COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

One Ashburton Place - Room 503
Boston, MA 02108
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BENJAMIN FUERTES,
Appellant,
v.

CASE NO: D1-10-45

CITY OF NEW BEDFORD,
Respondent

Appellant's Attorney:	Jaime Kenny, Esq. AFSCME Council 93 8 Beacon Street Boston, MA 02108
City of New Bedford Attorney:	Jane Medeiros Friedman First Assistant City Solicitor City of New Bedford Law Department 133 William Street New Bedford, MA 02470
Commissioner:	Paul M. Stein

DECISION

The Appellant, Benjamin Fuertes, appeals to the Civil Service Commission (Commission), pursuant to G.L.c.31,§§41-43, from a decision of the City of New Bedford (New Bedford), discharging him from employment as a New Bedford EMT-Paramedic. A full hearing was held at UMass School of Law at Dartmouth on October 27, 2010, October 29, 2010 and January 18, 2011. As no written notice was received from either party, the hearing was declared private. The hearing was digitally recorded. Twenty-seven exhibits were received in evidence and two exhibits were marked for identification. New Bedford called four witnesses. The Appellant called two witnesses and testified on his own behalf. By Post-Hearing Procedural Order (marked P.H.Exh.30) the Commission took administrative notice of certain materials and requested additional documents which New Bedford submitted by letter dated January 31, 2011 (marked P.H.Exh.31) Both parties submitted proposed decisions on April 29, 2011.

FINDINGS OF FACT

Giving appropriate weight to all exhibits, testimony (of the Appellant, New Bedford Mayor Scott Lang, EMS Director Mark McGraw, EMT Jean Quintin, Police Sergeant Jill Simmons and Police Officers Antone Pauline and Caesar Rebelo) and inferences reasonably drawn from the credible evidence, I make the findings of fact set forth below.

Appellant's Employment History

1. The Appellant, Benjamin Fuertes, became employed with the New Bedford Emergency Medical Services Department (EMS) on January 15, 2003 in the civil service position of Intermittent EMT and reclassified as a Paramedic (a higher level of EMS certification) on December 6, 2004. He became a full-time EMT-Paramedic, effective April 25, 2005 and served in that position until his termination in February 2010. (*Exh. 1; Testimony of Appellant*)

2. The New Bedford EMS is a separate departmental unit, managed by an EMS Director, who is the appointing authority for civil service employees in the department, and who reports directly to the Mayor of New Bedford. Mark McGraw has served as EMS Director since July 2009, after 20 years of continuous service at various levels within the department. For purposes of this appeal, EMS Director McGraw is the Appointing Authority. (*Testimony of McGraw*)

3. An EMT's core duties involve responding by ambulance to medical emergencies and administering medical care to the sick and injured on the scene. As a Paramedic, a higher level of EMS certification than EMT, the duties involve assessment and treatment at the Advanced Life Support (ALS) level, including intubations and administration of intravenous drugs and fluids, (*Exhs. 2 & 3; Testimony of Appellant, McGraw, Quintin)*

4. Mr. Fuertes performed his core duties as an EMT-Paramedic in a satisfactory manner throughout the period of his employment with New Bedford EMS. (*Testimony of Appellant, McGraw, Quintin*)

5. Mr. Fuertes's disciplinary history with New Bedford EMS consists of two written warnings issued within two weeks of each other in April 2006, one having to do with an altercation with a supervisor over "wearing of improper attire" and the second for going out on a call and leaving the EMS quarters unlocked. This discipline was the subject of an MCAD claim of harassment brought by Mr. Fuertes under G.L.c.151B that was still pending at the time of the Commission hearing. (*Exhs. 20 & 21; P.H.Exh.30 [Procedural Order, Administrative Notice, Attchs."E" & "F"];Testimony of Appellant, McGraw)*

6. The job descriptions for a New Bedford EMT also includes, among other things, responsibility to "[r]espond to given address with lights and siren, driving in a defensive manner, obeying the rules of the road" and to perform "[m]inor vehicle maintenance, washing, checking oil, water, fuel, washing floor and cleaning windows". (*Exh. 2*)

7. The job description for a New Bedford EMS Paramedic includes responsibility to "operate emergency medical service vehicles in a safe and accepted manner", to "inspect ambulance and other emergency medical service vehicles" and to "drive ambulances and other emergency vehicles as needed to and from scene of emergency." (*Exh. 3*)

8. Mr. Fuertes was never cited or disciplined for substandard work, carelessness misuse of city property, absenteeism or tardiness. He was never involved in any motor vehicle accidents while operating an EMS vehicle. EMS Director McGraw stated that he knew of no basis for concern about Mr. Fuertes's ability to safely drive a city-owned vehicle on duty. (*Exhs. 20 & 21; Testimony of Appellant, McGraw & Quintin*)

9. The evidence demonstrated, and I so find, that Mr. Fuertes was "very conscientious" about the care and maintenance of the ambulance to which he was assigned while on duty and "particularly careful" about keeping a clean windshield. (*Exhs. 22(ID) & 24; Testimony of Appellant, McGraw & Quintin*)

