

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

THOMAS DESHARNIAS
Appellant

v.

D1-09-406

CITY OF WESTFIELD,
Respondent

Appellant's Attorney:

Thomas J. Rooke, Esq.
73 Chestnut Street
Springfield, MA 01103

Respondent's Attorney:

Kathleen E. Degnan, Esq.
City of Westfield
59 Court Street
Westfield, MA 01085

Commissioner:

Christopher C. Bowman

DECISION

The Appellant, Thomas Desharnias (hereinafter "Desharnias" or "Appellant"), pursuant to G.L. c. 31, § 43, is appealing the decision of the City of Westfield Police Commission (hereinafter "City" or "Appointing Authority") to terminate him from his position as a police officer for untruthfulness and conducting unbecoming an officer.

The appeal was filed with the Civil Service Commission (hereinafter "Commission") on November 16, 2009. A pre-hearing conference was held on November 25, 2009 and a full hearing was held on January 13, 2010 at the Springfield State Building in Springfield, MA. The hearing was digitally recorded and both parties were provided with a CD of the

proceeding. Post-hearing briefs were submitted on March 8, 2010 (Appointing Authority) and May 11, 2010 (Appellant).

FINDINGS OF FACT:

Twenty-five (25) exhibits were entered into evidence at the hearing (Appointing Authority Exhibits 1-12 and Appellant Exhibits 1-13). At the pre-hearing conference held on November 25, 2009, the parties submitted stipulated facts. Based on the documents submitted and the testimony of the following witnesses:

For the Appointing Authority¹:

- Heather, High School student / “Police Explorer”²;
- Sergeant Brian Boldini, Westfield Police Department;
- Detective Todd Edwards, Westfield Police Department;
- Sergeant Steve Dickinson, Westfield Police Department;
- Douglas LaValley, Police Officer, Westfield Police Department;
- Lieutenant Lawrence Valliere, Westfield Police Department;
- Captain Michael McCabe, Westfield Police Department;
- John A. Camerota, Police Chief; Westfield Police Department;
- Karl W. Hupfer, Chairman, City of Westfield Police Commission;

For the Appellant:

- Thomas Desharnias, Appellant;

I make the following findings of fact:

¹ The testimony of Police Sergeant Edward Murphy and Police Officer Michael Gamache was not taken because the parties stipulated that the facts to which the officers were going testify (that police cruiser #7 was covered with blue-ish / green salt) would be admitted as a joint fact. It was also stipulated tha the picture marked as Appointing Authority Exhibit 4 was accurate.

² The last name of the “police explorer”, a high school student, is withheld.

1. The Appellant is a forty-five (45) year-old male. He and his wife reside in Westfield. They have six (6) children ranging in ages from 11 to 22. He is a veteran of the United States Army and served in Iraq in 1990 – 1991 as part of Operation Desert Storm. (Testimony of Appellant)
2. The Appellant was a tenured civil service employee in the Westfield Police Department prior to being terminated on November 12, 2009. He had been employed as a police officer in Westfield since July 15, 1996. The Westfield Police Commission is the Appointing Authority for police officers. (Stipulated Facts)
3. When first hired in 1996, the Appellant served as a dispatcher until the City eventually hired civilian dispatchers. Thereafter, he worked the 12:00 Midnight to 8:00 A.M. shift for five (5) years. (Testimony of Appellant)
4. During this five (5) year period, the Appellant became certified as a Drug Abuse Resistance Education (D.A.R.E.) officer. In this capacity, he worked with schools to promote this program until it was discontinued as a result of state budget cuts. (Testimony of Appellant)
5. In 2002 or 2003, the Appellant began working the 4:00 P.M. to 12:00 Midnight shift. (Testimony of Appellant)
6. The Appellant has no prior record of discipline and has been recognized for his work as a police officer. In 2001, Chief Camerota awarded the Appellant the “Police Star”, the highest honor in the Police Department, for his bravery in removing a trapped and unconscious driver from a burning car. (Testimony of Appellant)
7. In September 2007, the Appellant was assigned to take over the Westfield Police “Explorer Program”, a program designed to mentor young people with an interest in

law enforcement about the duties and responsibilities of police officers. In this capacity, the Appellant re-built the program through increased recruitment and fundraising. (Testimony of Appellant and Dickinson and Chief Camerota)

