

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

DANIEL McCARTHY,
Appellant

v.

D-01-1407

CITY OF NEWBURYPORT,
Respondent

Appellant's Attorney:

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Worcester, MA 01605

Respondent's Attorney:

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Commissioner:

John J. Guerin, Jr.

DECISION

Pursuant to the provisions of G.L. c. 31, s. 43, the Appellant, Daniel McCarthy (hereinafter "Appellant"), is appealing the decision of the Respondent, City of Newburyport (hereinafter "City" or "Respondent") as Appointing Authority, in suspending him without pay from the Newburyport Police Department for a total period of twenty-two (22) days arising out of two separate suspensions (which have been consolidated on appeal). The appeal was timely filed. A full hearing was held at the offices of the Civil Service Commission on June 27, 2005 and November 1-2, 2005.

Seven (7) tapes were made of the hearing. A written transcript of the record was also prepared. As no written notice was received from either party, the hearing was declared private. Fifty-five (55) exhibits were stipulated to by the parties and entered into the record. Witnesses were ordered to be sequestered. Both parties submitted post-hearing briefs, as instructed.

FINDINGS OF FACT:

Based upon the documents entered into evidence (Joint Exhibits 1-55), and the testimony of the Appellant; Thomas Cappelluzzo - Sergeant, Newburyport Police Department; Lisa Mead – former Mayor, City of Newburyport; Richard Hoyt - Sergeant, Newburyport Police Department; Richard McCarthy – retired Lieutenant, Newburyport Police Department; Alan Maguire - Sergeant, Newburyport Police Department; Robert Gagnon - Lieutenant, Newburyport Police Department; Christopher McDonald - Officer, Newburyport Police Department; Richard Rocco - Officer, Newburyport Police Department; and Richard Siemasko - Sergeant, Newburyport Police Department, I make the following findings of fact:

1. The City of Newburyport Police Department (hereinafter “Department”) is the employer and appointing authority. (Exhibit 1)
2. At all relevant times, the Appellant was a permanent, tenured Civil Service Police Officer (Patrolman) in the City of Newburyport. (Appellant Testimony)

3. No evidence was entered into the record to indicate that the Appellant had ever been issued any prior discipline as a Newburyport Police Officer.
4. On March 28, 1997, the Department issued the Appellant a Smith & Wesson revolver, at which time the Appellant signed the Firearm Record, which provided in pertinent part: “Said Officer hereby understands the working of said firearm, the proper handling, and safety features. The officer has also been trained in the proper storage and safekeeping of this firearm.” (Lt. McCarthy Testimony; Exhibit 50)
5. The “Rules and Regulations for the Government of Newburyport Police Department of the City of Newburyport” (hereinafter “Dept. Rules and Regulations”), which have been in effect since June 13, 1988, provide in pertinent part:

Section I.C.1.d Filing Reports – Promptly and accurately complete all reports and forms required by this manual. Before leaving the station house at the end of his/her tour, complete all required reports and forms which pertain to events occurring during the concluded tour, or as directed by the shift superior.

Section I.C.2.a Routine Orders – All lawful orders, written or oral, shall be carried out fully and in the manner prescribed by a superior officer ... Failure or deliberate refusal to obey a lawful order given by a superior officer shall be insubordination.

Section I.C.2.e Criticism of Orders – Members and employees shall not publicly criticize instructions or orders they have received.

Section I.C.3 Prohibited Conduct – The following acts, actions or activities by departmental personnel are prohibited or restricted.

a. Conduct Unbecoming an Officer – The commission of any specific act or acts of immoral, improper, disorderly or intemperate

personal conduct which reflects discredit upon the officer himself, upon his fellow officers or upon the police department.

c. Discourtesy – Being rude, impolite contemptuous or insolent to a fellow officer or a member of the public.

g. False Information on Records or Reports – An officer shall not make or submit any false or inaccurate reports or knowingly enter or cause to be entered into any departmental books, records or reports, any inaccurate, false or improper information.

m. Possessing Keys to Private Buildings – Having keys to private buildings or dwellings on a member's area of patrol without permission of the City Marshal.
(Exhibit 6)