10. Mr. Fuertes and his shift partner, EMT Jean Quintin, consistently followed the practice of washing the inside and outside of the ambulance when required at the beginning of their assigned day shifts (8:00 am to 6:00 pm), including cleaning off the windshield. They also checked the vehicle for any maintenance issues at the start of a shift as a regular and normal part of the job. (*Testimony of Appellant & Quintin)*

11. The EMS Department maintenance logs for the period from November 1, 2009 through February 4, 2010 confirm, and I so find, that Mr. Fuertes was considerably more diligent about his responsibility to clean the ambulance, and, in particular, in washing the exterior, than other members of the EMS staff. During this period, there were a total of 95 day shifts for EMS Ambulance Unit 2, on which Mr. Fuertes was the senior EMS person assigned on 25 shifts and other EMS personnel were assigned on 70 shifts. The logs show the following data for when that ambulance was cleaned:

	No. Shifts	Not Cleaned	Cleaned Inside Only	Cleaned Inside & Outside
Fuertes	25	8 (32%)	6 (24%)	11 (44%)
All Others	70	42 (60%)	19 (27%)	9 (13%)

(*Exhs 22(ID) & 24*)

12. Although the EMS Department maintenance logs provide space for checking off fluid levels, including fuel, radiator, oil, brakes, power steering and windshield washer, fluid levels on most forms are not checked off. For the most part, these items were handled by the mechanics who performed regular, routine maintenance on the ambulance fleet. (*Exhs 22 & 24; Testimony of Appellant & Quintin*)

13. I also find significant the fact that Mr. Fuertes washed the inside and outside of Unit 2 on February 1, 2010, the last day he worked prior to the incident in question on February 4, 2010, and that Unit 2 was not washed again by any of the EMS personnel assigned to the next three day shifts, on February 2, 3 and 4, 2010. (*Exhs. 22(ID) & 24*)

The February 4, 2010 Accident

14. Until the incident involved in this appeal, Mr. Fuertes had nearly a ten year clean driving record. He had never been involved in any at-fault accident. Since obtaining his Massachusetts driver's license in 1997, he was cited four times, once in 1998 for failure to wear a seat belt, twice in 2000 for speeding and once in 2000 for failure to stop. (*Exh. 7; Testimony of Appellant*)

15. At approximately 7:30 a.m. on February 4, 2010, Mr. Fuertes was involved in an off-duty motor vehicle accident while driving his personal vehicle, a 1999 Jeep Grand Cherokee. He had taken his sister to school. He turned from Rodney French Boulevard southeast onto Brock Avenue, approximately a block north of Harmony Street in New Bedford. As he turned, he encountered an intense, blinding sun glare which he sought to alleviate by slowing down and dropping his sun visor down. As he did this, he heard a sound and saw he had just struck a pedestrian in the street. (*Exhs. 4,7, 8, 11; Testimony of Appellant, Simmons, Pauline*)

16. The pedestrian was an elderly man who had just exited a convenience store and was walking slowly across Brock Avenue in the middle of the block, assisted by a cane. This was not the first time this same pedestrian had been struck by a motor vehicle as he attempted to cross Brock Avenue, having been hit nine years earlier in this "exact same spot". (*Exhs 8, 12; P.H.Exh.30 [Procedural Order, Administrative Notice, Attch."C"]*)

17. Mr. Fuertes immediately exited his Jeep. He yelled to someone to call 911 and proceeded to render emergency care on the injured pedestrian. (*Testimony of Appellant*)

18. New Bedford Police Officer Antone Pauline was first to arrive on scene. He, too, encountered sun glare that obscured his view of the accident scene as he approached. When Officer Pauline "made the turn" onto, "it was very difficult [for him] to see due to solar glare." (*Exhs. 7 & 11; Testimony of Pauline, Simmons*)

19. Mr. Fuertes gave Officer Pauline a statement on-scene. He acknowledged hitting the pedestrian. Two sergeants arrived on scene, Sergeants Stone and Conley, and, on their orders, Officer Pauline cited Mr. Fuertes for failing to slow for a pedestrian, a civil infraction. Mr. Fuertes left the scene shortly thereafter. (*Exh. 12: Testimony of Pauline*)

20. Meanwhile, the pedestrian was taken to a local hospital. He eventually died from his injuries at approximately 3:30 p.m. (*Exhs.5 & 11*)

21. At approximately 8:10 a.m., New Bedford Police Sergeant Jill Simmons and Officer Christen Gomes arrived on scene to conduct an accident reconstruction. Sgt. Simmons inspected the Jeep which she said was "encrusted with road salt". This observation caused her to order Officer Pauline to issue a second citation to Mr. Fuertes for negligent driving to endanger, which Officer Pauline hand-delivered to Mr. Fuertes late in the day. (*Exhs. 5, 9d, 9e & 11: Testimony of Simmons, Pauline*)

