THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

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August 4, 2023

Christopher C. Bowman, Chair
Civil Service Commission
100 Cambridge Street, suite 200
Boston, MA 02108

Re: Gallant v. City of Methuen
CSC No. D1-22-84, DALA No. CS-22-388

Dear Chair Bowman:

Enclosed is a recommended decision dated today. The parties are advised that, pursuant to 801 C.M.R. § 1.01(11)(c)(1), they have thirty days to file written objections to the recommended decision with the Civil Service Commission. Any objections should be filed by email to cscdocuments@mass.gov. Objections may be accompanied by supporting briefs.

If either party files objections to the recommended decision, the opposing party may file a response to the objections within 20 days of receipt of a copy of the objections. Any response should also be filed by email to cscdocuments@mass.gov.

Sincerely,

/s/ James P. Rooney
James P. Rooney
First Administrative Magistrate

Enclosure

cc: James W. Simpson, Jr., Esq.
Kenneth J. Rossetti, Esq.
Peter J. McQuillan, Esq.
Susanne M. O'Neil, Esq.

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. **Division of Administrative Law Appeals**

Gregory Gallant,
Appellant,

v.

City of Methuen,
Respondent.

No. CS-22-388 (D1-22-84)

Dated: August 4, 2023

Appearance for Appellant:
James W. Simpson, Jr., Esq.
Framingham, MA 01702

Appearance for Respondent:
Kenneth J. Rossetti, Esq.
Peter J. McQuillan, Esq.
Methuen, MA 01844

Appearance for Office of the Inspector General:
Susanne M. O'Neil, Esq.
Boston, MA 02108

Administrative Magistrate:
Yakov Malkiel

SUMMARY OF TENTATIVE DECISION

The appellant negotiated a collective bargaining agreement on behalf of his labor union. Very late in the bargaining process, the appellant made revisions to the evolving draft agreement. He disclosed his revisions to a member of the employer-city's bargaining team. He expected that the other members of the city's team would also review the new draft. The city and its council executed the agreement without understanding its financial implications. An arbitrator later deemed the agreement unenforceable. The appellant's negotiation tactics were aggressive; but he did not engage in any dishonest, untrustworthy, or improper conduct, either during the negotiations or in his ensuing testimony. The city therefore lacked just cause to terminate the appellant's employment.

TENTATIVE DECISION

Police Captain Gregory Gallant appeals from the City of Methuen's decision to terminate his employment. The Civil Service Commission referred the appeal to DALA. An evidentiary hearing took place over the course of four days during March-April 2023. The witnesses were

current Chief of Police Scott McNamara, retired Chief of Police Joseph Solomon, Captain Kristopher McCarthy, Officer David Gardner, Attorney Gary Nolan, and Captain Gallant himself. I admitted into evidence stipulations marked 1-9 and exhibits marked G1-G16, C1-C3, C6-C8, C11-C27, and A1-A10.[1] The record closed upon the submission of hearing briefs.

I. Procedural History

The case originated with collective bargaining negotiations between the city and the union representing its police superior officers, i.e., its sergeants, lieutenants, and captains. Captain Gallant led the union's bargaining team. The negotiations resulted in a CBA executed in September 2017.

At some point, reports began to circulate that the 2017 CBA entitled the city's superior officers to salaries much higher than those paid in other localities. The Office of the Inspector General investigated, issuing a final report in December 2020. The report found wrongdoing by Captain Gallant and various other individuals. *See* Office of the Inspector General, *Leadership Failures in Methuen Police Contracts* (2020).

During an overlapping timeframe, the city and the union litigated a class-action labor arbitration focused on the 2017 CBA's enforceability. In January 2022, the arbitrator deemed the CBA unenforceable, concluding that the city and the union had reached no "meeting of the minds" on material terms. *Methuen Police Super. Officers' Ass'n L. 17 v. City of Methuen*, No. 01-19-0001-3281 (Am. Arb. Ass'n Jan. 7, 2022). The arbitral award has become final.

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[1] Captain Gallant offered Exhibits G1-G16. The city offered Exhibits C1-C27, of which nos. C4, C5, C9, and C10 were excluded as duplicative. Exhibits A1-A10 are the transcripts of the arbitration proceeding discussed *infra*. Exhibit C3 is cited as the "OIG report." Exhibit C15 is cited as the "arbitral award." The testimony at the evidentiary hearing, which was transcribed in consecutively numbered volumes, is cited by page number.

In June 2022, the city terminated Captain Gallant's employment, citing "untrustworthiness" and related grounds. Captain Gallant appealed. A series of prehearing orders addressed the impacts of the OIG investigation and the labor arbitration on the appeal. Those orders deemed the OIG report admissible for its truth; they deemed the essential findings of the arbitral award preclusive.[2] Transcripts of the arbitration testimony were admitted into evidence, and the parties were not permitted to retread that testimony at the hearing.[3] *See generally* G.L. c. 30A, § 11(2).

II. Findings of Fact

The following findings are drawn from the testimony, the exhibits, and the essential determinations of the arbitral award.

