

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

**SUFFOLK, ss.**

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

**TIMOTHY SHEA,**

Appellant

**CASE NO: D-08-309**

v.

**CITY OF BOSTON,**

Respondent

Attorney for the Appellant:

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Attorney for the Respondent:

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Commissioner:

Paul M. Stein

**DECISION**

The Appellant, Timothy Shea, appealed to the Civil Service Commission (Commission), pursuant to G.L. c.31, §43, seeking reversal of the decision of the City of Boston ("Boston") to suspend him for ten (10) days from his employment as a Senior Computer Operator with Boston's Property and Construction Management Department (PCMD). At hearings on May 12, 2009 and June 30, 2009, the City presented evidence through six witnesses. The Appellant testified on his own behalf. Twenty-two Exhibits were received at the hearing and one additional Exhibit was received afterward. The hearing was declared private and was digitally recorded. Boston submitted a proposed decision, but the Appellant did not.

## **FINDINGS OF FACT**

Based upon the Exhibits; the testimony of the Appellant, five PCMD personnel [Deputy Director, Stephen Crosby, Assistant Human Resources Director Bill Kessler, Computer Operator Shelia Broderick, Computer Operator Cathy Simmons, Systems Administrator Francisco Skelton] and Service Employees International Union (SEIU) Local 888 field representative, Tina. Hardy;<sup>1</sup> and the inferences reasonably drawn from that evidence as I find credible, I make the findings of fact set forth below.

1. Since 1997, Mr. Shea held a tenured civil service position of Senior Computer Operator with the Boston PCMD. As a Senior Computer Operator, he was responsible for monitoring alarm systems throughout Boston's municipal facilities and dispatching appropriate public safety personnel to respond in the event of activity. Mr. Shea typically was scheduled to work the ("Last Half") midnight to 8:00 a.m. shift, during which he usually worked with one other operator and a supervisor, stationed in a modestly-sized control room in the PCMD Communications Office at 400 Frontage Road, Boston. (*Testimony of Appellant & Crosby; Claim of Appeal; Exhs.4, 20 & 22*)

2. Several female Computer Operators were employed in Appellant's work group, one of whom, Sheila Broderick, in 1999, married the Senior Supervisor of Computer Operators, PCMD employee, Tom Broderick. (*Testimony of Appellant, S. Broderick & Simmons; Exh.22*)

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<sup>1</sup> Tina Hardy acted as Appellant's union representative at the Appointing Authority level "Weingarten" investigatory interview and disciplinary hearing. The Appellant moved to quash the subpoena served on her by Boston on the grounds that it interfered with the collective bargaining "representational relationship" between Mr. Shea and his union. At the outset of the hearing, this Commissioner denied the motion, but limited the scope of Ms. Hardy's testimony to her percipient knowledge of facts other than those learned in private conversations with Mr. Shea. (Hearing and Ruling on Motion to Vacate Subpoena). See also Order of Dismissal, *In re City of Boston*, Division of Labor Relations, Docket MUP-09-5487 (August 6, 2019) and cases cited (dismissing unfair labor practice complaint by Local 888 alleging issuance of the Commission's subpoena to Ms. Hardy violated G.L.c.150E, §10(a)(1)).

3. By executive order in October 2000, Boston Mayor Menino promulgated a “Policy on Discrimination, Sexual & Other Forms of Harassment and Retaliation” (Anti-Discrimination Policy), which governs the PCMD and which Mr. Shea acknowledged receipt of a copy. (*Exh.18; Testimony of Kessler & Appellant*)

4. The Boston Anti-Discrimination Policy, among other things, prescribes that all employees are expected to conduct themselves “in a professional manner with respect and concern for their fellow employees and members of the public” and, specifically, prohibits all forms of discrimination, harassment and retaliation against employees, customers and visitors. Sexual harassment and harassment is defined as “advances, requests or conduct having the purpose or effect of unreasonably interfering with an individual’s work performance by creating an intimidating, hostile, humiliating or offensive work environment” and may include “leering . . . suggestive or insulting comments . . . use of sexual . . . epithets, slurs or derogatory comments . . . “belittling, derogatory or mocking culture or language” and “displaying material or verbal or physical conduct that shows hostility or aversion to a person’s [gender or sexual orientation]” (*Exh.18*)