22. Officer Pauline did not believe that a citation for driving to endanger was warranted, but he issued it because his superior had ordered him to do so. He acknowledged, however, that he was not specifically assigned to inspect the Jeep at the scene and did not do so. (*Testimony of Pauline*)

23. Mr. Fuertes's Jeep was towed to a garage where it was thoroughly inspected and photographed. This inspection revealed that the accident had damaged the left front bumper, grille and hood area in front of the driver's position, and broke a headlight. The windshield washer reservoir was empty and the washer fluid line was broken. The inspection also revealed extensive tire wear, one mismatched tire, and some broken rear lights. (*Exhs.4,5,9b, 9c, 9f, 9g, 10 & 12; Testimony of Simmons*)

24. At approximately 4:00 p.m., after the pedestrian had died, Sgt. Simmons called the Bristol County District Attorney's office and, following a conversation with a prosecutor, she ordered a further citation be issued to Mr. Fuertes for vehicular homicide. (*Exh. 5 & 11; Testimony of Simmons, Pauline*)

25. On February 4, 2010, as he was ordered, Officer Pauline filed an Application for Criminal Complaint against Mr. Fuertes for charges of driving to endanger and vehicular homicide (but not the failing to slow). (*Exhs 11 & 25*)

26. On March 31, 2010, after hearing, the Clerk-Magistrate of the Bristol County Third District Court entered a finding of "no probable cause" with respect to both charges. This finding was appealed to a District Court Justice, who upheld the magistrate's determination. (*Exh.25; Testimony of Appellant, Pauline & McGraw*)

<u>The Accident Scene</u>

27. Brock Avenue is a mixed use area of businesses and multi-family homes, approximately 50 feet in width at the accident scene. There is a marked cross-walk and traffic lights across Brock Avenue at Harmony Street, a few hundred feet north-west of the accident scene. The speed limit is 30 MPH. (*Exhs. 7, 8, 9a, 12 & 27; Testimony of Simmons, Pauline*)

28. According to the accident reconstruction report eventually prepared by Sgt. Simmons, and I so find, sunrise on February 4, 2010 occurred at 6:53 a.m. As a result, visibility "on the morning of the crash . . . would have been significantly compromised by the rising sun directly ahead at the end of the street" and "at 7:35 a.m. "[t]hat placed the sun just a few degrees above the horizon, directly in the eyes of anyone turning southbound on Brock Avenue. Sunrise at that time of year is somewhat south of east and Brock Avenue at the point runs southeast." Sgt. Simmons acknowledges, and I so find: "There is no denying that there was an intense rising sun directly in the path of the operator, Mr. Fuertes." (*Exh.12; Testimony of Simmons*)

29. Photographs taken the following day looking south-east from the cross-walk at Harmony Street, confirm the extreme degree of sun glare that would be experienced at approximately 7:30 a.m. by a vehicle as it approaches the block on Brock Avenue where the accident occurred. (*Exhs. 8, 27, 28, 29; Testimony of Appellant*)

30. Local residents in the section of Brock Avenue involved in this accident have called it "hazardous for pedestrians because of the heavy traffic." A 19-year old woman also was seriously injured while crossing Brock Avenue in a cross walk on January 21, 2010, which prompted one city councilor to demand that the city's Department of Public Infrastructure repaint the cross-walks and consider adding more of them. Immediately after their relative had died on February 4, 2010, the family of the deceased pedestrian called for additional "safety measures – a crosswalk, flashing lights, a divider or stop lights" to reduce the chances of another similar accident. (*P.H. Exh.30 [Procedural Order, Administrative Notice, Attch."C"]*)

Disciplinary Proceedings

31. On February 4, 2010, EMS Director McGraw placed Mr. Fuertes on paid administrative leave, pending the outcome of an investigation into the Brock Avenue incident. (*Exh 6; Testimony of McGraw*)

32. By one-page e-mail dated 4 Feb 2010 18:05:55, Sgt. Simmons reported to Deputy Police Chief David Provencher:

- "Benjamin Fuertes, a city EMT . . . was headed southbound on Brock Avenue in the area of Tedeschi's with the sun in his eyes at approximately 7:30 a.m. He struck a pedestrian [name and address redacted] and the injuries appeared serious."
- "[W]e . . . took pictures of the driver's ability to see through the windshield. It was encrusted with road salt. . . . and we were not able to see very well through the glass. With the sun on it, it was nearly impossible."
- "It was my recommendation that Officer Pauline (the officer of record) issue a citation for Operating Negligently so as to Endanger. . . . In my opinion, the condition of the car (albeit in conjunction with the sun's position) led to the crash. . . I felt it was negligence on the operator's part not to maintain his vehicle in good operating condition . . . .The sun only exacerbated the problem, but did not cause it. Had the windshield been clear, I believe that the collision could and would have been avoided."
- "At the tow yard, we . . . took a photo of the driver (Off. Pires) from the front of the hood and it is nearly impossible to see him behind the salt encrusted windshield."
- "We then tested the windshield wipers and they worked. However, when we tested the windshield washer, we found that we could not see any fluid in the reservoir . . . . [T]he washer fluid came from somewhere under the hood and . . dropped to the ground behind the left front tire. The owner would not have been able to clean the windshield even if he had wanted to. The last few days have been dry and he apparently never made an effort to stop in at a gas station to clean the windshield either."
- "The vehicle has three different tire manufactures for four tires . . .Two tires will not pass inspection . . . The rear taillights are messed up, with only one brake light out of three working . . . ."
- "The rear windshield was also salt encrusted and there has been no attempt to clean that one either."

