

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

MICHAEL RIZZO,
Appellant

v.

D1-07-376

TOWN OF LEXINGTON,
Respondent

Appellant's Attorney:

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153 Cordaville Road: Suite 320
Southborough, MA 01772-1834

Appointing Authority's Attorney:

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Commissioner:

Christopher Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, Michael Rizzo (hereinafter "Appellant" or "Rizzo"), is appealing the decision of the Appointing Authority, the Town of Lexington (hereinafter "Appointing Authority" or "Town"), to terminate him from his position as a police officer.

Six days of hearings were conducted at the offices of the Civil Service Commission (hereinafter "Commission") between March 18, 2008 and May 1, 2008 with one additional day of off-site testimony on May 14, 2008. The hearing was declared private. Fifteen (15) tapes as well as transcripts of the hearing were made. The transcripts were deemed to be the official

record of the proceedings. All witnesses, with the exception of the Appellant, were sequestered.

Both parties submitted post-hearing briefs.

FINDINGS OF FACT:

Forty-one (41) documents were entered into evidence and the parties reserved their right to raise objections to various exhibits in their post-hearing briefs. I have accepted all 41 documents into the record and given them the weight I deemed appropriate. The following witnesses testified before the Commission:

Appointing Authority Witnesses:

- Michael J. Santo, resident of Lexington (alleged victim of excessive force by Appellant);
- John “Jack” DiLillo; cousin and neighbor of Michael Santo;
- Shauna Parsons, former girlfriend of Michael Santo;
- David Santo, father of Michael Santo;
- Margaret Santo, mother of Michael Santo;
- Hsing-Kai Hsu, Lexington police officer;
- Lieutenant James E. Barry, Jr., Lexington Police Department;
- Lieutenant Joseph R. O’Leary, Lexington Police Department;
- Captain Mark James Corr, Lexington Police Department;

Appellant Witnesses:

- Michael D. Rizzo, Appellant;
- Detective Steven Garabedian, Lexington Police Department;

Other Witness:

- Dr. Benjamin Levine

Based on the above-referenced exhibits and testimony, I make the following findings of fact:

1. At the time of his discharge, the Appellant had been employed by the Town of Lexington as a permanent, full-time police officer since 1998. Before that, he had been an auxiliary police officer of the department since 1993. He is 43 years old; has lived in Lexington for most of his life; and has three teenage children. He attended Lexington High School and subsequently obtained his GED. He recently obtained a bachelors degree from Western New England College in 2007. (Testimony of Appellant)
2. The Appellant first became active in union affairs in approximately 2003, and became president of the union representing the Lexington patrol officers in 2005. He led a successful effort to end the union's affiliation with one union, the IBPO, and to instead become an unaffiliated, independent organization known as the Lexington Police Association (LPA). Following the change in union representation, the Appellant became president of the LPA. (Testimony of Appellant)
3. The Appellant was on duty between the hours of 12:00 midnight and 4:00 A.M. on Sunday morning, August 27, 2006. It was an overtime shift for him, meaning that he had already worked a tour of duty from 4:00 P.M. until 12:00 midnight on Saturday night, August 26, 2006. During the overtime shift, he was assigned to a patrol car and was assigned to patrol one of the geographic areas of the Town. (Testimony of Appellant)
4. At 3:03 A.M. on Sunday, August 27, 2006, Jack DiLillo of 10 Utica Street, Lexington, called the Lexington Police Department on a recorded line and reported that his ex-girlfriend had just showed up drunk and was "banging on the door" and "causing a ruckus." (Mr. DiLillo was twenty-one years old on the morning in question. The home in question is owned by his parents and they were not home on the morning in question.) At 3:03:44, a police dispatcher directed two on-duty officers – the Appellant and Officer Hsu – to respond to that call. The

dispatcher told the officers that the caller reported that, “his ex-girlfriend is intoxicated and is banging on the door.” (Exhibit 26)

5. The Appellant was the first to respond to the scene at 10 Utica Street and was the first to meet the female about whom DiLillo had called. Officer Hsu arrived shortly afterward. The female told the Appellant some information as to why she was upset and why she had been at the caller’s door. He learned from her that she had been inside with DiLillo and that one of her shoes and her mobile phone were still inside. (Testimony of Appellant)
6. The Appellant went inside the DiLillo house while Officer Hsu remained outside with the female. (Testimony of Appellant)
7. DiLillo testified before the Commission that he informed the Appellant on the morning in question that his ex-girlfriend had arrived uninvited and entered the house through an unlocked door. (Testimony of DiLillo)
8. According to the Appellant, DiLillo also said that he had had consensual sex with the female, but that she had not wanted to leave thereafter and he had forcibly removed her from the home. (Testimony of Appellant)
9. Officer Hsu testified before the Commission that the ex-girlfriend stated to him outside the house that DiLillo “had sex with me and kicked me out”. (Testimony of Hsu)
10. DiLillo retrieved the ex-girlfriend’s cell phone and shoe and gave it to the Appellant.
(Testimony of DiLillo and Appellant)
11. While the Appellant was inside the DiLillo house, it is undisputed that Michael Santo, DiLillo’s cousin and neighbor, walked onto the front yard of the DiLillo home to inquire about the well-being of his cousin, Jack DiLillo. (Testimony of Hsu, Michael Santo and DiLillo)

12. The Santo family has lived at 6 Utica Street, next door to 10 Utica Street, since 1978. Their children are first cousins of the DiLillo family who have lived at 10 Utica Street since the early 1990s. Their son, Michael, age 21 at the time of the incident, is very close to his cousin Jack DiLillo. Michael Santo has been employed by his father full-time as a contractor in the family-owned business, Santo Construction, since he was 18. He graduated from Lexington High School in 2004 and attended Bridgewater State College for one year. He is 5 feet, 8 inches tall and weighed approximately 155 to 160 pounds in 2006. (Testimony of Michael Santo)
13. By 3:00 A.M. that Sunday morning, Michael Santo had been home about three hours, staying up watching television. His parents, David and Margaret, were not up when he got home. (Testimony of Michael Santo)
14. Michael Santo testified that he had had one light beer when he got home around midnight and had opened another. He had consumed two light beers in the late afternoon at his brother's housewarming barbecue. (Testimony of Michael Santo)
15. Shortly before 3:00 A.M., Michael Santo was talking on his cell phone with Shauna Parsons, an ex-girlfriend. He started the call from the living room, then walked out onto the patio. (Testimony of Michael Santo)
16. At the time of the call, Shauna Parsons was on Cape Cod at her grandparents' house. She had not had any alcohol. (Testimony of Parsons)
17. Michael Santo's first conversation with Parsons ended around the time he became aware of police cruisers outside his cousin Jack's house. He went next door to inquire about his cousin. (Testimony of Santo)

The Call and Response at 10 Utica Street

18. It is undisputed that the incident which led to the Appellant's termination (the physical contact between him and Santo) did not occur at the DiLillo property at 10 Utica Street. Rather, it occurred after Santo eventually returned to his property at 6 Utica Street.
19. In regard to the actions and demeanor of various individuals (including the Appellant and Michael Santo) that are in dispute while Michael Santo was at, en route to or leaving the DiLillo property at 10 Utica Street (prior to the physical contact that occurred at the Santo house at 6 Utica Street), I fully credit and rely upon the testimony of Officer Hsu. Officer Hsu was a good witness with high credibility. He was in a good position to see and hear the actions of Santo and Rizzo and the interactions that occurred between them at 10 Utica Street. He had a good recollection of the events that transpired. Finally, he provided thoughtful answers that rang true to this Commissioner that were absent of any attempt to portray either police officer Michael Rizzo or citizen Michael Santo in a more favorable or less favorable light. (Testimony, demeanor of Hsing-Kai Hsu)
20. While the Appellant was inside the DiLillo house, Officer Hsu, while talking with the female on the porch of the DiLillo house, saw Michael Santo come around the corner of the house where he was standing on the lawn. (Testimony of Hsu)
21. When Hsu asked Michael Santo who he was, Santo stated, "Is my cousin OK; I'm his cousin. I live next door. Is my cousin OK?" to which Hsu responded, "Your cousin is fine; why don't you just go home?" (Testimony of Hsu)
22. After Michael Santo continued to inquire about the well-being of his cousin, Hsu pointed to a location on the lawn of the DiLillo house and told Santo to stand there, which Michael Santo did. (Testimony of Hsu)

23. Shortly thereafter, the Appellant exited the DiLillo house and asked Officer Hsu who the kid standing on the grass was. Officer Hsu told the Appellant it was DiLillo's cousin.