5. Boston also has promulgated a Management Information Services “Acceptable Use Policy” (MIS Policy), effective February 2008, which prescribes policies for security, privacy and acceptable use of municipally-owned computer, network and internet systems which “are the property of the City of Boston . . . to be used for business related purposes. . . . Inappropriate use exposes the City to liability and risks, including virus attacks and compromise of network systems and services.” In particular: “The following activities are strictly prohibited with no exceptions . . . Using the City’s assets

to run a ‘for profit’ business or for extended use of private, recreational or personal activities.” It is not disputed that Mr. Shea was aware of this policy. (*Exh.19; Testimony of Appellant, Skelton & Kessler*)

6. Mr. Shea served as the SEIU Local 888 Chapter Chair (i.e. steward) for his work group until the summer of 2008, at which time that responsibility was assumed by Michael Flaherty, who was a “Day Shift” (8am to 4 pm) supervisor. (*Testimony of Appellant; Exh.6*)

7. For a period of time while Mr. Shea was Chapter Chair, he pursued a long-standing dispute with Senior Supervisor Tom Broderick. As Chapter Chair, Mr. Shea had been instrumental in filing various grievances that resulted, among other things, in Mr. Broderick being reassigned to a different shift so that he would not be directly supervising his own wife, Sheila. The most recent grievance, filed on August 21, 2008, concerned improper favoritism by Mr. Broderick to his wife and others in granting overtime assignments, initiated by Mr. Shea and submitted by Mr. Flaherty, who had just recently assumed the position of Chapter Chair. (*Testimony of Appellant, Exh.6*)

8. The August 21, 2008 grievance was settled by promising that Mr. Shea would be granted the next overtime “pick”. Mr. Shea initially agreed to the settlement, but later, asserting that he was being retaliated against, endorsed the grievance to indicate that he “rescinds” the settlement and added requests for relief for the alleged retaliation and harassment. (*Testimony of Appellant, Exh. 6*)

9. On September 17, 2008, Catherine Simmons, Appellant’s co-worker, sent an e-mail communication to PCMD Operations Manager Robert Slade, complaining of “several episodes” that had put her in fear of Mr. Shea, including seeing Mr. Shea

“lurking” in the parking garage on September 6, 2008 with “what I believed to be a camera”, having been told that he also had taken a picture of Mrs. Broderick that morning, and a mysterious disappearance of the key to the ladies’ room. She reported that this situation had caused her to seek medical treatment for stress and that “something needs to be done”. (*Exh.8; Testimony of Simmons*)

10. The following day, Rosalind Johnson, reported in a memorandum to Mr. Slade that she had seen an unidentified male, whom she believed to be Mr. Shea, in the parking garage taking “pictures” of her. Ms. Johnson did not testify and her memorandum was not accepted in evidence as I do not find there is sufficient indicia of reliability to accept it for the truth. Among other things, it bears a 2002 fax date stamp, the event is dated “2009”, and there was no other evidence that Mr. Shea had taken such pictures, a matter which he credibly denied. (*Testimony of Appellant & Hardy; Exhibit 10-ID*)

11. At approximately 3:30 pm on September 18, 2008, Mr. Broderick accessed Mr. Shea’s computer at work. As supervisor, he apparently had authority and ability to do so. A document was introduced showing a computer screen entitled “Timothy’s Pictures” that Mr. Broderick copied and printed, showing a thumbnail portrait of Ms. Simmons, created in 2006 or earlier (showing a somewhat younger Ms. Simmons than appeared before the Commission in 2008) posing pleasantly for a photograph.<sup>2</sup> It was clearly taken with her permission, not at work by Mr. Shea, who denies taking the photograph and testified that he was unaware how the image was transferred onto his hard drive. Although there is no definitive way to determine who placed the image on Mr. Shea’s computer, the screenshot shown in Exhibit 21 illustrates that user “TEB” modified the

