

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

JOHN WIELAND,
Appellant

v.

Case No. D1-14-270

CITY OF HOLYOKE
Respondent

Appearance for Appellant:

Michael P. Clancy, Esq.
NAGE/IBPO
1299 Page Blvd.
Springfield, MA 01104

Appearance for Respondent:

Sara J. Carroll, Esq.
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Holyoke, MA 01040

Commissioner:

Paul M. Stein¹

DECISION

Pursuant to the provisions of G.L. c. 31, § 43, Mr. John Wieland (“Appellant” or “Mr. Wieland”) filed a timely appeal with the Civil Service Commission (“Commission”) against the City of Holyoke (“City” or “Respondent”) on November 17, 2014, contesting the City’s decision to terminate him from his position as a police officer with the Holyoke Police Department (HPD). A prehearing conference was held on January 14, 2015 at the Springfield State Building in Springfield, MA. A full hearing was held on March 11, 2015 at the same location.² The hearing

¹ The Commission acknowledges the assistance of Beverly J. Carey, Esq., in the drafting of this decision.

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, et. seq., apply to adjudications before the Commission with G.L. c. 31 or any Commission rules taking precedence.

was private. The witnesses were sequestered, with the exception of Mr. Wieland and HPD's Chief of Police, Mr. James Neiswanger. The hearing was digitally recorded. A copy was retained by the Commission and both parties were provided with copies as well.³ The parties submitted recommended decisions on or about April 17, 2015. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

Seventeen (17) exhibits were accepted into evidence during the hearing. Based upon the documents entered into evidence, the testimony of:

Called by the City:

- Mr. Michael McCoy, Police Lieutenant, HPD;
- Mr. Jeffery Ortiz, Police Officer, HPD;
- Mr. Daniel Escobar, Police Officer, HPD;
- Mr. Ryan Tabb, Police Officer, HPD;
- Mr. James Neiswanger, Police Chief, HPD;

Called by Mr. Wieland:

- Mr. John Wieland, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, policies, and reasonable inferences from the credible evidence, I make the following findings of fact:

1. The Appellant, John Wieland, was employed with the HPD as a fulltime patrolman in the Operations Division since 2008. Prior to his appointment as a patrolman, Officer Wieland served as a part-time reserve police officer for approximately five (5) years, beginning in

³ If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

2003. During his employment with the HPD, Officer Wieland was regularly assigned to the midnight to 8:00 AM shift. (Testimony of the Appellant)

2. Lt. Michael McCoy is currently employed as Commander of Operations Divisions for the second watch in the HPD. In August 2014, Lt. McCoy was assigned to the Professional Standards Division of the HPD, which was charged with conducting internal affairs investigations. Lt. McCoy served in the Professional Standards Division for approximately three (3) years and has conducted approximately thirty (30) internal affairs investigations during his employment. (Testimony of Lt. McCoy)
3. Officer Jeffrey Ortiz is currently employed as a patrolman with the HPD and is regularly assigned to the midnight to 8:00 AM shift. Officer Ortiz has been employed with the HPD for approximately four (4) years and has worked with Officer Wieland since May 2011. (Testimony of Officer Ortiz)
4. Officer Daniel Escobar is currently employed as a patrolman with the HPD and is regularly assigned to the midnight to 8:00 AM shift. Officer Escobar has been employed with the HPD for approximately ten (10) years and has worked with Officer Wieland throughout his employment. (Testimony of Officer Escobar)
5. Officer Ryan Tabb is currently employed as a patrolman and is a designated K-9 officer with the HPD, regularly assigned to the 11:00 PM to 7:00 AM overnight shift. Officer Tabb has been employed with the HPD for approximately eight (8) years and has worked with Officer Wieland regularly throughout his employment, in addition to a period of time in which Officer Tabb was employed as a police dispatcher. (Testimony of Officer Tabb)
6. Chief James Neiswanger is currently employed by the HPD as the Chief of Police. He has served as Chief at the HPD for approximately three and a half (3 ½) years. Prior to his

appointment with the HPD, Chief Neiswanger was employed by the Manchester Police Department in Connecticut for approximately twenty-five (25) years. (Testimony of Chief Neiswanger)