(Testimony of Hsu)

24. The Appellant then spoke directly to Michael Santo and asked him who he was. Michael Santo replied by saying, "I'm Michael Santo; DiLillo's cousin...can I go see him? I want to see if he's OK?" In response, the Appellant told Michael Santo, "he's fine; he's done for the night; go home." (Testimony of Hsu)

25. Michael Santo kept inquiring about the well-being of his cousin until both the Appellant and Officer Hsu came down off the porch and again asked Michael Santo to go home. Michael Santo began walking across the lawn of the DiLillo house and toward his house next door, with Officer Hsu and the Appellant walking behind him. (Testimony of Hsu)

26. While walking back into the driveway of his house at 6 Utica Street, Michael Santo asked Officer Hsu to shut the lights of his cruiser off. Officer Hsu acknowledges that he was angered by Santo's request and told him, "don't tell me what to do." (Testimony of Hsu)

27. According to Officer Hsu, Michael Santo said "'I just want', in a nice way, 'you to shut your lights off because you're going to distract my mother, my parents sleeping'". (Testimony of Hsu)

28. Both the Appellant and Officer Hsu returned to DiLillo's kitchen and concluded the processing of the call. (Testimony of Hsu)

29. Although Jack DiLillo, in his subsequent conversation with the Appellant and Officer Hsu while they were closing out the call, volunteered that the Appellant had been out drinking to celebrate a birthday, Officer Hsu testified before the Commission that Santo was "calm, like I'm talking to you right now." Further, Officer Hsu testified that he and Michael Santo had

no difficulty understanding each other; that Santo was steady on his feet; and that he (Officer Hsu) had no reason to believe that Michael Santo was drinking that night. (Testimony of Hsu)

30. The Appellant and Officer Hsu decided that Officer Hsu would drive the female to her home on Parker Street, a 4-5 minute drive, instead of letting her operate her own vehicle. (Testimony of Hsu)

31. At 3:26:02 A.M. Officer Hsu advised the dispatcher that he and the Appellant were clearing the scene at 10 Utica Street, that he (Hsu) would be transporting the female party to Parker Street and that the Appellant would follow. (Testimony of Hsu; Exhibit 26)

32. The Appellant was intending to follow Officer Hsu to the female's home, pursuant to a procedure that is employed to protect against false accusations of wrongdoing by members of one gender against officers of the other gender. (Testimony of Appellant; Exhibit 10)

33. At some point during his trip to the female's home, Officer Hsu noticed that the Appellant was not following him. (Testimony of Officer Hsu)

The Incident at 6 Utica Street

34. When Michael Santo got back to 6 Utica Street, he went to a patio on the side of the house and called Shauna Parsons on his cell phone again to tell her what had happened next door. He was there for a minute before he moved out to the VW Passat in the driveway and leaned against the passenger door, approximately 20-30 feet from the street. He testified before the Commission that he was talking to Parsons in a "casual" voice. (Testimony of Santo)

35. Not long before the call between Santo and Parsons began, the two Lexington police cruisers passed by the driveway of 6 Utica Street, first Hsu (transporting), then the Appellant (following). (Testimony of Appellant and Hsu and Michael Santo)

36. As the cruisers passed by 6 Utica Street, Michael Santo, while talking on the cell phone, made a gesture toward the officers “like a small wave.” (Testimony of Michael Santo)
37. The Appellant decided to stop his cruiser shortly after passing the driveway at 6 Utica Street; abandon his accompaniment of Officer Hsu during the opposite sex transport; and pull into the driveway of Michael Santo. (Testimony of Appellant)
38. According to the Appellant, his intent in pulling into the driveway of Michael Santo on the morning in question was to persuade Mr. Santo to continue his conversation inside of the house so as to not disturb the neighbors. (Testimony of Appellant)
39. After a careful review of the relevant testimony and documents submitted as part of the record, I find that the Appellant has been untruthful in regard to whether Michael Santo was speaking in a loud voice into his cell phone while standing in his driveway at 6 Utica Street on the morning in question. I base this finding on the following reasons. First, as referenced above, even in the midst of heightened concern regarding his cousin while on the lawn of 10 Utica Street, Michael Santo never raised his voice. (Testimony of Hsu) Second, despite the credible testimony of Officer Hsu that Michael Santo never raised his voice at 10 Utica Street, the Appellant, in an interview with Lieutenant Joseph O’Leary, falsely stated that Michael Santo “...was loud. He was also screaming at Officer Hsu to shut off his lights.” (emphasis added) (Exhibit 25: Transcript at p.14) Third, when the Appellant got into his cruiser at 10 Utica Street, directly next door to 6 Utica Street, he did not hear any loud voices. (Testimony of Appellant) Fourth, according to the credible testimony of Shauna Parsons, who was on the receiving end of Santo’s cell phone call, she and Santo were engaged in a friendly, casual conversation. (Testimony of Parsons) Fifth, Michael Santo’s testimony before the Commission that he was not speaking in a raised voice while on the cell

phone on the morning in question rang true to this Commissioner and I found his testimony on this matter to be highly credible. Finally, the Appellant's testimony before the Commission on this matter was less than forthcoming. When asked straightforward questions on this important issue, he equivocated, making statements such as "I don't recall if he [Santo] was screaming or if it was a loud conversation". On two occasions during his testimony, the Appellant referred to hearing "voices" (plural) on the morning in question; then corrected himself by stating he could only hear Michael Santo's voice on the morning in question. Overall, the Appellant's testimony on this important issue appeared to be geared more toward providing justification for his decision to pull into the Santo driveway as opposed to an honest, straightforward recollection of the events that transpired on the morning in question. (Testimony, demeanor of Appellant)

40. The verbal dialogue between the Appellant and Michael Santo in the driveway of 6 Utica Street occurred both while the Appellant was located in the cruiser and after he got out of the cruiser and stood facing Michael Santo in the space between the VW Passat and the cruiser. (Testimony of Appellant and Michael Santo)

41. The exact words spoken by the Appellant to Michael Santo immediately after pulling into the driveway of 6 Utica Street, while still in his cruiser, is in dispute.

According to Michael Santo:

"When he [the Appellant] pulled into my driveway, I was still on the phone the same way I showed you, just leaning against my car. He pulled up so I could see him with his window down and said, 'What are you doing outside? Get inside. You're causing a disturbance.'" (emphasis added)
(Testimony of Michael Santo)

According to the Appellant:

“I asked him [Michael Santo] to take the phone conversation inside, that we were there for a disturbance. There was a loud engagement prior, there was another loud engagement while officers were there and that we had disturbed the neighbors enough for the evening and...to take the conversation inside. (emphasis added)
(Testimony of Appellant)

42. In regard to the initial statement made by the Appellant after pulling into the driveway on the morning in question, I find Mr. Santo’s version to be more believable and I credit his testimony as being truthful. The Appellant told Michael Santo that he (Santo) was causing a disturbance and the Appellant ordered Santo to go inside his house, even though Santo was standing on his own property and was not causing a disturbance as Santo was not yelling, screaming or speaking in a loud voice, as falsely alleged by the Appellant.
43. It is not in dispute that Michael Santo, still talking on the cell phone with Shauna Parsons, objected to the Appellant’s order to go into the house. (Testimony of Appellant and Michael Santo). According to the credible testimony of Michael Santo, he told the Appellant that he “wasn’t doing anything wrong” by having a phone conversation in his driveway and that he intended to finish the call and then go check on his cousin next door. (Testimony of Michael Santo)
44. According to Michael Santo, the Appellant, while still in his cruiser, yelled, “You can’t see your cousin, get inside right now”. When Santo refused, the Appellant got out of his cruiser. (Testimony of Michael Santo)
45. As referenced above, I accept the testimony of Michael Santo that the Appellant ordered him to go inside his house, immediately after pulling into the driveway. Even the Appellant tacitly acknowledged that he was giving the Appellant an order, testifying before the

