

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

TIMOTHY SKWIRA,
SEAN SHATTUCK, and
JOSEPH WILSON,

Appellants,

v.

CITY OF HOLYOKE,

Respondent.

D-08-196 [SKWIRA]
D-08-197 [SHATTUCK]
D-08-198 [WILSON]

Appellant Skwira's Attorney and
Appellant Shattuck's Attorney:

Michael Clancy, Esq.
International Brotherhood of
Police Officers
1299 Page Boulevard
Springfield, MA 01104
MClancy@nage.org

Appellant Wilson's Attorney:

W. Michael Ryan, Esq.
P.O. Box 60476
Florence, MA 01060
wmryanlaw@yahoo.com

Respondent, City of Holyoke's Attorney:

Melissa M. Shea, Esq.
SULLIVAN, HAYES & QUINN
One Monarch Place, Suite 1200
Springfield, MA 01144-1200
Melissa.Shea@sullivanandhayes.com

Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, § 43, the Appellants, Timothy Skwira, Sean Shattuck and Joseph Wilson (hereinafter “Appellants”), are appealing the action of the City of Holyoke (hereinafter “Appointing Authority”) suspending them for fifteen (15) days. The appeals were timely filed. The Civil Service Commission (hereinafter “Commission”) consolidated the appeals and a full hearing was held on December 10, 2008 at the Springfield State Office Building. No witnesses were sequestered. One (1) CD was made of the hearing and mailed to each Party by the Commission.

Preliminary and other procedural matters

The Appellants requested that the hearing be conducted in public. This request was *allowed*.

Prior to the hearing, the Appellants filed a Motion for Summary Decision and the City filed an opposition which included its own Motion for Summary Decision. Both motions were *denied*.

The City filed a Motion in Limine to prohibit the testimony of Appellant witness Aaron W. Wilson, Esq. This motion was *denied* with this Commissioner reserving the right to determine how much weight would be given to his testimony.

At the conclusion of the hearing, the record was left open for the Appellants to file a Motion to Strike the Testimony of FBI Special Agent Ian D. Smythe and the City filed an opposition. This motion was *denied*, again with this Commissioner reserving the right to determine how much weight would be given to his testimony.

FINDINGS OF FACT

Thirty-Eight (38) Joint Exhibits; Nineteen (19) Respondent Exhibits; and Two (2) Appellant Exhibits were entered into evidence at the hearing in addition to a list of twenty-six (26)

stipulated facts. Respondent Exhibits 1-17 and Appellants' Exhibit 2 are deemed confidential and are impounded. Based on the documents submitted and the testimony of:

For the Appellants:

- Timothy Skwira, Appellant
- Sean Shattuck, Appellant
- Joseph Wilson, Appellant
- Edward Moskal, Union President
- Aaron Wilson, Esq.

For the Appointing Authority:

- Special Agent Ian Smythe, Federal Bureau of Investigations [hereinafter "FBI Agent"]
- Chief Anthony Scott, Holyoke Police Department [hereinafter "Chief"]
- Sergeant James M. Albert, Holyoke Police Department [hereinafter "Sgt. Albert"]

I make the following findings of fact:

1. Timothy D. Skwira has been employed as a permanent full-time police officer for the City of Holyoke since December 22, 2002. (Stipulated Fact) He has no record of prior discipline. (Joint Exhibit 19)
2. Sean C. Shattuck has been employed as a permanent full-time police officer for the City of Holyoke since December 22, 1995. (Stipulated Fact) During his fourteen (14) years of employment, Mr. Shattuck had only one incident of prior discipline, a documented verbal reprimand for being late to Court in 2004. (Joint Exhibit 27)
3. Joseph H. Wilson has been employed as a permanent full-time police officer for the City of Holyoke since October 3, 2004. (Stipulated Fact) On March 16, 2006, Mr. Wilson was

issued a letter of reprimand for improperly handling a motor vehicle crash. (Joint Exhibit 33)¹

4. Officers Skwira, Shattuck and Wilson were all together off-duty at a bar known as “Pal Joey’s Lounge” in Holyoke in the early morning of Tuesday, December 18, 2007 beginning at approximately 12:15 a.m. (Stipulated Fact)²
5. Sometime around 1:00 a.m., two males entered Pal Joey’s Lounge: Gilberto Rivera and Christopher Martinez. (Testimony of Skwira, Shattuck and Wilson)
6. Mr. Rivera and Mr. Martinez, who did not testify before the Commission, were known to the three officers because of their interaction with them as Holyoke police officers. (Testimony of Appellants Skwira, Shattuck and Wilson)
7. The bartender had an issue with Mr. Rivera and Mr. Martinez and their ability to pay for the beers that they ordered. She mentioned something to the owner of Pal Joey’s Lounge, Aldo J. Rigali about this. (Testimony of Skwira, Shattuck and Wilson)
8. Mr. Rivera made comments to other patrons about police being present and guns. He was heard to use the word “pistola” which means gun in Spanish. (Testimony of Skwira) He then stared at the three Officers, Shattuck, Skwira and Wilson. (Testimony of Shattuck, Skwira and Wilson)
9. The owner of Pal Joey’s Lounge, Aldo J. Rigali, knew Officers Shattuck, Skwira and Wilson to be Holyoke police officers. (Testimony of Officers Shattuck, Skwira and Wilson). Officer Wilson knew Mr. Rigali for many years and oftentimes referred to him as “Uncle Joey” and/or “Uncle Joe”. (Testimony of Officer Wilson). In fact, Officer

¹ Joint Exhibit 33 references another verbal reprimand against Mr. Wilson on August 7, 2003, more than a year prior to his stipulated start date.

