COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108

DAVID CHARTRAND,
Appellant

v.

D-16-27

TOWN OF DRACUT,
Respondent

Appearance for Appellant:

Andrew Gambaccini, Esq.
Reardon, Joyce & Akerson, P.C.
4 Lancaster Terrace
Worcester, MA 01609

Appearance for Respondent:

Peter J. McQuillan, Esq.
Fairburn & McQuillan
240 Pleasant Street
Methuen, MA 01844

Commissioner:

Cynthia A. Ittleman

DECISION

On July 21, 2016, the Appellant, David Chartrand (Mr. Chartrand or Appellant), pursuant to G.L. c. 31, s. 43, filed a timely appeal with the Civil Service Commission (Commission), contesting the decision of the Town of Dracut (Town or Respondent) to suspend him for ten (10) days. A pre-hearing conference was held on September 26, 2016 at the Lowell Housing Authority. A full hearing was held at the same location on December 5, 2016.[1] The hearing

[1] The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq*., apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

was digitally recorded and both parties were provided with a CD of the hearing[2]. The parties submitted post-hearing briefs on January 30, 2017.

Prior to submitting post-hearing briefs, on December 21, 2016, the Respondent submitted a response to my request at the hearing regarding Appellant's Exhibit (App.Ex.) 58, which included limited information pertaining to the Town's performance evaluation of the Town Manager, part of which had been published by an online publication, "Your Dracut Today". App.Ex. 58 also contains documents on which the Appellant relies to allege that the entire evaluation is public record.[3] The Respondent's December 21, 2016 submission offers its explanation of the events related to App.Ex. 58. Therefore, the December 21, 2016 submission is marked and entered into the record as Respondent Exhibit (R.Ex.) 58A. As indicated at the hearing, given the limited connection, if any, of App.Ex. 58 to this appeal, I give it little weight.

At the outset of the hearing, counsel for the Appellant averred that the Respondent wrongfully leaked information to The Lowell Sun (The Sun) about the Respondent's civil service hearing on the charges against the Appellant and his subsequent suspension, given the proximity in time between the supposed leak and news articles published by The Sun (App.Exs. 51 and 52). Counsel for the Respondent believed, but was not certain, that it provided information to the newspaper in response to a public record request. I directed the Respondent to

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

[3] On October 13, 2016, "Your Dracut Today" emailed a public record request to the BOS secretary. The secretary contacted Town Counsel James Hall, who informed the secretary that the Town would (and did) provide the averages score sheet of the Town Manager's evaluation (on October 14, 2016). Your Dracut Today published an article online on October 17, 2016 related to the Town Manager's evaluation, providing a link to the averages score sheet. On November 9, 2016, Appellant's counsel sent a public records request to the Town Manager, requesting a "full and complete copy of the performance evaluations ….", without referencing the prior publication online by "Your Dracut Today" of the Town Manager's averages score sheet. (App.Ex. 58) The Town Manager referred this request to Attorney McQuillan, who apparently was not informed that "Your Dracut Today" had submitted a similar public record request to the BOS secretary and that Attorney Hall had authorized release of the score sheet. On November 15, 2016, Attorney McQuillan denied the Appellant's public record request regarding the Town Manager's public record request. As I indicated at the hearing, I find such tactics to be unfortunate.

look into the matter after the hearing and to produce the pertinent public record request and the Respondent's response, indicating that the request and response would be entered into the record. On February 2, 2017, the Respondent filed a Motion to Re-Open the Record (Motion). On February 8, 2017, the Appellant filed an Opposition to the Motion arguing, in part, that the Respondent should have produced the documents offered in response to the Appellant's discovery requests in these regards and is not newly discovered. In addition, the Opposition speculates what The Sun knew when, implying that the Respondent leaked information that was not a public record in order to undermine the Appellant's position. The Appellant denies releasing the letters to The Sun.

With respect to re-opening of the record, 801 CMR 1.01(7)(k) provides,

> At any time after the close of a hearing and prior to a decision being rendered, a Party may move to reopen the record if there is new evidence to be introduced. New evidence consists of newly discovered evidence which by due diligence could not have been discovered at the time of the hearing by the Party seeking to offer it. A motion to reopen shall describe the new evidence which the Party wishes to introduce.
> (Id.)

The Motion is allowed as follows. In the Motion, responding to my direction at the hearing, Respondent's counsel stated, *inter alia*, that "no such documents directly related to the article were either requested or existed", he accepted responsibility for not reporting this sooner, and he attached email messages between The Sun and Town Manager Duggan regarding The Sun's prior records request for Lt. Fleury's two (2) Step 2 grievances and Mr. Duggan's decisions with respect to each grievance. As these two (2) documents are part of the Respondent's response to my direction and they are the email messages to which documents already in the record were attached, these email messages are marked and entered into the record

as R.Ex. 64[4]. The Motion also indicates that The Sun sent Mr. Duggan a later public records request regarding Lt. Fleury's grievances. This later request sought, "[a]ll communications from June 1 [2016] until the date this request is processed between the attorney(s) representing Dracut police Lt. Michael Fleury in his union grievance matters and the town of Dracut. …" the Town, through counsel, denied the request. Town counsel has been forthcoming in his explanation about his apparent confusion regarding the pertinent public record requests and responses and I detect no attempted subterfuge on the part of the Town in this regard. Moreover, given the Appellant's concerns about the public record requests and the Town's responses thereto related to his suspension and appeal, the record is re-opened to admit them such that this later public record request is marked and entered as R.Ex. 65 and the Town's denial thereof is marked and entered as R.Ex. 66. As with all evidence, these exhibits will be given the weight they are due.

More recently, the Appellant sought to re-open the record, alleging that Lt. Fleury told a named Selectman that he has evidence that the town Manager said that the discipline of the Appellant was a "bullet to get rid of Chartrand", which, he asserts, was requested by discovery and not produced. The Respondent opposed the request. Since the assertion involves multiples levels of hearsay and there is no indication when such statements were allegedly made, the request to re-open the record is denied.

FINDINGS OF FACT:

Exhibits 1 through 63 were entered into evidence at the hearing.[5] In connection with my requests at the hearing, the Respondent subsequently produced documents marked and entered as

[4] Jt.Ex. 63 is the transcript of the Town's civil service hearing for the Appellant. Jt.Exs. 36, 39, 49 and 50 are the grievances and decisions thereon.

[5] The exhibits were marked and entered as follows: Jt.Exs. 1 through 18, App.Exs.19 through 24, Jt.Exs. 25 through 50, App.Exs. 51 and 52, and Jt.Exs. 53 through 63.

R.Exs. 58A, 64, 65 and 66, as noted above. Based on all of the exhibits, the testimony of the following witnesses:

Called by the Respondent:

- Michael Fleury, Lieutenant (Lt. Fleury), Dracut Police Department (DPD)
- Kevin Richardson, then-Police Chief, DPD (Chief Richardson)

Called by the Appellant:

- David Chartrand, Deputy Chief, DPD, Appellant

and taking administrative notice[6] of all matters filed in the case and pertinent statutes, case law, regulations, policies, and reasonable inferences from the evidence; a preponderance of credible evidence establishes the following facts:

Background

1. The Appellant began his employment with the DPD as a special officer in 1986. In 1989, he was appointed permanent intermittent officer. In the early 1990s, the Appellant was laid off from the DPD. From 1993 to 1997, the Appellant was a member of the Derry, New Hampshire Police Department. In 1997, the Appellant returned to the DPD as a full-time police officer. In 2003, he was promoted to Sergeant and in 2006, he was appointed Deputy Chief. (Testimony of Appellant)
2. As DPD Deputy Chief, the Appellant is responsible for conducting all internal affairs investigations, responding to media inquiries and public records requests. (Testimony of

[6] This includes the parties' post-hearing briefs, the Respondent's Motion and the Appellant's Opposition. Also included in the record are a lengthy, undated document apparently submitted to the Commission at the prehearing conference, entitled, "Conducting Internal Affairs Investigations", prepared by General Counsel for the Municipal Police Institute, a non-profit research and training affiliate of the Mass. Chiefs of Police Association. The document is not numbered as an exhibit and it is given little weight since it provides information for police departments generally, whereas the hearing record specifically includes the DPD internal affairs policy and procedure.

Appellant; Jt.Exs. 5 and 8) In addition, the Appellant is in charge of DPD Operations. (Testimony of Richardson)

3. Chief Richardson was appointed Chief in 2005 and he retired in July of 2016. (Testimony of Richardson)
4. Lt. Fleury has been a permanent member of the DPD since 1988 and was appointed Lieutenant in 2005. (Testimony of Fleury)
5. Since 2009, the Appellant and Lt. Fleury have had a "rocky" relationship at work and his work performance has come under heightened scrutiny. In 2009, then-Sgt. Fleury was on duty one night when he was the officer-in-charge. Then-Sgt. Fleury responded, with two (2) patrol officers, to a call that reported that people were being held hostage by someone with a shotgun. When then-Sgt. Fleury arrived at the scene, the street was dark. Fleury approached the house with a patrol officer. There was a man standing in the middle of the dark street with a shotgun. Fleury yelled "gun!" to the patrol officer with him and kept telling the person with the shotgun to stop and put the shot gun down but the person kept approaching Fleury and Fleury drew his service weapon. Ultimately, it was determined that it was the Appellant who was holding the shotgun. There was an investigation in this regard and Fleury and the two (2) patrol officers wrote incident reports.[7] Since the 2009 event, Lt. Fleury believes that, in the Appellant's eyes, there is nothing he can do right. Correspondence Lt. Fleury receives from the Appellant is often derogatory. In addition, Lt. Fleury is the only supervisory officer who does not have additional assignments. Lt. Fleury had been assigned to process applications for a license to carry a weapon but the assignment ended because some applications lagged. Another

[7] There is no evidence in the record that the Appellant or the two (2) patrol officers were disciplined in this regard. (Administrative Notice)

member of the DPD has been assigned to process the license applications and is allowed to get paid overtime to do so; Lt. Fleury was not allowed to get paid overtime for this assignment. In connection with an unrelated event involving a civilian complaint, Lt. Fleury was once disciplined (to work one (1) day of punishment duty) approximately a decade ago. (Testimony of Fleury (beginning at or about 1 hr. 20 mins.))