Commission that, “I wanted to get him [Santo] to comply and get inside and to rationalize to him as to why.” (emphasis added) (Testimony of Appellant)

46. It is undisputed that after the Appellant got out of his cruiser in the driveway of 6 Utica Street on the morning in question, both the Appellant and Michael Santo engaged in a verbal exchange and, ultimately, the Appellant made physical contact with Santo. The testimony of the Appellant and Michael Santo diverge, however, in regard to the exact words exchanged between the two of them, the sequence of events after the Appellant got out of his cruiser as well as the extent, timing and circumstances surrounding the physical contact that occurred. (Testimony of Appellant and Michael Santo)

47. Other than the Appellant and Michael Santo, the only other percipient witnesses regarding the conversation and physical contact in question were: Shauna Parsons, to the extent that she heard part of the conversation between Michael Santo and the Appellant while on the other end of a cell phone call with Michael Santo; and Jack DiLillo, the cousin and neighbor of Santo, who testified that he witnessed the altercation between the Appellant and Michael Santo from a window in his parents’ house. (Testimony of Appellant and Michael Santo and Shauna Parsons and Jack DiLillo)

48. I give no weight to the testimony of Jack DiLillo in regard to what he saw and heard regarding the interaction between the Appellant and Michael Santo in the driveway at 6 Utica Street for the following reasons. First, there are significant discrepancies between DiLillo’s testimony before the Commission as compared to a written statement he signed shortly after the incident and statements he made to at least one member of the Lexington Police Department. While any witness can be excused for a fading memory that results in a somewhat different recollection of events several months (or in this case, almost 2 years)

after the incident in question, the discrepancies in DiLillo's statements over time were more fundamental than that. For example, DiLillo signed a statement two days after the incident in August 2006 stating that the Appellant, was "impolite and hostile toward me" upon entering his home; "hostile and threatening towards me" while initially talking to DiLillo; and "agitated and intimidating" during a subsequent conversation with DiLillo. (Exhibit 15) In his testimony before the Commission, however, DiLillo only describes the Appellant as "assertive" upon entering his home on the morning in question. In regard to the follow-up conversation between DiLillo and the Appellant, DiLillo testified before the Commission only that the Appellant "just told me they didn't want me to be mixed up with a girl like this; that this type of girl would get you a record and he left." (Testimony of DiLillo) This is a markedly different depiction of the Appellant than that contained in DiLillo's signed statement. Second, based on a careful review of the record and sworn testimony, it is painfully clear that DiLillo, in regard to his knowledge of whether Santo had been drinking earlier in the night, has offered divergent accounts, depending on whether he was responding to Lexington Police, the mother of Michael Santo, or questions posed during sworn testimony before the Commission. Finally, DiLillo's account of how his ex-girlfriend came to be in his parents' house on the night in question didn't ring true to me, thus casting a pall over his entire testimony. As a result, I am, regrettably, unable to reasonably rely upon Mr. DiLillo's testimony as it relates to his observations that occurred between the Appellant and Michael Santo next door in the driveway of 6 Utica Street on the morning in question. (Testimony, demeanor of Jack DiLillo)

Testimony of Michael Santo regarding what occurred after the Appellant exited his cruiser

49. According to Michael Santo, the Appellant, immediately upon exiting his cruiser “got in my face” and said, “you’re causing a disturbance. You’re making a ruckus in the neighborhood. Lights are going on. Would you like me to arrest you?” to which Santo replied, “What are you going to arrest me for? I’m not doing anything wrong. I’ll get my parents and they can tell you I’m not doing anything wrong. They have no problem with me being outside. I want to check on my cousin and go inside and go to bed.” (Testimony of Michael Santo)
50. According to Santo, the Appellant kept repeating that Santo was causing a disturbance in the neighborhood and kept asking Santo if he wanted to be arrested while Santo continued to question how the Appellant could arrest him if he was doing nothing wrong. At one point during this exchange, the Appellant, according to Santo, stated, “one more light goes on, I’m going to arrest you.” Michael Santo testified that, other than the light of one house which is on 24 hours per day, there were no lights on inside the houses within eyesight of 6 Utica Street. (Testimony of Santo)
51. According to Santo, the Appellant, without warning, then grabbed Santo’s left arm, pulled him forward; spun him around; put one hand on his elbow; pushed his left arm up; and then slammed Santo against the trunk of the VW Passat that Santo had been leaning against while talking on his cell phone, which dropped on the ground as a result of the physical altercation. According to Santo, he heard his elbow “pop” at some point during this altercation. (Testimony of Santo)
52. When Santo asked the Appellant to stop, the Appellant told Santo to “shut up” and pushed his left arm up even further, causing a “grinding” feeling in his elbow. According to Santo, he again asked the Appellant to stop and the Appellant once again pushed his left arm even

higher. Santo testified that he was in extreme pain and that he began pleading with the Appellant to stop, at which point the Appellant stopped. (Testimony of Santo)

53. According to Santo, he was eventually able to turn around and face the Appellant and stood there holding his own arm. At this point, according to Santo, the Appellant stated, “let’s talk about this; let’s just talk about what happened”. (Testimony of Santo)

54. According to Santo, immediately after the above-referenced physical altercation and the Appellant’s request to “talk about this”; the Appellant and Santo then engaged in a heated dialogue about: 1) the interior lights being on at a house across the street (the Maecks; which Santo claims are on 24 hours per day); and 2) a renewed dialogue regarding whether Santo was causing a disturbance. (Testimony of Santo)

55. Shortly thereafter, the Appellant, according to Santo, stated to Santo, “before I get more fucking aggravated, go check on your cousin and get inside”; at which point the Appellant got in his cruiser and drove away. (Testimony of Santo)

Testimony of Appellant regarding what occurred after the Appellant exited his cruiser

56. Similar to Michael Santo, the Appellant testified that he and Michael Santo, immediately after the Appellant exited his cruiser, were engaged in a verbal exchange in which the Appellant insisted he was doing nothing wrong and refused to go inside the house. (Testimony of Appellant)

57. In contrast to the Appellant’s testimony, however, the Appellant testified that he and Michael Santo began talking about the interior lights on across the street at the Maecks’ house before any physical contact between him and Michael Santo occurred. (Testimony of Appellant)

58. According to the Appellant, Michael Santo pointed over at the [Maecks’] house and said, “That house? I built that fucking house. I’ll go over and see if I’m disturbing them or if

you're disturbing them." Again according to the Appellant, Michael Santo then proceeded to "physically walk towards the [Maecks'] house." (Testimony of Appellant)

59. The Appellant, when asked during direct testimony, "Upon seeing that and hearing that, what, if anything, did you do?", stated, "I basically instructed him that he formed the decision what to do and I was taking him into custody and placing him under arrest."
(Testimony of Appellant)

60. Asked what the basis was for the arrest, the Appellant stated, "for a continued disturbance".
(Testimony of Appellant)

61. According to the Appellant, Michael Santo then began walking away from him, at which point the Appellant, "gestured to grab his wrist with my left hand. I put my hand on my cuffs and he made some sort of gesture or said, 'Why are you arresting me?' and then I went to put his hand behind his back and there was a little bit of struggle that ensued, and he ended up getting out of my grasp." (Testimony of Appellant)

62. According to the Appellant, Michael Santo then "spun away from me, jerked away from me. His momentum carried him away from me and I went to one side...he escaped my grasp."
(Testimony of Appellant)

