harsh as my assessment of Luca's testimony may seem, the disappointing fact is that all other witnesses didn't fare much better. Indeed, I found much of the testimony of Mulready and Harriman to be so unresponsive and lacking in recall as to render their statements nearly useless in advancing the Commission's knowledge and understanding of the facts in this matter. That said, I did find their reports at the time of the incident and their recollection of what was or was not said in the booking room to be reasonable and credible as this testimony and documentation corroborated the statements and reports of the Appellant and Luca.
- 105) The Booking Room incident which is the focus of this appeal is but a microcosm of a greater dysfunction which is pervasive in the Department. This incident stood against a backdrop of significant Union in-fighting where the most credible statement that this hearing officer heard was that the Appellant "hated Zadok" and considered him to be a "liar". (Testimony of Appellant) The Union in-fighting spilled over into the daily workplace. Following a period of financial disputes over compensation and seniority issues, the factions squared off in deeply personal combat. Witness testimony in this matter was rife with self-serving measured responses, couched answers, blanket denials, inconsistencies, poor recall, obfuscation and selective memories. I find that, despite the growing tensions within the Department, idle talk and threats among the membership were just that – idle. There is nothing in the record of this matter to suggest that actual physical harm would have come to any of those involved in the various feuds. There was simply no evidence submitted to sustain that theory. In fact,

each witness who was asked about the possibility of any certain threat actually being carried out, dismissed the respective threat as not being serious but, simply a demonstration of frustration with a given circumstance.

- 106) I found that the record was clear that Englehart and Zadok on one side were locked in an increasingly bitter relationship with the Appellant and others on the other side. To their credit, Englehart, Zadok and the Appellant were candid about their estrangement and this candor was helpful in assessing the testimony of others in this hearing process.
- 107) Union strife was not the only challenge to daily Department life. For the short period leading up to the Booking Room incident, Chief Skoog was essentially a lame-duck who was no doubt counting her days until retirement. It was clear from the record of this case that she was becoming increasingly disengaged from the day-to-day operations.⁴ It is important to note that part of that disengagement was a result, understandably, of the Chief caring for her ailing mother. However, it was telling that the only time that the Chief became animated during her testimony in this matter was when she chuckled knowingly (along with the Appellant) when the issue of the Union being difficult to deal with emerged during cross examination.
- 108) Meanwhile, the Town's Administration was demonstrating anti-Union animus as evidenced by the fact that on July 3, 2008, the Appellant submitted to the Commission for its consideration, the Division of Labor Relations ("DLR") decision in Town of Carver v. Raymond Orr, MUP-03-3894, dated June 30, 2008. The Commission accepts the submission of this decision and acknowledges that the decision, among several other issues which it

⁴ Chief Skoog was inexplicably unaware of the status of the Booking Room incident when queried of same by Zadok on July 9, 2002, she assigned the Appellant to deal with the shortcomings of Mulready and she claimed unconvincingly to be unaware of the loud outbursts in the June 19, 2002 Booking Room incident.

addressed, makes similar findings and conclusions on the issue of the Booking Room Incident, so called, as does this Commission. The DLR decision also deals with issues of protected Union activities. In its decision, the DLR ordered the following:

- “1. Cease and desist from:
 - a. Retaliating against Orr for engaging in concerted protected activities.
 - b. In any like manner, interfering, restraining and coercing its employees in any right guaranteed by Law.
2. Take the following affirmative action that will effectuate the purpose of the law:
 - a. Immediately offer to reinstate Orr to the post of sergeant and restore his seniority to its status immediately prior to the demotion.
 - b. Make whole Orr for all losses he suffered, if any, as a result of the Town’s unlawful action, plus interest on all sums owed at the rate specified in M.G.L. c. 231, Section 61, compounded quarterly;
 - c. Sign and post immediately in conspicuous places where employees usually congregate or where notices to employees are usually posted and maintain for a period of thirty (30) days thereafter copies of the attached Notice to Employees. The attached Notice to Employees shall be signed by all current members of the Board of Selectmen prior to posting.
 - d. Notify the Commonwealth Employment Relations Board within thirty (30) days after the date of service of this decision and order of the steps taken to comply with its terms.”