7. As Chief of Police, Chief Neiswanger is responsible for reviewing internal affairs investigations and making decisions on discipline and/or recommendations to the Appointing Authority for consideration. (Testimony of Chief Neiswanger)
8. The Appointing Authority for the City and the HPD is Mayor Alex. B. Morse. (Testimony of Chief Neiswanger)
9. On the evening of August 17, 2014 and the morning of August 18, 2014, Officers Ortiz, Tabb, Escobar, and Wieland were working the overnight shift on patrol in Holyoke, MA. (Testimony of Officer Ortiz, Officer Tabb & Officer Escobar)
10. Prior to 5:00 AM on the morning of August 18, 2014, Officer Tabb, Officer Escobar, and Officer Wieland met for breakfast at the Denny's restaurant located on Northampton Street in Holyoke, MA. Before being served, Officers Tabb and Wieland were called out to respond to a domestic violence call. Officer Ortiz responded to the call as backup. Officer Tabb and Officer Wieland invited Officer Ortiz to join them for breakfast at Denny's upon completion of the call. (Testimony of Officer Tabb, Officer Escobar, Officer Ortiz & Testimony of the Appellant)
11. At approximately 5:00 AM on August 18, 2014, Officer Tabb, Officer Ortiz, Officer Escobar, and Officer Wieland convened at the Denny's restaurant. All of the officers were in uniform and on duty. (Testimony of Officer Escobar, Officer Ortiz, Officer Tabb & Lt. McCoy)
12. The Denny's Restaurant on Northampton Street in Holyoke, MA consists of an "L" shaped dining area, a breakfast bar, and kitchen. The cash register for the restaurant is located at the

end of the breakfast bar towards the entry/exit to the restaurant. (Testimony of Officer Ortiz & Officer McCoy; Ex. 15)

13. The officers were seated towards the rear corner of the restaurant. (Ex. 12)
14. While there were no other customers in the dining area of the restaurant, two (2) or three (3) restaurant employees were in the dining area servicing tables. (Testimony of Officer Ortiz & Officer Escobar)
15. As the officers were eating breakfast, they were talking in a “joking manner” with each other, as a group. (Testimony of the Appellant & Officer Escobar).
16. At some point while the officers were eating breakfast, Officer Tabb showed Officer Ortiz a photograph of a female wearing an Air Force uniform. Officer Ortiz made a comment to the effect of the woman in the photograph is lazy because she is in the Air Force. (Testimony of Officer Ortiz)
17. Officer Ortiz and Officer Wieland then engaged in a conversation about their respective military affiliations. It was established that Officer Ortiz had served in the Army and Officer Wieland served in the Air Force. Officer Wieland had been deployed two (2) times while in the Air Force: to Iraq in 2010 and to Afghanistan in 2012. (Testimony of Officer Ortiz, Officer Escobar & Testimony of the Appellant)
18. Officer Wieland became upset by Officer Ortiz’s comment, but due to the nature and mood of the conversation leading up to that point, Officer Ortiz thought that Officer Wieland was still joking. (Testimony of Officer Ortiz) Officer Wieland was swearing at Officer Ortiz and their conversation became argumentative and progressively louder. (Testimony of Officer Tabb & Officer Ortiz)

19. Officer Wieland repeatedly stated to Officer Ortiz “You’re a piece of shit. Shut the fuck up. You’re a piece of shit.” (Testimony of Officer Ortiz)
20. Officer Ortiz and Officer Wieland had previously had conversations regarding their military backgrounds and deployments, but had never gotten into an argument over this topic previously. (Testimony of Officer Ortiz & Testimony of the Appellant)
21. The officers got up from the tables in the back corner of the restaurant and proceeded towards the exit. As the group walked to the exit, Officer Ortiz made a motion with his arms, stretching them out to his sides to imitate an airplane, and proceeded to simulate an airplane “flying” around a table in the dining area. (Testimony of Officer Ortiz; Ex. 12)
22. The officers continued towards the exit in single file. Officer Tabb was first (closest to the exit), followed by Officer Wieland, Officer Ortiz, and Officer Escobar. (Testimony of Officer Escobar, Officer Tabb, Officer Ortiz & Lt. McCoy; Ex. 12)
23. As the officers approached the exit, Officer Ortiz and Officer Wieland continued to argue with each other. At this point in time, Officer Wieland, while turning around to face Officer Ortiz, moved his left hand to his belt, drew his service weapon, and pointed the weapon at the chest of Officer Ortiz. While drawing his weapon, Officer Wieland continued to call Officer Ortiz a “fucking piece of shit.” (Testimony of Officer Escobar, Officer Ortiz, Testimony of the Appellant)
24. Officer Wieland’s service weapon was loaded and stored in a holster which required him to unbutton the strap on the top of the holster before removing the weapon. The weapon had no other safety or trigger lock and only a pull of the trigger was needed to fire the weapon. Officer Wieland did not have his finger on the trigger while pointing the weapon at Officer Ortiz. (Testimony of the Appellant)