63. The Appellant testified that there was then a "disengagement and there was distance created. And then that ended, that de-escalated the situation." When asked, "from the time you made a decision to place Mr. Santo into handcuffs and the time that this disengagement occurred, what, if any, hand control techniques or other methods did you employ in order to carry out your objective?", the Appellant stated, "It was the physical grabbing of his wrist and trying to put it behind his back and keeping it there. And that was done with one hand." (Testimony of Appellant)

64. The Appellant testified that he sought to arrest Michael Santo because, “I truly believed he was going to go ahead with his action or his statement of going to his neighbor’s house and create another problem with getting somebody to the door.” (Testimony of Appellant)
65. Also in contrast to the testimony of Michael Santo, the Appellant denies spinning Michael Santo around; he denies ever pushing Michael Santo up against the car in the driveway; and he denies that Michael Santo ever complained about being in any pain. (Testimony of Appellant)
66. Asked if he twisted Santo’s arm backward against its normal ability, as claimed by Michael Santo, the Appellant stated, “I put it in a 90-degree bend to go to the small of his back...consistent with what I was trained to do.” (Testimony of Appellant)
67. The Appellant testified that after the above-referenced “disengagement”, he asked Michael Santo to go inside his house; that Michael Santo “seemed to agree or want to comply” at which time the Appellant told Santo, “If that’s what you did in the first place as instructed, it didn’t have to come to this situation...”. (Testimony of Appellant)
68. The Appellant then re-entered his cruiser; went out onto Woburn Street and sped off in the direction that Officer Hsu had headed earlier. (Testimony of Appellant)

Testimony of Shauna Parsons

69. As referenced above, Michael Santo was on a cell phone call with Shauna Parsons, his ex-girlfriend, when the Appellant pulled his cruiser into the driveway. That cell phone call ended at some point during the exchange between the Appellant and Michael Santo. (Testimony of Santo)

70. Although Shauna Parsons offered credible, forthright testimony before the Commission, I give little weight to her testimony for the following reasons. First, she was not physically present during the incident. Further, it is impossible to determine with any certainty at what point, in relation to the interaction between the Appellant and Mr. Santo, the cell phone went dead on the morning in question, making it impossible to assess if her memory of events is more corroborative of the testimony offered by the Appellant or Mr. Santo. (Testimony of Parsons)

The Santo Family Complaint to the Lexington Police Department

71. At 3:43 A.M. on the morning in question, Michael Santo called the Lexington Police Department stating to the dispatcher “I’d like to file a complaint against one of your officers for unnecessary force.” (Exhibit 26)

72. Michael Santo was transferred to the shift commander, Lieutenant James Barry. He told Lt. Barry what had happened, how the Appellant had grabbed him by the arm, spun him around and hurt his arm. Specifically, Michael Santo told Lt. Barry that the Appellant had bent his arm behind his back so far that he felt his elbow pop. Michael Santo was offered, but declined medical assistance. (Testimony of Lt. Barry and Exhibit 19)

73. After discussing the complaint, Lt. Barry told Michael Santo that he would call him back. (Testimony of Michael Santo and Lt. Barry and Exhibit 14) Michael Santo then went upstairs, woke up his parents, David and Margaret, told them what had just happened and that Lt. Barry would be calling back. (Testimony of Michael Santo and David Santo and Margaret Santo)

74. Knowing that the Appellant was on a four hour overtime shift scheduled to end at 4:00 A.M., Lt. Barry immediately sought out the Appellant. He first saw Sergeant Edward O’Brien and

asked if he was on the call at Utica Street. O'Brien said he was not and asked why. Lt.

Barry explained to Sgt. O'Brien the allegation that was being made by Michael Santo. Lt.

Barry then found the Appellant; told him not to leave; and to see him upstairs. (Testimony of Lt. Barry and Exhibit 19)

75. Lt. Barry then returned to his office and resumed his phone conversation with Michael Santo.

According to Lt. Barry, he had no trouble understanding Michael Santo. Michael Santo proceeded to tell Lt. Barry what happened earlier that morning, both at 10 Utica Street and 6 Utica Street. (Testimony of Lt. Barry)

76. According to Lt. Barry, Michael Santo told him during the phone conversation that, "As Officer Rizzo was driving off, he was the second car, he said he waved to the officer. And I asked him, 'Did that mean you gave him the finger?' And he said no, he just waved but it was kind of a flip off wave, and he thought that may have antagonized the officer."

(Testimony of Lt. Barry)

77. At some point, presumably after Lt. Barry had concluded the follow-up phone conversation with Michael Santo, the Appellant entered the office of Lt. Barry. According to Lt. Barry, "I first asked him [the Appellant] if there were any problems on the call at Utica Street that I should be aware of. He said no. I then explained to him the allegations that Michael Santo had made, that he had grabbed him, grabbed him by the arm and twisted it for no reason. He [the Appellant] said that that never happened." (emphasis added) "He [the Appellant] went on to explain that the kid at the call on Utica Street was interfering with the call. He felt he was drunk and bothersome and wouldn't do as he was told. And Officer Hsu, who had also been at the call, could verify that that's what in fact was going on." (Testimony of Lt. Barry)

78. According to Lt. Barry, Officer Hsu, in response to Lt. Barry's prior request, appeared in his office, resulting in three people now in the commander's office on the morning in question: Lt. Barry, Officer Hsu and the Appellant. According to Lt. Barry, Officer Hsu, upon entering his office, stated that he knew what this was all about and that nothing had happened. According to Lt. Barry, the Appellant, after listening to Officer Hsu, "just kind of looked at me with a stare, kind of like, see, like I told you so type of response." (Testimony of Lt. Barry)
79. According to Lt. Barry, he told both the Appellant and Officer Hsu that everything up to the point described by Officer Hsu was similar to what Michael Santo had reported, but that the alleged incident occurred after Officer Hsu had left the scene. Lt. Barry testified that he then asked the Appellant if had gone back to the scene after Officer Hsu had left and "he [the Appellant] nodded in the affirmative, didn't say anything but nodded." According to Lt. Barry, he did not ask the Appellant any further questions at this point. (Testimony of Lt. Barry)
80. Officer Hsu, recalling what the Appellant said in his presence in the commander's office on the morning in question, testified that, "What I heard from Officer Rizzo, he said he never engaged in any activity, never touched him [Michael Santo]." Hsu repeated this testimony twice on cross-examination. (Testimony of Officer Hsu)
81. In his testimony before the Commission, the Appellant, in regard to his conversation with Lt. Barry, acknowledges telling Lt. Barry that "nothing out of the ordinary" had happened at the call. (Testimony of Appellant)
82. Contrary to the testimony of Lt. Barry, the Appellant testified that Lt. Barry did not proceed to tell him the nature of the complaint prior to Officer Hsu appearing in the office.