6. DPD Policy and Procedure 200, regarding internal affairs, provides, in part,

> I. General Considerations and Guidelines
> … In larger departments, the Internal Affairs function will be handled by a specially designated Internal Affairs Section … In smaller departments, this function may be delegated on an ad hoc basis to the Detective Bureau, an individual officer or even performed by the Chief. …
> The Internal Affairs Section will be responsible for recording, registering, and controlling the investigation of complaints against employees; supervising and controlling the investigation of alleged misconduct within the Department; and, maintaining the confidentiality of internal affairs investigations and records. The Internal Affairs Section will ensure that the integrity of the Department is maintained through an internal system where objectivity, fairness and justice are assured by intensive and impartial investigation and review.
> …All findings will be prepared in writing and presented to the Chief … with a recommendation for disposition. .
> All alleged or suspected violations … must be investigated according to the procedures outline for each …
>
> III Complaint Procedures
> A. Complaint Report Form
> 1. A standard complaint report form should be used to record all complaints …[8]
> B. Receiving and Recording Complaints[9]
> …Every complaint report form shall be given an identifying number, so that the processing of complaints can be carefully monitored …
>
> IV. Investigative Procedures
> A. Categories of complaints
> 1. The Department has established guidelines regarding which categories of complaints will be handled and investigated by the Internal Affairs Section and which by a shift supervisor, as a part of routine discipline. The criteria for determining the categories of complaints to be investigated by Internal Affairs include, but are not limited to, allegations of:

[8] This Form is required to elicit nine (9) different groups of details. (Jt.Ex. 40
[9] This section of the DPD Policy and Procedure 200 includes ten (10) instructions and/or requirements.

a. corruption;
b. brutality;
c. use of excessive force;
d. violation of civil rights; and
e. criminal misconduct.[10]

2. Criteria for the assignment of an investigation to a shift supervisor may include such offenses as:
   a. alleged rudeness;
   b. tardiness; and
   c. insubordination. …

C Investigation of Complaints

1. Any Internal Affairs investigation must be commenced immediately upon receipt of the complaint and must be completed within thirty (30) days …
   … Before a department employee is questioned or directed to submit a report regarding a complaint, such employee shall be issued a written statement of the allegations and the employee's rights and responsibilities relative to the investigation. …
   … Departmental Disciplinary Action: If it is determined as a result of a preliminary investigation, that allegations made against a department employee could result in departmental disciplinary action, the accused employee is entitled to a fair and objective investigation and resolution of the charges made. …

V. Report of Investigation

A. … a full written report shall be prepared for submission to the Chief, which shall include the following:
   1. the original complaint report;
   2. any additional statements taken from the complainant or statements obtained from witnesses;
   3. any statements made or reports submitted by the department employee under investigation;
   4. a summary of all evidence gathered;
   5. any mitigating circumstances;
   6. an evaluation of the complaint and a definitive statement as to whether the charges made by the complainant were:
      a. valid and supported by sufficient evidence;
      b. unsustained because of inadequate or insufficient evidence;
      c. unfounded as the allegations were baseless and without foundation; or
      d. unjustified or unwarranted as the actions of the accused department employee were in compliance with law or in accordance with Department policy and procedure. ...

[10] I note that while DPD Policy and Procedure 200 appears to include both criminal and civil matters among those matters that may be the subject of internal affairs investigations, the Appeals Court in Worcester Telegraph & Gazette Corp. v. Chief of Police of Worcester, 58 Mass.App.Ct. 1 (2003), appeared to limit internal affairs investigations to criminal conduct. *See* discussion of Worcester, *infra* at Fact 56.

B Upon receipt of the report of investigation, the Chief should take further action as is necessary …

VI Confidentiality of Internal Affairs

… No statement regarding an Internal Affairs investigation will be made or issued to the media unless the charges have been sustained and action has been taken or initiated against the officer or employee.
(Jt.Ex. 4)(emphasis added)

7. DPD Policy and Procedure 300, regarding Police Media Relations, provided by the Municipal Police Institute, Inc., includes, in part,

A 2006 memo from Chief Richardson stating, in part,

1. The Deputy Chief is the public information officer.
2. Media requests for ongoing cases or investigation shall be forwarded to the Deputy Chief.
3. "Requests for information pertaining to an incident that is subject to immediate press inquiry will be the responsibility of the Shift Commander or the Commander of the Detective Bureau. …"
4. "All effort will be made to consult with the Deputy Chief … prior to release of information. If information is released without a prior consultation with the Chief … or the Deputy Chief, that Shift Commander shall forward a memorandum to the Deputy Chief outlining what information has been released …"
5. At no time will a Patrolman release information to the media without first obtaining authorization from the Chief … or the Deputy Chief …"

It also includes a press release policy for the DPD, dated 1994, that states, in part,

"A member of the department shall not divulge to any unauthorized person, in or out of the department … any information concerning the business of the department … unless authorized by the Chief of Police. …"

Policy and Procedure 300[11] specifically provides, in part,

"… IV. Duties of the Public Information Officer

A. The public information function … is coordinated by the chief … The chief … will act, as or will designate an officer to act as, the department's Public Information Officer. The PIO will …

…VI. Investigative Information

… A.4. Sensitive information relating to internal investigation of

[11] The vast majority of Policy and Procedure 300 involves public information pertaining to criminal matters. (Jt.Ex. 4)

police officers shall not be released without the express permission of the chief of police. …

… IX. Records and Reports

… B. Media representatives shall be denied access to the contents of investigative or incident reports and records where release of the information would:

… Constitute an unwarranted invasion of the personal privacy rights of another person ….”

(Jt.Ex. 5)(emphasis added)

8. DPD Rule 4.09, Department Correspondence, states, in part,

> Officers shall not use department letterhead, computers or other equipment for private correspondence …
> (Jt.Ex. 6)(emphasis added)

9. DPD Rule 7.5, Dissemination of Official Information states, in part,

> …Officers shall treat as confidential all matters relating to investigations, internal affairs, and personnel. …
> No information shall be released, given or issued to the news media or to any members of the press concerning department operations … without the prior approval of the Chief of Police. …
> (Jt.Ex. 6)(emphasis added)

10. DPD Rule 7.7, “Truthfullness” (sic) states, in full,

> Officers shall speak the truth at all times when on duty or when discussing a matter arising out of or related to the officers (sic) duties or the operation, organization or business of the department. In cases in which an officer is not allowed by the regulations of the department to divulge facts within his or her knowledge, the officer will decline to speak on the subject.
>
> Officers shall not fabricate, withhold, or destroy any evidence of any kind unless lawfully authorized to do so.
> (Jt.Ex. 6)

11. DPD Rule 7.8, Statements Concerning Liability, states,

> Officers shall not make any oral or written statement to anyone concerning liability in connection with the operation of police vehicles or performance of other police duty, unless specifically authorized to do so by the Chief of Police.
> (Jt.Ex. 6)(emphasis added)

12. DPD Rule 8.0, Orders, states, in part,

> … Every officer of the department shall promptly obey without reservation, the orders, rules, regulations, policies and procedures of the department ….” (Jt.Ex. 6)(emphasis added)

13. DPD Rule 11.4, Policies and Procedures Compliance, provides, “Officers shall read, be familiar with and comply with the requirements of the department’s policies and procedures manual.” (Jt.Ex. 6)(emphasis added)

14. DPD Rule 13.4, Reporting Citizen Complaints, states, in part,

> … The Officer in Charge may try to resolve the complaint … Once a written complaint is received, the O.I.C. shall forward a copy to the Deputy Chief of Police who will advise the Chief of Police as to the nature of the complaint. The complaint will then be processed according to Department policy and procedure. …
> (Jt.Ex. 6)(emphasis added)

2015-2016 Incidents Relating to Lt. Fleury

15. On September 25, 2015, the Appellant wrote to Lt. Fleury stating that on September 24, 2015, Lt. Fleury had worked “twenty (20) hours in a twenty four (24) hour period[]” and that, prior to that detail, he had worked a 4 to 12 shift on September 23, 2015, and a following 12-8 shift on September 24, 2015, for a total of sixteen (16) hours of work. The writing also stated, “In accordance with department rules you would not have been eligible for additional work until 4 p.m. of 9/24/15.” (Jt.Ex. 25) The September 25, 2015 letter did not indicate that Lt. Fleury was under an internal affairs investigation. (Administrative Notice)

16. Prior to receiving the Appellant’s September 25, 2015 letter (Jt.Ex. 25), Lt. Fleury was not aware of a formal rule, regulation or policy regarding the regulation of hours worked in this manner. (Testimony of Fleury)