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<sup>2</sup> The only other photograph in “Timothy’s Pictures” was a snapshot of a Boston Police cruiser, which Mr. Shea acknowledged that he did take. (*Exhs.17 & 21; Testimony of Appellant*)

image on Thursday, September 18, 2008. The initials TEB belong to Tom Broderick, and September 18 is the day after two of the women made formal complaints against Mr. Shea, alleging that he had taken photographs of them at work. Given this evidence, along with testimony of MIS Systems Administrator Skelton, I cannot conclude it is more likely than not that Mr. Shea, as opposed to a co-worker or supervisor, took and/or placed the image of Simmons onto his computer. I also credit the testimony of Mr. Shea that he never knowingly took a photograph of any of his co-workers without their permission. *(Exhs. 17, 21; Testimony of Appellant, Hardy, Skelton Simmons & S. Broderick)*

12. These memoranda were followed, on September 20, 2008, by a memorandum from Mrs. Broderick to Robert Slade, expressly stating her concern that Mr. Shea “might go ‘postal’ as the saying goes”. She described her encounter with Mr. Shea on September 6, 2008 (which Ms. Simmons had alluded to in her memorandum). She states that, while at her work station, waiting for her relief, she was playing a game of solitaire on the computer when “unbeknownst to me” Mr. Shea took a picture of her in plain sight of the shift supervisor, Lee Lewis, who “failed to inform me of this or stop him from taking my picture.” Mrs. Broderick did not credibly explain how she could simultaneously know that her picture had been taken “unbeknownst to me”, while also being sure that her supervisor saw it too, but not pressing the issue with either Mr. Shea or Mr. Lewis. There was no credible direct evidence that Mr. Shea took such a picture, which he denied, or that Mr. Lewis, who did not testify, saw him do so. I also do not credit the truth of other details of Mrs. Broderick’s statements about the picture taking. (Mrs. Broderick testified that the camera was a Polaroid; Mr. Shea credibly denied owning such a camera.)*(Exhs 14 & 9-ID; Testimony of Appellant, Hardy & S. Broderick)*

13. Mrs. Broderick's memorandum, and her testimony, also described other conflicts with Mr. Shea over the prior two weeks, during which she said he had been "checking her work", complaining about the length of her breaks and her "clearing two alarms" under someone else's password. She also repeated the innuendo that she suspected Mr. Shea of stealing the key to the ladies' room. (*Exh.9; Testimony of S. Broderick*)

14. On September 25, 2008, Tom Broderick held a "mandatory" 10:00 am Staff Meeting, attended by about 10 employees. including both Computer Operators as well as "Alarm Techs". According to Mr. Shea, it was unusual to make attendance "mandatory" to such a meeting. According to the "minutes" of the meeting, after he covered certain routine issues, Mr. Broderick (who did not testify before the Commission) turned his attention to leading a discussion about the complaints against Mr. Shea. He read Ms. Simmons e-mail to Mr. Slade aloud to the group and disclosed the copy of the picture of Ms. Simmons that Mr. Broderick said was found on Mr. Shea's computer. Ms. Johnson (who also did not testify before the Commission) also complained about having her picture taken by Mr. Shea. (*Exh.23; Testimony of Appellant, Simmons, S. Broderick*)

15. Mr. Shea denied the picture taking and became quite upset with being confronted and humiliated in public by Mr. and Mrs. Broderick, Ms. Simmons, and Ms. Johnson. At one point he referred to the three women as "girls," and when one or more of them said "we are women not girls" he said: "Alright women, if that's what you are." After about an hour, Mr. Shea left the meeting. The discussion about him continued in his absence and "everybody agreed that [Mr. Shea] should go to EAP and work in City Hall." (*Exh.23; Testimony of Appellant, Simmons, S. Broderick*)

16. The next day, September 26, 2008, Mrs. Broderick, Ms. Simmons and Ms. Johnson sent a joint memorandum to PCMD Director Frank Pederson and other senior PCMD officials, in which, among other things, they recited their accusations about Mr. Shea's picture-taking, the disappearance of the ladies' room key and his "misogynistic attitude", all of which caused them to "fear bodily harm from him", perhaps "he is going to come after us in the ladies room where he won't have any witnesses." (*Exh.7*)