(Testimony of Appellant) As referenced above, Lt. Barry testified that he did inform the Appellant about the nature of the complaint and that, upon informing him of the nature of the complaint, the Appellant replied, “that never happened.”¹ (Testimony of Lt. Barry)

83. Contrary to the testimony of Officer Hsu, the Appellant testified before the Commission that he said nothing to Lt. Barry while Officer Hsu was in the commander’s office. (Testimony of Appellant)

84. According to the testimony of the Appellant, he also said nothing to Lt. Barry after Officer Hsu left the commander’s office. (Testimony of Appellant)

85. While the testimony of Lt. Barry and Officer Hsu differ regarding the timing and exact words spoken by the Appellant, both recall the Appellant stating “that never happened”. Lt. Barry remembers that being said after he made it clear to the Appellant that he was referring to the incident in the driveway at 6 Utica Street. (Testimony of Lt. Barry and Officer Hsu)

86. After a careful review of the testimony of Lt. Barry, Officer Hsu and the Appellant, I find that Lt. Barry did inform the Appellant about the nature of the complaint in the commander’s officer on the morning in question, contrary to the Appellant’s testimony before the Commission and contrary to the Appellant’s statement to Lt. Joseph O’Leary of the Lexington Police Department only weeks after the incident. (See Exhibit 25: Transcript of

¹ Proposed Finding of Fact #64 in the Appellant’s post-hearing brief to the Commission states, “Barry then told Rizzo that, ‘I had a guy who called claiming that you grabbed him by the arm and twisted it for no reason.’ Rizzo replied to the effect that, ‘that never happened’”. In fact, as referenced in Findings 82, 83 and 84 of this decision, the Appellant initially testified before the Commission that Lt. Barry did not tell him the nature of the complaint. Moreover, in the Appellant’s initial testimony before the Commission (V., 89-92), the Appellant does not acknowledge ever saying, either verbatim, or words to the effect, “that never happened”. Rather, other than acknowledging that he told Barry that “nothing out of the ordinary” happened and inquiring about who made the complaint against him, the Appellant initially testified before the Commission that he said nothing to Lt. Barry while in the commander’s office, either alone or while Officer Hsu was present. (V. 89-92) It was not until later in the Appellant’s testimony (V., 114), after reviewing a report by Lt. Barry, that the Appellant testified that he did say “that never happened” to Lt. Barry, but only in response to the way “it was being described as to for no reason and that I manhandled him and threw him around...I said that never happened”. Not only was the Appellant changing his testimony regarding whether he made that statement, he was also contradicting his own testimony, given only moments earlier, that Lt. Barry had not described the nature of the complaint to him.

the Interview of Michael Rizzo by Lt. Joseph O’Leary) Further, I find that the Appellant, after being told of the nature of the allegation in the commander’s office by Lt. Barry, said “it never happened”. As referenced in footnote 1 of this decision, even the Appellant asks the Commission to adopt this as a finding of fact, notwithstanding initial testimony to the contrary by the Appellant before the Commission, which I find to be untruthful. I base these related findings on the credible testimony of Officer Hsu, who, for reasons cited in previous findings, I have found to be a good witness. Further, I found Lt. Barry’s testimony on this topic to be credible on this topic. Lt. Barry offered straightforward answers before the Commission that were consistent with reports he submitted shortly after the interview with the Appellant. Further, Lt. Barry’s recollection of the Appellant’s denial is consistent with the information he subsequently referenced in a phone conversation with the Santo family later that morning (referenced in findings below). (Testimony, demeanor of Lt. Barry and Officer Hsu)

87. After speaking with the Appellant, Lt. Barry then called Jack DiLillo, took a statement over the phone and then called back Michael Santo, who was joined in the conversation on speaker phone by his parents, David and Margaret. At some point, David Santo spoke directly to Lt. Barry. (Testimony of Lt. Barry and David Santo) Lt. Barry told them he had spoken to the Appellant who said he never touched Michael Santo. In his testimony before the Commission, David Santo stated, “At that point, Michael was in so much pain, his arm was swollen, I couldn’t believe what I heard”. David Santo testified that he was “infuriated” when Lt. Barry began referencing what he considered minor discrepancies between the statements of his son and Jack DiLillo in addition to a reference that his son, Michael was

“drunk”. Michael Santo told Lt. Barry, “I’m standing right in front of him. Michael’s fine; he’s talking clearly and he was not drunk.” (Testimony of David Santo)

88. There is no evidence that Michael Santo’s admitted drinking of two light beers at a family housewarming barbecue, 8-9 hours before the incident or 1-plus light beers after driving home from Somerville at midnight (Testimony of Michael Santo), in any way impaired him in the period 3:15 – 3:45 A.M. He had a lengthy, normal phone conversation with Shauna Parsons. (Testimony of Parsons) The person who interacted with him the most at 10 Utica, Officer Hsu, testified he had no reason to believe Michael Santo had even been drinking. Michael was steady on his feet and he and Hsu had no trouble understanding each other. (Testimony of Hsu) Michael’s parents had no trouble understanding his fresh account of the incident (Testimony of David and Margaret Santo) and neither did Lt. Barry. (Testimony of Barry)
89. Michael Santo iced his elbow and took some Advil and tried to sleep. (Testimony of Michael Santo) During the day on Sunday, August 27th; Michael Santo stayed on the living room couch elevating his arm taking anti-inflammatory medications. (Testimony of Margaret Santo) He sought medical treatment on Monday and Tuesday, including an x-ray, but did not get an appointment with an orthopedist, Dr. Benjamin Levine, until Wednesday, August 30th. (Exhibit 33)
90. On Tuesday evening, August 29th, David Santo informed Lt. Barry that the x-rays showed that his son was seriously hurt. He also told Lt. Barry that he wanted to formally pursue an investigation, a complaint against the Appellant for unnecessary excessive force. (Testimony of David Santo and Lt. Barry)

91. Lt. Barry met with the Appellant at Laconia Street within hours of speaking to David Santo around 1:00 A.M. on August 30th. Exhibit 21 is a memorandum prepared by Lt. Barry on November 15, 2006 in regard to the conversation he had with the Appellant at 1:00 A.M. on August 30th. It states in relevant part:

When Officer Rizzo arrived I explained to him that based on my initial investigation and the phone conversation I had just had with David Santo I was moving forward with the complaint and would be bringing it to the Captains attention in the morning. Officer Rizzo stated that he was surprised to hear this since he thought the matter was over. I asked why he would think that, to which he said that since the guy didn't come in the other night to file a complaint he felt the matter was over. I explained that the complainant wanted to think about it before deciding what to do and has now decided to pursue the matter.

Officer Rizzo sat silently in his cruiser for a short period on [sic] time before I asked if he was all right [sic] and asked if he wanted to say anything. He replied back with general comments about the "problems" with the Lexington Police Department. Comments stating that whenever a citizen files a complaint the Officers are always guilty until proven innocent and that other police departments wouldn't even bother with complaints like this. We talked about these beliefs for a short period of time and I explained that I believed that most every police department would investigate an allegation such as this. I went on to explain to Officer Rizzo that based on my initial research I felt that something did happen on Utica St. and that it was in his best interest to tell the truth, that the worst thing he could do is get caught lying. He replied back with a comment something to the effect of, see I'm already guilty. With that said he drove away. The whole conversation lasted somewhere between five to ten minutes.

(Exhibit 21)

92. On Wednesday, October 31st, the Appellant saw his orthopedist, Dr. Benjamin Levine. Dr.

Levine provided sworn testify before this Commissioner at his office in Woburn, MA.

(Testimony of Dr. Levine)

93. Michael Santo was already a patient of Dr. Levine and had recently treated Michael Santo with a problem regarding his left hand, forearm and wrist, which was diagnosed as "intersection syndrome". (Testimony of Dr. Levine)

94. Dr. Levine examined Michael Santo and also examined x-rays of Michael Santo's elbow, which had been taken Monday during a visit to his primary care doctor. Concerning the x-ray, he wrote, "x-ray shows a coronoid avulsion fracture." The examination of Dr. Levine did reveal one error in the medical records, those of Dr. Earp, which stated that Michael Santo had a dislocated elbow. Dr. Levine assumed this was simply a mistake. (Testimony of Dr. Levine and Exhibit 33)

95. Dr. Levine testified that the "intersection syndrome" that Michael Santo had previously consulted Dr. Levine about had no relationship to the "coronoid avulsion fracture."
(Testimony of Dr. Levine)

96. Dr. Levine made a note of his visit in which, the section "History", he wrote the following:

This is a gentleman who comes in. He has an avulsion fracture of his coronoid process. This occurred as a result of trauma. He says he was in his driveway and the Lexington Police came to his cousin's house. Apparently when the policeman came, he got out of his car and tried to restrain Michael while he was in his own yard, and forcing his arm to a straight position while he had it bent, this probably caused this avulsion injury of his coronoid process.
(Exhibit 33)

97. Dr. Levine made the following notes after examining Michael Santo:

On physical examination, there is swelling in his elbow. Sensation is intact to light touch with normal capillary refill. Range of motion is limited secondary to pain.
(Exhibit 33)