6. The Appellant acknowledged, in writing, having received and read the Department Rules and Regulations on March 27, 1997. (Exhibit 36)
7. The Department has distributed numerous policies, procedures and documents relative to firearms safety. (Lt. McCarthy Testimony; Maguire Testimony; Exhibits 7-11, 13-15)
8. The Guidelines and Policy for Firearms Carried by Members of the Department stipulates that: “[a]ll Police Officers will be responsible for the safe handling of their firearms at all times and must properly secure their firearms when they are not under their direct control.” (Exhibit 7)
9. The Massachusetts Criminal Justice Training Council instructs that “[i]f a firearm is going to be handed to another person it should be done as follows ... b. a semi-automatic pistol will be unloaded, no magazine in the well, the slide locked back, and handle first.” (Exhibits 8 and 11).
10. Department members, including the Appellant, were taught to “always keep the muzzle pointed in a safe direction”; “never point a gun at anyone”;

“always point guns only in a safe direction – where property or people will not be harmed”; “if an officer must permit someone else to examine his firearm, he should carefully unload it”; “each cartridge should be counted after removal and the empty chambers should be examined”; and “necessity for a careful unloading process cannot be overemphasized.” (Exhibit 13)

11. Department officers, including the Appellant, were also instructed to:

1. Handle all firearms as if they were loaded ... Make safe gun handling a habit to be followed at all times.

2. Always keep the firearm pointed in a safe direction. In selecting a safe direction, you must also take into consideration that a bullet can ricochet or glance off any object it strikes...Remember: You should never point a gun (whether loaded or unloaded) at another person or yourself....

6. Thoroughly read the instruction manual supplied with your firearm. Never use any firearm unless you completely understand its operation and safety features...

(Exhibit 14)

12. The Department issued the Ruger Semi-Automatic Pistol to its members (including the Appellant) on or about 1997. Prior to the issuance of this weapon, the Department required all members to undergo a three (3) day transitional training course. As part of that training, all members received a course guide, which demonstrates the “general safety rules for unloading a firearm”; and reminds officers to “always keep the muzzle pointed in a safe direction”. The guide also includes specific instructions on the safe handling of the Ruger and other semi-automatic weapons, including removal of the magazine, clearing the weapon and rendering the weapon “safe.” (Lt. McCarthy Testimony; Exhibit 15).

13. Department members, including the Appellant, also received a copy of the instruction manual that was included by the manufacturer of the Ruger, which they were allowed to keep. The manual includes warnings that “if dropped or struck, the pistol may fire” and “any gun may fire if dropped.” The manual also includes directions for the safe unloading of the weapon and reiterates that the gun should always be pointed in a safe direction, defined as “a direction which will not permit a discharged bullet to strike a person, or to strike an object from which the bullet may ricochet.” (Lt. McCarthy Testimony; Cappelluzzo Testimony; Exhibit 16)

I. The Two-Day Suspension

A. Fowles News Incident

14. On April 11, 2001, the Appellant arrested two youths who were smoking marijuana while working in a warehouse at Fowles News in Newburyport. (Exhibit 39)

15. On Saturday, April 28, 2001, Sgt. Maguire was in charge of the four-to-midnight shift. Prior to roll call, the Appellant became aware of an excerpt of the Department’s Rules and Regulations posted on the bulletin board pertaining to “possession of keys.” The Appellant was upset by the posting and advised Sgt. Maguire that he believed it was a personal attack on him. (Maguire Testimony)

16. The Appellant then explained to Sgt. Maguire (who had recently returned from a nine (9) day vacation and was unaware of the Fowles News arrest) that

he had arrested the youths after first obtaining the warehouse key from the building owner. (Maguire Testimony; Exhibit 17)

17. Sgt. Maguire then asked the Appellant if the Marshal¹ was aware of the investigation at the time he had obtained the key and whether the Appellant had received permission from the Marshal to possess the keys. (Id.)

18. The Appellant answered “Yes” to both of these questions. (Id.)

19. Immediately after his discussion with Sgt. Maguire, the Appellant left the station in his assigned vehicle. Shortly thereafter, Sgt. Maguire was driving by Sgt. Siemasko’s house and noticed the Appellant’s cruiser parked in the driveway. The Appellant stayed at Sgt. Siemasko’s house for approximately 40-45 minutes. After making this observation, Sgt. Maguire alerted the Marshal as to what the Appellant had told him about the Fowles News investigation. The Marshal then instructed Sgt. Maguire to have the Appellant meet the two of them at the Police Station. (Maguire Testimony; Cappelluzzo Testimony)

20. Thereafter, the Appellant and Sgt. Maguire met with the Marshal in his office. When confronted with his statement to Sgt. Maguire that the Marshal had given him permission to obtain the keys to Fowles News, the Appellant denied making the statement. Instead, the Appellant asserted his supervisor, Sgt. Siemasko, was aware that he had the keys. (Id.)

