No.

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IN THE
SUPREME COURT OF THE UNITED STATES

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FRANK CONDEZ,
*Petitioner,*

v.

TOWN OF DARTMOUTH and others
*Respondents,*

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On Petition for a Writ of Certiorari to the Massachusetts Appeals Court

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# PETITION FOR A WRIT OF CERTIORARI

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December 11, 2019

## QUESTION PRESENTED

Does the Massachusetts Appeals Court decision constitute a forbidden intrusion of the petitioner's First Amendment rights?

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioner is Frank Condez. The Massachusetts Civil Service Commission and the Town of Dartmouth, Massachusetts are the Respondents. No party is a corporation.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner, Frank Condez, respectfully petitions for a writ of certiorari to review the judgment of the Massachusetts Appeals Court.

## OPINIONS BELOW

The opinion of the Massachusetts Appeals Court is published at 95 Mass. App. Ct. 1116 (2019); 126 N.E.3d 1037 (June 6, 2019). *See* Petition Appendix, (hereinafter "Pet. App."), pp. 11-26. The Massachusetts Supreme Judicial Court's denial of the petitioner's Application for Further Appellate Review is published at 483 Mass. 1102 (2019); 2019 Mass. LEXIS 532 (Sept. 13, 2019). *See* Pet. App., p. 133. The relevant Trial Court Order, Docket No., 1673CV00796, and the Civil Service Commission Decision, Docket No. D-14-192 are unpublished. *See* Pet. App., pp.112-132 & pp. 27-111.

## JURISDICTION

The Massachusetts Appeals Court issued its opinion on June 6, 2019. *See* Pet. App., pp. 11-26. On September 13, 2019, the Massachusetts Supreme Judicial Court denied the petitioner's Application for Further Appellate Review. *See* Pet. App., pp. 133. This Honorable Court has jurisdiction under the relevant provisions of 28 U.S.C. §1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the Government for a redress of grievances."

## STATEMENT OF THE CASE

In the underlying action the petitioner, Frank Condez, (hereinafter "Condez"), asserted that the Town of Dartmouth, (hereinafter "Town"), unlawfully discharged him as a police sergeant in direct violation of his rights guaranteed by First Amendment to the United States Constitution. Condez specifically asserted that the Town violated his First Amendment rights when it terminated him in retaliation for his constitutionally protected opinions made to the Town's Select Board in a letter dated June 4, 2014. *See* Pet. App., pp. 13 &-19.

The following salient facts are undisputed. In 1998, Condez was hired by the Town as a police officer and subsequently promoted to the rank of sergeant. On October 1, 2013, the Town placed Condez on administrative leave for conduct unrelated to the issues on appeal. On June 6, 2014, while on administrative leave, Condez hand-delivered a letter to the Town's Select Board, along with two (2) redacted photographs of a naked male child. Condez's letter stated as follows:

> Dear Mr. Cressman,
>
> Attached are photos which were recently discovered when initially recovered from Timothy Lee's personal laptop which was given to me by him to be serviced for a failing hard drive. The metadata encoded on these photos tie them to the same brand and model of digital camera used to take numerous other family photos. These are only two of multiple photos of this nature. There is also a possibility that some of the photos were taken out of state. The photos can, at best, be described as disturbing. They are more accurately,

> possible evidence of abuse or sexual exploitation of a child by him and could be indicative of serious liability for the Town should other victims be discovered. This is being shared with the Selectboard in their role as Police Commissioners and based on their duty to supervise the Chief of Police.
>
> These photos have been provided to the Selectboard in a redacted form so they are aware of this serious issue prior to it coming to them from an outside source. It is particularly disturbing to me and I'm sure it will be to the public as a whole that someone in a position of public trust would be involved or condone this type of conduct. I'm sure I don't have to explain the severity of something such as this and the duty of the Selectboard to investigate something as serious as this. I will be happy to provide all of the original evidence to whatever entity or outside police agency the Selectboard decides to have investigate this matter. Given the serious nature of the issues here I don't have to go into great detail as to the consequences for the Town should other victims be discovered given that the Town now has knowledge of the situation. Thank you for your prompt attention to this matter.
>
> Very Truly Yours,
>
> Frank Condez

One of the pictures enclosed in Condez's letter depicted a young male child (not an infant) standing in the bathtub

with an orange object hanging off of his penis. The other picture enclosed in Condez's letter also depicted a young male child (not an infant) lying in the bathtub with his penis clearly exposed. On July 3, 2014, Condez filed a report with the Massachusetts Department of Children and Families, (hereinafter "DCF"), after learning that the Town had not done so after receiving his June 6, 2014, letter. Condez reported to DCF that he was "concerned about the pictures and thinks that DCF should investigate." DCF ultimately screened out Condez's report.

On July 28, 2014, the Town sent a Notice of Charges and Disciplinary Hearing letter to Condez outlining nine (9) separate charges. The first eight (8) charges were identical to the charges previously alleged against Condez concerning the unauthorized downloading of software to the Town's police department computers. Charge 9 was new and related solely to Condez's June 2014 letter to the Town's Select Board. Charge 9 stated as follows:

> In his June 5, 2014 submission to the Town of Dartmouth Select Board, Sergeant Frank Condez made baseless accusations of a scurrilous nature against the Chief of Police Timothy Lee, claiming that Chief Lee engaged in deviant sexual criminal behavior with his own child and suggesting that there were other 'victims,' with the additional insinuation that the matter could become public. Condez did so with the motive to embarrass the Chief of Police and impede Condez's own disciplinary hearing. These actions involved immoral, improper and intemperate conduct, constituting Conduct Unbecoming an Officer in violation of the Dartmouth Police Rules and Regulations.

After seven (7) days of evidentiary hearings the Massachusetts Civil Service Commission, (hereinafter "Commission"), issued a Corrected Decision finding that the Town did not prove by a preponderance of the evidence that Condez engaged in the conduct alleged in Charges 1 through 8; however, the Commission did recommend Condez's termination based upon the purported allegations of misconduct set forth in Charge 9. In so finding the Commission summarily dismissed Condez's argument that his conduct was protected speech under the First Amendment to the United States Constitution. *See* Pet. App., p. 99. Condez timely appealed the Commission's decision by filing a Complaint for Judicial Review in the Massachusetts Trial Court.

Condez and the respondents filed Cross Motions for Judgment on the Pleadings in the Trial Court. On September 25, 2017, after a hearing, the Trial Court issued a Memorandum and Order denying Condez's Motion for Judgment on the Pleadings and upholding the Commission's decision. In reaching its decision the Trial Court determined that because Condez was not speaking on a matter of public concern his conduct was not protected First Amendment speech. *See* Pet. App., pp. 119 &120. Condez timely appealed the Trial Court's Order.

After oral argument, the Massachusetts Appeals Court issued a Memorandum and Order, dated June 6, 2019, affirming the judgment against Condez. In it's Memorandum and Order the Massachusetts Appeals Court assumed, without deciding, that Condez was speaking as a citizen on a matter of public concern but because his statements were false or made with actual malice the protections of the First Amendment did not apply. *See* Pet. App., pp. 21&23. On July 18, 2019, Condez filed an Application for Leave to Obtain Further Appellate Review with the Massachusetts Supreme Judicial Court. The Massachusetts Supreme Judicial Court denied Condez's

Application for Further Appellate Review on September 13, 2019. *See* Pet. App. p. 133.

## REASONS FOR GRANTING THE PETITION

The penultimate question considered by the Massachusetts Appeals Court was whether Condez's termination was a violation of his rights guaranteed by the First Amendment to the United States Constitution. This Court has long held that "[o]fficial reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right,' and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions…for speaking out." Hartman v. Moore, 547 U.S. 250, 256 (2006)(quoting Crawford-El v. Britton, 523 U.S. 574, 588 n. 10 (1998)). To determine whether a public employee's speech is entitled to First Amendment protection, a court must consider:

> ….whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based upon his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.

Garcetti v. Ceballos, 547 U.S. 410, 418 (2006), citing Pickering v. Bd. of Education, 391 U.S., 563, 568 (1968), Connick v. Myers, 461 U.S. 138, 147 (1983). Employing the three part test outlined above, the Massachusetts Appeals Court assumed, without deciding, that Condez was a citizen speaking on a matter of public concern. However, the

Massachusetts Appeals Court gravely erred by finding that Condez's statements were false because "to the extent it is a legal question whether the photos are possible evidence of abuse or sexual exploitation of a child, they are not." *See* Pet. App., p. 23. In so doing, the Massachusetts Appeals Court impermissibly substituted its own opinion of the photographs for Condez's opinion of the photographs.

The Massachusetts Appeals Court decision deviates from longstanding First Amendment jurisprudence holding that there is no such thing as a false opinion. The court committed a clear error of law by failing to rule that Condez's statements were protected by the First Amendment by imputing its own opinion of the photographs for that of Condez's. The United States Supreme Court has long made clear that, "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the consciences of judges and juries but on the competition of other ideas." Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-340 (1974). The opinion of the Massachusetts Appeals Court that "[t]he photos are of the kind that many parents take of their children, and are not evidence of sexual abuse or exploitation" cannot be allowed to supplant Condez's opinion of what the pictures may or may not depict. *See* Pet. App., p. 23. It is axiomatic that under First Amendment jurisprudence a court's opinion cannot supercede or replace the opinion of a citizen. Consequently, the Massachusetts Appeals Court decision constitutes a forbidden intrusion of Condez's First Amendment rights.

The protection of rights guaranteed by the First Amendment is of paramount importance. A citizen's right to express his or her opinion, particularly regarding a matter of utmost public concern, is guaranteed by the First Amendment and is vital to the health of a democratic government. When a decision implicates the rights guaranteed by the First Amendment to the United States

Constitution reviewing Courts have "…an obligation to 'make an independent examination of the whole record' in order to make sure that the 'judgment does not constitute a forbidden intrusion on the field of free speech.'" Pereira v. Commission of Soc. Serv., 432 Mass. 251, 258 (2000)(quoting O'Connor v. Steeves, 994 F. 2d 905, 912-913 (1st Cir. 1993). This case involves speech on matters of the highest public concern – the health and welfare of children. Arguably, there is no greater matter of public concern than the health and welfare of our children. "[B]asic in a democracy, stand the interests of society to protect the welfare of children…". Prince v. Massachusetts, 321 U.S. 158, 165 (1944). "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling'." New York v. Ferber, 458 U.S. 747, 756-757 (1982)(quoting Globe Newspaper Co., v. Superior Court, 457 U.S. 596, 607 (1982). "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." Prince v. Massachusetts, 321 U.S. at 168. Given these exceptionally important constitutional rights and societal interests there is a clear and compelling reason for this Honorable Court to grant this petition for a writ of certiorari. Allowing the Massachusetts Appeals Court decision to stand would have a significant chilling effect on the rights of citizens guaranteed by the First Amendment and would contemporaneously negatively impact society's paramount interest in protecting the health and welfare of children.

## CONCLUSION

For the foregoing reasons this Honorable Court should grant the petition for a writ of certiorari.

Respectfully submitted,
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December 11, 2019

## APPENDIX

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT
18-P-555

FRANK CONDEZ

vs.

CIVIL SERVICE COMMISSION & another[1] (and a companioncase[2]).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, a sergeant of the Dartmouth Police Department (department), was disciplined for sending a letterto the select board of the town of Dartmouth (board) accusing the town's police chief of possible sexual exploitation of a child. The parties agreed to hold a hearing before an officer of the Civil Service Commission (commission) under G. L. c. 31, § 41A. The hearing officer found that the allegations were false and baseless, and

concluded that the letter constituted conduct unbecoming a police officer and provided just cause for termination. The hearing officer also concluded that the letter was neither protected speech under the First Amendment to the United States Constitution nor a protected mandated report under

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[1] Town of Dartmouth.

[2] Frank Condez vs. Leonard H. Kesten & Town of Dartmouth.

G. L. c. 119, § 51A (h). The commission adopted the hearing officer's decision.

The plaintiff then filed two complaints in Superior Court. The first was an action under G. L. c. 30A, § 14, appealing the decision of the commission, in which the town of Dartmouth (town) also appeared as a defendant. The second was a complaint alleging unlawful retaliation under G. L. c. 119, § 51A (h), in which the defendants were the town and Attorney Leonard Kesten, who represented the town in the disciplinary proceedings. A judge of the Superior Court affirmed the decision of the commission in the c. 30A action, and granted summary judgment in favor of the defendants in the unlawful retaliation action. Condez appealed from both judgments, and the appeals were consolidated in this court.

Before us, the plaintiff argues that the First Amendment prohibits his termination because it was in retaliation for the exercise of his right to free speech. He argues in the alternative that he made his statements in the letter in good faith as a mandatory reporter, and that the town unlawfully retaliated against him under G. L. c. 119, § 51A (h). We affirm.

Background. The following facts are taken from the decision of the commission that forms the basis of this appeal. The commission's subsidiary factual findings are undisputed.

The plaintiff, Frank Condez, began his employment with the department in 1998 and was promoted to sergeant in 2010. In 2000, he began to operate a small computer repair business on the side, which was approved by the department.

In 2011, the wife of Timothy Lee, the department's chief, damaged her laptop computer and was unable to access many files on it, including a large number of family photos. Lee brought the laptop to Condez and asked him to recover the files as part of the side business. Condez agreed. He performed all his work on the laptop while off duty, and Lee paid him like any other customer. Eventually, Condez was able to recover some of the files through a process called "cloning," using a device known as a "scratch drive" to temporarily retain the files. He purchased a new hard drive for the laptop, transferred the data onto the hard drive, and installed it in the laptop. He then returned the refurbished computer to Lee along with the old, damaged hard drive. He also gave Lee a thumb drive containing the data he had recovered However, without telling Lee, he kept the scratch drive, which contained a copy of the data he had been able to recover from the hard drive. He later claimed that it was his normal practice to eventually wipe and reuse scratch drives for future projects.

For several years, Condez also performed some information technology (IT) work for the department, and was involved in

upgrading the department computers' hardware, software, and operating systems. Starting in March of 2013, some department computers began experiencing problems, and the department's IT director came to suspect that Condez had committed varioustypes of misconduct, the nature of which is not relevant here, regarding the computer upgrades. Condez was placed on paid administrative leave on October 1, 2013. A subsequent internal investigation by the department concluded, on February 6, 2014, that Condez had committed misconduct regarding the upgrades.

In addition, on the day Condez was placed on administrative leave, but before he was so notified, he lodged a complaint that his department locker was entered and his department-issued firearm was missing. He was ordered to take a polygraph test on this issue, administered by a civilian, on October 20, 2013. That day, he entered the police station holding an application for a temporary restraining order to prevent the polygraphtest. According to the commission, he believed in good faith that, according to law, polygraph tests could only be administered by police officers. Eventually, Lee told him that he would be fired if he did not take the polygraph test, and Condez complied.

The department leveled charges of misconduct against Condez related to the computer and polygraph incidents, and a hearing was scheduled before the appointing authority for April 17, 2014. See G. L. c. 31, § 41. On April 3, 2014, Condez's recently-retained attorney sought a continuance of thehearing, and the parties agreed on a new hearing date of June 9, 2014. On June 4 and 5, 2014, Condez, through his attorney, sought another continuance until July 1, 2014 or later due to afamily medical situation. Counsel for the town

responded that he was only willing to continue the hearing until June 17. The hearing, though, never took place.

On June 6, 2014, the day after town counsel rejected his proposed continuance, Condez hand-delivered a letter to the town administrator, addressed to the board.

The letter, which was not on department letterhead, read as follows:

> "Attached are the photos which were recently discovered when initially recovered from Timothy Lee's personal laptop which was given to me by him to be serviced for a failing hard drive. The metadata encoded in these photos tie them to the same brand and model of digital camera used to take numerous other family photos. These are only two of multiple photos of this nature. There is also a possibility that some of the photos were taken out of state. The photos can, at best, be described as disturbing. They are more accurately, possible evidence of abuse or sexual exploitation of a child by him and could be indicative of serious liability for the Town should other victims be discovered. This is being shared with the Select Board in their role as Police Commissioners and based on their duty to supervise the Chief of Police.
>
> "These photos have been provided to the Select Board in a redacted form so they are aware of this serious issue prior to it coming to them from an outside source. It is particularly disturbing to me and I'm sure it will be to the public as a whole that someone in a position of public trust would be involved

and or condone this type of conduct. I'm sure I don't have to explain the severity of something such as this and the duty of the Select Board to investigate something as serious as this. I will be happy to provide all of the original evidence to whatever entity or outside police agency the Select Board decides to have investigate this matter. Given the serious nature of the issues here I don't have to go into great detail as to the consequences for the Town should other victims be discovered given that the Town now has knowledge of the situation. Thank you for your prompt attention to this matter.

"Very Truly Yours,

"Frank Condez"

The first photo, which we shall refer to as Photo 1, is of a small child lying face up in a bathtub, smiling, surrounded by bath toys. The second photo, Photo 2, is of the same child, though apparently older, standing in a bathtub with his hands behind his back, with a square, apparently flat orange object with an image on it stuck to his body and covering his genitals. It is not clear from the picture exactly what the object is or exactly how it is adhered to the child's body. It appears that the object may be a bath toy or a piece of laminated paper and that it may be sticking to the child's body because he is wet. The image on the square object appears to be a pineapple. The photos are of Lee's son. Condez eventually claimed that he only first discovered them in May of 2014 when he was wiping scratch drives for reuse.

Lee was immediately informed of the letter, and that same day contacted the New

Bedford office of the Bristol County district attorney, and demanded to be investigated.

The district attorney's office and the town conducted an investigation into the matter. Lee and his wife cooperated fully with the investigation, were interviewed without representation, and provided the thumb drive Condez had given them in 2011 as well as a CD copy of its contents. (They had thrown away the laptop in 2013 because it stopped working.) Subsequent examination of these materials revealed that the photos were in different sub-subfolders of a subfolder named "Pictures" of a folder named "Documents The Photo 1 sub-subfolder contained 252 separate images.

Photo 1 was one of a sequence of photos of a child playing in a bathtub, all clearly taken at one time. Photo 2 was in a sub-subfolder with 138 separate photos and was the only one of its kind.

On July 3, 2014, Condez walked into the Taunton office of the Department of Children and Families (DCF) and made a formal report under G. L. c. 119, § 51A. The report indicated that Condez was a "mandated reporter" and alleged neglect of Lee's son. The report stated, among other things, that the "[r]eporter said that he was asked by child's father to do some work on his personal laptop computer to retrieve some lost files. While working on the computer, the reporter came across family photos." On July 11, 2014, DCF screened out the report.

Later, on July 23, 2014, the investigator from the district attorney's office knocked on the door of Condez's home and asked to speak with him. Condez was not home, and his mother, with whom he lived, took the investigaor's business card and contact information. The next day, Condez made a DVD copy of the files on the

scratch drive and "forensically wiped" the scratch drive, leaving no recoverable data or metadata on it. The lost metadata would have included when the files were accessed, which could have corroborated or contradicted Condez's explanation of when he first discovered them. Condez claimed that he forensically wiped the scratch drive because he did not want to be in possession of contraband.

While the department's charges against Condez on the computer and polygraph incidents were still outstanding, it added a final charge of conduct unbecoming a police officer based on Condez's letter to the board. The parties agreed to a hearing before the commission pursuant to G. L. c. 31, § 41A, which found no misconduct with respect to the computer and polygraph incidents, but found that Condez's delivery of the letter to the board constituted conduct unbecoming a police officer, because "Condez [made] false accusations amounting to charges that Chief Lee had committed a felony, i.e.[,] child abuse, either knowing them to be false or with reckless disregard." The commission determined that Condez's termination was warranted.

Discussion. Before us, Condez argues that his letter was speech protected by the First Amendment or, alternatively, G. L. C. 119, § 51A, and that it cannot form the basis for his discharge. Subject to an exception discussed below, we are "bound to accept the findings of fact of the commission's hearing officer, if supported by substantial evidence." Leominster v. Stratton, 58 Mass. App. Ct. 726, 729 (2003). We address these arguments in turn.[3]

1. The First Amendment. The First Amendment limits the government's authority to restrict and punish public employees' speech. In evaluating a claim that a public employer's disciplinary action was impermissibly made in retaliation for engaging in speech protected by the First Amendment, we employ

[3] The Superior Court judge granted summary judgment to the defendants in the unlawful retaliation action not on the merits, but because the commission's decision, which the judge had affirmed, barred on collateral estoppel grounds the unlawful retaliation claim. The judge also concluded that Condez's claim against Kesten failed because Kesten was not Condez's employer, and hence could not be liable under G. L. c. 119, § 51A (h). Condez does not challenge either conclusion on appeal, and instead states that the issues in both cases are "nearly identical." He has thus waived any objection to the judge's grant of summary judgment in favor of the defendants.

Even were these arguments not waived, we agree with Condez that the issues in the unlawful retaliation action are essentially identical to the issues in the appeal from the commission's decision.
Because we conclude that the judge was correct in affirming the commission's decision, judgment for the defendants in the retaliation action would also be appropriate on the merits.

the framework first articulated in Pickering v. Board of Educ., 391 U.S. 563 (1968), and later refined in Connick v. Myers, 461 U.S. 138 (1983), and Garcetti v. Ceballos, 547 U.S. 410 (2006). See Pereira v. Commissioner of Social Servs., 432 Mass. 251, 256-257 (2000). We proceed in two broad steps:

> "The first requires determining whether the employee spoke as a citizen on a matter of public concern. . . . If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. . . . If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public."

Garcetti, supra at 418. The second step, known as Pickering balancing, requires us to "balance . . . the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering, supra at 568. The protected status of speech is a question of law for the court, not a question of fact for the agency. See Connick, supra at 148 n.7.

a. Citizen speech and speech on a matter of public concern. We will begin by assuming without deciding that the speech in the letter was made by Condez as a citizen, rather than as a public employee, and that it was on a matter of public concern. Whether this was citizen speech is highly

context- dependent, see Cristo v. Evangelidis, 90 Mass. App. Ct. 585, 592 (2016), and vigorously contested by the parties. We will assume that it was. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." Connick, 461 U.S. at 147-148. See Pereira, 432 Mass. at 257. There is at least strength to Condez's argument that the subject matter of the speech at issue -- a police chief's alleged sexual exploitation of a child -- can be "fairly considered as relating to any matter of political, social, or other concern to the community." Connick, supra at 146. So likewise, we will assume without deciding that it was on a matter of public concern. The fact finder found that it was made by Condez to a third party, it could damage Lee's reputation, it was made with knowledge of its falsity or reckless disregard for its truth, and it accused Lee of a crime, see Ravnikar v. Bogojavlensky, 438 Mass. 627, 628-630 (2003) (describing elements of defamation). We will also assume, however, without deciding that a statement that is actionable as false and defamatory under New York Times Co. v. Sullivan, 376 U.S. 254 (1964), may nonetheless be speech on a matter of public concern. Allowing the government to discharge an employee for uttering a defamatory falsehood might create a chilling effect on protected speech that has an insufficiently weighty social benefit if the defamatory falsehood is not harmful to the government, even though it is sufficiently harmful to a private individual that the First Amendment poses no bar to recovery by that individual in a civil action. To the extent Condez's statement was made with knowledge of its falsity or with reckless disregard for its truth, we therefore consider that in the next step of our analysis.

b. Pickering balancing. Condez wrote that the two photos were "possible evidence of abuse or sexual exploitation of a child." This statement was found to be false, and this finding was supported by substantial evidence for the reasons that follow; indeed, to the extent it is a legal question whether the photos are possible evidence of abuse or sexual exploitation of a child, they are not. They are two out of hundreds of photos taken of this child on this hard drive that Condez, in choosing them, necessarily saw. It would be clear to anyone viewing the photos that they were of the child of the owner of the laptop. None of the photos on the hard drive depict anything that indicates sexual abuse or exploitation of the child. In all the bath photos except Photo 2, in which the child is standing, the child is sitting or lying in a bathtub full of water, surrounded by bath toys. Although his genitals are exposed in some of the photos, there is no indication that his genitals were manipulated or focused on. The photos are of the kind that many parents take of their small children, and are not evidence of sexual abuse or sexual exploitation. No other photos of the child on the hard drive show him in a state of undress or in any way that might possibly be described as sexual or sexualized.

Further, the commission found that Condez made the statement with knowledge of its falsity or reckless disregard of its truth. "Because First Amendment values are at stake," we must make an "independent examination" of the commission's findings on the issue of recklessness or knowingness. Murphy v. Boston Herald, Inc., 449 Mass. 42, 49 (2007). "Although the independent examination is not 'de novo' in the literal sense, . . . core First Amendment values require a searching reassessment . . . ." Id. at 50."[A] finding

of 'reckless disregard' requires proof, not of mere negligence, but thatthe author 'in fact entertained serious doubts as to the truth of his publication.'"Id. at 48, quoting St. Amant v. Thompson, 390 U.S. 727, 730-731 (1968). "That information was available which would cause a reasonably prudent man to entertain serious doubts is not sufficient. In order to [find recklessness, the fact finder must] find that such doubts were in factentertained by the [individual] . . . .The [fact finder] may, of course, reach this conclusion on the basis of an inference drawn from objective evidence . . . ."Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 867-868 (1975).Unlike the test for recklessness in the criminal law, the First Amendment recklessness test is "entirely subjective." King v. Globe Newspaper Co., 400 Mass. 705, 719 (1987), cert. denied, 485 U.S. 940, and 485 U.S. 962 (1988).

It might be the case, and we need not decide, that an individual who viewed Photo 2 could believe, with a mental state less culpable than recklessness, that it was possible evidence of sexual abuse or exploitation of a child. It is a stand-alone photo, and an object whose nature is difficult to discern has adhered to the child's body covering his groin area. If Condez actually thought this was evidence of sexual abuse or exploitation, even if he was negligently wrong, of course, his statements would be protected. The contents of his letter, however, demonstrated that Condez in fact understood both pictures to be nothing more than innocent bath photos. The letter stated that the attached photos were "only two of multiple photos of this nature." This statement implied, given what our independent examination of the record reveals as the obvious innocence of the other photos, that Condez subjectively understood

that Photo 2 was nothing more than the innocent bath photo it is. That he then wrote otherwise is objective evidence that he knew his accusations were false, or, at the least, entertained serious doubts about their truth. We therefore conclude, based on our independent review of the record, that, as a matter of law, Condez's false and defamatory statements were made with at least reckless disregard for their truth, if not knowledge of their falsity, and that his interests in making the statements were minimal.

By contrast, the efficiency of the government's operations was significantly hampered by Condez's statements. Condez's letter delayed his hearing on the computer and polygraph incidents. Moreover, Condez's false and inflammatory letter caused several unnecessary investigations into Lee, resulting in the needless expenditure of resources and the distraction of Lee and other town personnel from their normal duties. And the government, of course, has a strong interest in protecting the integrity of its law enforcement officers against baseless accusations that they are menaces to society. We therefore conclude that the Pickering balancing favors the town, and that the First Amendment does not bar Condez's discharge on the basis of this letter.

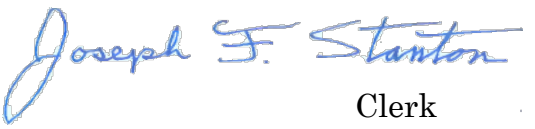
2. General Laws c. 119, § 51A. Condez also argues that his statement was protected by G. L. c. 119, § 51A (h), which provides, "No employer shall discharge, discriminate or retaliate against a mandated reporter who, in good faith, files a report under this section, testifies or is about to testify in any proceeding involving child abuse or neglect." But the letter was not a report under § 51A. It was not filed with DCF as required by the statute. Condez argues that this was a report filed pursuant to G. L. c. 119, § 51 (a), which provides,

> "If a mandated reporter is a member of the staff of a medical or other public or private institution, school or facility, the mandated reporter may instead notify the person or designated agent in charge of such institution, school or facility who shall become responsible for notifying the department in the manner required by this section."

Passing on whether the police department is a "public . . . institution . . . or facility" within the meaning of the statute, we see no error in the commission's conclusion that the letter was not a report filed in good faith under the statute. Condez filed a direct report with DCF about the photos less than thirty days after his letter to the board. If Condez sent the letter in the good faith belief that he was filing a report in fulfillment of his duty under the statute, there would have been no need for him to make a second, direct report to DCF. The commission's conclusion that this was not a report filed in good faith by Condez is therefore supported by substantial evidence.

Conclusion. In civil action no. BRCV2014-00836, the judgment is affirmed. In civil action no. 1673CV00796, the judgment is also affirmed.

So ordered.
By the Court (Rubin, Sullivan & Neyman, JJ.[4]),



Clerk

Entered: June 6, 2019.

[4] The panelists are listed in order of seniority.

**COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, SS.** **CIVIL SERVICE COMMISSION**
One Ashburton Place - Room 503
Boston, MA 02108
(617) 727-2293

**FRANK CONDEZ,**
*Appellant*
v.
**TOWN OF DARTMOUTH**,
*Respondent*

**Docket No.: D-14-192**

Appearance for Appellant: Jack J. Canzoneri, Esq.
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Commissioner: Paul M. Stein[1]

**DECISION (Corrected 10/19/2015)**

The Appellant, Frank Condez, filed this appeal with the Civil Service Commission (Commission) on August 6, 2014, alleging he had been unlawfully suspended by the Respondent, the Town of Dartmouth (Dartmouth) from the position of Sergeant with the Dartmouth Police Department (DPD). At the pre-hearing conference held by the Commission on September 12, 2014, the parties

stipulated that Sgt. Condez had not been suspended but had been placed on paid administrative leave on October 1, 2013, that no appointing authority hearing had been held, that no disciplinary action had been taken against him within the meaning of G.L.c.31,§41, and that the notice of "suspension for cause" Dartmouth issued had been sent in error. Dartmouth moved to dismiss the appeal as premature. By "Joint Motion to Amend Appeal

[1] The Commission acknowledges the assistance of Michael Chin, Esq., in drafting this Decision.

and to Hold G.L.c.31,§41A Hearing" dated October 14, 2014, the parties then agreed to dispense with the appointing authority hearing and submit the dispute to a disinterested hearing officer designated by the Chairman of the Commission pursuant to G.L.c.31,§41A. I was designated to conduct the Section 41A hearing[2] and to make findings of fact and recommendations to the Commission as to a final and binding decision on the charges proffered in Dartmouth's letter (the Charge Letter) dated July 28, 2014, entitled "Notice of Charging & Disciplinary Hearing Pursuant to G.L.c.31,§41". (*Exh. 2*)

Evidentiary hearings were held at the UMass School of Law in Dartmouth MA over seven days (November 18, 2014; November 20, 2014; December 12, 2014; December 19, 2014;
January 5, 2015; January 29, 2015; and February 23, 2015). The witnesses were sequestered. The hearing was declared private as no party requested a public hearing. The hearing was digitally recorded.[3] Forty-seven (47) exhibits were received in evidence at the hearing. The record remained open and the Appellant submitted sur-rebuttal evidence on February 26, 2015. The Respondent submitted its response to Appellant's sur-rebuttal on March 12, 2015. These post- hearing submissions were marked P.H. Exh. 48. The evidentiary record closed on March 18, 2015. Both parties submitted post-hearing proposed decisions on May 11, 2015.[4]

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[2] The hearings were conducted pursuant to the Standard Rules of Adjudicatory Procedure, 801 C.M.R. 1.01 (Formal Rules) adopted by the Commission.

[3] On its own initiative, Dartmouth arranged for a stenographic transcript (the "Dartmouth Transcript") to be made from the digital recording, which it supplied to the Commission and the Appellant's counsel with the filing of its proposed decision. The

Commission treats the Dartmouth Transcript as an addendum to Dartmouth's Proposed Decision and Post-Hearing Brief. The official record of the proceedings is the digital recording. 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 person 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 as the official record from which to transcribe the recording into a written transcript. The Commission neither approves nor precludes either party from employing the Dartmouth Transcript for that purpose.

[4] The Appellant objected to Dartmouth's supplemented post-hearing brief on the grounds that it exceeded the scope of technical changes for which leave was granted. The objections are overruled as I find the changes were reasonably appropriate and were not prejudicial to my consideration of the Appellant's claims.

## FINDINGS OF FACT

Based upon the documents entered into evidence, the stipulation of the parties, the testimony of:

*Called by Respondent*:

- DPD Chief Timothy Lee, Chief, DPD
- Mrs. Lee [Chief Lee's spouse]
- DPD IT Director, Anthony Souza
- Alfred Donovan, President, APD Management, Inc.
- Kenneth Bell, Cyber Engineer, Raytheon Co.
- Robert Pomeroy, Esq., Pomeroy Resources, Inc.
- MSP Trooper Daniel Giossi
- MSP Trooper Hollis Crowley

*Called by the Appellant*:

- DPD Sergeant Frank Condez, Appellant
- DPD Sergeant Scott Lake

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations and case law, and drawing reasonable inferences from the evidence I find credible, I make the following findings of fact:

Background

1. The Appellant, Frank Condez, is employed as a Sergeant by the DPD. He began his employment with the DPD as a patrol officer in 1998 when he took the Civil Service Examination and entered into the police academy. (*Testimony of Condez*)
2. Sgt. Condez is a member of the Dartmouth Police Brotherhood (Union). He has served as the Union's president since April 2011. (*Testimony of Condez*)

3. Sgt. Condez has been on paid administrative leave as of October 1, 2013. (*Testimony of Condez*)
4. Timothy Lee was appointed DPD Chief effective March 23, 2010. He previously served with the Police Department of the City of Providence, RI, where he was promoted to Lieutenant in 2000 and Captain in 2009. (*Testimony of Chief Lee*)

5. The DPD has approximately 65 sworn officers. David Cressman is the Dartmouth Town Administrator and the Dartmouth Select Board is the DPD Appointing Authority. (*Testimony of Chief Lee*)
6. Prior to Chief Lee's hire by the DPD, Mark Pacheco served as DPD Police Chief until 2009. Deputy Chief Gary Soares served as acting DPD Chief of the DPD from 2009 to March 2010 and remained as Deputy Chief until he retired. (*Testimony of Chief Lee*).
7. Prior to Chief Lee joining the DPD, the Appellant, then a patrol officer, had taken a Civil Service Exam for promotion to sergeant. When Chief Lee joined the DPD, (then) Officer Condez was first on the promotional list and was engaged in litigation with Dartmouth regarding his promotion. (*Exh.4; Testimony of Chief Lee*)
8. Chief Lee believed that DPD officers deserved a "fresh start" with him as Chief. In April 2010, he approved Officer Condez's promotion to Sergeant. (*Testimony of Chief Lee*)
9. On or about October 15, 2010, Sgt. Condez reached an agreement with Dartmouth to resolve the litigation which included a Consent Order establishing the agreed terms of his seniority as Sergeant. (*Exh. 4; Testimony of Chief Lee*)
10. Sgt. Condez, Chief Lee, Deputy Chief Soares and Town Administrator Cressman all had the understanding that their settlement was intended to, and did grant, Sgt. Condez full (both Union and civil service) retroactive seniority status as a sergeant going back to 2004. (*Exh. 4; Testimony of Chief Lee & Condez*)

11. Sergeants bid annually in the month of January for their shift assignments, to take effect the following March. (*Exhs. 4, 40ID; Testimony of Chief Lee*)
12. In January 2011, when the bid list for that year was posted, Sgt. Condez was listed junior to other sergeants (who had been promoted before him but after his negotiated retroactive seniority date pursuant to the Consent Order) and whom he believed should be junior to him pursuant to that agreement). Sgt. Condez protested the discrepancy but, as his first choice of shift assignment was open (the 8:00 a.m. to 4:00 pm "day shift" he had worked since July 2010) his 2011 choice of assignment was not affected. Sgt. Condez remained on the 8:00 a.m. to 4:00 p.m. "day shift". (*Exh. 4; Testimony of Condez*)
13. In January 2012, the bid posting had moved Sgt. Condez above the others who had been ahead of him the year before. This prompted the Union to file a grievance questioning whether or not Sgt. Condez should receive such retroactive seniority for collective bargaining purposes, such as shift bidding. (*Exh. 4; Testimony of Chief Lee*)
14. Chief Lee heard the Union's grievance and denied it, siding with Sgt. Condez. (*Exh. 4; Testimony of Chief Lee*)
15. The Union appealed Chief Lee's decision to the Dartmouth Select Board. On March 12, 2012, the Select Board overturned Chief Lee's decision and sided with the Union, deciding that the seniority granted by the Consent Order was meant to be limited to civil service rights, but not collective bargaining rights, thus, denying Sgt. Condez's retroactive seniority clam for shift

bidding purposes. (*Exh. 4; Testimony of Chief Lee*)

16. Chief Lee believed that Sgt. Condez "got screwed" by the decision of the Dartmouth Select Board. (*Testimony of Chief Lee*)

17. On March 19, 2012, Sgt. Condez challenged the Dartmouth Select Bard's seniority determination through a contempt action in Superior Court, seeking enforcement of his right to retroactive Union seniority. (*Exh. 4; Testimony of Chief Lee*)

*18.* In July 2012, Sgt. Condez moved from the "day shift" to the 4:00 p.m. to 12 midnight "evening shift", which he worked through February 2013. (*Testimony of Condez)*

19. When the 2013 shift bids were posted, Sgt. Condez was listed according to the March 2012 decision of the Select Board, i.e., junior to the sergeants whom he believed he would outrank based on his retroactive seniority date. (*Testimony of Condez*)

20. On Friday, March 1, 2013, Sgt. Condez began working the 12:00 a.m. to 8:00 a.m. "midnight shift". He also worked the midnight shift on Saturday, March 2, had days off on March 3 through 5, and next again worked on March 6, 2013. He continued on that shift until July 2013. (*Testimony of Chief Lee & Condez*)

21. On March 19, 2013, the Superior Court held a jury-waived trial of Sgt. Condez's contempt action. By decision dated April 9, 2013, the Superior Court dismissed the action, holding: "While it is clear that the Town agreed to grant Condez retroactive seniority for promotional purposes it is unclear whether it intended to do so for purposes of shift assignments. As the Order

is not clear, a finding of contempt is not warranted." (*Exh. 4*)

22. In July 2013, Sgt. Condez moved back to the "day shift" where he remained until placed on administrative leave in October 2013. (*Testimony of Chief Lee & Condez*)

The 2010 Computer Upgrade

23. Sgt. Condez has run a small computer repair business out of the basement of his home since 2000. He submitted, and the DPD approved, the required disclosure application to engage in this outside secondary employment. (*Testimony of Chief Lee & Condez*)

24. Sgt. Condez has no formal computer training but has had an interest in computers since he was a youth. (*Exhibit 34; Testimony of Condez*)

25. Sgt. Condez briefly provided IT support to the DPD under Chief Pacheco. (*Exhibit 34; Testimony of Condez*)

26. Antone ("Tony") Souza has been the DPD's IT Director since his hire in 2007 by Chief Pacheco. Previously, he was the General Manager for Universal Electronics, a radio equipment business. He has no formal computer training and is self-taught. (*Exh. 9 [Souza Interview]; Testimony of Souza*).

*27.* Mr. Souza is responsible for management of DPD's computer and communications systems, which includes the radios, and a computer network of approximately thirty "generic" desktop workstations, as well as laptops in the DPD cruisers. He is responsible for the annual IT budget, which is about $30,000 to $40,000. He is the DPD computer "administrator", and is only one of two DPD personnel who knew the code (password) needed to access the network. Sgt. Condez never had administrative access or knew the administrative pass code. (*Exh. 9 [Souza Interview]; Testimony of Chief Lee & Sousa)*

28. Administrative rights are elevated access to a computer or computer network. Typically it is given to a person setting up a computer or making changes to the network or a specific computer such as changing administrative settings such as enabling and disabling updates. Rank and file officers, such as Sgt. Condez, did not have this administrative "elevated" access and did not know the administrative password. (*Exh. 9 [Souza Interview]; Testimony of Chief Lee, Sousa, Lake, Bell & Condez*).

29. Prior to 2010, the computer system used Microsoft Windows XP operating system and Office 2003, along with computerized records management (RMS), computer-

assisted dispatch (CAD) and e-mail (IMC) software. (*Testimony of Souza*)

30. When Chief Lee arrived at the DPD, he made it known that he was concerned that the DPD computer system was outdated, in large part because it used Windows XP instead of the newer operating system Windows 7 and the older, outdated version of Microsoft Office. (*Testimony of Chief Lee*)

31. Prior to Chief Lee's arrival in March 2010, Mr. Souza had started purchasing the hardware needed to upgrade the DPD's computer system. He had been experimenting with what he referred to as a "beta" version of Windows 7 that he had installed on one machine he had constructed so that he could test its compatibility with DPD's other systems. (*Testimony of Condez & Sousa*)

32. Sometime over the summer of 2010, Deputy Chief Soares's computer (the Soares Computer) "died". At first, Mr. Souza intended to "put it all back" the way it was [which I infer to mean "reinstalling" Windows XP and Windows 2003] when "they told me to work with Condez" because "he has Windows 7". (*Exh. 9[Souza & Condez Interviews]; Testimony of Condez*)

33. It had become known to Chief Lee that Sgt. Condez had experience working with computers and, in furtherance of his "fresh start" policy to develop a better working relationship with Sgt. Condez going forward, Chief Lee asked Sgt. Condez to get involved in the computer upgrade. Chief Lee emphasized that there was "plenty of money" in the

budget and he wanted to see the Soares Computer and all other DPD computers upgraded as quickly as possible. (*Testimony of Chief Lee, Souza & Condez*)[5]

34. The evidence does not precisely narrow down when Mr. Souza started experimenting with his "beta" Windows 7 upgrade, when the Soares Computer "died", or what software was loaded on it at that point. Date(s) imbedded in the Soares Computer indicate that both Windows 7 and Microsoft Office 2007 were installed on June 5, 2010, but other evidence established that those dates may or may not be accurate and could be off by

[5] Mr. Sousa mostly recalled exchanges with Deputy Soares, not Chief Lee, but I do not credit this testimony, which is inconsistent with the recollections of both Chief Lee and Sgt. Condez. (*Testimony of Chief Lee, Condez & Souza*)

days, weeks, or even months. (*Exh. 9 [ Bell Report]; Exh. 12; Testimony of Condez, Sousa & Bell*)[6]

35. Sgt. Condez did not work on June 5, 2010. He places the bulk of his involvement much later. He remembers this specifically because it involved working over the weekend of October 2, 2010 when he planned to attend a Red Sox tribute to one of his favorite players. He also points to a memorandum he wrote, dated September 29, 2010, purporting to confirm the meeting with Chief Lee about these events. Chief Lee never saw the September 2010 memorandum until years later. Whether the memorandum is a contemporaneous record or a subsequent, self-serving document, the memorandum does persuade me that the timeframe – late summer – stated in that memorandum probably was, in fact, when the bulk of the work was performed to update the DPD computers as Sgt. Condez recalled. (*Exh. 21; Testimony of Souza & Condez*)

36. I also find Sgt. Condez's involvement with the Windows 7 upgrade most likely began with attempting to restore the Soares Computer and he worked on that computer first. (*Exh. 5; Testimony of Souza & Condez*)

*37.* After doing some on-line research, Sgt. Condez concluded that the cause of the problem Mr. Souza had encountered (what Condez called "nag screens") was the fact that the initial authorization period had expired for whatever version of Windows was then loaded on the machine. (*Exh. 9 [Condez Interviews]; Testimony of Condez)*

38. Most Windows products give the customer a

default "product key", enabling a 30-day window of free use before the customer must purchase and enter into the computer an authorized permanent product key that verifies that the customer has purchased his/her

[6] Among the discrepancies with the dates is that the embedded clock showed that the Windows 7 operating system was allegedly installed on the Soares Computer hours after the Office 2007 software, which it was undisputed is an impossibility. Also, other analysis placed installation of Office 2007 on other computers two months later. (*Exh. 12*)

copy of the product legally. (*Testimony of Souza, Condez, Bell*)

39. According to Microsoft on-line documentation introduced in evidence, "pre-release" versions of "Windows 7 Beta" had an expiration date of August 1, 2009. Windows 7 Release Candidate (RC) expired as June 1, 2010. After those dates, a computer with these pre-release versions will start with a "black screen", a message appears that the Windows version is not genuine, and the computer shuts down and restarts every two hours, which is intended to prompt the customer to install the officially released version of the software. (*Exh. 9 [ Bell Report]; Exh. 12; Testimony of Condez, Sousa & Bell*)

40. Permanent product keys may be purchased individually for a single computer or as "group keys" which enable activation of multiple copies of the product (which "count down" each time the key is entered into a different computer, until the total number of purchased installations is reached). (*Testimony of Souza, Condez, Bell*)

*41.* There are also so-called OEM keys that are associated with volume licenses granted to one or more specified computer manufacturers which enables the manufacturer(s) to pre-load their brand-name (OEM) computers for resale with Microsoft Windows 7 already installed. OEM keys are not authorized for use on computers from other manufacturers other than the ones specified for the license or the "generic" custom-built computers such as those deployed at the DPD. (*Exh. 9A;*

*Testimony of Bell & Condez)*

42. The typical cost for a product key needed to authenticate one copy of Windows 7 runs about $200 to $250. The cost to acquire an Office 2007 product key runs about $150 to $175 per copy. (*Testimony of Souza, Bell & Condez*)

43. Sgt. Condez found on-line what he called an "activation patch" that would eliminate "nag screens" and enable the Soares Computer to run Windows 7 immediately and "indefinitely". He installed the patch. (*Exh. 9 [Condez Interview]; Testimony of Condez*)

44. The "patch" that Sgt. Condez employed worked by making certain changes to the settings that overrode the activation components of the Windows 7 software. The "patch" was not a Windows-authorized product and did not substitute for the required purchase of a genuine "product key" for the Windows products. I find that both Sgt. Condez and Mr. Souza knew these facts. (*Testimony of Condez & Souza*)

45. In order to update other DPD computers to Windows 7, certain hardware (e.g., hard drive, motherboard, etc.) had to be replaced to handle the new software (e.g., Windows 7 and Office 2007.[7] (*Exh. 9 {Condez Interviews]; Testimony of Souza & Condez*)

46. As a stop-gap measure, Sgt. Condez brought an unopened box from home containing a Windows 7 upgrade disk and product key to "cover" the Soares Computer. Sgt. Condez placed the box in Deputy Chief Soares's office and stated: "Deputy, this box covers your computer, if anybody asks." At no time was the box opened in order to use the product to upgrade any machine. (*Exhs. 9 [Condez*

*Interviews]; 10 & 10A; Testimony of Condez*)

47. The evidence of Sgt. Condez's work on the Soares Computer focused on the Windows 7 operating system "patch". Neither Mr. Souza nor Sgt. Condez claimed that they had loaded Office 2007 software on the Soares Computer. Although Office 2007 obviously had been loaded at some point, no conclusive evidence was provided as to when or how that was done. (*Exhs. 9A, 9B & 12; Testimony of Souza, Bell & Condez*)

48. At some point after the Soares Computer had been fixed, Sgt. Condez and Mr. Souza spent a weekend at the DPD to assemble and deploy the necessary additional DPD computers. As I noted earlier, I find this work was most likely done in the late summer as

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[7] The parties all assumed that Office 2007 was the then current version. Although there is also an Office 2010 version, I infer that it was not released until a later date and was not the version installed in the summer of 2010.

Sgt. Condez recalled. (*Exh. 9 [Condez Interviews]; Testimony of Souza & Condez*)

49. Mr. Sousa brought the hardware he had acquired to Sgt. Condez who assembled the parts into a working computer and returned the machine to Mr. Souza to configure and install on the DPD network. Sgt. Condez used Deputy Chief Soares's hard drive as the "base" hard drive. He" cloned" each hard drives for assembly into the DPD computers using the base hard drive, meaning he made an exact "bit for bit" copy of everything that was on the Soares Computer hard drive. Therefore, any programs or files on the Soares Computer at the time of the cloning would also be on the cloned hard drives used on the rest of the DPD's computers. I find that both Sgt. Condez and Mr. Sousa knew these facts. (*Exh. 9 [Souza Interview; Condez Interviews]; Testimony of Condez & Souza*).

50. Cloning, in and of itself, does not constitute improper conduct. On the contrary, it is considered the efficient and standard practice in the computer industry when involved in multiple installations of software onto a computer (*Testimony of Condez & Bell*).[8]

51. As Sgt. Condez finished assembling the hardware for each machine, including the cloned hard drives, Mr. Souza deployed each of the machines to their assigned locations and connected them to the DPD's computer network servers. Each computer Mr. Souza put on the network was given a name on the network, i.e., "booking 1," "booking 2," and "booking 3." As he later admitted, Mr. Souza did not take the required steps to restrict administrative access to these newly

configured machines solely through the network password that only he knew. (*Testimony of Souza*).

52. Mr. Souza left the "stickers" that identified the Windows XP product key numbers for the operating system that had previously been installed on each computer. He did not

[8] Mr. Souza was the only witness who said he disapproved of cloning. (*Exh. 9 [Sousa Interview]; Testimony of Souza*)

purchase any new product keys for Windows 7 or Office 2007 for any of the DPD computers that Sgt. Condez upgraded in 2010. He "assumed" Sgt. Condez had purchased the keys. He was "concerned" that the same old product key stickers were on the machines when he got them back from Sgt. Condez, but Mr. Souza never asked Sgt. Condez to provide him with any new keys, group license information or the product key numbers for any of the upgraded machines. (*Testimony of Chief Lee, Souza & Condez*)

The Repair to Chief Lee's Wife's Laptop

53. Chief Lee married his wife in 2001 and they have one child, a son, born in 2005. They relocated to Massachusetts from Rhode Island following Chief Lee's appointment to the DPD. (*Testimony of Chief Lee*)

54. In 2011, Chief Lee's wife owned a small ASUS brand laptop computer. This laptop did not have a CD/DVD drive into which a CD or DVD could be inserted. She used the laptop mainly to browse the Internet, listen to music, and to store digital photos that she took. (*Testimony of Chief Lee & Mrs. Lee*)

*55.* Chief Lee's wife routinely took pictures of her son on a camera and on her phone and would store the photos on her laptop computer. She took all the photos at issue in the current hearing. (*Testimony of Mrs. Lee).*

56. Chief Lee's wife knocked her laptop off a table. Thereafter, she was unable to turn the computer on or access the files stored on it. She was quite upset over this and

was particularly upset at losing family photos. (*Testimony of Chief Lee & Mrs. Lee*).

57. At some point soon thereafter, Chief Lee spoke with Sgt. Condez about his wife's damaged laptop. He asked Sgt. Condez if it would be possible to examine the laptop as part of his outside computer repair business and see if files could be recovered, including family photos. (*Testimony of Chief Lee & Condez*).

*58.* Sgt. Condez indicated that he would look at the laptop and see if he could recover the files. Sgt. Condez asked where the important data was stored and Chief Lee told him that it was stored in the "My Documents" folder. (*Testimony of Chief Lee)*

59. Chief Lee and Sgt. Condez agreed that Sgt. Condez would work on the laptop exclusively during his off-duty time as part of his independent computer repair business and charge Chief Lee like any other customer. (*Testimony of Chief Lee*)

60. It was not uncommon for DPD officers to hire fellow officers who operated side businesses. (*Testimony of Chief Lee*)

61. Chief Lee brought the laptop to work and gave it to Sgt. Condez in the DPD's parking lot. He stated, "Let me know what you can do." Sgt. Condez said, "Okay, I'll get back to you." (*Testimony of Chief Lee & Condez*)

62. Sgt. Condez worked on the laptop for approximately "a week or two." He worked on the computer in the basement of his parents' house, the area where he had a workspace and ran his small computer repair business. (*Testimony of Condez*)

63. In his workspace, Sgt. Condez has a specially-

configured computer for data recovery.

This computer has many "docks" that allow for him to hook up several hard drives to do tasks, such as data recovery and hard drive cloning. (*Testimony of Condez*)

64. Sgt. Condez was partially successful in recovering data from the laptop but some files were beyond repair and could not be recovered. Sgt. Condez told Chief Lee that he would get the laptop back to him as soon as he was finished recovering the files. (*Testimony of Chief Lee & Condez*)

65. Sgt. Condez purchased a new hard drive for the laptop and transferred the data from the old, damaged hard drive to the new hard drive. Sgt. Condez then placed the new hard drive back into the laptop. (*Testimony of Condez*)

66. Sgt. Condez gave Chief Lee the laptop back with a new working hard drive installed and gave Chief Lee the old broken hard drive. Sgt. Condez also delivered a thumb drive to Chief Lee containing a copy of the data that Sgt. Condez said he had recovered. The project took several weeks. (*Testimony of Chief Lee & Condez*)[9]

67. Chief Lee gave the laptop and thumb drive to his wife which she placed it in a cup next to her bed where she stored miscellaneous items. She engaged a professional photographer to take photos of her son for Easter about a year later and, with the help of Chief Lee, put the photos on the thumb drive. The thumb drive was placed back in the cup next to her bed and remained there until June 2014. (*Testimony of Chief Lee & Mrs. Lee*)

68. The laptop failed again in approximately September or October 2013 and it was

discarded in approximately November 2013. Chief Lee purchased a new laptop for his wife as a Christmas gift that year. (*Testimony of Chief Lee &Mrs. Lee*)

The March 2013 Activation Screen Issues

69. Until March 2013, the DPD's computers operated without further significant problems.

They received software updates in the ordinary course. The only issues that Mr. Souza remembered from this period included networking problems and loss of some files. There is no evidence that Sgt. Condez had any further involvement with the DPD computers until the alleged incidents in March 2013. (*Testimony of Chief Lee, Souza & Condez*)

70. Prior to March 2013, Mr. Souza had engaged an outside vendor known as Enforsys to

[9] Sgt. Condez testified he gave a copy of the contents back to Chief Lee in the form of a DVD, not a thumb drive. I do not credit this testimony, as the laptop did not have a disk drive and it is implausible that he did so or that both Chief Lee and his wife would have essentially these same (mistaken) recollections about it. (*Testimony of Chief Lee, Mrs. Lee, Condez & Crowley*).

replace DPD's computerized records systems (CAD/RMS). In January and February, Souza and Enforsys personnel had been at DPD to install their product on the DPD's servers and desktops and had made a number of failed attempts to go "live". Ultimately, around the first week of March, Mr. Souza abandoned the project and uninstalled the Enforce product from the DPD's network servers and desktops. (*Testimony of Souza*)

71. On Friday, March 1, 2013, Mr. Souza learned that one of the booking room computers had a dialogue box come up indicating that it needed a "valid key". (*Testimony of Souza*).

72. In response, Mr. Souza entered a Windows 7 product key number that he had on hand which removed the warning and he thought nothing further about it. At his investigatory interview, Mr. Souza said he used what he called an "OEM install" product key code that he had purchased to license about seven additional computers. At the Commission hearing, Mr. Souza said these were "OEM keys; they can be installed, basically, on anything; you can build any hardware that you want to build and install it that way." (*Exh. 9 [Souza Interview]; Testimony of Souza*)

73. On Monday, March 4, 2013, Mr. Souza learned that two more booking room computers and one in the interview room had the same issue with a dialogue box come up indicating that the Microsoft Windows 7 operating system key was not valid. Again, Mr. Souza used the "OEM keys" that he had on hand to fix the problems. (*Testimony of*

*Souza*).

74. Mr. Souza knew that these developments implicated the authenticity of the product keys on other DPD computers. He informed Deputy Chief Szala (Deputy Soares's replacement).Chief Lee ordered whatever necessary done to finally fix the problem immediately, buying as many new keys as he needed. (*Testimony of Chief Lee & Souza*)

75. At 1:28 p.m. Mr. Souza placed a call to Sgt. Condez (who was off-duty) regarding the issues with the computers. The call lasted 22 minutes. (*Exh. 28; Testimony of Condez*).

76. Mr. Souza had limited recollection of the telephone conversation.[10] He recalled only that he asked Sgt. Condez "professional to professional" to tell him "what's going on" and Sgt. Condez replied that he was "pissed off" being put on the midnight shift and he "went to Microsoft and shut them off . . . disabled the keys." (*Testimony of Souza*)

77. Mr. Souza claimed that, based on this remark, he assumed Sgt. Condez shut off the keys by going to Microsoft's website. Neither he, nor any other witness at the Commission hearing explained how Sgt. Condez could have done this. I find that Sgt. Condez's remarks were sarcastic. I do not construe them as an admission that Sgt. Condez did what Mr. Souza said he assumed had happened or that even Mr. Souza actually believed he did so. (*Testimony of Souza, Bell & Condez*)

78. Sgt.. Condez recalled his conversation with Mr. Souza clearly, which he took on his cell phone in a supermarket parking lot. While I do not credit all the statements Sgt. Condez attributed to Mr. Souza during this

conversation, especially what Mr. Souza allegedly said about Chief Lee's suggestion that they could "rig" the computers to make them work, I do credit Sgt. Condez's testimony to the extent it plausibly described Mr. Souza's expressed personal concern that the problem would "end up coming back on me", and he was asking Sgt. Condez to help him so he wouldn't get "in trouble." Sgt. Condez said he was no longer "around days to fix stuff" and refused to get involved. Mr. Souza hung up the phone on Sgt. Condez very upset. (*Testimony of Condez*)

79. At some point on March 4, 2013, most likely after the conversation with Sgt. Condez,

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[10] Mr. Souza puts his call to Sgt. Condez as "very early" in the morning and immediately before going to Deputy Szala and Chief Lee and ordering new keys, but the credible evidence establishes that his version is mistaken. His conversations with his superiors had to have occurred before his call to Sgt. Condez, or contrary to his testimony, he waited most of the day before reporting the problem. (*Exh.9 [Souza Interview]; Testimony of Souza*)

Mr. Souza "overnighted" an order for fifty (50) brand new Windows 7 product keys. He received the first twenty-five keys the next day, and shortly thereafter received the remainder. (*Exh. 9 [Souza Interview]; Testimony of Souza*)

80. Mr. Souza then removed and reinstalled the Windows 7 and Windows 2010 software using the product keys he had recently purchased. No further shut-downs occurred. (*Testimony of Souza, Bell & Condez*)

81. Chief Lee contacted Kevin White of the Federal Bureau of Investigation. The FBI referred Chief Lee to Tom Montgomery, a civilian investigator from Microsoft. (*Testimony of Chief Lee*)

82. On March 19, 2013, investigators from Microsoft came to the DPD and made an on-site review of the DPD computers, including the Soares Computer and twenty-eight other desktops deployed throughout the DPD. (*Exhibits 9A & 12*)

83. Katie Hasbrouck, an Anti-Piracy Specialist for Microsoft reviewed three product keys that she received as part of the Microsoft on-site review (keys numbers ending in PW467, 3P7D8 and 7TP9F). Ms. Hasbrouck's report established the following facts:

- Sixteen of the computers (including the Soares Computer) showed that they had been loaded, initially, with the identical, genuine Microsoft Windows 7 product key (ending in PW487). This key is the one that enables the user the 30-day window of use before having to enter a permanent key. (*Exh. 9A; Testimony of Condez*)

- For reasons not explained in the report or in testimony, no initial "30-day" key was "captured" or reported for one of the booking room computers, and several others. (*Exh. 9A*)
- All of the computers, save for the Soares Computer, showed that they had been loaded using individually numbered (not "OEM" or "group") Windows 7 product keys. Microsoft did not evaluate the authenticity of any of these product keys because it had been told they were purchased by the DPD "after the incident was discovered." (*Exh. 9A*)
- All of the computers, save for the Soares Computer, showed that they had been loaded with the identically numbered Office 2007 product key (ending in 3P7D8), that was a counterfeit key. (*Exh. 9A*)
- The Soares Computer showed that it had been loaded with Windows 7 using a genuine "OEM" product key (ending in 7TP9F) that was authorized for use only on Acer, Gateway, and Packard Bell computers and "never should have been installed on this generic computer". (*Exh. 9A*)
- The Soares Computer also showed that it had been loaded with an Office 2007 product key (ending in 94THW) that was different from the key found on all other DPD computers and was not one of the three keys that Ms. Hasbrook had specifically stated she had received and reviewed. The chart that accompanied her report, however, stated that this key was counterfeit, although how this

determination was made is not clear as, according to Ms. Hasbrook's report, she did not examine or research that key number. (*Exh. 9A*)

- Twenty-three of the computers (but not the Soares Computer or any of the booking room computers) had been loaded with Office 2010, using separate, individually numbered product keys, none of which were analyzed for authenticity "since the key was purchased by [DPD] after incident was discovered". (*Exh. 9A*)

DPD's Internal Investigation

84. Chief Lee hired Alfred Donovan to investigate the issues with the DPD's computers. (*Testimony of Chief Lee*)

85. Mr. Donovan served for the Tewksbury Police Department from 1976 to 2009, where he eventually rose to the rank of chief of police. Since 2009, he has run an investigative service for police departments. (*Testimony of Donovan*)

86. Mr. Donovan hired Kenneth Bell to assist with the technical aspects of the investigation. (*Testimony of Donovan*)

87. Mr. Bell earned a master's degree in computer science from Norwich University. He was the supervisor of the Computer Crimes Unit for the Rhode Island State Police for twenty years. (*Testimony of Bell*)

88. Mr. Donovan produced a report dated February 6, 2014 that opined that Sgt. Condez was responsible for installing the counterfeit Microsoft Office 2007 product key and the unauthorized OEM Windows 7 product key on the DPD's computers in 2010,

as well as the subsequent removal of the Windows 7 keys in 2013. (*Exhs 9 & 9B*)

*89.* Messrs. Donovan and Bell relied upon their interviews of Mr. Souza on November 6, 2013 and three days of interviews with Sgt. Condez on November 1, 2013, December 2, 2013 and January 7. 2014. (*Exhs 9 & 9B; Testimony of Donovan & Bell)*

90. The only unaltered computer that was available for inspection was the Soares Computer.

All other DPD computers had been "flattened" by Mr. Souza in October 2013, shortly after Sgt. Condez was placed on administrative leave. By flattening the computers, Mr. Souza, "forensically wiped" the hard drives of all the software and other "meta-data" (installation history, log-on history, etc.), erasing the computers' hard drives and loaded them from scratch, thus obliterating all history of what had been loaded and unloaded from them. He explained that he did this to "stop the rumor mill" that Sgt. Condez had a back door into the DPD's system and this "weighed heavily" on him. (*Testimony of Souza, Bell, Giossi & Condez*)

91. Mr. Bell first presented the theory that a user could manually, with administrative access, use a SLMGR tool[11] to remove the product key with the "/upk" command, which would allow a user to undo the changes made by the "activation patch" installed by Sgt. Condez and would cause the error messages that were happening to the DPD's computers. (*Exhs. 9, 9B & 27; Testimony of Bell*)

*92.* As indicated in the finding above, however, Sgt. Condez denied that he ever had administrative rights and

Dartmouth presented no evidence that he had such rights. (*Testimony of Condez & Souza)*

*93.* A person using the SLMGR tool would have to have network administrative rights and either be physically sitting at the computer or access the computer remotely. Dartmouth produced no evidence showing that someone without administrative access could use the SLMGR tool to remove product keys remotely. (*Testimony of Bell)*

94. On the final day of the hearing, Dartmouth presented a second theory on how the Windows 7 product keys could be removed from the DPD's computers. Mr. Souza opined that, as of March 2013, it was possible to remove the Windows 7 product key without network administrative access if Sgt. Condez had been physically at a computer's workstation. (*P.H. Exh. 48; Rebuttal Testimony of Souza*)

95. Mr. Souza explained that this would have been possible because, when he put the

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[11] Software Licensing Management Tool, which would allow a user to undo the changes made by the activation patch installed by the Appellant. (*Exh. 27*)

computers onto the DPD's network, he gave them a name and an IP address but, as indicated in Finding of Fact No. 51 above, he had not taken steps to restrict such access as part of the 2010 upgrade process. Mr. Sousa opined that, therefore, a user could bypass the network and gain administrative access by logging onto the network locally. A user would have to press the control, alt, and delete buttons simultaneously to get the login and password screen. At this point a new login screen was accessed and a user could log in locally by typing the name of the computer (e.g. "booking1") as the user and leave the password blank. This would give a user administrative access to that particular computer. A user could then access the control panel and remove the product key by using the "change product key" button. (*Rebuttal Testimony of Souza*)

96. Mr. Souza admitted on cross-examination that his opinion was not based on any actual experience as he never attempted to test his hypothesis and was unclear as to whether or not it would actually work. (*Rebuttal Testimony of Souza*)

97. The DPD had surveillance cameras recording 24 hours a day, seven days a week during the time of the computer issues. The cameras recorded the booking area where Sgt. Condez would have had to sit to physically access and remove the Windows 7 product keys as the DPD contends. The cameras record to a DVR-type device that can store footage for up to three weeks. (*Testimony of Chief Lee & Souza*)

98. At no point did the DPD or Mr. Donovan

look at the recordings during their investigation. When Chief Lee was asked why this was never done he stated that he "didn't have a good answer". (*Testimony of Chief Lee*)

The Restraining Order

99. On October 1, 2013, the day Sgt. Condez was placed on administrative leave, but apparently before he was notified, he complained that his locker had been entered and his DPD-issued firearm was missing. The DPD initiated an investigation into the incident, conducted by Mr. Donovan. As part of the investigation, Sgt. Condez was ordered to participate in a polygraph test. (*Exhs. 7 & 9 [Investigative Report 2/6/2014]; Testimony of Chief Lee & Donovan & Condez*)
100. The polygraph test was scheduled for December 20, 2013 on the third floor conference room of the DPD Headquarters at 11:00 a.m. (*Testimony of Chief Lee & Condez*)
101. The day before the test, Sgt. Condez learned that a civilian, John "Jack" Consigli, was to administer the polygraph exam. (*Testimony of Condez*)
102. Based on his research of Massachusetts polygraph law, Sgt. Condez believed polygraphs of law enforcement officers had to be administered by a police officer. Although the law is not clear, I find that Sgt. Condez did hold a good faith belief that his construction of the law was correct. (*Exh. 8; Testimony of Chief Lee, Condez & Donovan*)
103. When Sgt. Condez entered the station on December 20th he held a rolled up paper in his

hand, an application for a temporary restraining order ("TRO") to prevent the polygraph test. He had not yet gone to court to seek an order. (*Exhs. 8 & 30; Testimony of Condez*).

104. Upon arrival, Sgt. Condez had a series of conversations with Deputy Chief Szala in the lobby. Sgt. Condez explained that he wanted to go to court and be heard on his TRO. Deputy Chief Szala reported back to Chief Lee who was waiting upstairs. Chief Lee directed Deputy Szala to return to the lobby and find out specifically if Sgt. Condez had obtained a court order. (*Testimony of Condez*)

105. Deputy Chief Szala returned to the lobby and asked Sgt. Condez if he had a court order and when he replied in the negative, Deputy Chief Szala returned to Chief Lee with this information. Chief Lee ordered Deputy Chief Szala bring Sgt. Condez upstairs. DPD Sargent Scott Lake was in the lobby and overheard the final exchanges between the two officers. (*Testimony of Lee, Condez & Lake*)

106. When he entered the third floor conference room, Sgt. Condez held the rolled up TRO application in his hand. Chief Lee, Mr. Donovan, and Jack Consigli met him. When Chief Lee confirmed that Sgt. Condez only had a draft application and had not obtained any official court order signed by a judge, he ordered Sgt. Condez to take the polygraph or hewould be fired. (*Testimony of Chief Lee, Donovan & Condez*)

107. Sgt. Condez complied with Chief Lee's order and submitted to the

polygraph examination on December 20, 2013. (*Testimony of Chief Lee & Condez*) [12]

Charges of Child Pornography

108. On April 3, 2014, Dartmouth received notice that Sgt. Condez had retained counsel (not his present counsel) to represent him at the appointing authority hearing scheduled for April 17, 2014 to consider the three then pending charges of alleged misconduct in the 2010 upgrade of the DPD's computers, the alleged disruption of the computers in 2013 and the polygraph incident. The attorney requested a continuance of the hearing to get up to speed on the issues presented. As a result, a new hearing date of June 9, 2014 was agreed upon. (*Exhs. 8 & 42; Testimony of Chief Lee & Condez*)

109. On June 4, 2014, the attorney sought a second continuance. On June 5, 2014, Dartmouth counsel responded that the Town would reschedule the upcoming hearing, but only if Sgt.

[12] The explanation for the missing gun and resulting polygraph test results did not lead to any charges against Sgt. Condez and were not offered as one of the reasons for the decision to seek to terminate his employment and, therefore, were not considered within the subject matter of this hearing or this Decision.

Condez would agree to a firm hearing date not later than June 17, 2014. Although the attorney was available, due to a family medical situation, through counsel, Sgt. Condez said he was not available until after July 1, 2014. On June 5, 2014, Dartmouth counsel advised that the Town would not postpone the hearing until July or later, and that it would proceed on June 17, 2014. No hearing was held, however, due to the events that followed. (*Exhs. 43; Testimony of Chief Lee & Condez)*

110. On June 6, 2014, Sgt. Condez hand delivered a letter (dated June 5, 2014) to the Dartmouth Select Board c/o Town Administrator Cressman, to which he attached copies of two photographs of Chief Lee's son in an apparent state of nudity. The photos were redacted to cover the child's privates, but the child's face was not disguised, covered or redacted. Sgt. Condez's letter stated:

> "Attached are the photos which were recently discovered when initially recovered from Timothy Lee's personal laptop which was given to me by him to be serviced for a failing hard drive. The metadata encoded in these photos tie them to the same brand and model of digital camera used to take numerous other family photos. These are only two of multiple photos of this nature.
> There is also a possibility that some of the photos were taken out of state. The photos can, at best, be described as disturbing. They are more

accurately, possible evidence of abuse or sexual exploitation of a child by him and could be indicative of serious liability for the Town should other victims be discovered. This is being shared with the Select Board in their role as Police Commissioners and based on their duty to supervise the Chief of Police.

"These photos have been provided to the Select Board in a redacted form so they are aware of this serious issue prior to it coming to them from an outside source. It is particularly disturbing to me and I'm sure it will be to the public as a whole that someone in a position of public trust would be involved and or condone this type of conduct. I'm sure I don't have to explain the severity of something such as this and the duty of the Select Board to investigate something as serious as this. I will be happy to provide all of the original evidence to whatever entity or outside police agency the Select Board decides to have investigate this matter. Given the serious nature of the issues here I don't have to go into great detail as to the consequences for the Town should other victims be discovered given that the Town now has knowledge of the situation. Thank you for your prompt attention in this matter." (*Exh. 3*)

111. The photographs are two of hundreds of family pictures taken by Chief Lee's wife over the years. About a dozen depict their infant son in a state of partial nudity, nearly all of them taken in their home during bath time which was her son's "absolutely funny time." One attached photo depicts the child, at about age one, lying face up in the bathtub, his smiling face and stomach above the water line. His privates are immersed and not visible. The other photo shows the toddler at about age four. Chief Lee's wife heard her son giggling in the bathroom, she entered the room to find him acting silly in front of the bathtub and snapped the picture. (*Exh. 11; Testimony of Mrs. Lee*)

112. Sgt. Condez selected these two photographs to include in the letter because they were "the two that were the most disturbing to me." (*Testimony of Condez*)

113. There were no photos introduced in evidence of any other children in a state of undress. (*Exhs. 17, 23 & 29*)

114. Chief Lee was informed immediately of Town Administrator Cressman's receipt of Sgt. Condez's letter and the attached photos. On the same day he was informed of the letter, Chief Lee contacted the New Bedford Office of the Bristol County District Attorney. Chief Lee demanded that the District Attorney "investigate me", i.e., conduct an investigation into the allegations in the June 5th letter that Chief Lee had engaged in the crime of sexual exploitation of a child. (*Testimony of Chief Lee*)

115. On June 12, 2014, Bristol Country Assistant District Attorney Sylvia Rudman informed Massachusetts State Trooper Hollis Crowley that Chief Lee had contacted the District Attorney's Office regarding the allegations against him. (*Testimony of Crowley*)
116. Trooper Crowley was assigned to investigate the allegations against Chief Lee. Trooper Crowley is an attorney who served as an Assistant District Attorney within the Suffolk County District Attorney's Office from 2001-2005. She has served as a Trooper within the Massachusetts State Police since 2005. She was assigned to the Suffolk County District Attorney's Office in the Massachusetts State Police Detective Unit from 2007 until 2013 when she was transferred to the Bristol Country State Police Detectives Unit ("SPDU"). (*Testimony of Crowley*)
117. On June 13, 2014, Trooper Crowley contacted Chief Lee and asked if he would submit to an interview. Chief Lee agreed to come to the SPDU in New Bedford that same day. (*Testimony of Crowley*)
118. Chief Lee arrived at the SPDU on June 13, 2014 and submitted to an interview by Trooper Crowley without representation by counsel. He also provided Trooper Crowley with the thumb drive that he had received from Sgt. Condez, as well as a copy of the June 5th letter and the attached images of his son. (*Testimony of Chief Lee & Crowley*)
119. Dartmouth retained Attorney Robert Pomeroy to investigate the allegations contained in the June 5th letter. (*Testimony of Pomeroy*)
120. Atty. Pomeroy previously served within the

Town of Plymouth Police Department from 1977-2008, where he attained the ranks of detective, sergeant, lieutenant, captain, and served as Chief of Police from 1992-2008. He also served as the interim Chief of Police for the Town of Hamilton Police Department in 2008-2009, and interim Chief of the Town of Sandwich Police Department in 2010. He was admitted to the Massachusetts Bar in 1996. He is retired from law enforcement and now provides training, consulting, and investigation services to law enforcement agencies through his company, Pomeroy Resources, Inc. (*Testimony of Pomeroy*)

121. On June 17, 2014, Town Administrator Cressman wrote Sgt. Condez stating that Dartmouth had hired Atty. Pomeroy to investigate the allegations of his June 5, 2014 letter and requested that Sgt. Condez cooperate in this investigation. (*Exhibit 14A*)

122. On June 21, 2014, Atty. Pomeroy conducted an interview of Chief Lee, who appeared without counsel. (*Testimony of Pomeroy*)

123. Chief Lee obtained from the State Police a CD copy of the contents of the original thumb drive provided to Trooper Crowley on June 13, 2014. Chief Lee provided this CD to Atty. Pomeroy. The State Police retained Chief Lee's original thumb drive. (*Exh. 17; Testimony of Chief Lee, Pomeroy & Crowley*)

124. On June 21, 2014, Atty. Pomeroy also conducted a separate interview of Chief Lee's wife, who also appeared without representation by counsel. (*Testimony of Pomeroy*)

125. Atty. Pomeroy scheduled a meeting with Sgt. Condez, through his (then) counsel, which

took place on July 1, 2014. (*Testimony of Robert Pomeroy*)

126. Sgt. Condez's (then) counsel asked Atty. Pomeroy if Sgt. Condez was being compelled to speak, to which Atty. Pomeroy stated he was not being compelled to speak because he did not have the authority for such compulsion. Sgt. Condez declined to speak to Atty. Pomeroy and the meeting ended. (*Testimony of Pomeroy & Condez*)

127. At this point, neither Dartmouth nor Sgt. Condez had reported the matter to the Department of Children and Families ("DCF"). (*Testimony of Pomeroy & Condez*)

128. On or about July 3, 2014, without prior notice to Dartmouth, Sgt. Condez walked into the local DCF office in Taunton and made a formal "Section 51A Report" with DCF's Taunton office alleging "neglect of [Chief Lee's son] approximately age 4 by his father". The report stated that Sgt. Condez was a "mandated reporter" who "was asked by the child's father to do some work on his personal laptop computer to retrieve some lost files.

    While working on this computer, the reporter came across family photos……..Reporter made copies of these photos." (*Exh. 24: Testimony of Condez*)

129. On July 11, 2014, DCF closed ("screened out") the Section 51A complaint, concluding: "The allegations do not rise to the level of investigation at this time." (*Exh. 24*)

130. By a letter from the DPD's Internal Affairs Officer Lieutenant Rutch, dated July 18, 2014, Sgt. Condez was notified that he was

"identified as the subject of an official Internal Affairs Investigation". The letter informed him that Atty. Pomeroy was conducting the investigation initiated as a result of the June 5th letter. The letter further instructed Sgt. Condez to meet again with Atty. Pomeroy on July 22, 2014 and bring "all original evidence" described in his June 5th letter. (*Exhibit 14B*)

131. Sgt. Condez had stated in his June 5th letter: "I will be happy to provide all of the original evidence to whatever entity or outside police agency the Select Board decides to have investigate this matter." (*Exhibit 3*)

132. On July 21, 2014, Dartmouth counsel was advised by Sgt. Condez's (then) counsel that Sgt. Condez would meet with Atty. Pomeroy but would not bring "unredacted photos" because Atty. Pomeroy "is not a statutory recipient". The attorney also stated:

> "Of course, if you really were investigating this matter properly, the Chief [Lee] could simply be ordered to turn over the photographs. But if the Sgt is charged with anything relating to this matter, you will get to see the photos in the public hearing when they are offered in poster size as exhibits."

(*Exh. 44*)

133. On July 23, 2014, Troopers Crowley and Daniel Giossi appeared at Sgt. Condez's residence intending to speak with him regarding his allegation of child abuse and exploitation against Chief Lee. (*Testimony of Crowley*)

134. Trooper Giossi was assigned to assist Trooper Crowley with the technical aspects of her investigation. He is a trooper within the Massachusetts State Police assigned to the Detectives Unit for the Bristol County District Attorney's Office. He has served within the State Police since 1996. He is a member of the State Police Internet Crimes Against Children ("ICAC") task force. (*Testimony of Giossi*)

135. Sgt. Condez's mother answered the door. The troopers explained that they were there to speak with Sgt. Condez about allegations he had made regarding child exploitation in his June 5th letter. Trooper Crowley gave Sgt.Condez's mother her business card and written contact information. (*Testimony of Giossi & Crowley*)

136. Sgt. Condez's mother informed her son on July 23rd that the State Police had come to the house regarding his complaint and gave him Trooper Crowley's business card. (*Testimony of Condez*)

137. The next day, Sgt. Condez, with his (then) counsel, attended the second interview with Atty. Pomeroy. Counsel informed Atty. Pomeroy that the Massachusetts State Police had contacted Sgt. Condez the day before. On advice of counsel, Sgt. Condez again declined to make any statement. Atty. Pomeroy requested the original evidence described in the June 5th letter. On advice of counsel, Sgt. Condez declined, citing case law that Atty. Pomeroy was not an appropriate party to receive the evidence and that the evidence would be turned over to the State Police. (*Testimony of Pomeroy*)

138. Sgt. Condez's (then) counsel contacted Trooper Crowley and a July 30, 2014

meeting was set. Trooper Crowley asked to make Sgt. Condez aware of the fact that she wanted any and all original evidence, including any photographs or anything involved in the complaint. (*Testimony of Crowley*)

139. On July 24, 2014, after learning of the visit from Trooper Crowley, Sgt. Condez made a DVD copy of the information contained on the scratch drive on which he had placed the "original evidence" he had cloned from Mrs. Lee's laptop during the repair of her computer. He then "forensically wiped" the scratch drive, leaving no recoverable data on it. He also made a list – called a "hash report" – of the files he had retrieved. Sgt. Condez said he did this because he "didn't want to be in possession of contraband." (*Exh. 25; Testimony of Condez*)

140. On July 30, 2014, Troopers Crowley and Giossi interviewed Sgt. Condez with his (then) counsel present. (*Testimony of Giossi & Crowley*)

141. Trooper Crowley took notes of the interview and wrote a report two days later, while the interview was still fresh in her mind, containing her recollections. She had intended to, and believed that she had recorded the interview, with Sgt. Condez's consent, but later discovered, due to technical difficulties, the recorder had not been turned on. (*Exh. 15; Testimony of Crowley & Giossi*)

142. During the interview, Sgt. Condez stated that the he had used a scratch drive[13] to recover the data from the damaged hard drive on Chief Lee's wife's laptop and then replaced the damaged hard drive with a working one. He stated that in May 2014 he had accumulated a pile of used scratch drives that

he wanted to wipe so he could reuse them. Sgt. Condez reuses these scratch drives often. It is his process to eventually wipe the data on used scratch drives so he will have clean scratch drives for future projects. Sgt. Condez scans every hard drive before wiping them, to ensure nothing of importance is lost. He browses files in "thumbnail mode" for speed and ease. He then wipes the scratch drive, thereby erasing all the data on the drive. (*Exh.. 15; Testimony of Giossi, Crowley &Condez*)

[13] Sgt. Condez uses spare hard drives of various capacities to transfer data. The Appellant refers to these hard drives as "scratch drives." (*Exh. 15; Testimony of Giossi & Condez*).

143. Sgt. Condez said that, per his custom, in May 2014, he went through the stack of scratch drives to see if there was anything on any of them of importance. He did not remember what was on these drives. He said he opened a file on one of the scratch drives labeled "pictures" and browsed through the folder and sub-folders. He testified, "the minute I clicked on that there was pictures opened up, right in the center of the screen was a picture of a naked child" and " I found it disturbing and inappropriate and kind of shocking". He then continued to look and found several other naked photos of the child whom he knew to be Chief Lee's son. (*Exh. 15; Testimony of Giossi, Crowley & Condez*)

144. Sgt. Condez said he then put aside all the scratch drives he had accumulated, and stopped wiping them for reuse. (*Testimony of Condez*)

*145.* Troopers Crowley and Giossi requested both the original damaged hard drive and the scratch drive with Mrs. Lee's data. Sgt. Condez responded that he did not have the original data because he had gotten rid of it. Trooper Crowley and Trooper Giossi understood this to mean that he had thrown it out, when, in fact, Sgt. Condez was referring to the data he had wiped, not the scratch drive itself, which he did retain. (*Exhs. 25 & 31; Testimony of Giossi, Crowley & Condez)*

146. Sgt. Condez provided the State Police with the DVD copy of the laptop's data that he had made. (*Testimony of Giossi*)

147. Sgt. Condez was able to identify which of the

scratch drives he had used in the repair of the laptop, because the computer had a 160GB hard drive and he only had one scratch drive of the same size. During the Commission hearing, this drive was provided to a forensic analyst, Michael Verreonneau, of Multi-Media Forensic Services, Inc. who examined the hard drive and attempted to retrieve recoverable data. Mr. Verreonneau's examination revealed that all data on the hard drive had been destroyed beyond recovery. The entire drive had been "forensically wiped" and all data overwritten with zeros. (*Exh. 25; Testimony of Giossi & Condez*)

148. The original hard drive or cloned scratch drive would have had important information not included on the DVD copy, such as the dates when the files were created and dates and times when the files were accessed. When Sgt. Condez copied the contents of the laptop onto the DVD all the files had the same creation date, July 24, 2014, the date that he erased the scratch drive and created the DVD. He said he also wiped all the other scratch drives he had earlier set aside at this time. (*Exhs. 17 & 25; Testimony of Giossi*)[14]

149. The CD copy that Sgt. Condez provided to the State Police contains a main folder named, "Documents." This folder contains six subfolders that contain more than one hundred different sub-subfolders, which contain a total of 1,371 files. (*Exh. 17*)

150. One of the six subfolders within the "Documents" folder is named "Pictures." The "Pictures" subfolder contains eleven separate sub-subfolders that contain a total of 1,045 jpg images of family photos. (*Exh. 17*)

151. When the contents of the "Pictures" subfolder are viewed with the sub-subfolders displayed in alphabetical order, the first of eleven sub-subfolders listed is named, "Floridaoct2010halloween." This sub-subfolder contains 289 separate .jpg images. It contains no photos of any nude child. (*Exh. 17*)

152. Photo 1 and Photo 2, which are attached to Sgt.Condez's June 5th letter, are jpg images contained on the CD. (*Exhs. 11. 17 & 23*)

153. Photo 2, the image that Sgt. Condez claims he immediately discovered when he viewed

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[14] Among the questions that might have been explained by access to the meta data on the scratch drive was the fact that the DVD provided to the State Police contained copies of the photos attached to the June 5, 2014 letter, but the "thumb drive" provided to the State Police by Chief Lee did not. No witness could explain this discrepancy.

the hard drive containing the contents of the laptop, is contained in a sub-subfolder titled "xmas2010Catskills2011." This sub-subfolder contains 138 separate jpg images. When displayed in alphabetical order, image "xmas2010Catskills2011 133" is the 63rd image listed. This is the only image in that subfolder showing a nude child. (*Exh. 17*)

154. Photo 1 is a jpg image contained in a different sub-subfolder which contains 252 separate jpg images. When viewed in alphabetical or numerical order, Photo 2 is the 249th image out of 252 listed. This photo is one in a sequence of pictures of an infant boy playing with his toys in a bathtub, all clearly taken at one time. (*Exhs 11, 17, 23, 29*)

**SUMMARY OF CONCLUSION**

Dartmouth met its burden to establish, by a preponderance of evidence, that Sgt. Condez has committed misconduct that justifies his termination as a police officer with the DPD. Although that burden was not met as to the charges related to improper behavior in updating and disrupting the DPD computer system, or the alleged untruthfulness surrounding his appearance for a polygraph test, Dartmouth has proved the charges of conduct unbecoming an officer for Sgt. Condez's wholly false accusations that Chief Lee was guilty of a felony, namely, criminal abuse of his only child. Sgt. Condez showed extreme lapse of judgment, untruthfulness and unconscionable retaliatory behavior motived by an unfounded personal animus against Chief Lee and others, all of which is utterly intolerable in a police officer. Accordingly, Dartmouth proved just cause for his termination on those charges against him.

## APPLICABLE LEGAL STANDARD

G.L. c. 31, §41 through §44, set forth the process through which a tenured civil service employee is typically disciplined by an appointing authority and, if aggrieved by that decision, entitled to appeal to the Commission for a de novo review of the appointing authority's decision.

This appeal, however, arises from a rarely invoked provision of civil service law contained in G.L.c.31, §41A, by which an employee and the appointing authority, by mutual agreement, may submit the matter directly to the Commission for hearing in the first instance. Section 41A provides:

> "Upon the request of the appointing authority and a tenured employee, who is entitled to a hearing [by the appointing authority] pursuant to the first paragraph of section forty-one, a hearing before a disinterested hearing officer, designated by the chairman of the commission, may be held in lieu of a hearing before the appointing authority.
> Such a hearing officer shall make findings of fact and may make recommendations for decision to the commission. Following the decision of the commission, there shall be no appeal pursuant to the provisions of section fourth-three; provided however, that a petition to review may be filed pursuant to the provisions of section fourth-four. All requirements relative to written notice and the holding of hearings pursuant to this section shall be governed by those set forth in section forty-one."

The Commission is not aware of any judicial

precedent concerning the standard of review or procedure for hearings held pursuant to Section 41A, and the parties have not called attention to any. Accordingly, the decision in this matter will be analyzed under the same standards that the Commission applies to its de novo review of appeals brought under Section 43.

The role of the Commission is to determine whether the Appointing Authority proved, by a preponderance of evidence, just cause for the discipline imposed. G.L. c. 31, § 43. See, e.g., City of Cambridge v. Civil Serv. Comm'n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923 (1997); School Comm. of Brockton v. Civil Serv. Comm'n, 43 Mass.App.Ct. 486, 488, 684 N.E.2d 620 (1997); Town of Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823, (2006); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Serv. Comm'n, 38 Mass App.Ct.473,477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 334, rev.den., 390 Mass. 1102 (1983).

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 Serv. 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' " as well as the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in governmental employment decisions.' " Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet

of the "merit principle" of civil service law that discipline must be remedial, not punitive, designed to "correct inadequate performance" and "separating employees whose inadequate performance cannot be corrected." G.L. c. 31, § 1

An action is "justified" if "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 Serv. v. Municipal Ct., 359 Mass. 211, 214 (1971); Cambridge v. Civil Serv. 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). An appointing authority's burden of proof 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); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928).

The Commission must take account of all credible evidence in the record, including whatever may fairly detract from the weight of any particular evidence. See, Mass. Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001). It is the purview of the hearing officer to determine the credibility of testimony presented to the Commission. E..g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003). See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Ret. Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003) (where live

witnesses gave conflicting testimony, decision relying on an assessment of their relative credibility cannot be made by someone not present at the hearing).

The Commission must also take into account the special obligations the law imposes upon police officers, who carry a badge and a gun and all of the authority that accompanies them, and which requires police officers to comport themselves in an exemplary fashion, especially when it comes to exhibiting self-control and to adhere to the law, both on and off duty.

> "[P]olice officers voluntarily undertake to adhere to a higher standard of conduct . . . .
> Police officers must comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel. they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities."

Attorney General v. McHatton, 428 Mass. 790, 793-74 (1999) and cases cited. See also Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct. 796, 801-802 (2004); Police Commissioner v. Civil Service Comm'n, 39 Mass.App.Ct. 894, 601-602 (1996); McIsaac v. Civil Service Comm'n, 38 Mass.App.Ct. 473, 475-76 (1995); Police Commissioner v. Civil Service Comm'n, 22 Mass.App.Ct. 364, 371, rev.den. 398 Mass. 1103 (1986) See also Spargo v. Civil Service Comm'n, 50 Mass.App.Ct. 1106 (2000), rev.den., 433 Mass. 1102 (2001)

Off-duty misconduct properly can be the basis for discipline when the behavior has a "significant correlation" or "nexus" between the conduct and an employee's fitness to perform the duties of his public

employment. See, e.g., City of Cambridge v. Baldasaro, 50 Mass.App.Ct. 1, 4, rev.den., 432 Mass, 1110 (2000); School Committee of Brockton v. Civil Service Comm'n, 43 Mass.App,Ct. 486, 491-92, rev.den., 426 Mass. 1104 (1997); Timperly v. Burlington School Committee, 23 MCSR 651 (2010) (misconduct by off-duty school custodian in public park).

**ANALYSIS**

Dartmouth's Charge Letter (*Exh. 2*) asserted a total of nine charges containing thrity- three specifications, alleging misconduct in violation of the DPD's General Order 600, Sections 650.00 (Required Conduct-Truthfulness & Criminal Conflict [committing criminal acts, whether or not conviction results], Departmental Communications, Courtesy); and Section 670.00 (Prohibited Conduct – Conduct Unbecoming an Officer, Abuse of Department Property, Incurring Department Liability & Neglect of Duty). In many respects the charges and specification are duplicative and, for purposes of this decision are grouped into four categories:

I. *Charges Related to the 2010 Computer Upgrade*: Charge 2, Specifications 1 through 7 (Conduct Unbecoming an Officer); Charge 3, Specifications 1 through 5 (Criminal Conflict); Charge 4, Specifications 1 through 5 (Abuse of Department Property); Charge 5, Specifications 1 through 5 (Incurring Departmental Liability)

II. *Charges Related to the 2013 Computer Disruption*: Charge 1, Specification 3 (Truthfulness); Charge 2, Specification 8 (Conduct Unbecoming an Officer); Charge

4, Specification 6 (Abuse of Department Property); Charge 6, Specification 1 (Departmental Communications); Charge 7, Specification 1 (Courtesy); Charge 8, Specification 1 (Neglect of Duty)

III. *Charges Related to the Polygraph Examination*: Charge 1, Specifications 1 & 2 (Truthfulness); Charge 2, Specifications 1 & 2 (Conduct Unbecoming an Officer)

IV. *Charges Related to False Accusation of Child Abuse*: Charge 9, Specification 1 (Conduct Unbecoming an Officer)

DPD General Order 600 upon which Dartmouth's Charge Letter relies, provide as follows:

> Section 650.00 (Required Conduct – Truthfulness
>
> "No member shall knowingly or with reckless disregard for the truth sign any false official statement or report [,] commit perjury, or give false testimony before any court, board, or commission, or in any judicial or administrative hearing, whether or not under oath. Members found to be in violation of this rule shall be subject to discipline up to and including discharge from the Department."
>
> Section 650.00 (Required Conduct – Criminal Conflict)
>
> "[Criminal conflict] is the commission of any felony or misdemeanor, or the violation of the criminal laws or statutes of

the United States or of any local jurisdiction. Members shall not commit any motor vehicle or criminal act (felony or misdemeanor), or violate the regulatory or criminal laws or statutes of the United States or of any state or local jurisdiction (by-
law/ordinance0 whether on or off duty.' NOTE: A member may be guilty of violating this rule regardless of the outcome of any criminal court case. Conviction for the violation is prima facie evidence of a violation of this rule. However, even in the absence of a conviction (which requires proof beyond a reasonable doubt), a member may still be disciplined under this rule for the conduct that was involved since a preponderance of the evidence is the quantity of proof."

Section 650.00 (Required Conduct – Departmental Communications)

"All officers shall transmit all official communications promptly, accurately and completely to other officers of the department as required, and shall immediately inform their Officer-In- Charge of any matter of police importance coming to their attention during their tour of duty, or otherwise. They shall call to the attention of their relieving officers and information regarding unresolved problems that may arise during the next tour of duty."

Section 650.00 (Required Conduct – Courtesy)

"All officers shall be courteous and considerate to the public and to their superior officers and to their fellow officers

of the department. They shall be tactful in the performance of their duties and are expected to exercise the utmost patience and discretion even under the most trying circumstances."

Section 670.00 (Prohibited Conduct – Conduct Unbecoming an Officer

"The commission of any specific act or acts of immoral, improper, disorderly or intemperate personal conduct, which reflects discredit upon the officer himself, upon his fellow officers or upon the police department."

Section 670.00 (Prohibited Conduct – Abuse of Department Property

"Intentionally or negligently abusing, misusing, damaging or losing Police Department property or equipment."

Section 670.00 (Prohibited Conduct – Incurring Department Liability

"An officer or employee shall not incur a liability chargeable to the police department without the prior knowledge of the Chief of Police."

Section 670.00 (Prohibited Conduct – Neglect of Duty

"Being absent from assigned duty without leave; leaving post or assignment without being properly relieved; or failing to take suitable and appropriate police action when any crime, public disorder or other incident requires police attention or service."

After considering each of the foregoing charges and specifications contained in the Charge Letter, and

the argument of the parties, I find that Dartmouth has proved that Sgt. Condez did make false accusations amounting to charges that Chief Lee had committed a felony, i.e. child abuse, either knowing them to be false or with reckless disregard and, in addition, made an effort to conceal his actions, all of which were taken with an ulterior motive to impede the investigation of the original pending charges being pursued against him. This conduct constitutes a serious violation of Section 670.00 Conduct Unbecoming an Officer and, as such, his misconduct is of such severity that it warrants his termination from the DPD.

Charges Related to the 2010 Computer Upgrade and 2013 Computer Disruption.

The bulk of the charges Dartmouth asserted against Sgt. Condez assert that, in 2010, that Sgt. Condez installed unlicensed and counterfeit Microsoft Windows and Microsoft Office products on the DPD's computers and, in 2013, surreptitiously, removed these product keys and thereby interrupted the DPD's computer access and then lied about his behavior, all in violation of federal criminal copyright law and various DPD Rules and Regulations. I find that Dartmouth has not met its burden of proving any of the twenty-eight specification covered by these charges, save for some infractions of Rule 650.00 for discourteous and disruptive behavior in the investigation of the computer-related issues. Had he committed no other offense, I would find these infractions worthy of some discipline, perhaps even a temporary demotion. In view of my determination that Sgt. Condez's other behavior in connection with the charges related to the Section 51A issue, alone, warrant his termination, there is no need to specifically address

what lesser level of discipline would be warranted on the computer-related charges.

First, as to the computer upgrade, Sgt. Condez never denied that he took steps to override the "nag" screens that had appeared on the Soares Computer with a OEM "activation patch" and that, he later "cloned" what had been installed on the Soares Computer onto all of the other hard drives that he then placed into the additional machines for deployment throughout the DPD. The experts (except Mr. Souza) agreed that cloning the hard drives did not, alone, suggest anything improper. Sgt. Condez also acknowledged that he knew that what he did had, in some way, enabled the Soares Computer to run indefinitely as if it had been equipped with OEM Microsoft products, which he knew was not the case. By his production of a Windows 7 upgrade box to "cover" the Soares Computer, he clearly recognized that further action was necessary to obtain an approved license for the Soares Computer, and, therefore, all of the other machines "cloned" from it. From there, however, evidence becomes inconclusive and does not establish by a preponderance of evidence that Condez's actions were taken solely on his own initiative and/or with the knowledge or intent that the DPD computer upgrades would never be lawfully licensed.

I find it implausible that Mr. Souza would have expected Sgt. Condez to have purchased authorized product keys for all of the (approximately thirty) new machines, which would have required a personal outlay of thousands of dollars. I also find it implausible that Mr. Souza would have deployed the upgraded computers without even asking for the product key numbers that had been installed. His acknowledgement that he saw the same old Windows XP product key stickers on the machines, although he knew Sgt. Condez had cloned them all from the

Soares Computer, and yet never bothered to inquire, is inexplicable. I cannot envision that as IT Director, he would have operated for almost three years without ever having made a record of the product key numbers that were assigned to the computers under his responsibility. The fact that, when problems arose, Mr. Sousa seemed to know exactly what was needed to fix the problem, further infers that he was fully aware that the machines had never been properly licensed. I am unable to draw any credible conclusion from the expert reports and testimony about what improper software was installed on what computers, when and by whom. In this regard, I also find it significant that Mr. Souza described how, at times, he had installed what he called "OEM" keys in some of the DPD computers, from which I infer that, it is at least as likely as not likely, that Mr. Souza's tinkering, not Sgt. Condez 's "activation patch" explained how such an OEM key first got onto these machines. I also note that Mr. Souza had access to the pre- release versions of Windows 7 which would have enabled him to use those versions until June 2010 before temporary "nag screens" would start to appear. There is also a dearth of evidence,

expert or otherwise, to explain how Office 2007 got onto the Soares Computer and, hence, onto the other upgraded machines.

For Mr. Condez's part, I find it credible that he was ordered to come up with a quick fix to an emergency situation involving the Soares Computer and to get the rest of the machines upgraded to Windows 7 ASAP. He does not dispute that he used an "activation patch" to work around whatever problem he found. I also find it credible that he would have expected Mr.
Souza to take care of the follow-up licensing requirements and that it was not unreasonable for him to have made that assumption. I also find that Sgt. Condez cannot be faulted for failing to follow-up with Mr. Sousa to ensure that he did his job as the IT Director properly. Finally, the preponderance of evidence does not support a conclusion that Sgt. Condez acted with the necessary intent to violate the federal criminal copyright infringement law, which, requires, among other things, that the offender acted "willfully" and "for purposes of commercial advantage and private financial gain". See 17 U.S.C.§506(a). While I agree that his behavior during the investigatory interviews was, at times, coy and discourteous and probably crossed the line of conduct defined by Rule 650.00, his responses, as a whole, were generally consistent with his position that he only knew what he had done, and did not know, and would not speculate about, what others may have done.

As to the March 2013 computer interruption, Sgt. Condez's sarcastic comment that he "shut [the product keys] down at Microsoft" has little weight in assessing what actually happened. There was no evidence to show that this was even possible and

Mr. Condez had no apparent motive to have done so and then admitted it immediately. Indeed, the trial of his pending contempt action was scheduled for later that month and I find it quite implausible that Sgt. Condez would be engaging in sabotage on the eve of that event. On the other hand, Mr. Souza, who had direct and ultimate responsibility for the computers, by his actions, showed that he knew exactly what the problem was and feared that the consequences would fall on his shoulders. He was probably particularly vulnerable to criticism having just been through the failed efforts to upgrade the DPD's RMS/CAD systems with Enforsys and he had never taken the necessary steps to confirm the legitimacy of the product keys or implement the necessary security measures that would fully restrict administrative access to the DPD computer system to him and the only other authorized DPD user.

Neither of the two theories for how Sgt. Condez might have caused the computer disruption was established. As Sgt. Condez never had remote access to the DPD's network, the first theory, use of a SLMGR tool, fails. The second theory, the use of local login, was never tested and the evidence did not establish whether or not it would work. Furthermore, this theory highlights the lack of security that was present under Mr. Souza's watch.

I am also troubled by the evidence that Dartmouth either erased or did not attempt to look for potential physical evidence of wrongdoing by Sgt. Condez. Mr. Souza "flattened" all the DPD hard drives in October 2013, thus eliminating the opportunity to discover exactly who had accessed those computers and what might have caused those computers to fail. I do not find Mr. Souza credible when he stated he did so to "stop the rumor mill" and keep Sgt. Condez, then on administrative leave, from

getting into the DPD computers through a "back door". In addition, DPD had surveillance cameras that would have recorded any activity that would have confirmed who had logged on to the booking room and interview room computers when they first went down. These cameras recorded for three weeks before they were overwritten but they were never examined or preserved.

In sum, I conclude that the twenty-eight Charges and Specifications regarding the computer upgrade and disruption have not been proved.

Untruthfulness at December 20, 2013 Polygraph Examination

On December 20, 2013, Sgt. Condez arrived at DPD Headquarters for his previously scheduled polygraph examination. Prior to his arrival, he discovered that the polygraph examination was going to be administered by a civilian whom Sgt. Condez believed was not lawfully empowered to conduct the test. Sgt. Condez entered the station holding a rolled up piece of paper in his hand, an application he had drafted to seek a temporary restraining order in court to prevent the polygraph examination. Dartmouth charged that Sgt. Condez violated the DPD rules for truthfulness and conduct unbecoming an officer when, on December 20, 2013, he allegedly told Chief Lee and Deputy Szala that he held a restraining order that prohibited the DPD to require that he submit to the polygraph test that he had been ordered to take that day.
The preponderance of the evidence fails to establish either charge.

First, there is no written record of the

interchange in the DPD lobby between Sgt. Condez and Deputy Chief Szala or of the interchange between Sgt. Condez and Chief Lee upstairs just before taking the polygraph test. The evidence does establish that Deputy Chief Szala had at least two, and probably three, conversations with Sgt. Condez in the lobby. This sequence is corroborated by Chief Lee's testimony (that Al Donovan also seemed to recall) that, after Deputy Chief Szala first appeared upstairs after seeing Sgt. Condez in the lobby, Chief Lee directed him back down to ask if Sgt. Condez had a restraining order and when Deputy Chief Szala returned to say that he did not have such an order, Deputy Szala was directed to bring Sgt. Condez upstairs, which he did. This shuttling back and forth is most consistent with the recollections of Sgt. Condez and Sgt. Lake (a totally disinterested witness), both of which confirmed that Sgt. Condez made it clear in the lobby that he only had an application for a TRO, not a court order and Chief Lee knew that before Sgt. Condez arrived in the room.

Second, the interchange between Chief Lee and Sgt. Condez upstairs lasted only seconds. I do not find it plausible that, in that brief interval, Sgt. Condez would claim that he had a court order in his hands, when he had just reported to Deputy Chief Szala that he did not have such an order, and then, promptly retract the statement. It is not disputed that, almost immediately, Sgt. Condez reiterated that he did not have a court order but was going to court to get one, and, when that did not satisfy Chief Lee, Sgt. Condez immediately submitted to the polygraph test. Deputy Chief Szala, a percipient witness to both the encounters, and the only witness who could have clearly put both pieces of this incident together, did not testify. I infer that his testimony would have supported what the

preponderance of the other evidence infers, that Sgt. Condez did not intend to, and did not deceive Chief Lee on December 20, 2013.

Third, insofar as there is no written record or statement regarding this incident, the evidence of whatever Sgt. Condez allegedly may or may not actually have said, or doubts about his veracity, remains inconclusive. This fact, alone, that the exchange was entirely oral, makes problematic any charge of "untruthfulness" under DPD General Order 650.00 (for "knowingly or with reckless disregard for the truth sign any false official statement or report [,] commit perjury, or give false testimony before any court, board, or commission, or in any judicial or administrative hearing") The preponderance of the evidence does not support Dartmouth's charge of untruthfulness. See generally, Keating v. Town of Marblehead, 24 MCSR 334 (2010)
("Given the potentially career-ending consequences of finding that a police officer has been untruthful, the fact finder's decision regarding alleged untruthfulness . . .should be made with the

highest degree of objectivity and supported by a preponderance of the evidence"); Robichau v. Town of Middleborough, 24 MCSR 352 (2011) and cases cited (same)

Fourth, the evidence showed that the conduct amounted, at most, to a misunderstanding or momentary breakdown of communications between police officers in a private meeting in which the adversarial relationship between the officers was self-evident. There is no claim that, even in that environment, Sgt. Condez was discourteous or insubordinate.

In sum, Dartmouth has not shown how anything Sgt. Condez did on December 20, 2013 or said to Chief Lee at that time rose to the level of "conduct unbecoming an officer" in violation of DPD General Order 670.00 ("any specific act or acts of immoral, improper, disorderly or intemperate personal conduct, which reflects discredit upon the officer himself, upon his fellow officers or upon the police department"). Charge 1, Specifications 1 & 2 (Truthfulness) and Charge 2, Specifications 1 & 2 (Conduct Unbecoming an Officer) are not proved.

Criminal Accusation of Child Abuse Against Chief Lee

Dartmouth charged that Sgt. Condez's June 5, 2014 letter to the Dartmouth Select Board, and his subsequent actions in furtherance of the assertions made in that letter, also violated General Order 670.00, prohibiting "Conduct Unbecoming an Officer." Here, Dartmouth is on solid ground. It is hard to imagine behavior that comes any closer to the intent of General Order
670.00 than does Sgt. Condez's willful, intemperate and wholly unsubstantiated accusations against Chief Lee of felonious conduct by alleging, in what amounts to a public accusation of child neglect and

sexual exploitation by Chief Lee of his only, wholly innocent, son. I conclude that Sgt. Condez's accusations amount to conduct unbecoming an officer. I also find that his accusations were retaliatory. Finally, I conclude that Sgt. Condez repeatedly lied, misled, concealed and destroyed evidence in order to further his unbecoming and retaliatory behavior.

First, Sgt. Condez's June 5, 2014 letter shows an utter disregard for the truth as he tries to deceptively portray Chief Lee as a suspected, active, serial sexual predator. The letter states that the photos were found on "Timothy Lee's personal laptop" and "are more accurately, possible evidence of abuse or sexual exploitation of an [unnamed] child by him", when Sgt. Condez knew the laptop belonged to Chief Lee's wife and knew the pictures were her family mementos, not his, taken by her of their infant son. Furthermore, Sgt. Condez notes that the pictures were taken with the "same camera" by an unnamed photographer, that some of them were taken "out of state" and twice suggests that there could be "other victims", when he knew that all the pictures were "family photos" taken in the Lee home, that the only child in the pictures was the Lees' son, and there was not a shred of evidence of any other "victims." Moreover, given the age of the child in the pictures (an infant about one year old in the most of the photos), Sgt. Condez knew that many years had elapsed since any of the allegedly offending pictures had been taken and there were hundreds of other photos of the child in the collection taken since then with no evidence introduced of additional recently-taken nude pictures of the child. Finally, one of the two photos that Sgt. Condez submitted with the private area covered in black, in its unedited form, shows the infant child submerged in the bathtub

among his bath toys with none of his private parts visible.

Unlike the brief exchange in the the heat of the moment in the polygraph room, I cannot attribute the misleading content of Sgt. Condez's letter simply to poor choice of words or inattention. I do not accept his argument that he merely wanted to raise a concern but had not actually thought he was accusing Chief Lee of being a sexual predator. Indeed, a person who sees no harm in using innuendo as a surrogate for direct defamation has no business in an occupation whose mission is to "protect and serve." An appointing authority is justified to terminate a police officer for conduct unbecoming who repeatedly demonstrates his "willingness to fudge the truth". See City of Cambridge v. Civil Service Comm'n, 43 Mass. 300, 303 (1997) ("The city was hardly espousing a position devoid of reason when it held that a demonstrated willingness to fudge the truth in exigent circumstances was a doubtful characteristic for a police officer. . . . It requires no strength of character to speak the truth when it does not hurt.") See also Everton v. Town of Falmouth, 26 MCSR 488 (2013) and cases cited, aff'd, SUCV13-4382 (2014); Gonsalves v. Town of Falmouth and cases cited, 25 MCSR 231 (2012), aff'd, SUCV12- 2655 (2014); Keating v. Town of Marblehead, 24 MCSR 334 (2011) and cases cited.

Second, Sgt. Condez showed no regard for the safety or privacy of the alleged "victim". His lack of sensitivity to the harm this choice of action could cause to an innocent child, let alone to Chief Lee and his wife, is astonishing. Sgt. Condez knew the identity of the "victim", yet did not conceal the child's face in the pictures he found so "disturbing". He knew that, as a mandated reporter, he could have (although not required to have) made an immediate,

direct confidential report to DCF. See Garney v. Massachusetts Teachers Retirement System, 469 Mass. 384, 386 (2014). Instead, he picked the unconventional approach and went public with his accusations through the Dartmouth Select Board.[15] In so doing, he chose, intentionally or recklessly, to put his own interests ahead of the rights of the "victim" and the alleged "predator" under Section 51A.

Third, at best, Sgt. Condez has made a veiled attempt to use G.L.c.119,§51A as a cover for a personal, ulterior motive. There is no explicit reference to Section 51A or call for the Select

[15] Sgt. Condez argued that, by making a report to the Select Board, he was also making an alternative Section 51A report, which Dartmouth strenuously disputed. While G.L.c.119, §51A(a) (2nd sentence) does provide for alternative reporting by a "member of [a] public institution" to "the person or designated agent in charge of the institution" for further reporting to DCF, I read that provision to apply to "institutions" such as schools who have care and custody of children, but not to a municipal police department. Even were I to find that Sgt. Condez had good reason to construe the statute otherwise, which I do not believe, his choice of a questionable solution in lieu of the well-known acceptable one, shows a serious lapse of judgment on his part that I would not expect from a police officer.

Board to take any action "in the best interest of the child" which is the "guiding principle" behind Section 51A statutory reporting. cf. Commonwealth v. Adkinson, 442 Mass. 401, 419 (2005) (describing the role of DCF under G.L.c.119,§51A) Rather, the allegation of abuse (as to which he belatedly asserts both a statutory and First Amendment right to make) was ancillary to the main theme expressed in the letter, which was to have the Select Board target disciplinary action against Chief Lee or face public embarrassment and legal liability of their own and, thus, take the heat off his own disciplinary issues that were coming to a head:

> "These photos have been provided to the Select Board in a redacted form so they are aware of this serious issue prior to it coming to them from an outside source. It is particularly disturbing to me and I'm sure it will be to the public . . ."
>
> This is being shared with the Select Board in their role as Police Commissioners and based on their duty to supervise the Chief of Police I'm sure I don't have to explain . . . the duty of the Select Board I don't have to go into great detail as to the consequences for the Town should other victims be discovered given that the Town now has knowledge of the situation."

I also cannot disregard his (former) counsel's statement that "you will get to see the photos in the public hearing when they are offered in poster size as exhibits," a claim Sgt. Condez never disavowed and which seems to parrot what was implicit in his own behavior, particularly the statements in his letter and

his subsequent decision (see below) to "forensically wipe" the "contraband" from his scratch drive, thus, destroying a key chain of evidence in any possible case against Chief Lee, another indication that the "best interests the child" was clearly not what he had on his mind.

The timing of Sgt. Condez's actions also illustrates an ulterior motive, coming the day after he learned that all efforts to keep postponing his disciplinary hearing had been exhausted. By his own admission, Sgt. Condez had known of the "disturbing" photographs and the allegedly potential liability they posed for some time, claiming he first saw them when he started to "wipe" his stack of "scratch drives" in May 2014. Yet he chose to take no action and did not report the "disturbing" discovery for another month. I heard no credible explanation for the unusual coincidence in timing other than the logical inference that it was meant to throw sand in the gears of the pending investigation of Sgt. Condez's own alleged misconduct and I conclude that was the primary, and probably sole, motive for his decision to send the June 5, 2014 letter.

Fourth, I do not believe Sgt. Condez's explanation that he only discovered the "disturbing" photographs by accident in May 2014 in the course of a routine review of his scratch drive discard pile, some two years after his initial work on the laptop and eight months after being placed on administrative leave, and then waited until July 2014 to copy the files onto a DVD because he did not want to be in possession of "contraband", and, only then, innocently wiped the original scratch drive along with all others then in the discard pile. By wiping the scratch drive, Sgt. Condez obliterated any possible chance that a forensic analysis of the drive would have recovered the history of the files, something that would have been an invaluable asset

to him in the pending Massachusetts State Police investigation. His actions in forensically wiping the scratch drive, despite knowing that the State Police wanted to examine it, warrants the adverse inference that, had he delivered an unaltered scratch drive to the State Police, it would have revealed information that Sgt. Condez had again "fudged the truth" about the charges against Chief Lee and did not want the State Police to know. While such an adverse inference is warranted, it is not necessary to my conclusion because, by wiping the scratch drive, Sgt. Condez knew, or acted in reckless disregard for, the fact that he was altering evidence known to be relevant to an ongoing criminal investigation and what he, himself, called "contraband". Such cavalier treatment of evidence, whether inculpatory or exculpatory, is more than unbecoming a police officer; it is unconscionable.

Fifth, I have also carefully considered Sgt. Condez's claim that, despite any of the above transgressions, he cannot be disciplined because he acted solely out of "good faith" belief that the photographs he saw contained evidence that could reasonably be construed to present "reasonable cause" for a mandated reporter to make a Section 51A report, and that such conduct is protected by (a) the whistleblower provisions of Section 51A(h), or alternatively, (b) as free speech under the First Amendment to the U.S. Constitution. I find that argument to be without merit on the facts and the law.

Section 51A Reporting & Immunity

G.L.c.119,§51A(a) requires reporting to the Department of Children & Families (DCF) certain particulars (as enumerated in G.L.c.119,§51A(d))[16], obtained "in his official capacity" by a "mandated

reporter" (defined to include a police officer), and permits reporting of such particulars by any other person, who:

> ". . . *has reasonable cause to believe* that a child *is suffering* physical or emotional injury resulting from: (i) *abuse inflicted upon him* which causes harm or substantial risk of harm to the child's health or welfare, *including sexual abuse*; . . . or (iv) *being a sexually exploited child*; . . . ." (*emphasis added*)

A "sexually exploited child" is defined as any person under the age of 18:

> ". . . who has been subjected to sexual exploitation because such person: (1) is the victim of the crime of *sexual servitude* . . . ;(2) engages, agrees to engage, or offers to engage in *sexual conduct with another person in return for a fee* . . .; (3) is a victim of the crime, whether or not prosecuted, of *inducing a minor into prostitution* . . . ; or (4) engages in *common nightwalking or common streetwalking* . . .

G.L.c.119,§21 (*emphasis added*).

Sgt. Condez argues that he acted "in good faith" as a "mandated reporter" when he wrote his letter to the Select Board, and made his subsequent Section 51A Report to DCF, and,

[16] The report filed must contain the names and addresses of the child and the adults responsible for the child's care, as well as the child's age, sex, extent of injuries or abuse and other relevant information.

therefore, his conduct is immune from discipline by virtue of G.L.c.119, §51A(h):

> "No employer shall discharge, discriminate or retaliate against a mandated reporter who, in good faith, files a report under this section..... Any employer who [violates this section] shall be liable to the mandated reporter for treble damages, costs and attorney's fees."

This argument is flawed for numerous reasons.

First, even Sgt. Condez does not contend (and clearly has no basis to contend) that the photographs themselves, or any other evidence, suggests, let alone presents "reasonable cause" to believe, that Chief Lee's son is a "sexually exploited child" within the very narrow statutory definition of that term. His argument hangs on the premise that the photographs, in effect, were a felonious act of "sexual abuse" of Chief Lee's son, specifically, the unlawful "possession" of a picture of his child engaged in "sexual conduct", prohibited by G.L.c.272, 29C.[17] To make out an offense, the statute requires a "knowing" possession of a picture showing a child engaged in some form of specific sexual conduct, including intercourse, oral or anal sex, bestiality, sexually sadistic or other "lewd exhibition" of a child's sexual organs. "Mere nudity" does not suffice.
E.g., Commonwealth v. Rex, 469 Mass. 36, 43-44 (2014) and cases cited. [18] The pictures that

Sgt. Condez said he found most disturbing, and the others introduced in evidence, all involve a pre-

pubescent male between the ages of one to four (well below the so-called "Coppertone age"), either taking a bath or having just emerged from one, snapped by the child's mother. None show a child engaged in any form of actual or simulated sexual conduct. Many do not show the child's

---

[17] Other criminal statutes associated with child pornography require "dissemination" and/or specific "lascivious intent", among other things, and are not remotely implicated here. E.g., G.L.c.272,§29 (possession "with lascivious intent" to disseminate material known to be obscene); G.L.c.272, §29A. (knowingly permitting a child "to pose or be exhibited" nude with "lascivious intent");G.L.c.272,§29B (possession "with lascivious intent to disseminate") See also G.L.c.272,§31 (Massachusetts equivalent of the "Dost" factors, which define "lascivious intent" as "a state of mind in which the sexual gratification or arousal of any person is an objective")

[18] In this regard, I take administrative notice of the work of the 19th century painter, Mary Cassatt, who was known for numerous portraits of nude children, some of which now hang in nationally-renowned art museums as an illustration of the type of portrayal of "mere" child nudity that is not pornographic.

genitalia at all. These pictures are far different from any pictures showing a child engaged in the form of sexual "activity" that has been held to fit the definition of a "lewd exhibition" of a child. See Commonwealth v. Rollins, 470 Mass. 66 (2014) (two children in sexually suggestive poses and facial expressions touching each other; a girl posed in an unnatural manner in front of a mirror, exposing both sides of her entirely naked body); Commonwealth v. Sullivan, 82 Mass.App.Ct. 293, rev.den., 463 Mass. 1112 (2012) (2-1 decision) (photo downloaded from a

Russian-based website by a Level 3 sex offender showing an adolescent girl posed to focus on her developing breasts and pubic area); cf. Commonwealth v. Rex, 469 Mass. 36 (2014) (inmate's possession of photos of naked man with group of naked boys clipped from National Geographic Magazine was not unlawful, despite DOC rule that all depictions of nudity were prohibited); Commonwealth v. Bean, 435 Mass. 708 (2002) (overturning conviction for lack of "lascivious intent" of an "aspiring photographer" who enticed a female minor and her boyfriend to participate in a "photographic shoot" during which they "posed" in various stages of undress, eventually, taking one photo of them embracing with one of her breasts exposed)

Second, Sgt. Condez made a seriously troubling decision, after allegedly "researching" the subject, to act on the assumption that "reasonable cause" to believe that a child "is suffering" from sexual exploitation or abuse is measured by what Sgt. Condez might personally find "disturbing". "Reasonable cause", albeit a "threshold" determination, nevertheless, requires a

consideration of the "collection of facts, knowledge or observations which tend to support or are consistent with the allegations, and when viewed in light of the surrounding circumstances and credibility of persons providing information, would lead one to conclude that a child has been abused or neglected." See 110 CMR 4.32(2) cited in B.K. v. Department of Children and Families, 79 Mass.App.Ct. 777, 780 (2011) Evidence must exist that actual abuse has occurred or that there is a proven "substantial risk" of future harm to a child. See 110 CMR 2.00 cited in Cobble v. Commissioner of DSS, 430 Mass. 385 (1999) (DSS lacked "reasonable cause" to support a claim of abuse for spankings of nine-year old with belt that left temporary marks on his buttocks) See also, Care and Protection of Robert, 408 Mass. 52 (1990) (discussing standard of proof required at various stages of DCF proceedings)

Moreover, whether or not Sgt. Condez found the pictures in question personally "disturbing" is not a basis on which to judge whether his actions were lawfully appropriate for a police officer. The proper question is whether Sgt. Condez acted within the authority permitted under the facts and the law. As a matter of law, Sgt. Condez's "subjective reaction to the photograph was not relevant . . . to the lewdness of the photograph itself." See Commonwealth v. Sullivan, 82 Mass.App.Ct. 293,309 rev.den., 463 Mass. 1112 (2012). Rather, the determination of what crosses the line from protected First Amendment expression and becomes criminal activity rests, ultimately, with the judiciary as gatekeeper of the constitutional rights of citizens, as to which the courts must make an independent, de novo review. See, e.g,, Commonwealth v. Rex, 469 Mass. 36, 41-42 (2014) ("We noted in Bean [v. Commonwealth,

435 Mass. 706 (2002)] that '[t]he fact finder is in no better position to evaluate the content and significance of these photographs than an appellant court." [citation] . . . Unlike testimony from a witness, an objective analysis of tangible evidence such as photographs requires no credibility determinations, rendering de novo review appropriate").

The serious consequences that would flow from Sgt. Condez allowing his personal "revulsion" – rather than an objective, informed judgement – to drive this exercise was aptly described by Justice Milkey in his well-reasoned dissent in Commonwealth v. Sullivan, 82 Mass. App.Ct. 293, 310, 312-313, 327-28 (2012), subsequently cited in Commonwealth v. Rex, 469 Mass. 36, 41 note 11 (2014), and worth repeating because it resonates so clearly with the present matter. Justice Milkey wrote:

> "Few things are as vile as the sexual abuse of children. It is therefore understandable that we, as a society, would implement severe measures to try to prevent such abuse from occurring. But *when we imprison someone for mere possession of a photograph of a child playing on a beach, we have lost all perspective*.
>
> . . .
>
> "The photograph has a distinct "snapshot' quality to it . . . the jury did not know if this was a vacation photograph taken by a member of the girl's family, or if it was instead surreptitiously captured by a stranger. The defendant downloaded the photograph from a Russian photograph-sharing Web site . . . that included what appeared to be 'a lot of vacation photographs.'
>
> . . .
>
> "As the prosecutor affirmatively conceded

below, 'there is certainly no sexual activity in this picture' . . . *the Commonwealth's new theory is that the photograph is accidentally lewd*. . . . *[W]hether the defendant found this photograph lewd is not the test. "If . . . subjective reaction were relevant, a sexual deviant's quirks could turn a Sears catalogue into pornography." [citation] . . . [T]he applicable test is whether the photograph sexualizes its portrayal of . . . nudity in an objective and sufficiently material way to warrant a criminal conviction merely for possessing it.* While the photograph need not be 'obscene' . . .*it still has to be so noxious that one commits a felony merely by holding the photograph in one's hand*. This photograph does not come even close to meeting that test. Indeed, it is not clear how any photograph that is at most subtly sexually suggestive could ever be deemed 'lewd' beyond a reasonable doubt. *The photograph cannot fairly be described as a permanent record of the girl being subjected to sexual abuse or exploitation; rather it is a permanent record of her playing in the sand* But the question before us is not whether whoever took the photograph broke the law in whatever jurisdiction this occurred. The question instead is whether the harm inflicted by the continued existence of the photograph is so substantial as to support treating its mere possession as a crime…… "*The need for an independent judicial role is particularly acute in cases when the expression at issue involves a photograph of a naked child .* . . [W]hen an individual actively pursues [conduct] *crossing the boundary into objectively criminal behavior that exploits*

> *children, . . . can and should warrant severe criminal sanctions*. However, *where the individual has not crossed the line . . . the government 'cannot constitutionally . . . . becom[e] an instrument for the suppression of . . . unpleasant expression.' "*

Id. (emphasis added).

Third, Sgt. Condez cannot inoculate his serious lapse of judgment in going public with a frivolous claim against Chief Lee, exposing both him and his family to public ridicule by claiming his behavior is protected under the "mandated reporter" immunity statute or as "citizen speech" protected by the First Amendment. Clearly, Sgt. Condez cannot have it both ways; if he acted as a "mandated reporter" under Section 51A his actions cannot constitute "citizen speech" when they arise in connection with his responsibility as a police officer to report abuse. See Pereira v. Commissioner of Social Services, 432 Mass. 261 (2000) and cases cited. See also, Lane v. Franks, -- U.S. --, 134 S.Ct. 2369, 2383-84 (Thomas, Scalia & Alito concurring) (although giving "truthful" testimony against an employer generally is protected "citizen speech", whether a public employee, such as a police officer, whose "ordinary job duties" call for them to testify is a "quite different question") Moreover, Section 51A(h) applies to confidential reports made with "reasonable cause" pursuant with the statute. Here, Sgt. Condez made a public report that did not comply with the statute without "reasonable cause."

In sum, Dartmouth has proved by a preponderance of the evidence Charge 9 set forth in the Charge Letter, establishing that Sgt. Condez

has committed "acts of immoral, improper, disorderly or intemperate personal conduct which reflects discredit upon the officer himself, upon his fellow officers [and] upon the police department"

**RECOMMENDED DISCIPLINE**

Sgt. Condez's long career with the DPD, during which he has performed on many occasions with distinction, including as president of his Union, is duly noted. Sadly, however, these distinctions and mitigating factors do not justify retaining him in the face of the serious lapses of judgment and untruthfulness that were proved in this case and brought irreparable damage to his credibility and to the reputation of his fellow officers and the DPD. After careful consideration, for the reasons expressed above, based on the preponderance of credible evidence presented at the hearing, I recommend that the Commission approve the termination of Sgt. Condez as a police officer with the DPD, effective as of the date of this Decision. Civil Service Commission.

*/s/ Paul M. Stein* Paul M. Stein Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman, Ittleman, McDowell, and Stein, Commissioners) on October 15, 2015, the Commission voted to adopt the recommendations and voted unanimously to order the termination of the Appellant, effective on the date of this Decision

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(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-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice sent to:
Jack Canzoneri (for Appellant)
Dennis M. Coyne, Esq. (for Appellant) Leonard H. Kesten (for Respondent) Evan C. Ouellette, Esq.(for Respondent)

**COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, SS.** **CIVIL SERVICE COMMISSION**
One Ashburton Place - Room 503
Boston, MA 02108
(617) 727-2293

**FRANK CONDEZ,**
*Appellant*
v. **Docket No.: D-14-192**
**TOWN OF DARTMOUTH**,
*Respondent*

**CORRECTIONS TO DECISION (10/19/2015)**

The Commission's Decision dated October 15, 2015 has been revised to eliminate typographical errors and the following corrections:

Finding 5, second sentence: revise second sentence to read: "David Cressman is the Dartmouth Town Administrator and **the Dartmouth Select Board** is the DPD Appointing Authority."

Finding 27, line 6 – revised to read "needed **to** access the network"
Finding 34, line 2 – "&" revised to "**7**"
Finding 39, line 2 delete "**as August 1, 2009**"
Finding 88, line 2 – "Microsoft Office 7" revised to "**Microsoft Office 2007**" Finding 95, line 3 – revised to read "Finding of Fact No. **51**"
Finding 97, lines 2-3 – revised "the Appellant" to read "Sgt. Condez" Finding 106, line 4 – revised to read "take the polygraph or **he**"
Finding 107, footnote, line 2 – revised to read "the decision **to seek** to terminate . . . " Finding 129, line 1 – revised to read "Section 51**A**"
Finding 143, line 7 – revised to read "photos **of** the child" Page 38, para. 1, lines 1-2 – revised "twenty-eight" to read "**thirty-three"** Page 40, para. 1, lines 6-7 "revised first "twenty-nine" to read "**twenty-eight**" and **delete second "twenty-nine"**

Page 44, line 1 – revised to delete **“twenty nine”**

Page 54, para.2, line12 – revised “appellant” to read **“appellate”**

**COMMONWEALTH OF MASSACHUSETTS**

**THE TRIAL COURT**

**SUPERIOR COURT DEPARTMENT**

**BRISTOL, ss.**

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**Civil Action No. 1473CV00836**

**FRANK CONDEZ,**

**Plaintiff**

**v.**

**TOWN OF DARTMOUTH and LEONARD H. KESTEN,**

**Defendants**

---

**CONSOLIDATED WITH**

---

**Civil Action No. 1673CV00796**

**FRANK CONDEZ,**

**Plaintiff**

**v.**

**CIVIL SERVICE COMMISSION and**

**TOWN OF DARTMOUTH**

**Defendants**

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MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS CONCERNING DECISION OF THE CIVIL SERVICE COMMISSION

The plaintiff, Frank Condez, brought civil action# 1673CV00796 pursuant to G.L. c. 31, § 44 and G.L. c. 30A, § 14, seeking judicial review of a decision of the Civil Service Commission terminating his employment as a police sergeant for the town of Dartmouth. The parties have filed cross-motions for judgment on the pleadings pursuant to rule 12 (c) of the Massachusetts Rules of Civil Procedure and Superior Court Standing Order 1-96.

**FACTS**

In reviewing a decision of an administrative agency, the court's review of the issues "shall be confined to the record...." G.L. c.30A, § 14(5). "The reviewing court is, therefore, bound to accept the findings of fact of the [civil service] commission's hearing officer, if supported by substantial evidence." City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). City of Beverly v. Civil Service Commission, 78 Mass. App. Ct. 182, 188 (2010).

The record shows that the town of Dartmouth accused Sgt. Condez of four incidents of misconduct relating to: (1) an upgrade of the police department's computers in 2010; (2) a disruption of the police department's computers in 2013; (3) a polygraph examination of Sgt. Condez in 2013 concerning an investigation of a missing firearm; and (4) accusations of child abuse against Police Chief Timothy Lee.

By agreement of the parties, a commissioner of the Civil Service Commission (rather than the appointing authority) held a hearing on the charges pursuant to G.L. c. 31, § 41A The commissioner made extensive findings of fact, which the Commission adopted on October 15, 2015. The following is a summary of the facts adopted by the Commission that are pertinent to this appeal.

In 2012, Condez was employed as a police sergeant in the town of Dartmouth, He also operated a side business repairing computers, The chief of police, Timothy Lee, brought his wife's laptop computer to Condez for repair.

Condez repaired and returned the computer but kept a copy of the data that was on Chief Lee's computer.

On October 1, 2013, Sgt. Condez was placed on paid administrative leave due to an investigation involving unlicensed software on the police department's computers. Charges of misconduct were brought against Sgt. Condez and a hearing was scheduled before his appointing authority. After an initial continuance, a hearing was scheduled for June 9, 2014. On June 4, 2015, Sgt. Condez' attorney sought a second continuance to a date after July 1, 2014. The town's attorney responded that the hearing would not be continued beyond June 17, 2014. However, the hearing never took place due to subsequent developments.

On June 6, 2014, Sgt. Condez hand delivered the following letter to the town administrator.

> Frank Condez
>
> 543 High Hill Road
>
> North Dartmouth, MA 02747
>
> Town of Dartmouth Selectboard
>
> C/O David Cressman, Town Administrator 400 Slocum Road
>
> Dartmouth, MA 02747 Dear Mr. Cressman,
>
> June 5, 2014
>
> Dear Mr. Cressman,
>
> Attached are the photos which were recently discovered when initially recovered from Timothy Lee's personal laptop which was given to me by him to be serviced for a failing hard drive. The metadata encoded in these photos tie them to the same brand and model of digital camera used to take numerous other family photos. These are only two of multiple

photos of this nature. There is also a possibility that some of the photos were taken out of state. The photos can, at best, be described as disturbing. They are more accurately, possible evidence of abuse or sexual exploitation of a child by him and could be indicative of serious liability for the Town should other victims be discovered. This is being shared with the Select Board in their role as Police Commissioners and based on their duty to supervise the Chief of Police.

These photos have been provided to the Select Board in a redacted form so they are aware of this serious issue prior to it coming to them from an outside source. It is particularly disturbing to me and I'm sure it will be to the public as a whole that someone in a position of public trust would be involved and or condone this type of conduct. I'm sure I don't have to explain the severity of something such as this and the duty of the Select Board to investigate something as serious as this. I will be happy to provide all of the original evidence to whatever entity or outside police agency the Select Board decides to have investigate this matter. Given the serious nature of the issues here I don't have to go into great detail as to the consequences for the Town should other victims be discovered given that the Town now has knowledge of the situation. Thank you for your prompt attention to this matter.

Very Truly Yours,

*s/ Frank Condez*

Frank Condez

Administrative Record, Vol II, p. 646.

Sgt. Condez included with the letter two photographs of Chief Lee's infant son naked in a bathtub. Sgt. Condez redacted the photographs to cover the child's genital area but not his face.

On learning of the letter, Chief Lee contacted the Bristol District Attorney's Office and demanded that the District Attorney investigate him. The District Attorney assigned two State Police troopers to investigate Chief Lee. The town hired Attorney Robert Pomeroy, a former Chief of Police in Plymouth, to conduct its own investigation of Chief Lee.

On July 1, 2014, Sgt. Condez and his attorney met with Attorney Pomeroy but Sgt. Condez refused to speak to him about the matter.

On July 3, 2014, Sgt. Condez filed a report with the Department of Children and Families in which he stated that Chief Lee had "neglect[ed]" his four year old son. Sgt. Condez submitted copies of the photographs of the child taken from Chief Lee's computer. · The Department concluded that the report was not worthy of investigation and closed the case a few days later.

On July 18, 2014, the internal affairs officer for the police department notified Sgt. Condez by letter that Sgt. Condez was the subject of an internal affairs investigation. The letter also advised Sgt. Condez that Attorney Pomeroy was conducting an investigation into the allegations Sgt. Condez made in his letter to the Select Board. The internal affairs officer directed Sgt. Condez to meet with Attorney Pomeroy and provide him with "all original evidence" as Sgt. Condez offered to do in his letter.

On July 24th, Sgt. Condez and his attorney again met with Attorney Pomeroy and Sgt. Condez again refused to speak to him. On advice of counsel, Sgt. Condez refused to provide Attorney Pomeroy with the "original evidence" on grounds that Attorney Pomeroy was not an appropriate person to receive the evidence. ,Sgt. Condez said that he would turn the evidence over to the State Police.

That same day, Sgt. Condez made a DVD copy of the data he had copied from Chief Lee's computer. He then "forensically wiped" the data from his own hard drive, where the data had been stored. This eliminated important metadata that had not been copied onto the DVD, such as the dates files were created and accessed.

On July 28, 2014 the Select Board issued a letter to Sgt. Condez advising him, pursuant to G.L. c. 31, § 41, of a disciplinary hearing scheduled for August 12th to consider numerous charges of misconduct against him. Charge 9 alleged a violation of a police department order prohibiting "Conduct Unbecoming an Officer," defined as "[t]he commission of any specific act or acts of immoral, improper, disorderly or intemperate personal conduct, which reflects discredit upon the officer himself, upon his fellow officers or upon the police department." The letter included the following "[s]pecification" of the charge:

> In his June 5, 2014 submission to the Town of Dartmouth Select Board, Sergeant Frank Condez made baseless accusations of a scurrilous nature against the Chief of Police Timothy Lee, claiming that Chief Lee engaged in deviant sexual criminal behavior with his own child and suggesting there were other "victims," with the additional insinuation that the matter could become public. Condez did so with the motive to embarrass the Chief of Police and impede Condez' own disciplinary hearing. These actions involved immoral, improper and intemperate conduct, constituting Conduct Unbecoming an Officer in violation of the Dartmouth Police Rules and Regulations.
>
> Administrative Record, Vol. II, pp. 643-644.

On July 30, 2014, Sgt. Condez met with, and was interviewed by, State Police troopers about the allegations against Chief Lee. Sgt. Condez provided the State Police

with the DVD copy of the data copied from Chief Lee's computer.

The commissioner who acted as hearing officer found that the town proved that Sgt. Condez falsely accused Chief Lee of committing child abuse; that he acted knowingly or recklessly; and that he concealed evidence. The commissioner found that Sgt. Condez' actions "were taken with an ulterior motive to impede the investigation of the original pending charges being pursued against him." Decision, p. 39. Although the commissioner found that the town had not proven any of the other charges against Sgt. Condez, the commissioner recommended that the Civil Service Commission terminate Sgt. Condez' employment as a police officer.

On October 15, 2014, the Commission voted to adopt the recommendations and to terminate Sgt. Condez' employment.

**ANALYSIS**

"Judicial review of a final decision of the [civil service] commission is governed by G.L.c. 30A, § 14 '[The court] may set aside or modify the commission's decision if [it] conclude[s] that "the substantial rights of any party may have been prejudiced" by a decision that is based on an error of law, unsupported by substantial evidence, or otherwise not in accordance with the law.' …[The court] generally defer[s] 'to the [commission] on questions of fact and reasonable inferences drawn therefrom.'" Sherman v. Town of Randolph, 472 Mass. 802, 810 (2015), quoting Police Department of Boston v. Kavaleski, 463 Mass. 680,689 (2012).

Sgt. Condez contends that the Commission's decision must be vacated because it was based on three errors of law; two of its key findings of fact were not supported by substantial evidence; and termination was too harsh a remedy for his misconduct.

## I. Errors of Law

The plaintiff contends that the Commission committed errors of law in ordering his termination from employment because: (A) his letter to the Dartmouth Select Board was protected speech under the First Amendment to the United States Constitution; (B) as a mandated reporter, his repo1i of child abuse was privileged under G.L. c. 119, § 51A (h); and (C) the Commission improperly based its decision on uncharged misconduct.

### A. First Amendment

Sgt. Condez argues that his letter to the Dartmouth Select Board concerning Chief Lee was protected speech under the First and Fourteenth Amendments to the United States Constitution.

"[P]ublic employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in ce1iain circumstances, to speak as a citizen addressing matters of public concern." Garcetti v. Ceballos, 547 U.S. 410,417 (2006).

"In *Pickering v. Board of Education*, 391 U.S. 563 (1968), [the Supreme Court] stated that a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment. [The Court] also recognized that the State's interests as an employer in regulating the speech of its employees 'differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.' Id., at 568. The problem, [is] arriving 'at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" Connick v. Myers, 461 U.S. 138, 140 (1983).

"Pickering and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional

protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech, , , , If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. , .. This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations." Garcetti v. Ceballos, 547 U.S. 410,418 (2006).

The court "must determine first, based on 'the content, form, and context of [the] given statement, as revealed by the whole record,' ... whether the public employee was speaking 'as a citizen upon matters of public concern.'" Pereira v. Co7:1missioner a/Social Services, 432 Mass. 251,256 (2000), quoting Connickv. Myers, 461 U.S. 138, 147-148 (1983).

Sgt. Condez argues that he was speaking as a citizen, rather than a police officer, when he wrote the letter to the Select Board. The court agrees. Condez obtained the photographs, not in the course of police work, but as paii of his computer-repair business. His letter did not contain any reference to his status as a police officer; nor did it request any criminal prosecution or other law enforcement action, such as reporting the matter to the Department of Children and Families. Instead, he wrote that he was sharing the photographs "with the Select Board in their role as Police Commissioners and based on their duty to supervise the Chief of Police." He warned of "serious liability for the Town" and adverse public reaction. These concerns are civil and administrative matters, They are not

peculiarly related to Sgt. Condez' employment as a police officer. They are the kind of concerns that any citizen - police officer or not - might articulate to the town's governing body if allegations of child abuse were made against the police chief

"To be protected, the speech must [also] be on a matter of public concern " *Waters v. Churchill*, 511 U.S. 661,668 (1994), *Pereira v. Commissioner of Social Services*, 432 Mass. 251, 259 (2000) ("the First Amendment's protection against adverse personnel decisions extends only to speech on matters of public concern,") "Speech involves matters of public concern 'when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public."' ... The inquiry turns on the 'content, form, and context' of the speech." *Lane v. Franks,*_ U.S._,_, 134 S.Ct. 2369, 2380 (2014).

If the photographs taken from Chief Lee's laptop actually constituted "evidence of abuse or sexual exploitation of a child," as suggested in Sgt. Condez' letter, the topic would undoubtedly be a matter of public concern; but they did not. The photographs merely show Chief Lee's infant son playing in the bath. That is a private matter; not a public concern. Accordingly, Sgt. Condez' letter is not protected speech under the First Amendment.

**B. G.L. c, 119, § 51A (h)**

Sgt. Condez also argues that he is protected from discipline by the privilege created by the Legislature for mandated reports of child abuse, The statute provides as follows:

> No employer shall discharge, discriminate or retaliate against a mandated reporter who, in good faith, files a report under this section, testifies or is about to testify in any proceeding

> involving child abuse or neglect. Any employer who discharges, discriminates or retaliates against that mandated reporter shall be liable to the mandated reporter for treble damages, costs and attorney's fees.
>
> G.L. c. 119, § 51A (h).

This argument must be rejected for two reasons.

First, the Commission found that Sgt. Condez did not make his report "in good faith," as required by the statute. 1 The phrase, "good faith," has not been construed by our appellate courts in the context of this statute. In general, however, a person is acting in good faith where he is "[b]ehaving honestly and frankly, without any intent to defraud or to seek an unconscionable advantage." Black's Law Dictionary, "Acting in Good Faith" (10 th ed. 2014).

The Commission found that Sgt. Condez made "false accusations amounting to charges that Chief Lee had committed a felony, i.e. child abuse, either knowing them to be false or with reckless disregard and, in addition, made an effo1i to conceal his actions, all of which were taken with an ulterior motive to impede the investigation of the original pending charges being pursued against him." Decision, p.39. The Commission described Sgt. Condez' letter to the Select Board as containing "willful, intemperate and wholly unsubstantiated accusations" that "were retaliatory." Decision, p. 46. These findings of fact make it clear that Sgt. Condez did not deliver his letter to the Select Board "in good faith."

Second, the report was not made to the Department of Children and Families. The statutory privilege applies to a mandated reporter who files a report under Section 51A. Under that section, under applicable circumstances, a mandated reporter must "file a written report with the department [of children and families.]" Although he later filed a report of "neglect" with the Department, Sgt. Condez' letter alleging abuse was filed with the town's Select Board.

1 The Commission also ruled that the statutory privilege does not apply because Sgt. Condez did not, in fact, have "reasonable cause to believe" that the child was abused. That is the standard that triggers the requirement that a mandated reporter report abuse to the Department of Children and Families. G.L. c. 119 § 51 A (a). The standard under§ 5 IA (h), which establishes the privilege, is broader. That subsection merely requires that the report be made "in good faith." A person who acts in a good faith but mistaken belief that the facts constitute "reasonable cause" to believe a child is being abused would be covered by the privilege. The fact that Sgt. Condez lacked "reasonable cause to believe" that the child was abused does not necessarily preclude application of the privilege.

Sgt. Condez argues that his letter to the Select Board qualifies as a report to the Department under the following provision:

> If a mandated reporter is a member of the staff of a medical or other public or private institution, school or facility, the mandated reporter may instead notify the person or designated agent in charge of such institution, school or facility who shall become responsible for notifying the department in the manner required by this section.
>
> G.L. c. 119, § 51A (a).

Whether Sgt. Condez' letter to the Select Board qualifies as a report of abuse by a mandated reporter under this provision is a mixed question of law and fact. The legal question is whether the Select Board qualifies as a "person ... in charge of [a public or private] institution, school or facility ... responsible for notifying the department. ..." Id. The factual question is whether Sgt. Condez sent his letter in lieu of a direct report to the Department.

The terms "institution" and "facility" are not defined in the statute or Department regulations. Still, their meaning can be adduced by the Legislature's use of those terms in other parts of the statute and in the Department's use of the terms in its regulations. The statutory definition of "mandated reporter" uses the term, "facility," to mean a place where children are cared for or receive services, i.e. "mandated reporter" includes a "person paid to care for or work with a child in any public or private facility...." G.L. c. 119, § 21. The Department's regulations use the terms, "institution" and "facility interchangeably and in the sense of an organization that provides care or services to children. For example, "institutional abuse" is defined as "abuse or neglect which occurs in any facility for children, including but not limited to group homes, residential or public or private schools, hospitals, detention and treatment facilities, family foster care homes, group day care centers,

and family day care homes." 110 CMR 2.00. Police departments are not primarily engaged in taking care of children, although that is an incidental part of police activities. The court therefore concludes that a municipal police department is not an "institution" or "facility" as those terms are used in G.L. c. 119, § 51A (a).

Likewise, the Commission was warranted in concluding that the purpose of the letter was not to serve as a mandated report of child abuse under Section 51A but rather as an attempt to "throw sand in the gears of the pending investigation of Sgt. Condez' own alleged misconduct." Decision, p. 50. The conclusion that the letter did not serve as a substitute for a report of child abuse directly to the Department is supported by the fact that the letter never mentions the Department and does not indicate in any way that Sgt. Condez expected the Select Board to forward the letter to the Department. Further, the argument that Sgt. Condez used the letter to the Select Board as a substitute for a direct report to the Department is contradicted by the fact that Sgt. Condez filed a direct report with the Department about the photographs less than thirty days after his letter to the Select Board. If Sgt. Condez sent the letter as a report in fulfillment of his duty under the statute, there would be no need to make a second, direct report to the Department.

Accordingly, Sgt. Condez was not privileged to send the letter to the Select Board under G.L. c, 119, § 51A (h).

**C. <u>Uncharged Misconduct</u>**

Sgt. Condez argues that the Commission erred because it decided to terminate his employment based on uncharged misconduct.

"Chapter 31, § 41, restricts the ability of an appointing authority to remove a tenured civil service employee. An employee cannot be laid off except for 'just cause.' The commission's task is to determine, after a hearing, whether the appointing authority has sustained its burden of proving by a fair preponderance of the evidence

that there was just cause for the action it took.... In attempting to show just cause, the appointing authority can rely only on those reasons for layoff that it gave to the employee in writing," Gloucester v. Civil Service Commission, 408 Mass. 292, 298 (1990).

Sgt. Condez argues that Charge 9 in the notice given to him "solely asserts" misconduct in sending the letter to the Select Board; whereas the Commission terminated his employment for "destroying evidence and/or making the subsequent 51A report to DCF," Plaintiff's Memorandum, pp. 17-18.

Sgt. Condez is correct that the notice alleged misconduct only in sending the letter to the Select Board, not in destroying evidence or filing a later report of abuse with the Department of Children and Families. The notice includes the following "specification" for Charge 9:

> In his June 5, 2014 submission to the Town of Dartmouth Select Board Sergeant Frank Condez made baseless accusations of a scurrilous nature against the Chief of Police Timothy Lee, claiming that Chief Lee engaged in deviant sexual criminal behavior with his own child and suggesting there were other "victims," with the additional insinuation that the matter could become public, Condez did so with the motive to embarrass the Chief of Police and impede Condez' own disciplinary hearing. These actions involved immoral, improper and intemperate conduct, constituting Conduct Unbecoming an Officer in violation of the Dartmouth Police Rules and Regulations.
>
> Administrative Record, Vol. II, pp. 643-644.

The written decision adopted by the Commission mischaracterizes the charge as including both the letter to the Select Board and subsequent conduct:

> Dartmouth charged that Sgt. Condez's June 5, 2014 letter to the Dartmouth Select Board, and his subsequent actions in furtherance of the assertions made in that letter, also violated General Order 670.00, prohibiting "Conduct Unbecoming an Officer." Here, Dartmouth is on solid ground. It is hard to imagine behavior that comes any closer to the intent of General Order 670.00 than does Sgt. Condez's willful, intemperate and wholly .unsubstantiated accusations against Chief Lee of felonious conduct by alleging, in what amounts to a public accusation of child neglect and sexual exploitation by Chief Lee of his only, wholly innocent son. I conclude that Sgt. Condez's accusations amount to conduct unbecoming an officer. I also find that his accusations were retaliatory. Finally, I conclude that Sgt. Condez repeatedly lied, misled, concealed and destroyed evidence in order to further his unbecoming and retaliatory behavior.
>
> Decision, p. 46 (emphasis Supplied).

The Commission essentially decided that the town had proven both the charge specified in the notice and also a cover-up of that misconduct. Since the charge alleged in the notice was proved, just cause existed for discipline. The finding of additional violations of General Order 670.00 is unnecessary but does not invalidate the finding of just cause.

## II. Substantial Evidence

Sgt. Condez also contends that two of the Commission's findings were not supported by substantial evidence: (A) Sgt. Condez was motivated by his desire to

"throw sand in the gears of the pending investigation" against him; and (B) Sgt. Condez engaged in conduct unbecoming a police officer.

A decision of a state agency must be supported by "substantial evidence." G.L. c. 30A, § 14(7)(e). "Substantial evidence" is defined as "such evidence as a reasonable mind might accept as adequate to support a conclusion." G.L. c. 30A, § 1(6).

"Judicial 'review under the substantial evidence standard is circumscribed.' ... It is a standard of review 'highly deferential to the agency' In order to be supported by substantial evidence, an agency conclusion need not be based upon the 'clear weight' of the evidence or even a preponderance of the evidence, but rather only upon 'reasonable evidence' i.e., 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' after taking into consideration opposing evidence in the record. G.L. c.30A, §§1(6), 14(8)." Lisbon v. Contributory Retirement Appeal Board, 41 Mass. App. Ct. 246, 257 (1996) (citations omitted.)

"Under the substantial evidence test, a reviewing court is not empowered to make a de novo determination of the facts, to make different credibility choices, or to draw different inferences from the facts found by the [agency]." Pyramid Co. v. Architectural Barriers Bd., 403 Mass. 126, 130 (1988) (citations omitted).

**A. <u>Sgt, Condez' Motive</u>**

Sgt. Condez contends that the Commission's finding that his motive in sending the letter to the Select Board was to delay the pending disciplinary hearing was not supported by substantial evidence.

The Commission adopted the following finding:

> The timing of Sgt. Condez's actions also illustrates an ulterior motive, coming the day after he learned that all efforts to keep

> postponing his disciplinary hearing had been exhausted. By his own admission, Sgt. Condez had known of the "disturbing" photographs and the allegedly potential liability they posed for some time, claiming he first saw them when he started to "wipe" his stack of "scratch drives" in May 2014. Yet he chose to take no action and did not report the "disturbing" discovery for another month. I heard no credible explanation for the unusual coincidence in timing other than the logical inference that it was meant to throw sand in the gears of the pending investigation of Sgt. Condez's own alleged misconduct and I conclude that was the primary, and probably sole, motive for his decision to send the June 5, 2014 letter.
>
> Decision, pp. 49-50.

The Commission contends that Sgt. Condez' motive based on the circumstances that existed at the time the letter was sent, including the timing of the letter. Since the inference was based on facts in evidence, it was a permissible inference. "A fact may be inferred even though the relationship between the basic fact and the inferred fact is not necessary or inescapable, so long as it is reasonable and possible" Mass. G. Evid, § 301 (b) (2017 ed.)

Sgt. Condez also argues that the Commission's finding as to his motive is arbitrary and capricious. "A decision that does not contain ... a factual source [for the agency's conclusion], along with a reasoned explanation, is 'arbitrary within the meaning of G. L. c. 30A, § 14(7)(g).'" Eady's Case, 72 Mass. App. Ct. 724726 (2008), quoting Dalbec 's Case, 69 Mass. App. Ct. 306, 316 (2007). A decision is arbitrary and capricious if "there is no ground which 'reasonable [persons] might deem proper' to support it." FHC Homes of Blackstone, Inc. v. Conservation Commission of Blackstone, 41 Mass. App. Ct. 681,685 (1996).

As the Commission stated in the passage quoted above, its finding concerning Sgt. Condez' motive was based on the factual circumstances in which he sent the letter, including the timing in relation to the pending disciplinary hearing. The finding was based on facts in evidence and was reasonable. Therefore, it was not arbitrary or capricious.

## B. Conduct Unbecoming a Police Officer

Sgt. Condez also challenges the following findings of the Commission:

> Dartmouth has proved the charges of conduct unbecoming an officer for Sgt. Condez' s wholly false accusations that Chief Lee was guilty of a felony, namely, criminal abuse of his only child. Sgt. Condez showed extreme lapse of judgment, untruthfulness and unconscionable retaliatory behavior motived [sic] by an unfounded personal animus against Chief Lee and others, all of which is utterly intolerable in a police officer. Accordingly, Dartmouth proved just cause for his termination on those charges against him.
>
> Decision, p. 34.

In particular, he contends that the following findings were not suppo1ied by substantial evidence: (1) the statements in his letter were "wholly false;" (2) he engaged in "unconscionable retaliatory behavior;" and (3) he was motivated "by an unfounded personal animus against Chief Lee and others."

Sgt. Condez sent a letter to the Select Board with two photographs of an infant boy naked in the bathtub. In one of the photographs, the boy has an indistinct object on his penis. Sgt. Condez asserted that the photographs were "possible evidence of abuse or sexual exploitation of a child by [Chief Lee]." Sgt. Condez wrote that it was "disturbing ... that someone in a position of public trust would be involved

and or condone this type of conduct." He described the situation as "serious" four times. He twice suggested that there were additional "victims." He warned of liability of the town and called for an investigation by an "outside police agency." Adm. Record, Vol. II, p. 646. Based on the letter and the photographs, the Commission could permissibly find that the serious accusations in the letter were "wholly false" in the sense that they were unsubstantiated.

The Commission could also permissibly find that Sgt. Condez' actions were "retaliatory" based on the fact that he only sent his letter after being denied an additional continuance of pending disciplinary proceedings. Likewise, the Commission could permissibly find that Sgt. Condez was motivated by personal animus against Chief Lee based on the facts that Chief Lee was in charge of the police department bringing the charges and the personal nature of the scandalous and unwarranted attack on Chief Lee.

## III. Severity of the Remedy

Finally, Sgt. Condez contends that his report of child abuse did not warrant the severe sanction of termination of employment.

The severity of the punishment is a matter committed to the sound discretion of the appointing authority and the Commission. See, Police Commissioner of Boston v. Civil Service Commission, 39 Mass. App. Ct. 595, 600 (1996). The court may not disturb the choice made by the agency unless the choice is arbitrary or capricious. As noted above, a decision is arbitrary and capricious if "there is no ground which 'reasonable [persons] might deem proper' to support it." FHC Homes of Blackstone, Inc. v. Conservation Commission of Blackstone, 41 Mass. App. Ct. 681,685 (1996).

In determining the appropriate disciplinary action, the Commission took into account the fact that Sgt. Condez "has performed on many occasions with distinction." Decision, p. 56. However, the Commission also determined

that Sgt. Condez had caused "irreparable damage" to his own credibility and to the reputation of the police department. Id. Weighing both factors, the Commission concluded that termination was the appropriate discipline. Because that decision was based on a rational view of the evidence, it was neither arbitrary nor capricious and the court is required to defer to the Commission's conclusion.

**ORDER**

In Civil Action No. 1673CV00796, the plaintiffs motion for judgment on the pleadings (Paper# 14) is **DENIED** and the defendants' cross-motion for judgment on the pleadings (Paper #15) is **ALLOWED**. Judgment shall enter **AFFIRMING** the decision of the Civil Service Commission.

September 23, 2017

Thomas F. McGuire, Jr.
Justice of the Superior Court

Supreme Judicial Court for the Commonwealth of Massachusetts RE: Docket No. FAR-26915
FRANK CONDEZ
vs.
CIVIL SERVICE COMMISSION & others

Bristol Superior Court No.
1673CV00796 A.C. No.
2018-P-0555

NOTICE OF DENIAL OF APPLICATION FOR FURTHER APPELLATE REVIEW

Please take note that on September 13, 2019, the application for further appellate review was denied.
Francis V. Kenneally, Clerk
Dated: September 13, 2019

To: Gregory V. Sullivan, Esquire
Robert L. Quinan, Jr., Esquire
Angela L. Linson, Esquire
Robert L. Ciociola, Esquire
Nora Rose Adukonis, Esquire
Leonard H. Kesten, Esquire
Evan C. Ouellette, Esquire