COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

KIRK MERRICKS,
Appellant

v.

D1-17-027

BOSTON POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

Bryan Decker, Esq.
Decker & Rubin, P.C.
295 Freeport Street
Boston, MA 02122

Appearance for Respondent:

Katherine Hoffman, Esq.
Boston Police Department
Office of the Legal Advisor
One Schroeder Plaza
Boston, MA 02120

Commissioner:

Cynthia A. Ittleman

DECISION

The Appellant, Kirk Merricks, (Mr. Merricks or Appellant) acting pursuant to G.L. c. 31, § 43, filed a timely appeal with the Civil Service Commission (Commission or CSC) on February 7, 2017 contesting the decision of the Boston Police Department (BPD or Respondent) to terminate his employment as a police officer. A pre-hearing conference was held on March 21, 2017 at the Commission. The full hearing was held on May 9 and June 2, 2017 at the

Commission.[1] Witnesses, except for the Appellant, were sequestered. Pursuant to the Appellant's written request at the hearing, the hearing was public. The full hearing was digitally recorded. The Commission sent copies of the digital recording to the parties.[2] Both parties submitted post-hearing briefs to the Commission.

FINDINGS OF FACT:

Forty-seven (47) exhibits were entered into evidence in total (eight (8) by the Appellant and thirty-nine (39) by the Respondent). Based on these exhibits, the testimony of the following witnesses:

Called by the Respondent:

- Richard Driscoll, Lieutenant (Lt.) Detective (Det.), BPD[3]
- Charles Warnock, Det., Plymouth Police Department (PPD)
- Brian McEachern, Lt. Det., BPD
- Frank Mancini, Superintendent (Supt.), BPD
- Scott Vecchi, Sergeant (Sgt.), PPD

Called by the Appellant:

- Patrick Rose, Officer, BPD, and President of the Boston Police Patrolmen's Association (BPPA)
- Appellant

and taking administrative notice of all matters filed in the case; pertinent statutes, case law, regulations, rules, and policies; and reasonable inferences from the credible evidence; a preponderance of the evidence establishes the following facts:

[1] The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq*., apply to adjudicatory hearings 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.
[3] At the time of the events in this case, Lt. Det. Driscoll was a BPD Sergeant.

Background

1. The Appellant began employment as a police officer at the BPD in or about 2001. (R.Ex. 25)
2. The Appellant served in the U.S. Marine Corps, active duty, from 1990 to 1996 (6) years, although he was not deployed overseas on active duty. Thereafter, he served in the Army National Guard as a military police officer from 1996 to 2003. He served in Afghanistan from 2002 to 2003. (R.Ex. 25)
3. In the Marine Corps, the Appellant's specialty was logistics, driving various trucks. While in the National Guard, the Appellant served in logistics for a while then became a military police officer and he served as such in Afghanistan. (R.Ex. 25)
4. After the Appellant returned to the U.S. in 2003 from active duty in Afghanistan, the Appellant returned to his residence in Dorchester. The Appellant and Ms. A became engaged in 2004. Sometime between 2004 and 2006, the Appellant also began living with Ms. A in Plymouth; most of his belongings were also at the Plymouth house. The Merricks were married in or about 2009. Also living at the Plymouth house were Ms. A's mother, who was ill, and the Appellant's school-aged daughter. Ms. A has two (2) sons (sons "A" and "B") both of whom had lived at the Plymouth house for unknown periods of time. Son A enlisted in the Marines in early 2013. Son B enlisted in the Navy in August 2013. Both the Appellant and Ms. A claim to have been at least part owners of the Plymouth house but Ms. A also reported at times that the house belonged to her and/or her mother.[4] The Appellant and Ms. A were separated in or about May 2013 and subsequently divorced. (R.Exs. 8, 25, 27, 28, 32)

[4] Ownership of the Plymouth house was not established here but it has been established, by a preponderance of the evidence, that the Appellant lived at the Plymouth house for years.

5. The Appellant did some work on the lower level/basement of the Plymouth house, referred to as the "man cave", where he maintained and/or worked on guns. He owned a shotgun, a .45 Glock, his BPD duty weapon (also a Glock) and an old western rifle that he was fixing. (R.Ex. 23) He had ammunition for these guns. In the master bedroom closet, the Appellant had a BPD evidence bag that he used for loose ammunition. In the man cave, he had a rifle rounds holder that could hold approximately 10 rounds for the rifle he was working on. (R.Ex. 27, p. 14; R.Ex. 32, p. 120; R.Ex. 12, p. 2) The Appellant had a license to carry firearms (LTC) but it expired on November 3, 2012. (R.Exs. 10, 12 and 22) No one else living in the house at the time had an LTC. (R.Ex. 32, p. 76)
6. By letter dated January 27, 2017, Commissioner Evans sent the Appellant a "notice of termination" of employment for violations of BPD rules in relation to a restraining order issued against the Appellant in May 2013 at the request of Ms. A and in connection with explosives found at the Plymouth house in July 2013. (R.Ex. 34)

Restraining Order

7. In or about the middle of May, 2013, the Appellant told Ms. A that he wanted to get a divorce. (R.Ex. 1)
8. On Friday evening, May 31, 2013, the Appellant and Ms. A had a loud, contentious verbal argument in their house. Among other things, the Appellant was yelling that Ms. A had called his girlfriend and Ms. A yelled at the Appellant that he had not been paying the bills. (R.Exs. 1 and 2) The Appellant "got caught cheating twice" during the marriage. (R.Ex. 25, p. 18)

9. At approximately 8:40 pm on May 31, 2013, the PPD received a call from Ms. A, reported as a domestic disturbance at the Appellant's address in Plymouth. The PPD dispatched Sgt. B, Officer P and Officer F to the Appellant's address. Officer F reported,

> [we] were dispatched [to the Appellant's address] regarding a report of a domestic verbal dispute. Upon arrival we located Mr. Kirk Merricks on the front porch of the residence. Mr. Merricks stated he was inside a short time ago, when his wife [Ms. A] began arguing with him over an assortment of topics. Mr. Merricks denied there were any threats or assaults during this argument. Mr. Merricks stated he was waiting for his laundry to dry (approx. 10 minutes) and was then leaving the residence to go to work.
>
> Next, I spoke with [Ms. A] inside the kitchen. [Ms. A] stated she and her husband have been having marital problems and tonight, there was an argument over financial matters and some other things. During the argument there was some loud yelling, but no threats of assaults. [Ms. A] stated she then left the kitchen and called police to help end the arguing.
>
> Both Mr. and [Ms. A] were advised of their Abuse Rights under MGL C.209A and both refused further services. Both stated there had been no assaults or threats, just some verbal arguing. Mr. Merricks stated he was going to leave within five minutes to work the overnight shift in Boston. [Ms. A] was satisfied with this ending. …
> (R.Ex. 1)

10. After the Appellant left the Plymouth house on May 31, 2013, he did not return to the house except when he was escorted by police to obtain his belongings. (Testimony of Appellant; R.Ex. 25, p. 19-20) After the Appellant left the house, his daughter continued to live at the Plymouth house with Ms. A to complete her schooling. (R.Ex. 25, p. 21)

11. At approximately 11 pm the same night (May 31, 2013), Officer TW was assigned to respond to the Appellant's residence again, this time to assist Ms. A in completing a request for a domestic violence (209A) restraining order. Officer TW reported,

> … . I was informed by the shift commander, Lt. [H] that the female party, identified as [Ms. A] had called the police station requesting an emergency 209A.

[Ms. A] was involved with a verbal domestic that Officer [F] and [Officer P] had responded to this evening. (Ref. Officer [F's] report).

Upon my arrival (sic) the residence I spoke with [Ms. A]. I asked her if her husband Kirk Merricks was also home. She stated that he left for work around [10pm]. I asked her if anything had happened after our Officers responded to her residence. She stated no. I asked her if there had been threats or abuse made after our Officer cleared, she stated no. [Ms. A] stated that she wanted to make sure that her husband could not return to the residence on Sunday. I asked her why, she stated she didn't want him to take anything out of the house or break anything inside the house.

I asked her if she was in fear for her life or anyone that resided at the residence, she stated no. I explained the process for obtaining a (sic) emergency 209A. [Ms. A] stated that she wanted to complete the process. Once the 209A package was completed, I contacted the oncall judge, … I explained the information that was passed on to me regarding the incident. [The judge] asked to speak with [Ms. A]. I handed her the phone.

A short time later [the judge] asked to speak with me once again, he informed me that after speaking with [Ms. A] he would not be issuing the emergency 209A order, he stated that he gave her instructions to call the police if any further incidents occurred between her and Mr. Merricks. … I informed dispatch of the order (sic) was not being issued and I cleared from the residence. …
(R.Ex. 1)

12. On Monday, June 3, 2013, at approximately 2:30 pm, PPD Officer B reported,

… I was directed by Lt. D. [F] to follow up with this incident. I was provided with the affidavit [Ms. A] completed when applying for her emergency 209A abuse prevention order.[5] Lt. F directed my attention to where [Ms. A] writes:

> 'When I went into the bathroom to call 911 I closed the door & locked it. He kicked the door open as he was yelling & screaming at me.'

Lt. [F] directed me to re-interview [Ms. A] on video about the incident and

[5] I take administrative notice that Officer B is referring in his report to the affidavit and restraining order application submitted to the on-call judge on the night of May 31 since that affidavit is not in the record and the quoted text does not appear in the affidavit that Ms. A submitted to court on June 4 (one day after PPD interviewed her) in support of her request for a 209A order.

examine any damage done to the bathroom door during the incident. I called [Ms. A] on her cell phone and left a message for her. I went to the residence … but found … no answer at the door. Several hours later, I received a call back from [Ms. A] and made arrangements to speak with her at [PPD].

