

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

**CIVIL SERVICE COMMISSION**

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

JAMES FOLEY,  
Appellant

v.

D1-14-30

CITY OF NORTH ADAMS,  
Respondent

Appearance for Appellant:

*Pro Se*  
James Foley

Appearance for Respondent:

Fernand J. Dupere, Esq.  
94 North Elm Street, Suite 307  
Westfield, MA 01085

Commissioner:

Christopher C. Bowman

**DECISION** (*Corrected Copy 4/24/15; Correcting Scrivener's Errors on Pages 11 & 30*)

On February 3, 2014, the Appellant, James Foley (Mr. Foley), pursuant to G.L. c. 31, § 43, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the City of North Adams (City) to terminate him from his position of police sergeant in the City's Police Department for violation of rules related to: conduct unbecoming an officer; improper associations; undue influence; interfering with the course of justice; public criticism of department; truthfulness; use of department records, reports & communication; orders; and insubordination.

On March 12, 2014, I held a pre-hearing conference at the Springfield State Building in Springfield, MA and a full hearing was scheduled for June 17<sup>th</sup> and 18<sup>th</sup>, 2014. Prior to the full hearing, then-counsel for both parties represented that they had reached a settlement agreement in principle. In order to provide the parties with appropriate time to execute a settlement agreement, the Commission, on June 12, 2014, entered an order dismissing the appeal with a future effective date of July 11, 2014. In the absence of a Motion to Revoke, the dismissal would become effective on July 11<sup>th</sup>.

On July 17, 2014, Mr. Foley, now pro se, filed a motion to re-open the appeal, arguing that he was unaware of the July 11<sup>th</sup> deadline for filing a Motion to Revoke. After conducting a motion hearing on September 10, 2014, Mr. Foley's motion was allowed by the Commission and a re-scheduled full hearing was held over two (2) days on November 17<sup>th</sup> and November 18<sup>th</sup>, 2014 at the North Adams City Hall in North Adams, MA.<sup>1</sup> As there was no request by either party for a public hearing, the full hearing was declared private and all of the witnesses, with the exception of Mr. Foley, were sequestered. CDs were made of the digitally-recording hearing. A copy was retained by the Commission and both parties were provided with copies as well.<sup>2</sup> The parties submitted post-hearing briefs in the form of proposed decisions on December 30, 2014 (City) and December 31, 2014 (Mr. Foley).

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<sup>1</sup> The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

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

## **FINDINGS OF FACT:**

Thirty-four (34) City exhibits and fifty-four (54) Appellant exhibits were accepted into evidence during the hearing.<sup>3</sup>

Based upon the documents entered into evidence, the testimony of:

### *Called by the City:*

- Marianne Shelvey, former ADA, Berkshire County District Attorney's Office;
- Joseph Pini, private citizen;
- Christopher Gelinas, police officer, North Adams Police Department;
- Mark Bailey, detective, North Adams Police Department;
- Michael Cozzaglio; Director, North Adams Police Department;
- Richard J. Alcombright; Mayor, City of North Adams;

### *Called by Mr. Foley:*

- Benjamin Austin, police officer, North Adams Police Department;
- Jason Wood, police officer, North Adams Police Department;
- James Foley, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, policies, and reasonable inferences from the credible evidence, I make the following findings of fact:

1. Located in a valley at the bottom of the Berkshire Mountains in the northwest corner of Massachusetts, North Adams has a year-round population of approximately 14,000. It is home to the Massachusetts College of Liberal Arts (MCLA) and the Museum of Contemporary Art (MASS MoCA) (Testimony of Director Cozzaglio;

Administrative Notice: [www.northadams-ma.gov](http://www.northadams-ma.gov))

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<sup>3</sup> Consistent with Massachusetts Statewide Retention Schedule 02-11, Sections B5 2(b) and/or B5 3(g), these exhibits, and the entire case record, will be retained, either at the offices of the Commission, or at the State Records Center, for six (6) years after final case activity / case closure. After such time period expires, the entire case file will be destroyed. A copy of this decision, however, will be retained permanently by the Commission.

2. The City's police department operates on an annual budget of \$1.3 to \$1.4 million and employs twenty-four (24) people, including a Police Director (the equivalent of Police Chief); a lieutenant; two (2) sergeants; one (1) acting sergeant; and police officers. Four (4) police officers are designated as detectives and report directly to the Police Director. The Police Director reports to the City's Mayor, who is the appointing authority for civil service purposes. (Testimony of Director Cozzaglio)
3. Mr. Foley is fifty (50) years old and has one (1) adult son.<sup>4</sup> He has lived in North Adams since 1986. He obtained a GED and has taken some courses at Berkshire Community College. He owns four (4) properties. (Testimony of Mr. Foley)
4. Mr. Foley began his career with the City's Police Department in 1994 as a reserve police officer. He became a permanent police officer in 1998 and was promoted to the position of sergeant in 2008. As a sergeant, he served as a patrol supervisor on the 4:00 P.M. to 12:00 Midnight shift. (Testimony of Mr. Foley)
5. From 1997 to 2003, Mr. Foley was a narcotics investigator and served on the Berkshire County Drug Force. During that time, Mr. Foley interacted with Marianne Shelvey, then an Assistant District Attorney (ADA) with the Berkshire County District Attorney's Office. Ms. Shelvey "worked upstairs" from Mr. Foley and Mr. Foley was a witness in various criminal cases prosecuted by ADA Shelvey over the years. (Testimony of Mr. Foley)
6. In November 2003, Mr. Foley returned to patrol, working the 4:00 P.M. to 12:00 Midnight Shift. During most of this time, Mr. Foley was part of the Berkshire County Special Response Team. (Testimony of Mr. Foley; Appellant Exhibit 54)

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<sup>4</sup> Mr. Foley's son attended both days of the full hearing and provided Mr. Foley with administrative assistance.