8. Explorers participate in providing security for such events as Taste of the World, the Arts Festival, and soccer matches. Members were also organized to participate in “tobacco stings” and other policing activities. Meetings were scheduled for training in police procedures, and the Police Explorers participated in national competitions. (Testimony of Appellant)

9. The Appellant organized the Explorers into a hierarchy of ranks, with a lieutenant as the highest rank, followed by two sergeants. (Testimony of Appellant)

10. The Explorers’ lieutenant at the time of the subject incident of this appeal occurred (October 4, 2009) was Heather, a 17 year old high school student, whom the Appellant appointed to this position only a couple of months earlier. Heather had been a member of the Police Explorers for approximately two years, and served as a Sergeant prior to being “promoted” to lieutenant. (Testimony of Appellant)

11. On numerous occasions, the Appellant took Explorers, including Heather, on “ride-alongs” for purposes of observation and training. (Testimony of Appellant and Heather)

12. On Sunday, October 4, 2009, the Appellant was working his regular 4:00 P.M. to 12:00 Midnight shift. Heather was scheduled to participate in a ride-along with the Appellant. (Testimony of Appellant)

13. The Appellant was driving police cruiser #7. He did not conduct a visual inspection of the vehicle prior to leaving the station nor did the officer who used the vehicle prior to him. (Testimony of Appellant)
14. The Appellant, with Heather as a passenger, drove cruiser #7 to Union Street in Westfield where a salt barn is located and set up radar. (Testimony of Appellant and Heather) The Appellant stopped two (2) vehicles and issued verbal warnings. (Testimony of Appellant)
15. It is undisputed that after completing the radar duties, the Appellant eventually drove into the salt barn on two (2) occasions. (Testimony of Appellant and Heather)
16. In regard to what occurred while the Appellant was driving into and through the salt barn, I credit the testimony of Heather. For reasons discussed in more detail below, she initially lied to police investigators about what occurred because she felt pressured to do so by the Appellant who had put her in a “tough spot”. In her testimony before the Commission, she acknowledged that this was a mistake. She ultimately set the record straight with police investigators after speaking with her mother. She was soft-spoken and appeared to be somewhat nervous testifying in a formal setting in which the Appellant was present. She appeared to understand the gravity of her sworn testimony before the Commission, however, and was a good witness. She listened carefully to the questions posed to her and appeared intent on ensuring that her testimony was accurate and limited only to what she saw and heard. (Testimony, demeanor of Appellant)
17. On the first occasion when the Appellant drove the cruiser into the salt barn, he “drove really fast and did spins”. The cruiser was “sliding and spinning”. On this

first occasion, the Appellant did not hit anything in the salt barn with the cruiser.

(Testimony of Heather)

18. Later that evening, the Appellant drove back to the salt barn and told Heather that he wanted to do it again because it was his “favorite thing to do”. (Testimony of Heather)

19. On the second occasion when the Appellant drove the cruiser into the salt barn, the Appellant was again doing “spins” while driving very fast. At one point, he “slammed on the brakes” and “slid into a salt pile that was on the side.” Heather felt the right side of the car “tap” the salt pile. The Appellant slowed down, straightened out the cruiser and then left the salt barn. The Appellant did not say anything to Heather as this occurred. (Testimony of Heather)

20. Although the Appellant acknowledges that he was acting “cowboy-ish” on a slow night, he maintains that he was performing “controlled spins” in the salt barn, that there was no aspect of recklessness to his operation of the vehicle, and that he never suspected that the cruiser made contact with anything, including a salt pile, in the salt barn. (Testimony of Appellant)

21. On the morning of October, 5, 2009 at approximately 8:00 a.m., Police Sergeant Brian Boldini was called by Police Officer Gamache to observe damage to Westfield Police cruiser #7. (Testimony of Boldini).