21. Sgt. Maguire filed an extensive report about this matter on April 28, 2001. He also sent an e-mail to the Appellant requesting that he file a full report of this

¹ In the City of Newburyport, the Marshal is the equivalent of the Chief of Police. At all relevant times, Sgt. Capelluzzo was the Acting Marshal.

incident. When the Appellant failed to respond, Sgt. Maguire sent the Appellant a second e-mail. He also telephoned the Appellant at home, twice, and left messages requesting that the Appellant return the calls. (Maguire Testimony; Exhibit 17).

22. On May 24, 2001, nearly four (4) weeks later, the Appellant still had not submitted a report or responded to Sgt. Maguire's e-mails or telephone calls. Sgt. Maguire then instructed an officer of the department to hand-deliver a memorandum to the Appellant's home, which directed the Appellant to submit a memorandum regarding the incident within twenty-four (24) hours. (Maguire Testimony; Exhibit 18)

23. It was not unusual for officers to receive telephone calls or correspondence or even visits at their homes when necessary to complete or conduct police business. (Maguire Testimony; Cappelluzzo Testimony)

24. After expressing his displeasure at being contacted at home and requesting that no officer be allowed on his property in the future without a search warrant, the Appellant submitted a report to Sgt. Maguire on May 26, 2001. (Maguire Testimony; Exhibit 19)

25. Notably, the report (bearing the subject line "Bulletin Board Incident") did not deny Sgt. Maguire's earlier attempts to obtain a complete report. The report was incomplete, and focused solely on the bulletin board posting. With regard to the critical issue (who authorized possession of the keys to Fowles News) and the Appellant's statements to Sgt. Maguire, the Appellant stated "the conversation in the Marshal's office was very stressful for me and I do not

recall the exact content of the subject matter other than (sic) the letter being posted.” (Exhibit 19)

26. The next day, May 27, 2001, Sgt. Maguire again directed the Appellant to submit a detailed report, requesting detail regarding the events of April 28, 2001, and specifically referencing the questions Sgt. Maguire asked the Appellant regarding his possession of the keys to Fowles News. (Exhibit 21)
27. The Appellant responded by e-mail, stating “Al, As I have already stated before I do not recall anything other than what I have already indicated to you, sorry you feel it is unacceptable, however, I cannot make things up just to satisfy your inquiry. I have nothing further to add other than I feel I am being harassed by you in my workplace.” (Maguire Testimony; Exhibit 22)
28. On May 30, 2001, Sgt. Maguire reported the Appellant’s response to the Marshal. (Maguire Testimony; Exhibit 23)
29. On June 8, 2001, the Marshal ordered the Appellant to submit, in writing, a detailed report on two (2) matters, one of which was with regard to his prior statements about his alleged authorization to conduct an investigation at Fowles News and to possess a private key to the business. (Cappelluzzo Testimony; Exhibit 28)
30. That day, the Appellant submitted another report. At the end of his report, the Appellant, in a handwritten note, claimed that the Marshal had directed him not to file the report previously sought by Sgt. Maguire and that the Marshal told him (Appellant) that he (the Marshal) would talk to Sgt. Maguire. (Exhibit 28)

31. The Marshal testified that he never made any such statement to the Appellant, as evidenced by his June 8, 2001 order. (Cappelluzzo Testimony; Exhibit 28)
32. Thereafter, on July 6 and 13, 2001, Sgt. Siemasko submitted reports to the Marshal regarding his knowledge of the Fowles News key incident. In the July 6, 2001 report, Sgt. Siemasko stated that he was aware that the Appellant was investigating a drug violation at Fowles News and that he was aware the Appellant was in possession of a key. (Siemasko testimony; Exhibit 29)
33. In his July 13, 2001 report, Sgt. Siemasko stated that he had no conversation with the Appellant prior to him taking possession of the key, but that he allowed the Appellant to keep the key and investigate the complaint. (Id.)
34. Sgt. Siemasko subsequently received a three day suspension (later reduced to two days) for providing incomplete or misleading information in his reports. When he received his suspension, Sgt. Siemasko surrendered his service revolver without incident and in accordance with the firearms training he had received. (Siemasko Testimony)

B. Statements to Officer Rocco

35. Officer Rocco credibly testified that during the spring of 2001, either in April or May, the Appellant approached him and stated that the Marshal told him (the Appellant) that if the union suspended him from the detail work list then the Marshal would suspend all details in the Department for one month. Officer Rocco asked the Marshal about this statement, and the Marshal denied making the statement. (Rocco Testimony; Cappelluzzo Testimony).

