

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108
(617) 727-2293

JOEL SILVA,
Appellant,

v.

D1-12-209

EAST BRIDGEWATER
POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

Timothy M. Burke, Esq.
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Needham, MA 02194

Appearance for Respondent:

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Commissioner:

Christopher C. Bowman

DECISION

Pursuant to G.L. c. 31, § 43, the Appellant, Joel Silva, (Officer Silva), appealed the decision of the Town of East Bridgewater (Town)'s Police Chief to discharge him from his position as a police officer with the East Bridgewater Police Department (Department) for untruthfulness and insubordination. The appeal was timely filed with the Civil Service Commission (Commission). A pre-hearing conference was held on July 27, 2012 at the UMASS School of Law in North Dartmouth. The first day of a full hearing was held on November 9, 2012 at the same location and the second day of hearing was held on March 11, 2013 at the East

Bridgewater Town Hall. A digital recording was created of the hearing and both parties were provided with a CD of the proceeding. The hearing was public, but the witnesses were sequestered. Following the close of the hearing, proposed decisions were submitted by both parties on May 2, 2013.

FINDINGS OF FACT

Three (3) joint exhibits and twelve (12) Appointing Authority exhibits were entered into evidence at the hearing. I also left the record open for documentation from an LICSW who treated Officer Silva. I have marked the LICSW's January 18, 2012 letter and her notes as Appellant Exhibit 1. Based upon the documents admitted into evidence and the testimony of:

Called by the Appointing Authority:

- Paul O'Brien, Sergeant, East Bridgewater Police Department;
- John Grillo, Detective, East Bridgewater Police Department;
- Matthew Monteiro, intermittent Patrol Officer, East Bridgewater Police Department;
- Timothy O'Sullivan, Dispatcher, East Bridgewater Police Department;
- John E. Cowan, Chief of Police, East Bridgewater Police Department;

Called by the Appellant:

- Joel Silva, Appellant;
- Michael McLaughlin, Sergeant, East Bridgewater Police Department;

I make the following findings of fact:

1. The East Bridgewater Police Department consists of the Police Chief; five (5) sergeants; three (3) detectives; and eleven (11) patrol officers. (Testimony of Sergeant O'Brien)
2. Officer Silva is thirty-seven (37) years old and has worked for the Department as a police officer for fourteen (14) years.

3. Officer Silva's sole prior discipline occurred in 2007 and consisted of eight (8) hours of punishment duty. (Testimony of Officer Silva)
4. There is no "love lost" between Officer Silva and the Town's Police Chief, John Cowan. Chief Cowan previously terminated Officer Silva's brother and father from the Department. (Testimony of Sergeant O'Brien) Officer Silva's brother was a police sergeant with the Department and his father was the Town's Police Chief who served as a special police officer after his retirement. (Testimony of Chief Cowan)
5. Sergeant Paul O'Brien has held that rank for two years. He was first hired by the Department in 1997 as a patrol officer. He holds an engineering degree from the Massachusetts Maritime Academy and a Masters degree in Criminal Justice from Western New England University. (Testimony of Sergeant O'Brien).
6. A few years ago, at a union meeting, Sergeant O'Brien and Officer Silva got into a heated argument regarding an issue related to overtime and yelled at each other. (Testimony of Sergeant O'Brien)
7. For many years, police officers working the Midnight to 8:00 A.M. shift have performed "business checks" throughout the shift. Business checks are performed by driving through business parking lots and looking for anything unusual or out of place. The purpose is to prevent criminal activity. In early November, 2011, in response to several house and car break-ins, a "*neighborhood* checks" program was put into place for officers on the Midnight to 8:00 A.M. shift. At first, this program consisted of officers radioing in to the dispatcher the names of streets (with the understanding that the street and surrounding areas had been checked). (Testimony of Sergeant O'Brien and Chief Cowan). This process of

neighborhood checks was implemented through verbal orders only. (Testimony of Officer Silva)