25. Officer Tabb, who was initially facing the exit, turned around to look at the officers behind him because of the way the conversation was escalating. When Officer Tabb turned around, he saw Officer Wieland's weapon pointed towards the ground as Officer Wieland returned it to his holster. (Testimony of Officer Tabb)
26. At the point in time when Officer Wieland drew his weapon, two (2) employees were present behind the counter of the restaurant looking on while a third employee was cleaning a table in the back corner of the restaurant, behind the officers. (Testimony of Officer Ortiz, Officer Tabb & Officer Escobar)
27. In response to Officer Wieland pointing his weapon at Officer Ortiz, Officer Ortiz made a statement to the effect of "Are you serious? Put that thing away" and immediately swatted the weapon away with his right hand. Officer Wieland used that momentum to return his weapon to his holster on his belt. (Testimony of Officer Ortiz)
28. Officer Ortiz was shocked and surprised by Officer Wieland's actions but he was not placed in immediate fear that he would be shot. Officer Ortiz quickly swatted the weapon away from him because he did not feel comfortable having a loaded weapon pointed at his chest. (Testimony of Officer Ortiz)
29. While he was offended and upset by Officer Ortiz's remarks, Officer Wieland did not intend to actually fire his weapon or harm Officer Ortiz. (Testimony of the Appellant)
30. As Officer Wieland exited the restaurant with his fellow officers, he can be seen on video footage securing the strap on his holster with his left hand. (Ex. 12)
31. Officer Ortiz was smiling as he exited the restaurant and testified that he was "laughing off" the incident that had just occurred. (Testimony of Officer Ortiz; Ex. 12)

32. Officer Wieland immediately got into his police cruiser and left the scene without any further conversation. The other officers walked to their respective cruisers and spoke about what had just happened and the need to report the incident to a superior officer. Officer Ortiz suggested that Officer Escobar reach out to Officer Wieland to urge him to report the incident himself. (Testimony of Officer Ortiz, Officer Escobar, and Officer Tabb)
33. Following the incident, Officer Wieland returned to the police station to work on a report. A short time later, Officer Wieland responded to another domestic call at the same location he had responded to earlier. Officer Ortiz also responded to this call, but stayed outside to speak with one of the people involved in the dispute as Officer Wieland spoke to the other party involved. Officer Ortiz did not speak with Officer Wieland during this call was not close enough to Officer Wieland to determine his demeanor or behavior. (Testimony of Officer Ortiz & Testimony of the Appellant)
34. After responding to the call, Officer Wieland returned to the station and his shift ended at approximately 8:00 AM on August 18, 2014. Although he was at the station and a supervisor was present, Officer Wieland did not report the incident that had taken place earlier at Denny's. (Testimony of the Appellant)
35. The Appellant testified that he did not report the incident because he was not sure of the best way to do so and did not want the other officers involved to get in trouble. (Testimony of the Appellant) .
36. Officer Escobar attempted to call Officer Wieland on Monday, August 18, 2014, but Officer Wieland did not answer or return his call. On Wednesday, August 20, 2014, Officer Escobar sent Officer Wieland a text message stating "We need to talk. Please give me a call." In a telephone conversation, Officer Escobar told Officer Wieland that Officer Wieland needed to

speaking to a supervisor about the incident that had taken place and that the other officers involved were giving him the chance to “come out and deal with it.” (Testimony of Officer Escobar)