17. In response to the foregoing, PCMD Deputy Director Stephen Crosby issued a hand-delivered memorandum to Mr. Shea, placing him on paid administrative leave, effective immediately, pending the investigation of "some very serious charges made against you by some of your female co-workers". He ordered him to stay away from the PCMD Frontage Road facility and to have no further contact with any of its staff. (*Exh.4; Testimony of Crosby*)

18. On October 1, 2008, Mr. Broderick sent his own memorandum to Director Pederson and the other senior PCMD managers who received his wife's memorandum of September 26, 2008. Mr. Broderick recounted Mr. Shea's prior "irrational" behavior, referred to Mr. Shea's removal from the uniformed division of the (former) Boston Municipal Police Department at some time in the past, as well as to Mr. Shea's personal efforts to "get" Mr. Broderick by using his (Shea's) position as union steward, allegedly motivated by Mr. Shea's jealousy in not being chosen for promotion to Shift Supervisor and a failure hire Mr. Shea's brother for a position as Computer Operator. Mr. Broderick called Mr. Shea's actions "of such an abhorrent nature that . . . he should be subject to criminal charges [for his] acts of a stalker on these three female employees. Taking pictures of all three in a clandestine way fits the profile [of] Workplace Violence . . . ."



Mr. Broderick did not testify before the Commission and I do not credit the bulk of the highly inflammatory (and potentially libelous) hearsay statements in his memorandum, as to most of which he does not appear to be a credible, percipient witness. (*Exh.13*)

19. In addition, Mr. Broderick solicited reports from various Shift Supervisors who worked under him, none of whom were called to testify before the Commission. I find little basis to credit most of the largely unreliable hearsay statements (some multi-layer hearsay) and opinions about Mr. Shea contained in these reports. I do note that the report filed by Mr. Shea's primary Shift Supervisor, Lee Lewis, states that he worked with Mr. Shea since 1997 and "he has always been prompt, never abused sick time and is a conscientious [sic] and good operator." He mentions one contentious exchange between Mr. Shea, Mrs. Broderick and Ms. Simmons in August 2008, but makes no mention of any picture-taking incidents at that time or subsequently. (*Exhs.12, 14, 15-ID & 16-ID*)

20. Messrs. Crosby and Kessler investigated the charges. They interviewed Mr. Shea and the female complainants. In addition, an MIS Systems Administrator (Mr. Skelton) examined Mr. Shea's computer files on which the portrait of Ms. Simmons had appeared. During Mr. Skelton's investigation, he discovered evidence that Mr. Shea had attached an external hard-drive to his work-station computer. I find none of these men harbored any personal animosity toward Mr. Shea. Lacking percipient knowledge, however, any conclusions about the severity of Mr. Shea's behavior, depends heavily on input from Mr. & Mrs. Broderick, and the other PCMD personnel, all of whom worked under Mr. Broderick's supervision. (*Exh.11;Testimony of Skelton, Crosby & Kessler*)

21. According to Messrs. Crosby and Kessler, Mr. Shea initially denied bringing any personal "computer equipment" into work, but, when confronted with the fact that there

was evidence that he had attached a hard-drive to his work-station computer, he admitted that he had done so. His explanation was that he had a “play list” of music that he used in his side job as a disc jockey, he had brought in the hard drive to let Lee Lewis hear some of the music he was interested in, and, sometimes, he had worked on this play list “when things are slow” at work. Mr. Shea’s explanation for initially denying that he did this was that he did not interpret the question about using “computer equipment” to refer to an external hard drive. (*Testimony of Appellant, Crosby, Kessler, Skelton & Hardy*)

22. I found Mr. Skelton to be knowledgeable in his field of information systems technology and a sincere and credible witness. The technical evidence provided by Mr. Skelton clearly confirmed that Mr. Shea had, indeed, attached his personal external hard drive, with his disc jockey play list, to his work-station computer. I find it is not credible to believe that Mr. Shea misunderstood the initial questioning about this subject, but, rather, knowing full-well what the strict policy was about using his work-station computer for personal business, tried to evade the question until he realized that he could not credibly deny doing so. (*Testimony of Appellant & Skelton*)