22. Boldini is assigned to the Westfield Traffic Bureau and is the police officer responsible for maintenance of all police vehicles. (Testimony of Boldini).

23. Police policy on cruiser maintenance requires officers to inspect their cruiser both prior to and at the end of their shift. (Testimony of Boldini and Exhibit 6)

24. After receiving the above referenced call from Gamache, Boldini observed that cruiser #7 was damaged in the manner stipulated thereto and as shown in the picture marked as Appointing Exhibit 4. (Testimony of Boldini and Appointing Authority Exhibit 4)
25. The salt on cruiser #7 was the same kind of salt located at a salt barn located on Union Street in Westfield, MA. (Appointing Authority Exhibit 2)
26. Boldini checked the vehicle key log and found that the Appellant was the last officer to use cruiser #7. (Testimony of Boldini and Appointing Authority Exhibit 5)
27. At 10:48 a.m. on October 5, 2009, Boldini sent an e-mail to the Appellant (a) stating that the Appellant signed out cruiser #7 on October 4, 2009 at 16:00 hours and (b) requesting that the Appellant contact him [Boldini] regarding the damage to cruiser #7. (Testimony of Boldini and Appointing Authority Exhibit 11) The Appellant did not respond to this e-mail. (Testimony of Boldini).
28. Also on the morning of October 5, 2009, Murphy and Gamache notified the Appellant's supervisor, Police Sergeant Stephen Dickinson, of the fact that cruiser #7 was damaged as shown in the picture marked as Appointing Authority Exhibit 4. (Testimony of Dickinson and Boldini and Appointing Authority Exhibits 1 and 4). Dickinson viewed said damage. (Testimony of Dickinson).
29. Boldini notified Dickinson that the Appellant was the last officer to use cruiser #7. (Testimony of Boldini and Dickinson and Appointing Authority Exhibit 1)
30. After being notified that the Appellant was the last known operator of cruiser #7, Dickinson called the Appellant shortly after 11:00 a.m. on October 5, 2009. (Testimony of Dickinson and Appointing Authority Exhibit 1)

31. During the phone conversation, Dickinson asked the Appellant if he took out cruiser #7 and the Appellant responded that he took said cruiser out at 4:00 p.m. on October 4, 2009; that he picked up Heather; that he performed traffic enforcement on Union Street near the salt piles until 8:00 p.m. at which time he dropped Heather off at the police station; and that he proceeded to the Powdermill Village until 10:00 p.m. at which time he brought cruiser #7 back to the police station. (Testimony of Dickinson and Appointing Authority Exhibit 1)
32. Dickinson then asked the Appellant if he was involved in an accident or whether he bumped into anything with cruiser #7. The Appellant replied “no”. (Testimony of Dickinson and Appointing Authority Exhibit 1)
33. Dickinson believed the Appellant’s answer and at 2:34 p.m. on October 5, 2009, Boldini sent an e-mail to all personnel asking if anyone was driving in the area of the salt pile on Union Street. (Testimony of Dickinson and Boldini and Appointing Authority Exhibit 11)
34. There was no response to Boldini’s e-mail to all personnel. (Testimony of Boldini)
35. When there was no response to Boldini’s e-mails, Captain Michael McCabe and Dickinson, at separate times asked Detective Todd Edwards to view the videotape of the police parking lot. (Testimony of Edwards)
36. On October 5, 2009, Edwards viewed videotape footage of the police parking lot from 8:00 a.m. October 4, 2009 to 7:00 a.m. October 5, 2009. Edwards is responsible for maintaining the police video tape system. Edwards observed Lt. Lawrence Valliere take cruiser #7 at noon on October 4, 2009 and return said cruiser at approximately 12:50 P.M. Edwards observed that Valliere did not inspect said

cruiser before taking it. Edwards observed no damage to cruiser #7 upon Valliere's return. Edwards observed the Appellant driving cruiser #7 out of the police parking lot at 4:00 P.M. on October 4, 2009, and Edwards also observed Heather getting into cruiser #7 with the Appellant. Edwards observed that the Appellant returned cruiser #7 at approximately 10:00 P.M. on October 4, 2009. Edwards could not discern whether there was damage due to darkness. Edwards observed that the Appellant did not inspect the vehicle prior to and after his shift. Edwards observed that cruiser #7 was not moved from 10:00 p.m. on October 4, 2009 through 7:00 a.m. on October 5, 2009. Edwards informed Dickinson of this fact on October 5, 2009. (Testimony of Edwards)