A. CBA Negotiations

1. Captain Gallant began his career as a Methuen police officer in approximately 1993. He achieved the rank of captain in approximately 2017. (Exhibits C16, A8; Tr. 139-140.)

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[2] Issue preclusion applies where "(1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom preclusion is asserted was a party (or in privity with a party) to the prior adjudication; . . . (3) [an] issue in the prior adjudication was identical to [an] issue in the current adjudication . . . [(4)] the issue . . . [was] essential to the earlier judgment." *Duross v. Scudder Bay Cap., LLC*, 96 Mass. App. Ct. 833, 836-37 (2020). Captain Gallant maintains that the arbitration involved different parties and different issues. But for preclusion purposes, "union members [are] in privity with their union," at least where "a class action . . . was filed on behalf of the entire bargaining unit." *DaLuz v. Department of Correction*, 434 Mass. 40, 42 & n.8, 44, 45 (2001). And issue preclusion may arise as to specific facts even where the earlier and later cases overlap only in part. *See Finnegan v. Baker*, 95 Mass. App. Ct. 1104 (2019) (unpublished memorandum opinion). Issue preclusion also does not depend on the prior judgment's correctness: it focuses on advancing "finality, efficiency, consistency, and fairness." *Bar Couns. v. Board of Bar Overseers*, 420 Mass. 6, 10-11 (1995).

[3] The parties were permitted to elicit non-repetitive testimony from witnesses who previously testified at the arbitration (such as Captain Gallant).

2. During May-August 2017, the city and the superior officers' union negotiated a new CBA. Captain Gallant led the union's bargaining team, which also included another police captain (Joseph Aiello). The city's bargaining team consisted of Mayor Stephen Zanni, Chief Solomon, City Solicitor Richard D'Agostino, and Assistant City Solicitor Anne Randazzo. (Arbitral award 5; Exhibits C16, A4-A6, A8; Tr. 140-142, 202, 314-316.)

3. Around August 29, 2017, the bargaining teams reached a tentative agreement. Among other things, they agreed that holiday pay, a cleaning allowance, and hazardous duty pay[4] would be "rolled into" the officers' base pay. The bargaining teams did not agree that educational incentives[5] would be rolled into base pay. (Arbitral award 6, 8; Exhibits C16, G4, A4, A6, A8, A9; Tr. 146, 343-345.)

4. Base pay was the starting point for calculations of the officers' overtime pay, vacation pay, and other compensation amounts. In addition, the salary of each rank of officers was calculated as a percentage of the next lower rank's base pay. As of 2017, the salary for sergeants was set at 132% of the maximum patrolman's base pay; the salary for lieutenants was set at 116% of the maximum sergeant's base pay; and the salary for captains was set at 116% of the maximum lieutenant's base pay. These percentage differentials were commonly referred to as the "splits." (Arbitral award 5, 9, 21; Exhibits C16, A5, A8; Tr. 1:146-147, 324-325.)

5. Among the items agreed upon at the bargaining table was a gradual increase of the splits. Each percentage number would remain unchanged in 2017, rise by 2% in 2018, and rise by another 2% in 2019. For example, the splits for sergeants were scheduled to remain

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[4] Also called "protective vest" or "technology" pay.

[5] Also called "Quinn Bill" pay, even as to officers whose educational incentives were not prescribed by G.L. c. 41, § 108L.

132% of maximum patrolman base pay in 2017, with increases to 134% in 2018 and 136% in 2019. The bargaining teams referred to this agreement as "0,2,2."[6] (Arbitral award 7-8, 19; Exhibits C16, G12, A4-A6, A8; Tr. 145, 232-236, 320, 326-327.)

6. The city's bargaining team asked Captain Gallant to prepare a clean draft of the CBA. Captain Gallant delivered his draft to Chief Solomon, leaving another copy in Mayor Zanni's office. The draft was dated August 31, 2017. Through Chief Solomon, Mayor Zanni asked Captain Gallant for certain changes: principally, the mayor wanted the CBA to expressly mention the "0,2,2" raises. (Arbitral award 7; Exhibits C16, C19, G6, A4-A6, A8, A9; Tr. 148-156, 331, 338-339.)

B. Captain Gallant's Revisions: Their Substance

7. Captain Gallant accommodated Mayor Zanni by adding the following language into the CBA's article XXIV:

> The cost of living increases are as follows:
> July 1, 2017—zero percent increase
> July 1, 2018—two percent increase
> July 1, 2019—two percent increase

Simultaneously, Captain Gallant inserted more than twenty other pieces of new, pay-related language into several sections of the CBA. He made these revisions partly in the hope of

[6] The "0,2,2" label apparently reflected Mayor Zanni's aspiration to grant consistent, modest raises to the city's various unions. (Exhibit A2.) As applied to the superior officers' CBA, this label was predestined to mislead. Even standing alone, the anticipated changes to the splits would not have yielded 2% pay increases in 2018 or 2019. For purposes of illustration, in 2018, sergeant pay would have risen from 132% of patrolman pay to 134% of patrolman pay—a total pay raise of about 1.5%. Lieutenant pay would have risen that year from 116%-of-132% of patrolman pay to 118%-of-134% of patrolman pay—a total raise of about 3.3%. (Exhibits C7, C16, A8.)

preventing miscalculations. But he also understood that the revisions would be beneficial to the union's members. (Arbitral award 7-9, 19; Exhibits C7, C19, A8.)