² Appellant Skwira was out on injured leave on December 17, 2007 as a result of a prior on-duty injury.

- Wilson's father, Aaron Wilson, a former Holyoke police officer himself, is the clerk of the corporation for Pal Joey's Lounge. (Testimony of Aaron Wilson)
10. Mr. Rivera and Mr. Martinez were joined at Pal Joey's Lounge by a third individual, William Brobovic. (Testimony of Skwira, Shattuck and Wilson)
 11. The owner of Pal Joey's Lounge, Aldo J. Rigali, requested Officers Skwira's, Shattuck's and Wilson's help in monitoring and/or removing these three individuals from the bar. (Stipulated Facts) Mr. Rigali stated to the three officers, "These guys are going to be trouble, I want them out of here." (Testimony of Wilson)
 12. The three officers approached Mr. Rivera and Mr. Martinez and indicated that they didn't want any trouble and asked them to leave. Mr. Rivera then threw a partially full pint of beer glass at Officer Shattuck and stated "Fuck you." (Testimony of Skwira)
 13. Mr. Martinez then "threw a punch" at Officer Shattuck. (Testimony of Skwira) Officer Shattuck, who had been "soaked" by the glass of beer, "grabbed [Mr. Rivera] by the collar and turned him so he could go to the door." Sometime during this interaction, Officer Shattuck was struck on the back of his head. (Testimony of Shattuck)
 14. The three individuals were removed from the bar by Officers Skwira, Wilson and Shattuck. (Stipulated Fact)
 15. During the monitoring and/or removing of the three individuals from the establishment, a physical and loud verbal altercation ensued and continued outside. (Stipulated Fact)
 16. Officer Wilson grabbed Mr. Martinez and took him outside out the front door where Mr. Rivera and Officer Shattuck were. (Testimony of Wilson)

17. The three Appellants offered the testimony outlined below in regard to what happened once the three of them were standing in the parking lot outside the lounge with Mr. Martinez, Mr. Rivera and Mr. Brobovic. (Testimony of Skwira, Shattuck and Wilson)
18. On the late night and morning in question, Officer Skwira was out of work having been injured on duty. (Testimony of Skwira)
19. Officer Skwira testified that as he was talking to Mr. Rivera in the parking lot, he saw Mr. Martinez “pacing back and forth, grunting”. Mr. Rivera threatened to kill the three officers and their families and “track them down.” (Testimony of Skwira)
20. According to Officer Skwira, Mr. Martinez then “went after” his two fellow officers and “charged them.”. Mr. Rivera “made a motion” to join them at which time Officer Skwira “stopped [him] and pushed him away.” (Testimony of Skwira)
21. According to Officer Skwira, he then had his back turned to his two other officers and Mr. Martinez and he never saw Mr. Martinez get struck by either of his fellow officers. On cross examination, Officer Skwira testified that although he did see Mr. Martinez “throw a punch” at Officer Shattuck (a second time) in the parking lot, his attention got “diverted” and he never saw them “connect”. (Testimony of Skwira)
22. Officer Skwira testified that he didn’t see Mr. Martinez again until he was driving away in a vehicle and that Mr. Martinez had minor injuries, as opposed to the more severe injuries shown in the photographs that are part of Respondent Exhibit 18. (Testimony of Skwira)
23. Officer Skwira eventually left the premises and went home without contacting any member of the Holyoke Police Department, including the supervisor on duty that morning. (Testimony of Skwira)

24. In regard to what happened in the parking lot, Officer Shattuck testified that Mr. Martinez told him, “I’m so strong I could kill you with my bare hands.” At some point, Officer Shattuck was struck “above his right ear” by Mr. Martinez. Mr. Martinez then swung at Officer Shattuck again and landed a “glancing blow” on Officer Shattuck. When Mr. Martinez came at Officer Shattuck again, Officer Shattuck testified that he struck Mr. Martinez “below his right eye” at which point Officer Wilson grabbed Mr. Martinez and “brought him to the ground.” (Testimony of Shattuck)
25. According to Officer Shattuck, Mr. Martinez began doing push-ups and stated “I’m going to kill you” which prompted Officer Shattuck and Officer Wilson to “hold him down.” (Testimony of Shattuck)
26. At some point, a vehicle pulled up and Mr. Martinez got in the vehicle. According to Officer Shattuck, Mr. Martinez had a “minor bump and swelling on his neck bone” and “redness in his cheek” when he got in the vehicle, as opposed to the more severe injuries shown in Respondent Exhibit 18. (Testimony of Shattuck)
27. Like Officer Skwira, Officer Shattuck left the lounge that night and went home without notifying anyone in the Holyoke Police Department, including the supervisor on duty. (Testimony of Shattuck)
28. Officer Shattuck testified that he intended on filing a report when he reported to duty at 3:00 P.M. the next day, but he did not do so after learning that he may be the subject of a criminal investigation at approximately 7:00 A.M. that morning (discussed later in these findings). (Testimony of Shattuck)
29. Officer Wilson testified that, while outside the lounge, he saw Mr. Martinez strike Officer Shattuck. When Officer Wilson tried to push Mr. Martinez back, Mr. Martinez slapped

