

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

JOSE CHAVES,
Appellant

v.

Docket No. D-00-2850

TOWN OF HUDSON,
Respondent

Appellant's Attorney:

Gary G. Nolan, Esq.
Nolan Perroni Harrington, LLP
133 Merrimack Street
Lowell, MA 01852

Respondent's Attorney:

Kimberly A. Rozak, Esq.
Mirick O'Connell
100 Front Street
Worcester, MA 01608

Hearing Officer:

John J. Guerin, Jr.¹

DECISION

Pursuant to the provisions of G.L. c. 31 §43 the Appellant, Jose Chaves (hereinafter "Appellant"), filed an appeal with the Civil Service Commission (hereinafter "Commission") on September 6, 2000, claiming that the Appointing Authority for the Respondent, Town of Hudson (hereinafter "Town"), did not have just cause to suspend him for sixty (60) days from his position as a police officer in the Hudson Police Department (hereinafter "HPD"). As will be discussed further, the Appointing Authority in this matter was found to be Hudson Police Chief

¹ John J. Guerin, Jr., a Commissioner at the time of the full hearing, served as the hearing officer. His term has since expired. After leaving the Commission, Mr. Guerin was authorized to draft this decision and to make the within credibility assessments.

Richard A. Braga, Jr. (hereinafter “Chief Braga” or “Appointing Authority”). The appeal was timely filed. Hearings were held over the course of nine days, February 12, 2001, September 28, 2001, March 11, 2002, March 12, 2002, April 24, 2002, May 1, 2002, May 2, 2002, August 17, 2007, and April 11, 2008. The hearing was declared private. The witnesses were sequestered. Except for the hearing on April 11, 2008, the testimony was transcribed and the transcriptions serve as the official record of this proceeding. The parties have agreed that when the testimony of the final day’s hearing is transcribed, said transcription shall serve complete the official record. Both parties submitted Proposed Decisions following the hearing.

PROCEDURAL BACKGROUND

Section 42 Complaint

In addition to the instant appeal, the Appellant filed a related complaint pursuant to c. 31 §42. The complaint was based upon (1) whether the Notice of Discipline sent by the Town to the Appellant complied with the requirements of c. 31 §41 and (2) whether the Chief of Police qualifies as the Appointing Authority for police officers in the Town. The February 12, 2001 hearing was devoted to discovery issues and the specificity of the charges. The September 28, 2001 hearing was devoted entirely to the Appointing Authority issue.

On January 24, 2002, the Commission issued a decision finding that the Chief of Police is the Appointing Authority, and that the suspension notice satisfied the requirements under c. 31 §41 regarding the specificity of charges. The Commission then resumed the hearing on the merits of the case, and the Town presented its case on March 11, March 12, April 24, May 1, and May 2, 2002. On or about June 18, 2003, before presenting its case, the Appellant appealed the Commission’s decision that the Chief of Police is the Appointing Authority. Due to that appeal, the Commission suspended the proceeding until the court issued a decision. The court issued its

decision on September 2, 2004, finding that the Hudson Police Chief is the Appointing Authority for the position of police officer.

Section 43 Appeal

This case has been now been pending at the Commission for eight (8) years. Over time, there have been personnel changes. Former Commissioner Daniel J. O’Neil (hereinafter “Commissioner O’Neil”) presided over the § 43 appeal. He also heard the March 11, March 12, April 24, May 1 and May 2 testimony in 2002. No further testimony was taken until August 17, 2007. At that time, due to changes in the union’s bargaining representatives, the Appellant had new counsel. The passage of more than five (5) years had also led to the expiration of Commissioner O’Neil’s appointment. Former Commissioner John J. Guerin, Jr. (hereinafter “Commissioner Guerin”), was assigned to the case. Commissioner Guerin presided over the testimony of the Appellant and of the partial examination of HPD Lieutenant David French.²

Violation of Sequestration Order

Upon motion by the Appellant, the hearing was declared to be private. Commissioner O’Neill issued a sequestration order. Both parties were advised that any violation of the sequestration order would lead to either a dismissal or the entry of judgment in favor of the Appellant. (*See* February 12, 2001 Transcript)

On March 12, 2002, a witness subpoenaed by the Appointing Authority testified that she had overheard the Appellant making a bet with friends that he would be the first to get a certain woman into bed. Commissioner O’Neil requested the names of the friends. At first reluctant, the witness complied upon the Commissioner’s insistence. (*See* March 12, 2002 Transcript)

² Lieutenant French served at all times pertinent to the events subject to this appeal as an Acting Captain for the HPD. At the time of his testimony in this matter, he was serving in his permanent position as a Lieutenant. He will herein be referred to alternately as “Lt. French” or “Capt. French.”

On March 13, 2002, the Appointing Authority was informed that the Appellants had informed his “friends” about the witness’s testimony. These “friends” were informed that the Appellant would be able to prove the witness’s testimony by showing them a copy of the transcript of the proceedings.

On April 16, 2002, the Appointing Authority filed an (1) Emergency Motion to Dismiss and/or Prevent the Intimidation of, Interference with, or Retaliation Against Witnesses; (2) a Motion to Exclude/Sequester Appellant During Inquiry by Commission and an (3) Emergency Motion to Impound All Transcripts. The Commission scheduled a hearing for April 24, 2002, for the sole purpose of determining whether the Appellant violated the sequestration order. (*See* April 24, 2002 Transcript)

The witness was recalled. The Appellant was ordered to leave the room so that he would not hear her testimony. Although reluctant to testify, the witness informed Commissioner O’Neil that shortly after her March 12, 2002 testimony, a man contacted her fiancé concerning her testimony. The witness had been required to give the names of the man and her fiancé to the Commissioner during her earlier testimony. The witness reported that the man told her that he heard that she had mentioned his name in “court,” and that the Appellant said he could prove it by showing him the transcript. The man told the witness’s fiancé that he did not want to get involved with “any of this,” since the bet had been a joke. (*Id.*)

The witness testified that she became afraid for the safety of her family after the call. She considered seeking a restraining order against the Appellant when she saw him on her street shortly after her testimony; they do not live in proximity to each other. The Appellant admitted that he had contacted the man in question, who denied knowledge of any such bet, and agreed to

testify on his behalf. The Appellant denied that his actions had violated the sequestration order. (*Id.*)

The Commissioner advised the Appellant that his account did not match the testimony given by the witness. Counsel for the Appellant argued that dismissal of the case would be too extreme. The Commissioner advised the parties that he had many options: including crediting the witness's testimony in full without the opportunity for rebuttal by the Appellant. Counsel for the Appointing Authority stated that its request for dismissal was based on the Commissioner's statement that violation of the sequestration order by either party could result in dismissal of the case.

On or about April 26, 2002, Commissioner O'Neil issued his decision allowing the Appointing Authority's Motion to Impound All Transcripts. The Commissioner also granted the Appointing Authority's Motion to Prevent the Intimidation of, Interference with, or Retaliation Against Witnesses. The man was not called as a witness in these proceedings.

Submission of Suicide Note of Luis Melo

The Commission then addressed the issue of the suicide note of Luis Melo (hereinafter "Mr. Melo"). The note was presented by the Appointing Authority with an accompanying translation and death certificate of Mr. Melo, as a dying declaration c. 233 §65. The note was written in Portuguese and translated by Dennis Frias. Dr. Jose Figueiredo confirmed that the translation was indeed accurate. The note was accepted into evidence. (*See* March 11, 2002 Transcript, Exhibits 6, 9 and 31)

Submission of Prior Sworn Testimony of Mr. Melo

The Appointing Authority submitted the prior sworn testimony of Mr. Melo from the Appointing Authority hearing, held pursuant to c. 31 §41. The Appointing Authority argued that

prior testimony of a presently unavailable witness is admissible if given under oath in a similar proceeding where the issues were substantially the same and the opposing party had an opportunity to cross-examine. *See Commonwealth v. Trigones*, 397 Mass. 633, 638 (1986); *Commonwealth v. Koonce*, 418 Mass. 367, 378 n. 6 (1994). The Commission accepted the prior testimony of Mr. Melo as Exhibit 13.