8. The great majority of Captain Gallant's insertions reiterated agreements that the previous draft had already reflected. The previous draft had stated that holiday pay (article XII), the cleaning allowance (article XVII), and hazardous duty pay (article XXIX, § 25) would be "considered base pay for all purposes." Captain Gallant repeatedly added, ". . . including determination of total compensation under article [XXIV]."[7] The previous draft had enumerated a long list of splits, stating each time that a particular rank of officers would receive a specified percentage of the next lower rank's "salary." Captain Gallant repeatedly added, ". . . including all base pay calculations." (Exhibits C7, C19, G13, A8; Tr. 164-165.)[8]

9. At the heart of the dispute is Captain Gallant's most substantive edit: a calculation formula appearing in the CBA's article XXIV, immediately after the new "0,2,2" language. It reads as follows:

> Base pay and added base pay calculations are to be calculated in the following order and manner to arrive at base pay for all purposes; Base pay, then add cleaning allowance, subtotal, then calculate and add Holiday compensation under Article XII, then add calculated Protective Vest/Hazardous Duty and Technology Compensation percentage, calculate Quinn Bill/Education Incentive.

(Exhibits C7, C16, C19, G14, A8.)

10. The OIG report and the arbitral award devoted substantial attention to the calculation formula's final clause, "calculate Quinn Bill/Education Incentive." The OIG and the

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[7] This edit was Attorney Nolan's idea. (Exhibit C24.)

[8] At the labor arbitration, the city suggested that the insertions described in paragraph 8 may have altered the CBA's practical implications. (Exhibits A1-A9 *passim*.) The arbitrator apparently did not adopt this unconvincing view. (Arbitral award *passim*.)

arbitrator both concluded that this clause caused educational incentives to be rolled into base pay. The arbitrator's ruling on this point is preclusive. The educational incentives available to Methuen's officers were substantial, and the splits would have compounded the impact of this revision with each successive rank of officers. (Arbitral award 5, 20-22; Exhibits C7, A8.)

11. The arbitrator wrote that "[i]t is not . . . clear . . . that Captain Gallant understood the full ramifications of the words he drafted." A preponderance of the evidence supports the conclusion that Captain Gallant did not believe that his edits would roll educational incentives into base pay. At the same time that he inserted roll-into-base-pay language into the CBA's provisions about holiday pay, the cleaning allowance, and hazardous duty pay, Captain Gallant made no such changes to the provision about educational incentives (article XXIX, § 19). He also did not indicate that educational incentives would be rolled into base pay in contemporaneous conversations with union members and other individuals. (Arbitral award 18; Exhibits C7, G4, G14, A8; Tr. 162-163, 215-217, 299-300, 346.)[9]

12. The rest of Captain Gallant's calculation formula relates to a conundrum posed by the bargaining teams' agreement that base pay would include three new components, i.e., holiday pay, the cleaning allowance, and hazardous duty pay. Two of these items—holiday pay and hazardous duty pay—were themselves derived from base pay.[10] The bargaining teams did not discuss whether, for purposes of calculating these two items, base pay would include any of its three new components. The approach reflected in Captain Gallant's formula was that, for

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[9] Captain Gallant *did* hope to ensure that the city would include various "base pay" items within the basis for its calculations of officers' educational incentives. (Exhibits C16, A8; Tr. 162-163, 203-204, 237-238.)

[10] Holiday pay equaled thirteen days' worth of base pay; hazardous duty pay equaled 1-2% of annual base pay. The cleaning allowance was a flat annual sum. (Exhibits C7, C19.)

purposes of calculating holiday pay, the cleaning allowance would count as base pay; and for purposes of calculating hazardous duty pay, both the cleaning allowance and holiday pay would count. These choices were favorable to the union,[11] and the splits would have compounded their impacts on the compensation of high-ranking officers. (Exhibits C7, G14, A6, A8.)

13. While planning and composing his edits, Captain Gallant consulted with the union's attorney, Mr. Nolan, writing: "[T]here are some big changes to the splits . . . . There is also an increase given to us with a percentage [sic] and hazardous duty pay. I foresee, [b]ecause of the large increases in pay, having to litigate the wording." In his next message, Captain Gallant added that the union had obtained "great increases, and it all compounds."[12] Some days later, Captain Gallant updated Attorney Nolan: "We made some language changes at the last minute, added a paragraph in compensation, in which we break down the order of calculations to be made . . . . It makes a little difference. We also . . . firmed up the definition of base pay in each section." (Exhibits C8, C22-C27, G12-14.)