37. After being told by Boldini that the Appellant was the last person to take cruiser #7 and being told by Edwards that said cruiser was not moved after the Appellant returned said cruiser, Dickinson made a second call to the Appellant. Dickinson asked the Appellant whether he was sure that nothing happened when he had cruiser #7. Dickinson asked the Appellant if maybe he bumped into something accidentally or took off quickly. (Testimony of Dickinson and Appointing Authority Exhibit 1)
38. The Appellant stated that nothing happened and that he simply performed traffic enforcement on Union Street. (Testimony of Dickinson and Appointing Authority Exhibit 1)
39. After talking with Dickinson on Monday, October 5th, the Appellant placed a phone call to Heather while she was at school. Heather and the Appellant offered divergent testimony regarding what was said during that phone call. (Testimony of Appellant and Heather)

40. The Appellant testified that since he planned on calling Heather in any event to confer about the upcoming week of events, he decided to take the opportunity to confirm that nothing had happened to the vehicle the previous evening. According to the Appellant, he asked Heather whether at any time the previous evening, “did anybody hit us? Did we back into anything? When I was out of the cruiser, when I left you in the car, did someone bump into us from behind, anything like that?” According to the Appellant, Heather responded by saying that no, they were not in an accident. The Appellant testified that, based on Heather’s answers, he then said to her: “ ... well, if anyone calls you, if Steve calls you, tell – you know tell him we weren’t involved in an accident or, you know, we didn’t damage the car. Obviously, you don’t have to tell him that I did – that I went into the barn and spun around with you in the cruiser. You don’t have to offer him – you know, don’t tell him that.”

(Testimony of Appellant)

41. Heather’s testimony is markedly different than the Appellant’s. According to Heather, the Appellant did not call her to discuss Explorer business. He called her at school and asked her if Sergeant Dickinson had called her and she said no. The Appellant then told Heather, “If he does and if he’s joking around or anything, nothing happened during the ride-along or [you] don’t know anything.” Heather testified that she “just agreed with him,” but “felt like something was going on” and wanted to “know why he was telling me that.” (Testimony of Heather)

42. I credit the testimony of Heather regarding the phone conversation between her and the Appellant on October 5th. The Appellant’s insistence that the primary purpose of the call was to discuss Explorer business is not credible. Moreover, Heather’s version

of what was said during that phone conversation rang true to me, but the Appellant's did not. (Testimony, demeanor of Appellant and Heather)

43. Shortly after speaking with the Appellant, Heather received a call from Sergeant Dickinson who asked her what happened during her ride along with the Appellant. Heather replied that they ran radar on Union Street, during which time, they stopped two (2) vehicles; one while driving on Union Street and the other while they were parked at the salt piles on Union Street. Dickinson asked Heather whether they may have bumped into something at the salt piles and Heather replied "not that she was aware of." Because of Heather's qualified statement, Dickinson met with the Appellant in person at the Powdermill Village Office, at approximately 4:00 p.m. on October 5, 2009, to make a third inquiry regarding the damage to cruiser #7.