Motions to Exclude Testimony of Appellant

On August 15, 2007, the Appointing Authority filed a Motion in Liminie to Exclude the Testimony of the Appellant. The Appointing Authority argued that the Appellant had failed or refused to testify at the Section 41 hearing and that the subject discipline could only be based on the facts and circumstances found to have existed at that time. The Appointing Authority argued that the Appellant's testimony could not be weighed in order to determine just cause for the discipline by the Appointing Authority's designated fact-finder. Therefore, the Appellant should be denied the opportunity to present such testimony at the subsequent Commission hearing since would be irrelevant. The Appellant argued that the Commission hearing is a *de novo* proceeding, and that he had had no obligation to testify at the Section 41 hearing. The Appellant maintained that, by statute, he could answer in person or through counsel and he chose to answer through counsel. The Appointing Authority's motion was denied on August 17, 2007. The Appellant's testimony was heard in this hearing and is given due weight here.

On August 15, 2007, the Appointing Authority filed a Motion in Liminie to Exclude Testimony by the Appellant Related to Alleged Assault. The motion was filed because the Appointing Authority anticipated testimony that could violate c. 41 §97D, regarding the confidentiality of conversations between victims and police officers relative to sexual assault.

The motion was taken under advisement. The Appellant's testimony at the Commission hearing was such that it did not necessitate a ruling on this motion.

Statement of Charges

The Appointing Authority contends that it had just cause suspend the Appellant for sixty (60) days based on the Appellant's violation(s) of the following HPD's Rules and Regulations and the General Laws:

1. Rule 4.03, Conflict of Interest;
2. Rule 4.17, Use of Official Position;
3. Rule 6.9, Truthfulness;
4. Rule 7.01, Insubordination;
5. Rule 9.18, Cooperation with Internal Affairs Investigation
6. Rule 9.19, Withholding Evidence;
7. Rules 9.20, Testifying at Investigation; and
8. G.L. c. 268A, §23(b)(2).

(Exhibits 1, 2 and 7)

The specific allegations levied by the Town against the Appellant are found in Section 41. The Hearing Officer's Report and Recommendation and state as follows:

1. "In 1999, in your capacity as a friend to Maria Graves, you allegedly provided advice to her about obtaining a 209A protective order against Luis Melo. Then, in your capacity as a police officer, you participated in the issuance of the protective order against Luis Melo. Furthermore, you allegedly continued to advise Ms. Graves regarding the 209A protective order.
2. During the investigation of a complaint made against you by Mr. Melo you were given a written order, dated July 28, 1999, not to have contact with Mr. Melo. You allegedly violated this order by having contact with Mr. Melo on several occasions, including on or about July 29, 1999, August 6th and 7th, 1999 and the week of September 1999 (sic) at the bar at which he worked, at your home on or about August 12, 1999 and on other such occasions.
3. During the course of the investigation you allegedly withheld evidence and were less than truthful with the investigating officer when questioned in connection with investigation.

4. On August 30, 1999, while off duty, you allegedly backed a truck into a parked motor vehicle in the area of Raymond Court. You allegedly left the scene of the accident before the police arrived and did not report it.”

(Exhibit 7)

FINDINGS OF FACT:

Based on the documents entered into evidence (Exhibits 1 – 32) and the testimony of:

For the Appointing Authority

- HPD Sergeant Lyndon Lewis (Retired) (hereinafter “Sgt. Lewis”)
- HPD Officer John Yates (hereinafter “PO Yates”)
- HPD Captain David Stephens (hereinafter “Capt. Stephens”)
- Dr. Jose Figueriedo (hereinafter “Dr. Figueriedo”)
- Nelia Lopes (hereinafter “Ms. Lopes”)
- Emilia Rodrigues (hereinafter “Ms. Rodrigues”)
- Joao Chaves (hereinafter “Mr. Chaves”)
- Fernanda Santos (hereinafter “Ms. Santos”)
- Antonio Paulino (hereinafter “Mr. Paulino”)
- HPD Lieutenant David French (*See* footnote # 2)

For the Appellant

- The Appellant

I make the following findings of fact:

1. The Appellant was a tenured civil service employee of the HPD in the position of patrolman. He had been employed by the Town for approximately 20 years at the time of the instant appeal, having been hired as a reserve police officer in 1980, and then full time in 1988. (Testimony of Appellant)

2. The Appellant is 59 years old. During the pendency of this appeal, in 2005, the Appellant petitioned the Middlesex Retirement Board for, and was granted, an ordinary disability retirement. Because the retirement is an ordinary and not a work-related disability retirement, the Appellant did not receive retroactive compensation. (Testimony of Appellant)
3. In 1983, the Appellant cooperated with the Massachusetts State Police and Middlesex County District Attorney in the investigation that drunk driving cases were being dismissed by the HPD in exchange for payment by defendants. The investigation led to the removal of the Police Chief and Police Prosecutor. (Testimony of Appellant)
4. Following the Appellant's cooperation in the above matter, he was bypassed for full-time employment with the HPD. He sued the Department in the United States District Court District of Massachusetts and was later hired as a full-time officer. (Testimony of Appellant)
5. The Appellant testified that the Hudson Board of Selectmen did not confirm his appointment to a full-time police officer position because the Board had labeled him a "whistleblower." (Testimony of Appellant)
6. Under cross examination, the Appellant admitted that he was not confirmed due to his failure of the physical examination. He further stated that he believed the physical requirements were "changed just for him" prior to his failing them. (Testimony of Appellant)
7. The Appellant testified that he was an aggressive union advocate and had developed an adversarial relationship with Capt. Stephens after the Appellant testified against him in a gender discrimination case. (Testimony of Appellant)

8. The Appellant and Mr. Melo met through the latter's former father-in-law. They became friends, and often fished and hung-out together. Mr. Melo, still married to his former wife, Susan, introduced Maria Graves (hereinafter "Ms. Graves") to Mr. Melo as his girlfriend. (Testimony of Appellant)
9. The Appellant testified that Mr. Melo was very jealous, he became upset and enraged when Ms. Graves would flirt with other men. (Testimony of Appellant)
10. Mr. Melo told the Appellant that he cut his own finger off so he spend time at home with Ms. Graves - and watch her. Ms. Lopes, a bartender at the Azores Pub where Mr. Melo also worked, and Ms. Rodrigues, both friends of Mr. Melo's, testified that Mr. Melo told them that he had cut his finger off for the same reason. (Testimony of Appellant, Testimony of Ms. Lopes, Testimony of Ms. Rodrigues)
11. The Appellant testified that he saw Mr. Melo around town quite often, especially at the Azores Pub. The Azores Pub was a popular gathering spot for the Portuguese-American community in Hudson. (Testimony of Appellant)
12. I find that Mr. Melo was infatuated with Ms. Graves and, in the words of Ms. Lopes, "loved the ground that she walked on and he would do anything for her." I also find that a review of the overall testimony reveals that Mr. Melo's romantic yearning for Ms. Graves did not affect the veracity of the allegations that he leveled against the Appellant. None of the witnesses gave testimony that would even suggest that Mr. Melo was untruthful in this matter or that he was prone to being untruthful. (Testimony of Ms. Lopes, et al.)

Citizen's Complaint by Mr. Melo against the Appellant

13. On July 24, 1999, at approximately 11:00 a.m., Mr. Melo filed a citizen's complaint against the Appellant which led to the Town's charges against the Appellant. (Exhibit 3)

14. The complaint was received by (now retired) Sgt. Lewis, who was with the HPD for 29 years: 14 years as a patrolman and 15 years as a sergeant. Sgt. Lewis filled out the complaint for Mr. Melo because, while Mr. Melo spoke English, he could not write it.

(Testimony of Sgt. Lewis)

15. The complaint stated:

“Joe has been repeatedly to 122 Houghton Street talking to Maria. He has been going in Azore’s Pub while on duty looking for Luis. Joe confronts him telling him ‘watch what you do. I’ll be on your ass.’ Luis feels Joe is following him at the bar, at the house, at Honey Dew, etc., in an attempt to provoke him so Joe can arrest him.