14. Captain Gallant left the signature page from his first draft of the CBA unchanged, including the execution date. He brought the new draft to Chief Solomon. The two men then discussed Captain Gallant's edits. Chief Solomon specifically commented on the new calculation formula. Thereafter, Captain Gallant delivered copies of the CBA to Mayor Zanni.

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[11] An alternative implementation of the parties' bargaining-table agreements could have used base pay without *any* of its new elements (holiday pay, the cleaning allowance, and hazardous duty pay) to calculate holiday pay and hazardous duty pay. It is not clear whether this option occurred to Captain Gallant.

[12] It appears that Captain Gallant sent the first two emails quoted in paragraph 13 before introducing his calculation formula into the draft agreement. (Exhibit C22 (5:21 pm email); Exhibit C8 (5:34 pm email); Exhibit C23 (5:38 pm email and attached non-final draft).) The parties had agreed to "changes to the splits," "large increases," and "compound[ing]" pay terms by the time they rose from the bargaining table. *See* paragraphs 3-5 *supra*.

During the ensuing days, Mayor Zanni signed the CBA without posing further questions or requests. (Arbitral award 10-11; Exhibits C7, C16, C19, G10, A8; Tr. 163-170, 339-347.)

C. Captain Gallant's Revisions: His Expectations

15. The primary theory underlying the city's termination of Captain Gallant is that his eleventh-hour revisions to the CBA were dishonest. The crux of the accusation is that Captain Gallant intended to trick the city's bargaining team by concealing his edits—really, his calculation formula—from them. I find that this was not Captain Gallant's intention. Although he made his edits very late in the day, Captain Gallant anticipated that the city's bargaining team would see and consider those edits. Paragraphs 16-18 expand on this pivotal finding. They recognize that adverse inferences may be drawn against Captain Gallant from his refusal to answer substantive questions during the city's disciplinary hearing (as discussed *infra*). *See Town of Falmouth v. Civil Serv. Comm'n*, 447 Mass. 814, 826-27 (2006). Those inferences are outweighed by the countervailing considerations that paragraphs 16-18 describe. *See United States v. Stein*, 233 F.3d 6, 16, 17 n.6 (1st Cir. 2000); *Selfridge v. Jama*, 172 F. Supp. 3d 397, 415 n.16 (D. Mass. 2016); *Parham v. Stewart*, 839 S.E.2d 605, 610 & n.8 (Ga. 2020).[13]

[13] The city's hearing officer drew the following adverse inferences from Captain Gallant's invocation of the Fifth Amendment: that he inserted edits into the draft CBA without first consulting the city's bargainers (see paragraph 7 *supra*); that he manipulated the CBA's formatting in order to conceal his new insertions (see paragraph 17 *infra*); and that he used the CBA's new provisions as "leverage" during the city-union negotiations of 2018 (see paragraph 21 *infra*); and that he provided "conflicting testimony" to the OIG and the arbitrator (see paragraphs 24-29 *infra*). (Exhibit C20.) The general rule that adverse inferences may be drawn from a party's invocation of a privilege rests on the commonsense insight that the party's reticence may "indicat[e] his opinion that the evidence, if received, would be prejudicial to him." *Phillips v. Chase*, 201 Mass. 444, 450 (1909). *See Lentz v. Metro. Prop. & Cas. Ins. Co.*, 437 Mass. 23, 26 (2002). With this premise in mind, an adverse inference becomes much less compelling when the party has eventually supplied the missing evidence. *See generally In re 650 Fifth Ave. & Related Properties*, 934 F.3d 147, 169 (2d Cir. 2019) (courts must take a "liberal view" of applications to withdraw invocations of the Fifth Amendment). Nonetheless,

16. Captain Gallant testified credibly that he expected the city's bargaining team to read and consider his revised draft of the CBA. That expectation was natural. The mayor and the city solicitor were duty-bound to review the final copy of the CBA before its execution. Captain Gallant also placed his calculation formula where the mayor was *most* likely to see it—on the same page as, and immediately after, the new "0,2,2" language that the mayor had requested. (Exhibits C7, A7-A9; Tr. 171.)[14]

17. It is true that Captain Gallant removed several line breaks from the page containing his new formula. This adjustment caused the CBA's pagination to remain mostly unchanged. But throughout the drafting process, Captain Gallant struggled to produce a readable document. He was especially stymied by page numbering, at some point even hand-pasting numbers onto a draft's printed pages. I find that Captain Gallant's spacing adjustments were intended not to obscure his edits but to avert additional formatting glitches. (Arbitral award 7; OIG report 12; Exhibits C7, C16, C19, G10, A8, A9; Tr. 149, 167-168, 230, 335.)[15]

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the Supreme Judicial Court has held that the commission is not permitted to ignore an employee's prior silence before the appointing authority, and must "account for" that silence even if the employee has since testified. *Town of Falmouth*, 447 Mass. at 826-27. *See also Singh v. Capuano*, 468 Mass. 328, 333 (2014) (a factfinder's obligation is to "entertain the possibility" of drawing an adverse inference).