23. On November 7, 2008, Deputy Director Crosby issued a memorandum to Mr. Shea, which informed him that the investigation against him remained ongoing and that he would remain on paid administrative leave until November 24, 2008, at which time he would be reassigned to duty at Boston City Hall. The new assignment entailed working alone on a 8am to 4pm shift at the Information Desk at City Hall, greeting, assisting and directing members of the public as they entered the building. Mr. Shea continued in this position at the time of his hearing before the Commission some six month later, without any report of inappropriate behavior. (*Exh.5; Testimony of Appellant, Crosby*)

24. On November 12, 2008, Deputy Director Crosby notified Mr. Shea that he was “being charged with conduct unbecoming a City of Boston employee, conducting personal business on City equipment and time, untruthfulness and harassment of female employees. Specifically . . . you brought into work a personal external computer hard drive and hooked it up to a City computer containing sensitive and secure information. You also admitted composing a playlist for your Disc Jockey business on your work computer during working hours. You have also been photographing female coworkers against their will and you were not truthful during an investigatory interview conducted on October 15, 2008.” A hearing was scheduled on the charges, and any further possible disciplinary action, to be held November 20, 2008.*(Exh.2)*

25. Following the November 20, 2008 hearing, by letter of November 26, 2008, Mr. Crosby increased Mr. Shea’s suspension to ten working days based on his additional findings that Mr. Shea “made offensive comments towards female coworkers” and “lied about ever bringing a camera into work, and using your work computer for personal business. . . until after you realized that the City had evidence proving that you were lying did you admit to those things.” This appeal duly ensued.*(Exhs.1 & 3)*

26. Mr. Shea appeared before the Commission as a polite, soft-spoken, well-groomed middle age man. He impressed me, consistent with the memo from his supervisor Lee Lewis, as a “by the book”, good, conscientious employee. I discerned no indicia of any specific animosity toward women, or toward any of his female co-workers in particular. He seemed fondly attached to his daughter, a special needs child.*(Testimony of Appellant)*

27. Mrs. Broderick (a 25-year Boston employee) and Ms. Simmons (30-year employee) both presented as quite nervous witnesses. Ms. Simmons exhibited fast speech

and an excessive degree of “eye-blink”, which detracted from the degree of confidence that I perceived in her testimony. Mrs. Broderick seemed physically uncomfortable, nervous and shaking, during her testimony (which I considered might be explained by Mr. Shea’s presence but I cannot reasonably attribute it to him, as he did not appear to display an intimidating demeanor or body-language during their testimony or his own). Both women generally avoided mentioning Mr. Shea by name, referring simply to “him” in the third-person. Neither witness impressed me as possessing a commanding, unvarnished memory of the facts or convinced me of the truth of their subjective allegations of alleged extreme fear of Mr. Shea, as they attempted to describe them. (*Testimony of S. Broderick & Simmons; Demeanor of Appellant*)

## **CONCLUSION**

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

“If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority’s procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.

The Commission has the duty to determine, under a “preponderance of the evidence” test, whether the appointing authority met its burden of proof that “there was just cause” for the action taken. G.L.c.31,§43. See, e.g., Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823, (2006); Police Dep’t of Boston v. Collins, 48

Mass.App.Ct. 411, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass App.Ct.473,477 (1995); Town of Watertown v. Arria, 16 Mass.App Ct. 331,334, rev.den.,390 Mass. 1102, (1983).

An action is "justified" if "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., 359 Mass. 211, 214 (1971); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass. App. Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983) The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in governmental employment decisions.' " Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of the "merit principle" which governs Civil Service Law that discipline must be remedial, not punitive, designed to "correct inadequate performance" and "separating employees whose inadequate performance cannot be corrected." G.L.c.31,§1.