- his hand and swung at Officer Shattuck. According to Officer Wilson, Officer Shattuck then swung back at Mr. Martinez. (Testimony of Wilson)
30. At some point, Officer Wilson testified that he (Wilson) had his knee on the back of Mr. Martinez while Mr. Martinez's face was down toward the ground. (Testimony of Wilson)
31. Officer Wilson testified that when Mr. Martinez left the parking lot, he (Wilson) only noticed "redness" on the cheek of Mr. Martinez, as opposed to the more severe injuries shown in Respondent Exhibit 18. (Testimony of Wilson)
32. Like Officers Skwira and Shattuck, Officer Wilson left the lounge and went home without notifying anyone from the Holyoke Police Department, including the supervisor on duty on duty that morning. (Testimony of Wilson)
33. Officer Wilson testified that he would have told his supervisor about the incident when he reported for his next tour of duty had he not subsequently been informed that he may be the subject of a criminal investigation regarding the incident. (Testimony of Wilson)
34. Officer Wilson testified before the Commission regarding a past incident involving himself and other officers where Christopher Martinez was disruptive and combative and no arrest was made and no report was written. (Testimony of Wilson)
35. After listening to the testimony of Officer Wilson and weighing it against the evidence and testimony presented in the case, I find that incident to be distinguishable from the incident which the subject of the instant appeal.
36. Holyoke Police Department Standard Operating Procedures ("S.O.P.") 8.20 Use of Force Reporting, Section IV Procedures, paragraph "D" Medical Attention states in relevant part: "After any level of force is used, the officer shall immediately evaluate the need for

- medical attention or treatment for that person upon whom the force was used and arrange for such treatment when that person has a visible injury...”. (Stipulated Fact)
37. Holyoke Police Department Rule 3 “Conduct and Responsibility, paragraph 3.17 Obligation to Report Crimes” states in relevant part: “Members of the Department shall communicate promptly to their respective superior officers all crimes, suicides, attempted suicides, fires, accidents, and all important happenings, complaints, and information of which the Department takes cognizant, that may come to their attention...”. (Stipulated Fact)
38. Holyoke Police Department Rule 4 Performance of Duty, paragraph 4.5 SUBMISSION OF REPORTS states that: “Officers shall submit all necessary reports on time and in accordance with established departmental procedure. Reports submitted by officers shall be truthful and complete, and bear the signature of the officer submitting the report. No officer shall knowingly enter or cause to be entered any inaccurate, false, or improper information. (old #1.33)” (Stipulated Facts and Joint Exhibit 7)
39. At 2:05 a.m., Tuesday, December 18, 2007, the Holyoke Police Department dispatch received a 911 call from an individual identified as William Bobvick [Brobovic]. The 911 dispatch record indicates that “PARTY REPORTS THAT HIS FRIEND WAS BEAT UP BY SOME PEOPLE. HE IS RESPONDING TO ER. STATES THAT THE PEOPLE WHO ASSAULTED HIM WERE HOLYOKE POLICE OFFICERS. THE CALLER ALSO STATES THAT HE WAS HIT IN THE BACK OF THE HEAD BY SOMEONE. ALSO REPORTS THAT ANOTHER INDIVIDUAL THAT HE DOES NOT KNOW WAS ALSO ASSAULTED BUT MIGHT STILL BE THERE.” (Joint Exhibit 11)

40. One of the individuals removed from the bar, Christopher Martinez, then went to Holyoke Hospital in the early morning of Tuesday, December 18, 2007 and alleged that Holyoke Police Officers beat him up. (Stipulated Fact)
41. At 2:12 a.m., Tuesday, December 18, 2007, the Holyoke Police Department dispatch received a 911 call from Holyoke Hospital about a disorderly patient, later identified as Christopher Martinez. (Joint Exhibits 12 and 15)
42. Mr. Martinez's aggressive behavior continued from the emergency room into the trauma room. He demanded that his facial injuries be photographed and stated that he would not cooperate until his photograph had been taken. He at first would not speak with Holyoke police officers who arrived at the hospital because he claimed that the injuries were caused by off-duty Holyoke police officers. (Joint Exhibit 15)
43. Photographs of Mr. Martinez were taken while he was at Holyoke Hospital by a Holyoke Police Officer. (Stipulated Facts and Joint Exhibit 25 and Respondent Exhibit 18)
44. Mr. Martinez had significant visible facial swelling, including cheek and eyelids. CT scan indicated no bone fractures or internal head injury. After assessment, Mr. Martinez was discharged at 4:10 A.M. on December 18, 2007. (Joint Exhibit 4)
45. At approximately 5:30 a.m. the morning of December 18, 2007, Chief Scott arrived at Holyoke Police Department Headquarters. Lieutenant Donald Whelihan ("Lt. Whelihan") informed Chief Scott sometime between 6:00 a.m. and 6:30 a.m. about the incident that occurred earlier that morning at Pal Joey's Lounge based on the limited information available from the officers who responded to the 911 calls. Lt. Whelihan was the supervisor on duty at the time of the incident. Lt. Whelihan presented Chief Scott with photographs of Christopher Martinez. Chief Scott was informed that the

photographs were taken earlier that morning of Mr. Martinez at Holyoke Hospital and that Mr. Martinez was alleging that he was beat up by three Holyoke Police officers. The Chief was informed that Mr. Martinez stated that there was going to be a cover-up. The identity of the three police officers was not known at that time. (Testimony of Chief Scott and Sergeant Albert)