17. On September 25, 2015, there was no formal written rule in the rules and regulations of the DPD or policies and procedures of the DPD prohibiting Lt. Fleury's conduct. (Jt.Ex. 28)
18. From the beginning, the Appellant considered his inquiry into Lt. Fleury's work hours an Internal Affairs investigation. (Testimony of Appellant)
19. The Appellant did not inform Lt. Fleury, orally or in writing, that his conduct was the subject of an Internal Affairs investigation. (Testimony of Fleury)
20. Prior to sending the September 25, 2015 letter to Lt. Fleury, the Appellant did not discuss the matter with him. (Testimony of Fleury and Appellant) By comparison, when Lt. Fleury sent a memo to the Appellant in November 2015 alleging that Sgt. A was being insubordinate, the Appellant suggested that they all meet to discuss the matter concerning Sgt. A. (Jt.Ex. 55-57)
21. The September 25, 2015 letter did not reference or cite the rule or regulation of the DPD regarding work-hour limitations. (Jt.Ex. 25)
22. The Appellant's September 25, 2015 letter to Lt. Fleury required him to provide a detailed explanation "relevant to this incident", noting that, as a high ranking officer, his adherence to "established rules" was paramount. (Jt.Ex. 25)
23. On the same date that he received the September 25 letter from the Appellant, Lt. Fleury provided the Appellant a written explanation, with supporting documentation. (Jt.Ex. 26)
24. On October 5, 2015, Lt. Fleury sent a letter to the Appellant requesting "clarification regarding the department's policy on 'sufficient time off' between working details and/or overtime shifts by an officer in a given time frame.'" (Jt.Ex. 27)

25. On October 6, 2015, the Appellant sent Lt. Fleury an email message stating that there was "a long standing rule restricting officers from working more than 16 hours" and in "2012 provided clarification to the union that said restriction was for a 24 hour period." (Jt.Ex. 28) The Appellant's response added, "[s]ince your incident" the matter had been discussed with both union presidents and that "[t]his rule will be added to the Department's Rules and Regulations Manual." (Id.)(emphasis added)

26. Lt. Fleury understood the Appellant's email response to mean that the matter was closed. (Testimony of Fleury)

27. On October 14, 2015, the Appellant had hand-delivered to Lt. Fleury at the DPD a letter of reprimand (Oct. 14, 2015 Letter). The Oct. 14, 2015 Letter states, in part,

> "[t]he message that you have put forth to officers within the department is that greed is acceptable, and that making money takes priority over safety";
>
> "[y]ou need to do some soul searching and dedicate yourself to performing your duties as a supervisor not just making money that is available to you from the department";
>
> "[t]ake some time to reflect on the potential consequences that could have occurred had you had to have been involved in a critical incident. Your physical condition and your mental acuity would both be called into question. Both would form a foundation to build a case that your decision making was impaired, as well as your ability to perceive the incident in a reasonable manner. Situations such as that are ripe for aggressive litigation alleging negligence and malfeasance. Your individual decision to work that many hours for personal gain could have placed you, the department, and the town in jeopardy of unnecessary legal liability";
>
> "[y]our … responses do little to alleviate concern, but are indicative of your consistent passive aggressive reaction when your actions are questioned"; and
>
> "[y]our reference to assigning yourself due to an interest in public safety is profoundly unbelievable".

The last paragraph of the letter stated, in part,

> "Be aware that if some ambiguity did not exist as to the specifics of the departmental rule restricting hours of work to 16 (sic) in a 24 hour period, your conduct would warrant disciplinary action up to and including suspension without

> pay. … You have the right to submit a response letter that will be retained with this letter."
> (Jt.Ex. 29 (emphasis added); *see also* Jt.Ex. 30))

The Oct. 14, 2015 Letter does not indicate that Lt. Fleury was under an internal affairs Investigation. (Administrative Notice)

28. Lt. Fleury was shocked, offended and embarrassed by the contents of the Oct. 14, 2015 Letter. (Testimony of Fleury) However, Lt. Fleury agreed with Appellant's counsel at the Respondent's civil service hearing that the Oct. 14, 2015 Letter was "[p]redominatly matters of opinion that [Lt. Fleury] disagree[s] with. (Ex. 63, p. 46)
29. The Appellant asserts that the Oct. 14, 2015 Letter was a letter of reprimand and the result of an internal affairs investigation conducted by the Appellant concerning Lt. Fleury's conduct. (Jt.Ex. 63 (Transcript of Town's civil service hearing), p. 82; Testimony of Chartrand)
30. The Appellant asserts that a letter of reprimand is not a form of discipline but is a "learning tool designed to address an observed deficiency so that an employee may correct their behavior prior to the necessity of imposed disciplinary action". (Jt.Ex. 40; Jt.Ex. 63, pp. 82-83; Testimony of Appellant)
31. An October 2015 report by Municipal Resources, Inc. (MRI), assessed the DPD, making a number of negative findings about the DPD, including its management, and making recommendations, including removal the Chief of Police title from civil service. The report, in addressing the "Internal Management Controls – Internal Affairs of the DPD, concluded,

> MRI determined there was no formal guidance relative to documenting complaints against employees. As such, employees who are the subject of several low-level citizen complaints (e.g. Rudeness, inappropriate demeanor, etc.) may go undocumented as they may be handled by the employee's immediate supervisor.

> This practice eliminates the ability of the organization to detect a trend or emergent behavior/performance issues in an employee that could be effectively addressed before a situation erupts that requires an investigation and disciplinary action. Complaints against employees that are deemed necessary for referral are directed to the deputy chief, …who adopted the role and responsibility for conducting investigations into complaints, as well as determining disciplinary action. There is no formalized internal affairs investigative program within the department ….

(Jt.Ex. 14, pp. 49-50)(emphasis added)

32. On or about November 11, 2015, The Lowell Sun submitted a public records request to the DPD requesting "all internal investigation reports from Nov. 1 2014 to Nov. 1, 2016." (Jt.Exs. 32, 34 and 50) Under G.L. c. 66, s. 10(a), "[a] records access officer … , shall at reasonable times and without unreasonable delay permit inspection or furnish a copy of any public record as defined in clause twenty-sixth of section 7 of chapter 4, or any segregable portion of a public record, not later than 10 business days following the receipt of the request …", with certain provisos. (Id.)(emphasis added) Weeks later, The Sun, not having received a response from the Appellant regarding its November 11, 2015 request, re-sent its request to the Appellant. The Appellant replied to The Sun stating that it could take another couple of weeks for him to respond to the public records request because he was preparing a response to the MRI report. (Jt.Ex. 34)

33. On December 21, 2015, the Respondent Board of Selectman (BOS) received a lengthy response to the MRI study on letterhead from the Appellant and Chief Richardson, stating, *inter alia*, that the MRI study was "one-sided", that many noted deficiencies are the result of the lack of adequate funding and staffing, that the study contains "inflammatory" comments, that the MRI study process was flawed, including the MRI's failure to interview the Chief and the Appellant, that they take "ownership" of a number

of problems, and that they offer recommendations to address them with the support of the Town. (Jt.Ex. 17)

34. Two (2) months after The Sun's initial public records request, on January 7, 2016, the Appellant responded to it. (Jt.Ex. 35), producing records regarding another officer and the Oct. 14, 2015 Letter (Jt.Ex. 30) that the Appellant wrote to Lt. Fleury. The Appellant redacted the last paragraph of the October 14, 2015 letter, which stated, in part,

> "Be aware that if some ambiguity did not exist as to the specifics of the departmental rule restricting hours of work to 16 (sic) in a 24 hour period, your conduct would warrant disciplinary action up to and including suspension without pay. … You have the right to submit a response letter that will be retained with this letter."
> (Jt.Ex. 30 (emphasis added); *see also* Jt.Ex; 29)

35. The Appellant asserts that the redaction was necessary in accordance with his interpretation of the public records law, that he could not release the nature of any discipline received by an officer. (Testimony of Appellant)

36. The Appellant did not consult with Town Counsel prior to responding to the public records request in the instant matter. (Testimony of Appellant; Jt.Ex. 2)

37. The last time the Appellant consulted with Town Counsel before releasing any internal affairs records was in 2010. The incident in question at that time was the theft of marijuana from the DPD evidence room. (Jt.Ex. 41; Testimony of Appellant)

38. In preparing to release the Oct. 14, 2015 Letter to The Sun, the Appellant relied upon the decision in Worcester Telegram & Gazette Corporation v. Chief of Police of Worcester, et al, 58 Mass.App.Ct. 1 (2003)(Jt.Ex. 59), as well as a memo issued by the Mass. Chiefs of Police Association (MCOPA) and the Massachusetts Major City Chiefs (MMCC) entitled, "Public Records for Internal Affairs Reports", dated November 20, 2015. (Jt.Ex. 33)

39. The MCOPA/MMCC memo states, in part, that if the Chiefs of Police had not already received a public records request for internal affairs reports, they may receive one soon and the memo provided a "recommended course of action". [12] (Jt.Ex. 33) The memo opined that the Worcester Appeals Court decision "ruled that internal affairs reports do not fall within exemption (c) of the public records law. …" (Id.)(emphasis in original). Further, the memo states that the Appeals Court determined what documents in an internal affairs file do not fall under statutory exemption (c):

> 1) Citizen complaint;
> 2) Notice of claim under the Tort Claims Act;
> 3) Letters from the Chief to the complainant (advising of the start of the investigation and of its results);
> 4) Police reports;
> 5) Incident reports;
> 6) Card reflecting police details and rosters;
> 7) Arrest logs;
> 8) Commercial phone book listing;
> 9) Memoranda from the Chief to the involved officer and other officers requiring information about the incident;
> 10) Responses of the involved officer and other officers'
> 11) Summaries of witness interviews;
> 12) Internal affairs report and supplemental report;
> 13) Memorandum from the Chief to the involved officer detailing the results of the investigation.
>
> Specifically, the court noted that
>
> > The officers' reports, the witness interview summaries, and the internal affairs report itself clearly bear on the ultimate decision by the chief to discipline or to exonerate [the officer] based upon the investigation. …
>
> The [Worcester] Court further explained '[t]hat the internal affairs process might lead to discipline, or even criminal action, does not transmute all materials in an internal affairs investigation into a disciplinary report, disciplinary documentation, or promotion, demotion or termination information. …'

[12] When asked at the local civil service hearing he intended to embarrass Lt. Fleury by releasing the Oct. 14, 2015 Letter to The Sun, the Appellant stated, "Absolutely not. I had no – I had no idea any of this would occur." Jt.Ex. 92. However, the MCOPA/MMCC memo on which the Appellant relied to respond to The Sun's request specifically indicated that police departments should anticipate media public record requests for internal affairs documents.