(Testimony of Dickinson)

44. Dickinson asked the Appellant whether he remembered bumping into anything with cruiser #7 and again the Appellant responded "No". Dickinson asked the Appellant if he noticed the condition of cruiser #7 and the Appellant said that the car was filthy but that he was not going to clean it. (Testimony of Dickinson)

45. At approximately 8:30 P.M. on October 5, 2009, Dickinson spoke with Heather in person and asked if she was aware of the condition of cruiser #7 when she went for a ride-along with the Appellant and Heather said "No". Heather also responded that she was not aware of any accidental bumping or spraying of salt; and that if something did happen she did not know. Dickinson concluded that he was not getting all of the information regarding what happened on Heather's ride-along with the

Appellant on October 4, 2009. (Testimony of Dickinson and Appointing Authority Exhibit 1)

46. On October 6, 2009, Dickinson submitted his report to Captain Michael McCabe explaining the details of his investigation into the damage to cruiser #7. (Testimony of Dickinson and Appointing Authority Exhibit 1)
47. Sergeant Dickinson was a good witness and I credit his testimony. His answers were responsive to the questions posed to him and he had a good recollection of events, when they occurred and what was said during the various conversations referenced above. Further, he appears to have no ulterior motive for testifying against the Appellant, whom he described as a hard working officer who has done an outstanding job. (Testimony, demeanor of Dickinson)
48. On October 6, 2009, after reviewing Dickinson's report, McCabe questioned two of the three officers that used cruiser #7 from the period of October 3, 2009 and October 5, 2009; those officers being LaValley and Lieutenant Valliere. (Testimony of McCabe)
49. Both LaValley and Valliere told McCabe that they had not damaged cruiser #7. (Testimony of McCabe)
50. At approximately 3:00 P.M. on October 6, 2009, McCabe visited the Tekoa Country Club to speak with Heather regarding the damage to the cruiser. (McCabe Testimony and Appointing Authority Exhibit 2)
51. Heather told McCabe that she did not remember hitting anything but that she could not be sure. (Appointing Authority Exhibit 2)

52. After making these statements to McCabe, Heather called her mother and sought her advice. After talking with her mother, Heather called Dickinson and told him that, while she was in cruiser #7, the Appellant drove said cruiser into the salt barn on Union Street and drove the car pretty fast and then stepped on the brakes thereby making the cruiser spin out on the salt and hitting or tapping a salt pile. (Testimony of Heather and Dickinson and Exhibits 2 and 3)

53. Heather also told Dickinson about the Appellant's phone call to her the day before. (Testimony of Dickinson)

54. After Heather divulged this information to Dickinson, Dickinson (per McCabe's instruction) asked Heather to come to the Police Department to make a written statement which she did. (Testimony of Dickinson)

55. Heather testified that if the Appellant had not influenced her otherwise that she would have initially divulged what she knew regarding the damage to cruiser #7. (Testimony of Heather)

56. On or about October 15, 2009, McCabe met with the Appellant, in the presence of the Appellant's counsel at the time. According to McCabe, he asked the Appellant the following questions and received the following responses:

- McCabe: Are you responsible for the damage to car 7?
- Appellant: No
- McCabe: Are there any circumstances that you can think of that would cause the damage to car 7?
- Appellant: No
- McCabe: Could any of your driving activities have led to the damage to Car 7?
- Appellant: No

57. McCabe then told the Appellant that this was not the conclusion that he (McCabe) had drawn after looking at the damage to the vehicle and talking to Heather. (Testimony of McCabe)
58. McCabe then asked the Appellant to describe his driving activities on the night in question. The Appellant responded by saying that he ran radar and that there was “nothing out of the ordinary” that night. (Testimony of McCabe)
59. McCabe then asked the Appellant if he did any “spins” or erratic driving in the salt barn or the storage location that night. When the Appellant “basically didn’t answer the question”, [McCabe] pointed out that Heather said he had been doing “doughnuts” in the salt barn that night. McCabe then asked the Appellant if that could have possibly caused the damage and the Appellant said, “no”. (Testimony of McCabe)
60. During the same discussion, the Appellant initially told McCabe that he never called Heather. Several minutes later, the Appellant contradicted himself and said that he [Appellant] called Heather on Explorer business. (Testimony of McCabe)
61. On or about October 15, 2009, McCabe prepared a report which he submitted to Police Chief John Camerota indicating his [McCabe’s] findings that the Appellant had violated numerous provisions of the Westfield Police Rules and Regulations, including but not limited to, Rule 5.2 Truthfulness and Rule 2.3 Conduct Unbecoming an Officer. (Testimony of McCabe and Appointing Authority Exhibit #3).
62. McCabe stated that he believed that the Appellant knew that his driving actions caused the damage to cruiser #7 and that the Appellant never disclosed his driving