C. Statements to Lt. Gagnon

36. The Appellant failed to use one (1) of his vacation days in fiscal year 2001, and failed to timely file a request to carry it over to the next fiscal year. (Gagnon Testimony; Exhibits 30 and 32)
37. On July 8, 2001, the Appellant broached the carryover request issue with Lt. Gagnon, who advised him that a late request would be declined. The Appellant then asked if he could be given eight (8) hours of “comp time” for travel to a training seminar he had attended in mid-June. The Appellant claimed that other officers had received “comp time” for attending such training. By memorandum dated July 11, 2001, Lt. Gagnon directed the Appellant to provide specifics to support his request for comp time, including a time-owed slip, a detailed account of the time requested along with the dates earned and the details of the other instances that the Appellant referred to in their conversation. (Id.)
38. A few days later, the Appellant wrote a note on Lt. Gagnon’s memo stating “I spoke to Officer MacDonald re: the drug unit of 2000 summer; he informed me that the other officer’s (sic) that attended put in for the time, but he did not.” (Gagnon Testimony; Exhibit 30)
39. On July 13, 2001, the Appellant submitted a time-owed slip to Lt. Gagnon, which listed four days, from June 18-21, 2001, and requested two (2) hours of time for each day. (Gagnon Testimony; Exhibit 31)
40. In an effort to verify the Appellant’s information and obtain additional facts, Lt. Gagnon contacted Officer MacDonald. Officer MacDonald told Lt.

Gagnon that he did not recall ever having a conversation with the Appellant on the subject of compensation for attending training classes. A week later, Lt. Gagnon again raised the issue with Officer MacDonald, who again stated that he never had any such conversation with the Appellant. Thereafter, Officer MacDonald submitted a report confirming that he did not have such a conversation. (Gagnon Testimony; MacDonald Testimony; Exhibit 32)

41. On July 22, 2001, Lt. Gagnon asked the Appellant when his alleged conversation with Officer MacDonald took place. The Appellant replied “two weeks ago.” (Gagnon Testimony; Exhibit 32).
42. The Appellant claimed that Officer MacDonald mentioned that the drug unit attended training in “summer 2000” (Id.)
43. Conversely, Officer MacDonald testified at hearing that that training took place in November 2000 and that, to his knowledge, none of the members of the drug unit sought or received extra compensation in connection with the training. (MacDonald Testimony)
44. When Lt. Gagnon confronted the Appellant with the fact that he could not substantiate his claim, the Appellant immediately withdrew his request for “comp time” and stated that he had been “pressured by unnamed individuals” in the Department not to pursue the issue. (Gagnon Testimony; Exhibit 32)
45. When Lt. Gagnon asked for the names of these “unnamed individuals”, the Appellant refused to divulge them. Thereafter, on July 23, 2001, Lt. Gagnon submitted a report to the Marshal regarding this incident, in which he expressed his concerns that the Appellant had made false statements about his

conversation with Officer MacDonald in order to support a claim for additional compensation. (Id.)

46. Thereafter, on July 25, 2001, the Appellant was issued a Notice of Suspension for three (3) days without pay for: (a) failure to follow orders over a six-week period to submit a full report about who authorized his possession of keys to a private business and the veracity of the statements he made related to this issue; (b) his criticism of the Marshal's order to Sgt. Maguire instructing him to obtain a report from the Appellant regarding the keys; (c) his false statements to Officer Rocco regarding a statement about what the Marshal would do if the Appellant was suspended from the Union; and (4) his misrepresentation of a conversation with Officer MacDonald to support his claim for additional comp time. (Exhibits 4 and 34)

47. The Notice of Suspension indicated that the aforementioned conduct violated several department Rules and Regulations, including "Professional Conduct and Responsibilities"; "Possessing keys to Private Buildings"; "Conduct Unbecoming an Officer"; "Discourtesy"; "False Information on records and reports" [sic]; "General Conduct on Duty"; "Filing Reports"; "Routine Orders"; and "Criticism of Orders." (Exhibit 4)