7. Mr. Foley's prior discipline includes a one (1)-day suspension in 2011 for mishandling evidence and disobeying an order from the Police Director. (City Exhibit 23)
8. Mr. Foley first met Joseph Pini, a private citizen, in 1998 when Mr. Foley was working foot patrol as a police officer. Mr. Pini has a criminal record and has provided helpful information to Mr. Foley and other members of the Police Department over the years. (Testimony of Mr. Foley)
9. On March 2, 2012, North Adams Police Officer Nicholas Kaiser was dispatched to Montana Street in North Adams near MCLA. I infer that many of the townhouses on Montana Street are rented by college students. (City Exhibit 7 and inferences made)
10. The tenants of the Montana Street address reported that several electronic items had been stolen, including a laptop and an "X box". (City Exhibit 7)
11. Aware that MCLA police officers were investigating several prior reports of breaking and entering on Montana Street, Officer Kaiser notified dispatch to have MCLA police officers respond to the scene. (City Exhibit 7)
12. A MCLA police officer arrived at the scene and told Officer Kaiser that he had observed and pursued a male party who was carrying a dark covered pillow case which appeared to have objects inside. Officer Kaiser subsequently interviewed the MCLA police officer and obtained a physical description of the suspect. (City Exhibit 7)
13. As the patrol supervisor on duty that night, Mr. Foley also arrived at the scene and provided assistance. (City Exhibit 7 & Testimony of Mr. Foley)

14. Eight (8) days later, in the early morning hours of March 10, 2012, the Police Department of adjacent Williamstown notified the North Adams Police Department that they had arrested an individual (“RJ”) for breaking and entering into an apartment at Williams College (located in Williamstown) and taking laptop computers. This incident appeared to be similar to the incidents that had occurred at MCLA and Montana Street in North Adams. (City Exhibit 6 and Testimony of Officer Bailey)
15. North Adams Police Officer Mark Bailey went to the Williamstown Police Department and spoke with suspect RJ in the presence of Williamstown Police Sergeant Scott McGowan, who had been interviewing RJ prior to Officer Bailey’s arrival. (Appellant Exhibit 1)
16. Officer Bailey later returned to formally interview RJ. During these interviews, RJ claimed that he (RJ) was involved in the breaking and entering incidents in North Adams and that Joe Pini “was the leader and came up with idea.” RJ said that Mr. Pini would wait until he saw the college kids walking past his apartment towards the bar and then they would go to their apartments and look for the kids who left their doors unlocked. According to RJ, Mr. Pini would sit in his car while RJ went to an apartment, knocked on the door, and if it was unlocked, he would go in. RJ claimed that if someone answered the door he would ask the person if ‘Jeff’ was home. If the person said that ‘Jeff’ didn’t live there, he would apologize and move to the next apartment. (City Exhibit 6)
17. RJ claimed that he would steal electronics from the apartments and put them in Mr. Pini’s car before moving to the next apartment. RJ also claimed that Mr. Pini was

selling the merchandise to people all over town and some in Adams, MA and that Mr. Pini would pay him \$50 for every night he worked and stole items. (City Exhibit 6)

18. On March 11, 2012, Sgt. McGowan of the Williamstown Police Department met with (North Adams) officer Bailey (and Detective Richard Lesniak). It was determined that Mr. Pini would be placed under arrest. An arrest warrant was issued. (Appellant Exhibit 1)

19. When Officer Bailey and Detective Lesniak went to Mr. Pini's residence to arrest him on March 11<sup>th</sup>, he was not there. (City Exhibit 6)

20. Shortly after Officers Bailey and Lesniak left Mr. Pini's residence on March 11<sup>th</sup>, Detective Lesniak informed Sgt. McGowan that Mr. Pini had called and was looking to speak with Detective Lesniak. Sgt. McGowan called Mr. Pini back himself and asked him (Pini) if he was willing to come into the Williamstown Police Department. Fearing arrest, Mr. Pini refused to come into the police station and told Sgt. McGowan that he (Pini) was taking the battery out of his phone to prevent the police from finding him. Mr. Pini also stated that RJ was a 'rat'. (Appellant Exhibit 1)

21. On March 21, 2012, based on information received from Sgt. McGowan, Officer Bailey went to an address on Houghton Street in North Adams where one of the computers reported stolen was allegedly being used to access the Internet via an Internet Service Provider (ISP). (City Exhibit 6)

22. The tenant at the Houghton Street address ("KA") reported that he purchased a desktop computer from "some guy named Joe Pini." KA claimed that he was not aware that the computer was allegedly stolen and that he paid Mr. Pini \$700 for the computer. He reported that Mr. Pini arrived at his residence driving an SUV with

someone sitting in the passenger seat. KA claimed that Mr. Pini agreed to the sale, carried the computer up the stairs to KA's apartment and left with \$700 in cash. (City Exhibit 6)

23. On May 7, 2012, Mr. Pini was arrested based on outstanding warrants against him. He was immediately incarcerated and held at the Berkshire County House of Correction for approximately one year, when he was finally released on May 1, 2013. (Testimony of Mr. Pini)

24. While Mr. Pini was incarcerated, he had numerous conversations with Mr. Foley. (Testimony of Mr. Pini)

25. One of the conversations between Mr. Pini and Mr. Foley took place on July 14, 2012. In a recorded conversation initiated by Mr. Pini from the Berkshire County House of Correction, Mr. Pini called his girlfriend<sup>5</sup> and asked her to call Mr. Foley's cell phone number and conference him into the call. When Mr. Pini's girlfriend called and was forwarded to Mr. Foley's voicemail, Mr. Pini told her to call the police station and tell Mr. Foley to answer his cell phone because it was important. (City Exhibit 28)

26. Moments later, Mr. Pini's girlfriend told Mr. Pini that she made contact with Mr. Foley at the police station and that he (Foley) would go get his cell phone. In response, Mr. Pini said, "he leaves his phone in his truck." Shortly thereafter, the three-way conference call was initiated by Mr. Pini's girlfriend. (Exhibit 28)

27. During the conference call, Mr. Pini stated that he was "scared to death" about receiving a lengthy prison sentence and insisted that he had nothing to do with the



breaking and entering in Williamstown. In response, Mr. Foley stated: “I know, I believe you.” When Mr. Pini stated that the District Attorney has “got me by the balls”, Mr. Foley replied with words to the effect: “I wasn’t there; talk to your attorney; all I know is what you tell me.” (City Exhibit 28)

28. During the July 14, 2012 conference call, Mr. Pini complained to Mr. Foley about his court-appointed attorney. When Mr. Pini referenced the name of another local attorney that wanted \$10,000 to take his case, Mr. Foley stated words to the effect, “he’s good; that was my attorney” referencing a case in which Mr. Foley was a defendant. (City Exhibit 28)