actions to Dickinson despite the fact he was asked on three (3) separate occasions. (Appointing Authority Exhibit #3). McCabe also stated his belief that the Appellant's conduct of calling Heather and asking her not to say anything to Dickinson about the Appellant's driving of the car on the night in question was particularly egregious given that the Appellant had charge of the Explorer group and is supposed to be a role model for explorers. (Testimony of McCabe and Appointing Authority Exhibit #3)

63. Captain McCabe was also a good witness and I credit his testimony. He has over twenty-five (25) years of experience with the Westfield Police Department and has completed dozens of internal investigations. He had a good recollection of events and was able to provide detailed answers that rang true to me. Although he stated during cross examination that he had previously questioned the Appellant's honesty as a result of prior charges against the Appellant (none of which were sustained), I do not believe that it influenced his investigation of this matter and/or his conclusions. (Testimony, demeanor of McCabe)

64. After reviewing reports from Dickinson and McCabe, Camerota believed that a charge of untruthfulness existed, and that the charge was beyond his level of disciplinary authority. (Testimony of Camerota)

65. As a result, Camerota sent written notice to the Appellant dated October 27, 2009 stating that a hearing was scheduled for November 9, 2009 before the Appointing Authority to address the investigation completed by McCabe and submitted by Camerota and determine any discipline.³ Enclosed with said written notice was a copy of McCabe's report (attached hereto as Appointing Authority Exhibit #3).

³ The Appellant filed an appeal alleging that the Appointing Authority failed to comply with G.L. c. 31, §42. Such appeal was dismissed by vote of this Commission on January 7, 2010.

66. The Appointing Authority conducted a disciplinary hearing on November 9, 2009 and the Appellant was present with legal counsel. (Appointing Authority Exhibit 9)

67. Camerota informed the Appointing Authority of his opinion [Camerota's] that the Appellant's lack of truthfulness during the course of the police investigation into the damage of cruiser #7, together with the fact that the Appellant called Heather to instruct and/or influence her not to divulge what she knew as how said cruiser was damaged, rose to the level of termination. (Testimony of Camerota and Exhibit 9)

68. On November 12, 2009, the Police Commission sent its decision to the Appellant notifying him of his termination. The letter stated in relevant part:

“The reasons for this decision to terminate your employment are your violations of:

1. Section 5.2 of the Police Rules and Regulations requiring that police officers be truthful; and
2. Section 2.3 of the Police Rules and Regulations regarding Conduct Unbecoming a Police Officer.

This Commission has found that you were not truthful during the course of a police investigation regarding damage to police cruiser 7 that occurred on October 4, 2009 and that you engaged in conduct unbecoming an officer when you contacted the female 18 year old police explorer (who was riding with you on that date) and requested, instructed, and/or otherwise influenced her not to cooperate with or divulge information to the officers investigating the damage to said police cruiser.” (Exhibit 10)

69. The Appellant filed a timely appeal of the Appointing Authority's decision to the Civil Service Commission. (Stipulated Fact)

CONCLUSION

G.L. c. 31, § 43, provides:

“If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person

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

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 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass. App. Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983)

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956).

"The commission's task...is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether 'there was reasonable justification for the action taken by the appointing authority in the

circumstances found by the commission to have existed when the appointing authority made its decision”, which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006). See Watertown v. Arria, 16 Mass. App. Ct. 331, 334, rev.den., 390 Mass. 1102 (1983) and cases cited.

Under Section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew.” Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. The role of the Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102, (1997). See also Leominster v. Stratton, 58 Mass. App. Ct. 726, 728, rev.den., 440 Mass. 1108, 799 N.E.2d 594 (2003); Police Dep’t of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den. (2000); McIsaac v. Civil Service Comm’n, 38 Mass App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 390 Mass. 1102 (1983).