> The Court did, however, determine that one document in the internal affairs file was subject to exemption (c); that was a notice from the disciplining authority (the Chief) to the involved officer advising of the disciplinary decision ….
>
> Id.)(citations omitted)(emphasis added)

At the end of the memo, it provided a detailed "recommended course of action", including locating the requested documents, determining the cost to providing the requested documents, contacting the requesting individual within ten (10) days of the request and redacting the documents. The "recommended course of action" added,

> … After redaction is complete, the agency **should** consult with Town/City Counsel (if applicable)[13] to ensure that all of the appropriate redactions have been made in conformity with the law.
>
> After consulting with Town/City Counsel (if applicable) the redacted reports may be released to the requesting party.
> (Id.)(emphasis added)

40. The Appellant did not inform Lt. Fleury of the public records request by The Sun or his release of the redacted version of the Oct. 14, 2015 Letter as part of the DPD's response to The Sun's public records request. (Testimony of Appellant and Fleury)

41. On January 26, 2016, the union, NEPBA, filed a grievance on behalf of Lt. Fleury asserting, *inter alia*, that the Oct. 14, 2015 Letter, as a letter of reprimand, constitutes discipline without just cause and should be removed from Lt. Fleury's file. (Jt.Ex. 36; *see also* Jt.Ex. 47)

42. The Appellant responded to the Jan. 26, 2016 grievance, in part, stating,

> As a customary practice, letters of reprimand are not included in a personnel file. They are maintained in an investigatory file. The purposes of retention of the

[13] There is no indication in the MCOPA/MMCC memo what the reference to consulting Town counsel "if applicable" means. For example, this phrase could be interpreted to indicate that the police department should refer the matter to Town counsel if there is a Town counsel. However, it could also be interpreted to indicate that the police department should refer the matter to Town counsel if local rules or ordinances so require. Absent a clear meaning in this regard, I decline to imply one. However, at a minimum, it is fair to assume that the memo does not bar officers from consulting Town counsel in these regards.

> investigatory files are two-fold. First it constitutes the record of the departmental internal inquiries. Secondly it is maintained to document that an employee has been advised of prohibited conduct. Should future or subsequent similar conduct occur, the reprimand could then be referenced as a prior advisement. As a matter of practice, a letter of reprimand in and of itself, would not be a contributing factor in decision-making regarding promotion or advancement.
> (Jt.Ex. 48, p. 3)

43. The Appellant did not interview Lt. Fleury, nor discuss with him his alleged conduct regarding working hours. (Testimony of Appellant and Fleury)

44. Although the last paragraph of the Appellant's Oct. 14, 2015 Letter stated, in part, "[y]ou have the right to submit a response letter that will be retained with this letter", Lt. Fleury was not informed whether the Oct. 14, 2015 Letter would be retained in a personnel file or an internal affairs file. (Jt.Ex. 29; Testimony of Fleury)

45. The Oct. 14, 2015 Letter was not placed in Lt. Fleury's personnel file. (Testimony of Appellant)

46. G.L. c. 149, s. 52C defines a "personnel record". It states, in part, that a personnel record is,

> … a record kept by an employer that identifies an employee, to the extent that the record is used or has been used, or may affect or be used relative to that employee's qualifications for employment, promotion, transfer, additional compensation or disciplinary action. A personnel record shall include a record in the possession of a person, corporation, partnership or other association that has a contractual agreement with the employer to keep or supply a personnel record as provided in this section. A personnel record shall not include information of a personal nature about a person other than the employee if disclosure of the information would constitute a clearly unwarranted invasion of such other person's privacy. Without limiting the applicability or generality of the foregoing, all of the following written information or documents … shall be included in the personnel record for that employee: the name, address, date of birth, job title and description; rate of pay and any other compensation paid to the employee; starting date of employment; the job application of the employee; resumes or other forms of employment inquiry submitted to the employer in response to his advertisement by the employee; all employee performance evaluations, including but not limited to, employee evaluation documents; **written warnings of substandard performance**; lists of probationary periods; waivers signed by the

> employee; copies of dated termination notices; any other documents relating to disciplinary action regarding the employee.
> (Id.)(emphasis added)

47. The Appellant did not advise Lt. Fleury, orally or in writing, that he had the right to challenge the entry of a document into his personnel file pursuant to G.L. c. 149, s. 52C. (Testimony of Appellant and Fleury)

48. The Appellant put the Oct. 14, 2015 Letter in an internal affairs investigation file. All internal affairs files were kept in the Appellant's office. (Testimony of Appellant)

49. Chief Richardson did not keep any internal affairs files in his office. (Testimony of Richardson)

50. DPD internal affairs investigations are governed by the DPD Policy and Procedure 200. (Jt.Ex. 4) Page 1 of this document is entitled, "Internal Affairs[,] General Considerations and Guidelines". (Id.) However, page 5 of this document includes a section entitled, "Complaint Procedures" which states, for example, "A. Complaint Report Form; 1. A standard complaint report form should be used to record all complaints of misconduct, mistreatment or unethical practices against police department personnel …"; and 2. The following information shall be included on the complaint report form: [requiring nine (9) specific forms of information]; 3. "Every person making a complaint against a department employee shall receive a copy of his or her complaint …"; Section B, entitled "Receiving and Recording Complaints", part 1, states in part, that "[t]he Officer-in-Charge of the station at the time the complaint is made shall be responsible for the efficient receiving and complete recording of any complaint …; part 5 states, in part, "[e]very complaint report form shall be given an identifying number, so that the processing of complaints can be carefully monitored …; Part IV, part C, "Investigation of

Complaints", provides, in part, "Before a department employee is questioned or directed to submit a report regarding a complaint, such employee shall be issued a written statement of the allegations and the employee's rights and responsibilities relative to the investigation. …" (Id.)

51. The Appellant has read and was familiar with Policy and Procedure 200. (Jt.Ex. 63, pp. 98-99; Jt.Ex. 4)

52. In Worcester Telegraph & Gazette Corp. v. Chief of Police of Worcester, 58 Mass.App.Ct. 1 (2003) an internal affairs investigation is defined, in part, as,

> "[A] formalized citizen complaint procedure, separate and independent from ordinary employment evaluation and assessment. Unlike other evaluations and assessments, the internal affairs process exists specifically to address complaints of police corruption (theft, bribery, acceptance of gratuities), misconduct (verbal and physical abuse, unlawful arrest, harassment), and other criminal acts that would undermine the relationship of trust and confidence between the police and the citizenry that is essential to law enforcement."
> (Id.; Jt.Ex. 59)(emphasis added).

53. The Appellant did not follow all of the provisions of Policy and Procedure 200 regarding the internal affairs investigation into Lt. Fleury's alleged violation of the work hour's limitation referenced by the Appellant. (Testimony of Appellant and Richardson)

54. Chief Richardson and the Appellant decide whether a problem is a disciplinary matter or an internal affairs matter. (Testimony of Richardson)

55. No standard complaint form was executed even though Policy and Procedure 200 calls for such form for a citizen complaint or an internal complaint. (Jt.Ex. 4, III, A. 1.; Jt.Ex. 61; Testimony of Appellant)

56. No internal affairs number was assigned. (Testimony of Appellant)

57. The Appellant did not submit a written report, for example, with supporting evidence, mitigation, and statements, to Chief Richardson but they discussed Lt. Fleury's alleged conduct. (Testimony of Richardson and Appellant)[14]

58. On March 13, 2016, The Sun published an article entitled, "Who Polices the Police?", which referenced internal affairs issues at a number of municipal police departments, including the DPD and the Appellant's Oct. 14, 2015 letter to Lt. Fleury. The article asserted, in part, that Lt. Fleury had violated a work time limit. The Sun added, in part, that the Appellant "wrote a scathing response", the article included quotes from the Oct. 14, 2015 letter, such as "[t]he message that you have put forth to officers … is that greed is acceptable, and that making money takes priority over safety .. "[y]ou need to do some soul searching and dedicate yourself to performing your duties as a supervisor, not just taking as much money that is available to you from the department …." (Jt.Exs. 37 and 38)

59. Lt. Fleury first learned of the release of the Oct. 14, 2015 Letter to the press when he read the article about it in the March 13, 2016 edition of The Sun. Lt. Fleury and his family were shocked, angry and embarrassed by the article. At the time of the hearing, Lt. Fleury reported that, as a result of the news article, he was still the "butt of jokes" in social settings and, while on details, he had been approached by people asking how many hours he has worked. (Testimony of Fleury)

[14] Chief Richardson and the Appellant testified at the Commission that Chief Richardson initially suggested that Lt. Fleury be suspended for two (2) days for his alleged conduct. However, there is no documentary or independent corroborating evidence in this regard. In addition, there is no indication that other members of the DPD were suspended for similar conduct.