8. Prior to December 5, 2011, Officer Silva had always performed the business and neighborhood checks as directed and had never disobeyed an order given by Sergeant O'Brien. (Testimony of Sergeant O'Brien)
9. Sergeant O'Brien developed a plan to improve the neighborhood checks. His plan divided the Town into eight "sectors" and assigned letters to each sector. Now, instead of radioing in a street name, officers would radio in a letter which would correspond to a specific area of Town. (Testimony of Sergeant O'Brien and Joint Exhibit 3).
10. Sergeant O'Brien worked the 4:00 P.M. to Midnight shift on December 4, 2011. Officer Silva was the officer in charge of the upcoming Midnight to 8:00 A.M. shift for December 5, 2011. A permanent, intermittent police officer, Matthew Monteiro, who was covering for a permanent police officer on vacation, was also scheduled to work the Midnight to 8:00 A.M. shift on December 5th. (Testimony of Sergeant Silva)
11. Shortly before the end of Sergeant O'Brien's shift, he received a call from the Cohasset Police Department regarding a suicide threat related to an East Bridgewater resident who was threatening to jump in front of a train. (Testimony of Sergeant O'Brien) The East Bridgewater resident had sent a text message to his girlfriend stating that he was going to commit suicide. (Testimony of Officer Silva) Sergeant O'Brien considered the call serious, partly because of past incidents involving the same person that led Sergeant O'Brien to conclude that the individual was fully capable of following through on his suicide threat. (Testimony of Sergeant O'Brien) On the previous occasion, which occurred approximately two months prior, the East Bridgewater resident had mixed a bowl of ricin, a poisonous

agent, as part of his suicide attempt. A full “hazmat” team was required to respond to that prior incident. (Testimony of Officer Silva)

12. Officer Silva was scheduled to work the next shift, from Midnight to 8:00 A.M. on December 5th. He would be one of two officers working that night and served as the “officer in charge.” (Testimony of Sergeant O’Brien & Officer Silva)

13. During the shift change, just prior to midnight, Sergeant O’Brien handed a memorandum with an attachment to Officer Silva entitled “EBPD Midnight Shift Patrol Orders Effective December 5, 2011” and stated: “We’ve changed the way we’re calling in the neighborhood checks. It takes effect tonight. Here’s the map of it. You also have a call pending a health and welfare check.” Sergeant O’Brien told Officer Silva that he should complete the neighborhood checks “as time permitted.” The verbal exchange lasted for approximately one minute. (Testimony of Sergeant O’Brien and Joint Exhibit 3)

14. Page 2 of Joint Exhibit 3 is the attachment to the memorandum in question. It is a color-coded map with various sections of the Town labeled with letters from A to H. December 5, 2011 was the first time that Officer Silva had seen the new map. Sergeant O’Brien did not review the map with Officer Silva nor did he explain to him what sectors comprised the “west side” or “east side” that was referenced in the memorandum or his expectation regarding who would cover which sectors and how this would differ depending on whether there were two or three officers assigned to the midnight shift.¹ (Testimony of Officer Silva)

¹ At the hearing before the Commission, Sergeant O’Brien testified that it was his expectation that, when the midnight shift was manned by two officers, one officer would cover the “west side”, which he considered to include newly-formed Sectors A, B and C and the other officer would cover the “east side”, which he considered to include newly-formed Sectors D, E, F, G and H. Further, Sergeant O’Brien testified that if there was a third officer on the midnight shift, the third officer would cover the “center” of town and serve as a back-up for the other sectors. None of this was conveyed to Officer Silva on December 5th.