By a preponderance of the evidence, the Appointing Authority has shown that it had reasonable justification for disciplining the Appellant for untruthfulness and conduct unbecoming a police officer. I base this conclusion largely on the credible testimony of the City’s witnesses, including Heather, the 17-year old police “explorer”. It is the function of the hearing officer to determine the credibility of the testimony presented before him. 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); (In cases

where live witnesses giving different versions do testify 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); Connor v. Connor, 77 A. 2d. 697 (1951) (the opportunity to observe the demeanor and appearance of witnesses becomes the touchstone of credibility).

The Appellant, the father of six (6) children, is a war veteran who has served our country with distinction. For that, he has this Commissioner's admiration and gratitude. That distinguished military service, however, and his commendations for bravery as a member of the Westfield Police Department, do not exempt him from the professional standards of conduct expected of all police officers.

On the evening of Sunday, October 4, 2009, the Appellant had arranged for Heather, a 17-year old member of the high school "Explorer" program, to join him on a "ride-a-long". The Appellant was justifiably proud of his efforts to rebuild the local Explorer program. Over a period of several months, he had recruited additional student members, bolstered the group's fundraising and re-instituted meetings and other activities such as ride-a-longs.

Most of the October 4th ride-along was routine and uneventful, including two (2) traffic stops at which the Appellant gave verbal warnings to motorists. On two (2) different occasions that night, however, the Appellant inexplicably engaged in reckless behavior, by driving his cruiser into a salt barn and performing "spins" or "doughnuts". Even the Appellant acknowledges he was behaving in a "cowboy-ish" manner. That reckless behavior, however, was not the basis of the Appellant's termination. In fact, there is little doubt that his behavior in the salt barn that night, alone, likely would have

resulted in nothing more than a relatively minor disciplinary action against him. The basis for termination was the Appellant's subsequent untruthful statements regarding what occurred on the night of October 4th (untruthfulness) and his attempt to discourage the 17-year old Explorer from providing accurate information to police investigators (conduct unbecoming an officer).

On the second charge, even the Appellant acknowledges that he contacted Heather while she was at school after he learned that questions were being raised about what occurred on the night of October 4th. He acknowledges telling Heather during that conversation, "... you don't have to tell him that I did – that I went into the barn and spun around with you in the cruiser. You don't have to offer him – you know, don't tell him that." Even if I were to accept the Appellant's version of this conversation, which I do not, his admitted statements constitute conduct unbecoming an officer. That the Appellant, a 45-year old police officer, who was in charge of the Explorer program, advised a 17-year old high school student to withhold information during a police investigation in order to avoid potential discipline, is unconscionable.

In regard to the charge of untruthfulness, the Appellant maintains that since he was not aware that the cruiser was damaged or whether he actually caused the damage, that his statements denying any responsibility for such damage were truthful. Unfortunately for the Appellant, his untruthfulness pervaded the entire investigation, and was not strictly limited to his answer to the question of whether or not he damaged the cruiser.

Even after the Appellant was aware that questions were being raised regarding what occurred on October 4th, the Appellant, during a second phone call with Sergeant

Dickinson, told Dickinson that nothing happened and that he simply performed traffic enforcement on Union Street on October 4th. (Finding 38)

The Appellant was subsequently asked a series of open-ended questions about the night of October 4th by Captain McCabe, including: 1) Are there any circumstances that you can think of that would cause the damage to car 7; and 2) Could any of your driving activities have led to the damage to Car 7? Each time, the Appellant stated “no” and failed to mention that he performed “spins” and “doughnuts” in the salt barn (which he had asked Heather to conceal). (Finding 56)

Even after being told that Heather had provided a conflicting story, the Appellant, when asked to describe his driving activities on the night in question by Captain McCabe, stated that “nothing out of the ordinary” occurred that night. (Finding 58)

During the same discussion, the Appellant initially told McCabe that he never called Heather. Several minutes later, the Appellant contradicted himself and said that he [Appellant] called Heather on Explorer business. (Finding 60)

All of the above-referenced statements by the Appellant demonstrate that he was untruthful during a police investigation. An appointing authority is well within its rights to take disciplinary action when a police officer has “a demonstrated willingness to fudge the truth in exigent circumstances” because “[p]olice work frequently calls upon officers to speak the truth when doing so might put into question a search or embarrass a fellow officer.” See Falmouth at. 796, 801; citing Cambridge, *supra* at 303.