All Luis wants is for Joe to leave him alone.”³

(Exhibit 3)

16. At approximately 11:45 a.m., less than an hour later, the Appellant asked Sgt. Lewis to meet him behind the Horseshoe Pub in Hudson. Sgt. Lewis and the Appellant were both on duty at the time. The Appellant asked Sgt. Lewis if Mr. Melo had filed a complaint against him. (Testimony of Sgt. Lewis)

17. The Appellant told Sgt. Lewis that Mr. Melo had “problems,” that Mr. Melo and Ms. Graves had been a couple, but their relationship was on the rocks, and that in the past Ms. Graves had taken out a restraining order against Mr. Melo. (Id.)

18. The Appellant also informed Sgt. Lewis that Ms. Graves had thrown Mr. Melo out of the house the week before. The Appellant further stated that Ms. Graves had flagged him down on Washington Street that same day, and told him that Mr. Melo had been to her house

³ It was not disputed by either party that “Joe” refers to the Appellant, “Maria” refers to Ms. Graves and “Luis” refers to Mr. Melo.

today and would be filing a complaint against the Appellant. (Testimony of Sgt. Lewis, Exhibit 4)

19. The Appellant informed Sgt. Lewis that he had advised Ms. Graves to get a temporary restraining order. The Appellant also told Sgt. Lewis that he and Ms. Graves were just friends, and that he had advised her several times to get a restraining order against Mr. Melo. (Testimony of Sgt. Lewis)
20. On the same day, July 24, 1999, at approximately 1:00 p.m., Ms. Graves went to the Hudson Police Station, seeking a temporary restraining order against Mr. Melo. (Exhibit 4)
21. Mr. Melo was unavailable before the Commission because he had committed suicide on April 11, 2000. He attributed this death by his own hand to the provocation of the Appellant. Mr. Melo had testified at the Appointing Authority hearing, however, and this testimony was entered as an exhibit to this proceeding. (Exhibits 6, 31 and 13)
22. In that testimony, Mr. Melo explained that he had filed the complaint due to the Appellant's harassment and threats. Mr. Melo believed the Appellant was trying to destroy his relationship with Ms. Graves. He filed the complaint so that the Appellant would leave them alone. (Exhibit 13)
23. Ms. Lopes, a friend of Mr. Melo's, testified that he told her that he filed the complaint because the Appellant was intimidating him and trying to court his girlfriend. (Testimony of Ms. Lopes)
24. Mr. Paulino, another friend, testified that Mr. Melo had told him he had filed the complaint because the Appellant had gone out with his girlfriend and made his life miserable.

Mr. Melo told Mr. Paulino that the Appellant was about to “put him in jail, take him out.”

Mr. Paulino testified he believed Mr. Melo because he was upset and crying. (Testimony of Mr. Paulino)

25. A third friend of Mr. Melo’s, Mr. Chaves, testified that Mr. Melo was honest and would not complain that the Appellant was bothering him if it was not true. (Testimony of Mr. Chaves)
26. On or about July 28, 1999, Lt. French was assigned to conduct an internal investigation of the complaint. (Exhibit 15)
27. From September to December 1999, the complaint was referred to the District Attorney’s office for a determination of whether the Appellant’s actions constituted a criminal violation. After an investigation by the State Police, the District Attorney concluded that while there was insufficient evidence for presentment to the grand jury, internal discipline would be appropriate. (Exhibits 26 and 32)
28. When Lt. French met with Mr. Melo on July 28, 1999, he was informed that the Appellant was involved in an ongoing personal relationship with his girlfriend. In addition, Mr. Melo said that the Appellant was harassing him and telling people that he was involved in narcotics and drug use so that the girlfriend would end the relationship. (Testimony of Lt. French)
29. Mr. Melo said that he and Ms. Graves used to live together. A few weeks before, they had gone to dinner with family and friends, including the Appellant. After the dinner, Ms. Graves asked him to move out. (Testimony of Lt. French, Exhibit 13)

30. Mr. Melo said that he believed the Appellant had advised Ms. Graves to get the restraining order (the Appellant had admitted this to Sgt. Lewis). Afterwards, the Appellant began following him and threatening to lock him up. (Testimony of Lt. French)
31. Mr. Melo said that he brought the complaint because he wanted the following and harassment to stop. This is consistent with his written complaint and the subsequent testimony he provided at the Appointing authority hearing in 2000. (Testimony of Lt. French, Exhibit 13)
32. Lt. French testified before the Commission that in the “dozens of meetings” with Mr. Melo, he always appeared scared and nervous. Lt. French attributed this demeanor to Mr. Melo fear of the Appellant. (Testimony of Lt. French)
33. Lt. French testified that Mr. Melo called him on April 11, 2000 to tell him that he no longer trusted the police, and that the lieutenant would find him with a note in his pocket. This was approximately one week after his testimony at the Section 41 hearing. Mr. Melo said that “something bad is going to happen” to himself within the next few weeks. The HPD did find Mr. Melo dead that day, hanging with a suicide note in his pocket. (Testimony of Lt. French, Exhibits 6 and 13)
34. According to Capt. Stephens, that same day Mr. Melo was wanted by the police for assault and battery, and the rape or attempted rape of Ms. Graves. Capt. Stephens found Mr. Melo’s body at 122 Houghton Street, where he had been living with Ms. Graves. Capt. Stephens testified that Lt. French, then Acting Captain, had alerted HPD personnel to look for Mr. Melo. Capt. Stephens did not believe that there was an active 209A order against Mr. Melo at that time. (Testimony of Capt. Stephens)

35. I find that, other than testimony denying the allegations by Mr. Melo against him, the Appellant offered no evidence and produced no witnesses to rebut the charges in Mr. Melo's complaint. The Town offered testimony from witnesses who knew Mr. Melo well enough, who were consistent in their statements, and who were unbiased. I find that they were credible witnesses. Their individual veracity was further confirmed in that their stories corroborated each other, and were not rebutted by the Appellant.

The Appellant improperly advised Ms. Graves regarding protective orders against Mr. Melo

36. On July 11, 1999, a temporary restraining order under c. 209A was issued against Mr. Melo, to run from July 11, 1999 at 10:35 a.m. through 4:00 p.m. on July 12, 1999. (Exhibit 17)
37. The Appellant served this restraining order on Mr. Melo despite, as the Town asserts, his personal relationship with Ms. Graves and his alleged involvement in counseling her to obtain such an order. The Appellant testified at the Commission hearing that he was instructed by his supervisor to take Mr. Melo into protective custody and advise Ms. Graves about her rights under c. 209A. The Appellant testified that he only did as instructed. (Testimony of Appellant, Exhibit 17)
38. The Town asserts that the Appellant acted in his capacity as a friend of Ms. Graves, not as a police officer, when he advised and counseled her about obtaining the restraining order. The Town charges that the Appellant then acted in his capacity as a police officer when he participated in serving the 209A order on Mr. Melo. The Town also charges that the Appellant then continued to advise Ms. Graves about extending 209A order against Mr. Melo. (Exhibit 7)

39. The Town alleges that the Appellant improperly advised Ms. Graves on the 209A order because was involved in a romantic relationship with Ms. Graves while she was also involved with Mr. Melo. The Town charged that this “classic relationship triangle” presented a conflict of interest when the Appellant used his position as a police officer to influence Ms. Graves. (Proposed Decision of the Respondent)
40. The Appellant admitted that he was friends with Ms. Graves, but maintained that the relationship was social in nature and that he desired nothing further. He insisted to Sgt. Lewis and Lt. French that they were only friends. On August 17, 2007, he also testified before the Commission that this was the extent of their relationship. (Testimony of Sgt. Lewis, Testimony of Lt. French, Testimony of the Appellant)
41. Mr. Melo maintained that the Appellant was actively courting Ms. Graves. (Exhibit 13)
42. The Town presented several witnesses before the Commission to provide testimony about the romantic nature of the relationship between the Appellant and Ms. Graves. (Testimony of Ms. Lopes, Ms. Rodrigues, Mr. Chaves and Mr. Paulino)
43. Ms. Lopes has been a resident of Hudson for 31 years. She worked full time at the Azores Pub for 3 years as a bartender through January 2001. Mr. Melo, a part-time coworker, was close friend. Mr. Melo also visited her at the pub when he was not working. They spoke every day. Ms. Lopes has also known the Appellant for approximately 15-16 years. They stopped being close friends in 1999. (Testimony of Ms. Lopes)
44. Ms. Lopes testified that she knew the Appellant and Ms. Graves were having a romantic relationship because Ms. Graves had told her that they were involved. Ms. Lopes had also saw them fondling each other, holding hands and kissing at the pub. At Ms. Lopes’

fiancé's home, the Appellant introduced Ms. Graves as his girlfriend. (Testimony of Ms. Lopes)