48. The Appellant filed a notice of appeal of the three-day suspension dated July 26, 2001 with the then-Mayor of Newburyport, Lisa Mead (hereinafter "Mayor"). Upon receipt, the Mayor asked one of her aides to contact Labor

Counsel (Phillip Collins) and to schedule an appeal as soon as practicable.²
(Mayor Testimony; Exhibit 4)

II The Twenty-Day Suspension

49. On July 25, 2001, the Appellant reported for his four-to-midnight shift. At the instruction of the Marshal, Sgt. Hoyt went to the roll call room and asked the Appellant to accompany him to the Marshal's office for a meeting. (Hoyt Testimony; Cappelluzzo Testimony)
50. Once in the Marshal's Office, the Marshal delivered the news of the three-day suspension to the Appellant without incident and explained that the Appellant had Civil Service appeal rights with regard to the suspension. In response, the Appellant made a sarcastic comment relative to the reprimand for the key incident. (Hoyt Testimony; Cappelluzzo Testimony)
51. The Appellant next asked if that was all and, when advised affirmatively, the Appellant began to exit the Marshal's office. As the Appellant began to exit the office, the Marshal directed the Appellant to surrender his gun and badge, as the Marshal understood this to be the practice in the Department when an officer was suspended from duty. (Id.)
52. Upon being asked to surrender his weapon, the Appellant turned around and walked back towards the Marshal's desk, removed his weapon from his holster and negligently tossed it onto the Marshal's desk. When the weapon

² Mayor Mead was on maternity leave from July 23, 2001 through the second week of August 2001. The first week, she was in the hospital and did not receive City correspondence. The second week she was home, and received and responded to City correspondence that aides brought to her house. Thereafter, she initially returned to work on a part-time basis. (Mayor Testimony)

hit the desk, it made a loud banging sound, slid approximately two feet across the desk after landing and spun such that when it came to rest, the barrel was pointed a few inches to the left of the Marshal's right arm and shoulder. (Hoyt Testimony; Cappelluzzo Testimony; Exhibit 37)

53. After negligently tossing his weapon onto the Marshal's desk, the Appellant unpinned his badge from his uniform and tossed it at the Marshal. The badge landed on the Marshal's desk and slid approximately half way across the desk. The Appellant then left the Marshal's office without further comment or incident. (Id.)

54. After the Appellant left, the Marshal pointed out to Sgt. Hoyt that the Appellant's weapon was fully loaded and asked Sgt. Hoyt to submit a detailed report about the incidents he had just observed regarding the surrendering of the Appellant's weapon and badge. Sgt. Hoyt submitted his report on July 27, 2001. (Id.)

55. On August 1, 2001, the Appellant was issued a Notice of Suspension for five (5) days without pay based on his actions on July 25, 2001. The Notice of Suspension stated that the manner in which the Appellant surrendered his weapon was "an egregious violation of the Department's firearms policy and proper procedure for handling a firearm" and that his conduct was insubordinate and in violation of Department Rules and Regulations pertaining to "professional Conduct and Responsibilities", "Conduct Unbecoming An Officer" and "Discourtesy." (Exhibit 1)

56. The Marshal credibly testified that he did not immediately suspend the Appellant on July 25, 2001, because he knew that he had just issued the Appellant a three (3) day suspension and he knew the Appellant would not be on duty for at least that many days. Additionally, immediately following the gun incident, the Marshal was shocked at what had transpired and consulted with both legal counsel and the Mayor by telephone prior to issuing the five-day suspension. (Cappelluzzo Testimony)
57. On August 3, 2001, the Appellant sent a note to the Mayor requesting a hearing with regard to the five (5) day suspension. (Exhibit 42)
58. Upon receipt, the Mayor contacted Labor Counsel regarding both suspensions of the Appellant. (Mayor Testimony)
59. On August 15, 2001, the Mayor sent the Appellant a certified letter indicating that she had received a copy of the five-day suspension for the gun and badge incident from the Marshal and was contemplating imposing additional discipline pursuant to G.L. c. 31, s. 41. She stated in the letter that she believed an additional suspension of fifteen (15) days was warranted. (Mayor Testimony; Exhibit 42)
60. The Mayor credibly testified at hearing that her decision regarding imposing additional discipline was in no way influenced by the Appellant's appeal of either suspension. (Mayor Testimony)