98. Based on the nature of the injury revealed by the x-ray, Dr. Levine theorized that Michael Santo had sustained a "capsular avulsion injury." That is to say, he believed that the "anterior capsule," a ligamentous material that connects the humerus and the coronoid process had pulled off a small piece of bone from the bony structure at the end of the ulna known as the coronoid process. (Testimony of Dr. Levine)

99. Dr. Levine believed that the avulsion had been caused by the straightening of Mr. Santo's arm. He believed that the arm had been extended – straightened out - further than it typically would be. (Testimony of Dr. Levine)
100. Dr. Levine reviewed his medical records, Michael Santo's account of the contact, and the Appellant's version. In his professional opinion, the nature and severity of the injury is consistent with Michael Santo's version and inconsistent with the Appellant's. (Exhibit 34) He maintained that view in his testimony before the Commission to the effect that the injury more likely occurred from the kind of force alleged by Michael Santo. (Testimony of Dr. Levine)
101. As of the date of his testimony, Michael Santo has undergone three surgeries on his elbow, one by Dr. Levine and two by Dr. Earp. (Exhibits 33 and 35) After the injury and after each of the surgeries, he was unable to perform any physical labor for a period of weeks, and even after those recovery periods, he has not been able to perform certain tasks essential to his position in the family-owned business. He was still experiencing pain in his elbow as of the date of his testimony before the Commission. (Testimony of Michael Santo)
102. On Thursday, August 31, 2006, Lt. Joseph O'Leary was instructed to conduct an investigation into the Santo complaint. (Testimony of O'Leary)
103. Also on August 31, 2006, the Appellant was placed on "desk duty" and thereafter he worked each of his work tours inside the police station. (Testimony of Appellant)
104. On October 23, 2006, Lieutenant Detective Joseph O'Leary conducted an investigatory interview of Michael Rizzo at which he was represented by counsel. The interview was taped and a transcript prepared. The following were among the statements made to Lt.

O'Leary by the Appellant in regard to the morning in question:

- Michael Santo was intoxicated while dealing with Officer Hsu;
- Michael Santo was screaming at Officer Hsu;
- The reason he chose to pull into the driveway at 6 Utica Street was that he heard "loud voices," [plural] and even a little bit of yelling, while Michael Santo was on the phone;
- Michael Santo was threatening to disturb the peace and wake his neighbors;
- He reached for Michael Santo's wrist in order to arrest him to prevent him from disturbing the neighbors;
- The extent of his touching Mr. Santo involved only reaching for Michael Santo's wrist and Mr. Santo immediately initiating the disengagement.

Further, the Appellant denied that he told Lieutenant Barry that "nothing happened."

(Exhibit 25)

105. The Lexington Police Department requested the Middlesex District Attorney's office to review the matters investigated by Lt. O'Leary concerning potential criminal proceedings against Officer Rizzo. In deference to the wishes of the Santo family and the fact of the Town's administrative proceedings, the D.A.'s office declined to initiate prosecution
(Exhibit 41)

106. Michael Santo is planning civil litigation for money damages stemming from the encounter. (Testimony of Michael Santo)

107. After a careful review of the testimony of the Appellant, Michael Santo, Lt. Barry, Officer Hsu, Lt. O'Leary and Dr. Levine as well as the relevant documents entered into evidence, I find that the Appellant's testimony before the Commission regarding what occurred in the driveway, after he got out of his cruiser, at 6 Utica Street is untruthful. I find the testimony of Michael Santo regarding the events that transpired at 6 Utica Street

after the Appellant got out of his cruiser to be credible and I accept his version of events as being a more accurate depiction of what happened. Further, I find that the Appellant was untruthful in his interview with Lt. O’Leary, both in regard to what occurred at 6 Utica Street and in regard to what he said to Lt. Barry shortly after the incident. These related findings are based on the following reasons. First, as referenced in previous findings, Officer Hsu was a good witness and I deem his testimony to be highly credible. Officer Hsu, both during direct testimony and cross-examination, testified that he heard the Appellant, during a conversation with Lt. Barry, deny touching Michael Santo on the morning in question. The Appellant, both during his subsequent interview with Lt. O’Leary and during his initial testimony before the Commission, denies making any such statement. Second, Lt. Barry, whose testimony I deem credible, also recalls the Appellant stating “that never happened” after Lt. Barry told the Appellant about the nature of Michael Santo’s complaint. Contrary to the credible testimony of Lt. Barry, the Appellant, in addition to denying he made that statement, also testified that Lt. Barry did not tell him about the nature of Santo’s complaint during their conversation in the commander’s office. Third, the medical evidence reinforces the conclusion that the injuries sustained by Michael Santo are not consistent with the Appellant’s description of one-handed contact, but, rather, that *Michael Santo’s* description of events, in which he describes the Appellant using two hands, including one on his elbow, as consistent with how such an injury would occur. Fourth, Michael Santo was a good witness and testified in a straightforward manner regarding all events, including what transpired after the Appellant got out of his cruiser in his driveway. He was unhesitant in his responses; and he did not try to overreach in his answers. Michael Santo has described this incident on a

number of occasions: to Lt. Barry on the night in question; briefly to Dr. Levine; in his written statement; to Detective-Lt. O’Leary; and again before the Commission. Through all these descriptions, he has consistently described a two-handed grab of his wrist and upper arm, the straightening of the arm, and its bending behind his back with strong force putting great pressure on the elbow joint. While I am permitted to do so, I do not draw a negative inference in this case from the fact that Michael Santo intends to seek monetary damages via a civil suit from the Appellant. I find that when Michael Santo called Lexington Police to file a complaint shortly after the incident occurred, he did so solely based on his belief that a police officer had just used excessive force against him with no justification in his own driveway. The statements he made to police that morning and his subsequent written statement are consistent with his testimony before the Commission. Finally, even when viewed independently of other witnesses, the Appellant’s testimony before the Commission was not credible. As referenced in a previous finding, the Appellant, seeking to justify his decision to pull into the driveway of Michael Santo, continued to suggest, similar to his sworn statement to Lt. O’Leary, that he heard multiple loud voices, only to recant this later in his testimony, stating he heard *one* loud voice, that of Michael Santo. Even that allegation by the Appellant is not convincing, particularly considering his allegation that Michael Santo had previously been “screaming” at Officer Hsu, which was disputed by Officer Hsu. Moreover, I find the Appellant’s testimony incredulous in regard to why he allegedly told the Appellant he was going to arrest him (which I don’t believe he did) and his alleged subsequent decision not to arrest him. The Appellant asks the Commission to accept that after the allegedly loud heated conversation, after Michael Santo’s failure to comply with the

order to go inside, the act of Michael Santo *resisting* arrest would somehow be viewed as a “de-escalation” thus causing the Appellant to change his mind and not arrest Michael Santo. Finally, the Appellant’s contention that he used only one hand (to effectuate this alleged arrest) is contrary to the credible testimony of Michael Santo, who testified that the Appellant used two hands during the physical altercation. Moreover, the Appellant’s only other witness, Officer Stephen Garabedian, appeared to undermine the veracity of the Appellant’s alleged one-handed wrist grab, stating that he had never, in his 25 years as a police officer, tried to arrest a noncompliant person with one hand. (Testimony, demeanor of the Appellant and Michael Santo)

108. The Appellant was placed on paid administrative leave on January 9, 2007, pending a disciplinary hearing to be conducted by the Appointing Authority pursuant to G.L. c. 31, § 41. The town charged the Appellant with the following: 1) Excessive Use of Force; 2) Failure to Make and File Necessary Reports; 3) Untruthfulness; 4) Failure to Follow Procedure Regarding Special Transports; 5) Impermissibly Working “Off-Line”; and 6) Failure to Perform Duties in a Courteous and Professional Manner. (Exhibit 2)

109. The Lexington Police Department’s Policy and Procedure titled Use of Force, in effect at all material times, provides in pertinent part as follows concerning the use of force:

When determining how much force is appropriate, officers should be guided by the principle that the least amount of force necessary in any situation is the greatest amount of force that is permissible. Using force to overcome the unlawful resistance to a legitimate police purpose or to affect the safety of the officer or another is justifiable. The unnecessary or improper use of force cannot be justified.