37. Neither the officers involved nor Officer Wieland reported the incident to a supervisor. Prior to his next scheduled shift, Officer Wieland contacted the union president and was referred to the union attorney, who was unavailable at the time. (Testimony of Officer Ortiz, Officer Tabb, Officer Escobar & Testimony of the Appellant)

38. On or about Saturday, August 23, 2014, Chief Neiswanger received a phone call from a captain with HPD regarding a rumor of the incident that had occurred at Denny’s on August 18, 2014. Chief Neiswanger directed that a preliminary investigation take place. Based on the preliminary finding and a discussion with Officer Ortiz, Officer Escobar, and Officer Wieland, Officer Wieland’s service weapon was seized when he arrived for his next scheduled shift on Sunday, August 24, 2014. (Testimony of Chief Neiswanger; Ex. 6)

39. On or about August 25, 2014, Lt. McCoy was called to the Chief’s office and informed of the incident that had taken place at Denny’s on the morning of August 18, 2014. Lt. McCoy was asked by the Chief to conduct an investigation regarding the incident. Lt. McCoy was given written statements from the officers that had been present. (Testimony of Lt. McCoy)

40. On the same day, August 25, 2014, Officer Wieland was placed on paid administrative leave until he was cleared medically to return to work by Chief Neiswanger. Chief Neiswanger’s order to place Officer Wieland on paid administrative leave was not contingent upon any finding of the employee assistance program. In addition, Chief Neiswanger seized Officer Wieland’s private license to carry firearms and took possession of all his personal firearms. (Testimony of Lt. McCoy & Chief Neiswanger; Exs. 6 & 16)

41. Officer Ortiz, Officer Tabb and Officer Escobar were give written reprimands for their failure to promptly report the incident. (Testimony of Officer Ortiz, Officer Tabb & Officer Escobar)
42. During the course of the internal affairs investigation, Chief Neiswanger discussed the incident with the District Attorney's office and provided copies of the initial findings and statements from the officers. By email dated September 22, 2014, the District Attorney responded that because Officer Ortiz was not placed in fear and no one was injured, no criminal charges would be forthcoming stemming from the incident. The email also states: "I do not minimize the seriousness of the incident. Pointing a loaded firearm at another from close range in a public restaurant during what had become a rather testy exchange demonstrated incredibly poor judgment and a rash temper, especially from an officer sworn to maintain the peace." While the District Attorney deferred to the Chief on the matter of discipline, he also states: "I'm sure you will want to send a signal to your department that this sort of conduct will not be tolerated." (Testimony of Chief Neiswanger; Ex. 5)
43. While the incident was being investigated, the incident was featured in the local media, in addition to two (2) other incidents which also involved the handling of department issued firearms. (Ex. 14)
44. On or about September 30, 2014, as part of his internal investigation, Lt. McCoy interviewed Officer Wieland. During the interview, Officer Wieland admitted that he removed his service weapon from his holster and pointed it at Officer Ortiz. Officer Wieland stated that he did not have any intention of harming Officer Ortiz and that he "acted out of frustration." (Ex. 11)

45. Officer Wieland had been seeing a licensed clinical psychologist since 2010 for non-work related issues. With the permission of Officer Wieland, Chief Neiswanger spoke with Officer Wieland's psychologist regarding the incident. (Testimony of Chief Neiswanger & Appellant; Ex. 13)
46. In a report from Officer Wieland's psychologist, it is the doctor's opinion that Officer Wieland's behavior was an isolated incident, rather than part of a pattern that warrants concern. In addition, the psychologist reports that Officer Wieland was remorseful of his actions. (Ex. 13)
47. On or about October 10, 2014, Lt. McCoy submitted the findings of the internal investigation to Chief Neiswanger. In the report, Lt. McCoy concluded that Officer Wieland had violated nine (9) rules and regulations of the HPD and recommended that the complaint be classified as "sustained". (Ex. 11)
48. Following the completion of the internal affairs investigation, the matter was referred to the Captains Review Board. The Captains Review Board recommended that the findings of the investigation be sustained, but deferred to Chief Neiswanger regarding disciplinary action. (Testimony of Chief Neiswanger & Lt. McCoy)
49. On or about November 4, 2014, Chief Neiswanger issued a recommendation for disciplinary action to the mayor. In his recommendation, Chief Neiswanger found Officer Wieland violated nine (9) provisions of the HPD's Police Department Rules and Regulations and Standard Operating Procedures.⁴ Chief Neiswanger recommended that Officer Wieland be terminated from his employment with the HPD. (Ex. 2)