15. I find that the map is somewhat difficult to read for various reasons, including the tiny font of the street names which, in some cases, would require some type of magnifying device to read. Further, even Chief Cowan struggled in his testimony to clearly explain the new system.
16. Officers were expected to call or text the dispatcher on duty after conducting the checks in each sector and the dispatcher was expected to log this information into the Department's computer system. (Testimony of Sergeant O'Brien)
17. Shortly after receiving the memorandum regarding the new system for neighborhood checks, as well as being informed of the call regarding the potential suicide attempt, Officer Silva, in the presence of Dispatcher Timothy O'Sullivan, stated, "we're not going to have time for this tonight" in reference to the neighborhood checks. (Testimony of Officer Silva)
18. Prior to responding to the call regarding the potential suicide attempt, Officer Silva contacted the East Bridgewater Fire Department and requested that they respond to the individual's residence as well. (Testimony of Officer Silva)
19. Officer Silva drove his cruiser to the resident's home and was met by an East Bridgewater paramedic, an EMT and Officer Monteiro, all of whom arrived shortly after Officer Silva. (Testimony of Officer Silva)
20. After arriving at the residence, Officer Silva observed that the resident was very agitated and had broken several dishes on the ground. The resident became very confrontational with the fire and rescue personnel and Officer Silva intervened to calm the resident down. The resident's wife was also on scene and was very upset. (Testimony of Officer Silva)
21. Since the resident objected to being transported to the hospital, Officer Silva contacted the Brockton Hospital and obtained a doctor's order to have him transported against his will.

While at the Brockton hospital, Officer Silva met with the nurse and doctor who treated the resident and showed them the text messages that the resident had sent to his girlfriend.

(Testimony of Officer Silva)

22. Officer Silva left the Brockton Hospital at approximately 1:30 A.M. on December 5th, returned to the police station, printed out a hard copy of the text messages and faxed them to the doctor at Brockton Hospital. (Testimony of Officer Silva)

23. Officer Silva completed other police reports on the Department's computer from approximately 2:00 A.M. to 3:00 A.M. (Testimony of Officer Silva and Exhibits 5 & 6)

24. Officer Silva left the police station at approximately 3:15 A.M. on December 5th to take his dinner break, which lasted until approximately 4:15 A.M. Officer Silva parked on the side of the road to take his dinner break, as opposed to going home and risking that he would wake up his wife and four children, ages 3 to 17. (Testimony of Officer Silva)

25. Police officers who work the Midnight to 8:00 A.M. shift typically conduct radar traffic enforcement during the morning commute from 5:00 – 8:00 A.M. (Testimony of Sergeant O'Brien)

26. In addition to conducting radar traffic enforcement between 5:00 A.M. and 8:00 A.M., Officer Silva did follow-up interviews at the local Cumberland Farms convenience store as well as the Joppa Market Store. (Testimony of Officer Silva)

27. While at the Cumberland Farms, Officer Silva interviewed the store manager for a larceny that Officer Silva was investigating. The primary purpose of the visit was to obtain surveillance footage of the incident in question. (Testimony of Officer Silva)

28. While at the Joppa Market Store, Officer Silva met with the manager of the store, had the manager sign a “no trespass order” and reviewed camera footage of a man who allegedly passed a counterfeit twenty dollar bill the previous day. (Testimony of Officer Silva)
29. Officer Silva served the no trespass order on the individual in question at approximately 7:30 A.M. and informed the station, via radio, that the order had been served. (Testimony of Office Silva)
30. Officer Silva filled his cruiser’s gas tank and returned to the police station at approximately 7:45 A.M. (Testimony of Officer Silva)
31. The only duties that the other officer on duty that night, Officer Monteiro, could recall completing was serving as a back-up to Officer Silva at Brockton Hospital and making two traffic stops. (Testimony of Officer Monteiro)
32. Officer Monteiro was aware of Sergeant O’Brien’s instructions regarding the new method of conducting neighborhood checks, but had also overheard Officer Silva stating that there would be no time to complete the checks that night. (Testimony of Officer Monteiro)
33. At the conclusion of his shift, Officer Monteiro stated to Dispatcher O’Sullivan that he had completed the neighborhood checks, but Dispatcher O’Sullivan told him it would not be right to log them in since Officer Monteiro did not call them in during the shift. (Testimony of Dispatcher O’Sullivan)
34. Sometime during the morning of December 5, 2011, Sergeant O’Brien returned to the police station to speak to Chief Cowan about an unrelated matter. While in the office of Chief Cowan’s administrative assistant and in the presence of the administrative assistant and the Chief, Dispatcher O’Sullivan entered the room. When Sergeant O’Brien asked Dispatcher

O'Sullivan how things had gone on the previous shift, Dispatcher O'Sullivan stated that the neighborhood checks had not been completed. (Testimony of Sergeant O'Brien)