- "[A]round 13;30 I received a call . . . that [the pedestrian] had passed away. I called the DA's office . . . and [ADA Cindy Brackett] agreed . . . that we should be issuing a citation for the misdemeanor motor vehicle homicide."

(*Exh. 5: Testimony of Simmons*)

33. Deputy Chief Provencher forwarded Sgt. Simmons's memorandum to William Burns, Chief of Staff for Mayor Scott W. Lang: "FYI. Bill please treat this as confidential and for your and SWL's eyes only." (*Exh 5; Testimony of Mayor Lang*)

34. As early as the following day, after speaking to Sgt. Simmons, Mayor Lang "made the decision" that Mr. Fuertes had been "grossly negligent" and "it was not appropriate for the city or the people of the city to have the liability of having someone drive an ambulance that operated a vehicle in that manner." (*Testimony of Mayor Lang*)

35. Initially, EMS Director Mark McGraw had a different take on the cause of the crash. When he was shown the pictures of the alleged "salt-encrustation", he "didn't see it". He was particularly puzzled by the fact that Mr. Fuertes was permitted to pick up his impounded vehicle later in the day and drive it home, which seemed incongruous to the contention that it was so salt-encrusted and the windshield washers in poor mechanical condition as to be unsafe. (*Testimony of McGraw*)

36. Mr. McGraw had been newly appointed by Mayor Lang as the EMS Director. Prior to becoming EMS department head, he had been a professional colleague and personal friend to Mr. Fuertes (attending his wedding) and had trained him. Mr. McGraw's first concern was "for Ben", whom he sent to Employee Assistance to cope with the tragedy of causing a fatal accident (*Testimony of Appellant, McGraw)*

37. Mr. McGraw didn't see any negligence on the part of Mr. Fuertes. Rather, he believed that the crash was "an accident" He saw no reason to think that Mr. Fuertes could not be trusted to safely perform his duties as an EMS ambulance operator. After

giving it careful thought, he could offer nothing about Mr. Fuertes behavior that would tend to support a concern that he presented "more risk" as an ambulance driver than any other New Bedford EMS personnel. (*Testimony of McGraw*)

38. Mr. McGraw had a series of conversations with Mayor Lang and the New Bedford City Solicitor over several days immediately following the February 4, 2010 crash and well prior to the appointing authority hearing conducted by Mr. McGraw. (*Testimony of Mayor Lang, McGraw*)

39. Although Mayor Lang did not specifically order that Mr. Fuertes be fired, it was clear to Mr. McGraw that the Mayor desired that result. Mr. McGraw told Mayor Lang that he [McGraw] had problems terminating Mr. Fuertes, but eventually came around to do what Mayor Lang said needed to be done. (*Testimony of Mayor Lang, McGraw*)

40. On February 10, 2010, Mr. McGraw suspendedd Mr. Fuertes, effective February 15, 2010 and notified him of his potential termination for the following reasons:

> "On February 4, 2010 you were involved in a motor vehicle accident with death resulting. The initial police investigation indicates that. . .your windshield view was obstructed by an accumulation of salt and road debris . . . and the vehicle's windshield wiper fluid mechanism was not properly operating. Such negligent actions by you directly affect the rights and interest of the public in that you are required to safely operate an ambulance and safely transport patients in the course of your employment. Your actions on February 4, 2010 demonstrate a serious lack of judgment in your operation of a motor vehicle and give rise to a concern for the safety of the public should you operate an ambulance in the course of your employment as required in your job description.
>
> "In addition, the New Bedford Police Department has issued a citation . . .for operating a motor vehicle negligently so as to endanger, pursuant to M.G.L.c.90 §24E; failure to yield to a pedestrian, pursuant to M.G.L.c.90 §14E; and Motor vehicle homicide by negligent operation pursuant to M.G.L.c.90 §24G(b)."