The Appointing Authority's burden of proof is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence,

exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) The Commission must take account of all credible evidence in the record, including whatever may fairly detract from the weight of any particular evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65 (2001)

It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. "[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance." E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003) (where live witnesses gave conflicting testimony at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing)

In performing its appellate function, "the commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew. . . . [after] 'a hearing de novo upon all material evidence and a decision by the commission upon that evidence and not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer' . . . For the commission, the question is . . . 'whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed

when the appointing authority made its decision.’ ” Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003) (affirming Commission’s decision to reject appointing authority’s evidence of appellant’s failed polygraph test and prior domestic abuse orders and crediting appellant’s exculpatory testimony) (*emphasis added*). cf. Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (inconsequential differences in facts found were insufficient to hold appointing authority’s justification unreasonable); City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (commission arbitrarily discounted undisputed evidence of appellant’s perjury and willingness to fudge the truth); Town of Watertown v. Arria, 16 Mass. App. Ct. 331, 334, rev.den., 390 Mass. 1102, (1983) (commission improperly overturned discharge without substantial evidence or factual findings to address risk of relapse of impaired police officer) See generally Villare v. Town of North Reading, 8 MCSR 44, reconsid’d, 8 MCSR 53 (1995) (discussing need for de novo fact finding by a “disinterested” Commissioner in context of procedural due process); Bielawski v. Personnel Admin’r, 422 Mass. 459, 466, 663 N.E.2d 821, 827 (1996) (same)

In reviewing the commission’s action, a court cannot “substitute [its] judgment for that of the commission” but is “limited to determining whether the commission’s decision was supported by substantial evidence” and to ‘give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it. . .This standard of review is highly deferential to the agency on questions of fact and reasonable inferences drawn therefrom.’ ” Brackett v. Civil Service Comm’n, 447 Mass. 233, 241-42 (2006) and cases cited.

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

“It is well to remember that the power to modify is at its core the authority to review and, when appropriate, to temper, balance, and amend. The power to modify penalties permits the furtherance of uniformity and equitable treatment of similarly situated individuals. It must be used to further, and not to frustrate, the purpose of civil service legislation, i.e., ‘to protect efficient public employees from partisan political control’ . . . and ‘the removal of those who have proved to be incompetent or unworthy to continue in the public service’.”

Id., 39 Mass.App.Ct. at 600. (*emphasis added*). See Faria v. Third Bristol Div., 14 Mass.App.Ct. 985, 987 (1982) (remanded for findings to support modification)

In deciding to exercise discretion to modify a penalty, however, the commission’s task “is not to be accomplished on a wholly blank slate. After making de novo findings of fact, the commission must pass judgment on the penalty imposed, a role to which the statute speaks directly. G.L.c.31,§43. Here, the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether “there was reasonable justification for the action taken by the appointing authority in the circumstances found by the Commission to have existed when the appointing authority made its decision.’ ” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983). “The ‘power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded to the appointing authority.”



Falmouth v. Civil Service Comm’n, 61 Mass.App.Ct. 796, 800 (2004) quoting Police Comm’r v. Civil Service Comm’n, 39 Mass.App.Ct. 594, 600 (1996).

Thus, when it comes to its review of the penalty, unless the Commission’s findings of fact differ materially and significantly from those of the appointing authority or interpret the relevant law in a substantially different way, the commission is not free to “substitute its judgment” for that of the appointing authority, and “cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation.”). Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited (minor, immaterial differences in factual findings by Commission and appointing authority did not justify a modification of 180 day-suspension to 60 days). See, e.g., Town of Falmouth v. Civil Service Comm’n, 61 Mass.App.Ct. 796 (2004) (modification of 10-day suspension to 5 days unsupported by material difference in facts or finding of political influence); Commissioner of MDC v. Civil Service Comm’n, 13 Mass.App.Ct. 20 (1982) (discharge improperly modified to 20-month suspension); cf. School Committee v. Civil Service Comm’n, 43 Mass.App.Ct. 486, rev.den., 426 Mass. 1104 (1997) (modification of discharge to one-year suspension upheld); Dedham v. Civil Service Comm’n 21 Mass.App.Ct. 904 (1985) (modification of discharge to 18-months suspension upheld); Trustees of the State Library v. Civil Service Comm’n, 3 Mass.App.Ct. 724 (1975) (modification of discharge to 4-month suspension upheld)