29. During the next several minutes of the conversation, Mr. Foley told Mr. Pini that: 1) he couldn’t contact the District Attorney on Mr. Pini’s behalf because of Mr. Foley’s own prior case in which he (Foley) was a criminal defendant; 2) he (Foley) believes Mr. Pini did not commit the breaking and entering in Williamstown; and 3) he “can’t do anything” for Mr. Pini. Mr. Pini then asked Mr. Foley if there were “any B&Es out there” because he “need[s] the kid [RJ] to start up again.” In response, Mr. Foley stated that there had not been any recent breaking and entering reports and that RJ “may not” start-up again. Mr. Foley also told Mr. Pini that he probably wouldn’t be incarcerated at the time if he (Pini) had followed Mr. Foley’s advice to turn himself in voluntarily. At the end of the conversation, Mr. Foley stated, “If you need something else, have your girlfriend call me.” (City Exhibit 28)

30. After Mr. Foley terminated the call, Mr. Pini and his girlfriend had a brief conversation in which Mr. Pini stated that Mr. Foley “had no clout with the DA

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<sup>5</sup> Based on the exhibits, including the recorded interview of Mr. Pini, it appears that Mr. Pini, at some point, married his girlfriend. Thus, she is now his wife. For the sake of clarity and simplicity, this decision refers

because of that case he had.” Mr. Pini, referencing the “paid attorney that wanted \$10,000” to take his case who also served as Mr. Foley’s attorney, then stated, “look at him, now he’s a sergeant.” (City Exhibit 28)

31. Mr. Pini made calls to at least one other member of the North Adams Police Department seeking assistance. He was rebuffed by at least one member of the Police Department who told Mr. Pini that he couldn’t talk to him without his (Pini’s) attorney present. (City Exhibit 30A)
32. On November 11, 2012, Mr. Pini sent a letter to Mr. Foley from the House of Correction. The sending of the letter was logged in the House of Correction Inmate Mail List. (City Exhibit 9 and Testimony of Mr. Pini) Mr. Foley claims that he threw this letter away. (Testimony of Mr. Foley)
33. On December 7, 2012, Mr. Foley, while on duty and in uniform, went to the House of Correction and met with Mr. Pini. Mr. Foley signed in on the “Visitor Register”. Under the column “Department or Person Visited” Mr. Foley wrote: “Visit Interview”. Under the column “Purpose of Visit”, Mr. Foley wrote, “Interview”. (City Exhibit 9)
34. During the December 7, 2012 visit, Mr. Pini provided Mr. Foley with information regarding other unrelated crimes that had occurred in North Adams. Mr. Foley wrote this information down on an envelope. (Testimony of Mr. Foley and Appellant Exhibit 1, Last Page)
35. Also during the December 7, 2012 visit, which lasted 1 ½ hours, Mr. Pini reviewed various documents with Mr. Foley that he (Pini) had obtained via discovery related to

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to her as Mr. Pini’s girlfriend

the criminal case against him. Mr. Foley and Mr. Pini concluded that there were inconsistencies in the statement taken from KA. (Testimony of Mr. Foley)

36. Shortly before the Christmas holiday in 2012, without notifying anyone at the North Adams or Williamstown Police Departments (or the District Attorney's Office), ~~Mr. Pini~~ **Mr. Foley** met with witness KA at KA's home and told him that Mr. Pini believed that his (KA's) statements were not accurate. (Testimony of Mr. Foley)
37. On January 2, 2013, Mr. Foley met with Police Director Cozzaglio. Prior to this meeting, Director Cozzaglio was not aware that Mr. Foley had any involvement in the Pini case. (Testimony of Director Cozzaglio) During the meeting, Mr. Foley stated that he had "concerns" about the Pini case. Director Cozzaglio was surprised that Mr. Foley had such detailed information about the case and asked Mr. Foley why he was so interested in the case. In response, Mr. Foley stated that an "innocent party shouldn't be jailed." (Testimony of Director Cozzaglio)
38. Director Cozzaglio considered the Pini matter to be "primarily a Williamstown" case, but he knew that Officer Bailey (who had now been appointed as a Detective by the Director), was the primary investigator regarding the North Adams aspect of the case. Director Cozzaglio told Mr. Foley to bring his concerns regarding the Pini case to Officer (now Detective) Bailey. (Testimony of Director Cozzaglio)
39. On January 8, 2013, Mr. Foley met with Detective Bailey. During their meeting, Mr. Foley told Detective Bailey that "Pini was not the master mind", but rather, RJ was the master mind and that RJ was "just playing stupid." In response, Detective Bailey asked Mr. Foley how he had such detailed information about the Pini case. Mr. Foley stated the he had received multiple calls from Mr. Pini and that he had worked with

Mr. Pini in the past. Mr. Foley then told Detective Bailey that Mr. Pini usually admits to his crimes; that there were inconsistencies regarding the witness statement from KA and that Detective Bailey may have violated the “safe harbor rule” in regard to his interview with RJ. Mr. Foley told Detective Bailey that he should re-interview KA. Specifically, Mr. Foley told Detective Bailey that RJ (not Pini) had sold the computer to KA and that RJ (not Pini) had brought the computer up to KA’s apartment. (Testimony of Detective Bailey)

40. At the end of their conversation, Mr. Foley told Detective Bailey that he would provide him (Bailey) with a supplemental narrative regarding the matters he had just brought to Detective Bailey’s attention. He never did. (Testimony of Detective Bailey)

41. Also on January 8, 2013, Mr. Foley sent an email to Director Cozzaglio which stated:

“Director:

On January 8, 2013, at the beginning of my shift, I spoke to Detective Bailey about my concerns regarding the Pini / [RJ] case. I advised him of what I thought and the information given to me by Pini. I also advised him of the conflict between [KA]’s new statement and his original statement. I discussed the inconsistencies within [RJ]’s statement. Detective Bailey stated that he will speak with all parties and decide were (sic) to go from there. I advised Detective Bailey that I would assist him and do a supplemental report regarding this information. As I mention (sic) during my conversation with you last week, I do not believe [KA]’s statement would change the charges against Pini. I think it would be minimally detrimental to the case of receiving stolen property. I still recommend submittal of [KA]’s new statement to the District Attorney’s office.