⁴ Chief Neiswanger concluded that Mr. Wieland violated the following rules of the HPD: Rule 1.1: Violation of Rules; Rule 3.2: Unbecoming Conduct; Rule 3.4: Compliance to Law; Rule 3.11: Use of Force; Rule 3.14: Conduct Toward Member; Rule 3.17: Obligation to Report Crimes; Rule 7.2: Department Firearms; Rule 7.3: Weapons

50. By letter dated November 6, 2014, the Mayor notified Officer Wieland that Chief Neiswanger had recommended that Officer Wieland be terminated from his employment with the HPD based on the conduct that occurred on August 18, 2014. A hearing was scheduled to take place on November 12, 2014, in accordance with G.L. c. 31, § 41. Officer Wieland was also provided with a copy of Chief Neiswanger's recommendation for disciplinary action. (Ex. 17)
51. Following the § 41 hearing before the Mayor, on or about November 13, 2014, the Mayor informed Officer Wieland that he was relieved from duty with the HPD based on his violation of nine (9) rules and regulations of the HPD.⁵ (Ex. 1)
52. Officer Wieland's prior discipline consists only of a written reprimand in 2005, when he was a reserve officer with the HPD. Officer Wieland was reprimanded for failing to pick up a criminal law reference handbook by the specified deadline. (Ex. 2)
53. Lt. McCoy testified at the hearing before the Commission about a sergeant who had accidentally left his service weapon in a public restroom. While the sergeant was using the facilities, he removed his service weapon from his belt and placed it between the handicapped railing and the wall next to the toilet. A customer then entered the restroom with a child that was in urgent need to use the bathroom. In his haste to exit the restroom, the sergeant inadvertently left without taking his weapon. The weapon was quickly discovered by the customer and store employees were notified. The sergeant returned for his weapon approximately fourteen (14) minutes later. The sergeant was given a ten (10) day suspension

Handling; and Standard Operating Procedure 2.8.2: Authorized Weapons (Procedures, Drawing and Displaying). (Ex.2)

⁵ The Mayor concluded that Mr. Wieland violated the following rules of the HPD: Rule 1.1: Violation of Rules; Rule 3.2: Unbecoming Conduct; Rule 3.4: Compliance to Law; Rule 3.11: Use of Force; Rule 3.14: Conduct Toward Member; Rule 3.17: Obligation to Report Crimes; Rule 7.2: Department Firearms; Rule 7.3: Weapons Handling; and Standard Operating Procedure 2.8.2: Authorized Weapons. (Ex. 1)

and placed on desk duty without a weapon for at least thirty (30) days. (Testimony of Lt. McCoy)

54. Lt. McCoy also testified about an incident in which an officer accidentally fired his service weapon at a vehicle. In this incident, multiple police units had been called to respond to a report of a vehicle fleeing the scene of an armed home invasion. The vehicle was stopped near a known gang location and occupied by two (2) individuals who were reportedly armed. When the officer exited his vehicle, he drew his weapon to cover the passenger of the vehicle and his gun accidentally discharged, striking the vehicle. The discharge may have been the result of an unsanctioned flashlight attachment on the officer's weapon. The officer was given a five (5) day suspension, assigned to desk duty, and required to attend firearms training and written training. (Testimony of Lt. McCoy)

DISCUSSION

The Respondent's Argument

The City argues that it had reasonable justification to terminate Officer Wieland from his employment with the HPD. In this instance, there is little dispute about Officer Wieland's underlying conduct. The City contends that termination was an appropriate level of discipline because Officer Wieland's behavior was so egregious that it affects his ability to perform police functions in the future.

The Appellant's Argument

While the Appellant concedes that his conduct on August 18, 2014 was in violation of HPD Rules and Regulations and that discipline was warranted, he argues that the City went too far in terminating him from his employment. The Appellant argues that local media coverage of the incident that took place, in addition to other incidents that occurred while the investigation

was pending, influenced the Chief's decision to terminate Officer Wieland. In addition, Officer Wieland raises an argument of disparate treatment, citing other incidents that occurred involving officers of the HPD and firearms.