Upon [Ms. A's] arrival, she agreed to an audio and video recorded interview. I was assisted in the interview by Det. [T]. The following is a synopsis of my interview with [Ms. A] (please see recording for complete interview):

[Ms. A] stated Mr. Merricks told her on May 13, 2013 that their marriage was over and he wanted a divorce. [Ms. A] went on for some time explaining to me the arguments the two have been having over unpaid bills and money issues. On Friday, May 31, 2013, the two continued to argue about money issues. Mr. Merricks was 'screaming' at [Ms. A] and calling her names. [Ms. A] admitted she too was yelling at Mr. Merricks and called him some names. [Ms. A] stated Mr. Merricks put his face close to her face and was yelling at her. [Ms. A] admitted she was yelling back at him in this manner.

[Ms. A] told me she was tired of Mr. Merricks yelling at her and demanded he leave the house several times throughout the argument. [Ms. A] decided to call the police to have Mr. Merricks removed. [Ms. A] grabbed the house phone and locked herself in the bathroom where she called the police. [Ms. A] told me she was on the phone with the dispatcher when Mr. Merricks kicked open the bathroom door. Mr. Merricks yelled to [Ms. A] something to the effect of 'don't lock doors in this house'.

[Ms. A] told me she was at the very back of the bathroom when Mr. Merricks kicked open the door. [Ms. A] stated she was not struck with the door. [Ms. A] stated Mr. Merricks never entered the bathroom but just shouted a few words at her and walked away. [Ms. A] told me she did not believe Mr. Merricks was going to assault her. [Ms. A] told me she was never in fear of being assaulted. …

… Several hours later, [Ms. A] called the [PPD] back and requested an emergency 209A order. Officer [TW] arrived and assisted [Ms. A] with the paperwork. [Ms. A] told me she spoke with the on call judge and

> explained the situation at the house. [Ms. A] told the judge about Mr. Merricks kicking the door. The judge denied the order stating no abuse occurred and told [Ms. A] she could apply for another order in person at the court today. [Ms. A] had not yet gone to the court to apply for an order.
>
> [Ms. A] told me multiple times she is not in fear of Mr. Merricks. [Ms. A] stated Mr. Merricks has never physically assaulted her or placed her in fear of being assaulted. [Ms. A] stated Mr. Merricks has never threatened her. … [Ms. A] stated several times she was in fear of Mr. Merricks returning to the house and either taking or destroying their property. [Ms. A] was not in fear for her safety. …
>
> Det. [T] and I went back to the residence with [Ms. A] where we were able to view the door. I noticed the door was made of extremely thin particle board type material. A foot sized hole was found towards the bottom of the door only through the outer panel of the door. The latch and knob were found to be loose but in tact. The door was still able to be closed, locked, and latched. Det. [T] took pictures of the damage.
> (R.Ex. 1)(emphasis added)

13. On Tuesday, June 4, 2013, Ms. A went to court to request an ex parte 209A order against her husband, the Appellant. In her affidavit in support of her request for a 209A order, Ms. A wrote, in part,

> Kirk Merricks my current husband was at our house. He stated on May 13, 2013 that he didn't want to be married any longer ... We need to figure out an arrangement as his … daughter just moved in June 2012 and he got full custody … and would like to finish … school … We have been arguing over unpaid bills and supposedly phone calls to his current friend/girlfriend. On May 31st around 8pm Kirk was yelling & screaming at me about calling [a girlfriend] (sic) stated I didn't. Asked when he planned on paying bills – doesn't know. He was yelling & screaming face to face at me. Name calling (sic) & slamming things. I asked him several time (sic) to leave the house. He said no I could leave. My mother who is [elderly and ill] was on the LR couch during this whole argument. I grabbed the house phone – walked into the bathroom – closed & locked the door. Kirk kicked the door in and told me to never lock doors in his house as he proceeded to yell & scream. …. I am in fear of him returning to the house to

> continue with his verbal abuse and damage other items in my 'mothers' (in quotes)(sic) home.
> (R.Ex. 2)(emphasis added)

14. Also on June 4, 2013, the PPD faxed its incident report regarding the Appellant and Ms. A to BPD Sgt. Coyne in Area A-1, where the Appellant worked. (R.Ex. 1)

15. The court granted Ms. A's request for a 209A order on June 4, 2013, indicating that the order would expire on June 18 but that a hearing would be held prior to the expiration of the order. The order included a requirement that the Appellant surrender his guns to the police, which he did[6]. It also ordered the Appellant to "surrender your service firearm and your license to carry [to] your commanding officer at the end of each shift". (R.Ex. 2) The Appellant had kept these guns even though his LTC expired in November 2012. (R.Ex. 22; Administrative Notice)

16. Both parties attended a subsequent court hearing on the 209A order. On June 20, 2013, the 209A order was ended with the court checking the boxes on the order form, indicating, "E. PRIOR COURT ORDER TERMINATED … TERMINATED AT PLAINTIFF'S REQUEST." (R.Exs. 2 (emphasis in original) and R.Ex. 27)

17. The Appellant filed appropriate notices with BPD regarding the 209A order, termination of the order, his address change and his receipt of a divorce summons. (R.Ex. 5)

18. Shortly after the 209A order was ended, the BPD opened Internal Affairs case IAD 2013-0224. (R.Ex. 3) BPD Sgt. Driscoll was assigned to investigate the 209A order

[6] The Appellant's duty weapon and his off-duty Glock were taken by the BPD, his shotgun and the old western non-functioning rifle that he was restoring were taken by the PPD. As of his October 2015 interview by the BPD regarding the explosives, the Appellant had not reclaimed his guns. (R.Exs. 25 and 27) It is unknown if the Appellant applied for, and was able to renew his LTC.

against the Appellant. He tried repeatedly to locate Ms. A in order to interview her in person. When he finally reached her, she declined to be interviewed in person. Instead, on June 28, 2013, Sgt. Driscoll conducted a recorded phone interview with Ms. A lasting seven (7) minutes. (R.Ex. 3; Testimony of Driscoll)

19. Ms. A told Sgt. Driscoll, in part, that on May 31, 2013, she and the Appellant had been arguing about unpaid bills and allegations that Ms. A called the Appellant's girlfriend and Ms. A asked the Appellant to leave the house but he didn't. In their phone call, Ms. A then told Sgt. Driscoll,

> I grabbed the house telephone. I just nonchalantly walked into my bathroom, closed the door and locked it to call 911. … Mr. Merricks kicked the bathroom door in, and … I was in fear of my safety of what was going to happen … He continued yelling and screaming and slamming things until the Plymouth Police arrived. …. An officer … said Mr. Merricks would be leaving in about ten minutes. I asked if the officer was going to stay. He said 'no. if there's any problems … just give us a call back.' Mr. Merricks finished doing his laundry, and he soon went out the door … I did call Plymouth Police back at 11:00pm asking for a restraining order in the fear of he would come in, God knows to do what, because we still have the property together. I did talk to a Judge McCollum … I explained … and the judge denied it. … [Mr. Merricks] didn't make any threats. … There's no physical abuse. It was all verbal abuse. … we were yelling and screaming … As of the court order … as of last Thursday, I have exclusive and physical use of this house. It's in my mother's name. … We've never had any physical abuse in the 12 years we've been together. … (R.Ex. 3)(emphasis added)

20. Asked why she asked the court to end the 209A order, Ms. A told Sgt. Driscoll, "he has agreed he would not come back onto the property … The only time he's able to come back is today at noon with a police officer detail from Plymouth to retrieve his items." (Id.)(emphasis added)

21. Ten (10) minutes after Sgt. Driscoll conducted a recorded phone interview of Ms. A, Sgt. Driscoll and Sgt. Daniel Humphreys conducted a recorded audio-visual interview of

the Appellant for five (5) minutes. The Appellant chose not to have any union or legal representation at the interview. When asked what happened on May 31, 2013, the Appellant reported that he and his wife, who were getting divorced, had an argument over bills and other matters, his wife called the police, the police arrived, the police asked if there was any physical harm and both he and his wife (separately) said 'no'. The Appellant told the police he would be leaving shortly for work in Boston and that was all. The Appellant did not mention that he had kicked the bathroom door but admitted that he did when Sgt. Driscoll asked him. When asked if the house belonged to him (and, apparently, Ms. A the Appellant said "yes". Asked if there was any physical abuse between the Appellant and Ms. A, the Appellant said "never". (R.Exs. 4, 5)

22. On an unknown date, Sgt. Driscoll submitted his report to Lt. Det. Hamilton for him to make findings based on Sgt. Driscoll's report. (R.Ex. 8, p. 17)[7]

23. On July 11, 2013, Sgt. Driscoll issued a report to Dep. Supt. Lisa Holmes, Assistant Chief of the Bureau of Professional Standards at the BPD, regarding his investigation of the Appellant and the 209A order that had been issued against the Appellant and been lifted. The report is a memorandum with the subject "IAD Complaint #IAD2013-0224 Concerning: violation of Rule 102 Sec. 35 (Conformance to laws)", and Ms. A is listed as the complainant. (R.Ex. 5)(emphasis added)

24. Rule 102, § 35 states

> Employees shall obey all laws … , all City of Boston ordinances and bylaws and any rule or regulation having the force of law of any board, officer, or commission having the power to make rules and regulations. An employee of the Department who commits any criminal act shall be subject to disciplinary action up to and including discharge from the Department. Each case shall be considered

[7] It appears that there is no document in the record from Lt. Det. Hamilton indicating his findings.