Respectfully,  
Sergeant James Foley” (Exhibit 2)

42. Director Cozzaglio does not recall receiving the above email from Mr. Foley, but he does not dispute that it was probably sent to him. (Testimony of Director Cozzaglio)

43. From January 9, 2013 to May 8, 2013 (the day of Mr. Pini's scheduled trial), neither Director Cozzaglio nor Detective Bailey ever heard from Mr. Foley again regarding the Pini case. (Testimony of Director Cozzaglio and Detective Bailey)
44. On March 22, 2013, Detective Bailey did re-interview KA. During this second interview, KA stated that it wasn't Mr. Pini who he handed the money to, but, rather, RJ. Further, KA stated that RJ was the person who actually brought the computer up to KA's apartment, not Mr. Pini. Detective Bailey submitted this new statement to the ADA handling Mr. Pini's criminal case, Marianne Shelvey. (Testimony of Detective Bailey & City Exhibit 32) ADA Shelvey turned this new statement over to defense counsel on April 9, 2013. (Testimony of ADA Shelvey and City Exhibit 32)
45. Sometime in March or April 2013, Mr. Foley had another phone conversation with Mr. Pini via a conference call facilitated by Mr. Pini's girlfriend. During that conversation, the two of them had a discussion related to Mr. Pini's request that KA be re-interviewed. (Testimony of Mr. Foley)
46. On May 1, 2013, Mr. Pini was released from the House of Correction. (Testimony of Mr. Pini)
47. On May 7, 2013, at approximately 10:00 P.M., one day before Mr. Pini's criminal trial, Mr. Pini spoke with Mr. Foley via telephone while Mr. Foley was on duty at the police station. (Testimony of Mr. Foley and Mr. Pini)
48. During the May 7<sup>th</sup> phone conversation, Mr. Pini told Mr. Foley that he was scared that he was going to be convicted and sentenced to ten (10) years in jail. Mr. Pini told Mr. Foley that he had no faith in his attorney and asked Mr. Foley if he could help

him (Pini) point out inconsistencies in witnesses' testimony that should be brought up at trial the next day. (Testimony of Mr. Pini and City Exhibit 30A)

49. While still on duty, Mr. Foley left the police station, drove to Mr. Pini's home in his police cruiser, picked up Mr. Pini and drove with him to the "Fish Pond" in North Adams. Mr. Pini brought with him the documents he had received via the discovery process related to his criminal trial. (Testimony of Mr. Foley and Mr. Pini)

50. While sitting in the cruiser at the Fish Pond, Mr. Pini asked Mr. Foley to review the documents and make written notes on the documents regarding any inconsistencies that should be brought up at trial. Mr. Foley did not make any notations directly on the discovery documents. (City Exhibit 30A)

51. Mr. Foley and Mr. Pini reviewed the various documents for 30 to 45 minutes.  
(Testimony of Mr. Foley)

52. After reviewing the documents, Mr. Foley drove Mr. Pini home and then drove back to the police station with the discovery documents. While at the police station, Mr. Pini, using a Police Department computer, typed up two and a half (2 ½) pages of notes. Those notes, as written, but with redactions, are inserted here on the following three (3) pages. They include hand-written notes at the end made by Mr. Pini.

(Testimony of Mr. Foley & Mr. Pini, City Exhibit 11)

EX-11

February 24, 2012, 7:43 PM computer reported missing from [REDACTED] Williamstown stolen sometime between 1:00 PM and 7:40 PM [REDACTED] stated he did this B&E with assistance of Pinj. Incident #12-92. One (1) computer stolen at this time.

February 25, 2012 6:14 AM computers reported missing from [REDACTED], [REDACTED] Williamstown. B&E occurred sometime between 7:00 PM - 6:10 AM (2/24/12 to 2/25/12). Suspicious male seen on 2/24/12. Described as W/M, 5-07 to 5-09, curly brown hair. [REDACTED] stated he did this B&E with [REDACTED]. Police list [REDACTED] as suspect with [REDACTED]. Incident #12-93-of. Two (2) computers stolen.

\*\*\*\*\* Was it Pinj or [REDACTED]? [REDACTED] has two different people committing two separate B&E at approx. the same time.

February 27, 2012, 8:00 AM B&E reported at [REDACTED] Williamstown SECOND B&E at this address. Window broken with rock. [REDACTED] written statement clearly states that he and [REDACTED] went to this address twice. [REDACTED] stated that on both occasions he and [REDACTED] were planning on stealing computers. It is not logical that he and [REDACTED] break in building and do not steal anything. [REDACTED] implicates Pinj insinuating this was the third B&E in the same building but only stole the second and third time. [REDACTED] stated that he was with Pinj on the second or third break. Incident #12-96-Of. Two (2) computers were stolen.

On March 4, 2012, 2:58 AM B&E reported [REDACTED] where four (4) computers were stolen and other electronics. The B&E occurred between March 3, 1900 and time reported. [REDACTED] admitted to stealing these items. Incident #12-105-of.

On March 9, 2012 at approximately 1040 PM [REDACTED] was caught in the act of stealing more computers. Only one set of foot prints and broken window with rock same MO as Incident #12-96-of)

\*\*\*\*\* During all of the above incidents according to [REDACTED] cell phone records there is no connection to Pinj during any of the B&E's as described in any of [REDACTED] statements. There is no identifiable record of a connection between [REDACTED] and Pinj from cell phone records to corroborate [REDACTED] allegation.

if Pini was the leader of this crime spree why would [REDACTED] have to inform him of the thefts. Pini should have prior knowledge as being the mastermind. It would appear that [REDACTED] had computers and was looking to get rid of them and asked Pini if he knew people looking for cheap computers.

[REDACTED] STATEMENT:

Statement #1

[REDACTED] stated he acted alone. The computers were for his own use. [REDACTED] denied involvement in any other B&E's. (UE)

\*\*\*\*\*16 hours later a second statement is taken by police because they do not believe him.

Statement #2 [REDACTED] names Pini and implicates himself and Pini in four other breaks.

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\*\*\*\*\*24 hours later a second statement is taken by police because they STILL do not believe him.

[REDACTED] stated he did all five, that Pini did four (4) and [REDACTED] did one (1). Stated that would drive them and be in contact via cell phone (no records to that fact) Pini sold all the computers. [REDACTED] stated that he sold all but two of the computers with [REDACTED] [REDACTED] kept one for himself and Pini sold one with [REDACTED] to [REDACTED]. In [REDACTED] statement he states that [REDACTED] drove them to Williamstown.

[REDACTED] stated that he and [REDACTED] sold computers to:

(2) [REDACTED]

(1) [REDACTED]

(1) [REDACTED]

(1) [REDACTED]

(1) [REDACTED] kept on for himself

(1) [REDACTED] still had one for sale at the time of [REDACTED] arrest.

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(7) Total sold by [redacted] and [redacted]

(1) Pini helped [redacted] make contact with [redacted] to sell a computer.

Total 8 of the nine computers stolen. What was Pini getting from this? It was alleged that that Pini was paying the two \$50.00 a day to steal for him but [redacted] and [redacted] are selling all the computers and making all the money. Why would Pini drive them or involve himself if [redacted] had his own car?