III The Disciplinary Hearing

61. Subsequently, on August 24, 2001, a closed hearing in accordance with s. 41 was conducted by James G. Gilbert, Esq. (hereinafter "Hearing Officer"), the Mayor's designee, on the matter of the three (3) day suspension dated July 25, 2001; the five (5) day suspension dated August 1, 2001; and the Mayor's notice of additional contemplated discipline dated August 15, 2001. The hearing officer issued two (2) reports on August 31, 2001, copies of which were forwarded to the Appellant by letters from the Mayor dated September 4, 2001. (Exhibits 34 and 35)

62. The hearing officer's reports concluded that:

- a. Appellant wholly fabricated a conversation with Officer MacDonald to support a claim for compensation;
- b. Appellant lied to Sgt. Maguire on April 28, 2001 when he told Sgt. Maguire that the Marshal was aware of his investigation and authorized possession of the keys;
- c. Appellant lied when he told Sgt. Maguire that the Marshal and "his supervisor", Sgt. Siemasko, had given him permission and when he denied making his earlier statements to Sgt. Maguire;
- d. Appellant repeatedly ignored Sgt. Maguire's directives to file a report for over one month and then claimed that his memory had faded;
- e. Appellant lied when he stated that the Marshal directed him not to file a report;
- f. Appellant's actions on July 25, 2001, in throwing his weapon onto the Marshal's desk, were deliberate and knowing and conducted with reckless disregard for the safety of all those present in the room;
- g. Appellant's pattern of behavior during these incidents exhibited both a troubling "disregard of the truth" and that Appellant's willingness to lie about such unimportant issues (such as one day's

vacation pay) raised “serious questions about his ability to distinguish the truth in other, more important or critical situations”; and

- h. Appellant ignored extensive training on the proper and safe handling of firearms. His conduct [throwing a loaded gun onto the desk in the direction of the City Marshal] was “at best a reckless and dangerous deed, perilously close to assault ... His actions demonstrate a dangerous inability to control his temper, and raise equally serious questions about [his] current overall fitness for duty.”

(Exhibits 34 and 35)

- 63. The hearing officer recommended that the three (3) day suspension be reduced to two (2) days (because the false statement to Officer Rocco concerned an internal union matter). The hearing officer also recommended that the five (5) day suspension be increased by fifteen (15) days. (Id.)
- 64. The Mayor accepted the hearing officer’s recommendations and, by notice dated September 4, 2001, advised the Appellant that she had accepted the hearing officer’s recommendations. The Mayor also concurred with the hearing officer’s recommendation that the Appellant undergo a psychological evaluation prior to returning to active duty. (Id.)
- 65. This appeal ensued.
- 66. A criminal charge of assault with a dangerous weapon, based on the weapon handling incident in the Marshal’s office, was brought against the Appellant in Commonwealth v McCarthy, Case No. 0236 CR 0363 (Salem Dist. Ct). The charge was dismissed by the Court on the basis that the District Attorney had not established the *mens rea* (“intent”) required to establish a charge of assault with a dangerous weapon. Notably, the Court did not make any findings of

fact with respect to the manner in which the Appellant surrendered his weapon on July 25, 2001. (Exhibit 55)

67. At the Civil Service Commission hearing, the Appellant offered disturbing testimony. The Appellant admitted that cavalierly tossing his badge (with an open pin) at the Marshal in frustration was “OK” as there was “no intent to hit or disrespect”; and that “the operator’s state of mind” is more important in handling a firearm than “how it should be done in a manual.” (Appellant Testimony)

68. Indeed, in accord with this view, the Appellant admitted that when he surrendered his weapon, he did not follow weapon protocol because he was “upset”. The credible testimony establishes that the Appellant negligently tossed the weapon in such a manner that it pointed in the general direction of the Marshal (rather than a safe/unoccupied corner of the room); did not remove the magazine from the weapon; did not pull the slide back or lock it; did not clear the chamber of live rounds; did not declare the weapon “open and safe”; did not demonstrate that the weapon was secured; and did not hand the weapon “butt first” to the Marshal. The Commission finds that failure to follow one (1) of these steps constitutes a significant breach of weapon safety protocol. Here, the Appellant failed to perform any of these critical safety steps. The fact that the Appellant was “upset” is a not an excuse.