35. According to Sergeant O'Brien, "we looked at the logs" and "the Chief told me to start an investigation into it" (Testimony of Sergeant O'Brien)

36. At the beginning of the next Midnight to 8:00 A.M. shift (on December 6th), Sergeant O'Brien asked Officer Silva to produce a "to/from" memo regarding why he didn't complete the neighborhood checks the previous night and what he (Silva) had "told the other people who were working with him that evening." (Testimony of Sergeant O'Brien)

37. Officer Silva told Sergeant O'Brien that he didn't perform the neighborhood checks the previous evening because he had been too busy on the shift. Sergeant O'Brien then instructed Officer Silva to include what he did on the shift in his to/from memo. (Testimony of Sergeant O'Brien)

38. Shortly thereafter, Officer Silva asked for and received permission to consult with a union representative prior to completing the to/from memo. (Testimony of Sergeant O'Brien)

39. On December 9, 2011, Officer Silva penned a memo to Sergeant O'Brien stating, in its entirety, "I don't remember the entire conversation." (Exhibit AA 1, Part D)

40. On December 10, 2011, Officer Silva penned another memo to Sergeant O'Brien stating in part that he did not take Sergeant O'Brien's words to be an order that night, but, rather, a directive; that he had not had time to go over the new protocol with Sergeant O'Brien; and that he had been busy with other matters on the night in question, including the suicide threat. (Exhibit AA, Part E)

41. Sergeant O'Brien obtained to/from memos from other individuals including Dispatcher O'Sullivan and Officer Monteiro. (Exhibit AA, Part B & E)

42. On December 14, 2011, Sergeant O'Brien penned a memo to Chief Cowan summarizing his conversations with Officer Silva and the contents of the various to/from memos. (Exhibit AA 1)
43. On January 9, 2012, Chief Cowan conducted an investigative interview with Officer Silva regarding this incident. Present at that interview were Union Counsel Jun Lim, Town Counsel Kevin Feeley, Officer Silva and Chief Cowan. The recording of this interview is incomplete. It is missing approximately 20-30 minutes of the beginning of the interview due to an operating error. During the interview, Officer Silva repeatedly stated that his focus that night was on the suicide attempt; that he never meant to disobey an order; and that he'd be willing to write a letter of apology to Sergeant O'Brien if he (O'Brien) felt that his order was not obeyed. He also repeatedly stated that he wanted to ensure that his answers were truthful and did not want to answer yes or no to questions where he could not remember the exact comments he made or the exact times that events occurred. He also stated during the interview that he had memory problems due to post-traumatic stress disorder from a work-related call that occurred in 2005. (AA Exhibit 4)
44. On June 7 and June 18, 2012, the Police Chief served as the hearing officer at a hearing to determine if Officer Silva should be disciplined, up to and including termination. (Exhibit AA 2)
45. Chief Cowan found that just cause existed to discharged Officer Silva from employment. As part of his findings, Chief Cowan found that Officer Silva:
- “was disrespectful and insubordinate when he stated words to the effect that the Neighborhood Checks Orders were a waste of time and that it would be too busy to perform them.”

- “was untruthful when he stated words to the effect that Sergeant O’Brien on December 6, 2011 that the reason the Neighborhood Checks were not performed on December 5, 2011 was because it (or he) was too busy to perform them.” (emphasis added)
- “was untruthful when he stated words to the effect to Sergeant O’Brien on December 10, 2011 that the reason the Neighborhood Checks were not performed on December 5, 2011 was because it (or he) was too busy to perform them.” (emphasis added)
- “was deceptive, insubordinate and incomplete in his report on December 9, 2011, when he wrote only that he could not recall ‘the exact’ conversation he had with Dispatcher O’Sullivan and/or Officer Monteiro at the beginning of the December 5, 2011 shift.”
- “was untruthful when he wrote in his December 10, 2011 report to Sergeant O’Brien his explanation on why he did not follow the Orders was because he thought it was only a directive. Further, he was deceptive when he clearly implied in the report that he was too busy to perform the Neighborhood Checks because of the activities he actually did perform during this shift.” (Exhibit AA2)

Legal Standard

G.L. c. 31, § 43, provides:

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

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, rev.den., 426

Mass. 1102, (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass. App. Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983)

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

"The commission's task...is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether 'there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision.'" Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006). See Watertown v. Arria, 16 Mass. App. Ct. 331, 334, rev.den., 390 Mass. 1102 (1983) and cases cited.