(*Exh.12*)

41. After hearing on February 17, 2010, Mr. McGraw terminated Mr. Fuertes from employment by letter dated February 19, 2010, which restated the identical reasons

contained in the letter of suspension provided on February 10, 2010 as quoted above. This appeal duly ensued. (*Exh. 13; Claim of Appeal*)

42. Mr. McGraw again approached the New Bedford City Solicitor after the criminal charges against Mr. Fuertes had been dismissed to see about reinstating Mr. Fuertes at that point. He was told that it would be up to the Civil Service Commission, not him, whether or not Mr. Fuertes should be reinstated. (*Testimony of McGraw*)

The Subsequent Accident Reconstruction Report

43. At some point after Mr. Fuertes was terminated, Sgt. Simmons prepared a formal, 25-page Collision Reconstruction Report. She believed work on the substance of the report had been finished prior to the criminal probable cause hearing at the end of March 2010. The electronic copy of the report, filed as an exhibit for identification, indicates that the report was issued on or about May 13, 2010, and I so find. (*Exh.7; Exh.10(ID); Testimony of Simmons*)

44. Sgt. Simmons reported that the windshield washer motor worked properly but the washer fluid line was broken, which caused washer fluid to drain down behind the front tire rather than onto the windshield. However, there is "no way to know" if these conditions existed prior to, or were the result of, the crash. (*Exh. 7; Testimony of Simmons*)

45. Based on extensive scientifically recognized formulas for analysis of the "rust debris" from the crash scene as well as application of "pedestrian fall formulas", Sgt. Simmons concluded, and I so find, that "speed was not a factor" in the crash. Mr. Fuertes was traveling "most probably significantly below the speed limit" of 30 MPH, with the various formulas "conclusively" produced calculated speeds between 20 MPH to 25

MPH. Sgt. Simmons stated, and I so find, that Mr. Fuertes "was not operating recklessly or at an excessive speed." (*Exh. 7; Testimony of Simmons*)

46. Sgt. Simmon's report makes the following statements, which I find credible, relevant to the sun glare at the time of the crash:

- "Information from the U.S. Naval Observatory places sunrise that particular day at 6:53 AM. The crash was reported at 7:35 AM, 42 minutes later. That placed the sun just a few degrees above the horizon, directly in the eyes of anyone turning southbound on Brock Avenue."
- There is generally an uptick in crashes due to solar glare in the early morning hours and the late afternoon hours. The glare-induced "blindness" is especially prevalent during the winter months, due to the lower elevation of the sun in the sky and the extremely reflective qualities of snow and ice on the ground."

(*Exh. 7: Testimony of Simmons*)

47. Sgt. Simmons' concluded:

> "There is no denying that there was an intense rising sun directly in the path of the operator, Mr. Fuertes. That was attested to by even the initial responding officers.
>
> "[H]ad Mr. Fuertes maintained his vehicle in better condition, he would have had a significantly better chance of seeing [the pedestrian] in time to avoid the crash.
>
> "In the final assessment, he could not see [the pedestrian] due to the obstructed windshield. As can be seen from the photos . . . we can barely see a police cruiser in front of the car. . . .Due to the windshield condition, Mr. Fuertes would have almost no chance of seeing the victim in this case."
>
> The crash was caused by the poor windshield condition, for which the operator, Mr. Fuertes, is ultimately responsible."
>
> "It is this writer's opinion that Mr. Fuertes, due to the windshield condition, is the sole and proximate cause of the death of [the pedestrian]. . . ."

(*Exh. 7*)

48. After careful review of all of the testimony and documents in the record, I find that the preponderance of evidence does not support the "salt encrustation" theory as the proximate, contributing cause of the crash. Rather, I find more credible the evidence, including the photographs that show the actual views of the "sun glare" looking directly toward, and approaching, the scene of the crash, taken at the same moment in time as the

crash one day later, together with the credible and consistent statements from the two percipient witnesses, Mr. Fuertes and Officer Pauline, all of which support the inference, which I draw, that even an operator with a perfectly clean windshield (i.e. Officer Pauline) was more likely than not to be blinded by such solar glare that day. (*Exhs.7, 9d, 9e, 9f, 14, 15, 16, 27, 28; Testimony of Appellant, Pauline, Simmons, McGraw*)

49. In particular, I give less weight to the contrary inferences that I was asked to draw from photographs taken on the day of the crash for several reasons: (a) the on-scene photos taken at a different time of day from inside Mr. Fuertes's Jeep, looking through the windshield, actually show that, except for the extreme left and right edges of the windshield (which washers could not reach), the view in front of and immediately to the right of the driver (where the pedestrian was hit) was not significantly obscured, but is sufficient even to see lettering on the side of a police cruiser parked in front, despite the facts that the cruiser was parked further away from the Jeep than was the pedestrian when he was hit and the photographs were taken from the rear deck of the Jeep and do not depict the actual perspective or peripheral view from the driver's seat; (b) photos taken directly facing the Jeep inside the tow shop are more ambiguous and show little sign of what could be called "salt encrustation"; and (c) the credible testimony from EMS Director McGraw (the appointing authority) who said he "didn't see it", meaning the alleged salt encrustation, when shown these same allegedly incriminating photographs. (*Exhs.7,9d,9e,9f,14,15,16,27,28;Testimony of Appellant, Pauline, Simmons, McGraw*)