Please note

[redacted] WAS interviewed a second time because the first time was never recorded. Do we have that second interview? if not why? if yes why haven't I seen it?

Also when Willmington found out [redacted] wrote a ALIBY statement she was picked up and questioned at WPD for 3-4 Hours Do we have any video tape or statements from that? if not why?

witnesses I want Simmons/ testify

[redacted]  
[redacted]  
[redacted]  
[redacted]  
Joe Pini Defendant

53. While typing up these notes at the police station, a sergeant by the name of Baker was trying to ask Mr. Foley about police-related issues related to drugs and violence at a location in North Adams. Mr. Foley was focused on typing up the Pini-related notes. (Testimony of Mr. Foley)
54. At or around 12:30 A.M. on May 8, 2013, Mr. Foley printed out the notes and drove to Mr. Pini's home. (Testimony of Foley)
55. While at Mr. Pini's home, Mr. Foley returned the discovery documents to Mr. Pini and also gave Mr. Pini the 2 ½ pages of notes that he had just finished typing up at the police station. (Testimony of Mr. Pini)
56. On the morning of May 8, 2013, Mr. Pini's criminal trial commenced in the Berkshire Superior Court. ADA Shelvey appeared for the Commonwealth and Mr. Pini was represented by counsel. (Exhibit 12)
57. Prior to the commencement of the trial, ADA Shelvey and counsel for Mr. Pini engaged in settlement discussions that were not successful. Further, ADA Shelvey remembers that Mr. Pini was trying to remove his attorney. (Testimony of ADA Shelvey)
58. As the trial commenced, Mr. Pini began waving around a document, saying that it was a police report from a police officer named Foley that showed he didn't commit the crimes for which he was being tried that day. At first, ADA Shelvey mistakenly believed that Mr. Pini was referring to a Lt. Foley from the State Police, but eventually learned that Mr. Pini was referring to Sgt. Foley of the North Adams Police Department. (Testimony of ADA Shelvey)

59. ADA Shelvey had worked with Mr. Foley on past criminal cases, including cases where Mr. Pini had provided information, but she was surprised to learn that Mr. Foley had any involvement in the current matter. Three (3) North Adams police officers were among potential police witnesses (Bailey, Kaiser and Detective Lesniak) and Mr. Foley was not one of them. (Testimony of ADA Shelvey and City Exhibit 32)
60. Before seeing the document (Exhibit 11) that Mr. Pini had in his hand, ADA Shelvey was concerned that a police report had been completed that she was unaware of and that possibly should have been turned over to defense counsel. (Testimony of ADA Shelvey)
61. Based on the unexpected turn of events in the court room, the presiding Judge recessed the trial at 10:20 A.M. on May 8<sup>th</sup> to reconvene at 2:00 P.M. the same day. At this point, ADA Shelvey still did not have a copy of the document that Mr. Pini was referencing. (Testimony of ADA Shelvey)
62. That morning, Mr. Pini sent Mr. Foley a text message stating words to the effect, “I fucked up; I didn’t know I shouldn’t have given the document to anyone.” (Testimony of Mr. Pini)
63. Shortly after 10:20 A.M., ADA Shelvey contacted Director Cozzaglio and inquired if he was aware of any report prepared by Mr. Foley regarding Mr. Pini’s criminal case. Director Cozzaglio. (Testimony of ADA Shelvey)
64. Director Cozzaglio told ADA Shelvey that Mr. Foley had taken a keen interest in the Pini case. (Testimony of Director Cozzaglio). However, Director Cozzaglio told ADA Shelvey that he was unaware of any report and that Mr. Foley had prepared

and that he had ordered Mr. Foley not to have any involvement with matters involving Mr. Pini's criminal case<sup>6</sup>. (Testimony of ADA Shelvey and City Exhibit 12)

65. Director Cozzaglio, after speaking with ADA Shelvey, obtained a civilian subpoena against Mr. Foley, ordering him to appear at the Berkshire Superior Court at 2:30 P.M. that afternoon "to give evidence of what he knows relating to such matters and things as shall be inquired of him in behalf of the Commonwealth, in the case of "Commonwealth vs. Joseph Pini." Director Cozzaglio personally served the subpoena on Mr. Foley. (City Exhibit 10)
66. When the Court reconvened at 2:00 P.M., the Judge asked both counsel for an update regarding the document referenced by Mr. Pini that morning. Counsel for Mr. Pini stated:
- "Yes, there is some clarity. At the recess I asked Mr. Pini more detailed questions about it. I had never spoken to him before he actually said it in open court. He used the term report very loosely. Apparently I now have copies of what he was referring to. He has a friend who happens to be a police officer who apparently has had access to everything Mr. Pini has gotten in discovery and went through it, enumerated potential conflicts, potential areas of exploration on cross examination. It was simply trial strategy that was presented to Mr. Pini and forwarded to me. When it was first presented to me this morning, your Honor, I thought Mr. Pini had done that. He has done that throughout the course of the case, been very, very helpful in identifying areas of cross examination. I did not understand when I looked at that originally that it came from a friend who is a police officer but that's the situation." (City Exhibit 12)
67. When asked by the Judge to confirm that this was not a law enforcement officer that had any involvement in the case, ADA Shelvey stated:

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<sup>6</sup> During his testimony before the Commission, Director Cozzaglio candidly acknowledged that he couldn't remember if he actually ordered Mr. Foley not to have any involvement in the Pini case. I have concluded that no such order was actually given. However, as discussed in the analysis, I have concluded that Mr. Foley was insubordinate for other reasons.

“Your Honor, he’s actually the sergeant in charge of the individual responsible for doing the investigation. I have spoken to Director Cozaglio (sic) about this matter. He’s the Director of Public Safety from North Adams. They don’t have a chief, per se. He made it clear to me that this Sergeant was told not to be involved in this case. There’s a relationship between the Defendant and this Sergeant. He was told not to have anything to do with this case. Notwithstanding those instructions from Director Koczela (sic) directly, this Sergeant has now accessed files. We don’t know the extent to which that has been done. I don’t know what is in these – I’m going to call this a report ...”

...