69. While I find the Appellant’s testimony an honest expression of his personal belief system, his belief system is tragically flawed and in conflict with the

appropriate conduct of a police officer. The Appellant exhibited a complete failure to grasp the basic principles underlying firearm safety.

70. In sum, the Appellant failed to offer any credible explanation or suitable response from a police officer as to his numerous false statements to multiple members of the Department; his failure to file timely and complete reports; his egregious breach of safety protocol with respect to the surrender of his weapon; and his insubordination.

71. In contrast, the testimony of the City's eight (8) sequestered witnesses [Sgt. Cappelluzzo; Lisa Mead; Sgt. Hoyt; Lt. Richard McCarthy (Ret.); Sgt. Maguire; Lt. Robert Gagnon; Officer McDonald; and Officer Rocco] was highly credible. All of these witnesses were composed and presented information in a clear and concise manner. Each of these witnesses confidently and uniformly corroborated the testimony of one another, as well as their own respective prior statements (as recorded in their various reports and correspondence, the disciplinary hearing and the trial transcript in the criminal case brought against the Appellant.) Their testimony was in no way discredited upon cross-examination.

CONCLUSION:

The role of the Civil Service Commission is to determine “whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” City of Cambridge v. Civil

Service Commission, 43 Mass. App. Ct. 300, 304 (1997). Town of Watertown v. Arria, 16 Mass. App. Ct. 331 (1983). McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995). Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000). City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is “justified” when it is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law.” City of Cambridge at 304, quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971). The proper inquiry for determining if an action was justified is, “whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service.” Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983). School Committee of Brockton v. Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997). This burden must be met by a preponderance of the evidence. G.L. c. 31, §43.

Substantial misconduct by police officers adversely affects the public interest, perhaps more than any other civil service position. In a free society, the public must have confidence in their police officers because of the vast power they can dispatch. “Police officers are not drafted into public service; rather they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.” Police Commissioner of Boston v. Civil Service Commission, 22

Mass.App.Ct. 364, 371 (1986). “Police officers must comport themselves in accordance with the laws they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel.” Id. Because of the nature of a police officer’s position, and the risk of abuse of power, police officers are held to a higher standard of conduct than other employees and citizens. Attorney General v. McHatton, 428 Mass.App.Ct. 790 (1999); McIsaac v. Civil Service Commission, 38 Mass.App.Ct. 473; Boston Police Department v Collins, 48 Mass.App.Ct. 408 (2000).

It is the conclusion of this Commission that the Respondent has satisfied its burden of proving reasonable justification for suspending the Appellant for a total of twenty-two (22) days without wages and benefits. Specifically, the evidence proffered by the Department is sufficiently reliable to warrant a reasonable mind to find that the Appellant is guilty of the misconduct for which he was penalized.

A preponderance of the credible documentary and testimonial evidence establishes, in almost mirror similarity to the conclusions of the Section 41 Hearing Officer, that:

- a. The Appellant wholly fabricated a conversation with Officer MacDonald to support a claim for compensation;
- b. The Appellant lied to Sgt. Maguire on April 28, 2001 when he told Sgt. Maguire that the Marshal was aware of his investigation and authorized possession of the keys;
- c. The Appellant lied when he told Sgt. Maguire that the Marshal and “his supervisor”, Sgt. Siemasko, had given him permission to possess the keys in question and when he denied making his earlier statements to Sgt. Maguire;

- d. The Appellant repeatedly ignored Sgt. Maguire's directives to file a report for over one month and then claimed that his memory had faded;
- e. The Appellant lied when he stated that the Marshal directed him not to file a report;
- f. The Appellant's actions on July 25, 2001, in throwing his weapon onto the Marshal's desk were deliberate and knowing and conducted with reckless disregard for the safety of all those present in the room;
- g. The Appellant ignored extensive training on the proper and safe handling of firearms;
- h. The Appellant's actions on July 25, 2001 in flipping his badge (with an exposed pin) at the Marshal "in frustration" was done with reckless disregard for the safety of the Marshal; and
- i. The Appellant's pattern of behavior during these incidents exhibited a remarkable disregard of the truth.

The Appellant's actions were in violation of Department Rules and Regulations Sections I.C.1.d (Filing Reports); I.C.2.a (Routine Orders); I.C.2.e (Criticism of Orders); I.C.3.a (Conduct Unbecoming an Officer); I.C.3.c (Discourtesy); I.C.3.g (False Information on Records or Reports); and I.C.3.m (Possessing Keys to Private Buildings). The Appellant's actions also violated the Department Guidelines and Policy for Firearms; the Massachusetts Criminal Justice Training Council instructions on firearms; the Ruger instruction manual; and numerous other training guides and regulations issued to the Appellant with regard to firearm safety.