#### Hostile Work Environment/Harassment Claim

The investigation into Mr. Shea’s allegedly harassing conduct was initiated by allegations he was acting strangely in the presence of three female co-workers: Mrs. Broderick, Ms. Johnson and Ms. Simmons. These women alleged Mr. Shea was

engaging in stalker-like behavior, and that he took, or at least appeared to be taking, photographs of each woman without her permission. The only evidence presented in support of this alleged photo taking was a screenshot of Mr. Shea's computer showing a thumbnail portrait of Catherine Simmons, which was created in 2006, and was clearly not taken without her consent (she is smiling into the camera) or taken by Mr. Shea at work. The image shows Ms. Simmons posing pleasantly for a photograph. Mr. Shea denies taking the photograph and testified that he was unaware how the image was transferred onto his hard drive. There is no definitive way to determine who placed the image on Mr. Shea's computer. The circumstantial evidence leads me to believe that, indeed, Mr. Shea may not have been the person who did so. Mr. Shea's denial of responsibility for Ms. Simmons' picture appearing in his file is credible. I can find nothing in the evidence to suggest why Mr. Shea would store a portrait of Ms. Simmons, which appears quite likely copied from some public source, on his office computer, or why Ms. Simmons would be offended by this. In the absence of reliable evidence to the contrary and no reliable evidence of the instances of alleged picture-taking of Mrs. Broderick or Ms. Johnson, the preponderance of evidence failed to establish that Mr. Shea "stalked" his co-workers and took clandestine photographs of any of them without their permission.

It is further alleged that Mr. Shea generally harassed, in a sexual nature, several of his female peers and, as a result, created a hostile work environment. The proof of this allegation is the evidence that he referred to Ms. Johnson, Mrs. Broderick and Ms. Simmons as "girls" or "whatever you are" during the September 25, 2008 staff meeting. Mr. Shea admits to using these words to refer to the three women but denies that he intended it as a derogatory term or a slur. He testified that he used the words out of

frustration because he became agitated by the wildly outrageous accusations and animosity of his co-workers. I found Mr. Shea to be credible in this regard. Indeed, it is probably closer to the mark to believe his contention that the September 25, 2008 public confrontation (and the memorandum leading up to that) was, as he had anticipated, an orchestrated effort by Mr. & Mrs. Broderick to bait and humiliate him and get him transferred out of their work group.

On the other hand, I did not find credible the testimony of either Ms. Simmons or Mrs. Broderick, both of whom appeared to be nervous and anxious, that they were so offended by Mr. Shea's behavior that it interfered with their work. I also am not convinced that most of the grievances against Mr. Shea, which include stalking and staring, refusing to speak to them, stealing the ladies' room key, always checking their work, and so forth, were credibly supported by the evidence in the record. Moreover, at best, these largely non-specific, generalized suspicions seem to be the misguided result of petty inter-personal conflicts or work-habit differences, and do not amount to objective evidence that Mr. Shea created a hostile work environment or sexually harassed his female co-workers. There is no doubt that these women did not trust or befriend Mr. Shea, although it is more likely that the reasons were fueled largely by their own personality issues and the animosity that had been brewing for some time between Mr. Shea and Mr. & Mrs. Broderick, in particular. Based on these circumstances, I do not believe basic merit principles justify disciplining an employee for what amounts to petty personality differences.

I also find significant that, following the incidents in question, Mr. Shea was reassigned to a job as the main greeter of the public at the Information Desk at Boston

City Hall, where he worked without incident, something unlikely if he had serious personality or interpersonal issues, and certainly not if he had a “misogynistic attitude”, or presented a risk of going “postal”, as his accusers had charged.