“My concern is that this Sergeant has been told directly by his supervisor not to get involved in any of the information involved in this case that was being investigated by Williamstown and another sergeant who this Sergeant directly supervises ...”  
(City Exhibit 12)

68. The Judge postponed the criminal trial to July 2013. (City Exhibit 12 and Testimony of ADA Shelvey)

69. That same day, Mr. Foley responded to the subpoena that was served on him by Director Cozzaglio by reporting to the Berkshire Superior Court and met with ADA Shelvey. When ADA Shelvey asked Mr. Foley why he had prepared and given Mr. Pini the “trial strategy” document, Mr. Foley stated that: the document in question contained his own personal notes; he was concerned about how the investigation was handled; he had conducted his own investigation; and that his notes must have been inadvertently picked up by Mr. Pini when he (Foley) handed Mr. Pini’s discovery documents back to him. (Testimony of ADA Shelvey)

70. ADA Shelvey did not believe that Mr. Foley was being forthcoming about how Mr. Pini ended up with the trial strategy document that Mr. Foley had prepared. ADA Shelvey told Mr. Foley to prepare a report documenting any contact that he had within anyone regarding the Pini criminal matter, including Mr. Pini and KA.  
(Testimony of ADA Shelvey)

71. Also on May 8, 2013, Director Cozzaglio sent a letter to Mr. Foley stating:

“Sergeant James Foley,

You are ordered to provide me, in writing, the following information:

Any and all correspondence you had with Joseph Pini-Campbell or his attorney since the beginning of this investigation that led to the charges he is currently on trial for. This investigation began on or around March 2012. This will include, but not limited to, any information you provided or received in written form, computer generated, copied, spoken in word, whether in person, via telephone, text message, any type of digital communication or thru (sic) a third party to include but not limited to [Pini’s girlfriend].

This report is to be completed and on my desk, signed by you no later than May 9, 2013 at 8:00 A.M.

Michael Cozzaglio  
Police Director” (City Exhibit 13)

72. When Mr. Foley asked Director Cozzaglio for clarification regarding the order,

Director Cozzaglio told him to simply follow the order. (Testimony of Director Cozzaglio)

73. In a letter dated May 8, 2013, Mr. Foley penned the following letter to Director

Cozzaglio:

“TO: Director Cozzaglio  
North Adams Police Department

FROM: Sergeant James Foley

RE: Response to direct order for information regarding correspondence

I do not recall having any correspondence with Joe Pini, [Joe Pini’s girlfriend], or Joe Pini’s attorney, as requested in your letter dated May 8<sup>th</sup>, 2013.

If you have any further questions regarding this matter please contact my union attorney, Terry Coles at [phone number].”

Thank you for your attention to this matter.

Respectfully Submitted,

Sergeant James Foley” (City Exhibit 14)

74. After reviewing Mr. Foley’s May 8<sup>th</sup> reply, Director Cozzaglio considered it to be untruthful, as it did not mention the trial strategy document or the conversations that Mr. Foley had with Mr. Pini, which Director Cozzaglio was now aware of via his conversations with ADA Shelvey. (Testimony of Director Cozzaglio)
75. The next day, on May 9, 2013, Mr. Foley sent a two (2)-page fax to ADA Shelvey. The first page was a fax cover sheet. The second page was a copy of the email that Mr. Foley sent to Director Cozzaglio on January 8, 2013. That email does not state that Mr. Foley met with Mr. Pini or KA. (City Exhibit 15)
76. For reasons unrelated to the issues in this appeal, ADA Shelvey left the District Attorney’s office for another career opportunity in June 2013. She stopped handling cases, including the Pini criminal case, in May 2013. It is her understanding that Mr. Pini “pled out” and received a suspended sentence. (Testimony of ADA Shelvey)
77. On May 24, 2013, Mr. Foley was placed on paid administrative leave and Director Cozzaglio initiated an investigation. (Testimony of Director Cozzaglio and City Exhibit 17)
78. As part of the May 24, 2013 notice to Mr. Foley regarding his paid administrative leave, it was stated, that, “while on administrative leave you are not to report to the City Hall or Police Station unless you have previously been given permission to do so by a Superior Officer during regular business hours. You will be notified later of the progress of the investigation, and of the date and time you will be interviewed regarding this matter.” (City Exhibit 17)

79. Also on May 24, 2013, Director Cozzaglio issued an email to all members of the Police Department stating: “In an effort to minimize rumors and or assumptions, I want to advise all of you that Sgt. Foley has been placed on administrative leave until further notice. He is not to be inside of the police department unless it is during regular business hours and with a superior officer. Thank you for your cooperation and understanding in this matter.” (Appellant Exhibit 12)
80. On July 21, 2013, two (2) days prior to a scheduled interview with Director Cozzaglio to discuss his interactions with Mr. Foley, Mr. Pini visited the North Adams police station to report an unrelated matter related to a Keno ticket. While there, he spoke with Officer Ben Austin. He told Officer Austin about the scheduled meeting on July 23<sup>rd</sup>. (Testimony of Mr. Pini and Exhibits 30A and 30B and Appellant Exhibit 53)
81. Shortly after leaving the police station, Mr. Pini was contacted by Mr. Foley who wanted to know the purpose of the July 23<sup>rd</sup> meeting. (Testimony of Mr. Pini and City Exhibits 30A and 30B)
82. Director Cozzaglio and others interviewed Mr. Pini on July 23, 2013 regarding his interactions with Mr. Foley. (Testimony of Director Cozzaglio and Mr. Pini and City Exhibit 30A)
83. On July 26, 2013, Mr. Pini and his girlfriend were again interviewed by Director Cozzaglio. Mr. Pini and his girlfriend reported that Mr. Foley arrived at their home earlier that day (July 26<sup>th</sup>), pounded on the door, and demanded to see Mr. Pini. Mr. Pini’s girlfriend reported that she went out and spoke with Mr. Foley, who told her that it was important for Mr. Pini to tell the City that he received the notes from Mr. Foley at the House of Correction and not the Fish Pond. (City Exhibit 31)



84. On July 29, 2013, Director Cozzaglio hand-delivered a written notice to Mr. Foley, ordering him to stay away from Mr. Pini, his residence, and anyone associated with Mr. Pini. (City Exhibit 19)

85. On August 12, 2013, while Mr. Foley was on paid administrative leave, Officer Austin sought and received the assistance of Mr. Foley regarding how to write up a police report regarding a confidential informant. (Appellant Exhibit 53 and City Exhibit 22)

86. On August 22, 2013, Mr. Foley filed an application for a criminal complaint in the Northern Berkshire District Court against Director Cozzaglio, alleging that Director Cozzaglio engaged in “Intimidation of Witness.” (City Exhibit 25)

87. Mr. Foley attached an affidavit to his complaint application that, after reciting his version of what occurred prior to initiation of his then-pending disciplinary investigation, stated in part:

“ ... This fallacious investigation is being conducted with malice causing me financial, emotional, and psychological harm. Due to a lack of a reasonable explanation it is a clear message to me of his attempt to prevent, discredit, or sway my testimony as a witness in this Superior Court trial.