60. On March 19, 2016, the union filed a second grievance, seeking a retraction from The Sun regarding the March 13, 2016 article, an apology regarding the release of the letter to The Sun, and an investigation into "violations" of the Appellant. (Jt.Exs. 39 and 50)

61. On March 23, 2016, on stationary with the names of Chief Richardson and the Appellant and signed by the Appellant, addressed to a union President, Lt. Fleury's grievance was denied. The letter stated that the Oct. 14, 2015 Letter to Lt. Fleury is not a form of discipline under G.L. c. 31, s. 41. Further, the March 23, 2016 letter stated that Lt. Fleury was aware that the letter of reprimand was not discipline because on November 22, 2015, Lt. Fleury put a letter in a Sergeant's personnel file for insubordination instead of discipline. Finally, the March 23 letter stated that Lt. Fleury had been given the opportunity to submit a letter in his personnel file responding to the allegations in the Appellant's Oct. 14, 2015 Letter. (Jt.Exs. 40, 50 and 55) Lt. Fleury's detailed, three (3)-page November 22, 2015 letter to the Appellant about the Sergeant's alleged many acts of insubordination, stated, in part,

> [a]lthough a form of official administrative discipline might possibly be warranted in cases of insubordination such as this, it is not my intention. However, I do feel that his disregard for policies and given orders especially by a supervisor, is detrimental to our expectations of other officers complying with the department policies and orders given by their superiors. Where Sgt. [X]'s actions of insubordination are directed at me, I request that he be directed by your office that from this point on he is to rectify his actions and comply to not only departmental rules and regulations but orders given to him by me … or any other superior officer …. and ask that you reinforce this compliance with him. I would also respectfully request that in lieu of any form of discipline that this correspondence be placed into Sgt. [X]'s personnel file.
> (Jt.Ex. 55)

62. On March 24, 2016, the Appellant sent a memo to Chief Richardson concerning Lt. Fleury's grievance dated March 23, 2016. The Appellant wrote that police are "guided by a benchmark Appeals Court decision when it comes to the release of internal affairs

files." The Appellant specifically cited Worcester Telegram & Gazette v. Chief of Police of Worcester, 58 Mass.App.Ct. 1 (2003), for the proposition that internal affairs reports are public records, as relied upon in The Sun's request. The Appellant concluded that his Oct. 14, 2015 Letter to Lt. Fleury was an internal affairs matter and, therefore, that the DPD was required to produce it to The Sun. In addition, the Appellant stated in his memo to the Chief that he (the Appellant) had provided the Oct.14, 2015 Letter to The Sun, in response to The Sun's record request, on January 7, 2016, which was before Lt. Fleury filed a grievance on January 26, 2016 and, therefore, he (the Appellant) did not interrupt the grievance process. (Jt.Ex. 41)

63. By a letter dated March 28, 2016, Chief Richardson informed the union President that, having reviewed Lt. Fleury's grievance and the Appellant's response thereto, Lt. Fleury's grievance was denied. (Jt.Ex. 42)

64. By a letter dated March 30, 2016, union President George asked Mr. Duggan to proceed to Step 2 to Lt. Fleury's two (2) grievances. President George's letter added that the denial of the March 19, 2016 grievance failed to mention the remedies it sought, including an investigation into the Appellant's alleged violations of processes. (Jt.Ex. 43)

65. On March 30, 2016, The Sun published an article entitled, "Union Files Grievance Against Dracut Deputy". (Jt.Ex. 45) The article asserted that "[a] copy of the grievance against Chartrand has not yet been released to the public, so the specific allegations are unknown … Shortly after the union filed the grievance, Duggan asked The Sun for copies of all the documents Chartrand provided the paper in response to the public-records

request for internal-affairs files. Because those documents are public records, The Sun has fulfilled that request and posted all three internal-affairs reports online. …." (Id.)

66. On March 31, 2016, Mr. Duggan sent a memo to the BOS recommending removal of the Police Chief position from civil service, as recommended by the MRI report. (App.Ex. 19) Mr. Duggan re-issued this memorandum to the BOS on May 3, 2016, with a proposed hiring policy for the Police Chief after the title is removed from civil service. (App.Ex. 20)

67. On April 28, 2016, at 9:12 a.m., The Sun emailed the Town Manager with a public records request for: "a copy of the final report stemming from the April 28 grievance hearing for Dracut Police Department Deputy Chief David Chartrand[]" and "[a]ny supporting documentation submitted by or on behalf of Lt. Michael Fleury and Deputy Chief David Chartrand regarding the grievance …." (Jt.Ex. 63)

68. On April 28, 2016, at 10 a.m., the Town Manager convened a Step 2 grievance conference, which included the Appellant, Lt. Fleury, two (2) union representatives, the Town Manager, and attorney Peter McQuillan for the town. (Jt.Ex. 49)

69. At the April 28, 2016 conference, the Union submitted two (2) written grievances. The first grievance asserted that the Oct. 14, 2015 Letter should be removed from Lt. Fleury's record because there was no such sixteen (16)-hour rule in place, the letter constitutes discipline according to DPD's own rules and it was issued without just cause, that it is wrong to assert that the Oct. 14, 2015 Letter is an internal affairs matter because they did not follow the internal affairs process and the text of the letter is inflammatory. The second grievance asserted that the Appellant unlawfully released the letter of reprimand to Lt. Fleury to The Sun, in violation of Lt. Fleury's privacy. Further, the second

grievance asserted that the letter of reprimand is a personnel record, not a public record, and violated specific DPD regulations, policies and procedures. The second grievance requested that the town issue a correction to The Sun, investigate the Appellant's actions in this regard and take any other appropriate actions. (Jt.Ex. 47)

70. On May 5, 2016, Mr. Duggan, the Town Manager, issued his decision regarding the April 28, 2016 Step 2 Conference, allowing the grievance such that the letter of reprimand from the Appellant to Lt. Fleury was to be removed from the DPD files. This decision was copied to Peter McQuillan, Special Labor Counsel; then-Police Chief Richardson; and the Appellant. (Jt.Ex. 49)

71. Also on May 5, 2016, Mr. Duggan convened a conference involving attorney McQuillan, Chief Richardson, the Appellant, Lt. Fleury, attorney Gambaccini (for the Appellant), two (2) union representatives, and attorney Meghan Cooper. (Jt.Ex. 50)

72. On May 11, 2016, Mr. Duggan issued his findings and decision on the second grievance. This decision was copied to attorney McQuillan, Special Labor Counsel; Chief Richardson; and the Appellant. In his findings and decision, Mr. Duggan indicated that he would refer to a special labor counsel whether the Oct. 14, 2015 Letter issued by the Appellant to Lt. Fleury is a disciplinary report or an internal affairs matter under the public records law, that The Sun would not likely retract the article referencing the Oct. 14, 2015 Letter, that an apology by the Appellant "would be in order", that serious questions remain regarding the treatment of Lt. Fleury's alleged violation of the work time limitation as an internal affairs matter, and that further inquiry was warranted. (Jt.Ex. 50)

73. On or about May 11, 2016, the BOS voted to remove the Police Chief title from civil service. (App.Ex. 21) The removal would occur by the adoption of a home-rule petition urging the Legislature to change the law in this regard. (App.Ex. 22)

74. On May 13, 2016, Mr. Duggan responded to The Sun's public record request on April 28, 2016 stating, "[a]ttached are the two grievances (January 26, 2016 & March 19, 2016) and decisions as they relate to your public records request…." (R.Ex. 64)

75. By a letter dated May 31, 2016, Mr. Duggan informed the Appellant that a hearing would be held on June 6, 2016 at 10 a.m. regarding four (4) charges stating, in part,

> "Charge One" - Appellant violated G.L. c. 149, s. 52C (defining personnel record); DPD Rule 7.7 (truthfulness); and DPD Rule 7.8 (Statements concerning liability) by:
> - sending the September 25, 2015 letter to Lt. Fleury alleging that he (Lt. Fleury) violated the work time "rule",
> - telling Lt. Fleury on October 6, 2015 that the work time "rule" would be incorporated into the DPD Manual,
> - sending a letter on October 14, 2015 to Lt. Fleury "containing statements that were baseless, untrue and were personally and professionally demeaning, and
> - putting the October letter in Lt. Fleury's "personal and/or internal investigative file. …" (Jt.Ex. 1)
>
> "Charge Two" – Appellant violated G.L. c. 66, s. 10 (public records statute); DPD Rule 7.5 (Dissemination of Official Information); and DPD Rule 13.4 (Reporting Citizen Complaints) by:
>
> - failing to provide a timely response to the public records request of The Sun and provided information that "was not subject to public disclosure" regarding "officers" of the DPD,
> - stating at a Step 2 conference that "any inquiry which may result in discipline qualifies as an internal affairs matter", showing a "serious abuse of discretion" and violating DPD Rule 13.4, regarding the procedure for citizen complaints, and
> - failing to "obtain prior approval of the Chief of Police prior to sending the subject letter to Lt. Fleury and disseminated the same for public disclosure in violation of " Rule 7.5." (Jt.Ex. 1)
>
> "Charge Three" – the Appellant violated G.L. c. 4, s. 7 (cl. 26)(definition of public record), G.L. c. 66, s. 10 (public records statute), and G.L. c. 149, s. 52C (definition of personnel record); DPD Rule section 4.6 (Department

correspondence); DPD Policies and Procedures 300 (media relations); and DPD Policies and Procedures 200 (VI and VIII, internal affairs) by:

- redacting the word "ambiguity" in reference to the work time limit "rule" in the October 14, 2015 Letter when he sent it to The Sun and not redacting the "demeaning, personalized language" regarding Lt. Fleury in violation of DPD Policies and Procedures 300.