Applicable Law

Pursuant to G.L. c. 31, § 43, a "person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, appeal in writing to the commission" The statute provides, in pertinent part:

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 the 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 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.

G.L. c. 31, § 43.

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." Cambridge v. Civil Serv. Comm'n, 43 Mass.App.Ct. 300, 304 (1997); Comm'rs of Civil Serv. v. Mun. Ct. of Bos., 359 Mass. 211, 214 (1971); 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. of Brockton v. Civil Serv. Comm'n, 43 Mass.App.Ct. 486, 488 (citing 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).

While the Commission makes *de novo* findings of fact, "the Commission's task, however, is not to be accomplished on a wholly blank slate." Town of Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823 (2006). "Here, 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.'" Id. at 823-24 (citing Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983)).

Analysis

Applying these principles to this appeal, I conclude that the City has met its burden of proof and had just cause to discipline Officer Wieland. A preponderance of evidence establishes that Officer Wieland violated the following nine (9) Rules and Regulations/Standard Operating Procedures of the HPD: Rule 1.1: Violation of Rules; Rule 3.2: Unbecoming Conduct; Rule 3.4: Compliance to Law; Rule 3.11: Use of Force; Rule 3.14: Conduct Toward Member; Rule 3.17: Obligation to Report Crimes; Rule 7.2: Department Firearms; Rule 7.3: Weapons Handling; and Standard Operating Procedure 2.8.2: Authorized Weapons. The Appellant does not deny his conduct and acknowledges that his actions violated the rules and regulations of the HPD. Because Officer Wieland's behavior violated numerous Rules and Regulations of the HPD, the City had just cause to discipline him.

Having determined that discipline was warranted, I must determine if the City was justified in the level of discipline imposed, which, in this case, was termination. The Commission is guided by the “the principle of uniformity and the equitable treatment of similarly situated individuals” [both within and across different appointing authorities]” as well as the “underlying purpose of the civil service system . . . to guard against political considerations, favoritism and bias in governmental employment decisions. ” Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 824 (2006) (citing Police Comm’r of Bos. v. Civil Serv. Comm’n, 39 Mass.App.Ct. 594, 600 (1996); Falmouth v. Civil Serv. Comm’n, 61 Mass.App.Ct. 796, 800 (2004)). Even if there are past instances where other employees received more lenient sanctions for similar misconduct, however, the Commission is not charged with a duty to fine-tune an employee’s discipline to ensure perfect uniformity. See Bos. Police Dep’t v. Collins, 48 Mass.App.Ct. 408, 412 (2000). “[T]he power accorded the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded the appointing authority.” Falmouth v. Civil Serv. Comm’n, 61 Mass.App.Ct. 796, 800 (2004) (quoting Police Comm’r of Bos. v. Civil Serv. Comm’n, 39 Mass.App.Ct. 594, 600 (1996)). In addition:

Unless the commission’s findings of fact differ significantly from those reported by the [appointing authority] or interpret the relevant law in a substantially different way, the absence of political considerations, favoritism, or bias would warrant essentially the same penalty. The commission is not free to modify the penalty imposed by the [appointing authority] on the basis of essentially similar fact finding without an adequate explanation.

Town of Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 824 (2006) (citing Police Comm’r of Bos. v. Civil Serv. Comm’n, 39 Mass.App.Ct. 594, 600 (1996)). Here, after a de novo hearing, at which I reviewed all of the documentary evidence and listened to the testimony of the witnesses, I have concluded that modification is not warranted in this instance.

Officer Wieland's conduct on the morning of August 18, 2014 demonstrated exceedingly poor judgment and disrespect for the law and his fellow officer. As a police officer, Officer Wieland had a duty to protect the City and conduct himself in a way that reflects positively on the HPD, and to uphold the laws of the Commonwealth, the City, and the HPD. A police officer must be expected to maintain his or her composure in stressful and difficult situations on a daily basis, which includes maintaining respect for colleagues and superiors, even when presented with stressful and uncomfortable circumstances. While even if Officer Ortiz's behavior was meant jokingly, Officer Wieland's escalation of the incident through repeated profane and disrespectful outbursts, culminating in the drawing and pointing his loaded firearm at Officer Ortiz in a public location and in the presence of civilian employees was completely unacceptable for that of a police officer.