> on its own merits, and the circumstances of each shall be fully reviewed before the final action is taken.
> (A.Ex. 1)

25. Sgt. Driscoll's report summarizes his interviews of the Appellant and Ms. A and includes the PPD incident reports, the 209A court records, and the BPD Form 26 reports submitted by the Appellant to his superiors regarding the related events. (R.Ex. 5; A.Exs. 7 and 8) Although Sgt. Driscoll's report references the PPD audio-visual recording of the PPD interview of Ms. A and the photos PPD took of the damaged bathroom door at the Merricks home, he did not have them. He requested them from the PPD but the PPD did not produce them. Sgt. Driscoll did not follow up with PPD to obtain copies of the recorded interview and photos though they would be important to an investigation. (Testimony of Driscoll; R.Ex. 8, p. 26)

26. At the Commission hearing, Sgt. Driscoll denied that he cannot assess someone's credibility if he interviews them by phone, rather than in person. (Testimony of Driscoll) However, at the BPD hearing regarding the 209A order, Sgt. Driscoll testified that he tried and failed multiple times to interview Ms. A in person but she was unavailable. As a result, Sgt. Driscoll testified at the BPD hearing, " … I spoke with my supervisor and asked if it would be okay to conduct a phone interview, which we typically try to avoid, but he okayed it …." (R.Ex. 8, p. 27) Asked if it's better to interview someone in person as opposed to over the phone, Sgt. Driscoll testified at the BPD hearing, "Preferably, yes." (Id.) Sgt. Driscoll has never met Ms. A. (Testimony of Driscoll)

27. Sgt. Driscoll's report does not make a finding or recommendation that the allegations against the Appellant in this regard should be sustained. (R.Exs.1 and 5; Administrative Notice)

28. By memorandum dated February 3, 2014, Dep. Supt. Walcott wrote to Police Commissioner Evans that the Internal Affairs Division "sustained" the complaint against the Appellant that is the subject of IAD2013-0224 for violating BPD Rule 102, § 35, regarding conformance to laws. (A.Ex. 3)

29. By memorandum dated March 20, 2014, Dep. Supt. Walcott informed the Appellant that the complaint against him in IAD2013-0224 for violation of BPD Rule 102, § 35, regarding conformance to laws, was sustained. (A.Ex. 4)

30. By letter dated December 19, 2016, Commissioner Evans informed the Appellant that he was contemplating disciplinary action against him based on IAD 2013-0224, for which there would be a hearing on December 29, 2016. (R.Ex. 7) Attached to the December 19, 2016 letter were copies of G.L. c. 31, §§ 41-45 and a memorandum from Supt. Mancini (BPD Bureau of Professional Standards) to the Police Commissioner, stating,

> I hereby bring the following complaint against Police Officer Kirk Merricks, ID# (redacted), presented assigned to the BAT/Administrative Leave Section, for a violation (sic) Rule 102 § 3 (Conduct Unbecoming).
>
> Specification I
>
> On May 31, 2013, P.O. Merricks was involved in an argument with his wife, [Ms. A]. [Ms. A] locked herself in the bathroom, called 911, and requested the removal of P.O. Merricks from the residence. In response, P.O. Merricks kicked in the bathroom door, causing damage to the door. Thereafter, [Ms. A] obtained a restraining order against P.O. Merricks. Such conduct reflects unfavorably on the Boston Police Department and is in violation of Rule 102 § 3 (Conduct Unbecoming).
> (Id.)(emphasis added)

31. Rule 102, § 3 states,

> Employees shall conduct themselves at all times, both on and off duty, in such a manner as to reflect most favorably on the Department. Conduct unbecoming an

> employee shall include that which tends to indicate that the employee is unable or unfit to continue as a member of the Department, or tends to impair the operation of the Department or its employees.
> (A.Ex. 1)(emphasis added)

32. The disciplinary hearing was held on December 29, 2016, at which Sgt. Driscoll, then Lieutenant Driscoll, and the Appellant testified. The Appellant was represented by counsel at the BPD hearing. (R.Ex. 8)[8]

33. By memorandum dated January 23, 2017, Dep. Supt. Lydon, the hearing officer, issued his findings and his recommendation to Commissioner Evans that the charge against the Appellant for conduct unbecoming (not for conformance to laws) be sustained. (R.Ex. 9; *see also* R.Ex. 8, p. 18) Dep. Supt. Lydon's findings include various statements by Ms. A at different times to different people:

> "'I am in fear of him returning to the house to continue with his verbal abuse and damage other items in my 'mothers' (sic) home.'"
> " … we still have the property together …"
>
> "[Ms. A] stated she was at the very back of the bathroom when Mr. Merricks kicked open the door and that she was not struck with the door. She stated that Mr. Merricks never entered the bathroom but just shouted a few words at her and walked away."
>
> "[Ms. A] told [PPD] Officer [B] several times that she was in fear of Mr. Merricks returning to the house and either taking or destroying their property. But she stated that she was not in fear for her safety."
>
> At her BPD June 28, 2013 phone interview, [Ms. A] told Lt. Driscoll, "I grabbed the house telephone. I just nonchalantly walked into my bathroom, closed the door and locked it to call 911, Mr. Merricks kicked the bathroom door in, and at that point in time, I was in fear of my safety of what was going to happen at that point in time."
> (R.Ex. 9)

[8] The Appellant was represented by a different attorney at the BPD hearing concerning the 209A order than the attorney who represented the Appellant at the Commission and at the BPD hearing concerning the explosives.

34. Dep. Supt. Lydon's report indicates that the Appellant concurred that he and Ms. A had a verbal argument May 31 and he provided details of their argument and their impending divorce proceedings. When asked at his interview if he kicked in the bathroom door when Ms. A's was in there calling 911, the Appellant admitted that he did and that his kick damaged the door, and he stated that the house belonged to him and Ms. A. (R.Ex. 9)

35. Dep. Supt. Lydon's report acknowledged that Lt. Driscoll had not obtained the PPD video recording of Ms. A's interview or the PPD photos of the damaged bathroom door. It also acknowledged that Ms. A called the police a second time on the night of May 31, 2013 and that the on-call judge that night denied her request for a restraining order. By the time that Ms. A called the PPD the second time on May 31, the Appellant had left the house to work his night shift in Boston. (R.Exs. 1, 2 and 9)

36. Dep. Supt. Lydon's report did not indicate the reason Lt. Driscoll interviewed Ms. A by phone instead of an in-person interview is that Ms. A failed and/or refused to make herself available or that the court ended the 209A order on June 20, 2013 at Ms. A's request. (R.Ex. 9; Administrative Notice)

37.Officer Rose has been a member of the BPD for more than two (2) decades and is the BPPA President. He has a lengthy and notable military record, including active duty experience. The BPD has not disciplined a member of the force based entirely on a restraining order issued against them, although they may have been disciplined with regard to things that occurred in connection with the restraining order. (Testimony of Rose)

Explosives

38. From July 3 to July 7, 2013, Ms. A's adult son A was home with her at the Plymouth house on leave from the military for the weekend. Son A was attending training as a Military Police Officer at the time. (R.Exs. 10 and 11) On July 6, 2013, Ms. A and son A were "gathering items for her husband to pick up" since he had vacated the house. (R.Ex. 10 (PPD incident reports))

39. On July 11, 2013, at approximately 2:45 pm, five (5) days after Ms. A's adult son A left her house, PPD Officer J and PPD Sgt. Vecchi were dispatched to the Plymouth house "for found property." (R.Ex. 10)

40. Officer J arrived at the Plymouth house first. Officer J's incident report that day indicates that he "was advised to speak with the caller [Ms. A], and that there may be explosives (TNT) on scene." (Id). The Plymouth Fire Department had been notified of this matter and arrived shortly after Officer J. Officer J spoke with Ms. A, asking her the location of the explosives. Ms. A directed Officer J to the back bedroom. In the bedroom, Ms. A "directed [Officer J's] attention to a metal box which was on a shelf in the closet." (Id.) Officer J removed the box carefully, opened it and found, "3 ea 1/4LB TNT explosive stick wrapped in a military green cloth container. 1 ea 1/4LB TNT explosive stick in plain view within the box, this stick had a piece of grey masking take (sic) affixed to the top. Asst. rounds of ammunition." (Id.)

41. At approximately 2:50 pm on July 11, 2013, Sgt. Vecchi was informed of the report of explosives at the Plymouth house and he went to the scene, arriving at the house shortly thereafter. Officer J. Sgt. Vecchi has been at the PPD for more than twenty years. He has a lengthy military background; he has served on active duty in a number of

places outside the U.S. He is a retired Marine gunnery sergeant who received training with explosives while in the military. While in the service, he cleared landing zones, worked with torpedoes, operated explosives ranges, and carried a grenade launcher. In the military, explosives are monitored and must be signed out and signed back in when returned. (Testimony of Vecchi)

42. Ms. A directed Sgt. Vecchi to the right rear bedroom of the Plymouth house where Officer J was located. Officer J directed Sgt. Vecchi's attention to the box he had opened. Sgt. Vecchi reported,

> On the open lid of this box I observed four (4) green tubes clearly labeled as ¼ lb TNT with a yellow/gold colored band around the tube. Through my training and experience I immediately recognized these as military grade High Explosives. As they were not primed and no blasting caps or det cord was located in this box I knew … that these were stable and not in danger of detonating. Also located was a Boston Police Evidence bag containing assorted ammunition.
>
> As a precaution for the safety of all I directed that [Ms. A] and [the Appellant's daughter] evacuate the house. …
>
> [Ms. A] then led us to the off white metal shed located at the back left of the yard where she stated additional explosives were located. She then directed us to a black plastic container with a hinged lid and clasp. She stated inside of this was a brief case with explosives.
>
> Officer [J] and I opened this container and brief case and inside located a cloth bandoleer of the type issued by the military which contained four (4) 40mm High Explosive/Dual Purpose (HEDP) grenades, which are used in a military M203 Grenade Launcher. I observed these grenades had a yellow/gold colored head which indicated them to be High Explosive/Dual Purpose (HEDP) and that the primers were intact and not dimpled indicating that they were fully functional. We were also shown two (2) lengths of military green time fuse each with a Non-Electric pull igniter attached. …
>
> We were also shown three (3) lengths of white det cord with copper colored blasting caps attached to each end, with the word BOOSTER labeled on each, and one aluminum blasting cap.