The authority to use force while serving the community is the most powerful responsibility vested in the police officer by the citizens of Lexington. This

authority is based on trust and the understanding that Lexington Police Officers place the highest value on the lives and safety of the public. Consequently, the manner in which a police officer uses force may have significant bearing on the Department's ability to effectively achieve its mission. Reckless or careless use of force causes public indignation and erodes citizen trust and support. Without the confidence, respect and cooperation of the community, the total police effort will be seriously handicapped. It is imperative for officers to use the highest level of judgment and professional competence when using force.

- B. The least amount of force, which is reasonable and necessary in any situation, is the greatest amount of force that is permissible. An officer should exhaust every reasonable means of employing lesser amounts of force before escalating to a more severe application of force. However, some situations will require the immediate application of higher levels of force particularly when there is an imminent threat of serious bodily injury or death.

110. That same policy also governs the obligation to report the use of force, as follows:

VII. Use Of Force And Firearm Reporting

- A. An officer shall immediately notify the Commanding Officer or Patrol Supervisor whenever he/she:
 - 2. Takes any action that results in, or may result in claims of, injury or death of another person.
 - 3. Applies force by any means. This shall include use of physical strength/hand controls.
- B. Unless otherwise authorized by the Chief of Police or his designee, a report shall be completed and submitted to the Commanding Officer before the end of the duty shift.
- C. The report shall explain in detail the circumstances surrounding the event. Note: The Department's "Use of Force/Firearm Report" has been suspended pending the creation of a new form to document statistical data.
- D. The report shall be reviewed immediately by the Commanding Officer to insure that the report is complete. The Commanding Officer will then submit the report, related documentation and a report of findings to the Chief of Police. The report of findings shall include the relevant facts and circumstances surrounding the incident and a conclusion as to whether the use of force was consistent with Department policy. (Exhibit 7)

111. The Rules and Regulations of the Lexington Police Department specifically prohibit **Conduct Unbecoming An Officer**, defined as: “Any specific type of conduct which reflects discredit upon the member as a police officer, or upon fellow officers, or upon the police department that he/she serves” The Rules also specifically require that officers be truthful:

VII, G. Truthfulness. An officer shall be truthful in all reports, oral or written, as well as when he appears before any judicial, departmental or other official investigation, hearing, trial or proceeding. He shall cooperate fully in all phases of such investigations, hearings, trial or proceedings (Exhibit 5)

112. The Lexington Police Department has a general order on Patrol Operations which regulates so-called threshold inquiries, as follows:

Threshold Inquires and Motor Vehicle Stops

- A. Officers will notify the dispatch center before initiating a motor vehicle stop or threshold inquiry.
1. Threshold inquiry: a threshold inquiry is also known as an investigative detention. In these instances, the officer has articulable reasons to suspect that a crime has been, is about to be, or is presently being committed. At a minimum, officers should give:
 - a. The location of the stop;
 - b. A brief description of the person(s) or vehicle(s) stopped; and
 - c. The reason for the detention. (Exhibit 8)

113. Exhibit 10 sets forth special procedures and protections for opposite sex transports.

In Section IIB, 1, the officer transporting must notify the dispatcher of the time the transport begins. Section IIB, 2 requires a report on the ending mileage. The policy

requires, if possible, that a second officer should accompany the transporting officer or follow in another vehicle. (Exhibit 10)

114. The hearing officer designated by the Town conducted five days of hearings in August and September of 2007 and heard the testimony of the same nine (9) Appointing Authority witnesses that testified before the Commission. The Appellant did not testify at the Appointing Authority hearing. The hearing officer concluded that the Town had met its burden of showing by a preponderance of the evidence that the Appellant had engaged in substantial misconduct and upheld all five of the above-referenced charges against the Appellant. (Exhibit 2)
115. The Town Manager accepted the report of the hearing officer and terminated the Appellant on October 30, 2007. As part of his decision, the Town Manager drew an adverse inference to the fact that the Appellant failed to testify at the Appointing Authority hearing. (Exhibit 2)
116. The Appellant subsequently filed a timely appeal with the Civil Service Commission.

(Exhibit 4)

Employment Record

117. The Appellant received a letter of reprimand in November 2005. Five of the eight incidents cited in the letter of reprimand involve unprofessional, confrontational behavior. (Exhibit 32)
118. In the next seven months, he received two letters (one a reprimand) about insubordination. (Exhibit 32)

119. The Appellant has received numerous letters of appreciation from citizens and others during his tenure, some recognizing him individually and others recognizing him as part of a larger group. (Exhibit 32A)

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). See 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." Id. 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 Commission determines justification for discipline by inquiring, "whether the employee has been guilty of 44444by impairing the efficiency of 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).

The Appointing Authority's burden of proof is one of a preponderance of the evidence which 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). In

reviewing an appeal under G.L. c. 31, §43, if the Commission finds by a preponderance of the evidence that there was just cause for an action taken against an Appellant, the Commission shall affirm the action of the Appointing Authority. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 800 (2004).

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision." Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). See Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

As part of the seven days of hearings before the Civil Service Commission, I carefully reviewed the testimony of each of the witnesses, including those who were percipient witnesses to the events that occurred at 6 Utica Street on the morning in question. It is the function of the hearing officer to determine the credibility of the testimony presented before him. See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Department of Social Services, 439 Mass. 766, 787 (2003); (In cases where live witnesses giving different versions do testify 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); Connor v. Connor, 77 A. 2d. 697 (1951) (the opportunity to observe the demeanor and appearance of witnesses becomes the touchstone of credibility).

After a careful review of the testimony of each of the witnesses, in addition to a review of the documents submitted into evidence, I reach the following conclusions regarding the charges proffered by the Town against the Appellant:

Excessive Use of Force

By a preponderance of the evidence, the Town has shown that the Appellant violated the Town's Use of Force Policy when he used force, with no justification, against Michael Santo in the early morning hours of Sunday, August 27, 2006. This occurred while Michael Santo was standing in his driveway at 6 Utica Street in Lexington talking on his cell phone.

For all of the reasons stated in the findings of fact, I accept the testimony of Michael Santo and conclude that the Appellant, without justification, grabbed Santo's left arm, pulled him forward; spun him around; put one hand on his elbow; pushed his left arm up; and then slammed Santo against the trunk of a car that Santo had been leaning against while talking on his cell phone. When Santo asked the Appellant to stop, the Appellant told Santo to "shut up" and pushed his left arm up even further. Santo again asked the Appellant to stop and the Appellant once again pushed Santo's left arm even higher. Only after Santo complained of being in extreme pain and began pleading with the Appellant to stop, did the Appellant stop.

Conversely, for the reasons also cited in the above findings, I did not find the Appellant to be a reliable witness and I did not credit his testimony in regard to the events that transpired in the driveway at 6 Utica Street on the morning in question. Specifically, I do not credit the Appellant's testimony that Michael Santo was speaking in a loud voice on his cell phone or that Santo was causing a disturbance. Further, I do not credit the Appellant's testimony that he ever sought to arrest Michael Santo and/or that Michael Santo resisted the Appellant's purported attempt to arrest him.

There is no justification for using any type of force against Michael Santo on the morning in question. However, even if there had been justification for using force that night, I conclude, for all of the reasons cited in the findings of fact, including the compelling medical evidence, that the Appellant misrepresented the level of force he used against Michael Santo and that he actually used a far greater degree of force against Michael Santo than he testified to before the Commission.