Under Section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew." Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. The role of the 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." Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102, (1997). See also Leominster v. Stratton, 58 Mass. App. Ct. 726,

728, rev.den., 440 Mass. 1108, 799 N.E.2d 594 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den. (2000); McIsaac v. Civil Service Comm'n, 38 Mass App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 390 Mass. 1102 (1983).

Analysis

The Town has not shown, by a preponderance of the evidence, that Officer Silva was untruthful, disrespectful or insubordinate. Rather, the Town's Police Chief oversaw and personally directed a result-driven investigation against Officer Silva and then, while serving as the Town's hearing officer in this matter, mischaracterized Officer's Silva's actions and statements. The Police Chief then used these mischaracterizations to issue highly questionable findings and conclusions to support his decision to terminate Officer Silva. In doing so, he has unfairly and forever impugned the integrity of a law enforcement officer.

It is worth recounting what *actually* occurred on the night in question. Just *prior* to the start of Officer Silva's Midnight to 8:00 A.M. shift on December 5, 2011, while *Sergeant O'Brien* was still on duty, the East Bridgewater Police Department received a call from the Cohasset Police Department regarding a potential suicide attempt by an East Bridgewater resident. Sergeant O'Brien considered the call "serious" in part because his Department had, only weeks earlier, responded to a similar call in which the resident had also attempted suicide. In Sergeant O'Brien's opinion, the resident was fully capable of following through on his new suicide threat. There was good reason for Sergeant O'Brien's concerns. During the previous incident, the resident, who is a former public safety worker in a large Massachusetts city, attempted to mix a concoction of ricin, a poison, as part of his suicide attempt. A full "hazmat" team was needed as part of that prior incident.

It appears that Sergeant O'Brien, who became aware of the call just prior to the end of his shift, took no immediate steps to respond to this "serious" call from the Cohasset Police Department. Rather, he opted to go forward with the normal routine of a shift change at which time he passed on the information about the serious call to Officer Silva. With precious minutes ticking away regarding the attempted suicide call, Sergeant O'Brien also opted to speak with Officer Silva about a new protocol for conducting neighborhood checks which involved calling in checks by letter-coded "sectors". Remarkably, Sergeant O'Brien was not even sure whether he told Officer Silva about the serious attempted suicide call prior to discussing the new letter-coded system he had devised. Regardless, it was the first time Officer Silva had ever been informed about these new letter-code sectors which even Chief Cowan had trouble explaining during his testimony before the Commission. Importantly, it is undisputed that the new letter-coded neighborhood checks were only to be completed "as time permitted."

Upon receiving the information about the call from the Cohasset Police Department, Officer Silva immediately took the following actions:

- He contacted the East Bridgewater Fire Department and requested that they dispatch a fire and rescue team to the resident's home immediately.
- He ordered the junior officer on the shift, Officer Monteiro, to provide him with back-up.
- He rushed to the resident's home, arriving before any other public safety personnel.

Upon arriving at the resident's home, Officer Silva found the resident outside breaking dishes and also observed that the resident's wife was in a highly emotional state. Officer Monteiro and the East Bridgewater Fire and Rescue arrived shortly thereafter.

Over the next hour and half, Officer Silva would:

- Help calm the resident down.
- Obtain an order from a doctor at Brockton Hospital to have the resident involuntarily transported to that hospital for observation.
- Travel to Brockton Hospital.
- Meet with the doctor and nurse treating the resident and ensure that they were aware of the suicidal text messages that the resident had sent to his girlfriend, who lives in Cohasset.

The doctor at Brockton Hospital asked Officer Silva to provide him with a hard copy of the resident's text messages for their files. After being unable to sync his phone (that contained the text messages) to the hospital computers, Officer Silva drove back to the East Bridgewater police station, transferred the text messages to his own email account, printed the text messages out on the Police Department's printers and then faxed them over to the hospital.