> Through my training and experience I immediately recognized all of these as military grade High Explosives that no civilian should possess.
>
> I also knew that these items were fairly stable and should not explode if handled carefully …
>
> I then notified dispatch and [Lt. F] that I needed the State Police Bomb Squad to respond …
>
> I then directed Officer [J] to go to all of the houses that bordered the [house] and advise them to stay in the house … As I knew these explosives to be stable and did not fear an imminent explosion I did not order an evacuation. …
>
> While speaking with [Ms. A] she informed me that … her son [A] was home on leave from the … Marine Corps for the weekend [of July 6] ... that she had shown the items to him and he informed her that they were explosive and she should not touch them.
>
> [Ms. A] stated that she then contacted her attorney as to how she should proceed, and had called us today.
>
> She also informed me that [the Appellant] had served six (6) years in the United States Maine Corps, and seven (7) years in the Army National Guard.
>
> At approx (sic) 3:35pm the State Police Bomb Squad arrived, followed shortly thereafter by Sgt. [P] of the State Police Fire Marshals (sic) office, and State Police Crime Scene Services. …
>
> I then filled out a … consent to search form and [Ms. A] signed it …
> [PPD] Lieut. [F] made notification to Boston Police of the circumstances and the involvement of BPD Officer Kirk Merricks, they informed him that Merricks was not a member of their Bomb Squad and had no Police purpose in possessing these explosives. …
>
> … a search warrant was later obtained.
> (R.Ex. 10)(emphasis added)(*see also* R.Exs. 13 and 14)

43. It is not uncommon for members of the BPD to take BPD evidence bags home to hold some of their gear. (Testimony of Rose)

44. After an initial search of the Plymouth house, PPD Officer Warnock prepared an affidavit for the search warrant on July 11, 2013. At some point that day, Officer Warnock also talked to Sgt. P of the State Police Bomb Squad and Trooper B of the State Police Crime Scene Section. Officer Warnock "requested that latent finger print analysis of any evidence be conducted. Sgt. [P] advised that due to the volatile nature of high explosives finger print analysis would not be safe and could endanger lives. Sgt. [P] also reported … that the M203 Grenades were stamped 1974. Sgt. [P] reported that he would be speaking with [U.S. Bureau of Alcohol Tobacco and Firearms] officials to determine the location were (sic) the explosives were stolen from could be obtained." (R.Ex. 10)(emphasis added)

45. At approximately 7 pm on July 11, 2013, a PPD officer arrived at the Plymouth house with a search warrant. PPD Officer R reported that the following were "located, photographed then secured by the MSP Bomb Squad[:]

> (4) 40mm HEDP (High Explosive Dual Purpose) grenades, located in the shed
> (3) Lengths of explosive detonation cord w/ 2 blasting caps at each end, (6) blasting caps total, located in the shed
> (4) ¼ pound boosters of TNT, located in the upstairs bedroom
> (2) Lengths of time fuse with igniters, located in the shed …"
> (R.Ex. 10)(*see also* R.Ex. 12)

Then PPD Officer R "photographed and secured the following items which were later inventoried and placed into evidence at [PPD] police headquarters[:]

> A-(10) Shotgun shells, located in the upstairs bedroom
> B-(25) Rounds of .380 caliber ammunition, located in the upstairs bedroom
> C-(3) Rounds of .40 caliber ammunition, located in the upstairs bedroom
> D-(2) Rounds of .45 caliber ammunition, located in the upstairs bedroom
> E-(62) Rounds of .22 caliber ammunition, located in the upstairs bedroom
> F-(7) Rifle rounds of 32 Winchester, located in the basement
> G-(38) Rifle rounds (unknown types), located in the upstairs bedroom …."

(R.Ex. 10)(*see also* R.Ex. 12)

46. The shed in which some explosives materials were found was not locked (R.Ex. 25) but the backyard fence around it was locked. (R.Ex. 24)

47. There was what appeared to be a wooden storage box in the shed with the name "MERRICKS" on it. (R.Ex. 12, pp. 3 and 4)

48. After the search warrant was executed, "[i]t was decided by the Bomb Tech's (sic) that the copper blasting caps attached to the white det cord were not stable enough for long term storage as evidence due to their age. They then cut the copper blasting caps from the det cord, and secured them for later detonation. …" (R.Ex. 10)(emphasis added) The blasting caps were subsequently detonated at another location. (Id.)

49. In view of what was found at the Merricks house, Sgt. Vecchi concluded,

> As these explosives were all military grade, that no civilian should posses (sic) these, that an extensive permitting process exists for any possession of explosives, and strict storage requirements exist requiring all explosives be stored in a blast rated magazine, and none of these conditions were met (sic). It is believed that these items were all stolen from the US military.
> (R.Ex. 10)

50. PPD Officer Warnock reported that during the search of the Plymouth house,

> … the Boston Police Dept was contacted and requested that Kirk Merricks present himself to the Plymouth Police for questioning. I was advised that Merricks was summons (sic) to report to his commanding Officer and that Merricks would then be transported to Plymouth. … When Merricks arrived … I … advised Merricks of his Miranda Warnings. Merricks ... elected to NOT speak to me upon advice from his counsel.
> (R.Ex. 10)

51. Later that evening (July 11, 2013), the Appellant was arrested and charged with multiple counts each of possession of explosives in violation of G.L. c. 266, § 102C,

receipt of stolen property in violation of G.L. c. 266, § 60, and possession of ammunition without a license in violation of G.L. c. 269, § 10. (R.Ex. 10)

52. G.L. c. 266, § 102C provides, in pertinent part,

> Whoever, without lawful authority, knowingly develops, produces, stockpiles, acquires, transports, possesses, controls, places, secretes or uses any biological, chemical or nuclear weapon or delivery system, with the intent to cause death, bodily injury or property damage, shall be punished by imprisonment in the house of correction for not more than 2 and one-half years or by imprisonment in the state prison for not more than 25 years or by a fine of not more than $50,000, or by both such fine and imprisonment.
> (Id.)

53. G.L. c. 266, § 60 provides, in pertinent part,

> Whoever buys, receives or aids in the concealment of stolen or embezzled property, knowing it to have been stolen or embezzled, or whoever with intent to defraud buys, receives or aids in the concealment of property … and who intends to deprive its rightful owner permanently of the use and enjoyment of said property shall be punished as follows: if the value of such property does not exceed $250, for a first offense by imprisonment in the house of correction for not more than 21/2 years or by a fine of not more than $1,000; … or if the value of such property exceeds $250 by imprisonment in the house of correction for not more than 21/2 years or by imprisonment in the state prison for not more than 5 years or by a fine of not more than $5,000 or by both such fine and imprisonment.
> …
> (Id.)

54. On July 12, 2013, PPD Officer Warnock conducted an interview of Ms. A regarding the explosives. The interview was audio/video recorded. Ms. A stated that the Appellant moved his belongings into the Plymouth home when he returned from active duty in Afghanistan; he had a brief case that was found in the shed that the Appellant told her, at some point in time, had "military stuff" in it; a few years ago she asked the Appellant where the brief case was and he told her he "got ride (sic) of it"; she "never had a conversation with [the Appellant] in regard to explosives or any of his 'Military stuff'"; and she denied that the explosives belonged to her or son A. (R.Ex. 10; *see also* R.Ex.

24, p. 10) Officer Warnock did not ask Ms. A why she waited a number of days after she found the explosives to call PPD, and son A had warned her about them. (R.Ex. 32, p. 24) The PPD was unable to produce for the BPD a copy of Officer Warnock's recorded interview of Ms. A concerning the explosives. (R.Ex. 32, pp. 41-42)

55. Previously, Ms. A told the Appellant that some things in the shed belonged to her father, who had served in the Navy. (R.Ex. 27)

56. At or around the time of Ms. A's interview by the PPD, PPD Officer Warnock spoke to son A's superior officer who said that son A did not have access to grenades and he could not get them off of the base. (R.Ex. 32, p. 28)

57. On September 20, 2013, Ms. A, PPD Officer Warnock, and representatives of the State Police Crime Scene Section and the Bomb Squad testified at a grand jury concerning the criminal charges against the Appellant. (R.Ex. 16)

58. On September 20, 2013, after the grand jury received the testimony, the Appellant was indicted for two (2) counts of possession of explosives in violation of G.L. c. 266, § 102(c) and four (4) counts of receiving stolen property in violation of G.L. c. 266, § 60. (R.Ex. 15 and 19)

59. On October 2, 2013, Sgt. Det. Hoffman, of the BPD Bureau of Professional Standards and Development Anti-Corruption Division (BPS/ACD) sent a memo to Lt. Det. McEachern, Commander of the BPS/ACD, referencing Case No. 13-034, informing him of the grand jury's action. (R.Ex. 16)

60. On October 10, 2013, the BPD hand-served a notice of the Appellant's suspension without pay to the Appellant's mother in Dorchester. (R.Ex. 19)[9]

61. On November 27, 2013, PPD Officer Warnock sent an email message to son A's superior officer requesting a letter indicating that son A "had not been trained in the use of or been in a position to possess the explosives located with his (sic) incident." (R.Ex. 10) Officer Warnock had sent the same or a similar email message to the same superior officer in August, October and earlier in November. (Id.) There is no indication in the record that Officer Warnock received such a letter from son A's superior officer. (Administrative Notice)

62. On December 15, 2014, the Assistant District Attorney was "unable to locate a necessary witness" and the case was dismissed without prejudice for lack of prosecution. (R.Ex. 20) The necessary witness was Ms. A. (R.Ex. 28[10])

63. On December 16, 2014, BPD Sgt. Det. Hoffman sent a memo to Lt. Det. Hamilton, Commander of the ACD, regarding his (Sgt. Det. Hoffman's) work with ATF Special Agent (S/A) M about the explosives found at the Plymouth house. S/A M conducted a trace of the explosives. (R.Ex. 17)

64. On December 18, 2014, Sgt. Det. Hoffman wrote a memo to Lt. Det. Hamilton indicating that ATF S/A M reported that he had identified the explosives, that some of the explosives were manufactured in 1988 and some in 1993, that he found the locations where those explosives were manufactured, that there were no reported "thefts,

[9] However, at some point thereafter, the Appellant was assigned to the BAT/Administrative Leave Section, as noted in Fact 30 *supra*. (R.Ex. 7) The Appellant testified at the Commission that he was on administrative leave for three (3) years.