46. Chief Scott waited until Lieutenant Fournier (“Lt. Fournier”) who is the head of the Professional Standards Division – the Holyoke Police Department’s Internal Affairs – to arrive and brought him into the Chief’s Office at approximately 7:00 a.m. that same morning. The Chief informed Lt. Fournier that he was ordering an internal investigation into the allegations made by Mr. Martinez and requested that Lt. Fournier notify his partner, Sergeant McCavick. Chief Scott indicated that he would notify Captain Monfette of the Criminal Investigations Bureau (“CIB”) when he arrived at work that morning and that he would contact Sgt. Albert, also of the CIB for purposes of conducting a criminal investigation. At approximately 8:00 a.m. Chief Scott assembled those individuals in his office as well as Sergeant Loftus (“Sgt. Loftus”) who was a supervisor on duty at the time of the incident. Chief Scott asked Sgt. Loftus to brief them all regarding the incident. There were no reports made from Officer Shattuck, Skwira or Wilson who were at Pal Joey’s Lounge at the time of the incident. All that the Holyoke Police Department had by way of information was that an individual who reported at Holyoke Hospital – Christopher Martinez – indicated that he had been beat up by Holyoke police officers and that there was going to be a cover up. They had the 911 calls and the photographs. (Testimony of Chief Scott)

47. Police Chief Anthony R. Scott ordered a criminal and internal investigation into the incident at Pal Joey's sometime after 8:00 a.m. later that morning of Tuesday, December 18, 2007. The Hampden County District Attorney's Office was notified about the allegations by Chief Scott as was the Federal Bureau of Investigations ("FBI") on that same date. (Stipulation of Facts)
48. Around 7:00 A.M. that same morning, Officer Wilson received phone calls informing him that Mr. Martinez went to the hospital claiming to have been beaten up by Holyoke police officers and that Chief Scott had called the F.B.I. and the District Attorney. Officer Wilson called Officers Skwira and Shattuck and informed them of this information. (Testimony of Wilson)
49. Sometime after 3:30 p.m. on December 18, 2007, Chief Scott was informed that Mr. Martinez identified Officers Shattuck, Skwira and Wilson from their photographs hanging on the walls outside the CIB offices when Mr. Martinez came in earlier that day to provide statements to the police about the incident. (Testimony of Chief Scott)
50. On December 20, 2007, the Appellants were placed on paid administrative leave pending the outcome of the investigation that had been ordered by Chief Scott.
51. When they reported to the police station, each Appellant was asked by Sergeant Albert, the detective conducting both the criminal and internal investigation, to make a statement. All three invoked their right to remain silent so as not to risk incriminating themselves. (Testimony of Appellants)
52. On or about December 31, 2007, Attorney Robert Jubinville, representing Officer Skwira, Attorney Charles Dolan, representing Officer Shattuck and Attorney Aaron Wilson representing Joseph Wilson submitted a statement signed by them indicating that

Mr. Rigali told the officers at the time of the incident that ““these guys are trouble; I want them out of here.’ Rivera said in Spanish ‘get your gun’. Skwira who understand some Spanish words, then told them that he knows what they said and to ‘knock it off’. Skwira told Shattuck and Wilson that they were talking about a gun. All three officers had had on-duty involvement with Rivera and Martinez in the past and knew of their violent propensities. Rivera began yelling things such as ‘fuck you’ and other confrontational and threatening remarks. . . . Outside, Rivera was yelling about ‘capping and shooting’ the officers and their families in English. He also stated ‘I will get my boys, it’s not going to end here’.” (Joint Exhibit 5)

53. The incident was investigated by the Holyoke Police Department’s CIB and Professional Standards Division. (Testimony of Chief Scott and Sergeant Albert)
54. The FBI conducted an investigation regarding the incident and interviewed several individuals, including percipient witnesses. Said investigation, as of the date of the civil service hearing, was noted as being on-going. (Testimony of FBI Agent)
55. On January 18, 2008 Officer Shattuck and Officer Wilson were charged by the Holyoke Police Department with Assault and Battery and Assault and Battery with a Dangerous Weapon – a shod foot on Christopher Martinez. (Stipulated Fact)
56. Officers Shattuck and Wilson were subsequently arraigned in the Holyoke District Court. Due to the local connection and media coverage of the case, the matter was assigned to the Palmer District Court with the Honorable Robert W. Gardner presiding.
57. At approximately the same time that the charges were filed against Officers Shattuck and Wilson, Officer Skwira was served through his attorney, a letter from Chief Scott ordering him in on January 21, 2008 to give a statement along with a letter from the

District Attorney stating that Officer Skwira would not be prosecuted by his office for the events at Pal Joey's if Chief Scott decided to handle the matter internally. (Testimony of Chief Scott and Joint Exhibit 17)