#### Misuse of City Property

I do conclude that the evidence presented in support of Boston’s claim that Mr. Shea used his work computer for a private business is substantially credible. Using City-owned property to further his for-profit business venture is a clear violation of Boston’s MIS Policy. Although Boston produced no documentation showing Mr. Shea’s written acknowledgement of the policy, it is not disputed that he was aware of it. The evidence shows that Mr. Shea brought an external hard drive into work on one or more occasions and transferred several files to a folder on his work computer called “DJ Playlist.” Mr. Shea also admitted that he has brought his personal laptop into work on several occasions in order to complete work for his disc jockey business. Although he now admits to using personal computer equipment at work, he initially denied the allegation. As a defense, he now asserts that he made the denial with the sincere belief that an external hard drive was not “computer equipment”, but, as indicated earlier, I find this explanation disingenuous and further evidence that Mr. Shea probably knew he was acting in violation of MIS rules when he used City equipment to further his for-profit business.

I am troubled by the fact that Mr. Shea worked on his disc jockey business in the presence of his supervisors, who in all likelihood had knowledge of the business, and that the circumstances only came to light because of the animus-motivated investigation of the (unfounded) sexual harassment investigation triggered by Mr. & Mrs. Broderick. That, however, does not change the fact that the violation occurred. Boston has strictly

enforced its MIS policy in the past – one employee who conducted an “Avon Products” business on Boston work time was suspended for three (3) days.

At the hearing before the Commission, Mr. Shea defended his actions by noting that several co-workers play solitaire on Boston computers during work hours. I find this defense unconvincing. There is a clear distinction between playing a harmless computer game when not actively engaged in work activity and using municipal assets to make a profit. Moreover, Boston’s MIS Policy does permit employees to use Boston computers for “private, recreational or personal activities” as long as it is not an “extended use.”

Accordingly, I find that Boston was justified to conclude that Mr. Shea was “using City assets to run a ‘for profit’ business” in violation of MIS policy, and impose discipline against him on this basis.

The decision-maker in this case was Deputy Director Crosby, whom I have found to be a sincere, credible witness who harbored no personal bias or animus against Mr. Shea. Insofar as his decision to impose discipline for the “hostile work environment” charge was exclusively based on evidence from biased witnesses, however, including evidence that I have found to be untrue, that charge cannot be justified on the facts, despite Mr. Crosby’s own impartiality. Thus, in that respect, this case is an appropriate occasion for the Commission to exercise its discretion to modify the discipline imposed that was based, in part, on the unsubstantiated and overblown charge of workplace harassment.

The MIS policy violation stands on a different footing. The violation was confirmed by credible testimony from a disinterested MIS employee, Mr. Skelton, whom I found knowledgeable in his field, sincere and credible, as well as, to some extent, by Mr. Shea’s own admissions. Boston is reasonably justified to conclude that Mr. Shea was “using City

assets to run a 'for profit business', in violation of MIS policy. Since the proof of this charge – as opposed to the hostile work environment charge – does not depend on the credibility of biased witness or discredited testimony – Boston is justified to impose discipline for this violation. However, an unpaid ten (10) day suspension is inconsistent with evidence of prior discipline of other Boston employees found to have been using City assets to further a for-profit business venture.

In sum, Boston had just cause to impose a three (3) day suspension against Mr. Shea for his use of a work computer to further a for-profit business, which would be consistent with the closest prior discipline imposed for a similar violation of the MIS Policy. Boston, however, has failed to show just cause that Mr. Shea harassed any of his female colleagues or created a hostile work environment for any of them.

Relief to be Granted

Pursuant to the authority granted under G.L.c.31,§43, the ten (10) day suspension of the Appellant, Timothy Shea, must be modified to a three (3) day suspension and, except for such modified suspension, the Appellant shall be restored all pay and civil service benefits to which he is otherwise entitled. This relief does not affect the reassignment of the Appellant in November 2008, which is not a matter within the jurisdiction of the Commission, but solely governed by the terms and conditions of the applicable collective bargaining agreement, if any. Accordingly, the appeal of the Appellant, Timothy Shea, is *allowed in part*.

Civil Service Commission

Paul M. Stein  
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis [ABSENT], McDowell and Stein, Commissioners) on February 10, 2011.

A True Record. Attest:

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Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c.30A, §14(1) for the purpose of tolling the time for appeal.

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

Notice to: Timothy Shea (Appellant)  
Joseph G. Donnellan, Esq. (for Appellant)  
Joseph N. Ablon, Esq. (for Appointing Authority)