Evidence of Disparate Treatment

50. The Appellant's abrupt suspension and termination for his first involvement in an off-duty motor vehicle accident was inconsistent with the discipline that New Bedford

meted out to other employees similarly situated. (*Exhs. 17, 18, 19(ID) & 23; P.H. Exhs 30 & 31; Testimony of Mayor Lang, McGraw, Simmons, Rebelo; Stipulated Facts*)[1]

51. In 1987, a New Bedford Police Officer was involved in an off-duty motor vehicle accident in which he collided with another vehicle that had skidded into his travel lane and resulted in two fatalities. He was charged with operating under the influence and two counts of motor vehicle homicide. He was placed on desk duty for six months. He was acquitted of the criminal charges and continued his employment as a New Bedford Police Officer thereafter until the present. (*Testimony of Simmons & Rebelo*)

52. In 2009 another current New Bedford Police Officer (whose duties required him to operate a motor vehicle) was charged with driving while intoxicated in New Hampshire, for which he was found guilty in May 2009 and lost his driver's license. A year later, in May 2010, he was permitted to resign pursuant to an agreement with Mayor Lang, the Appointing Authority. (*Exh. 18; Testimony of Mayor Lang*)

53. In or about September 2008, a New Bedford Firefighter (whose duties required him to operate a vehicle and possess a valid driver's license) was charged with operating while intoxicated while off-duty, and had his license suspended for three months. He was reassigned to desk duty and ordered to attend EAP counseling. He was eventually given a 24-hour suspension but was not terminated. Mayor Lang distinguished this situation because a first offense for driving while intoxicated did not justify termination. (*Exh. 17; Testimony of Mayor Lang, Stipulated Facts*)

[1] One alleged instance of disparate treatment involved a New Bedford EMS employee who struck and killed a pedestrian while operating an ambulance in 1981, the only evidence of which was a letter that gave little detail. This letter was deemed too stale and inconclusive to be given any weight as an example of disparate treatment and was not considered further at the hearing. (*See Exh. 19[ID]*)

54. In March 2007, a New Bedford EMS employee was given a written warning, following the fourth on-duty motor vehicle accident in which he was involved, which resulted in a civil claim for damages against New Bedford for which the City actually paid $1,124.37. (*Exh. 23*)

55. At least five other New Bedford employees (including two EMS employees, a New Bedford Firefighter, a New Bedford Police Officer and an Inspectional Services employee) have been involved in on-duty motor vehicle accidents which resulted in personal injury claims against New Bedford ranging from $25,000 to $95,000, none of whom were disciplined. (*Testimony of Mayor Lang, McGraw; Stipulated Facts*)

56. No New Bedford employee has ever been terminated for negligent operation of a city vehicle or his or her personal vehicle. (*Testimony of Mayor Lang; Stipulated Facts*)

57. In December 2008, two New Bedford EMS employees were involved in an incident in which they failed to properly treat a patient with cardiac arrest who was pronounced dead shortly after he arrived at the hospital, resulting in 30-day suspensions of their EMT licenses by the Massachusetts Office of Emergency Medical Services (OEMS). One EMT received a 45 day suspension and the other a 70 day suspension. (*P.H. Exhs. 30 & 31*)

CONCLUSION

Applicable Civil Service Law

A permanent civil service employee aggrieved by a disciplinary decision made pursuant to G.L.c.31,§41, may appeal to the Commission under G.L. c.31, §43:

> "*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*.

Under Section 43, the role of the Commission is to determine, under a "preponderance of the evidence" test, "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). See also Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev.den., 440 Mass. 1108 (2003); Police Dep't of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); McIsaac v. Civil Service Comm'n, 38 Mass.App.Ct. 473, 477 (1995); Watertown v. Arria, 16 Mass.App.Ct. 331, rev.den., 390 Mass. 1102 (1983).

In performing its function, "the commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew. . . . [in] 'a hearing de novo upon all material evidence and a decision by the commission upon that evidence and not merely. . .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 decision rejecting evidence of appellant's failed polygraph test and 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 insufficient to hold appointing authority's justification unreasonable) 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); Bielawksi v. Personnel Admin'r, 422 Mass. 459, 466 (1996) (same)

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). The Commission 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 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); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1982). The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001). The Commission is entitled to due weight for its experience, technical competence, and specialized knowledge, 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.