58. On January 21, 2008, Officer Skwira, at the advice of counsel, initially balked at the letter of immunity from the District Attorney as it was not offered by the Attorney General and/or the United States Attorney's office. That same day, Officer Skwira subsequently agreed to a verbal directive from Chief Scott to answer questions posed to him by Sergeant Albert. Two attorneys representing Officer Skwira were present during the interview with Sergeant Albert, for which there is a written transcript. (Testimony of Skwira and Exhibit 20)
59. In regard to Officers Shattuck and Wilson, Judge Gardner conducted an Adjutant hearing on April 28, 2008 on the admissibility of prior acts of conduct by Mr. Martinez and Mr. Rivera. He heard testimony from nine Holyoke police officers, including the three Appellants and he credited their testimony in regard to their prior encounters with Mr. Martinez and Mr. Rivera. (Exhibit 36)
60. On May 27, 2008 Hampden County District Attorney entered a Nolle Prosequi with respect to the charge of Assault and Battery with a Dangerous Weapon – shod foot. (Stipulated Fact)
61. On June 2, 2008 a jury acquitted both Officer Shattuck and Officer Wilson of the remaining charge of Assault and Battery. (Stipulated Fact)
62. Notwithstanding the above-referenced acquittal, Chief Scott maintained in his testimony before the Commission that the facial injuries visible in the photographs of Christopher

Martinez, taken at Holyoke Hospital, were the result of a beating by two of the officers.
(Testimony of Chief Scott and Appellant Exhibit 18)

63. On June 6, 2008 in response to an order by Chief Scott to document the incident on December 17 [18], 2007 at Pal Joey's Officer Shattuck, Officer Skwira and Officer Wilson submitted a written report to cover the time one half hour before arriving at Pal Joey's through one half hour after leaving. (Stipulated Facts and Joint Exhibits 1 – 3)
64. Prior to writing the reports, the Appellants asked Chief Scott if the federal investigation had concluded. Chief Scott testified that, in response, he told the officers that he was not a federal officer and that the F.B.I. did not keep him abreast of their investigation.
(Testimony of Chief Scott)
65. As of the date of the full hearing before the Civil Service Commission, F.B.I. Special Agent Ian Smythe testified that there was still an ongoing "civil rights investigation" regarding these three police officers and the event that occurred at Pal Joey's. (Testimony of Smythe)
66. Based on a review of all the evidence submitted to Chief Scott, including the FBI Summaries and CIB Statements, as well as the statements provided by the three officers themselves, Chief Scott decided to impose discipline based on the violation of certain Holyoke Police Department rules and the consequences of the rule violations.
(Testimony of Chief Scott)
67. Subsequently at the conclusion of the internal investigation, Chief Scott suspended Officers Shattuck, Skwira and Wilson for five (5) days and recommended to the Appointing Authority, Mayor Michael J. Sullivan, that the officers receive additional

- discipline for violation of Holyoke Police Department Rules and Regulations. (Stipulated Facts and Joint Exhibits 19, 27 and 33)
68. By interoffice memo to the three officers dated July 9, 2008, Chief Scott notified them of the rule violations for which they were being suspended for violating. These included: Obligation to Report Crimes; Submission of Reports; Use of Force Reporting; Conduct Unbecoming an Officer; Lack of Courtesy toward Public; Incompetence; and violation of a rule regarding off duty use of intoxicants. (Joint Exhibits 19, 27 and 33)
69. In addition to the 5-day suspensions which Chief Scott is able to issue under the civil service law, he recommended to the Mayor that Officer Shattuck be suspended for an additional 115 days; Officer Skwira an additional 30 days; and Officer Wilson an additional 55 days. (Testimony of Chief Scott)
70. Officers Shattuck, Skwira and Wilson appealed the five (5) day suspension imposed by the Police Chief to the Appointing Authority, Michael J. Sullivan who consolidated the five (5) day suspension appeal with the Chief's request for additional discipline to be imposed by the Appointing Authority. (Stipulated Facts)
71. On August 4, 2008, the Appointing Authority, Mayor Sullivan, conducted the Appointing Authority hearing at which the three Appellants testified. A written transcript of the local hearing was prepared and entered as Joint Exhibit 16. (Stipulated Facts and Joint Exhibit 16)
72. Officers Skwira, Shattuck and Wilson were each suspended for a total of fifteen (15) days for violation of the Rules and Regulations of the Holyoke Police Department regarding: Obligation to Report Crimes; Submission of Reports; and Use of Force Reporting. (Stipulated Facts)

73. After hearing, however, the Appointing Authority did not sustain the remaining rule violations previously cited by the Police Chief including: Conduct Unbecoming an Officer; Lack of Courtesy toward Public; Incompetence; and violation of a rule regarding the off duty use of intoxicants. (Stipulated Facts)
74. On or about August 15, 2008, Appellants appealed the Appointing Authority's decision to the Civil Service Commission ("CSC"). (Stipulated Facts)
75. At the Pre-Hearing Conference it was noted that percipient witnesses Mr. Martinez, Mr. Brobovic and Mr. Rivera were unavailable for hearing and that based on information and belief, Mr. Martinez and Mr. Brobovic were residing at that time in the Western United States.

CONCLUSION

G.L. c. 31, § 43, provides:

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

Under Section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew." Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006) and cases cited. The role of the Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification

for the action taken by the appointing authority." Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997). See also Leominster v. Stratton, 58 Mass. App. Ct. 726, 728, 792 N.E.2d 711, rev.den., 440 Mass. 1108, 799 N.E.2d 594 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, 721 N.E.2d 928, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass App.Ct. 473, 477, 648 N.E.2d 1312 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983).