[10] R.Ex. 28 is BPD Sgt. Rosado's report to Dep. Supt. Walcott regarding her investigation of the explosives allegations against the Appellant. I note that although the report is dated February 10, 2015, many documents and/or events on which it relies (such as interviews of the Appellant and others) are dated later. As a result, it appears that the February 10, 2015 date of the report is inaccurate.

recoveries or losses" of those explosives and that there is no information indicating where those explosives were relocated after having been manufactured. (R.Ex. 18)(emphasis added) S/A M added that the people who most commonly come in contact with such explosives are military engineers or EOD (explosives ordinance disposal[11]) specialists, that such explosives are "closely accounted for during training exercises but during active combat missions there is no way of keeping an exact count of these mutitions (sic). … The likelyhood (sic) of someone coming into unlawful contact with EOD's are military personnel who either stoled (sic) for themselves or for others who received these devices as stolen property." (R.Ex. 17; *see also* R.Exs. 18 and 19) The explosives that can be stored safely were stored at the State Police Bomb Unit. (R.Ex. 17)

65. Son A's military superior officer reported to the PPD by phone that son A did not have access to explosives in his military service and that he had not been deployed overseas. NCIS reported to BPD Det. Lt. McEachern by phone that son B did not have access to explosives in his military service and that he was on an aircraft carrier but that he had not been deployed. (R.Ex. 32, pp. 71-73)

66. On December 30, 2014, Sgt. Det. Hoffman wrote a report concluding his criminal investigation, indicating that the Appellant had been criminally charged and indicted but that the criminal case in court was dismissed for lack of prosecution after Ms. A failed or refused to appear at the court criminal trial. (R.Ex. 19) Sgt. Det. Hoffman's memos regarding the explosives reference the PPD incident reports. (R.Exs. 16 – 19; Administrative Notice)

[11] *See* https://www.goarmy.com/careers-and-jobs/browse-career-and-job-categories/intelligence-and-combat-support/explosive-ordnance-disposal-specialist.html (March 14, 2018).

67. The BPD investigation relating to the explosives next went to the BPD Internal Affairs Division (IAD Case No. IAD2014-0611) and was assigned to Sgt. Det. Rosado, who was aided by others in the IAD. Sgt. Rosado's final report to Dep. Supt. Walcott, and Assistant Chief of the BPD Bureau of Professional Standards noted, " … the majority of this investigation was conducted by the [PPD] and [Sgt. Det.] Hoffman of the [BPD] Anti-Corruption Unit." (R.Ex. 28)

68. As part of her investigation, Sgt. Det. Rosado interviewed PPD Det. Warnock, PPD Det. R, PPD, Det. J, PPD Sgt. Vecchi and the Appellant (whom she interviewed twice). However, the interview of PPD Det. R, who helped execute the search warrant at the Plymouth house, "suddenly cuts off" early in the interview (R.Ex. 26). The interviews of PPD Det. J, who was at the house on July 11, and PPD Sgt. Vecchi, who was the PPD incident commander at the house on July 11, were not recorded at all because the recorder "malfunctioned". (R.Exs. 26 and 28) Sgt. Det. Rosado's investigation report disclosed these problems and indicated that her report on the unrecorded interviews was based on notes that she took at the interviews. Sgt. Rosado also included in her report a number of documents, such as the PPD Incident Report, the initial criminal complaint, the Superior Court case summary, the PFD report, and State Police Investigation documents. (R.Ex. 28; *see also* R.Exs. 13 and 14) The BPD was unable to interview Ms. A concerning the explosives. (Administrative Notice)

69. Sgt. Rosado interviewed PPD Det. Warnock on February 26, 2015. This nine (9)-minute interview was recorded. PPD Det. Warnock drafted the affidavit in support of the search warrant application for the house but he did not go to the house on July 11, remaining instead at the station to attempt to interview the Appellant when he arrived.

(R.Ex. 28) He interviewed Ms. A at the PPD on July 12. (R.Ex. 24) Det. Warnock is not a bomb squad technician; he believed that Ms. A believed the explosives belonged to the Appellant because "she knew they weren't hers and she knew they weren't her son['s] …." (R.Ex. 24, p. 10). Det. Warnock added that "[t]he reason we charged [the Appellant] with receiving stolen property is because MSP Bomb Squad determined that it was United States Army issued ordinance and there was no legal justification or legal means for him to obtain these other than stealing them…." (Id.) Det. Warnock did not know if anyone, other than Ms. A and her son A and the Appellant and his daughter, had access to the shed in the back yard of the Plymouth house. (Id. at 9, 10 and 12)

70. PPD Det. R was involved in executing the warrant for the explosives at the Plymouth house. He stated briefly, before the interview recorder stopped working, that he was informed at roll call that Ms. A had called the PPD to report explosives in the house that she believed belonged to the Appellant but he did not speak with any of the inhabitants of the Plymouth house, if any were present when he arrived. He collected and photographed all of the evidence that he could except that the State Police Bomb Squad took the explosives. (R.Ex. 26, p. 6)

71. Sgt. Det. Rosado's summary of her interview with PPD Sgt. Vecchi states that when he asked Ms. A who the explosives belonged to, Ms. A said "I think they belong to Kirk Merricks." (R.Ex. 28, p. 5) However, PPD Sgt. Vecchi testified at the Commission hearing that he does not recall telling Sgt. Rosado that the Appellant's wife said 'I think those are the Appellant's' explosives. (Testimony of Vecchi) Given Sgt. Vecchi's lengthy experience as a police officer, his military experience, his experience with explosives, his detailed conversation with Ms. A on July 11 at the house, his detailed

incident report written on July 12 (R.Ex. 10), his consistent testimony, and that Sgt. Rosado's summary of his interview was based on her subjective notes and not a recording, I find Sgt. Vecchi's testimony in this regard more credible. Sgt. Rosado reported that she asked PPD Sgt. Vecchi if the steel box in the master bedroom closet or the brief case in the shed "contained anything that could connect Kirk Merricks or anyone else to the explosives, he replied no." (R.Ex. 28, p. 7)(emphasis added)

72. Lt. Det. McEachern and Sgt. Rosado interviewed the Appellant on March 26, 2015 for twenty-five (25) minutes and on October 13, 2015 for ten (10) minutes. The Appellant was represented by counsel at both of the BPD interviews. At the March 26, 2015 interview[12], the Appellant repeatedly denied owning the explosives found at the Plymouth house and stated that he did not know to whom they belonged. He denied knowing that there were explosives in the house. He denied that Ms. A asked him about the briefcase containing "military stuff" and telling her that he got rid of it. He denied owning the briefcase in which some explosives were found at the shed in the backyard of the Plymouth house. He did not have explosives training at the BPD, nor did he respond to any calls or have any involvement with cases involving explosives. He did not have access to explosives through the BPD or another agency. The only explosives training he received in the military was the regular familiarization everyone receives in the Marines. As a truck driver in the Army National Guard, he did not transport explosives, which requires a special license endorsement that he did not have. He denied taking any explosives home from the military. He asserted that the only things in the backyard shed

[12] Sgt. Rosado's report states that the Appellant invoked his Fifth Amendments right against self-incrimination twice: once when arrested by PPD in relation to the explosives found at the Plymouth house and a second time in his March 26, 2015 BPD interview concerning the explosives. It appears that the Appellant invoked his Fifth Amendment right only when he was arrested by PPD. (R.Ex. 28, pp. 12, 13, 25 and 27) The Appellant also invoked his Sixth Amendment right to counsel when he was arrested by the PPD. (R.Ex. 32, p. 36)

were "junk" that wouldn't fit in the basement and things like camping gear, Ms. A's father's things, and military backpacks. He stated that Ms. A has two (2) sons who have lived in the Plymouth house; one of the sons enlisted in 2013 prior to the divorce but he did not know when the other son enlisted. Before the explosives were found at the house, his marriage was breaking up. The Appellant stated, "I got caught cheating twice …"(R.Ex. 25, p. 18); he found that money was missing from their bank account so he had his paycheck deposited into another. (Id., p. 19); he lived in the Plymouth house for three (3) years; and when Ms. A's 209A order ended, he believed that she wrote an affidavit for his daughter to obtain a restraining order against him. (R.Ex. 25; R.Ex. 32, pp. 63 and 99)

73. The Appellant's second interview was conducted on October 13, 2015. At that ten (10)-minute interview, the Appellant was represented by counsel. The Appellant declined to sign a form asserting his right to remain silent[13]. (R.Ex. 27, p. 6) He stated that he lived at the Plymouth house for six (6) or seven (7) years (Id., p. 7). Asked if he was living at the Plymouth house when he and Ms. A were engaged, the Appellant answered, "[b]ack and forth. You know, I still had to live in Boston." (Id.) When he left the Plymouth house in May 2013, he left his belongings there. (Id., p. 9) When asked, with respect to the explosives at the Plymouth house, if he never possessed them at the Plymouth house, the Appellant stated that he did not. (Id., pp. 10 – 13, 15) He denied recognizing the briefcase in the shed in which explosives were found. (Id., p. 11) He denied recognizing or owning the steel box containing explosives that was recovered from the master bedroom at the Plymouth house. (Id., p. 13; *see also* R.Ex. 12) He admitted that the rifle shells found in the BPD evidence bag inside the steel box belonged

[13] *See* Michael P. Carney v. City of Springfield & others, 403 Mass. 604 (1988).

to him but it did not make any sense to him that there were some rifle shells in the BPD evidence bag when photos of the evidence showed that approximately half of the rifle shell holder on the mantel in the man cave was empty.[14] (Id., pp. 14, 19 and 20; *see also* R.Ex. 12). The Appellant denied knowing how the BPD evidence bag wound up inside the steel box in the bedroom. (Id.; *see also* R.Ex. 12) The Appellant stated that other BPD officers use BPD evidence bags in their duty bags, for example. (Id., p. 17)

74. Lt. Det. McEachern oversaw Sgt. Rosado's investigation. He became aware of this matter when he was assigned to ACD, which was monitoring the Appellant's criminal court case. Since Lt. Det. McEachern transferred from ACD to Internal Affairs when the Appellant's case went to Internal Affairs and Sgt. Rosado was new to the Internal Affairs Division at the time, Lt. Det. McEachern became more involved in the investigation. (R.Ex. 32 (p. 63) Lt. Det. McEachern previously served in the U.S. Air Force but he did not work with explosives, he is not familiar with explosives, but he knows they are secured on a military base. (R.Ex. 32, pp. 86-89)