I made no finding or conclusion as to whether this use of force rose to the level of a felony, as the Appointing Authority's hearing officer concluded in his report and referenced in the decision of the Town Manager. A full reading of the Town Manager's decision, however, leaves little doubt that the Town's decision to terminate the Appellant did not hinge on this determination of whether the Appellant's acts constituted a felony and a lack of any finding on this issue by the Commission does not subtract from the Town's conclusion that the Appellant used excessive force against Michael Santo or that termination is warranted.

Failure to Make and File Necessary Reports

By a preponderance of the evidence, the Town has shown that the Appellant violated the Town's Rules and Regulation when he failed to notify his commanding officer or submit the required reports indicating that he engaged in a use of force. Even the Appellant acknowledges that he made physical contact with the Appellant on the morning in question and used "hand controls". Even if I accept the Appellant's version of events, which I do not, he was still required to comply with department policy and report that he used force against a citizen.

Untruthfulness

By a preponderance of the evidence, the Town has shown that the Appellant violated the Town's Rules and Regulations when he was untruthful on multiple occasions. First, I conclude,

for all of the reasons listed in the findings of fact, that the Appellant was untruthful when he said Michael Santo was “screaming” at Officer Hsu at 10 Utica Street. Second, the Appellant was untruthful when he, seeking to justify pulling into the driveway of 6 Utica Street, said that Michael Santo was talking in a loud voice on his cell phone. Third, the Appellant was untruthful when he told Lt. Barry that “nothing out of the ordinary” happened that morning. Fourth, I conclude, contrary to the Appellant’s initial testimony before the Commission, that he did tell Lt. Barry “that never happened” and that he was being untruthful when he said that. Fifth, the Appellant was dishonest when he encouraged Lt. Barry to seek verification of his story from Officer Hsu, even though the Appellant knew that the physical contact with Michael Santo occurred after Hsu had left with the female transport. Sixth, the Appellant’s claim in the investigatory interview that Michael Santo must have caused his own injury by pulling away from the wrist grab during an attempted arrest is contrary to the medical evidence and defies common sense. These statements are untruthful. Seventh, the Appellant’s description of the nature and extent of the force he used against Michael Santo was untruthful. Eighth, the Appellant was untruthful when he told Lt. O’Leary that Lt. Barry never told him the nature of Michael Santo’s complaint.

An Appointing Authority is well within its rights to take disciplinary action when a police officer has “a demonstrated willingness to fudge the truth in exigent circumstances” because “[p]olice work frequently calls upon officers to speak the truth when doing so might put into question a search or might embarrass a fellow officer.” See Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 801 (2004); citing City of Cambridge, supra at 303.

The Civil Service Commission has recognized that a police officer must be truthful at all times and that failure to do so constitutes conduct unbecoming an officer. MacHenry v. Town of Wakefield, 7 MCSR 94 (1994). Lying in a disciplinary investigation alone is grounds for termination. LaChance v. Erickson, 118 S. Ct. 753 (1998), citing Bryson v. United States, 396 U.S. 64 (1969). The Commission has stated that “it is well settled that police officers voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens.” Garrett v. City of Haverhill, 18 MCSR at 381, 385 (2005). Specifically, there “is a strong public policy against employing police officers who are untruthful.” Royston v. Town of Billerica, 19 MCSR 124, 128 (2006). Therefore, “a police officer that has lost his credibility can no longer effectively perform the duties of the position.” Pearson v. Whitman, 16 MCSR 46, 50 (2003). As a result, the Commission has often upheld a police officer’s discharge based upon the officer’s dishonesty.²

Failure to Follow Procedure Regarding Special Transports

By a preponderance of the evidence, the Town has shown that the Appellant violated the Town’s Rules and Regulations when he failed to comply with the Town’s rules regarding opposite sex transports. He did not give reasonable grounds for abandoning the transport and compounded the error by not reporting by radio to Officer Hsu, the road supervisor, other officers or the police station that he was not providing the necessary back up.

Impermissible Working Off-Line

² See Royston v. Town of Billerica, 19 MCSR at 128-29 (upholding discharge of police officer who “knowingly lied to the Chief during a departmental investigation to cover up” his own misconduct); Garrett v. City of Haverhill, 18 MCSR at 385-86 (reasonable justification for discharge of police officer who repeatedly presented false testimony during departmental investigation of officer’s misconduct) ; Meaney v. City of Woburn, 18 MCSR 129, 133-35 (discharge upheld for police officer based, in part, on officer’s consistent dishonesty and “selective memory” during departmental investigation of officer’s misconduct); Pearson v. Whitman, 16 MCSR at 49-50 (appointing authority’s discharge of police officer who had “a problem with telling the truth” upheld); Eisenbeiser v. Town of West Springfield, 7 MCSR 99, 104 (discharge upheld based, in part, on officer’s dishonesty as his misconduct was ongoing, intentional and showed no signs of improvement).

By a preponderance of the evidence, the Town has shown that the Appellant violated the Town's Rules and Regulations when he impermissibly worked "off-line" on the morning in question.

The Town's rules and regulations require officers to notify the dispatcher whenever they make a threshold inquiry and provide the location, a description of the persons or vehicles stopped and the reason for the detention.

It is undisputed that the Appellant failed to notify the dispatcher, or anyone else, of his contact with Michael Santo on the night in question and I conclude, based on all of the testimony and evidence, that it was a violation of General Order 99-01.

Failure to Perform Duties in a Courteous and Professional Manner

By a preponderance of the evidence, the Town has shown that the Appellant, Michael Rizzo, violated the Town's Rules and Regulations when he was discourteous and unprofessional to Michael Santo.

In light of the findings and conclusions referenced above, there is no question that the Appellant failed to meet these minimum standards of courtesy and professionalism.

Pursuant to G.L. c. 31, § 43, the Commission must also pass judgment on the penalty imposed by the appointing authority. Town of Falmouth v. Civil Service Commission, 447 Mass. 814 (2006). In doing so, the Commission determines 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." Id., quoting, Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). While the Commission has the authority to modify the penalty imposed by the Appointing Authority, unless the Commission's findings of fact differ

significantly from those reported by the Appointing Authority or interpret the relevant law in a substantially different way, the absence of political considerations, favoritism or bias would warrant essentially the same penalty. The Commission is not free to modify the penalty imposed by the Appointing Authority on the basis of essentially similar fact finding without an adequate explanation. Town of Falmouth, citing, Police Commissioner of Boston v. Civil Service Commission, 39 Mass. App. Ct. 594 (1996).

While I reached a different credibility assessment regarding one of the percipient witnesses in this matter (DiLillo), and gave no weight to his testimony, I have, based on the testimony of other witnesses and the documentary evidence submitted, reached essentially the same findings as the Town of Lexington. Specifically, I have found that the Appellant used force against Michael Santo with no justification; failed to make and file necessary reports; was untruthful; failed to follow procedure regarding special transports; impermissibly worked “off-line” and failed to perform his duties in a courteous and professional manner.

Further, although there was a brief reference, in the background portion of the Appellant’s testimony, to his being the local union president, there was no evidence of anti-union animus against the Appellant or even significant conflicts between the Appellant and the Town Manager. As for bias of any other police officials, the Appellant admitted that he had no reason to believe that Lt. Barry or Officer Hsu would lie in their reports or testimony.

Also, there is no evidence of disparate treatment here. Although there was testimony regarding whether Lt. Barry handled the citizen complaint in an appropriate manner, he, nor any other officer, was accused of unjustified and excessive force and then lying about it, as the Appellant was. Nor was there any evidence submitted of prior cases in which the Town failed to terminate an individual facing similar charges.

Finally, although the Appellant's prior disciplinary history is limited to written reprimands, that does not warrant the Commission's intervention in terms of a modified penalty. The serious nature of the charges, including unjustified and excessive force and repeated examples of untruthfulness, warrant the discipline imposed by the Town – termination.

For all of the above reasons, the Appellant's appeal filed under Docket No. D1-07-376 is hereby *dismissed*.

Civil Service Commission

Christopher Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on November 13, 2008.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(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 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:

Philip Collins, Esq. (for Appointing Authority)

James Lamond, Esq. (for Appellant)