Michael Cozzaglio is aware of my current status as a witness as mentioned above he delivered the summons personally. I believe he is concerned that my testimony will bring credibility issues to the statement made by the main witness against the defendant of the above mentioned case. Cozzaglio would be justly concerned of a conversation he had with me in his office on January 2, 2013 that will be brought to light when I testify. My testimony could possibly cause civil issues making Cozzaglio and others defendants in a civil suit. At the very least my testimony will cause him vast embarrassment amongst the community, his subordinates and his peers.

Based on the above mentioned facts I believe his intent is to discredit, retaliate and intimidate me due to the fact that I am a witness. I believe probable cause exists and the elements have been met violating the Massachusetts General Law as it applies to intimidation of a witness.” (City Exhibit 25)

88. On September 4, 2013 at approximately 2:00 A.M., Mr. Foley sent a text message to North Adams Police Officer Christopher Gelinas while Officer Gelinas was working the 12:00 Midnight to 8:00 A.M. shift. In the text message, Mr. Foley asked Officer Gelinas to call him. (Testimony of Officer Gelinas)
89. When Officer Gelinas called Mr. Foley, Mr. Foley asked him if he could look up a case and see if Mr. Pini was arrested on a certain date on or about January 5, 2012. Officer Gelinas told Mr. Foley that he was not comfortable providing Mr. Foley with this information. Mr. Foley replied that the information was public knowledge and that Officer Gelinas would not be “flagged” for looking up the information on the Police Department’s Mobile Data Terminal (MDT). Officer Gelinas declined to conduct the inquiry requested and reported this interaction to Director Cozzaglio when Director Cozzaglio reported to work at approximately 8:00 A.M. (Testimony of Officer Gelinas and Exhibit 21)
90. On September 9, 2013, after a hearing and a review of the evidence, the Clerk Magistrate determined that no probable cause existed to issue criminal process against Director Cozzaglio for the alleged offense of Intimidation of a Witness. (City Exhibit 25)
91. In his September 9<sup>th</sup> decision, the Clerk Magistrate, under the section labeled “uncontested facts” stated in part, “On May 7, 2013, even though Foley was not assigned to the Pini case in any capacity, he again *without authorization from Pini’s legal counsel* and without the knowledge or consent of the Office of the Berkshire County District Attorney spoke with Pini on not less than three occasions.” (City Exhibit 25) (*emphasis added*)

92. On September 19, 2013, Mr. Foley filed an appeal of the Clerk Magistrate's decision.

On September 30, 2013, a District Court Judge "declined to set the matter for further hearing." (City Exhibit 26)

93. On October 2, 2013, while Officer Gelinas was responding as backup to a police call,

Mr. Foley drove by the scene and stopped to speak with Officer Gelinas. Mr. Foley apologized for putting Officer Gelinas in a tough spot on September 4, 2013, but stated that he would still like to get the information he requested. (Testimony of Officer Gelinas)

94. After providing Mr. Foley with notice, a hearing was conducted by the Appointing

Authority, the City's Mayor, on January 31, 2014 to determine whether Mr. Foley should be disciplined for violating numerous rules and regulations of the Police Department related to: conduct unbecoming an officer; improper associations; undue influence; interfering with the course of justice; public criticism of department; truthfulness; use of department records and communications; orders and insubordination. (City Exhibit 2)

95. Mr. Foley did not testify at the January 31<sup>st</sup> local hearing. (Stipulated Facts)

96. After the hearing, the Mayor, via written notice dated January 31, 2014, terminated

Mr. Foley from the City's Police Department. (City Exhibit 3)

### *Legal Standard*

G.L. c. 31, § 43 provides:

"If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing

authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority."

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible

evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law," Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928).

The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service," School Comm. v. Civil Service Comm'n, 43 Mass. App. Ct. 486, 488 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983).

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there," Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956).

Under section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew," Falmouth v. Civil Service Comm'n, op.cit. and cases cited. However, "[t]he commission's task... is not to be accomplished on a wholly blank slate. After making its de novo findings of fact, the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether

‘there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision’,” which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority, Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006), quoting internally from Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983) and cases cited.

### *Analysis*

On May 8, 2013, then-Assistant District Attorney Marianne Shelvey, appearing for the Commonwealth, was prepared to try a criminal case against Joseph Pini in Berkshire Superior Court during a trial that was expected to last three (3) days involving more than two (2) dozen potential witnesses. The charges against Mr. Pini were serious and, based on his own testimony before the Commission, he faced a potential jail term of up to ten (10) years if convicted.

As the trial was about to commence, Mr. Pini waived a document that he called a “police report” in his hand, arguing that it proved his innocence. Unbeknownst to ADA Shelvey, or North Adams’s Police Director, that document was primarily the work product of North Adams Police Sergeant James Foley and had been prepared by Mr. Foley while he was on duty the prior night after meeting with the criminal defendant. Through these actions, Mr. Foley interfered with the course of justice, which is a violation of the rules of the North Adams Police Department, and contrary to the high standard expected of all police officers (conduct unbecoming an officer).

Mr. Foley argues that the document, which pointed out alleged inconsistencies of Commonwealth witnesses to be addressed on cross examination, was given to Mr. Pini in

error when he returned discovery documents to Mr. Pini approximately ten (10) hours prior to the commencement of the criminal trial.

First, I do not credit Mr. Pini's **Foley's** testimony in this regard. Mr. Foley *acknowledges* that he left the police station at approximately 10:00 P.M. on the night of May 7<sup>th</sup>; went to Mr. Pini's home; drove Mr. Pini to a recreational facility in North Adams; spent close to an hour reviewing discovery documents with Mr. Pini; and then, after dropping Mr. Pini off, returned to the police station where he used a Police Department computer to prepare the document in question. Further, Mr. Foley *acknowledges* that, while preparing the document, he brushed off questions from a fellow police officer who was inquiring about police-related business in North Adams and stayed thirty (30) minutes past the end of this shift to ensure that the document was completed; and then made a return trip to Mr. Pini's home. Mr. Foley failed to testify at the City's local hearing and the Mayor accepted the Police Director's well-reasoned and well-supported conclusion that Mr. Foley's mission that night was to arm Mr. Pini with a trial strategy-like document to assist him at his criminal trial. Although Mr. Foley did not testify at the local hearing, and the City was entitled to draw an adverse inference from that<sup>7</sup>, I still gave Mr. Foley ample opportunity during his testimony at the Commission hearing to dispute the City's conclusion. He offered halting, illogical testimony finally stating that he simply wanted to get the document prepared for his own personal files that night. I do not credit that statement. Rather, when applying common sense, the record supports the City's conclusion regarding Mr. Foley's intentions that night.