The Commission has recognized that a police officer must be truthful at all times and that failure to do so constitutes conduct unbecoming an officer. MacHenry v Wakefield, 7 MCSR 94 (1994). Lying in a disciplinary investigation alone is grounds for

termination. LaChance v. Erickson, 118 S. Ct. 753 (1998), *citing* Bryson v. United States, 396 U.S. 64 (1969). The Commission has stated that “it is well settled that police officers voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens.” Garrett v. Haverhill, 18 MCSR at 381, 385 (2005). Specifically, there “is a strong public policy against employing police officers who are untruthful.” Royston v., 19 MCSR 124, 128 (2006). Therefore, “a police officer that has lost his credibility can no longer effectively perform the duties of the position.” Pearson v. Whitman, 16 MCSR 46, 50 (2003). As a result, the Commission has often upheld a police officer’s discharge based upon the officer’s dishonesty.⁴

Having determined that it was appropriate to discipline the Appellant, the Commission must determine if the City was justified in the level of discipline imposed, which, in this case, was termination.

The Commission is guided by “the principle of uniformity and the ‘equitable treatment of similarly situated individuals’ [both within and across different appointing authorities]” as well as the “underlying purpose of the civil service system ‘to guard against political considerations, favoritism and bias in governmental employment decisions.’ ” Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. Even if there are past instances where other employees received more lenient sanctions for similar misconduct, however, the Commission is not charged with a duty to

⁴ See Royston v. Billerica, 19 MCSR at 128-29 (upholding discharge of police officer who “knowingly lied to the Chief during a departmental investigation to cover up” his own misconduct); Garrett v. Haverhill, 18 MCSR at 385-86 (reasonable justification for discharge of police officer who repeatedly presented false testimony during departmental investigation of officer’s misconduct); Meaney v. Woburn, 18 MCSR 129, 133-35 (discharge upheld for police officer based, in part, on officer’s consistent dishonesty and “selective memory” during departmental investigation of officer’s misconduct); Pearson v. Whitman, 16 MCSR at 49-50 (appointing authority’s discharge of police officer who had “a problem with telling the truth” upheld); Eisenbeiser v. West Springfield, 7 MCSR 99, 104 (discharge upheld based, in part, on officer’s dishonesty as his misconduct was ongoing, intentional and showed no signs of improvement).

fine-tune employees' suspensions to ensure perfect uniformity. See Boston Police Dep't v. Collins, 48 Mass. App. Ct. 408, 412 (2000).

“The ‘power accorded the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded the appointing authority.’” Falmouth v. Civ. Serv. Comm’n, 61 Mass. App. Ct. 796, 800 (2004) quoting Police Comm’r v. Civ. Serv. Comm’n, 39 Mass.App.Ct. 594, 600 (1996). Unless the Commission’s findings of fact differ significantly from those reported by the appointing authority or interpret the relevant law in a substantially different way, the commission is not free to “substitute its judgment” for that of the appointing authority, and “cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation” E.g., Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006).

I have, based on the testimony of credible witnesses and the documentary evidence submitted, reached essentially the same findings as the City. Specifically, I have found that the Appellant engaged in conduct unbecoming an officer and that he was untruthful as part of a police investigation.

Although the Appellant has no prior disciplinary history, that does not warrant the Commission’s intervention in terms of a modified penalty. The serious nature of the charges, including untruthfulness, warrants the discipline imposed by the City – termination.

For all of the above reasons, the Appellant’s appeal under D1-09-406 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman, Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and McDowell, Commissioners) on July 29, 2010.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice:

Thomas John Rooke, Esq. (for Appellant)

Kathleen Degnan, Esq. (for Appointing Authority)