75. The original charges against the Appellant relating to the explosives were for violations of BPD rules concerning conduct unbecoming of an officer and conformance to laws. After the BPD's first interview of the Appellant, the BPD added to these charges a charge that the Appellant had been untruthful. (R.Ex. 27, p. 22)

76. Sgt. Rosado's Internal Affairs report references the 209A restraining order obtained by Ms. A against the Appellant but does not report that the order was ended at Ms. A's request a couple of weeks after it was issued and that Ms. A's initial overnight request for a 209A order was denied. (R.Ex. 28; Administrative Notice) The report mentions that Ms. A found the explosives on July 6, 2013 and that she did not notify the PPD of the

[14] At the Commission hearing, the Appellant specifically denied putting the rifle shells in the BPD evidence bag.

explosives until July 11, 2013 but the report does not indicate the reason for Ms. A's delayed reporting after son A told her he they were not safe. The report does not mention that Ms. A reported she spoke to her attorney before calling the PPD about the explosives. (R.Ex. 28; Administrative Notice) The report notes that people other than the Appellant had access to the backyard shed and that it appeared that Ms. A had been "funneling the families' funds into her separate account unbeknownst to him." (R.Ex. 28, p. 5) The report indicates that Sgt. Rosado had sent multiple certified letters to Ms. A in February 2015 to interview her regarding the explosives, at least some of which letters were returned. (R.Ex. 28, p. 12) In June 2015, Sgt. Rosado sent additional certified letters to Ms. A, son A and son B which were either returned or to which there was no response. (R.Ex. 28)

77. Lt. Det. McEachern recommended that all complaints against the Appellant be sustained. (R.Ex. 32 (Testimony of McEachern at BPD hearing), pp. 82-84).[15] Most of the documents that he saw in this matter indicated that the explosives were unstable, which he understood "to mean that they were capable of exploding." (R.Ex. 32, p. 86) He also knew that State Police detonated some of the explosives offsite. (R.Ex. 32)

78. Lt. Det. McEachern discussed this investigation "in depth" with Sgt. Rosado, who appears to have indicated, at a minimum, that she could go either way on a recommendation to sustain the complaints against the Appellant. Ultimately, it appears, Lt. Det. McEachern thought that Sgt. Rosado "agrees that we have a 51 percent", that is, that the BPD had established that it was more likely than not that the Appellant violated the cited BPD rules. (R.Ex. 32, p. 84)

[15] There does not appear to be a document in the record from Lt. Det. McEachern reporting his recommendation to sustain the complaints against the Appellant.

79. By memo dated January 11, 2016, to Commissioner Evans, Dep. Supt. Walcott submitted an Internal Affairs Division recommendation that the charges of conduct unbecoming (Rule 102, § 3), untruthfulness (Rule 102, § 23) and conformance to laws (five (5) counts) (Rule 102, § 35) be sustained. (R.Ex. 29)

80. Rule 102, § 23 provides,

> Employees shall submit all necessary reports on time and in accordance with established Departmental procedures. Reports submitted by employees shall be truthful and complete. No employee shall knowingly enter, or cause to be entered, any inaccurate, false or improper information.
> (R.Ex. 29)

81. Also regarding truthfulness, Police Commissioner's Memo, Number CM 10-007, dated January 20, 2010, marked "Post/Mention: Indefinite", with the subject title: "Disciplinary Policy Statement", and signed by then-Commissioner Davis, states,

> The following statement is issued in an effort to put employees on notice that untruthfulness will not be tolerated by the Department. When an officer is found to be untruthful, it damages the officer's ability to testify in future court proceedings. Testifying in court is a fundamental job requirement for a police officer, and therefore it is essential that an officer's integrity and credibility are intact. Should the Department determine that an employee has been untruthful in any report to the Department, during any sworn testimony or in an internal investigatory interview including interviews at Internal Affairs and Anti-Corruption, termination will be the presumptive disciplinary action, consistent with just cause principles. This policy will be effective immediately.[16]
> (R.Ex. 39)

82. By letter dated August 31, 2016, Commissioner Evans notified the Appellant that he was contemplating disciplinary action against him including, but not limited to discharge, reduction in rank or suspension, in connection with the Internal Affairs Division case relating to the explosives found at the Plymouth house, and that a hearing would be held

[16] The Appellant was given a copy of this policy prior to the beginning of each of the three (3) interviews conducted by the BPD of the Appellant in this case. (R.Exs. 4, 25 and 27)

in those regards on September 16, 2016. Attached to the letter were copies of G.L. c. 31, §§ 41-45 and eight (8) specifications:

> I – conduct unbecoming for being indicted for possession of explosives and receiving stolen property;
>
> II - untruthfulness for being untruthful at his IAD interview, denying having any knowledge of the explosives at the house he had shared with Ms. A;
>
> III - conformance to laws for being arrested after the explosives were located at the Plymouth house in a briefcase in the shed "which [Ms. A] identified as belonging to P.O. Merricks, in violation of G.L. c. 266, § 102 (possession of explosives);
>
> IV - conformance to laws for being arrested after explosives were found in a metal box in the bedroom at the Plymouth house, which box also contained a BPD evidence bag, in violation of G.L. c. 266, § 102;
>
> V - conformance to laws for being arrested after military grade TNT boosters were located at the Plymouth house in the metal box in the bedroom, which were obtainable only by theft or receipt after the theft, in violation of G.L. c. 266, § 60;
>
> VI - conformance to laws for being arrested and charged with receiving stolen property (four (4) military grenades) found in the shed at the Plymouth house, which were obtainable only by theft or receipt after the theft, in violation of G.L. c. 266, § 60;
>
> VII - conformance to laws for being arrested and charged with receiving stolen property over $250 (two (2) lengths of time fuse with igniters) found in the shed at the Plymouth house, in violation of G.L. c. 266, § 60;
>
> VIII - conformance to laws for being arrested and charged with receiving stolen property three (3) lengths of explosive detonator chord) found in the shed at the Plymouth house, which were obtainable only by theft or receipt after theft, in violation of G.L. c. 266, § 60.
> (R.Ex. 31)

83. At the September 16, 2016 BPD disciplinary hearing regarding the explosives, the only witnesses who testified were PPD Officer Warnock and BPD Lt. McEachern. The

Appellant was represented by counsel at the disciplinary hearing. The Appellant did not testify at that hearing.[17] (R.Exs. 32 and 33; Administrative Notice)

84. PPD Det. Warnock testified at the September 16, 2016 BPD hearing regarding the explosives, in part:

> he has received basic and advanced interrogation training to assess witness credibility but he could not recall when he received that training;
>
> he believed that Ms. A was credible when he interviewed her but he did not explain the reasons he found her credible other than to say that she was calm even though she was concerned about the explosives at her home;
>
> he has no military experience or experience with explosives;
>
> he had no knowledge about the Appellant's military duties or training;
>
> he wrote the search warrant affidavit based on information he obtained from other police officers who obtained it from the people who lived at the Plymouth house;
>
> he did not know when the Appellant had left the house;
>
> he found out shortly before the BPD September 2016 hearing that the disk recording of Ms. A's July 12, 2013 interview was destroyed after the criminal court case ended pursuant to PPD policy and the original recording was damaged or destroyed when aspects of the recording system were changed;
>
> he never saw the explosives in person – only in photographs;
>
> he did not know who owned the house; and
>
> he did not know if the explosives were from a military base where the Appellant had been assigned.
> (R.Ex. 32, pp. 29-61)

[17] At the prehearing conference in this case, the parties stipulated that the Appellant testified at the BPD disciplinary hearings. (Administrative Notice) The Appellant testified at the disciplinary hearing concerning the 209A order against the Appellant (R.Ex. 8) but not at the hearing concerning the explosives found at the Plymouth house (R.Exs. 32 and 33).

85. Lt. Det. McEachern testified at the September 2016 BPD hearing. Asked if there's any evidence to connect the Appellant to the explosives found in the bedroom, he stated that the metal box found in the bedroom that contained explosives also contained a BPD evidence bag with rounds of rifle ammunition in it (for the rifle that the Appellant was fixing) which ammunition the Appellant admitted was his; there were explosives in a briefcase in the shed, and Ms. A had told PPD that the briefcase with explosives in it belonged to the Appellant. (R.Ex. 32, p. 76) At the BPD hearing, Lt. Det. McEachern also stated, in pertinent part, that:

> the BPD attempted to interview Ms. A and sons A and B about the explosives but they were unable to do so (R.Ex. 32, p. 67);
>
> the BPD was not able to determine how recently son B had lived at the Plymouth house (Id., at 70-71);
>
> the BPD found that son A had not been deployed overseas (Id. at 72);
>
> he was unable to reach son A's superior officer to verify whether son A had access to explosives (Id.);
>
> he called NCIS and spoke to Special Agent R to find out if son B had access to explosives and had been deployed oversees and the Special Agent told him that son B was an aircraft technician, which job does not have access to explosives, and that son B was stationed on an aircraft carrier but was not deployed overseas (Id. at 73-124);
>
> he has never seen a report from the State Police lab indicating that the explosives found at the Plymouth house were capable of exploding although he knows that several of the explosives were detonated by the State Police. (R.Ex. 32, pp. 86-87); and
>
> he did not "have any direct evidence or overwhelming evidence how [the Appellant] came into contact with [the explosives] or possession of them." (R.Ex. 32, p. 92)

86. On January 23, 2017, Dep. Supt. Lydon issued his hearing officer report regarding the September 16, 2016 hearing. The report concludes that the BPD established by a preponderance of the evidence that the Appellant violated the rules cited in the eight (8) Specifications against him for possessing and receiving stolen explosives based on its finding that Ms. A stated that the briefcase containing explosives in the shed belonged to the Appellant; the metal box containing explosives in the bedroom closet, which included a BPD evidence bag containing some ammunition that the Appellant identified as his, belonged to the Appellant; the Appellant was untruthful when he denied that these items belonged to him; it was likely that the person who came into contact with the explosives was someone (like the Appellant) who had been in the military at the time that at least some of the explosives were manufactured; the only way to come into possession of the explosives is to steal them or receive them after they were stolen; the Appellant was indicted for possession of the stolen explosives and the charges were dismissed without prejudice, indicating that the Appellant could still be subject to prosecution; the Appellant could be subject to future prosecution if Ms. A is willing to testify or other information becomes available; the Appellant asserted his 5th Amendment rights and refused to be interviewed by the PPD immediately prior to his arrest; and the Appellant did not testify at the BPD hearing. (R.Ex. 33)