This Charge adds that the October 14, 2015 Letter that the Appellant sent Lt. Fleury and disclosed to The Sun was a personnel record that should not have been disclosed, the letter is a letter of reprimand, it is "adverse to the officer's employment status and would negatively affect his qualifications for employment, promotion, transfer, additional compensation or the possibility that the employee will be subject to disciplinary action." (Jt.Ex. 1)

"Charge Four" – the Appellant violated DPD Policies and Procedures Rule 200 (internal affairs), Rule 300 (media relations) and DPD Rules and Regulations Rule 11.4 (policies and procedures) because:

> "The asserted violation of an unwritten policy known as the '16 hour rule' did not warrant an Internal Affairs investigation based on [DPD] Policies and Procedures regarding these underlying circumstances. …
> The subject letter did not contain any references that the matter was being treated as an internal affairs investigation. No internal affairs investigation was conducted and none of the Policies and Procedures for internal investigations under Section 200 of the same were followed. [The Appellant's] statement during the Step 2 conference regarding the grievance of the NEPBA was essentially that any matter of inquiry, regardless of the degree, in which the possible outcome could result in discipline warrants an internal affairs investigation, and that Policies and Procedures are not relevant as to how 'we operate', demonstrates [the Appellant's] utter disregard for an organizational structure necessary for … the [PDP]. …
> … The subject letter did not warrant an Internal Affairs investigation. It was inappropriate to release the subject letter. It was not a public record. [The Appellant] subjected its contents containing a personal attack and baseless conclusions to publication bringing into question the integrity required of a municipal police department …. [i]t would have been appropriate to have consulted both the chief of Police and town Counsel prior to the release of the same. …
> (Jt.Ex. 1)

The letter was copied to James Hall, Town Counsel; Chief Richardson; and attorney McQuillan, Special Labor Counsel. (Id.)

76. On June 1, 2016, The Sun published an article entitled, "Dracut Deputy Police Chief Digs in for Hearing". (App.Ex. 51)

77. On June 2, 2016, The Sun published an apparently updated article entitled, "Dracut Deputy Police Chief Digs in for Hearing," regarding the Appellant's local civil service hearing to be held on June 5. The June 2 article asserts[15], in part,

> Town Manager Jim Duggan has scheduled a civil-service (sic) hearing Monday to determine whether Deputy Police Chief David Chartrand violated department policy and state law when he released documents regarding a Dracut police lieutenant to The Sun.
> Chartrand received a letter notifying him of the hearing on Wednesday and through a lawyer expressed his expectation that the hearing would be a 'farce and a sham' due to Duggan's bias against him.
>
> 'For some time, it has been evident that Town Manager James Duggan has waged an illicit campaign designed to discredit and harm Deputy Chief Chartrand,' attorney Andrew Gambaccini said in a statement. 'The vendetta has now lasted for many months and Manager Duggan's latest step, to advance baseless administrative charges against the Deputy, is the culmination of that endeavor.'
>
> The hearing stems from two union grievances filed earlier this year by Lt. Michael Fleury …
>
> In his ruling on the grievances, Duggan wrote that the letter did not appear to meet the department's own definition of an internal-affairs (sic) matter, and therefore, should not have been released.
>
> The grievances asked for a further investigation into the matter.
>
> 'Based upon the grievance that was filed and my decisions … I have exercised that further inquiry and examination, thus Deputy Chief Chartrand has been presented with the charges,' Duggan said.
>
> He declined to discuss the specific charges leveled against Chartrand.
>
> 'The accusation of a personal vendetta is baseless,' Duggan said. 'I am only responding to grievances filed based on the actions and behavior of the deputy chief.'…

[15] As indicated at the hearing in this case, the newspaper articles in the record are given limited weight and were admitted but not to prove the truth of the matters asserted therein. The Respondent's hearing officer, Attorney Bower, similarly determined that the news articles in the record were not determinative, at least in regards to the news articles' characterization of documents as public records. *See also* Jt.Ex. 63 (Transcript of Dracut Civil Service Hearing, pp. 94-95).

(App.Ex. 51)(emphasis added)

78. A June 4, 2016 article in The Sun again mentioned the allegations that Lt. Fleury had violated a work time limitation, including again certain "scathing" comments that the Appellant had written to Lt. Fleury. (Jt.Ex. 38)

79. The Respondent conducted the Appellant's civil service hearing on June 13, 2016. The Appellant testified at Respondent's hearing. (Jt.Ex. 2)

80. On or about June 5, 2016, Dracut's Town Meeting voted to keep the Police Chief position in the civil service system. (App.Ex. 23)

81. On June 14, 2016 at 12:17 p.m., The Sun emailed the Town Manager, making a public record request for "[a]ll communications from June 1 until the date this request is processed between the attorney(s) representing Dracut police Lt. Michael Fleury in his union grievance matters and the town of Dracut. …" (R.Ex. 65)

82. On June 21, 2016, the Town (through town Counsel) denied The Sun's June 14, 2016 public record request. (R.Ex. 66)

83. By a memo dated July 12, 2016 from Mr. Duggan to the BOS, Mr. Duggan informed the BOS that he had appointed Neil Ouellette to the position of "Interim" Police Chief, that the state's Human Resources Division (HRD) had approved this provisional appointment, that an assessment center would be conducted to appoint a permanent Police Chief, and that Mr. Ouellette's appointment would be on the agenda for the BOS meeting on July 14, 2016. Mr. Ouellette's resume, attached to this memo, indicated that he worked at MRI from May 2015 to the present time and that he had been the Police Chief in Danvers previously for many years. (App.Ex. 24)[16]

[16] Mr. Ouellette's interim Chief appointment, after having worked with MRI to evaluate and report on the DPD, raises an eyebrow. There is no "interim" civil service title.

84. By a letter dated July 14, 2016, hearing officer James Bowers, Esq. reported to Mr. Duggan that he had conducted the Appellant's local civil service hearing on June 13, that he upheld the four (4) charges against the Appellant and recommended that Mr. Duggan suspend the Appellant for ten (10) working days. With specific regard as to whether the Oct. 14, 2015 Letter that the Appellant sent to Lt. Fleury was a public record, the hearing officer found, quoting from Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, et al, 58 Mass.App.Ct.1 (2003),

> 'Standing on a different footing, and more like the disciplinary report in Wakefield [Wakefield Teacher's Association v. School Committee of Wakefield, 431 Mass. 792 (2000)], is the … memorandum from the chief to (the officer), detailing the findings of the internal affairs investigation and the conclusion that no disciplinary action was to be taken. The document is a notice from the disciplining authority to the particular employee advising of the disciplinary decision (that disciplinary action was not warranted). The nature and character of this document makes it part of the 'core category of personnel information that [is] useful in making employment decisions regarding the employee … we conclude that this is a disciplinary report exempt from disclosure as a 'personnel [file] or information.' (Worcester Telegram at 9-1)
> (Jt.Ex. 2)

85. By letter dated July 18, 2016, Mr. Duggan informed the Appellant that he adopted the hearing officer's recommendation and suspended the Appellant for ten (10) days. This letter was copied to James Hall, Town Counsel; Peter McQuillan, Special Labor counsel for the Town; and Mary Hamilton, Human Resources Coordinator. (Jt.Ex. 3) Prior to the ten (10)-day suspension at issue here, Chartrand had not been suspended, demoted or terminated at the DPD. (Testimony of Chartrand)[17]

86. Also on July 18, 2016, The Sun published an article entitled, "Dracut Deputy Chief Suspended in Records Flap", asserting, in part

[17] There is no indication whether the Appellant had received any oral or written reprimands previously.

> Deputy Police Chief David Chartrand has been suspended for two weeks, following a civil service inquiry into his handling of documents in a Dracut lieutenant's personnel file …
> The Board of Selectman was notified of the decision Monday morning [July 18, 2016]. ..
> The civil service hearing that led to Chartrand's suspension began in June, after Duggan upheld two union grievances filed against the deputy chief by Lt. Michael Fleury. ..
> And last Thursday, Gambaccini sent a letter to the town on Chartrand's behalf threatening to sue over the appointment of Ouellette as the interim police chief. (App.Ex. 52)

There is no indication in the article that The Sun was quoting from a document when it reported that the Appellant had been suspended for ten (10) days. (Administrative Notice)

87. On June 25, 2012, Chief Richardson denied a grievance regarding an alleged violation of the work hours limitation involving a supervisory officer and a patrolman administratively. The matter was not categorized as an internal affairs matter and was handled administratively. (Jt.Ex. 60)

Applicable Law

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, s. 41. A person aggrieved by a decision of an appointing authority made pursuant to G.L. c. 31, s. 41 may appeal to the Commission under G.L. c. 31, s. 43.