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214, 268 N.E.2d 346 (1971); Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass. App. Ct. 486, 488, 684 N.E.2d 620, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514, 451 N.E.2d 408 (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, 133 N.E.2d 489 (1956).

"The commission's task...is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . the commission does not act without regard to the previous

decision of the [appointing authority], but rather decides whether ‘there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision’”, which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006). See Watertown v. Arria, 16 Mass. App. Ct. 331, 334, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983) and cases cited.

After an investigation and an Appointing Authority hearing regarding the incident in question, Officers Skwira, Shattuck and Wilson were each suspended for a total of fifteen (15) days for violation of the Rules and Regulations of the Holyoke Police Department regarding their obligation to report crimes; submit reports and use of force reporting relating to medical attention

Holyoke Police Department Rule 3 “Conduct and Responsibility, paragraph 3.17

OBLIGATION TO REPORT CRIMES” states that:

Members of the Department shall communicate promptly to their respective superior officers all crimes, suicides, attempted suicides, fires, accidents, and all important happenings, complaints, and information of which the Department takes cognizant, that may come to their attention. Any member withholding “tips” or information with a view to personal achievement or for any other reason shall be subject to charges. (old #1.60) (emphasis added)

Holyoke Police Department Rule 4 Performance of Duty, paragraph 4.5 SUBMISSION OF REPORTS states that:

Officers shall submit all necessary reports on time and in accordance with established departmental procedure. Reports submitted by officers shall be truthful and complete, and bear the signature of the officer submitting the report. No officer shall knowingly enter or cause to be entered any inaccurate, false, or improper information. (old #1.33)

Holyoke Police Department Standard Operating Procedure (“S.O.P.”) 8.2.0 Use of Force Reporting, Section IV Procedures, paragraph “D” Medical Attention states as follows:

1. After any level of force is used, the officer shall immediately evaluate the need for medical attention or treatment for that person upon whom the force was used and arrange for such treatment when:
 - a. That person has a visible injury; or
 - b. In the case of use of pepper spray, immediately after spraying suspect, officers shall be alert to any indications that the individual needs medical care. This includes, but is not necessarily limited to, breathing difficulties, gagging, profuse sweating and loss of consciousness; or
 - c. That person complains of injury or discomfort and requests medical attention.

NOTE: Any person requesting and/or deemed in need of immediate medical attention shall be transported (in accordance with the departmental policy on Transporting Prisoners to the appropriate hospital or medical facility. All medical treatment received shall be noted in the officer's report.

There is no dispute about the essential and relevant facts giving rise to the suspension. On Tuesday, December 18, 2007, Officers Shattuck, Skwira and Wilson met at the Pal Joey's Lounge located in Holyoke, Massachusetts at approximately 12:15 a.m. The evidence revealed that the officers at Pal Joey's Lounge on that date were known to be Holyoke Police Officers and, in fact, the officers testified that the owner of the establishment requested their help in monitoring and/or removing three (3) individuals from the establishment; that during the monitoring and/or removing of the individuals, a physical and loud verbal altercation ensued and continued outside. Testimony at the hearing indicates that at least one of the individuals in question was a mentioned the word "pistola" – which is gun in Spanish – and made threats against the officers in question, including threats against the families of the officers. The testimony of the officers also indicated that Officer Shattuck was struck during this altercation and that Officer Shattuck struck one of the individuals as well. Ultimately, one of the individuals who was physically removed by the officers ended up shortly thereafter at Holyoke Hospital.

Despite the nature of the verbal and physical altercation, the three police officers went home. without making any attempt to report the incident to police headquarters or a supervisor. They did not affect an arrest, notify their supervisor promptly, call for on-duty back-up or officially document their actions in the form of a written report as they should have after the incident occurred. If the three individuals (Mr. Rivera, Mr. Brobovic and Mr. Martinez) violated the law or committed any arrestable offense, as Officers Shattuck, Skwira and Wilson's statements suggested, they should have been arrested or at least detained by them and a supervisory officer notified. If anyone was injured, pursuant to departmental rules, the officers should have insured medical attention was provided or, at a minimum, after the physical altercation the officers should have at least evaluated the need for any medical attention pursuant to the departmental rules. There was no evidence to suggest that any such evaluation occurred even though testimony by Officer Shattuck indicated that he, himself, punched Mr. Martinez.

Based on the testimony of the Appellants, there is no question that the incident was at a minimum "an important happening". The Officers testified that their lives and the lives of their families were threatened. The officers testified that at least one of the individuals was a dangerous individual. There was a physical altercation where punches were thrown, including by Officer Shattuck. The officers testified that one of the individuals even threw a beer glass at one of the officers, knowing him to be a police officer. The owner of the establishment specifically approached the three officers because they were known to be Holyoke police officers to request their assistance.

At a bare minimum, an incident report should have been filed by the three officers at the conclusion of the altercation. The altercation began sometime after 1:00 A.M. and concluded shortly before 2:00 A.M. At 6:00 A.M. that morning when the Chief first met with Lt.

Whelihan, the three officers had still not reported the incident. To suggest that they did not immediately report the incident because they believed that they were suspects in a criminal investigation is contrary to the evidence. They were only identified as suspects in the incident sometime after 6:00 A.M. that morning, well after the incident occurred and they chose to go home without notifying anyone at the Holyoke Police Department about the incident. I conclude that by going home without notifying anyone in the Holyoke Police Department that the Appellants failed to promptly notify the Department as required.