It is the function of the agency hearing the matter to determine what degree of credibility should be attached to a witness' testimony. School Committee of Wellesley v. Labor Relations Commission, 376 Mass. 112, 120 (1978). Doherty v. Retirement Board

of Medicine, 425 Mass. 130, 141 (1997). The hearing officer must provide an analysis as to how credibility is proportioned amongst witnesses. Herridge v, Board of Registration in Medicine, 420 Mass. 154, 165 (1995).

The Commission assigns little credibility to the testimony of the Appellant with respect to the incidents in question. At hearing, the Appellant offered disturbing testimony. The Appellant admitted that cavalierly tossing his badge (with an open pin) at the Marshal in frustration was “OK” as there was “no intent to hit or disrespect”; and that “the operator’s state of mind” is more important in handling a firearm than “how it should be done in a manual.”

Indeed, in accord with this view, the Appellant admitted that when he surrendered his weapon, he did not follow weapon protocol because he was “upset”. A preponderance of the credible testimony establishes that the Appellant negligently tossed the weapon in such a manner that it pointed in the general direction of the Marshal (rather than a safe/unoccupied corner of the room); did not remove the magazine from the weapon; did not pull the slide back or lock it; did not clear the chamber of live rounds; did not declare the weapon “open and safe”; did not demonstrate that the weapon was secured; and did not hand the weapon “butt first” to the Marshal. The Commission notes that failure to follow one (1) of these steps constitutes a significant breach of weapon safety protocol. Here, the Appellant failed to follow any of these critical safety steps. The fact that Appellant was “upset” is a not an excuse.

While I find the Appellant's testimony an honest expression of his personal belief system, his belief system is tragically flawed and in conflict with the appropriate conduct of a police officer. The Appellant exhibited a complete failure to grasp the basic principles underlying firearm safety. The Commission notes that the failure to follow required weapon safety protocol has been held as sufficient grounds for demotion and/or termination (*See Collins, supra*; Commissioner of Civil Service v. Third District Court of Eastern Middlesex, 2 Mass.App.Ct. 89 (1974) (officer suspended for six months for negligently handling weapon); Hershon v Department of Correction, 8 MCSR 202 (1995) (officer suspended for fifteen days and demoted in rank for pointing loaded weapon at fellow officer). Given the existing circumstances, the decision of the City to suspend the Appellant for twenty days was lenient.

In sum, the Appellant failed to offer any credible explanation or suitable response from a police officer as to his numerous false statements to multiple members of the Department; his failure to file timely and complete reports; his egregious breach of safety protocol with respect to the surrender of his weapon and his insubordination.

In contrast, the testimony of the City's eight (8) sequestered witnesses [Sgt. Cappelluzzo; former Mayor Mead; Sgt. Hoyt; Lt. McCarthy (Ret.); Sgt. Maguire; Lt. Gagnon; Officer McDonald; and Officer Rocco] was highly credible. All of these witnesses were composed and presented information in a clear and concise manner. Each of these witnesses confidently and uniformly corroborated the testimony of one another, as well as their own respective prior statements (as recorded in their various reports and

correspondence; the disciplinary hearing; and the trial transcript in the criminal case brought against the Appellant.) Their testimony was in no way discredited upon cross-examination.

For all of the above stated reasons, it is found that the City of Newburyport has established by a preponderance of the reliable and credible evidence in the record that it had just cause to discipline the Appellant for his misconduct. Therefore, the appeal on Docket No. D-01-1407 is hereby *dismissed*.

Civil Service Commission

John J. Guerin, Jr.
Commissioner

By vote of the Civil Service Commission (Bowman, Guerin and Marquis, Commissioners) [Goldblatt, Chairman and Taylor, Commissioner absent] on March 1, 2007.

A True Record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with MGL ch. 30A sec. 14(1) for the purpose of tolling the time of appeal.

Pursuant to MGL ch. 31 sec. 44, any party aggrieved by a final decision or order of the Commonwealth may initiate proceedings for judicial review under MGL ch. 30A sec. 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:

Austin M. Joyce, Esq.
Darren R. Klein, Esq.