Under section 43, the Commission makes a de novo review "for the purpose of finding the facts anew." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. The role of the Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304,

rev.den., 426 Mass. 1102 (1997). *See also* City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, *rev.den.*, 440 Mass. 1108 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, *rev.den.*, 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass.App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, *rev.den.*, 390 Mass. 1102 (1983).

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, *rev.den.*, 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass.App.Ct. 486, 488, *rev.den.*, 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983). The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in governmental employment decisions.' " Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited.

G.L. c. 31, section 43 also vests the Commission with some discretion to affirm, vacate or modify the discipline imposed by an appointing authority, although that discretion is "not without bounds" and requires sound and reasoned explanation for doing so. *See* Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 600 (1996) and cases cited. ("The power accorded to the commission to modify penalties must not be confused with the power to impose

penalties ab initio, which is a power accorded the appointing authority") "[T]he power to modify is at its core the authority . . . to temper, balance, and amend. The power to modify penalties permits the furtherance of uniformity and equitable treatment of similarly situated individuals. It must be used to further, and not to frustrate, the purpose of civil service legislation, i.e., 'to protect efficient public employees from partisan political control' and 'the removal of those who have proved to be incompetent or unworthy to continue in the public service' [Citations]" Id. (emphasis added). *See also* Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983).

Opinion of Commissioner Ittleman (Hearing Officer)

The Respondent has established by a preponderance of the evidence that it had just cause to discipline the Appellant in part for the following reasons.

Just Cause Found

The Respondent established by a preponderance of the evidence that the Appellant violated DPD Rules 8.0 and 11.4, which require members of the DPD to know and obey the DPD policies and procedures manual, orders, rules, regulations, and policies and procedures. The main issues here involve the Oct. 14, 2015 Letter the Appellant sent to Lt. Fleury about the latter's alleged violation of a purported work time rule and the Appellant's release of the Oct. 14, 2015 Letter to The Sun in response to its public records request for certain internal affairs documents.

The Appellant refers to the Oct. 14, 2015 Letter to Lt. Fleury as a letter of reprimand, sounding like a disciplinary matter. Under public records law, discipline-related documents are placed in an employee's personnel file and are exempt from public records disclosure. *See*

Worcester Telegraph & Gazette Corp. v. Chief of Police of Worcester, 58 Mass.App.Ct. 1 (2003); G.L. c. 149, s. 52C; and November 15, 2015 MCOPA and MMCC memo noted above. But the Appellant also asserts that the Oct. 14, 2015 Letter is not a form of discipline but an internal affairs matter, a "learning tool designed to address an observed deficiency so that an employee may correct their behavior prior to the necessity of imposed disciplinary action". Jt.Ex. 40; Jt.Ex. 63, pp. 82-83; Testimony of Appellant. Although DPD Policy and Procedure 200 indicates the measures to be taken in an internal affairs investigation and the Appellant indicated that he was aware of this Policy and Procedure, the Appellant admitted that he did not follow DPD Policy and Procedure 200, in his investigation of Lt. Fleury. In substantial part, the Appellant did not interview Lt. Fleury as part of the investigation, he did not inform the Appellant (until months later, by which time Lt. Fleury believed the matter had ended) that he was the subject of an internal affairs investigation; and he did not inform the Appellant that the letter would be kept in his personnel file or an internal affairs file (although the Appellant permitted Lt. Fleury to submit a response to the Oct. 14, 2015 letter). In addition, the Appellant sent Lt. Fleury a letter in September 2015 stating that Lt. Fleury had violated a DPD work time limitation rule, Lt. Fleury responded to the Appellant asking for clarification about the rule, and the Appellant replied in the Oct. 14, 2015 Letter stating, in part, "[s]ince your incident", the matter had been discussed with both union presidents and that "[t]his rule will be added to the Department's Rules and Regulations Manual", indicating that the work time limitation that the Appellant had asserted Lt. Fleury violated was not, in fact, a rule of the DPD. Jt.Ex. 28. [18] The Appellant's actions in these regards violated DPD Policy and Procedure 200 and kept Lt. Fleury in the dark about the actions being taken against him, which is also inconsistent with basic merit principles of civil service law. G.L. c. 31, s. 1. Moreover, the Appellant did not inform Lt.

[18] Again, this decision does not in any way condone excessive work hours by members of the DPD.

Fleury that the Appellant released the Oct. 14, 2015 Letter to The Sun, redacting the last paragraph, which indicated that the work time limitation "rule" that Lt. Fleury was alleged to have violated was, in fact, "ambiguous" and that no further action would be taken against Lt. Fleury. While the Appellant alleged that he redacted the last paragraph of the Oct. 14, 2015 Letter because it referenced Lt. Fleury's discipline, which is to be redacted pursuant to the Worcester Appeals Court decision and the November 15, 2015 MCOPA and MMCC Memo on the subject, the redacted last paragraph does not state the disciplinary action to be taken but states that if the work time limitation were not ambiguous, Lt. Fleury would be subject to an unspecified suspension. In addition, the redaction deleted the text indicating that the rule the Appellant alleged that Lt. Fleury had violated was "ambiguous", that it had now been discussed with union representatives, and that the work time limitation would be included in the DPD manual. Redacting these parts of the Oct. 14, 2015 Letter made it appear that Lt. Fleury had violated a valid DPD rule when, in fact, the work time limitation was "ambiguous".

The Appellant also violated G.L. c. 66, s. 10(a), pertaining to requests for public records. This statute provides, in pertinent part, that,

> A records access officer appointed pursuant to section 6A, or a designee, shall at reasonable times and without unreasonable delay permit inspection or furnish a copy of any public record as defined in clause twenty-sixth of section 7 of chapter 4, or any segregable portion of a public record, not later than 10 business days following the receipt of the request …
> Id. (emphasis added)

The Appellant received The Sun's public records request for certain internal affairs documents on or about November 11, 2015. Weeks later, on December 4, 2015, The Sun, not having received a response from the Appellant, re-sent its request to the Appellant. The Appellant replied to The Sun, stating that it could take another couple of weeks for him to respond to the public records request because he was preparing a response to the MRI report. On December 21,

2015, the Appellant submitted a response to the MRI report for himself and then-Chief Richardson. On January 7, 2016, approximately two (2) months after The Sun had submitted its public records request to the Appellant, the Appellant responded to the public records request, providing the redacted Oct. 14, 2015 Letter that the Appellant had written to Lt. Fleury as well as internal affairs matters involving other officers. Having waited nearly two (2) months to respond to the public records request of The Sun when G.L. c. 66, s. 10 requires recipients of such requests to respond in ten (10) business days, the Appellant violated G.L. c. 66, s. 10(a). Further, it is especially troubling that the Appellant delayed his response to the public record request for the self-interested purpose of responding to the MRI report that criticized him and then-Chief Richardson.

I find that the Appellant's actions in these regards constitute substantial misconduct which adversely affects the public interest by impairing the efficiency of public service and warrant discipline.

Just Cause Not Found

The Respondent did not establish by a preponderance of the evidence that it had just cause to discipline the Appellant in part for the following reasons.

The Respondent did not establish by a preponderance of the evidence that the Appellant violated G.L. c. 66, s. 10(a) (public records law) and G.L. c. 149, s. 52C (regarding personnel files) by releasing the Oct. 14, 2015 Letter to The Sun in response to its public records request for certain internal affairs documents. Under G.L. c. 4, s. 7, cl. (c), the following are exempt from public disclosure: "personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy". Id. Most internal affairs documents are treated

differently than personnel documents in relation to public records law. Worcester Telegraph & Gazette Corp. v. Chief of Police of Worcester, 58 Mass.App.Ct. 1 (2003); *see* MCOPA and MMCC November 20, 2015 memo. As noted above, although he refers to the Oct. 14, 2015 Letter as a letter of reprimand as if it is a disciplinary matter, the Appellant states that the Oct. 14, 2015 Letter was related to an internal affairs investigation (although he did not comply with the applicable DPD rules regarding internal affairs investigations), not to a disciplinary matter, and, therefore, the Oct. 14, 2015 Letter was subject to disclosure as a public record. While the Respondent avers that the Appellant, as the DPD records access officer, did not consult town counsel in this regard, there is no indication in the record that he was required to do so.[19] Rather, the Appellant indicated that he relied on the Appeals Court decision in Worcester Telegraph & Gazette Corp. v. Chief of Police of Worcester, 58 Mass.App.Ct. 1 (2003), and the timely November 15, 2015 MCOPA and MMCC November 15, 2015 Memo on the Worcester decision relating to the public record status of certain internal affairs documents, before he decided to release the Oct. 14, 2015 Letter to The Sun in response to its request.[20] The MCOPA and MMCC Memo stated, in part, that the Worcester decision ruled that "internal affairs reports do not fall within exemption (c) of the public records law …." Jt.Ex. 33 (citations omitted). The Memo lists specific internal affairs-related documents that the Worcester Court indicated are not exempt from public release but indicates that there is an exception for "a notice from the disciplining authority (the Chief) to the involved officer advising of the disciplinary decision …". Id. Based on this information, the Appellant concluded that the Oct. 14, 2015 Letter, as a

[19] That said, the MCOPA and MMCC memo on which the Appellant relied in deciding if the Oct. 14, 2015 Letter was to be produced to The Sun as a public record, included a "recommended course of action" in responding to internal affairs-related public records requests, stating, in part, that " … the agency should consult with Town/City Counsel (if applicable) …". Jt.Ex. 33.

[20] I note that, unlike the instant case, the Worcester case involved internal affairs matters following civilian complaints against certain officers. The Worcester Court found that making certain internal affairs documents public supports the processing of civilian complaints at a police department. Worcester Telegraph & Gazette Corp. v. Chief of Police of Worcester, 58 Mass.App.Ct. 1, 7 (2003).

notice from the disciplining authority to the involved officer (Lt. Fleury) advising of the disciplinary decision, was a public record and that he was required to release the Oct. 14, 2015 letter to The Sun. Since the Oct. 14, 2015 Letter was filed as an internal affairs document, and not filed in Lt. Fleury's personnel file, the Appellant was not obliged to inform Lt. Fleury of a right to challenge the entry of the Oct. 14, 2015 Letter into his personnel file under G.L. c. 149, s. 52C. The Respondent also charged the Appellant with abusing his discretion by stating at Lt. Fleury's grievance conferences in connection with the Oct. 14, 2015 Letter, that "any inquiry which may result in discipline qualifies as an internal affairs matter". However, as the MCOPA and MMCC Memo stated, the Worcester court decision recognized that the lines between internal affairs and disciplinary matters may overlap, stating,

> ' … That the internal affairs process might lead to discipline, or even criminal action, does not transmute all materials in an internal affairs investigation into a disciplinary report …'.
> Jt.Ex. 33 (citations omitted)[21]

The Respondent did not establish by a preponderance of the evidence that the Appellant violated DPD Rule 7.7, which requires members of the DPD to be truthful. It is well established that it is essential for police officers to be truthful. Thus, the Commission takes allegations of untruthfulness very seriously. The Respondent alleged that the Appellant made untrue statements about Lt. Fleury in his Oct. 14, 2015 Letter. As scathing and personal as many of the Appellant's statements in the Oct. 14, 2015 Letter were, they were matters of opinion, as Lt. Fleury himself acknowledged, not statements susceptible of assessment for their veracity. As a result, it cannot be gainsaid that such statements were untruthful. However, it is unfortunate

[21] An argument could be made that the Oct. 14, 2015 Letter is exempt from publication as a personnel record under G.L. c. 149, s. 52C because it referenced Lt. Fleury's alleged "substandard" performance. However, the Appellant cannot be faulted for relying on MCOPA and MMCC Memo in this regard.

that, as disconcerting as the Appellant found Lt. Fleury's work hours on September 25 and 26, 2015, that he (the Appellant) found it necessary to employ ad hominems to make his point.

The Respondent did not establish by a preponderance of the evidence that the Appellant violated DPD Rules 8.0 and 11.4 by violating DPD Policy and Procedure 300 and DPD Rule 7.8, which bar the release of internal investigations of police officers without the "express permission of the chief of police" (Policy and Procedure 300) and "except as authorized by the Chief of Police or by statute" (DPD Rule 7.5). Although then-Chief Richardson and the Appellant testified at the Commission hearing that the Chief had approved the Appellant's release of the Oct. 14, 2015 Letter to The Sun prior to its release, at the grievance conference it appears that then-Chief Richardson stated that he did not. At the local civil service hearing, the Appellant testified that he did not recall the Chief stating that he had not approved of the release in advance. Jt.Ex. 63, pp. 109-111. Thus, the evidence in this regard is inconsistent and inconclusive and the Respondent has failed to establish by a preponderance of the evidence that the Appellant did not obtain prior express permission to release the Oct. 14, 2015 Letter in violation of the cited DPD rules.

The Respondent did not establish by a preponderance of the evidence that the Appellant violated DPD Rule 4.09, which Rule provides that members of the DPD are not to use DPD stationery for private correspondence. In this regard, the Respondent charged the Appellant with using Department stationary to submit a response to the MRI report which heavily criticized the Appellant and then-Chief Richardson. The MRI report was a lengthy, detailed document analyzing the DPD, which report was prepared at the request of the Town. The letter from the Appellant and then-Chief Richardson officially responded to the official report on the

Department. I find that the response to the MRI report was an official response to an official report and the use of DPD stationary in this regard was not improper.

The Respondent did not establish by a preponderance of the evidence that the Appellant violated DPD Rule 13.4, which Rule concerns the reporting of citizen complaints. While I note that this Rule provides for the processing of such complaints by trying to resolve them in perhaps a more informal manner and that the Respondent has argued that the Appellant should have handled the Appellant's concerns with Lt. Fleury under Rule 13.4, rather than as an internal affairs matter, the incident here did not involve a citizen's complaint. Consequently, I find that the Appellant did not violate Rule 13.4.

The Respondent further alleged that the Appellant was wrong to subject Lt. Fleury to an internal affairs investigation because Lt. Fleury's conduct did not fall under the criteria for it under DPD Policy and Procedure 200. The criteria include corruption, brutality, use of excessive force and violation of civil rights. Jt.Ex. 4. However, the phrase immediately preceding these criteria states that "the criteria for determining the categories of complaints to be investigated by internal Affairs include, but are not limited to," allegations of corruption and son on. Id. As a result, the Appellant was not prohibited from pursuing allegations against Lt. Fleury for other alleged misconduct as an internal affairs matter.

There are multiple allegations of bias in this case. Lt. Fleury testified that the Appellant is biased against him. The Appellant denies that his actions toward Lt. Fleury were based on his animus toward him. However, the history of the Appellant's relationship with Lt. Fleury and the tenor, tone and language of the Oct. 14, 2015 Letter undermine the Appellant's denial. The Appellant did not offer to discuss the matter before any formal action was taken here as he did when Lt. Fleury informed the Appellant about the insubordination of another member of the

DPD. In addition, there is no indication that Lt. Fleury had previously violated the purported work time rule, nor is there any indication in the record that anyone else in the DPD had been disciplined for violating the purported rule. The Appellant argues that the charges against him are based on Town Manager Duggan's bias against him. In addition, the Appellant believes that a member of the Board of Selectman is against him because, *inter alia*, the Selectman is a former member of the DPD who unsuccessfully competed with the Appellant for the Deputy Chief position and supported the removal of the Police Chief position from civil service.[22] Testimony of Appellant and Richardson. I have considered the Appellant's concerns but I find that they do not undermine the Commission's objective assessment of whether the Appellant's conduct violated the cited rules and statutes.

Having found just cause for only some of the charges pressed by the Respondent against the Appellant, modification of the ten (10)-day suspension is warranted and the suspension is reduced to a three (3)-day suspension. If the Appellant has already served the ten (10)-day suspension, the Respondent shall reimburse the Appellant for his lost wages for seven (7) of the ten (10) days and all related DPD records shall be amended to indicate the reduction of the Appellant's suspension as noted herein.

For the foregoing reasons, I believe that the disciplinary appeal of the Appellant, under Docket No. D-16-127, should be allowed in part such that his suspension is reduced from ten (10) to three (3) days as provided herein.

/s/ *Cynthia A. Ittleman*

Cynthia A. Ittleman
Commissioner

[22] At the local civil service hearing, the Appellant described his relationship with the Selectman, Mr. Archinski, as "caustic and adversarial". Jt.Ex. 63, p. 71. At the time, Mr. Archinski was also an administrator in an office that represents both the DPD supervisors' union and the patrolmen's union. Id.

Opinion of the Majority (Commissioners Stein, Camuso and Tivnan)

We adopt Commissioner Ittleman's findings and agree with her conclusion that significantly modified discipline is warranted here. We agree that the Town has not established just cause for discipline for violation of the most serious charges, including no violation of the public records laws or other misconduct, save for his failure to provide proper due process to the subject of an internal affairs investigation, as required by the department's rules and regulations. We depart from the Hearing Officer's conclusion, however, that the Appellant's failure to meet the "10-day" time limit for responding to a public records request is also grounds for discipline. We also take into account that the rules and regulations promulgated by the police department have not been unambiguously enforced in the past and leave some room for interpretation. Thus, as that one misstep is the only one that is justified by the record, and given the Appellant's solid record of past performance, the Commission is warranted to exercise its discretion to modify the discipline and to reduce it to no more than a written reprimand.

For these reasons, we believe that the appeal should be ***allowed in part*** and that the ten (10)-day suspension should be modified and reduced to a written reprimand, with the Appellant to be restored to his position and all other compensation and benefits to which he is entitled.

Opinion of Commissioner Bowman

This appeal should be allowed. The crux of this matter involves an alleged violation of the public records law. The Appellant had been delegated with the responsibility to respond to requests for public records made to the Town's Police Department. In that capacity, he provided a document, which he deemed to be a public record, to a local media outlet. The Town argues that the document should not have been released and ultimately suspended the Appellant for ten (10) days for producing the document and, purportedly, for other related offenses. There is sufficient ambiguity in the public records law related to this particular issue that could support an argument for or against producing the document in question. As I believe the discipline here could have a chilling effect on the need for transparency in government affairs, I would have allowed the appeal. For that reason, I voted no.

The Majority Opinion is adopted by a 3-2 vote of the Civil Service Commission:

Bowman, Chairman – No
Ittleman, Commissioner – No
Stein, Commissioner – Yes
Camuso, Commissioner – Yes
Tivnan, Commissioner - Yes

on November 8, 2018.

Either party may file a motion for reconsideration within ten (10) days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty (30) day time limit for seeking judicial review of this Commission order or decision.
Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice to:
Andrew Gambaccini, Esq. (for Appellant)
Peter J. McQuillan, Esq. (for Respondent)