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)

When an Appointing Authority relies on scientific evidence provided through expert witnesses, the Commission is mindful of the responsibility to ensure: (a) the scientific principles and methodology on which an expert's opinion is based are grounded on an adequate foundation, either by establishing "general acceptance in the scientific community" or by showing that the evidence is "reliable or valid" through an alternative means, e.g., Canavan's Case, 432 Mass. 304, 311, 733 N.E.2d 1042, 1048 (2000) *citing* Commonwealth v. Lanigan, 419 Mass. 15, 641 N.E.2d 1342 (1994); (b) the witness is qualified by "education, training, experience and familiarity" with special knowledge bearing on the subject matter of the testimony, e.g., Letch v. Daniels, 401 Mass. 65, 69-69, 514 N.E.2d 675, 677 (1987); and (c) the witness has sufficient knowledge of the particular facts from personal observation or other evidence, e.g., Sacco v. Roupenian, 409 Mass. 25, 28-29, 564 N.E.23d 386, 388 (1990).[2]

Experts' conclusions are not binding on the trier of fact, who may decline to adopt them in whole or in part. See, e.g., Turners Falls Ltd. Partnership v. Board of Assessors, 54 Mass.App.Ct. 732, 737-38, rev. den., 437 Mass 1109 (2002). See also, Ward v. Commonwealth, 407 Mass. 434, 438 (1990); New Boston Garden Corp. v. Board of Assessors, 383 Mass. 456, 467-73 (1891); Dewan v. Dewan, 30 Mass.App.Ct. 133, 135, rev.den., 409 Mass. 1104 (1991).

[2] As to the latter point, the Commission's notes that it is granted broader discretion in the admission of evidence than permitted in the Massachusetts courts. Compare G.L.c.30A, §11(2) with Department of Youth Services v. A Juvenile, 398 Mass. 516, 531, 499 N.E.2d 812, 821 (1986).

No specific certitude is required for expert testimony which may be accepted if the opinion is "reasonable" and expressed with sufficient firmness and clarity. See, e.g., Commonwealth v. Rodriguez, 437 Mass. 554, 562-63 (2002); Bailey v. Cataldo Ambulance Service, Inc., 64 Mass.App.Ct. 228, 235 (2005); Resendes v. Boston Edison Co., 38 Mass.App.Ct. 344, 352, rev.den., 420 Mass. 1106 (1995). If certain facts were unknown or mistakes were made in some of the expert's assumptions, that generally goes to the weight of the evidence. Commonwealth v. DelValle, 443 Mass. 782, 792, 824 (2005); Sullivan v. First Mass. Fin. Corp., 409 Mass. 783, 790-92 (1991). However, "it is also a familiar principle that testimony may not rest wholly on conjecture, and that is no less the case when the conjecture flows from the mouth of an expert. [Citations] Fourth Street Pub, Inc. v. National Union Fire Ins. Co., 28 Mass.App.Ct. 157(1989) (Kass.J., dissenting), rev.den., 406 Mass. 1104 (1990). See also Board of Assessors v. Odgen Suffolk Downs, 398 Mass. 604, 606-60, (1986) (expert testimony stricken which overlooked critical facts)

Finally, G.L.c.31,§43 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)

Applying these principles to the facts of this appeal, I conclude that New Bedford did not meet its burden to establish just cause to terminate Mr. Fuertes.

First, New Bedford did not establish by the preponderance of the evidence that Mr. Fuertes operated his private vehicle negligently on February 4, 2010. The alleged poor mechanical conditions of his vehicle were not the cause of the crash. In particular, the evidence did not establish that the alleged malfunction of the windshield wiper/washer was more probably a contributing factor of the crash than it was caused by the crash. Indeed, Sgt. Simmons acknowledged this fact. Mr. Fuertes's windshield was certainly dirty, but the credible evidence did not support the conclusion that it fairly could be called "salt encrusted". Moreover, the preponderance of the credible evidence demonstrated that the sun glare at the time and place of the crash was sufficiently blinding to any operator (including the first responding police officer whose windshield was clear and still was unable to see the accident scene as he approached) that the glare, alone, made it likely that this accident was unavoidable by even the most careful of drivers. Finally, the preponderance of evidence leads me to conclude that the negligence, if any, on the part of Mr. Fuertes, is outweighed by factors beyond his control. [3]

Sgt. Simmons presented as a competent professional and experienced accident investigator within her sphere of expertise. She gave a cogent explanation, supported by reliable scientific analysis, for her conclusion that speed was not a factor in the crash. In

[3] Mr. Fuertes would need to be found more than 50% at fault in order to establish civil liability to the estate of the deceased pedestrian in this regard. G.L.c.231,§85.

my view, however, her opinions about the effect of sun glare on a dirty windshield carry less weight because, in that one particular respect, they call for additional specialized knowledge in assessing the physical properties of glass and how sunlight would reflect differently, if at all, on glass that was clear versus obscured, or the physiology of a person's vision when exposed to solar glare, and were contradicted by the testimony of other witnesses, as well as the acknowledgement that it is generally recognized that accidents due to sun "glare-induced blindness" are "especially prevalent during the winter months". I also find noteworthy that, in dismissing the criminal charges, both the magistrate and the District Court judge found no probable cause to believe that Mr. Fuertes could be proved culpable of conduct which would constitute "operating a motor vehicle . . . negligently so that the lives or safety of the public might be endangered." See. G.L.c.90, §24(2)(a).