87. Dep. Supt. Lydon's report does not indicate, in part, that,

> the BPD investigators had not met Ms. A and did not interview her by phone or in person regarding the explosives because Ms. A did not make herself available;
>
> PPD Officer Warnock conducted the interview of Ms. A's son A by phone, there does not appear to be a PPD record documenting the phone call, and son A's superior officer did not provide a written statement as requested by the BPD or

PPD investigators indicating whether or not son A had access to explosives at his military base;

PPD Sgt. Vecchi reported that, from his military experience with explosives, the explosives appeared to be stable and the State Police Bomb Squad stated that some of them were unstable for purposes of long term storage with the State Police and were detonated at another location;

when BPD investigators asked PPD Sgt. Vecchi if anything was found with the explosives that "could connect Kirk Merricks or anyone else to the explosives", he said no; (R.Ex. 28, p. 7) and that Lt. Det. McEachern testified at the BPD hearing that he did not have "direct" or "overwhelming" evidence indicating how the Appellant obtained them (R.Ex. 32, p. 92);

the BPD Internal Affairs Division investigation report states that the interviews of the Appellant and PPD Det. Warnock, and part of the interview of PPD Det. R, were recorded but the interviews of PPD Det. J and PPD Sgt. Vecchi, who were involved at the scene, were not recorded because of a recorder malfunction and that the report relied on the interviewer's subjective notes of the interviews instead; and

ATF reported that the explosives had not been reported lost or stolen and there was no indication if the explosives were sent the bases to which the Appellant had been assigned.

(R.Exs. 10, 14, 17, 18, 24-28, 32 and 33; Administrative Notice)(emphasis added)

88. By letter dated January 27, 2017, Commissioner Evans informed the Appellant that he sustained the charges against him in IAD Case No. 2014-0611 (regarding the explosives), which was the subject of a hearing on September 16, 2016, following which the hearing officer found just cause to discipline him the Appellant for one (1) violation of Rule 102, § 3 (Conduct Unbecoming), one (1) violation of Rule 102, § 23 (Untruthfulness), and six (6) violations of Rule 102, § 35 (Conformance to Laws). The same letter informed the Appellant that Commissioner Evans sustained the findings of the hearing officer of the December 29, 2016 hearing, who found just cause to discipline the Appellative relative to IAD Case No. 2013-0224 (regarding the 209A order) for one (1)

violation of Rule 102, § 3 (Conduct Unbecoming). Having sustained the hearing officer's findings in both cases, Commissioner Evans terminated the Appellant's employment. (R.Ex. 34)

89. The Appellant's previous discipline is as follows:

> January 2008 – five (5)-day suspension. The Appellant called in sick for the eleventh time that year and failed to consult a physician for "his alleged illness, he submitted a report that did not indicate the necessity of his absence" on one date; in addition, the Appellant hired a civilian to remove debris from his property on another date but the checks paid to the worker were not honored by the bank and the Appellant did not repay the worker in a timely manner; the Appellant did not notify his commanding officer of a criminal complaint against him in regard to the failure to timely pay the worker at his house (R.Ex. 38); and
>
> August 2008 – fifteen (15)-day suspension although the Appellant was reimbursed for twelve (12) days in a subsequent settlement. The Appellant was "ordered to complete a report for an apparent Assault & Battery with a Dangerous Weapon. Officer Merricks refused to comply with this order. …" (R. Ex. 37; *see also* R.Ex. 36)

Applicable Legal Standards

A tenured civil service employee may be discharged for "just cause" after due notice and hearing upon written decision "which shall state fully and specifically the reasons therefore." G.L. c. 31, § 41. An employee aggrieved by the decision may appeal to the Commission. G.L. c. 31, § 43. Under section 43, the appointing authority carries burden to prove to the Commission by a "preponderance of the evidence" that there was "just cause" for the action taken. Id. *See, e.g.*, Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823 (2006); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, *rev.den.*, 726 N.E.2d 417 (2000). In performing its function:

> ". . .the commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew. . . . [after] a hearing de novo upon all material evidence and . . . not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer. . . . For the commission,

> the question is . . . "whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision." Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-28 (2003) (quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983)(emphasis added)).

See also Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823; Cambridge v. Civil Serv. Comm'n, 43 Mass.App.Ct. 300, 303-05, *rev.den.*, 428 Mass. 1102 (1997).

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, *rev.den.*, 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 22 (1928). The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract 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). It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. "[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance." Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003). *See* 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). *See also* Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003)(where live witnesses gave conflicting testimony at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing).

"The Commission is permitted, but not required, to draw an adverse inference against an appellant who fails to testify at the hearing before the appointing authority (or before the Commission). Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006)." Clark v. Boston Housing Authority, 24 MCSR 193 (2011), Clark v. Boston Housing Authority, Suffolk Superior Court, C.A. No. SUCV2011-2554E, *aff'd* (Feb. 13, 2015). In a civil case, the Massachusetts courts have held that even a party asserting his or her rights against self-incrimination under the U.S. or Massachusetts Constitutions "may be the subject of a negative inference by a fact finder where the opposing party … has established a case adverse to the person invoking the privilege. Quintal v. Commissioner of the Dep't of Employment & Training, 418 Mass. 855, 861 (1994), quoting Custody of Two Minors, 396 Mass. 610, 616 (1986)." Town of Falmouth, at 826-27 (citations omitted). While the adverse inference may not be required, in Town of Falmouth, the Supreme Judicial Court found that the Commission erred when it failed to factor into its decision to reduce the Appellant's suspension from 180 days to 60 days that the Appellant failed to testify at the Town's hearing, invoking the privilege against self-incrimination. Id. Finally, an adverse inference "cannot alone meet the plaintiff's burden. *See* McGinnis v. Aetna Life & Casualty Co., [398 Mass. 37, 39 (1986)]." Frizado v. Frizado, 420 Mass. 592, 596 (1995)(emphasis added).

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 the "merit principle" which governs 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.

Police are held to a high standard of conduct, as the Commission found in the recent decision in Zorzi v. Town of Norwood, Docket No. D-15-111. In Zorzi, the Commission noted,

> "An officer of the law carries the burden of being expected to comport himself or herself in an exemplary fashion." McIssac v. Civil Service Comm'n, 38 Mass.App.Ct. 473,475 1995)(negligent off-duty handling of firearm). 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)."

This standard of conduct extends, of course, to truthfulness. In Gonzalves v. Falmouth, 25 MCSR 231 (2012), Gonsalves v. Civil Service Commission and Town of Falmouth, Suffolk Superior Court, C.A. No. 12-2655G (2014) *aff'd*, the Commission articulated the importance of an officer's obligation to be truthful in that case and as established previously, stating,

> "The most serious charge proved against Officer Gonsalves involved his untruthfulness. He left a trail of evasive, incredible and inconsistent statements that began on December 20, 2008, with his original denial to the Oscar 11 Officer that he had pulled 27 into the Granite City Electric parking lot while the officer and Ms. A were meeting. It continued through the FPD investigation and was on display during his two days of testimony at the hearing before the Commission. On these grounds, alone, Falmouth is fully justified to terminate a police officer who repeatedly demonstrates his inability to tell the truth. *See*

> City of Cambridge v. Civil Service Comm'n, 43 Mass. 300, 303 (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* Phillips v. Town of Hingham, 24 MCSR 267 (2011)(police officer terminated for untruthfulness about inappropriate "horseplay" with civilian employee while on duty); Desharnais v. City of Westfield, 23 MCSR 418 (2010)(officer damaged cruiser in "cowboyish" spins and then untruthfully denied his antics); Mozeleski v. Chicopee, 21 MCSR 676 (2008)(lying to cover-up inappropriate conduct during a late-night traffic stop); Rizzo v. Town of Lexington, 21 MCSR 634 (2008)(police officer failed to report use of force and later misrepresented level of force used); Layne v. Town of Tewksbury, 20 MCSR 372 (2007)(police officer denied using profanity directed to accident victims)."

G.L. c. 31, § 43 also vests the Commission with authority to affirm, vacate or modify a penalty imposed by the appointing authority. The Commission is delegated with "considerable discretion" in this regard, albeit "not without bounds" so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. *See e.g.*, Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 600 (1996) and cases cited; Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct. 796, 800 (2004); Faria v. Third Bristol Div., 14 Mass.App.Ct. 985, 987 (1982)(remanded for findings to support modification). However, the Supreme Judicial Court has added,

> "Unless the commission's findings of fact differ significantly from those reported by the town or interpret the relevant law in a substantially different way, the absence of political considerations, favoritism, or bias would warrant essentially the same penalty." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 815, 824.

Analysis

The Respondent has established, by a preponderance of the evidence, that it had just cause to discipline the Appellant for violation of the BPD Rule 102, § 3, concerning conduct unbecoming an officer, when, during a loud and bitter domestic argument on May 31, 2013, Ms. A locked herself in the bathroom to call the PPD for help and the Appellant kicked the bathroom

door, causing damage to the door. PPD officers arrived at the Merricks' residence and arranged for the Appellant to leave the residence and go to work at the BPD. Later the same night, Ms. A called the PPD again, this time seeking a restraining order out of fear that the Appellant would cause further damage if he was allowed to return to the house after his shift ended the following morning. Although the initial request for a restraining order was denied by an on-call judge on May 31, the PPD subsequently reviewed the matter and interviewed Ms. A at the Plymouth police station and advised her to go to court to request a restraining order. The court issued an ex parte order on June 4, 2013 but it ended at Ms. A's request when both parties appeared before the court approximately ten (10) days or so later when the Appellant indicated that he would not return to the house. While both the Appellant and Ms. A were yelling during this argument, the Appellant's conduct in kicking and breaking the bathroom door when Ms. A was in the bathroom, trying to call the police for assistance, crossed the line. Although the BPD was unable to obtain the PPD's recorded interview of Ms. A and photos of the damage to the bathroom door, it interviewed Ms. A by phone, the Appellant did not deny his conduct when BPD investigators interviewed him about it or when he testified at the BPD hearing regarding the restraining order. The Appellant's behavior led to the involvement of multiple members of the PPD and the court, who learned in the course of their duties, that the Appellant was a member of the BPD. Such conduct reflects unfavorably on the BPD in violation of the BPD Rule 102, § 3 regarding conduct unbecoming an officer and the Respondent had just cause to discipline the Appellant therefor.