Further, I did consider the arguments made by the Appellants that Chief Scott failed to follow other required procedures as part of the internal investigation regarding this matter, pointing to the *Citizen/Employee Complaints and Use of Forms* procedure (Joint List of Exhibits 9) and the *Civilian Complaint Against Superior and Officers* (Joint List of Exhibits 10). I conclude that these policies are inapplicable to the given circumstances since it was the Police Chief and not a “citizen” as that term is defined in the rules who initiated the investigation and complaint based on the information – or lack thereof by the three officers – that was presented to him. Any attempt to suggest that the policy applies to the Chief of Police rather than to “citizen” as the term is clearly defined in the policies is unreasonable. Moreover, the record shows that the Appellants were afforded notice, a local hearing before the Appointing Authority, an opportunity to respond and a *de novo* review before the Commission, in full satisfaction of their due process rights. See O’Neill v. Baker, 210 F.3d 41, 47 (1st Cir. 2000) (tenured civil service employees are “entitled to the constitutional minimum of some kind of hearing and some pretermination opportunity to respond” [internal quotation marks and citation omitted]).

Finally, I did review the Appellants’ request that the Commission draw an adverse inference from the fact that the three supposed victims were avoided by the employer. There is no need to

do so as I have reached the conclusions regarding the alleged rule violations primarily on the testimony of the three officers and not the statements of three supposed victims.

After a careful review of all the evidence and the testimony of the three officers, I conclude that they each violated the three rules of the Holyoke Police Department cited by the Mayor and that there was reasonable justification for disciplining the officers for violating these rules.

Having determined that it was appropriate to discipline the Appellants for these rule violations, the Commission must determine if the City was justified in the level of discipline imposed, which, in this case, was a 15-day suspension for each Appellant.

The Commission is guided by “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.’ ” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006) and cases cited. 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 employees’ suspensions to ensure perfect uniformity. See Boston Police Dep’t v. Collins, 48 Mass. App. Ct. 408, 412 (2000).

“The ‘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.’ ” Town of Falmouth v. Civil Service Comm’n, 61 Mass. App. Ct. 796, 800 (2004) quoting Police Comm’r v. Civil Service Comm’n, 39 Mass.App.Ct. 594, 600 (1996). 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 commission is not free to “substitute its

judgment” for that of the appointing authority, and “cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation” E.g., Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006).

I carefully considered the Appellants’ arguments in regard to why the discipline imposed in this case was too harsh and I address them as follows.

Alleged Bias of Police Chief

The Appellants argue that Chief Scott formed his opinion of their guilt after first viewing the photographs of Christopher Martinez. Also, the Appellants argue that the fact that Chief Scott still maintains, notwithstanding the not guilty verdicts, that two of the officers inflicted the injuries depicted in the photographs in questions, shows that he has a personal bias that resulted in a penalty that is too harsh. Finally, in regard to Chief Scott, the Appellants argue that it was inappropriate for him to rely on hearsay evidence in the form of F.B.I. summaries of witness statements.

Chief Scott is unapologetic about his view that the injuries shown in the photographs in question were inflicted by two of the Appellants – and that the court dispositions in favor of Officers Shattuck and Wilson did not change his mind. I conclude that this contributed to the number of charges made by Chief Scott against the Appellants and his recommendation to the Mayor to implement additional suspensions ranging from 30 to 115 days. The Mayor, however, is the Appointing Authority for police officers in Holyoke. As such, he conducted a local disciplinary hearing and determined that only three of the charges against the officers should be sustained and appropriately decided that only a 15-day suspension for each officer was warranted. As referenced above, I also concluded that the evidence and testimony of the officers presented at the de novo hearing before the Commission showed that they violated the three rules

in question. This conclusion was reached after giving no weight to the witness statement summaries taken by the F.B.I.

Infraction was not egregious

The Appellants argue that any fraction in this case, if found to be supported by the Commission, can not be considered “egregious, intentional or malicious” thus justifying a downward modification of the 15-day suspensions. Specifically, the Appellants argue that the Commission should consider that this incident “sprang from a calloused world-view hardened by the stress of working in the equivalent of a combat zone where the officers’ only allies are his fellow officers and many of the people he is sworn to protect hate him, harass him, and threaten him on a daily basis so that the unusual becomes routine and the objectively important becomes subjectively trivial.”

Police officers, particularly those working in an urban environment such as the City of Holyoke, hold the toughest jobs in Massachusetts, for which they deserve our respect and admiration. For those who work in more orderly environments, including this Commissioner, it is difficult to comprehend the dangers that police officers confront on a daily basis, including encounters with such dangerous individuals such as those involved in this case.

Even after considering the dangerous environment in which they work, the evidence shows that they failed to promptly communicate, file a written report, or comply with reporting requirements regarding use of force policies regarding an important happening after: 1) their lives and the lives of their families were threatened; 2) they knew that at least one of the individuals was a dangerous individual who had made reference to a gun; 3) there was a physical altercation where punches were thrown, including by Officer Shattuck; and 4) one of the individuals threw a beer glass at one of the officers, knowing him to be a police officer. Failure

to promptly communicate and report this important happening is a serious violation of the rules of a paramilitary organization such as the Holyoke Police Department and the 15-suspension issued against each officer was warranted based a preponderance of the evidence presented to the Commission.

For all of the above reasons, the Appellants' appeals under Docket Nos. D-08-196, D-08-197, and D-08-198 are hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman, Chairman

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman - Yes; Henderson, Commissioner – No; Marquis, Commissioner – Yes; Stein, Commissioner – Yes; and Taylor, Commissioner - No) on April 2, 2009.³

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:

Michael Clancy, Esq.
International Brotherhood of Police Officers
1299 Page Boulevard
Springfield, MA 01104

W. Michael Ryan, Esq.
of P.O. Box 60476
Florence, MA 01060

³Dissenting Opinion Attached

Melissa M. Shea, Esq.
Sullivan, Hayes & Quinn
One Monarch Place – Suite 1200
Springfield, MA 01144-1200

Dissenting opinion of Commissioners Henderson and Taylor:

CONCLUSION:

The three Appellants here, under the totality of the circumstances, handled the situation that was thrust upon them, in admirable fashion. They did not provoke or instigate the circumstances in any way. They were off duty, acting in full conformity with the law and social practices. They aided and assisted upon request, the elderly owner of this private business establishment, (Pal Joey's Lounge). They protected the owner, older patrons and employee, (female bartender) from a potentially dangerous development.

The circumstances here were highly unusual and concerning, even for experienced police officers and probably frightening for regular citizens. Yet, these officers assessed and addressed the situation appropriately at every stage of its development. They properly attempted to ignore, then placate, then deescalate and then finally confront this willful menace. They confronted this menace with coordinated good judgment and reasonable force. They exhibited great restraint under these circumstances. In essence, these three officers acted in self-defense and the defense of the third parties named above.

These three off-duty officers obviously did not consider themselves to be victims of any crime and therefore did not report it as such. It was all in an off-duty night's work for them, at no cost to the City. Imagine, if they made a 911 call or a call for officers in trouble. Other officers arriving in uniform would have been a catalyst for an explosion. By making such a call, the Appellants could have easily shifted the burden and potentially dangerous consequences on to the responding on-duty officers, and the third parties named above.

The three, (primarily Martinez and Rivera) were notorious, defiant, dangerous, provocative and belligerent young men. They entered this establishment shortly before closing primed for mayhem. Yet, Chief Scott summarily cast them in the role of victim and cast his own officers in the role of offenders.

Martinez, the most provocative and dangerous of the three, went into this establishment, bent on destruction and later went to the hospital looking for evidence, not medical treatment. Martinez threatened and disrupted the hospital staff, so that hospital security and 911 calls were made. However, Chief Scott did not charge Martinez with any crime and did not order a criminal investigation of Martinez.

For every asserted crime there is a corresponding tort, for which a claim of monetary damages is made. Here, the establishment owner, the eight to ten patrons, including the three off-duty appellants and the female bartender did not make a report or a claim that any crime had been committed against them, yet they were probably the real victims of assaults, threats and assault and battery. You cannot force victim hood on a person. They apparently exercised their option to view the assailant's behavior only as bad behavior, torts or potential torts. However, the statute of limitation has not yet expired on these torts or potential torts.

None of the three young provocateurs, characterized as victims by Chief Scott, testified at this hearing. Any evidence relating to their alleged injuries and their causes is abject hearsay. Any

evidence even alleged photographic evidence wilts under the glare of effective cross-examination.

There was approximately one-half hour unaccounted for before Martinez arrived at the hospital. This was plenty of time for him to have gotten into a fight at another location or to self inflict the swelling to his eyes. The swelling could have been caused by a foreign substance entering or being applied to the eyes. The commonly known treatment to remove a foreign substance is flushing with water and the treatment for swelling from impact is ice. He did not need to go to a hospital for water or ice. Martinez did not need hospital services. He went to the hospital with other purposes in mind. He arrived at the hospital and vehemently and repeatedly demanded that photographs be taken. He went there to continue to be assaultive and disruptive and cause evidence to be created against these three Appellants.

Where were the other two, when Martinez was at the hospital? It appears that Brobovic participated in this venture by placing the belated 911 call. He didn't place the call during the disruption at the establishment, when real assistance might be claimed or sought. He waited and placed the call after the fact so that the responding officers found a closed establishment with no one around, outside the establishment. Again, this appears to be a coordinated effort by Martinez and Brobovic to create evidence and cause the initiation of some action against the Appellants. Why wasn't Martinez charged criminally for his assaultive, threatening, and disruptive behavior at the hospital?

Martinez played his role perfectly, at the hospital, by claiming that he was going to the media and the FBI. This threat apparently inspired Chief Scott to quickly call in the FBI and the District Attorney's Office.

A common sense and neutral solution to this situation for Chief Scott would have been to file applications for cross-complaints for assault and battery between these two groups of three, at the local District Court. The parties would then have been summonsed to appear and testify at a Clerk-Magistrate's probable cause hearing. The Clerk-Magistrate would then, after a hearing, determine the issuance or non-issuance of the various criminal complaints.

These three Appellants should have received commendations for good judgment and their effective and efficient handling of this potentially dangerous situation. Instead, they were charged and disciplined for rule violations, which under these circumstances seem inappropriate and certainly unjust. The rule violations here are simply a triumph of technical form over substance.

For all of the above stated reasons we would allow the Appellant's appeals and order them to be returned to their respective positions, without any loss of pay or other benefits.

Daniel M. Henderson,
Commissioner

John E. Taylor,
Commissioner

April 2, 2009