Second, even if I were to believe Mr. Foley (which I do not), his admission to meeting

with a criminal defendant hours prior to his criminal trial, without the knowledge of the ADA prosecuting the case or the City's Police Director, constitutes interfering with the course of justice. Further, a reading of the transcript of the Superior Court proceeding shows that Mr. Pini's counsel was also surprised to learn that Mr. Foley, a North Adams police sergeant, had discussions with his client hours before the trial.

A preponderance of the evidence also supports the City's conclusion that Mr. Foley was untruthful – on multiple occasions. First, as referenced above, Mr. Foley prepared the trial strategy document for Mr. Pini and gave him the document to assist him with his criminal trial. Thus, Mr. Foley was untruthful when he told ADA Shelvey and later, the City's Police Director, that Mr. Pini obtained the document by accident. Second, when ADA Shelvey told Mr. Foley to give her a report documenting any contact that he had with anyone related to the Pini criminal matter, he faxed her a copy of a non-responsive email he sent to the Police Director months prior that did not reference his meeting with KA<sup>8</sup> or his conversations with Mr. Pini. By omitting that information, he was untruthful. Third, Mr. Foley was untruthful in his May 8, 2013 memorandum to the Police Director when he stated: "I do not recall having any correspondence with Joe Pini, [Joe Pini's girlfriend], or Joe Pini's attorney, as requested in your letter dated May 8<sup>th</sup>, 2013."

Again, Mr. Pini had, only hours early, given Mr. Pini the trial strategy document.

Further, it was abundantly clear from Director Cozzaglio's written order that he wanted to know whether Mr. Foley had any in-person conversations, phone calls or text message

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<sup>7</sup> Although Mayor Alcombright testified that he did not draw an adverse inference from Mr. Foley's failure to testify at the local hearing, he was forced to make his decision without the benefit of Mr. Foley's testimony.

<sup>8</sup> Although the email from Mr. Foley references two (2) statements from KA, and it appears now, after listening to Mr. Foley's testimony, that he was referring to the "statement" that he (Foley) took from KA, it would be impossible to know simply from reading the email sent to ADA Shelvey that Mr. Foley had actually met with KA.

communication with Mr. Pini. By failing to reference any of the *many* occasions where such communication occurred prior to May 8<sup>th</sup>, Mr. Foley was untruthful – and insubordinate, as his response failed to comply with the order of the Police Director.

By using the Police Department’s computer to complete the trial strategy document, Mr. Foley also violated the Police Department’s rules related to department records, reports and communication.

Finally, by visiting Mr. Pini’s home after Mr. Pini was interviewed by the Police Director, and asking that Mr. Pini revise his statement, Mr. Foley violated the Police Department rule regarding undue influence.

The hearsay testimony related to the charge of Mr. Foley’s public criticism of the Department was not sufficiently reliable for me to conclude that Mr. Foley violated this particular rule.

In summary, Mr. Foley engaged in serious misconduct that adversely affected the public interest, thus justifying disciplinary action against him. Having determined that it was appropriate to discipline Mr. Foley for his misconduct, I must determine if the City was justified in the level of discipline imposed – termination.

“The ... power accorded the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded the appointing authority.” Falmouth v. Civ. Serv. Comm’n, 61 Mass. App. Ct. 796, 800 (2004) quoting Police Comm’r v. Civ. Serv. Comm’n, 39 Mass. App. Ct. 594, 600 (1996). Unless the Commission’s findings of fact differ significantly from those reported by the appointing authority or interpret the relevant law in a substantially different way, the commission is not free to “substitute its judgment” for that of the appointing authority, and “cannot



modify a penalty on the basis of essentially similar fact finding without an adequate explanation.” E.g., Falmouth v. Civil Service Commn, 447 Mass. 814, 823 (2006).

The Commission is also guided by “the principle of uniformity and the equitable treatment of similarly situated individuals” [both within and across different appointing authorities]” as well as the “underlying purpose of the civil service system ... to guard against political considerations, favoritism and bias in governmental employment decisions. ” Falmouth v. Civil Service Commission, 447 Mass. 814, 823 (2006) and cases cited.

Even if there are past instances where other employees received more lenient sanctions for similar misconduct, however, the Commission is not charged with a duty to fine-tune an employee’s discipline to ensure perfect uniformity. See Boston Police Dep’t v. Collins, 48 Mass. App. Ct. 408, 412 (2000).

The Commission has recognized that a police officer must be truthful at all times and that failure to do so constitutes conduct unbecoming an officer, MacHenry v Wakefield, 7 MCSR 94 (1994). Lying in a disciplinary investigation alone is grounds for termination, LaChance v. Erickson, 522 U.S. 262 (1998), citing Bryson v. United States, 396 U.S. 64 (1969). The Commission has stated that “it is well settled that police officers voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens,” Garrett v. Haverhill, 18 MCSR at 381, 385 (2005). Specifically, there “is a strong public policy against employing police officers who are untruthful,” Royston v Billerica, 19 MCSR 124, 128 (2006). Therefore, “a police officer that has lost his credibility can no longer effectively perform the duties of the position,” Pearson v. Whitman, 16 MCSR 46, 50 (2003). In Meaney v. Wobum, 18 MCSR 129, 133-35

(2005), the discharge of a police officer was upheld based, in part, on the officer's consistent dishonesty and "selective memory" during the departmental investigation of that officer's misconduct. In Eisenbeiser v. West Springfield, 7 MCSR 99, 104, the discharge of a police officer was upheld based on, *inter alia*, the officer's dishonesty as his misconduct was ongoing, intentional and showed no signs of improvement. And, in Deshamias v. City of Westfield, 23 MCSR 418 (2009), a police officer's discharge was upheld based primarily on the officer's dishonesty about a relatively minor infraction that occurred on his shift.

Here, it has been shown that Mr. Foley was untruthful on multiple occasions and violated numerous other rules of the City's Police Department, thus justifying the decision to terminate him as a North Adams Police Sergeant.

#### *Conclusion*

Mr. Foley's appeal under Docket No. D1-14-30 is hereby ***denied***.

Civil Service Commission

Christopher Bowman

Christopher C. Bowman  
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on March 19, 2015.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

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

Notice to:  
Joseph Foley (Appellant)  
Fernand Dupere, Esq. (for Respondent)