Over the next hour, it is undisputed that Officer Silva completed two reports regarding unrelated incidents while at the police station. He then proceeded to take an hour-long dinner break in his cruiser, continuing to be on-call in the event of any incoming calls that required his assistance.

After his dinner break, Officer Silva visited two local convenience stores to follow-up on criminal investigations. At one convenience store, he interviewed the manager and retrieved a surveillance tape as part of a larceny that he was investigating. At the other convenience store, Officer Silva also interviewed the store manager, reviewed surveillance video and had the manager sign a no trespass order. Officer Silva then proceeded to serve the no trespass order on the East Bridgewater resident.

Finally, consistent with the standard practice of the East Bridgewater Police Department, Officer Silva completed radar traffic enforcement during the morning commuting hours before refilling his cruiser with gas and returning to the East Bridgewater police station at approximately 7:45 A.M. By almost any objective standard, this was a productive – and commendable – eight hours of public service by Officer Silva.

Later that same morning, however, Sergeant O’Brien returned to the police station to meet with the Police Chief regarding what he asserts were unrelated matters. When the dispatcher from the overnight shift, Dispatcher O’Sullivan, came into the office of the Police Chief’s administrative assistant, Sergeant O’Brien asked him how the overnight shift had gone. Dispatcher O’Sullivan, in the presence of Chief Cowan, stated that no neighborhood checks had been completed on the overnight shift. Chief Cowan, Sergeant O’Brien and Dispatcher O’Sullivan proceeded to review the logs at which point Chief Cowan “ordered an investigation.”

The above-referenced conversation was noteworthy to me for various reasons. First, it was surprising to me that the conversation did not focus on, or possibly even include, an update regarding the suicide attempt or how the Department responded to it. Had it been included, Chief Cowan might have been able to inquire about the far more serious issue of what actions – or inactions – took place immediately after his Department received this call from the Cohasset Police Department. Second, Chief Cowan failed to even mention this discussion during his testimony.² Rather, he simply stated that Sergeant O’Brien had come to him on December 5th and reported that Officer Silva had failed to obey his orders to conduct neighborhood checks by sector during the overnight shift. Third, while the memorandum that Sergeant O’Brien gave to

² I reviewed the recording of the Commission hearing to confirm that Sergeant O’Brien, during his testimony stated that Chief Cowan was present for the conversation that included the Chief, Sergeant O’Brien and Dispatcher O’Sullivan.

Officer Silva, as well as verbal instructions, clearly stated that the checks were to be completed “as time permitted”, that did not appear to be part of the discussion. Rather, it appears that there was a desire, from the outset, to characterize Officer Silva’s actions as a failure to obey the orders of a superior officer. Finally, while it did not factor into my conclusions regarding this matter, I drew an inference, based on the relevant testimony, that the discussion between the Chief, Sergeant O’Brien and Dispatcher O’Sullivan did not happen by chance.

As part of the initial phase of the investigation, Sergeant O’Brien spoke directly with Officer Silva and ordered Officer Silva, Officer Monteiro, Dispatcher O’Sullivan and one other officer to submit “to/from” memos. Sergeant O’Brien ordered Officer Silva to explain “...why he disobeyed the orders ...” (Exhibit AA 2, Paragraph 19). That instruction is yet another example of the pre-determined nature of this so-called investigation. It is clear that Chief Cowan and Sergeant O’Brien had determined, *prior to the investigation*, that Officer Silva disobeyed an order.

After receiving a written summary of Sergeant O’Brien’s investigation, Chief Cowan took over the investigation and decided to conduct his own recorded “interview” of Officer Silva. He acknowledges that because of human error, the first twenty minutes of the interview was not recorded. I reviewed a good part of the remainder of the interview, which was submitted in the form of a CD and marked as Exhibit 4. The interview was, at best, bizarre. For the better part of sixty (60) minutes, Chief Cowan, rather than ask probative questions, strayed into making declaratory statements that were, at times, unsupported by the facts, unrelated to the alleged misconduct and indicative of a Chief who lacks a basic understanding of an employee’s Weingarten rights. Even when considering the need to ask tough questions to test the veracity of

Officer's Silva's responses, the overall tone, tenor and methodology of the interview fell far short of the professionalism expected of a police chief in Massachusetts.

Among the declaratory statements made by Chief Cowan during the "interview" were that Officer Silva was unable to account for 3-4 hours of down-time during the night in question and that Officer Silva "ordered" the dispatcher not to record any neighborhood checks that night. Chief Cowan then berated Officer Silva for seeking advice and counsel prior to submitting the "to/from" memo that the Town intended to use as part of the disciplinary proceedings against him. Officer Silva was well within his rights to seek advice and counsel and Chief Cowan was simply wrong to suggest otherwise. Although less important, another portion of the interview provides some insight into its bizarre nature. When Officer Silva stated during the interview that he had a dinner break in his cruiser, Chief Cowan went on another tangent about how officers should not take breaks in their cruisers because of the potential for carbon-monoxide poisoning.

Equally troubling are the conclusions that the Chief subsequently draws from this bizarre interview, including that Officer Silva's responses were "evasive". It appears that Chief Cowan drew this conclusion based on responses from Officer Silva that he could not recall making certain statements on the night in question. One such exchange during the interview involved a statement from Chief Cowan that Officer Silva ordered the dispatcher not to record any neighborhood checks that night. When Officer Silva replied that he did not recall making that statement, Chief Cowan was incredulous, suggesting that Officer Silva was accusing the dispatcher of lying. For reasons discussed in more detail below, the record does not support a conclusion that Officer Silva ordered the dispatcher not to record the calls.

After completing his investigation into Officer Silva, Chief Cowan, acting as the Appointing Authority, convened a civil service hearing to determine whether Officer Silva should be subject

to discipline, up to and including termination. Chief Cowan served as the hearing officer and subsequently issued a decision that contained thirty findings (including several findings about the interview he conducted as part of the investigation) and a summary of his conclusion that just cause existed to terminate Officer Silva. Findings 26 through 30 of Chief Cowan's decision formed the core of his decision. For clarity, I reiterate them below. Findings 26 through 30 from the Chief's decision stated that Officer Silva:

- 26. "was disrespectful and insubordinate when he stated words to the effect that the Neighborhood Checks Orders were a waste of time and that it would be too busy to perform them."
- 27. "was untruthful when he stated words to the effect that Sergeant O'Brien on December 6, 2011 that the reason the Neighborhood Checks were not performed on December 5, 2011 was because it (or he) was too busy to perform them." (emphasis added)
- 28. "was untruthful when he stated words to the effect to Sergeant O'Brien on December 10, 2011 that the reason the Neighborhood Checks were not performed on December 5, 2011 was because it (or he) was too busy to perform them." (emphasis added)
- 29. "was deceptive, insubordinate and incomplete in his report on December 9, 2011, when he wrote only that he could not recall 'the exact' conversation he had with Dispatcher O'Sullivan and/or Officer Monteiro at the beginning of the December 5, 2011 shift."
- 30. "was untruthful when he wrote in his December 10, 2011 report to Sergeant O'Brien his explanation on why he did not follow the Orders was because he thought it was only a directive. Further, he was deceptive when he clearly implied in the report that he was too busy to perform the Neighborhood Checks because of the activities he actually did perform during this shift." (Exhibit AA2)

After conducting a two-day de novo hearing, which included testimony from Chief Cowan, Officer Silva, Dispatcher O'Sullivan and Officer Monteiro, my findings differ significantly from the Police Chief.

First, I have not found that Officer Silva stated that the Neighborhood Checks were “a waste of time.” When first asked (by me) what Officer Silva said about the Neighborhood Checks on the night in question, Dispatcher O’Sullivan stated that Officer Silva said words to the effect that there wasn’t going to be time to conduct the Neighborhood Checks that night. Only after prompting by counsel for the Town did Dispatcher O’Sullivan then testify that Officer Silva said that the checks were “a waste of time”. Asked if he had an independent recollection that Officer Silva made the “waste of time” comment, Dispatcher O’Sullivan equivocated and stated “I think so.” Even standing alone, I was unable to credit Dispatcher O’Sullivan’s testimony in this regard. Further, it contradicts the credible testimony of Officer Silva and Officer Monteiro (who overheard the conversation) that Officer Silva simply stated words to the effect that there wasn’t going to be time to conduct the Neighborhood Checks.

That leads to the remainder of Chief Cowan’s Finding 26 and his Findings 27 and 28 where he finds that Officer Silva was “untruthful” (and disrespectful and insubordinate) when he stated words to the effect that it would be too busy to conduct the Neighborhood Checks during his shift.

A review of the timeline that night shows that it was in fact a busy shift, which included a serious call regarding a suicide attempt, completion of two unrelated reports, follow-up investigations regarding two pending criminal matters, serving a no-trespass order and radar traffic patrol during the morning commute. It would be inapposite to conclude that Officer Silva was lying when he stated that he would be too busy to conduct the neighborhood checks during that shift. It is also noteworthy that Officer Silva had performed the neighborhood checks before and after that shift without hesitation. I also gave weight to those portions of the recorded interview with Chief Cowan in which Officer Silva emphatically stated that he meant no

disrespect to Sergeant O'Brien and would be willing to apologize to Sergeant O'Brien if his comment had been interpreted as such.

In his Finding 29, Chief Cowan found that Officer Silva was “deceptive, insubordinate and incomplete in his report when he wrote only that he could not recall ‘the exact’ conversation he had” on December 5th. In the context of what occurred here, I find nothing “deceptive, insubordinate or incomplete” about this statement for two reasons. First, the off-handed comment made by Officer Silva was made shortly after being informed that an East Bridgewater resident may be on the verge of committing suicide. It is perfectly reasonable that Officer Silva, more concerned about this serious call, could not remember the exact conversation he had about the far less serious issue of the new letter-coded sectors proffered by Sergeant O'Brien. Second, the Town's own witnesses – and the charges – reference “words to the effect” as opposed to the exact words. More substantively, however, Officer Silva did produce a to/from report that provided significant details related to his memory of the conversation that night.

The additional charge of untruthfulness in Finding 30, regarding whether Sergeant O'Brien issued an “order” or “directive” are also unsupportable - and silly. Even Sergeant O'Brien acknowledges that the Neighborhood Checks were only to be completed “as time permitted”. More broadly, this charge appears to be nothing more than an attempt to pile-on and manufacture a case of misconduct that simply does not exist.

In summary, Officer Silva was not untruthful; he was not insubordinate; he was not evasive; he was not disrespectful; and there is no basis upon which to discipline him.

Finally, it is impossible to ignore the overall context in which this discipline occurred. Chief Cowan, who personally conducted a good portion of the investigation, served as the hearing officer and, as Appointing Authority, made the decision to terminate Officer Silva, has an

adversarial relationship with Officer Silva's brother and father. Chief Cowan terminated Mr. Silva's brother, who served as a police sergeant and then terminated Mr. Silva's father, the Town's former police chief, from his position as a (post-retirement) reserve police officer. Based on the dearth of evidence upon which Chief Cowan based his decision, his decision to personally conduct portions of the investigation, and his over-the-top behavior during the investigatory interview, I have reached the reasonable inference that the animosity between Chief Cowan and the Silva family contributed to his decision to terminate Officer Silva.

Conclusion

For all of the above reasons, Officer Silva's appeal under Docket No. D1-12-209 is hereby **allowed**. He shall be restored, forthwith, to his position as an East Bridgewater police officer, without any loss of pay or benefits.

Further, pursuant to G.L. c. 31, § 45, the Town shall reimburse Mr. Silva: \$200 toward attorney fees associated with the hearing before the appointing authority; \$200 toward attorney fees associated with the hearing before the Commission; \$100 toward the cost of summoning witnesses; and \$100 for any other necessary expenses incurred in such defense.³

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on June 13, 2013.

³ Had the statute permitted full reimbursement for attorney fees, it would have been so ordered in this case.

A True Record. Attest:

Commissioner

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

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

Notice to:

Timothy M. Burke, Esq. (for Appellant)

Daniel C. Brown, Esq. (for Respondent)