[14] Captain Gallant and Chief Solomon testified that Captain Gallant gave the city copies of the revised CBA with tabs marking the revised pages. A photograph of a "yellow tabbed copy" was in evidence at the arbitration hearing. (Arbitral award 20 n.16; Exhibit G7; Tr. 163-170, 340, 350-355.) I find that Captain Gallant's testimony on this point reflected his best recollection. I do not find further that the city's bargainers (other than Chief Solomon) in fact received tabbed copies of the agreement, because the arbitrator found "no credible evidence" that Captain Gallant's edits "were expressly brought to the attention of the full bargaining team." (Arbitral Award 19-20.) *See Alba v. Raytheon Co.*, 441 Mass. 836, 843-44 (2004) (a non-essential finding may be preclusive when it results from "full litigation and careful decision").

[15] Mayor Zanni testified at the arbitration proceeding that he did not read any version of the CBA before signing it. City Solicitor D'Agostino testified that he never saw any pre-execution draft of the CBA. Assistant City Solicitor Randazzo testified that she received a pre-execution draft but did not read it. (Exhibits A4, A5, A6.) In these circumstances, the theory

18. The charge that Captain Gallant attempted to hide his edits from the city's bargaining team runs aground on the reality that, in Captain Gallant's presence, city negotiator Chief Solomon *in fact* examined those edits. By way of a fallback argument, the city suggests that Captain Gallant hoped to obscure his revisions from *other* city bargainers; the city posits that Captain Gallant suspected that Chief Solomon would not zealously defend the city's interests, because Chief Solomon's own compensation was derived from the superior officers' pay.[16] This fallback theory is not supported by a preponderance of the record evidence. No testimony, real-time emails, or meeting notes suggest that Captain Gallant doubted Chief Solomon's fidelity to the city or zeal on its behalf. No evidence discloses any extra-professional relationship between the two men. Captain Gallant testified credibly that he "trusted" Chief Solomon and "took his word" with respect to discussions within the city's bargaining team. With the benefit of 20/20 hindsight, this testimony is an easy target for skepticism: but it is important to recall that the mayor, the city solicitor, the assistant city solicitor, and the city councilors all trusted Chief Solomon's integrity and advice. These individuals were responsible for safeguarding the city's interests. Taking them as points of comparison, it becomes very plausible that Captain Gallant—

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that Captain Gallant's formatting adjustments were designed to impede the city's contract-review process relies on a measure of imagination. Both Chief Solomon and City Auditor Thomas Kelly, who did review the CBA around the time of its execution, promptly became concerned about its various new provisions. (Exhibit A7; Tr. 339-347.)

[16] Chief Solomon retired in January 2021. A recent commission investigation found misconduct on his part unrelated to the instant appeal. Civil Service Commission, *Investigation Regarding the Prior Use of Non-Civil Service Intermittent Police Officers in the Methuen Police Department*, No. I-20-182 (2023). Still more recently, the State Ethics Commission commenced disciplinary proceedings against Chief Solomon, making allegations that *are* based in part on the events at issue here. *See* Order to Show Cause, *In the Matter of Solomon*, No. 23-0010 (Ethics Comm'n June 30, 2023). The current decision does not rely on any extra-record information that the commission, the State Ethics Commission, or any other agency may have gathered. *See* G.L. c. 30A, § 11(4).

a member of an adverse bargaining team—failed to worry about Chief Solomon's apparent conflict of interest. Finally, Captain Gallant's choice to place his new calculation formula right next to Mayor Zanni's newly requested "0,2,2" language undercuts the theory that he meant to hide his edits from *anyone*. (Arbitral award 18-19, 22; OIG report 24, 26; Exhibits C7, C16, A6, A9; Tr. 137-138, 181.)

D. Approval, Renegotiation, OIG Investigation, and Labor Arbitration

19. Methuen's city councilors voted to approve the CBA on September 13, 2017. Before the vote, the councilors received no analysis of the CBA's financial impact. They did not hear details about the CBA's divergences from its predecessor agreement. They did not ask questions. At least some of them did not read the CBA. They did not understand the implications of its new terms. They believed that the CBA would increase the superior officers' compensation by small amounts. (Arbitral award 10-11, 18-19; Exhibits C7, C16, G16, A1-A7.)

20. A new mayor took office around early 2018. City personnel then computed the CBA's financial consequences. They concluded that, by the last year of the CBA, the superior officers would be earning annual base salaries of $200,000 to $500,000. These figures would have represented pay raises of between 77% and 224% compared to the prior CBA. The arbitrator found preclusively that the city made these computations in good faith. (Arbitral award 12, 14; OIG report 16-17; Exhibits C16, A1, A2, A7, A8.)[17]

21. The city and the union conducted a series of negotiations designed to clarify or amend the CBA's pay provisions. During those negotiations, the union was represented by

[17] Captain Gallant himself believed that the city had intentionally inflated its computations. He related this belief to Mayor Zanni. (Exhibit C3.) Captain Gallant's perception was not without support. (*E.g.*, Exhibit A7.)