(Administrative Notice)

CONCLUSION

The role of the 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." Cambridge v. Civ. Serv. Comm’n, 43 Mass. App. Ct. 300, 304 (1997). *See* Watertown v. Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civ. Serv. Comm’n, 38 Mass. App. Ct. 473, 477 (1995); Police Dep’t of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); 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 Civ. Serv. v. Mun. 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 substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Comm. of Brockton v. Civ. Serv. Comm'n, 43 Mass. App. Ct. 486, 488 (1997). The Appointing Authority's burden of proof is one of a preponderance of the evidence which is established "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. Falmouth v. Civ. Serv. Comm'n, 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 at 334. *See* Commissioners of Civ. Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster at 727-728.

By virtue of the powers conferred by their office, police officers are held to a high standard of conduct. “Police officers are not drafted into public service; rather, they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question, their ability and fitness to perform their official responsibilities.” Police Comm’r of Boston v. Civ. Serv. Comm’n, 22 Mass. App. Ct. 364, 371 (1986).

The Appointing Authority has not proven by a preponderance of evidence that (1) the Appellant remembered a month later exactly what Mulready said in the Booking Room or (2) that the Appellant’s memory is other than as he reported it to the Chief in his reports. Specifically, the Town charged the Appellant with lying when he stated in his July 18, 2002, report that “I told the Chief the only incident I recall on (sic) anyone ever threatening to break a leg is at a Union meeting a while ago, when Officer Englehart referred to breaking Officer Mulready’ (sic) legs for issuing Officer Zadok’s kid a criminal citation.”

The first reason why the Appointing Authority cannot prevail is because most reliable evidence about the Booking Room incident shows (1) that the Appellant was busy with the changing of the shifts, and (2) that the Appellant was the farthest from Mulready when he entered through the front door. Given that Harriman was close to Mulready and did not hear what he said, that Luca who also nearby officer and heard only part of what Mulready said, and that the Chief heard nothing at all, the Town cannot prove that the Appellant *must* have heard the content of Mulready’s rant. In addition, the Appellant testified that he and Mulready were both yelling at each other. Luca also testified in this hearing and before the Labor Relations Commission that the Appellant was on the phone at the time — a point that the Appellant does

not remember, but does not deny. The Appellant plausibly reports that he did “not recall specifics” when he told Mulready “to knock it off (sic) I’ve had enough.”

The second reason why the Appointing Authority cannot prevail is that the Appellant and others testified consistently that they knew that Chief Skoog was just a few feet outside the Booking Room, reviewing recorded phone calls — the flashpoint for Mulready’s outburst that day. Luca testified that Chief Skoog was no more than four or five feet outside this door. Chief Skoog testified that she remembers seeing Mulready the day she was searching for a particular recorded phone call, but did not hear Mulready’s statement upon entering the Booking Room. The Appellant reported that he told Mulready to “knock it off” in part because he knew the Chief was nearby and in part because he regarded it as his duty to maintain control of his shift.

The third reason why the Appointing Authority cannot prevail is that the essence of Englehart’s New Bedford statement was common knowledge within the Department, even among the Town’s witnesses and to Vautrinot, Margaret Pelletier, and Charlotte Marando, who were absent from the meeting. As the Appellant credibly testified, Englehart’s statement had become a running joke within the Department and was never taken seriously.

The final reason why the Appointing Authority cannot prevail is due to the fact that the record clearly indicates that the Town treated the Appellant differently by singling him out from others similarly situated for suspension and ultimately for discipline.

The Town states in its second charge that the Appellant lied when he stated in his July 18, 2002, report, “I do not recall any incidents on any specific dates where officer (sic) Mulready threatened to break Officer Zadok’ (sic) leg.” Again, the Town fails to show with sufficiently reliable evidence that the Appellant likely lied by writing this statement because, as mentioned above, the Appellant credibly claims not to recall specifics of Mulready’s rant in the Booking

Room. In addition, the Town does not prove that the Appellant understood Mulready's rant to be a threat against Zadok. About one month after the incident, the Appellant reported that Mulready "may have referred to the leg breaking remarks from the past incident" (i.e., Englehart's statement at the 2000/2001 Union meeting). At most, then, the Appellant understood Mulready to be referring to a statement about leg-breaking in New Bedford that was not, itself, a threat.

Those who have reported or repeated the "leg-breaking" part of the statement from 2000 or 2001 (as opposed to the statement that Mulready had children of his own who were growing up in the Town) consistently describe a statement that does not constitute a threat. In other words, the Appellant and others who describe the New Bedford statement have not asserted, as the Town has argued, that Englehart threatened to break Mulready's legs herself. In his testimony, the Appellant agreed with the Town's statement that Englehart could have meant that, in New Bedford, police officers would have been "pissed off" by Mulready's ticketing a fellow officer's son, but did not believe it was a criminal threat.

The fact that Mulready had just stepped away from a conversation with his Chief, who was outside the Booking Room door, reinforces Mulready's assertion that he would not have threatened anyone in the manner alleged by the Town in this charge. Indeed, the Town did not suspend, let alone discipline, Mulready for this incident, which undermines its assertion that Mulready made threats in the Booking Room on that day. Even Chief Skoog testified that she did not hear Mulready after their conversation when he went into the Booking Room.

A second point is that the Town is accusing the Appellant of lying about any incidents on any date in which Mulready threatened to break Zadok's legs. Yet, the Town has put forward no evidence of any other occasion — besides the Booking Room incident — in which the Appellant

was supposed to have knowledge of Mulready's making such a threat against Zadok. This charge, then, must be limited to the Booking Room incident and not to some other unspecified occasions.

The Appellant's incident report concerning the Booking Room does not contain the internal inconsistency that the Town seems to be suggesting (i.e., that the Appellant heard a threat but did not report it) with its second charge. The Appellant did report that Mulready "may have referred to the leg breaking remarks of the past incident...." But that statement does not contradict the Appellant's prior sentence stating that he has not heard Mulready threaten to break Zadok's leg because Englehart's leg-breaking statement, as consistently described, was not a threat.

Even the Town's witnesses have contradictory and confusing testimony about whether Mulready made serious threats to harm Zadok. On the one hand, when a "very concerned" Luca told Zadok within a few days about the Booking Room incident, Zadok believed Luca because Mulready had a temper . . . but did nothing. About a week later, Luca told Zadok that he was serious in describing Mulready's threats to kill him, and Zadok went, not to the Chief for protection and immediate intervention with Mulready, but to the Town Administrator, for some reason. Zadok clearly did not act as someone who was seriously threatened.

On the other hand, Luca, who reported the most detail about Mulready's ranting and raving that day, contradicted himself in his testimony before this Commission when confronted with his earlier sworn statement before the Labor Relations Commission in September 2005. In this Commission hearing, Luca attempted to testify that he considered Mulready's rant to be a threat against Zadok, even saying that he considered Mulready "dangerous." On cross-examination, however, Luca admitted that he had truthfully told the Labor Relations Commission in September 2005 that:

- Luca did not perceive Mulready’s statement as a threat because it “wasn’t a big deal,”
- “It was just [Mulready] blowing off steam,” and
- “Even if I heard [Mulready] say, ‘I’m going to kill that fucking Zadok,’ I wouldn’t think that was a threat...” (Luca I:167-70)

Based on his prior Labor Relations Commission testimony, Luca ultimately testified before this Commission that he did not consider Mulready’s statement to be a real threat toward Zadok and that Mulready did not commit a crime that day by threatening Zadok. Further, Luca never explained why, if he truly believed Mulready’s threats were serious or that Mulready was a dangerous person, he waited at least one day and possibly three days before warning Zadok about the Booking Room incident when Mulready and Zadok could have run into each other at any time. Luca’s conflicted statements appear to be an attempt to reconcile two opposing points of view.

Following its investigation of the Booking Room incident, the Town did not discipline anyone in the Booking Room for writing a false or inaccurate report except for the Appellant. The Town did not discipline Officer Mulready for writing his report. Yet, Mulready states in his report, like the Appellant, (1) that he did not remember exactly what he said, and (2) that he did not make any threats to anyone. For some reason, the Town’s second charge is leveled against the Appellant because *Mulready* threatened “to break Officer Zadok’s leg.”

The Town did not discipline either Harriman or Luca — who were both closer to Mulready than the Appellant and who also wrote in summary fashion about what Mulready said that day. After retiring as Chief of Police, Chief Skoog recommended Harriman to be sergeant in part because “he will always do the right thing for the department...” Harriman reported even less about what happened in the Booking Room than the Appellant did by saying that he did not recall anything Mulready had said that day.

Last, it is important to note here that all four officers wrote their reports about a month or more after the Booking Room incident. In addition to the passage of time, the officers, including Luca, did not mark Mulready's rant as an extraordinary occurrence or wrote notes about it at the time. It is a significant fact that both the Appellant and Harriman had to ask Chief Skoog for details about what she wanted them to write about because her initial order did not call the event to that particular incident to mind.

The evidence reliably supports the conclusion that the Appellant wrote a truthful report in response to Chief Skoog's request. On July 22, 2002, Chief Skoog e-mailed the Appellant under the subject heading of "Threats/Englehart" with an order to write a report about who was present at the 2000/2001 Union meeting by July 29th. On July 28, 2002, the Appellant sent an e-mail under the subject "report" to Chief Skoog's replacement, Malonson, stating, "I do not know who was present at the meeting" because he was unable to get from the Union's former president the meeting minutes and because the Appellant was too uncertain about who attended at this point to write a truthful report.

First, the Town asserts that the Appellant failed to file a report. In her e-mail to the Appellant, Chief Skoog writes that the Appellant "may add this information to incident #0205202." (*emphasis added*) The Appellant followed the Chief's order by submitting a response within the time requested to the new Chief of Police after the Appellant had requested — but did not receive — the Union meeting minutes.

Second, the Appellant testified at length that he was unwilling to guess who attended the 2000/2001 Union meeting at that point because the Union had met numerous times during this phase and because the Appellant discovered that his memory of who attended differed from what

officers told him. As such, the Appellant's report is not false because he testified as to not having a specific memory of who was at that particular meeting at the time he wrote the report.

Moreover, Chief Skoog had the authority to determine who attended that Union meeting by ordering every Union member to submit a report. Chief Skoog did not do that, possibly because she did not believe that she was investigating a criminal act. That belief is supported by the Appellant's initial e-mail to her complaining about Englehart's "verbally abusive" actions at Union meetings, which, the Appellant wrote, "some would consider violent." The Appellant testified that he did not consider Englehart's leg-breaking statement to be a crime or even a threat to Mulready. The Appellant, based on his training and experience, was capable of distinguishing between problematic behavior and criminal acts. Accordingly, the Appellant recommends counseling, not discipline, for Englehart because she has a promising career ahead of her.

The evidence shows that the Appellant may have not liked Englehart, but the Town fails to show that he retaliated against her by wholly fabricating her outbursts at Union meetings. As Chief Skoog acknowledged, the Town must allow the Union members ample room in which to express their opinions to each other about Union matters. Englehart passed up a perfect opportunity to challenge the Appellant's September 26, 2001 statement about her behavior at Union meetings when she filed her November 2001 MCAD complaint. Even though Englehart testified to learning about the Appellant's e-mail within days, Englehart's signed statement to the MCAD does not mention that document, which she described as a "complete lie". Even if Englehart had overlooked this point in talking with her lawyer, her lawyer, Attorney Scott, was also present at that September 2001 Union meeting and would have known whether the Appellant was lying.

Finally, the Town's demotion of the Appellant as senior sergeant is a grossly disproportionate sanction for the offenses alleged, even if the allegations were sustained. The Town demoted the Appellant after he served over twelve (12) years as Sergeant, eight (8) of which as the Department's senior Sergeant. The mere reduction in status from Sergeant to Patrolman is a daily renewed punishment for anyone — but especially for a veteran supervisor like the Appellant.

Based on all the reasons stated herein, the Appointing Authority has not sustained its burden of proving just cause for its action demoting the Appellant from his position as a police sergeant for making false and misleading statements in his July 18, 2002 and July 22, 2002 reports.

Therefore, the appeal filed under Docket No. D-03-307 is hereby *allowed* and the Appointing Authority is ordered in accordance with G.L. c. 31, § 43 to return the Appellant “to his position without loss of compensation or other rights.”

Civil Service Commission

John J. Guerin, Jr.
Hearing Officer

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on January 29, 2009.

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

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

Notice to:
Douglas I. Louison, Esq.
Robert A. Stewart, Esq.
Maria C. Rota, Esq.