In addition, I do not find that the Appellant was entirely candid when he offered, as an explanation for not reporting the incident, that he was not sure of the best way to handle it and didn't want to get others in trouble. The evidence clearly established that the Appellant knew full well that he had engaged in conduct that called into question his judgment and character as a police officer and that he had a duty to report what he did. The primary motivation for keeping silent was to protect himself, not his colleagues, from the consequences. While his delay, alone might not warrant termination, it does reinforce the fact that he compounded his error, which also reflects on judgment and character. In City of Cambridge v. Civil Service Commission, 43 Mass.App.Ct. 300, 303, n.3 (1997), the Court described the standard of truthfulness in police discharge cases under the just cause requirement of G.L. c. 31. The court stated:

The city was hardly espousing a position devoid of reason when it held that a demonstrated willingness to fudge the truth in exigent circumstances was a doubtful characteristic for a police officer. Police work frequently calls upon officers to speak the truth when doing so might put in question a stop or a search or might embarrass a

fellow officer. It requires no strength of character to speak the truth when it does not hurt.

See, e.g., Desmond v. Town of West Bridgewater, 27 MCSR 654 (2014); Robichau v. Town of Middleborough, 24 MCSR 352 (2011); Descharnais v. City of Westfield, 23 MCSR 418 (2010); Royston v. Town of Billerica, 19 MCSR 124 (2006)

The Commission also must take into account the case law that imposes special obligations upon police officers, who carry a badge and a gun and all of the authority that accompanies them, and which requires police officers to comport themselves in an exemplary fashion, especially when it comes to exhibiting self-control and to refrain from unjustified threatening and intimidating conduct and use of force.

[P]olice officers voluntarily undertake to adhere to a higher standard of conduct 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 implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.

Attorney General v. McHatton, 428 Mass. 790, 793-74 (1999) and cases cited. See Falmouth v. Civil Service Comm'n., 61 Mass.App.Ct. 796, 801-802 (2004); Police Commissioner v. Civil Service Comm'n., 22 Mass.App.Ct. 364, 371 (1986).

Officer Wieland raised an argument based on disparate treatment, citing two (2) incidents: the first involved a sergeant who left a service weapon in a public restroom; the second involved an officer who inadvertently fired his weapon at a vehicle during a high intensity traffic stop. These incidents involved accidental and negligent actions by the officers involved. In contrast, Officer Wieland's conduct involved the intentional and deliberate "use of force" on a fellow officer as part of an angry confrontation. Indeed, based on the description of the physical confrontation that did occur, although no injuries occurred, a risk of an accidental discharge of

his firearm was clearly created. Therefore, I do not find that there was disparate treatment in regard to the penalty imposed.

While this case generated some local media attention, there is no evidence to suggest that Chief Neiswanger's or the Mayor's decision to terminate Officer Wieland were influenced by this. Officer Wieland's action of drawing his firearm on a fellow officer was an unprecedented occurrence and it is understandable that the Chief of Police and the Mayor would conclude that any further risk of such behavior by a sworn member of the Holyoke Police Department cannot be tolerated.

The Commission's findings do not differ significantly from those reported by the City or the HPD, nor does the Commission interpret the law differently than the City has done in this case. In addition, there is no evidence of any ulterior motives that would warrant the Commission's intervention with respect to the penalty imposed. Although there is no doubt that, save for this incident, the Appellant served the City of Holyoke well and, until this incident of misconduct, he had only one prior minor discipline on his record. Some may well take a view that the Appellant deserves a fresh start to prove himself worthy of continued service, but whether that is a risk the Appointing Authority chooses to take rests with it. It is not within the purview of the Commission to substitute its judgment in a matter of this nature that involves a serious lapse of judgement in the use of a loaded firearm.

As a result, based on the evidence presented, I find the City had just cause to terminate Officer Wieland's employment with the HPD.

Conclusion

For the foregoing reasons the Appeal of the Appellant, John Weiland, under Docket Number D1-14-270, is hereby *dismissed*.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners) on August 6, 2015)

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 COFFICER 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:

Michael P. Clancy, Esq. (for the Appellant)
Sara J. Carroll, Esq. (for the Respondent)