Attorney Nolan. Neither Captain Gallant nor the other participants in the negotiations contended that the CBA, properly construed, rolled educational incentives into base pay. The negotiating teams reached an agreement, which they memorialized in a signed memorandum of understanding; but the city council declined to approve that agreement. (Exhibits C13, C16, A1, A2, A6-A8; Tr. 172-180, 242-252, 360-366.)

22. The OIG commenced its investigation during 2018, responding to complaints that the new CBA reflected "a waste of public funds" and possibly fraud. The OIG issued a preliminary letter in February 2019 and a final report in December 2020. It found "a failure of leadership at all levels" of Methuen's government, including the mayor, the city solicitor, the city council, and Chief Solomon. With respect to Captain Gallant, the OIG wrote that he acted in "bad faith" by drafting terms into the CBA that the bargaining teams had not agreed upon. (OIG report 1-4, 23, 28-29, and *passim*.)

23. In March 2019, the superior officers' union brought a class-action grievance against the city to arbitration. The essence of the grievance was that the city was failing to honor its obligations under the CBA. The arbitrator heard ten days of testimony. She then denied the grievance, deeming the CBA unenforceable. The arbitrator explained that the CBA negotiations had not yielded a "meeting of the minds between the City and the Union as to the costs and meaning of the [CBA's] compensation provisions." That determination is preclusive. The arbitrator's essential subsidiary findings are reflected throughout the current decision. (Arbitral award 17-22, 31, and *passim*; Tr. 260.)

E. Captain Gallant's Testimonies

24. Captain Gallant testified under oath both before OIG investigators and in the arbitration hearing. His testimonies on those occasions were fundamentally consistent with each other and with the findings of the instant decision. As to certain details, Captain Gallant's

accounts differed in their nuances or in their degrees of certainty and circumspection. Paragraphs 25-29 elaborate.

25. With respect to his course of action upon completing a first draft of the CBA, Captain Gallant told the OIG's investigators: "I believe I dropped it off with the mayor's office. Or you know, this one I'm not sure. I may have given this one to the chief . . . ." At the arbitration hearing, Captain Gallant's account was less tentative: "I brought it to the chief to review . . . He told me to bring it to the mayor's office. I brought it to the mayor's . . . ." (Exhibits C16, A8.)

26. As for his actions when he had completed his revised draft, Captain Gallant at first told the OIG: "[M]y recollection is I went up to the mayor's office . . . and he signed it." Later in the interview, Captain Gallant qualified: "I don't recall if he signed it and then got it back to me." At the arbitration hearing, Captain Gallant's memory was firmer: "My recollection is . . . I brought [the contracts] up to the mayor's office. . . . I left them in the mayor's office . . . . [Eventually] the chief gave me a signed copy." (Exhibits C16, A8.)

27. The city maintains that Captain Gallant told different stories to the OIG and the arbitrator about Chief Solomon's role in the CBA negotiations—minimizing that role to the OIG, accentuating it to the arbitrator. On this score, Captain Gallant's two accounts were identical in substance. He said on both occasions that Chief Solomon's role was the same as it had been during other negotiations, focusing on "management rights." (Exhibits C16, A8; Tr. 362.)[18]

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[18] Relatedly, the city takes issue with Captain Gallant's statement to the OIG that he "gave" his calculation formula to Officer Gardner, so that Methuen's patrolmen could mimic the formula in their own CBA. (Exhibits C2, C16.) The city points out that it was Chief Solomon who emailed Officer Gardner a copy of the superior officers' new CBA. (Exhibits C6, G15.) But what Captain Gallant conveyed to the OIG in substance was that he had spoken to Officer Gardner orally about the superior officers' new contractual terms. (Exhibit C16; Tr. 203-205.)

28. At the arbitration proceeding, Captain Gallant testified that he did not intend for his calculation formula to roll educational incentives into base pay. As discussed in paragraph 11, I conclude that this testimony was true. This conclusion casts an unflattering light on the corresponding portion of Captain Gallant's testimony to the OIG. The OIG's investigators asked Captain Gallant repeatedly whether he meant for his formula to roll educational incentives into base pay. Instead of disclosing his own intentions, Captain Gallant consistently pivoted, stating instead that he "didn't believe they were going to roll it through." (Exhibits C16, A8.)

29. At the time of the OIG interview, the arbitration proceeding loomed. Captain Gallant was accompanied by Attorney Nolan. Apparently Captain Gallant worried that direct, complete responses to the investigators' questions on this particular topic might harm the union's case. The tenor of the interview, which drifted at times into bluff bravado, also may have played a part in Captain Gallant's attitude. In any event, his insistent circumspection was ill-conceived. A sworn interview with authorized investigators was an occasion for directness, not tactical maneuvering. Even so, I do not find that Captain Gallant crossed the line from reticence into dishonesty. He neither intended to mislead the OIG's investigators nor in fact misled them. (Exhibit C16.)