45. Ms. Lopes also offered the following, significant testimony under examination by Attorney Rozak for the Town:

Q. "Did you ever speak to Joe Chaves about his relationship with Maria Graves?

A. Yes, I did.

Q. What did he tell you?

A. I spoke to him in the back room of the pub.

Q. And when was this? Was this again in 1999?

A. Yes, it was.

Q. What was the substance of your conversation?

A. Excuse me. It wasn't in '99.

Q. When was this conversation?

A. This was - - Luis died in April.

Q. Was it before - -

A. It was December or January. It was before Mr. Melo passed away.

Q. So sometime maybe in December 1999 or January 2000?

A. Yes.

Q. And you were going to testify about a conversation you had with Mr. Chaves at the Azore's Pub?

A. We had it in the back room where we keep our stock.

Q. What was the conversation?

A. The conversation was that he loved Maria, he wanted to be with Maria, and for that he had to do things right and he had to leave Luis alone. They had to get off this thing of both of them wanting the same woman. Joe was very close. He was almost a father to me. And Luis was a close friend, and I saw both of them killing each other over a woman.

Q. Did you say that to him?

A. Yes, I did.

Q. Did he say anything to you?

A. No."

(Transcript)

46. Ms. Lopes testified that she witnessed the Appellant and Ms. Graves "with [her] own eyes" and knew they were a couple; there was no doubt in her mind they were romantically involved. Ms. Lopes also testified about a trip the Appellant and Ms. Graves took to

Florida together. She also observed the Appellant's truck and a police cruiser at Ms. Graves's house all the time. (Testimony of Ms. Lopes)

47. Ms. Rodrigues has lived in Hudson for approximately 7 years. Ms. Rodrigues was friends with both Mr. Melo and Ms. Graves. She lived about 3 minutes walking distance from Ms. Graves. (Testimony of Ms. Rodrigues)

48. Ms. Rodrigues had been friends with Mr. Melo since 1994, and she first met Ms. Graves in 1998, right after Mr. Melo met Ms. Graves. Shortly thereafter, Ms. Rodrigues became friends with Ms. Graves. Although Ms. Rodrigues knew that the Appellant was a police officer, she did not know him socially; the first time she met him was at Ms. Graves' house. (Testimony of Ms. Rodrigues)

49. Ms. Rodrigues testified before the Commission that on one Saturday during the summer of 1999, she received a call from Ms. Graves asking her to come to her home right away. When she arrived, the Appellant was there. Ms. Graves wanted to go out that night with Ms. Rodrigues. When Ms. Graves asked the Appellant to leave, he refused to do so. When Ms. Graves went to the bathroom to get ready, the Appellant who told Ms. Rodrigues he "liked" Ms. Graves. (Testimony of Ms. Rodrigues)

50. Ms. Rodrigues understood that the Appellant wanted to pursue a relationship with Ms. Graves. She was surprised that he would say so since he knew that Ms. Graves was involved with Mr. Melo. Ms. Rodrigues and Ms. Graves did go out that evening, leaving the Appellant at Ms. Graves' home. (Testimony of Ms. Rodrigues)

51. On another occasion, Ms. Rodrigues was out walking and noticed that their mutual friend, Odelta, was there when she reached Ms. Graves' house. The Appellant and Ms. Graves' mother were also there, everyone was having dinner. Ms. Rodrigues stopped in and stayed

for a little while. Ms. Rodrigues testified that the Appellant referred to Ms. Graves' mother as "Mom." (Testimony of Ms. Rodrigues)

52. Ms. Rodrigues testified that, during her short stay, Ms. Graves remarked that she liked her ring. The Appellant asked Ms. Rodrigues where she bought the jewelry, a symbolic Portuguese ring. Ms. Rodrigues replied that she had bought it in Portugal. The Appellant replied that "they" would go to Fall River, because there is a Portuguese community there, and buy the same type of ring for Ms. Graves. (Testimony of Ms. Rodrigues)

53. Similar to Ms. Lopes's testimony, Ms. Rodrigues testified that while out walking, she observed either the Appellant's truck or his police cruiser at Ms. Graves' house. (Testimony of Ms. Rodrigues)

54. One Saturday in September 1999, around 5:00 p.m., Ms. Rodrigues went to pick up Ms. Graves so that they could attend a Portuguese festival. The Appellant was there. As they were leaving, the Appellant grabbed Ms. Graves because he did not want her to leave. The Appellant stayed at Ms. Graves' house after they left. (Testimony of Ms. Rodrigues)

55. Mr. Chaves arrived in the United States in or about 1998. He has lived in Hudson on and off for about five (5) years, and knew Mr. Melo very well. They met shortly after Mr. Chaves arrived in this country. (Testimony of Mr. Chaves)

56. Mr. Chaves also testified that he knows both the Appellant and Ms. Graves. He met Ms. Graves when she started going out with Mr. Melo. Although he was not certain if Ms. Graves and the Appellant were involved in a "romantic" relationship, had seen them out together at the Azores Pub on several occasions and described them as "a couple." (Testimony of Mr. Chaves)

57. Mr. Paulino has lived in Hudson for over thirty (30) years and owns his own auto repair business. Mr. Paulino testified that he was a good friend of Mr. Melo and knew him for more than ten (10) years. (Testimony of Mr. Paulino)
58. Mr. Paulino has known the Appellant for over twenty (20) years and is aware he is a police officer. Mr. Paulino also knows who Ms. Graves is. He knew she was Mr. Melo's girlfriend and that they lived together in Hudson. (Testimony of Mr. Paulino)
59. Mr. Paulino testified that he had seen the Appellant and Ms. Graves together at the Azores Pub. Mr. Paulino also testified about an occasion that he had let the Appellant and Ms. Graves borrow his car and they got stuck on the road. The Appellant called Mr. Paulino for assistance. When Mr. Paulino went out to restart the car, Ms. Graves was with the Appellant. (Testimony of Mr. Paulino)
60. The Appellant told Mr. Paulino that he would visit Ms. Graves at her house. He also told Mr. Paulino that Ms. Graves came over to his place many times. When interviewed as part of the investigation of Mr. Melo's complaint, the Appellant only admitted that Ms. Graves had been to his house "two or three times." Testimony of Mr. Paulino, Exhibit 28)
61. The Appellant told Mr. Paulino that Ms. Graves would take a taxi to his house. Mr. Paulino assumed that she did this so no one would see her car at the Appellant's house. (Testimony of Mr. Paulino)
62. Mr. Paulino testified that the Appellant told him that he was romantically involved with Ms. Graves. When Mr. Paulino raised the point that Mr. Melo was going out with Ms. Graves, the Appellant told Mr. Paulino that he could do what he wanted because he is a cop. (Testimony of Mr. Paulino)

63. Capt. Stephens also testified that he had personal knowledge of a relationship between Ms. Graves and the Appellant. The Captain had heard that the Appellant was seeing Ms. Graves and one night he saw them out dining. Capt. Stephens was with his family for dinner, and the Appellant came over and introduced Ms. Graves to him. (Testimony of Capt. Stephens)
64. I find that, other than his own testimony denying that he was anything more than “just friends” with Ms. Graves, the Appellant offered no evidence and produced no witnesses to rebut the compelling testimony of several witnesses demonstrating that they were certain that the Appellant and Ms. Graves enjoyed a romantic relationship. The Town offered testimony from witnesses who knew Ms. Graves and the Appellant well enough, who were consistent enough in their respective statements and who were far enough removed from having any bias against the Appellant in this matter that they could be considered by this Commission as credible witnesses. Their individual veracity was further confirmed when their stories corroborated each other, and were not rebutted by the Appellant. Ms. Graves, the one person other than the Appellant who could have shed substantial light on this point, was not called to testify in this appeal.
65. When interviewed on January 26, 2000 as part of the investigation surrounding the complaint against him, the Appellant admitted that he had advised Ms. Graves about obtaining a *temporary* 209A against Mr. Melo, but he denied advising her to extend it. He described Ms. Graves as only a friend. (Testimony of Lt. French, Exhibit 28)
66. Sgt. Lewis testified that the Appellant had admitted earlier to him, on July 24, 1999, that he had advised Ms. Graves several times to get a 209A against Mr. Melo. (Testimony of Sgt. Lewis, Exhibit 4)

67. On July 11, 1999, the Appellant served the temporary 209A on Mr. Mello. On July 24, 1999, the same day Mr. Melo filed his citizen's complaint against the Appellant, Ms. Graves requested and received a 209A order for one year against Mr. Melo; for the period July 24, 1999 through July 24, 2000. (Exhibits 17 and 18)
68. Mr. Melo believed that the Appellant manipulated Ms. Graves into obtaining first the temporary 209A and then extending it. Mr. Melo stated that, on one occasion, he overheard a conversation between the Appellant and Ms. Graves concerning the restraining order. This happened when Ms. Graves failed to hang up the phone after he called her. The line remained open and Mr. Melo overheard Ms. Graves and the Appellant discussing the order. (Exhibit 13)
69. Mr. Melo also stated that on or about August 11, 1999, he spent the night with Ms. Graves at a hotel. Ms. Graves admitted to the State Police that she had spent the night with Mr. Melo at a hotel while the restraining order was active. (Exhibits 13 and 32)
70. That night, Ms. Graves told Mr. Melo that she would request that the restraining order be vacated. The next day, however, she called and said that the Appellant was going to lose his job because of the complaint filed by Mr. Melo. As a result, she could not request that the order be vacated unless Mr. Melo withdrew the complaint. (Exhibit 13)
71. The next day, August 12, 1999, Mr. Melo went to the Appellant's house for a cookout. Ms. Graves was present. (Testimony of Lt. French, Exhibits 13 and 32)
72. On the evening of August 13, 1999, Ms. Graves invited Mr. Melo to Checkerboard's restaurant for dinner with her, her mother and Edmund Betty (hereinafter "Mr. Betty"), a mutual friend from New Jersey. (Exhibit 21)

73. HPD Patrol Officers DiPersio and Blair were also at Checkerboard's Restaurant. They observed Mr. Melo and Ms. Graves in the parking lot together as they left, walking hand in hand. The Officers recognized Mr. Melo from a previous arrest for violation of the 209A order. (Exhibit 21)
74. Officer Blair contacted dispatch to confirm that the 209A was still in effect, while Officer DiPersio watched the four individuals exit the parking lot in Mr. Betty's vehicle. Upon confirmation, Officers DiPersio and Blair followed, stopped the vehicle, and arrested Mr. Melo for violating the 209A order. (Exhibit 21)
75. Ms. Graves told the officers that Mr. Melo was with them at her invitation and that she did not want him arrested. She also told them that she might request that the restraining order be vacated. Ms. Graves even contacted the District Attorney's Office and told Assistant District Attorney Kerry Aleman (hereinafter "ADA Aleman") that she had invited Mr. Melo to dinner since they were trying to work things out. Ms. Graves also told ADA Aleman that she was not afraid of Mr. Melo. ADA Aleman advised Ms. Graves to go to court before contacting Mr. Melo again. (Exhibits 21 and 22)
76. As ADA Aleman was speaking with Ms. Graves on the phone, Mr. Betty came in to her office. Mr. Betty told ADA Aleman that all of them had gone to the restaurant as friends, and there was no problem between Ms. Graves and Ms. Melo. (Exhibit 22)
77. Mr. Melo told Lt. French that after he had spent the weekend in jail, Ms. Graves contacted him and said that the Appellant had urged her to keep the restraining order active until the internal complaint was dropped. (Testimony of Lt. French)
78. Lt. French spoke with Mr. Betty by telephone on or about August 18, 1999. Mr. Betty said he was a friend and business partner of Ms. Graves, and a friend of Mr. Melo. Mr. Betty

told the lieutenant that he had just met the Appellant for the first time at Ms. Graves' house over the weekend. Mr. Betty was aware there was a problem between the Appellant and Mr. Melo. (Testimony of Lt. French)

79. Mr. Betty informed Lt. French the he overheard that conversation between the Appellant and Ms. Graves. Mr. Betty said that the Appellant told Ms. Graves to keep the restraining order active until the internal complaint against him was dropped by Mr. Melo.

(Testimony of Lt. French)

80. Despite Ms. Graves' discussion with ADA Aleman, she did not seek to have the restraining order vacated in court. Mr. Melo was arrested again on September 1, 1999 for an alleged violation of the restraining order. (Exhibits 22 and 30)

81. In the meantime, Mr. Melo was issued a summons to appear for a probable cause hearing.

(Exhibit 23)

82. On October 5, 1999, the restraining order was vacated. Ms. Graves informed the court that she was no longer in fear of her safety. (Exhibit 27)

The Appellant violated a written order forbidding him from contacting Mr. Melo – the “No Contact” Order

83. On July 28, 1999, Lt. French handed the Appellant an order instructing him to refrain from contact with Mr. Melo. (Testimony of Lt. French, Exhibit 15)

84. Lt. French advised the Appellant that the order prohibited him from having any communications with, and to stay away from, the complainant, Mr. Melo, and to stay away from his workplace. Lt. French also told the Appellant to report if he had even inadvertent contact with Mr. Melo so that the Lieutenant would be aware in the event Mr. Melo made a further complaint about harassment. (Testimony of Lt. French, Exhibit 15)

85. The Appellant testified at the Commission hearing that he complied with the “No Contact” order at all times. He stated that he understood the order not to cover any “casual” or incidental contact with Mr. Melo. (Testimony of Appellant)
86. On August 7, 1999, HPD PO Yates was working the 11:00 p.m. to 7:00 a.m. shift. Around midnight he was parked at the Armory on Washington Street speaking with HPD Officer Joseph Kerrigan (hereinafter “PO Kerrigan”). (Testimony of PO Yates)
87. The Appellant arrived at the Armory, in his truck, to speak with PO Kerrigan. PO Yates was not directly involved in the discussion, but he could hear the conversation. PO Yates testified before the Commission that the Appellant told PO Kerrigan that he was having a problem with the man who filed the complaint against him while at the Azores Pub, and that he left the pub to avoid a confrontation. (Testimony of PO Yates)
88. PO Yates testified that he was aware of the complaint, but he thought that the woman involved in this matter was the Appellant’s girlfriend. PO Yates stated that he assumed that the other man must be her ex-boyfriend. (Testimony of PO Yates)
89. PO Yates also testified that, as he understood it, the Appellant was saying that Mr. Melo was filing a complaint against him for spending time at Ms. Graves house while he was on duty. (Testimony of PO Yates)
90. On August 12, 1999, Mr. Melo attended a cookout at the Appellant’s house. Ms. Graves confirmed this fact to the State Police. (Testimony of Lt. French, Exhibits 13 and 32)
91. The Appellant testified at the Commission hearing that Mr. Melo had indeed shown up, but was unaware that he had been invited. He asked him to leave. (Testimony of Appellant)
92. The Appellant testified that he was in a room on the other side of his house from the party, convalescing from a medical procedure involving his heart. When the party became loud,

he emerged from his room and discovered that Mr. Melo's presence. Mr. Melo's cousin, Daniel, was visiting from Portugal and was staying with the Appellant. This visit was the occasion for the cookout. (Testimony of Appellant)

93. In contrast, Mr. Melo stated that when the Appellant spoke to him, he asked him to drop the citizen's complaint and to just ignore Lt. French when he made contact. According to Mr. Melo, the Appellant did not ask him to leave his house. Instead, the Appellant said, "If something happens, you've never been here." (Exhibit 13)
94. I find that the Appellant's testimony before the Commission in regard to the August 12, 1999 cookout inconsistent with previous statements made during the Internal Affairs investigation. It is not documented on the record that the Appellant mentioned an illness or convalescing in a room away from the party. The Appellant's testimony before the Commission was the first revelation that he was not socializing with the other attendees, including Mr. Melo. I find that the Appellant's testimony that he emerged from his convalescence to discover Mr. Melo at his home was not credible.
95. On at least three or four occasions during the time that the "No Contact" order was in effect, Ms. Lopes observed the Appellant at the Azores Pub while Mr. Melo was there. (Testimony of Ms. Lopes)
96. Mr. Chaves also testified that he saw the Appellant at the Azores Pub at the same time Mr. Melo was there during the summer and fall of 1999. (Testimony of Mr. Chaves)
97. The Appellant testified that he was unaware that Mr. Melo worked at the Azores Pub since did not go there every day. (Testimony of Appellant)

98. I find that the Appellant's statement that he did not know of Mr. Melo's employment at the Azores Pub is preposterous based on the weight of testimony to the contrary, including his own testimony that he saw Mr. Mello at the Azores Pub "many times."
99. I further find that Lt. French was credible when he testified that he counseled the Appellant to report even inadvertent or incidental contact with Mr. Melo. Lt. French's reasoning for this instruction was sound in light of Mr. Melo's fearful state of mind. It was for the Appellant's own good that he should steer well clear of Mr. Melo and avoid any further complaints. Therefore, I also find that the Appellant was not credible when he testified that he had not been so instructed.
100. After Mr. Melo withdrew his complaint, the Appellant met with him and Ms. Graves at the 99 Restaurant in Hudson. The Appellant thanked Mr. Melo for dropping the complaint but told him "this thing is not over." The Appellant advised Mr. Melo that he should "ignore whoever (from the police department that) needs to talk about it." (Exhibit 13)

The Appellant left the scene and failed to report an August 30, 1999 motor vehicle accident at the Raymond Court apartment complex

101. On August 31, 1999, Mr. Melo contacted Lt. French and told him that the night before he had observed his truck, co-owned with Ms. Graves, involved in an accident at Raymond Court (an apartment complex with multi-unit buildings). The Appellant was the operator. (Testimony of Lt. French)
102. There was some confusion during the course of the hearing as to whether Ms. Graves or Mr. Melo owned the truck and boat that Mr. Melo would refer to as "his." Ms. Lopes explained that Ms. Graves had signed for the vehicles, but Mr. Melo made the payments. In addition, Mr. Melo assisted her with house payments. The Appellant testified that the

truck was Ms. Graves's but was aware that Mr. Melo claimed it as his own. (Testimony of Ms. Lopes, Testimony of the Appellant)

103. For the purposes of this decision, the truck's owner is Ms. Graves.

104. Mr. Melo said that he saw the Appellant hit a parked vehicle in the parking lot. Mr. Melo approached the Appellant and told him he just hit a vehicle, but the Appellant denied it. (Testimony of Lt. French, Exhibit 19)

105. Lt. French testified Mr. Melo told him that he had witnessed the accident, went over to speak to the Appellant, but fled when he realized that Ms. Graves was present as a passenger. Mr. Melo said he was concerned about violating the 209A restraining order. (Testimony of Lt. French)

106. Lt. French investigated the report of the accident and found damage to a car at Raymond Court, as well as damage to Ms. Graves's truck. He took pictures of both vehicles. (Testimony of Lt. French, Exhibit 19A)

107. Lt. French explained that there was old damage on the right side of Ms. Graves's truck. However, there was new damage and paint transfer on the rear bumper of the truck that was consistent with the other vehicle. He also observed a chip of the amber plastic lighting from the parked vehicle on the trailer hitch of the truck. (Testimony of Lt. French, Exhibit 19A)

108. After taking photos of the truck, Lt. French tried to speak with Ms. Graves, but she would not answer her door. She did call him later in the day. She said that *she* had been driving the truck on August 30th, and that the damage to the right side was from a previous accident at Wal-Mart. (Testimony of Lt. French)

109. Lt. French testified that the Appellant never reported to him that he had been involved in an accident, nor did he report that he had contact with Mr. Melo on August 30, 1999.
- Lt. French stated that he later telephoned the Appellant on September 2, 1999, advising him that the accident had been reported and requesting a written report about the incident, including the 209A violation by Mr. Melo. (Testimony of Lt. French)
110. The Appellant testified at the Commission hearing that he had been helping Ms. Graves and Odelta move a desk with the truck on August 30, 1999. He stated that Mr. Melo emerged from behind a crop of bushes and loudly accused him of damaging another vehicle with the truck. (Testimony of Appellant)
111. In his written statement reporting the motor vehicle incident, the Appellant stated that Ms. Graves asked her friend to call the police and report that Mr. Melo was violating his 209A. The Appellant denied that an accident had occurred and stated that the truck in question had been previously damaged. The Appellant stated that he also left the scene as he was concerned about having any contact with Mr. Melo in violation of his “No Contact” order. (Testimony of Appellant, Exhibit 20)
112. During his discussion with Lt. French on September 2, 1999, the Appellant informed him that he was the *passenger* in the truck on August 30, 1999 and that Ms. Graves was driving. (Testimony of Lt. French)
113. In the Appellant’s written statement to Lt. French, he claimed that he was *driving* Ms. Graves’ truck on the night of August 30, 1999. (Exhibit 20)
114. During Lt. French’s Internal Affairs investigation of the Appellant, the following exchange between the Appellant and Lt. French took place in regard to the Raymond Court motor vehicle incident:

- Q. On the night of that incident, was Maria Graves operating a black Dodge truck at Raymond Court when you observed the 2098 (sic) violation?
- A. No.
- Q. Who was operating the truck?
- A. I was.
- Q. Who owns the truck?
- A. Maria Graves.
- Q. At any time while you were operating the truck at Raymond Court, did you back into another vehicle?
- A. No, I did not. Not that I know of, anyway. Let's put it that way.

(Exhibit 28, page 35)

115. I find that a preponderance of the evidence and testimony adduced at hearing strongly suggest that the Appellant was involved in a minor collision with a parked vehicle on August 30, 1999. I further find that the Appellant failed to report the accident and left the scene under the guise of avoiding further contact with Mr. Melo. This was the only time, in a review of the record of this matter, that the Appellant seemed truly concerned with not having contact with Mr. Melo and I find that concern was disingenuous.

The Appellant withheld evidence and was untruthful with the investigating officer during the course of an Internal Affairs investigation

116. At the time of his testimony in 2002, Lt. French had worked for the HPD for 18 years, successively holding the ranks of detective, acting Captain and Lieutenant. Before his service in Hudson, he worked for the Town of Stow as a police officer for five years.

(Testimony of Lt. French)

117. As of 1999, Lt. French had been responsible for conducting Internal Affairs investigations for a little over 4 years. On or about July 28, 1999, Lt. French was assigned by the Chief of Police to investigate the complaint made by Mr. Melo against the Appellant. (Testimony of Lt. French)

118. I found Lt. French's testimony at hearing to be credible. His recall of events, given the unusually long passage of time (nearly nine years in some cases), was almost painfully arduous. Nevertheless, his statements were consistent with his past reports and investigatory materials as entered into evidence in this matter. Overall, I find that Lt. French was a reliable witness.
119. Lt. French testified that he conducted a comprehensive and detailed investigation of the complaint made by Mr. Melo and submitted a voluminous report to the Chief of Police upon completion of the investigation. He also testified that the investigation spanned a number of months for various reasons, including the fact that Mr. Melo repeatedly contacted him about specific instances of harassment by the Appellant which needed to be investigated; the fact that Ms. Graves lodged a complaint against the lieutenant alleging that he was not enforcing the 209A against Mr. Melo, and that he was harassing Ms. Graves by asking her for information as part of his investigation. (Testimony of Lt. French)
120. As a result of Ms. Graves' complaint, Lt. French's investigation of Mr. Melo's complaint was put on hold on September 15, 1999. The Police Chief then referred Ms. Graves' complaint to the State Police for investigation. The complaint against Lt. French was investigated by the State Police and a letter dated November 29, 1999 from the District Attorney's Office to the Police Chief concluded that the complaint was unfounded. (Testimony of Lt. French, Exhibit 25)
121. During the course of the investigation, the Appellant told Lt. French that he had only provided advice or counseling to Ms. Graves concerning the *temporary* restraining order.

However, the Appellant told Sgt. Lewis that he had advised Ms. Graves several times to get a restraining order against Mr. Melo. (Testimony of Sgt. Lewis, Exhibits 25 and 28)

122. The Appellant told Lt. French that he never talked with either Ms. Graves or Mr. Melo about the internal affairs complaint made by Mr. Melo against him. However, on October 27, 1999, the Appellant had a conversation with Capt. Stephens and advised him that the complaint against him would be withdrawn the next day. On October 28 1999, Mr. Melo came to the station and withdrew his complaint against the Appellant. (Testimony of Capt. Stephens, Testimony of Ms. Santos, Exhibits 14 and 28)

123. The Appellant was previously disciplined on February 25, 1999, when he was suspended without pay for three (3) days for violating Department Rule 6.1, Public Criticism, and Rule 7.01, Insubordination: for making disparaging remarks toward certain supervisory personnel.

CONCLUSION

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. Civ. Serv. Comm'n, 43 Mass. App. Ct. 300, 304 (1997). *See* Watertown v. Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civ. Serv. Comm'n, 38 Mass. App. Ct. 473, 477 (1995); Police Dep't of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); 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." Cambridge at 304, *quoting* Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482

(1928); Commissioners of Civ. Serv. 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 substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Comm. of Brockton v. Civ. Serv. Comm'n, 43 Mass. App. Ct. 486, 488 (1997). The Appointing Authority's burden of proof is one of a preponderance of the evidence which is established "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. Falmouth v. Civ. Serv. Comm'n, 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).

By virtue of the powers conferred by their office, police officers are held to a high standard of conduct. "An officer of the law carries the burden of being expected to comport himself or

herself in an exemplary fashion.” McIsaac at 473-474. “[P]olice officers voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens.” Attorney General v. McHatton, 428 Mass. 790, 793 (1999). As stated in Police Comm’r of Boston v. Civ. Serv. Comm’n, 22 Mass. App. Ct. 364, 371 (1986):

Police officers must comport themselves in accordance with the laws that they are sworn to enforce *and* behave in a manner that brings honor and respect for, rather than public distrust of, law enforcement personnel. They are required to do more than refrain from indictable conduct. Police officers are not drafted into public service; rather, they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.

In order to ensure that police officers adhere to this standard, a “police department has ‘substantial and very practical reasons’ for penalizing an officer in such a case ... namely to enforce the highest norms of decorum in a department that depends on discipline under conditions of stress.” Falmouth at 798, *quoting* Police Dep’t. of Boston, at 413. An Appointing Authority is well within its rights to take 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 stop or a search or might embarrass a fellow officer.” Falmouth at 801, *citing* Cambridge at 303. Thus, “police rules of conduct and their enforcement as policy matters that, absent ‘overtones of political control or objectives unrelated to merit standards or neutrally applied public policy’ are beyond the Commission’s reach.” Boston Police Dep’t. at 408.

Police officers are granted their authority by the Commonwealth in order to maintain an orderly society and to protect the rights of citizens. The power granted to police officers is immense and requires adherence to the highest ethics of office and commitment to follow the principles of law. Both sworn and civilian members of the Police Department are expected to

abide by standards of behavior that are professional and appropriate to the mission of the Department and the integrity of the organization.

A preponderance of the credible evidence as presented in this matter makes clear that the Appointing Authority has met its burden of proof in establishing just cause for the sixty (60) day suspension of the Appellant.

The first charge against the Appellant alleges that in 1999, in his capacity as a friend to Ms. Graves - and not in his official capacity as a police officer - the Appellant advised and counseled her about obtaining a 209A restraining order against Mr. Melo; and that in his capacity as a police officer, he participated in the service of said restraining order on Mr. Melo. The charge also provides that the Appellant continued to advise Ms. Graves about maintaining the 209A protective order.

The facts show that the Appellant and Ms. Graves were more than just “friends.” The Town presented several witnesses who testified to their personal knowledge of their relationship. Despite the overwhelming evidence to the contrary, the Appellant maintains that he was just a friend. Apart from his own testimony, the Appellant presented absolutely no evidence to rebut the testimony of the Town’s witnesses.

The facts establish that Ms. Graves was involved in a romantic relationship with Mr. Melo, which did not appear to be the most stable at times. The Appellant admits that based on the relationship between Ms. Graves and Mr. Melo, he advised her to obtain a restraining order. The facts establish as well, however, that the Appellant was also involved in a relationship with Ms. Graves, which created a conflict of interest for the Appellant when he advised her to obtain a

restraining order, when he served the restraining order, and when he participated in the arrest of Mr. Melo.

The Appellant maintained in his blanket denial of the charges that Mr. Melo was mentally unstable in his romantic obsession with Ms. Graves. Because the Appellant believed that Mr. Melo's state of mind was clouded by this obsession, he felt it appropriate to advise Ms. Graves to get the order. However, Mr. Melo believed that the Appellant had manipulated Ms. Graves into maintaining the order not only to keep him out of the picture, but as leverage in getting Mr. Melo to drop his complaint.

Despite the Appellant's attempts to portray Mr. Melo as a mentally disturbed, paranoid individual who was unduly fearful of the Appellant and from whom Ms. Graves needed physical protection, the facts in this case demonstrate that Mr. Melo's statements were consistent and corroborated by other credible witnesses – while the Appellant's were not.

Although police officers routinely offer advice in domestic situations about a citizen's right to obtain 209A orders, the foregoing discussion demonstrates that the Appellant did much more than offer advice to a random member of the public. He had a personal relationship with Ms. Graves, a violation of c. 268A § 23(b)(2) which provides in relevant part that a public employee shall not "use or attempt to use his official position to secure for himself or others unwarranted privileges ..." The Appellant also violated Department Rule 4.03, Conflict of Interest, which explains that officers are to "avoid all situations involving conflicts of interest whether in fact or only in appearance." Similarly, the Appellant's actions violated Rule 4.17, Use of Official Position, which states in relevant part, "Officers shall not use their official position, ... (a) for personal or financial gain; (b) for obtaining privileges not otherwise

available to them except in the performance of duty, or (c) for avoiding consequences of illegal acts.”

The second charge against the Appellant states that during the investigation of the citizen complaint, the Appellant was given a written order, dated July 28, 1999, ordering to refrain from contact with Mr. Melo. The Appellant violated this order by interacting with Mr. Melo on several occasions, including on or about July 29, 1999, on August 6 and 7, 1999, during September 1999 at the Azores Pub, at the Appellant’s home on or about August 12, 1999 and at other times.

On July 28, 1999, Lt. French gave the Appellant a written no contact order. The order instructed the Appellant to have no contact with Mr. Melo. Additionally, the order stated that if the Appellant was dispatched to any type of police call in which Mr. Melo was involved, he was to call for a supervisor. Lt. French also discussed the no contact order at the time it was issued to the Appellant, and advised the Appellant to notify him or another supervisor in case of inadvertent contact.

Despite the order, the Appellant and Mr. Melo came into contact with each other a number of times at the Azores Pub. The Appellant would tell Mr. Melo when he saw him at the Azores Pub, “I’m not supposed to be here, I’m not supposed to be talking to you.” The Appellant repeatedly violated the order by showing up at the Azores Pub although he knew Mr. Melo worked there and spent his free time there with Ms. Lopes. At no time did the Appellant notify Lt. French or another supervisor of this contact. The Appellant’s assertion that he did not know that Mr. Melo worked at the Azores Pub and that he understood the “No Contact” order to allow for “inadvertent” or “casual” contact were unpersuasive.

On August 12, 1999, another violation of the “No Contact” order occurred when Mr. Melo attended a cookout at the Appellant’s home. When Ms. Graves was interviewed by the State Police, she admitted that the Appellant and Mr. Melo were together at the Appellant’s home on that occasion. Although the Appellant never notified anyone from the HPD that Mr. Melo was at his home on August 12, 1999, the Appellant admitted during his interview with Lt. French that Mr. Melo was at his home that day. The Appellant alleged that Mr. Melo showed up at his house and walked in, and that he did not know who invited him. However, when the Appellant testified before the Commission in 2007 eight years later, he recalled that he was actually sick on August 12, 1999 and in his room during the cookout. He said he only came out when he heard loud voices, discovered Mr. Melo, and asked him to leave. The Appellant never offered this information before August 17, 2007.

In stark contrast, Mr. Melo’s version of his interaction with the Appellant on August 12, 1999 is quite different. Mr. Melo testified that he had a discussion with the Appellant that day, and the Appellant told Mr. Melo not to cooperate with the internal investigation being conducted by Lt. French. Mr. Melo testified that the Appellant told him “every time [Lt. French] calls you say I have nothing to say.” According to Mr. Melo, the Appellant never asked him to leave his house, but rather told Mr. Melo, “if something happens, you’ve never been here.” This is consistent with what the Appellant told Mr. Melo when he saw him at the Azores Pub, “I’m not supposed to be here, I’m not supposed to be talking to you.”

Here, again, Mr. Melo’s statements are consistent and corroborated by others, the Appellant’s are not.

Finally, the Appellant again had contact with Mr. Melo when he dropped his citizen’s complaint against the Appellant. When Mr. Melo met with the Appellant and Ms. Graves at the

99 Restaurant, the Appellant thanked him for dropping the complaint, and said, “this thing is not over,” and that he should “ignore whoever needs to talk about it.”

The Appellant would have the Commission believe that all of the contact he had with Mr. Melo was inadvertent, and that every time he saw Mr. Melo he would leave immediately. I do not find the Appellant’s version of events credible. The evidence shows that the Appellant did not always leave right away whenever he encountered Mr. Melo. Moreover, the evidence shows that the Appellant continued to frequent the same places he knew that Mr. Melo either worked or at which he socialized. It was the Appellant’s obligation and responsibility not to have contact with Mr. Melo, not the other way around. The Appellant failed to meet this obligation, and in doing so violated the no contact order, which constitutes a violation of Rule 7.01, Insubordination, of the Department’s Rules and Regulations (“Officers shall not be insubordinate. Insubordination shall include: any failure or deliberate refusal to obey a lawful order (written or oral) given by a Superior Officer or as otherwise specified above.”)

The third charge against the Appellant alleges that during the course of the investigation, he withheld evidence and was not truthful with the investigating officer. The facts demonstrate several instances where the Appellant either withheld evidence or was not truthful.

As discussed above, the Appellant had contact with Mr. Melo on a number of occasions in violation of the no contact order. Assuming the Appellant believed that this contact was coincidental, or initiated by Mr. Melo, he should have advised Lt. French. Instead, he withheld this evidence from the Lieutenant. At a minimum, the Appellant should have immediately reported the Raymond Court accident to the lieutenant since this incident also involved a violation of the 209A order in effect against Mr. Melo. The Appellant, however, only submitted a report after being instructed to do so by a superior officer.

Not only did the Appellant fail to report the Raymond Court incident, he initially advised Lt. French that he had not been driving Ms. Graves' truck that night. This was consistent with Ms. Graves's statement. The Appellant's written statement, however, contradicts what he told Lt. French and reports that he was driving the truck that night.

Another example of the Appellant's untruthfulness is when he told Lt. French that he had only provided advice or instruction to Ms. Graves concerning the *temporary* restraining order. However, the Appellant told Sgt. Lewis that he advised Ms. Graves several times to get a restraining order.

Similarly, the Appellant told Lt. French that he never had a discussion with Ms. Graves or Mr. Melo regarding the internal affairs complaint. However, on October 27, 1999, the Appellant advised Capt. Stephens that the complaint would be withdrawn the next day. This was indeed done on October 28, 1999. It is simply not credible to believe that the Appellant would have known of the imminent withdrawal without speaking to either Mr. Melo or Ms. Graves.

As already noted, the Appellant's testimony on August 17, 2007 concerning the cookout that took place at his house on August 13, 1999 differed from the information he provided during his interview with Lt. French as part of the investigation and was found to be untruthful.

The Town demonstrated by credible facts that the Appellant withheld evidence and was not truthful with the investigating officer, a violation of Rule 6.9, Truthfulness. Rule 6.9 provides in relevant part that "Officers shall speak the truth at all times." In addition, the Appellant's actions violate Rule 9.18, Cooperation with Internal Affairs Investigation, which provides in relevant part, "Officers shall answer questions, respond to lawful orders, and render material and relevant statements, in an internal Department investigation ..."; Rule 9.19, Withholding Evidence, which provides in relevant part, "Officers shall not fabricate, withhold, or destroy any evidence of any

kind”; and Rule 9.20, Testifying at Investigation, which provides, “Officers shall truthfully testify to or state the facts as they know them when they appear before or are involved in any judicial departmental or other official investigation, hearing, trial or proceeding and in all other ways cooperate fully during such.”

The fourth charge against the Appellant alleges that on August 30, 1999, while off duty, he backed a truck into a parked motor vehicle in the area of Raymond Court and left the scene of the accident before the police arrived and did not report it.

Mr. Melo testified that he witnessed the Appellant back Ms. Graves’s truck into a parked motor vehicle at Raymond Court on August 30, 1999. Lt. French investigated the scene and concluded that an accident had occurred due to the physical evidence recovered from the scene.

The Appellant testified before this Commission that there was no accident at Raymond Court on August 30, 1999. He failed, however, to explain how Lt. French was able to collect the evidence from the scene. In fact, he did not refute any of the statements Lt. French made about his investigation of the accident. The Appellant stated that he left the Raymond Court area that night after he witnessed a violation of the 209A because the “No Contact” order required him to stay away from Mr. Melo. The Appellant appeared to find the no contact order convenient in this instance as it provided an excuse for leaving the scene of an accident. Yet again, however, the Appellant never reported, until ordered to do so, that he had contact with Mr. Melo that night.

The Appellant’s actions violate Rules 6.9, Truthfulness, Rule 9.18, Cooperation with Internal Affairs Investigation, Rule 9.19, Withholding Evidence, and Rule 9.20, Testifying at Investigation, all previously cited above.

The Appellant exhibited a willingness to withhold information, and submit inconsistent and untruthful statements in an effort to hinder a legitimate police investigation. Although given the

opportunity during the course of the investigation to provide relevant information and be truthful about his involvement with the complainant and Ms. Graves, the Appellant failed so to do.

The Appellant maintains that he did nothing wrong. However, he could submit no evidence showing that the Town harbored political motivation or objectives unrelated to merit standards or neutrally applied department standards and policy. The only testimony submitted by the Appellant alleging political overtones was that some time in or about 1984 the (then) Board of Selectmen failed to confirm his appointment to full-time police officer. The Appellant then admitted that his appointment was not confirmed due to his failure to pass a required physical. Consistent with his demonstrated lack of ability to accept responsibility for his actions, the Appellant then opined that the physical requirements had been changed “just for him” and the changes caused his failure of the physical. The Appellant submitted no evidence of political bias, improper motive, favoritism or bias by anyone acting on behalf of the Town.

The Commission also makes an adverse inference against the Appellant’s credibility due to the April 26, 2002 decision by Commissioner O’Neil allowing the Appointing Authority’s Motion to Impound All Transcripts because the Appellant violated the sequestration order governing witnesses for this hearing. The Commissioner also granted the Appointing Authority’s Motion to Prevent the Intimidation of, Interference with, or Retaliation Against Witnesses.

For all of the reasons stated herein, the Commission finds that the Appointing Authority proved by a preponderance of the credible that there was just cause to support the sixty (60) day suspension levied against the Appellant.

Therefore, the appeal filed under Docket No. D-00-2850 is hereby *dismissed*.

Civil Service Commission

John J. Guerin, Jr.
Hearing Officer

By a 3-1 vote of the Civil Service Commission (Bowman, Chairman; Taylor and Marquis, Commissioners [Henderson – No] [Stein – Absent]) on October 9, 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:

Gary G. Nolan, Esq. (for Appellant)

Kimberly A. Rozak, Esq. (for Appointing Authority)