Second, whatever negligence, if any, Mr. Fuertes arguably may have demonstrated in operating his private vehicle on February 4, 2010, New Bedford did not prove, by a preponderance of the credible evidence, that Mr. Fuertes's off-duty behavior has the necessary work-related nexus which constitutes "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). To the contrary, the clear weight of the evidence showed that Mr. Fuertes was a good driver and an exemplary employee who stood out in his care and maintenance of the ambulance he was entrusted to drive. It is also significant that Mr. Fuertes's alleged negligence, if any, related to how he maintained his vehicle, not as to how he operated it. On the record presented, there is no

basis to believe that Mr. Fuertes would ever operate a city ambulance in a negligent manner, operate one that was not kept in good condition of which he was aware, or act on-duty in any other way that presented any discernable risk of "liability" to the City of New Bedford or the public. Establishing a nexus between off-duty conduct and responsibilities as a public employee is an essential element that must be proved to show just cause for termination under basic merit principles of civil service law.

Third, Mr. Fuertes presented compelling evidence of disparate treatment. The Commission is charged with "authority to review and amend the penalties of the many disparate appointing authorities subject to its jurisdiction so as to promote the basic merit principle of uniformity and "equitable treatment of similarly situated individuals", both within and across appointing authorities. See Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. See also Boston Police Dep't v. Collins, 48 Mass. App.Ct. 408, 412, rev.den. 726 N.E.2d 417 (2000); Police Comm'r of Boston v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 600 (1996). Mr. Fuertes is the first similarly-situated civil service employee of the New Bedford EMS Department or any other New Bedford department to be summarily suspended and terminated for any alleged off-duty or even on-duty negligent motor vehicle operation, even in cases of involving a fatality or proven "liability" to New Bedford. Furthermore, EMS personnel, who violated state-mandated treatment protocols in caring for a cardiac patient who later died, were disciplined with suspensions. New Bedford's attempts to distinguish these other cases as warranting remedial discipline, rather than termination, are not persuasive. Many of these other cases involved even more serious offenses – such as a conviction for OUI – or involved actual payments for claims of civil liability by the City of New Bedford, as

opposed to the hypothetical future risk of liability asserted here. These cases stand in stark contrast to the suspension and termination of Mr. Fuertes, all within a period of weeks, and New Bedford's adamant refusal to allow his appointing authority to consider his reinstatement even after all criminal charges against him had been dropped. In view of these numerous other cases of lesser discipline, and the tenuous nexus, if any, between Mr. Fuertes's off-duty accident and his on-duty responsibilities with New Bedford EMS, Mr. Fuertes's termination was clearly disproportionate punishment that cannot stand as appropriate remedial discipline under basic merit principles of civil service law.

Modification of Discipline

Since the facts as found by the Commission vary from those determined by the appointing authority, New Bedford EMS, the Commission considers whether the discipline imposed should be vacated or modified.

One the one hand, the evidence established that the decision to terminate Mr. Fuertes was formulated within days of the accident and long-before his local level civil service hearing and that it was influenced by the predisposition of others than his appointing authority, EMS Director McGraw, who would not have terminated Mr. Fuertes but left him on administrative leave, and who recommended his reinstatement after all criminal charges against Mr. Fuertes. had been dismissed. This rush to judgment invites allowing the appeal, rather than modifying the discipline to a suspension.

On the other hand, without benefit of hindsight, but given the serious nature of the charges that were lodged against Mr. Fuertes (negligent homicide), supported by a facially sufficient initial police investigation, it was certainly justified for New Bedford to take some form of remedial action, with such an investigation pending. Once it had been

determined that there was no probable cause to support such charges, however, EMS Director McGraw, who is the appointing authority, saw no reason to defer Mr. Fuertes's reinstatement. At that point, whatever prior legitimate concerns expressed by his superiors that Mr. McGraw decided to accept, the decision to reinstate Mr. Fuertes was his to make, as the lawfully designated appointing authority under civil service law. That judgment was fully warranted and it should have been respected. Thus, after carefully considering the entire record, the appropriate remedial action in this particular case, especially given the treatment of other similarly situated employees, is to grant relief consistent with that which EMS Director McGraw intended, namely, to reinstate Mr. Fuertes after the criminal charges against him had been dismissed.

Accordingly, the appeal of the Appellant, Benjamin Fuertes, is hereby ***allowed in part.*** His termination is modified to a period of three-months of unpaid administrative leave Except as modified, Mr. Fuertes shall be reinstated to his position with the New Bedford EMS Department without loss of any other compensation or other benefits.

Civil Service Commission

Paul M. Stein
Commissioner

By 4-1 vote of the Civil Service Commission (Bowman, Chairman [NO][4]; Ittleman [YES], McDowall [YES], Marquis [YES] & Stein [YES], Commissioners) on October 18, 2012.

A True Record. Attest:

_____
Commissioner

[4] Chairman Bowman voted NO as he concluded that there was just cause to terminate the Appellant.

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 the 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 a Civil Service Commission's final decision.

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:
Jaime Kenny, Esq. (for Appellant)
Jane Medeiros Freidman, Esq. (for Appointing Authority)