Lastly in this vein, Captain Gallant's testimonies about the handwriting appearing on a draft of the CBA also do not reflect dishonesty. Captain Gallant told the OIG that he did not recognize the handwriting; the OIG indicated that the handwriting belonged to Chief Solomon; and that is the information that Captain Gallant provided when he was asked about the handwriting's owner at the arbitration hearing. (Exhibits C16, A8.)

F. Disciplinary Proceedings

30. In early 2022, the police department commenced an investigation into Captain Gallant's conduct. In an April 2022 report, Chief McNamara concluded that Captain Gallant had committed conduct unbecoming a department employee, had behaved dishonestly, and had provided untruthful testimony to the OIG, the arbitrator, or both. (Stipulations 3, 4; Exhibit C2; Tr. 38-50.)

31. In May 2022, the city convened a disciplinary hearing before a hearing officer. Captain Gallant took the stand, answered preliminary questions, but otherwise remained silent. In June 2022, the hearing officer recommended discipline, and the city terminated Captain Gallant's employment. He timely appealed. (Stipulations 1, 2, 5-9; Exhibits C1, C18, C20, C21; Tr. 50-53.)

III. Analysis

As a "tenured employee" within the meaning of the civil service law, Captain Gallant may be discharged only for "just cause." G.L. c. 31, §§ 1, 41. Just cause exists when an employee has committed "substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service." *Town of Brookline v. Alston*, 487 Mass. 278, 292-93 (2021) (quoting *Doherty v. Civil Serv. Comm'n*, 486 Mass. 487, 493 (2020)). The commission's review of disciplinary decisions is required to "focus on the fundamental purposes of the civil service system—to guard against political considerations, favoritism, and bias in governmental employment decisions . . . and to protect efficient public employees from political control." *Boston Police Dep't v. Collins*, 48 Mass. App. Ct. 408, 412 (2000) (quoting *Cambridge v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 300, 304 (1997)).

It is the appointing authority's burden to prove just cause by a preponderance of the evidence. *Collins*, 48 Mass. App. Ct. at 411. The appointing authority's decision is judged by

"the circumstances . . . [that] existed when [it] made its decision." *Town of Falmouth v. Civil Serv. Comm'n*, 447 Mass. 814, 824 (2006). But those circumstances must be "found by the commission" based on a "de novo hearing." *Id.* at 823-24. At that hearing, "[t]here is no limitation of the evidence to that which was before the appointing officer." *City of Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727 (2003) (quoting *Sullivan v. Municipal Ct. of the Roxbury Dist.*, 322 Mass. 566, 572 (1948)). *See also Boston Police Dep't v. Civil Serv. Comm'n*, 483 Mass. 461, 477-78 (2019).

Police officers are held to exacting standards of behavior. *See McIsaac v. Civil Serv. Comm'n*, 38 Mass. App. Ct. 473, 474 (1995). Among other things, they are required to remain scrupulously honest and trustworthy. Without this demand, police departments would struggle to preserve their public legitimacy. Plus, day-to-day police work "frequently calls upon officers to speak the truth." *Falmouth v. Civil Service Comm'n*, 61 Mass. App. Ct. 796, 801 (2004). *See Keating v. Town of Marblehead*, 24 MCSR 334, 339 (2011); *Kinnas v. Town of Shrewsbury*, 24 MCSR 67, 73-74 (2011). *See also City of Boston v. Boston Police Patrolmen's Ass'n*, 443 Mass. 813, 821 (2005). Accordingly, any dishonest conduct by Captain Gallant would have justified disciplinary action against him.

But the facts do not reflect such conduct. The pertinent events took place within the context of a bargaining relationship. The interests of the union and the city diverged. Captain Gallant's primary fiduciary duties were toward the union. Even so, he did not mislead or try to trick the city's bargainers. The gist of what he did was to propose late-in-the-day revisions to a non-final draft agreement. He disclosed those revisions to Chief Solomon, expected the city's other bargainers to review them, and did not impede their opportunity to do so. Contrast *Axalta Coating Sys., LLC v. Midwest II, Inc.*, 217 F. Supp. 3d 813, 822-25 (E.D. Pa. 2016); *In re*

Decade, S.A.C., LLC, 635 B.R. 735, 767-68 (Bankr. D. Del. 2021). *See generally Moody Realty Co., Inc. v. Huestis*, 237 S.W.3d 666, 676-77 (Tenn. Ct. App. 2007).

The iterative exchange of evolving drafts is a commonplace phase of the bargaining process. "The final governing documents are generally complex . . . . These papers are far from being just another 'wheel in the machinery.' Until the documents are signed and delivered the game is not over." *Tull v. Mister Donut Dev. Corp.*, 7 Mass. App. Ct. 626, 631-32 (1979). *See Community Builders, Inc. v. Indian Motocycle Assocs., Inc.*, 44 Mass. App. Ct. 537, 556 (1998); *Goren v. Royal Invs. Inc.*, 25 Mass. App. Ct. 137, 142-43 (1987). *Cf. Qureshi v. Fiske Cap. Mgmt., Inc.*, 59 Mass. App. Ct. 463, 467 (2003). This dynamic is a major reason why—as the OIG emphasized in its report—the mayor, the city solicitor, and the city council were obligated to review the agreement's final version.[19] Captain Gallant negotiated aggressively on his union's behalf, but he did not cross the line into dishonesty or unscrupulousness.