The Respondent has not established, by a preponderance of the evidence, that it had just cause to discipline the Appellant for violation of BPD rules in connection with the explosives found at his Plymouth residence. Even drawing an adverse inference here from the Appellant's

failure to testify at the Respondent's hearing does not establish by a preponderance of the evidence that the Appellant engaged in the misconduct alleged in connection with the explosives.[18] *See* citations and discussion in Applicable Legal Standards section, *supra*, including Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, 826-27 (2006); Clark v. Boston Housing Authority, 24 MCSR 193 (2011), Clark v. Boston Housing Authority, Suffolk Superior Court, C.A. No. SUCV2011-2554E, *aff'd* (Feb. 13, 2015); Quintal v. Commissioner of the Dep't of Employment & Training, 418 Mass. 855, 861 (1994), quoting Custody of Two Minors, 396 Mass. 610, 616 (1986); McGinnis v. Aetna Life & Casualty Co., 398 Mass. 37, 39 (1986); and Frizado v. Frizado, 420 Mass. 592, 596 (1995).

In rendering its decision to discipline the Appellant, the Respondent relied on a hearing officer's report that relied on a State Police report, the Appellant's indictment, the reports and/or statements of various members of the PPD, reports, the BPD corruption report, the internal affairs report and interviews of the Appellant. The Commission gives considerable credence to police reports that are, for example, detailed, corroborated by eyewitnesses, and timely-made. *See* Abbot A. v. Commonwealth, 458 Mass. 24, 35-36 (2010). However, the Respondent's investigators were unable to interview Ms. A by phone or in writing regarding the explosives to corroborate her statements reported by the PPD; they did not obtain or have access to the PPD audio-visual recording of Ms. A's interview regarding the explosives; they conducted in-person interviews of the PPD Officers Warnock, R, J and Sgt. Vecchi, only some of which interviews were recorded because of a faulty recorder, and summaries of their interviews were based on the interviewers' notes, which are always subject to the author's subjective views.

The Respondent's hearing officer's report on which Commissioner Evans relied, either ignored or gave little weight to other, highly significant information. For example, the hearing

[18] The Respondent's post-hearing brief does not reference taking an adverse inference in this regard.

officer did not mention that the PPD had recorded its interview of Ms. A about the explosives but the BPD was unable to obtain a copy of the recording and that no member of the BPD had ever met Ms. A to verify remarks attributed to her concerning the explosives. Next, the hearing officer failed to note that even though the PPD asked the State Police for a fingerprint analysis of the seized evidence, the State Police declined, stating that it would be unsafe to do so and, thus, there were no fingerprints identifying the person/s who come in contact with the evidence. In addition, the hearing officer did not note that the ATF indicated that there was no report that the explosives found at the Plymouth house had been lost or stolen or that the manufacturer had sent them to military sites where the Appellant had served. Further, the hearing officer did not note that Lt. Det. McEachern testified at the local hearing that he did not have any direct evidence how the Appellant could have obtained the explosives (R.Ex. 32, p. 92) and that Sgt. Rosado's report indicated that PPD Sgt. Vecchi made a similar statement (R.Ex. 28, p. 7). The Respondent's hearing officer's report also ignored or gave little weight to the information that even though Ms. A and son A reportedly found the explosives on July 6, 2013, Ms. A waited until July 11, 2013 (after son A had returned to his military assignment and Mrs. A had phoned her attorney) to report the explosives to the PPD. Apparently, no one at the PPD thought to ask Ms. A this important question. Also given inadequate consideration was the fact that the backyard shed in which some explosives were found was unlocked so that anyone who had access to the house would have access to the shed. With regard to access, it was not determined at what dates Ms. A's son B lived at the house to determine whether he was connected to the explosives. Similarly, the Respondent's hearing officer report does not note that Lt. Det. McEachern testified at the local hearing that he had never seen a report from the State Police lab indicating that the explosives were capable of exploding, although he knew that several of the

explosives were detonated by the State Police. R.Ex. 32, pp. 86-87. The hearing officer further ignored or gave inadequate weight to the fact that the Appellant's occupation in the military did not involve explosives and that he received the same limited basic training regarding explosives that other soldiers received. Also, the BPD and PPD made efforts to discern if either of Ms. A's sons had seen active military duty overseas, where they might have access to explosives, or if they received explosives training. The BPD was told "no" in both regards by son A's superior officer and by NCIS regarding son B but they received no written confirmation in these regards and were apparently unable to speak directly to the sons.

Further, the BPD hearing officer did not have additional significant information provided at the Commission hearing including: 1) soldiers returning home from active military duty abroad are thoroughly checked to ensure that they are not taking anything they are not authorized to take; and 2) PPD Sgt. Vecchi testified at the Commission that he did not agree with Sgt. Rosado's report stating that he did not agree that Ms. A had told him the explosives belonged to the Appellant. In addition, the BPD hearing officer's report provided no rational explanation for some of the Appellant's rifle shells appearing in the BPD evidence bag in the metal box (which metal box did not belong to the Appellant) in the master bedroom closet when the rest of the rifle shells were in a half-empty holder on the mantel in the man cave.

The BPD hearing officer's report also provided limited insight into the context of the discovery of the explosives. In the midst of a highly contentious divorce, with the Appellant having been removed from the house and a restraining order issued weeks prior to discovery of the explosives, the visit of son A to the Plymouth house when the Appellant was no longer living there, and Ms. A's five (5)-day delay in reporting the explosives to the PPD (after son A had

returned to his military base and Ms. A had consulted her attorney), there were opportunities to tamper with the home and the evidence to implicate the Appellant.

The Respondent also states that another reason for sustaining the explosive charges against the Appellant is that the criminal case against the Appellant could be re-opened since the case was dismissed without prejudice. The criminal case was based on the indictment issued following Ms. A's testimony to a grand jury. However, since that time, Ms. A apparently departed the state and has been unresponsive to many efforts to speak to her and elicit her cooperation in re-opening the case.

That the Respondent failed to establish by a preponderance of the evidence that it had just cause to discipline the Appellant does not mean that the Appellant's testimony was not without its flaws. For example, when talking to BPD investigators the first time, the Appellant stated that he had only lived at the Plymouth house for three (3) years (R.Ex. 25, p. 7) while at his second interview by BPD investigators, he stated that he had lived there for six (6) to seven (7) years (R.Ex. 27, p. 7). When BPD investigators asked him whether he lived in Boston or Plymouth, the Appellant stated that he lived in both, in view of the BPD residency requirement. In responding to BPD investigators' questions about what happened on the night of May 31 after the PPD police arrived in response to Ms. A's call, the Appellant stated that he "just left the house" when, in fact, he did not "just leave" until the PPD police officers arrived in response to Ms. A's 911 call and spoke with the Appellant and Ms. A. R.Ex. 25, p. 17. However, such inconsistencies do not materially affect this decision.

The Respondent argued that the Appellant was untruthful in that he denied that the explosives belonged to him. To this end, it essentially relied on the unverified, contested statements of a witness the Respondent has never met and the Appellant's admission that

ammunition in a BPD evidence bag that belonged to him was found sitting in a metal box with explosives, which did not belong to him. These reasons fall short of the preponderance of the evidence standard.

The Commission finds that the Respondent established by a preponderance of the evidence that it had just cause to discipline the Appellant regarding the domestic violence related charges but that the Respondent's January 27, 2017 notice of termination letter (R.Ex. 34) simply states that the Appellant was terminated based on both the domestic violence related charges and the explosives related charges. Since the Respondent has not established just cause for the explosives charges against the Appellant, a separate discipline for only the domestic violence related charge is warranted. A review of Commission case law indicates that police officers and other public employees have been terminated for domestic violence alone in especially grievous cases, when the have engaged in domestic violence on multiple occasions and/or in connection with other misconduct. *See, e.g.* Hatfield v. Town of Hull Fire Department, D1-15-121 (2016); Tobias v. City of Newton, 22 MCSR 661 (2009); Weinrebe v. Department of Correction, 20 MCSR 651 (2007); Venuto v. Town of Braintree, 26 MCSR 390 (2013); Lavery v. North Attleborough, 30 MCSR 373 (2017); Torres v. City of Chicopee, 30 MCSR 467 (2017); Alicea v. City of Holyoke, 27 MCSR 150 (2014). However, in a case involving a single, less egregious incident of domestic violence unaccompanied by other proved misconduct, the Commission has upheld a three (3)-day suspension. Horner v. Department of Correction, 24 MCSR 405 (2011). In determining appropriate discipline regarding the Appellant's domestic violence proved charge, I further considered the Appellant's previous discipline. The Appellant was disciplined twice in 2008, once for sick leave abuse and for issuing a check to someone to remove debris from his property (a five (5)-day suspension) and a second time for a fifteen (15)-day suspension

for failing to complete a report as ordered for an apparent assault and battery with a dangerous weapon (for which he was reimbursed twelve (12) days). Following progressive discipline, the Appellant shall be suspended for ten (10) days in regard to the domestic violence charge proved here.

Conclusion

For all of the above-stated reasons, Appellant's appeal under Docket No. D1-17-027 is ***allowed in part*** with regard to the explosives charges but ***denied in part*** with regard to the domestic violence charge such that he shall be suspended for ten (10) days. The Respondent shall return the Appellant to employment and compensate him for the time he was not paid after his termination of employment.

/s/ *Cynthia A. Ittleman*

Cynthia A. Ittleman
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan Commissioners) on May 10, 2018.

Either party may file a motion for reconsideration within ten days of the receipt of the Commission's 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. 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:
Bryan Decker, Esq. (for Appellant)
Katherine Hoffman, Esq. (for Respondent)