

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

NAZA HAYNES,
Appellant

v.

CITY OF SOMERVILLE,
Respondent

D1-15-22

Appearance for Appellant:

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Appearance for Respondent:

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Commissioner:

Paul M. Stein

CORRECTED DECISION

The Appellant, Naza Haynes, appealed to the Civil Service Commission (Commission), pursuant to G.L.c.31,§43, from his termination by the City of Somerville (Somerville) as a Police Officer with the Somerville Police Department (SPD). A pre-hearing conference on February 17, 2005 and a full hearing on April 22, 2015 were held at the Commission's Boston office.¹ At Somerville's written request, the hearing was declared public. Witnesses were sequestered. Somerville called four witnesses and the Appellant called two witnesses and testified on his own behalf. Thirteen (Exhs. 1 through 4, 5A, 5B, 6 , 5A, and 7 through 11) exhibits were introduced in evidence. The full hearing was digitally recorded and both parties received a CD of the proceeding². On June 15, 2015, both parties submitted proposed decisions.

¹ 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.

² 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 the substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, the CD recording provided to the parties should be transcribed by the plaintiff in the judicial appeal into a written transcript.

FINDINGS OF FACT

Based on the Exhibits and the testimony of the following witnesses:

Called By the Appointing Authority:

- David R. Fallon, SPD Police Chief
- James Rooney, SPD Police Lieutenant
- Gerard Rymill, SPD Police Lieutenant
- Ms. A, Private Citizen

Called by the Appellant:

- Naza Haynes, Appellant
- Jason Costa, SPD Police Officer
- Michael McGrath, SPD Police Officer

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations and policies, and reasonable inferences therefrom, a preponderance of the evidence establishes the following findings of fact:

1. The Appellant, Naza Haynes, held a civil service position of permanent police patrol officer in the SPD from his appointment on February 28, 2011 until his termination on January 20, 2015. Save for the incident that gave rise to his termination that is the subject of this appeal, he had not been the subject of any discipline by the SPD. Mr. Haynes is married with two children. (*Stipulated Facts; Testimony of Appellant & Chief Fallon*)

2. The Mayor of Somerville is the Appointing Authority over the SPD. Since 2005, Joseph A. Curtatone has served as the Mayor of Somerville. (*Testimony of Chief Fallon*); *Administrative Notice* [<http://www.somervillema.gov/photo-galleries/mayors-somerville>)]

3. Mayor Curtatone appointed Richard Fallon as the SPD Chief of Police on September 11, 2014. His appointment came with a mission to take all appropriate measures to “improve the department” inherited from his predecessors. (*Testimony of Chief Fallon*)

4. In the early morning hours of Saturday, November 8, 2014, Mr. Haynes was one of two SPD patrol officers who responded to two complaints about loud music emanating from the first

floor tenant of a building called in by the tenants who occupied two other units in the building. (*Exh. 5a & 6; Testimony of Appellant, Costa & Ms. A*)

5. Upon arriving on scene, Officers Haynes and Costa met the two female tenants who had mistakenly reported what they had thought was loud music from the first floor tenant, who had recently moved into the building, and had been the subject of prior complaints (of which Officer Haynes was previously aware) about noise and the smell of marijuana from the apartment. As they waited for the police to arrive, they realized that, in fact, the music was coming from their next door neighbor, with whom they were actually friendly. The officers explained that they were still obliged to follow-up the complaint, proceeded to the source of the disturbance, admonished the neighbors to abate the disturbance and returned to the two women to report the matter was resolved. (*Exh. 5A & 6; Testimony of Appellant, Costa & Ms. A*)

6. After speaking briefly together, one of the women departed to apologize to the neighbors for having called the police and Officer Costa started back to the police cruiser. Officer Haynes and Ms. A continued in “light conversation and laughter” about getting the wrong people in trouble. During this conversation, Ms. A asked Officer Haynes if she could contact him again in case there were future problems with the first floor neighbors “smoking weed.” (*Testimony of Appellant, Costa & Ms.A*)

7. Officer Haynes returned to the cruiser. Officer Costa said: “When you are on a call, always remember Officer G, Officer G, Officer G.” (*Testimony of Costa*)

8. Officer G had a reputation for striking up relationships with women whom he met through his official duties. This included a woman he met when she was booked and placed into an SPD jail cell, had a child by her, and was then (wrongfully) accused of domestic violence for which he wound up being taken into custody himself. In a second incident, Officer G received a

three-day suspension for making improper advances on a female clerk while working a detail at a package store. In a third incident, Officer G attempted to contact a woman who had come into the SPD police station to lodge a domestic violence complaint, using information from the department's computer data base (CAD), to call her and visit her home. The woman complained and Officer G was terminated at that point, but the termination was rescinded and Officer G was allowed to resign in lieu of termination. (*Testimony of Costa & McGrath*)

9. The following Tuesday, November 11, 2014, Officer Haynes worked the midnight to 8:00 A.M. shift. Using a pre-paid (so-called "throw away") cell phone he said was found abandoned by another officer in a cruiser and personal contact information retrieved from the SPD's CAD system, he began texting Ms. A.

- At 12:12 A.M. Officer Haynes texted: "Hey can I ask you a question?"
- At 2:26 A.M., Ms. A. awoke from sleep and noticed the message. Thinking it was probably a friend, she replied: "Who is this?"
- The following exchange then ensued:
 - Haynes: "Can I ask you 3 questions?"
 - Ms. A: "?"
 - Haynes: "I might not have the right person If not I am sorry"
 - Ms. A: "Who are you looking for"
 - Haynes: "First are you engaged or dating? Not that it would matter."

(*Exh. 6A; Testimony of Appellant & Ms. A*)

10. Ms. A. had returned to bed before she saw Officer Haynes last message. When she awoke at 6:52 A.M. she replied: "?" to which Officer Haynes responded: "??". The exchange then continued:

- Ms. A: "If it doesn't matter then why would you ask it. Who is this and who are you looking for"
- Haynes: "I'm just a guy who thought you were attractive. I wanted to know if you were taken. You obviously are . . .no worries take care."
- Ms. A: "Well might I suggest that you introduce yourself instead of hiding behind a random phone number next time you try to talk to someone."

Haynes: “Haha. I’m not hiding. I chose to go about it this way. I’m well schooled on how to talk to women. I have no problem in that department. I’m not trying to be creepy. I work for you. I’m here to protect and serve”

Ms. A: “Like the police?”

Haynes: “Yes, like the police. How many cops do you know?”

Ms. A: “Depends what city we are talking about”

Haynes: “Somerville. Anyway are you taken? I don’t want to waste either of our time.”

(Exh. 6A; Testimony of Ms. A)

11. At this point, Ms. A realized that the texts are not coming from anyone she knows, and now believed they probably were coming from an SPD Police Officer. She guessed “Juan”, another SPD officer she had worked with in the past, and says that she is in a “serious” relationship. (She lives with her boyfriend.) *(Exh. 6A; Testimony of Ms. A)*³

Haynes: “Are you asking if I’m Juan?”

Ms. A: “Correct”

Haynes: “Are you interested in Juan? You’re not answering any of my questions. I see where this is going. I’m giving you permission to see other people. Lol. Anyway gg”.

(Exh. 6A)

12. Ms. A was now alarmed that someone she did not know in the SPD had her phone number. She was determined to try to identify the person. Officer Haynes continues to drop hints, until Ms. A narrows it down to one of the two officers who responded to the noise complaint the previous Saturday. The messages continue for an hour or so. Officer Haynes sent the last message around 7:00 to 8:00 A.M, to which Ms. A made no response.

Ms. A: “Who is this?!?”

Haynes: “What do I have to gain” You’re in a serious relationship. If you ever decided you needed a friend, I’m only a text away. Not to . . . Don’t text me when your neighbors are smoking weed. You blew it.”

Ms. A: “Why can’t you just say who you are instead of hiding behind a number. It really is creepy . . Now I know who this is. How did you get this number”

³ The text message containing the information about Ms. A’s relationship does not appear verbatim in the transcript in evidence. Ms. A explained that in the course of her attempt to copy the messages to create a paper record to bring to the SPD, she accidentally deleted that message and at least one other (about having to go to work). It is clear that she did disclose her relationship status at some point in the Tuesday early morning exchange, as Officer Hayes acknowledges he received that information and continues to refer to it thereafter. I find Ms. A’s explanation for why the messages were deleted and find no evidence of any ulterior motive by Ms. A to do so. *(Exh. 6A; Testimony of Ms. A)*

Haynes: "I asked for it. . . . I asked about the call to your house. Anyway sorry to creep you out. . . . You still don't know who I am"

Ms. A: "You have to be Juan [last name redacted]"

Haynes: "I'm not Juan . . . How do you know so much about him? He's new guy"

Ms. A: "I used to work with him"

Haynes: "Oh ok. I came to your house about a week ago. You and the girl upstairs were complaining about the noise. I'll let you get ready for work or whatever. Enjoy Serious and Juan. Lol, gg."

Ms. A: "A week ago?"

Haynes: "About... You want to continue this later tonight or no?"

[No immediate response]

Haynes: "No it is . . . take care"

Ms. A: Sorry I was not by my phone. I just want to know who this is"

Haynes: "It's cool. I told you when I came by."

[No response]

(Exhs. 6 & 6A; Testimony of Ms. A)

13. At 12:36 A.M. the next night, Officer Haynes resumed texting Ms. A, sending the message: "Hey Mrs. Serious. Are we done? If yes, I won't bother you." Upon waking, Ms. A saw the message and responded at 6:46 A.M.: "I need to know who this is". *(Exh. 6A)*

14. Officer Haynes replied: "[Y]ou called the Police with the chic [sic] from upstairs. You thought the noise was coming from inside but it was your neighbors on Waldo. Then the chic [sic] from your building said she wanted to go apologize for calling the cops on them." *(Exh. 6A)*

15. At 8:40 A.M., Ms. A sent the final message exchanged between her and Officer Haynes, stating: "As I mentioned I have a serious boyfriend. I also don't think it's right that you pulled my phone number and still haven't identified yourself completely." *(Exh. 6A)*

16. The following Monday, November 17, 2014, Ms. A went to the SPD police station with copies of the text messages to make a formal complaint. In the written narrative she later provided to the SPD, she described her fear about possible retaliation and/or, worse, possibly being mistaken that it was not a real police officer but someone who was pretending to be one.

"As you can see from the messages, I approached the conversation not knowing who it was The only reason I continued the conversation was because this individual had explicit information about me, the situation going on in our building, the "chic from

upstairs”, reminding me I didn’t know who he was, etc. I was determined to find out who was behind the messages. At the end, I just gave up.

It took me multiple days to make it to the police station to make a formal complaint. I was afraid of retaliation. I was afraid of it not being who they said they were, perhaps impersonating a police officer. I was afraid of what would happen once I brought this to light. I spoke with many close friends, some associated to law enforcement (outside of Somerville) and others not, and finally gathered the courage and reasoning to go to the police . . .”

(Exhs. 3 & 6; Testimony of Ms. A, Lt. Rooney & Lt. Rymill)

17. SPD Lt. James Rooney, the shift commander on duty, took Ms. A’s complaint. He thought of his own daughter, about the same age as Ms. A, and his initial reaction was that the situation “bordered on stalking.” His cursory investigation soon identified Officers Haynes and Costa as the two officers who had responded to the November 8, 2014 noise complaint. When Officer Haynes, then off duty, learned of the complaint, he came to the police station at approximately 6:30 P.M. and reported to Officer Rooney. Officer Haynes admitted that he was the person who sent Ms. A the text messages. Lt. Rooney then gave Officer Haynes a direct order not to contact Ms. A and that the matter would be referred to the Office of Professional Standards. *(Exh. 3; Testimony of Appellant, Lt. Rooney & Ms. A)*

18. On November 18, 2014, after learning of Ms. A’s complaint, SPD Chief Fallon convened a meeting attended by the senior members of his Command Staff (Deputy Chiefs Trant and Carrabino), Captain Daniel Cotter, Lt. Rymill, Lt. Mitsakis and Lt. Rooney. Lt. Rymill was assigned to mentor Lt. Mitsakis, who had just been appointed as the new supervisor of the Office of Professional Standards, and Lt. Rymill personally conduct the investigation. *(Exh. 3; Testimony of Chief Fallon, Lt. Rooney & Lt. Rymill)*

19. Lt. Rymill notified Officer Haynes of the investigation and ordered him to submit a Station Report in which he was required to answer twenty-seven specific questions regarding the November 8, 2014 call and his subsequent text messaging with Ms. A. Among his responses:

- Ms. [A] stated there was a party going on inside her building and it was too loud.
- I did not introduce myself [to Ms. A or anybody else] by name or badge number.
- Ms. [A] did not give me her phone number.
- I did not ask Ms. [A] for her phone number. Ms. [A] asked me for my phone number.
- I obtained Ms.[A]'s number from the Reporting Party. CAD.
- Ms. [A] did not ask me to call, text, e-mail or otherwise.
- I contacted Ms. [A] by texting.
- I did not identify myself in the messages.
- I identified myself as a Somerville Police Officer.
- I sent the messages several days after Nov. 8. The messages were sent during my 12-8 AM shift.
- Ms. [A] asked me several times to identify myself.
- Ms. [A] asked if I was a police officer.
- I did ask Ms.[A] if she were engaged or dating.
- I said not that it would matter because I wasn't looking for a relationship with Ms. [A].
- What I meant when I said don't text me when your neighbors are smoking too much weed, you blew it was . . . Ms. [A] said she wanted me to come back and deal with the people smoking weed. The only reason I used this sentence was to try to give Ms.[A] a clue of who I was.
- What I meant when I said I'm not trying to be creepy, I'm here to protect and serve was I wanted her to know I was a Police officer and . . . wasn't trying to be creepy.
- Ms. [A]'s situation was an isolated incident. My reasoning for doing so was because Ms. [A] was very flirtatious and asked . . . for my number. I would have never contacted Ms. [A] if I didn't think she wanted to get to know me or talk to me. I am deeply sorry and know I made a terrible mistake. I can promise The Command Staff that nothing like this will ever happen again if I'm given a second chance. Please give me the opportunity to redeem myself.

(Exhs. 5A & 5B) (emphasis added)

20. On November 19, 2014, Lt. Rymill interviewed Ms. A for approximately one hour at the police station. He observed her to be “nervous and apprehensive”, “visibly shaking and had red, watery eyes as though she had been crying.” He assured her she would not be retaliated against for making the complaint, as she feared, and that her complaint would be taken seriously. She became “furious to the point of crying again” when she expressed her fear about her phone number being compromised. She became “irate” over the statement that Officer Haynes said she asked for his phone number, which she denied and said the other woman present could substantiate this. She “became very emotional” and kept repeating how she could not believe he

“abused his position and authority” to gain and use her personal information. Lt. Rymill asked Ms. A to put her statement in writing, which she did in a five-page, single spaced e-mail dated November 20, 2014. (*Exhs 3 & 6: Testimony of Lt. Rymill & Ms.A*)

21. On November 20, 2014, Lt. Rymill spoke with the other tenant by phone. She provided “much the same” description of the November 8, 2014 encounter. She recalled that both women and the two officers “laughed a little” about the wrong apartment issue for a few minutes (maybe ten minutes). When asked whether Ms. [A] ever asked Officer Haynes for her phone number, she stated: “Absolutely not.” The woman agreed to submit a written statement but none was provided. (*Exh. 3; Testimony of Lt. Rymill*)

22. On November 21, 2014, Lt. Rymill conducted a personal interview with Officer Costa. He confirmed that the reporting parties had told the officers that the noisy apartment was not the same apartment as they originally thought and, after they went to the noisy apartment, and they returned and the four of them spent about ten minutes together before leaving. Officer Costa did not recall Ms. A asking Officer Haynes for his phone number, but said he had started to his cruiser first and could not be sure if something was said after he walked away. Officer Costa did not tell Lt. Rymill about his admonition to Officer Haynes about “Officer G.” (*Exh. 3; Testimny of Lt. Rymill & Officer Costa*)

23. On December 1, 2014, Lt. Rymill interviewed Officer Haynes, with his union and legal counsel present. Officer Haynes reiterated his written statement that “yes, [Ms. A] had asked him for his number.” When asked if he gave Ms. A his number, he said they were standing alone at the front door, he on the porch and she inside the door and Ms. A asked “can I get your number and he just smiled.” Then as he was walking away, Ms. A said “can you come back and deal with the people smoking weed to which he just smiled and waved.” (*Exh. 3*)

24. On December 3, 2014, Lt. Rymill submitted his written report to Chief Fallon and Deputy Chiefs Trant and Carabino. His report concluded that charges were sustained for Unauthorized Dissemination of Official Information and Untruthfulness (Exhs. 3 & 10⁴; Testimony of Lt. Rymill)

25. On December 8, 2014, Lt. Rymill supplemented his report with a further finding that sustained an additional charge of Conduct Unbecoming a Police Officer (*Exh. 4; Testimony of Lt. Rymill*)

26. By letter dated December 9, Chief Fallon imposed a five-day suspension upon Officer Haynes for misconduct in violation of the three SPD Rules and Regulations cited in Lt. Rymill's reports, in accessing the CAD system to obtain Ms. A's cell phone number and text messages to her, and his claim that Ms. A had been flirtatious and asked him for his phone number. (*Exh. 1*)

27. By separate letter dated December 9, 2014, Mayor Curtatone notified Officer Haynes that a hearing would be held to determine whether further discipline was warranted for these violations, up to and including termination. (*Exh. 2*)

28. On January 6, 2015, a hearing was held before a hearing officer designated by Mayor Curtatone to determine whether just cause existed for the five-day suspension of Officer Haynes imposed by Chief Fallon and whether just cause existed for further discipline up to and including termination of employment. After hearing the testimony of witnesses, including Officer Haynes, the hearing officer submitted his written findings and conclusions that Officer Haynes "violated the Rules and Regulations of the Somerville Police Department which prohibit Unauthorized Dissemination of Official Information and prohibit Conduct Unbecoming a Police Officer, as

⁴ The SPD Rules and Regulations introduced in evidence (Exh. 10) are numbered differently from the numbers cited in Lt. Rymill's reports, and in the initial disciplinary notice from Chief Fallon, apparently due to different editions of the rules promulgated from time to time. There was no contention, however, that any material differences existed in the substance of the rules.

well as the Rule which requires that a police officer truthfully state facts in all reports and when the officer appears before any departmental investigation.” The hearing officer found just cause to suspend Officer Haynes for five days without pay and to impose further discipline, up to and including termination. (*Exhs 7 & 8*)

29. By letter dated January 30, 2015, Mayor Curtatone adopted the hearing officer’s report and the findings and conclusion contained therein and discharged Officer Haynes effective immediately. Mayor Curtatone’s letter stated:

“Personal information obtained from a private citizen calling for police assistance is considered official information and is not to be utilized for personal gain of any sort. While you admit that you did so and admit that it was wrong, you fail to understand the seriousness of your wrongdoing. During the course of the investigation, you even attempted to shift blame on [Ms. A] by claiming that she was flirtatious and that you thought it was okay to contact her because, you claimed, she had asked for your telephone number. That statement was found to be untruthful based upon witness testimony of your conversation with her.

“I also find it significant that the woman you contacted was deeply disturbed by this contact. As stated by the hearing officer your ‘unsolicited and unwanted messages to [her] were clearly harassing and raised legitimate fear, outrage and apprehension in [her] mind.’ I find that what you did was an egregious act of misconduct for which termination is the only appropriate remedy.”

(*Exh. 9*)

30. This appeal duly ensued. (*Claim of Appeal*)

APPLICABLE CIVIL SERVICE LAW

A tenured civil service employee may be disciplined for “just cause” upon due notice and opportunity for hearing and written decision by the appointing authority “which shall state fully and specifically the reasons therefore.” G.L.c.31,§41. A person aggrieved by a decision of an appointing authority made pursuant to G.L.c.31,§41 may appeal to the Commission under G.L.c.31,§43, which provides, in 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 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 makes a de novo review "for the purpose of finding the facts anew." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. The role of the Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). See also City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev.den., 440 Mass. 1108 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass.App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, rev.den., 390 Mass. 1102 (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., 359 Mass. 211, 214 (1971); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass.App.Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983)

The 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 (2006) and cases cited. It is also a basic tenet of “merit principles” of civil service law that discipline must be remedial, not punitive, designed to “correct inadequate performance” and “separating employees whose inadequate performance cannot be corrected.” G.L. c.31,§1.

The Appointing Authority meets its burden of proof "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). See also Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) The Commission must take account of all credible evidence in the record, including whatever fairly detracts from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001). The Commission is not obliged to follow strictly the rules of evidence applied in a judicial proceeding, and may credit, in its sound discretion, reliable hearsay that would be inadmissible in a court of law. See, e.g., Doe v. Sex Offender Registry Board, 459 Mass. 603 (2011); Costa v. Fall River Housing Auth., 453 Mass. 614, 627 (2009). The hearing officer determines the credibility of witnesses. Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) See also Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003); Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 141 (1997).

G.L.c.31, Section 43 also vests the Commission with “considerable discretion” to affirm, vacate or modify the discipline imposed by an appointing authority, although that discretion is “not without bounds” and requires sound and reasoned explanation for doing so. See Police Comm’r v. Civil Service Comm’n, 39 Mass.App.Ct. 594, 600 (1996) and cases cited. (“The power accorded to 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”). See also Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983).

ANALYSIS

Somerville has met its burden to establish just cause for the suspension and discharge of Officer Haynes. His misconduct in contacting, harassing and intimidating a private citizen while he was on duty for the purpose of attempting to establish a personal relationship with her after he came to her residence in response to her complaint about an obnoxious neighbor, violated SPD’s rules and regulations which prohibit unauthorized access and use of official information for personal gain, constitutes conduct unbecoming an officer, and fully warranted his discharge from employment as a police officer.

First, the Commission is mindful that “[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). When it comes to police officers, the law teaches that there is a special “trust reposed in [a police officer] by reason of his employment. . . . 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.” Police Comm’r v. Civil Service Comm’n, 22 Mass.App.Ct. 364, 371, rev.den., 398 Mass. 1103 (1986) See also McIssac v. Civil Service Comm’n, 38 Mass.App.Ct. 473, 475 (1995) (“An officer of the law carries the burden of being expected to comport himself or herself in an exemplary fashion.”)

Second, the duty imposed upon a police officer to be truthful is one of the most serious obligations he or she assumes. See, e.g., Falmouth v. Civil Service Comm’n, 61 Mass.App.Ct. 796, 801 (2004) citing City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (“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. . . . It requires no strength of character to speak the truth when it does not hurt.”) See also, Desmond v. Town of West Bridgewater, 27 MCSR 645 (2014); Ung v. Lowell Police Dep’t, 24 MCRS 567 (2011); Gallo v. City of Lynn, 23 MCSR 348 (2010). An appointing authority is as equally entitled to impose discipline upon a police officer whose credibility can be questioned by a demonstrated lack of objectivity as it is upon an officer who knowingly distorts the truth through lying. See Robichau v. Town of Middleborough, 24 MCSR 352 (2011) and cases cited.

Applying these principles to the facts of this appeal, I conclude that Officer Haynes has irrevocably broken his sworn duty of public trust and Somerville had just cause to terminate his employment.

First, even Officer Haynes admits that his behavior violated SPD Rules and Regulations and demonstrated extremely poor judgment on his part. I am persuaded by the testimony from Ms. A and Lt. Rymill, that Ms. A never provided Officer Haynes with her phone number, ever asked him to call her, or in any other way, did or said anything that suggested any interest in striking up a personal relationship with Officer Haynes. Officer Haynes had no reason to think that she did.

Second, as Somerville rightly points out, Officer Haynes's misconduct went further than simply poor judgment that might easily be remediated. Officer Costa specifically reminded Officer Haynes that the SPD frowned on a police officer who crossed the line and used official position for personal advantage. Not only did Officer Hayes ignore this advice, he compounded the error by using his access to the police department CAD system to obtain Ms. A's cell phone number and contact her while he was on duty, another serious, and premeditated misuse of his police powers. Even when Ms. A told him that his anonymous and intrusive texting, which he also admitted was by design, was considered unwanted and "creepy", he did not relent. Finally, his choice of a pre-paid "throw-away" phone to conduct this activity reinforces my conclusion that he knew exactly what he was doing, knew it was wrong and intentionally sought to conceal his activities.

I am somewhat more skeptical that Officer Haynes was "untruthful" when he claimed that Ms. A asked him for his "number." The evidence does leave some ambiguity about what she actually said and how he reported it when asked during Lt. Rymill's investigation. What is clear, however, is the fact that, whatever Ms. A said, she simply wanted to know how to contact Officer Haynes in his official capacity, not for personal reasons. The evidence demonstrates that Officer Haynes must have known or should have known that to have been her sole intention.

Thus, his lack of candor in how he described this aspect of the encounter is clearly a matter of legitimate concern that Somerville was justified to take into account.

Finally, I have considered the Appellant's contention that his termination should be rescinded because other SPD officers who committed similar acts of misconduct allegedly received less severe discipline. I do not find that argument persuasive.

Officer G. Officer G was terminated after he used the departmental CAD system to contact and harass a woman who had filed a complaint with the SPD but the termination was rescinded and he was permitted to resign pursuant to a settlement agreement. I do not find that situation materially different as it resulted in permanent separation from the SPD. Officer G's two prior transgressions involved different situations – one was a consensual relationship that did not come to light until he was charged with domestic abuse and the other involved an incident of harassment that resulted in a suspension.

Officer J. The Appellant introduced a 2013 Arbitration Award (Exh. 11) involving SPD Officer J, who had been discharged in 2011 for untruthfulness and conduct unbecoming, among other things, arising from allegations that he had tipped off a friend about an imminent drug bust. The Arbitrator found that Somerville had not proved that Officer J had called the friend with improper motives, but had been "arrogant" and gave "defensive and incomplete" answers to questions by the SPD investigator, and ordered Officer J reinstated without back pay. As the arbitrator found that Officer J had not committed the offenses for which Somerville had fired him, this case is completely irrelevant to the present discipline.

Gonzales v. Boston Police Dep't, 20 MCSR 53 (2007), involved an appeal of a 60-day suspension of a Boston Police Officer who had used his official position to help friends, one by unlawfully seizing property from another on the guise it was stolen and another by intervening in

a criminal matter. Although the Commission upheld the suspension, the Appellant cites this decision for the proposition that, although the Commission “has the authority to increase a penalty”, the Commission chose not to do so and allowed “the officer to remediate his misconduct and conform to the standards required of him as a police officer.” The Appellant argues he should receive similar leniency. The Appellant’s premise is mistaken. The Commission’s authority to modify a penalty has been construed to be limited to downward modification, and does not allow for an increase in the penalty assessed by the appointing authority. See Moloney v. Civil Service Comm’n, Suffolk Sup. Ct. C.A. 2004-2682 (2005) (vacating Commission decision that increased 5-day suspension to a 30-day suspension)

I have not overlooked the fact that Officer Haynes promptly confessed his mistakes after he had been caught. I also credit his testimony that he is truly sorry for the harm caused by his actions. This level of remorse is commendable, but it does not erase the demonstrated and irreparable damage that he has done to the individual he targeted, to his own credibility, and to the public trust. Accordingly, my findings do not differ substantially from those found by the Appointing authority and, thus, this case is not one in which the Commission would be warranted to exercise its discretion to modify the termination to a suspension.

CONCLUSION

For all of the above stated reasons, the appeal of the Appellant, Naza Haynes, under Docket No. D1-15-22, is *dismissed*.

Civil Service Commission

/s/ Paul Stein

Paul Stein

Commissioner

By vote of the Civil Service Commission (Ittleman, Camuso, Stein & Tivnan, Commissioners; Bowman, Chairman [Absent]) on November 10, 2016.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), 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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

Joseph A. Padolsky, Esq. (for Appellant)

Matthew J. Buckley, Esq. (for Respondent)