The city's remaining theories for discipline against Captain Gallant are resolved by the foregoing observations and the findings of fact stated *supra*. The law imposes certain duties of good faith among parties to collective bargaining negotiations. *See* G.L. c. 150E, § 6. *See also School Comm. of Newton v. Labor Rels. Comm'n*, 388 Mass. 557, 572 (1983). *Cf. Schwanbeck v. Fed.-Mogul Corp.*, 412 Mass. 703, 705-07 (1992); *Sisneros v. Citadel Broadcasting Co.*, 142 P.3d 34, 39-41 (Ct. App. N.M. 2006). There might arise circumstances in which violations of

[19] The arbitrator saw an exception here to the usual rule, which holds that a sophisticated party's failure to read a contract does not detract from the contract's force. *See Cohen v. Santoianni*, 330 Mass. 187, 193 (1953); *Brown v. Grow*, 249 Mass. 495 (1924); *Ruane v. Jancsics*, 2001 Mass. App. Div. 103 (Dist. Ct. App. Div. 2001); 7 *Corbin on Contracts* § 29.8 (rev. ed. 2002).

those duties are egregious enough to demonstrate an employee's untrustworthiness. But no such circumstances are present here.

It is true that collective bargaining parties are required to "meet at reasonable times . . . and . . . negotiate in good faith" about various terms of employment. G.L. c. 150E, § 6. But it is reasonably clear that no "meeting" or further "negotiations" are necessary when one party makes a proposal and the other party accepts. *Cf. School Comm. of Newton*, 388 Mass. at 570 (even a bargaining party's inaction may establish its acquiescence to a change of employment terms). *See generally* Douglas A. Randall & Douglas E. Franklin, *Municipal Law and Practice* § 12.5 (5th ed. 2006). In real time, that is what seemed to have happened here, from the union's perspective: Captain Gallant proposed new contractual terms, which the city promptly accepted by executing his draft.

As discussed in the findings of fact, no dishonesty or untrustworthiness emerges from Captain Gallant's series of testimonial accounts. The commission has cautioned that accusations of untruthfulness must be analyzed with care: "[S]ubjective hair-splitting cannot be the basis for the serious charge of untruthfulness, nor can the inability . . . to remember every specific detail of a tumultuous event." *Grasso v. Town of Agawam*, 30 MCSR 347, 369 (2017). Civil servants must not be branded dishonest based on misunderstandings or errors. *Marchionda v. Boston Police Dep't*, 32 MCSR 303, 308 (2019); *Owens v. Boston Police Dep't*, 31 MCSR 14, 17 (2018).

Captain Gallant gave his testimonies in response to several hours of cross-examination. Such circumstances are not conducive to meticulous narratives. A witness on the stand cannot plot out the testimony or proofread it for mistakes. The transcripts must be read realistically, commonsensically, and with a focus on substance. The arguable variations among Captain

Gallant's accounts revolve around points of nuance, emphasis, and (in one instance) misplaced reticence. The charge that he testified untruthfully is not established by a preponderance of the evidence.

To be clear, Captain Gallant's elusiveness about his original aspirations for the "calculate Quinn Bill/Education Incentive" language was not model behavior. But that conduct also was not so deficient as to meet the "substantial misconduct" test. *Town of Brookline*, 487 Mass. at 292-93. Its degree of honesty or dishonesty did not differ qualitatively from the honesty or dishonesty of any witness's stubbornly guarded testimony in the face of vigorous cross-examination. Needless to say, the multiplicity of unmeritorious charges brought against Captain Gallant does not diminish the city's burdens as to each charge. In this context, quantity is no substitute for quality, and each accusation must be measured against the usual governing standards. *See Desmond v. Town of W. Bridgewater*, 33 Mass. L. Rptr. 364, 366 (Suffolk Super. 2016); *Bliss v. Town of Wareham*, 24 MCSR 246, 258 (2011).

The 2017 CBA was a disaster. Enforced as written, the CBA would have overstretched Methuen's finances to the disproportionate benefit of the city's superior officers. A confluence of errors allowed this harmful agreement to be executed. The city's negotiators and councilors fell down on the job. Neither of the bargaining parties computed the CBA's likely costs. Captain Gallant pursued and achieved concessions that the city could not realistically honor. He also drafted imprecise language preordained to generate disputes. Still, it was the city's representatives who were mainly responsible for defending the city's interests. Captain Gallant's performance of his own duties did not involve "substantial misconduct" meriting disciplinary action. *Town of Brookline*, 487 Mass. at 292-93.

IV. Conclusion and Order

Subject to review by the commission, Captain Gallant's appeal is ALLOWED and the city's decision is REVERSED. Captain Gallant is entitled to be reinstated to his position in accordance with any additional directives the commission may issue.

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate