

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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MCAD and CLEVELAND COATS,  
Complainants

Docket No. 14 BEM 00729

v.

MASSACHUSETTS STATE POLICE,  
Respondent  
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Appearances: Lisa Brodeur-McGan and Daniel Montagna, Esqs. for Complainant Coats  
Siobhan E. Kelly, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On March 27, 2014, Cleveland Coats Jr. ("Complainant") filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") alleging that he was subjected to discrimination by the Massachusetts State Police (Respondent) on the basis of race and age pertaining to his removal from Respondent's Executive Protection Unit and his transfer into its Joint Terrorism Task Force.

The MCAD issued a probable cause finding and certified the case for public hearing. A public hearing was conducted on October 21, 22, 25, 28, 29, November 1, 5, 25, 26, December 17, and 18, 2019. The parties introduced sixty-seven (67) joint exhibits and chucks A-E. The following individuals testified at the public hearing: Cleveland Coats Jr., Carmelo Ayuso, Shawn Givhan, Lisa Butner, Aaron Gross, Dermot Quinn, James Duggan, Kevin Scaplen, and Stephan Flaherty.

To the extent the parties' proposed findings are not in accord with or are irrelevant to my findings, they are rejected. To the extent that the testimony and exhibits are not in accord with or are irrelevant to my findings, they are also rejected. Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

## II. FINDINGS OF FACT<sup>1</sup>

1. Complainant Cleveland Coats Jr. (DOB: [REDACTED] 57) is an African-American male who graduated from Massachusetts State Police Training Academy in 1983. Prior to joining the State Police, he was a special/auxiliary police officer in the Town of Lexington and a reserve police officer in the Town of Westford. Complainant testified that he graduated from the Training Academy as number six in his class. Tr. 1 at p. 42. According to Complainant, drill instructors at the Training Academy required that he and the other African American recruits dress as waiters, serve their classmates at a candle-lit dinner, and have their dinner in a separate location. Tr. 1 at pp. 67-68. Two of Complainant's classmates at the Training Academy were Timothy Alben and James Hanafin who, in 2012, became Colonel and Lt. Colonel, respectively, of the State Police. Joint Exhibit 1. Complainant testified that they both laughed during the Training Academy incident described above. Tr. 1 at p. 69. I credit Complainant's testimony regarding the incident.

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<sup>1</sup> The record contains an eleven-volume transcript of the MCAD hearing as well as exhibits. Citations to the transcript consist of the abbreviation "Tr." followed by volume number and page references. Because of security concerns raised by Respondent, the hearing record and exhibits have been impounded.

2. Respondent Massachusetts State Police is a paramilitary force in the Commonwealth under the command of a Colonel who is appointed by the Governor. Tr. 3 at pp. 130, 136. During the relevant period, the force was divided into four divisions, each headed by a Lieutenant Colonel: 1) the Division of Investigative Services; 2) the Division of Administrative Services; 3) the Division of Standards and Training; and 4) the Division of Field Services. Tr. 3 at p.130-131. Majors, Detectives, Captains, Detective-Lieutenants, Lieutenants, Sergeants, and Troopers serve under the Lieutenant Colonels. Tr. 3 at p. 132-134.
3. Complainant's first assignment was a three-year stint in the Division of Field Services as a uniform Patrol Officer (Trooper) out of the Leominster Police Barracks for three years and then out of the Concord Barracks for another three years during which he became a Canine Officer. From 1983 through 2006, Complainant remained in the Division of Field Services. Complainant worked as a Canine Officer for eighteen years during which time he was promoted to Sergeant in 1995. As a Canine Officer, Complainant's duties consisted of conducting building searches, tracking suspects, searching for missing persons, locating evidence, performing crowd control, and looking for narcotics, explosives and arson accelerants. Joint Exhibit 19. After he was promoted to Sergeant, Complainant testified that he sought to attend a supervisory training program called "Sergeant's School" but was told he didn't need to do that because he was a "tactical guy." Tr. 1 at p. 159. Complainant observed that newly-promoted Caucasian Sergeants were allowed to attend the program. Tr. 1 at pp 159-160. According to Complainant, the

program would have assisted him in learning skills such as accessing police data bases and computer systems. I credit Complainant's testimony in this regard.

4. When candidate Deval Patrick ran for Governor in 2006, Complainant volunteered for approximately eight to ten months as a member of the candidate's security team.

Complainant volunteered to work for the candidate during his off-duty hours, performing such tasks as arriving ahead of time at events, coordinating the candidate's movements inside and outside buildings, and escorting the candidate during campaign events. Tr. 4 at p. 22. The security team operated under the direction of Boston Police Detective Sergeant Aaron Gross. Sergeant Gross was thereafter appointed by Governor Patrick as Colonel of the Environmental State Police, a position he held from 2008-2014. Colonel Gross testified that he, the Governor, and the Governor's wife were all favorably impressed by Complainant's conduct as a member of the security team. Tr. 6 at pp. 190-196. I credit this testimony.

5. Complainant informed then-Sergeant Gross that he was interested in working in the State Police Executive Protection Unit ("EPU") if candidate Patrick were elected. Tr. 4 at pp. 19, 24, 27. Complainant also spoke to then-Detective Lieutenant Hanafin about joining the EPU. Tr. 4 at p. 20.

6. The EPU is a unit within the Division of Investigative Services of the State Police which provides security for the Governor, the Lt. Governor, and, in some instances, the First Lady. Tr. 8 at p. 189. EPU positions are assigned on a non-biddable basis. Members of the EPU are stationed at the State House. They wear business attire, i.e., suits and ties, and are issued unmarked state vehicles along with fuel cards to pay for gas. Tr. 4 at pp.

34-35. EPU members interact with the Secret Service, the State Department, and local police departments. Id. Jobs within the EPU are high prestige, sought-after positions which involve international travel, trips to the White House, and generous overtime. Captain Kevin Scaplen, EPU Unit Commander from 2009 to the present,<sup>2</sup> testified that interest in EPU openings is communicated through "word-of-mouth" and that open positions are filled on a temporary basis before being made permanent. Tr. 8 at p. 191, 199. He described the EPU as a "pretty tight knit group so you have to be a fit within the group." Tr. 8 at p. 193. According to EPU Commander Scaplen, members of EPU have to be accepted by the group as well as have chemistry with the Governor and Lt. Governor. Id.

8. According to Complainant, requesting assistance in securing a sought-after position such as an EPU assignment is a common occurrence. Tr. 4 at pp. 169-170. I credit this testimony notwithstanding Article 5.29.1 of the Rules and Regulations of the Department of State Police, effective January 31, 2001, which states that "No member shall . . . cause any person . . . to intercede on his/her behalf . . . for the purpose of seeking . . . assignment or promotion." Joint Exhibit 30.
9. Non-biddable positions such as those within EPU are filled at the discretion of the State Police Colonel rather than by seniority.<sup>3</sup> Permanent, non-biddable positions are posted, but temporary ("TDY") placements into non-biddable positions are not. Joint Exhibits 2

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<sup>2</sup> Kevin Scaplen will be referred to throughout the decision as Unit Commander, EPU Commander, or Captain except when focusing on a prior period of time during which he held a lower rank.

<sup>3</sup> Biddable positions, by contrast, are typically located in the Division of Field Services and are filled on the basis of seniority. Tr. 3 at p. 129; Joint Exhibit 36.

(ADM 27), 36, 36A, 50 (Art. 28); Tr. 3 at p. 39; Tr. 5 at pp. 15-15. Because temporary assignments into non-biddable positions are not posted, potentially-interested individuals do not receive notification of the openings. The individuals who are hand picked for the assignments then have the opportunity to become familiar with the positions before they are permanently filled. Tr. 3 at pp. 54-54. According to Lt. Carmelo Ayuso, President of the Massachusetts Minority State Police Officers Association, the lack of postings presents an "equal opportunity concern." Tr. 3 at pp 68-69. Lt. Ayuso testified that 99.9 percent of the individuals who receive TDY placements are Caucasian and that individuals are "TDY'd" into non-biddable units as preparation for permanent transfers. Tr. 3 at pp. 39-41, 47-48. Lt. Lisa Butner, who is President of "One Blue,"<sup>4</sup> likewise testified that the failure to post openings for TDY assignments into non-biddable positions works to the benefit favored candidates at the expense of an inclusive selection process.

10. Captain Scaplen testified that Complainant was brought into the EPU per the request of Governor Patrick. Tr. 10 at pp.133-134. Complainant joined the EPU effective November 19, 2006 as a Sergeant on a TDY basis. Joint Exhibit 9 at p. 3404; Tr. 8 at p. 213.
11. At the time Complainant entered the EPU, the Unit Commander was then-Detective Lieutenant Hanafin. Joint Exhibit 1; Tr. 8 at p. 198. Trooper John Fraioli (Caucasian)

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<sup>4</sup> One Blue was established in 2016 to bring together officers who are female, male, minority, LGBTQ, and Caucasian. Tr. 6 at pp. 4-5. Lt. Butner was in the Police Affirmative Action Unit from January 2000 to September 2002. Tr. 5 at p. 119.

joined the EPU on a TDY basis approximately six weeks after Complainant, effective December 31, 2006 per the recommendation of Lt. Governor Timothy Murray. Tr. 8 at p. 201; Joint Exhibit 9, Bate stamp 3405. Steven Flaherty (Caucasian) transferred into the EPU in 2003 and was promoted to Sergeant in 2008. Joint Exhibit 1. Kevin Scaplen, who later became EPU Commander, and Sgt. Flaherty, who remains a member of the EPU, have been friends both inside and outside of work since 1993. Tr. 10 at p. 39.

12. Trooper Fraioli was made permanent in EPU effective July 1, 2007, prior to Complainant. Joint Exhibit 9, Bate stamp 3406, 3408, 3409; Tr. 4 at p. 30. Complainant went to Wes McCravey at the Diversity/Affirmative Action Unit to complain about his position not being made permanent prior to or at the same time as Fraioli's. Complainant was thereafter made permanent effective July 15, 2007. Joint Exhibit 9.
13. According to Complainant, most of the members of the EPU attend a week-long training hosted by the National Governor's Security Association ("NGSA"). The course focuses on uniform techniques for protecting officials in order to promote reciprocity among security officers in different states. Tr. 10 p. 61. Complainant testified that he asked to attend the course when he was appointed to the EPU but that his request was denied. Tr. 1 at p. 163. Captain Scaplen acknowledged that he, Flaherty, Driscoll, and O'Riordan attended the course but that Complainant did not.
14. There are three primary roles in the EPU: the "driver" (aka "body/advance"), the "catch" and the "chase." Tr. 8 at p. 207. The roles are assigned for week-long periods. Tr. 4 at p. 32. [REDACTED]  
[REDACTED]

[REDACTED]

15. According to Captain Scaplen, during the 2006-2013 period, electronic devices such as GPS, Google Maps, Mapquest, and actual maps were used as tools for advance work but were not supposed to be relied upon by a driver. Tr. 8 at pp. 214-215. Captain Scaplen testified that the Governor's advance team asked that Complainant not be assigned to the role of driver because his over-reliance on GPS caused him to take heavily-trafficked routes. Tr. 8 at p. 215-217. Captain Scaplen stated that the Governor's advance team would increase the drive times needed to get to important events by ten to fifteen minutes when they knew that Complainant was the driver. Tr. 8 at p. 218. According to Complainant, however, he was never told to refrain from using GPS to research a route in



preparation for serving as driver. Tr. 2 at pp. 74-77. Complainant stated that Governor Patrick appreciated his use of GPS. Tr. 2 at p. 76.

16. Captain Scaplen testified that when Complainant was assigned as catch, he would lag behind the Governor and his team when entering a location rather than lead the way. Tr. 9 at pp. 6-8. Scaplen estimates that he spoke to Complainant about falling behind more than ten times. Tr. 9 at p. 8. Scaplen testified that when Complainant was assigned as chase, he would also fall behind in his vehicle so that he could not be viewed by the driver of the Governor's vehicle and then would impermissibly use his emergency lights in order to catch up. Tr. 9 at pp. 14-16.
17. In January 2009, then-Capt. Hanafin was promoted to Major. Joint Exhibit 1; Chalk D. He moved out of EPU and into the Office of Division Commander which oversees the EPU. Joint Exhibit 1. Then-Sergeant Scaplen replaced Hanafin as Unit Commander of EPU. Tr. 10 at 6, 8; Chalk D. Complainant had approximately ten years more seniority in the rank of Sergeant than Scaplen, but Hanafin told Complainant that Sgt. Scaplen was being selected as Unit Commander because he was on a promotional list for Lieutenant. Tr. 1 at p. 86.
18. At the time that Sgt. Scaplen was promoted to Unit Commander of EPU, Governor Patrick and his Chief of Staff Brendan Ryan asked him to name Complainant as Executive Officer of the EPU. Tr. 8 at p. 203; Tr. 10 at p. 140. EPU Commander Scaplen testified that the position of Executive Officer within the unit existed in title only and no additional responsibilities were given to Complainant. Tr. 8 at p. 205; Tr. 10 at p. 142. According to Lt. Colonel Quinn, however, an Executive Officer is part of command

staff and is entitled to exercise administrative as well as supervisory responsibility as second in command. Tr. 7 at pp. 72-73.

19. Complainant asserts that EPU Commander Scaplen would schedule administrative meetings at headquarters at times that he (Complainant) could not attend and would allow Sgt. Flaherty to attend in his place. Tr. 1 at p. 178; Tr. 2 at p. 54. Sgt. Flaherty was given the responsibilities of doing line inspections, making travel arrangements, and serving as liaison to outside agencies including the Secret Service and the State Department. Tr. 11 at pp. 9, 25.
20. Complainant was given the task of combining the EPU's paper records of threats against various Governors into a filing system even though Sgt. Flaherty was the EPU's liaison with the State Police Joint Terrorism Task Force ("JTTF"). Tr. 9 at pp. 27-30. EPU Commander Scaplen states that although he did not specify how the task was to be accomplished, he was "shocked" that Complainant organized the threats by date rather than by the last name of the individuals making the threats. Tr. 9 at pp. 31-32.  
  
Commander Scaplen did not have Complainant collaborate with the JTTF about how to organize the threats in a manner that would be compatible with JTTF's multiple databases of threats. Tr. 10 at pp. 101-103.
21. In April 2011, the EPU consisted of Unit Commander Kevin Scaplen (Caucasian), who was still a Sergeant and three additional Sergeants: Complainant (African-American), Sergeant Stephen Flaherty (Caucasian), and Sergeant Brian O'Riordan<sup>5</sup> (Caucasian).

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<sup>5</sup> O'Riordan came into the EPU on December 26, 2010. Tr. 2 at p. 60.

Joint Exhibit 6. Complainant was the most senior Sergeant in EPU by rank and by age. The EPU also had three Troopers who were Caucasian males (John Maguire, Matthew Quinn, and Mark Coleman<sup>6</sup>), two Troopers who were African-American (Marque Fraser<sup>7</sup> and Nathan Thomas), and one Trooper who was a Caucasian female (Deborah Thompson). Joint Exhibit 6; Tr. 2 at p. 60. Complainant was the direct supervisor of Troopers Maguire and Thompson from at least April 2011 until his removal from EPU. Joint Exhibit 6.

22. EPU Commander Scaplen testified that in 2012, Trooper Marque Fraser jokingly placed a "mock-up" on an EPU wall of various actors and other celebrities portraying members of the EPU in roles from the HBO mini-series "Band of Brothers." Tr. 9 at p. 85.

Commander Scaplen stated that he was depicted as being played by Chris Farley or John Candy, that Sgt. Flaherty was depicted as being played by Red Sox manager Terry Francona, and that he (Scaplen) jokingly added that Complainant should be portrayed as "Grady" -- a character from the seventies sitcom Sanford and Son. Tr. 9 at p. 86; Tr. 10 at 92-93. According to Commander Scaplen and Sgt. Flaherty, the incident was a good natured matter about which everyone laughed including Complainant. Id.; Tr. 11 at 51-52, 103.

23. Complainant disputes the assertion that he was called Grady as part of jovial gag involving numerous members of the EPU who were assigned actors in a mock version of the movie "Band of Brothers." Tr. 4 at pp. 77-78. Complainant described the character

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<sup>6</sup> Coleman left the EPU around March 2012. Joint Exhibit 6; Tr. 10 at p. 115, 146.

<sup>7</sup> Fraser entered the EPU in April 2006, approximately six months prior to Complainant. Tr. 11 at p. 67.

Grady as an elderly, disheveled, decrepit black male, maintained that EPU Commander Scaplen persisted in calling him by that name, and stated that it was embarrassing and unacceptable to be associated with such a character. Complainant testified that he asked EPU Commander Scaplen to stop calling him Grady but that Scaplen refused and said that Complainant should retire. Tr. 2 at pp. 35-39; Tr. 4 at 77-79. I credit Complainant's version of the Grady matter over that conveyed by EPU Commander Scaplen and Sgt. Flaherty.

24. According to Unit Commander Scaplen, on one occasion when the Governor rode his bike in the Berkshires, Complainant created a roadblock by following the Governor in a police vehicle with his emergency lights turned on. Tr. 9 at p. 19. I do not credit that Complainant's driving capabilities were problematic and note that no issues relating to his driving are documented in any of Complainant's performance reviews.
25. On February 1, 2012, Complainant was assigned as the chase for Mayor Kevin White's funeral and Trooper Maguire was the Governor's driver. Tr. 1 at p. 184. According to Complainant, Maguire, who was driving erratically, reported that he had gotten into an accident but did not stop so that license information could be obtained from the other vehicle. Id.; Tr. 10 at p. 105. Complainant states that he observed damage to the passenger side of the vehicle that Trooper Maguire was driving. Tr. 4 at p. 43. Complainant testified that he informed EPU Commander Scaplen about the accident but was told, "Don't worry about it, it doesn't concern you" even though it was Complainant's responsibility as chase to handle all law enforcement activity at the scene of an accident. Tr. 1 at p. 188; Tr. 4 at p. 53; Tr. 9 at p. 92; Tr. 10 at pp. 179-180. EPU Commander

Scaplen testified that there was no damage to the other vehicle, but I do not credit this assertion as he acknowledged that the other vehicle was never located and testified that he does not recall speaking to Complainant or Trooper Maguire about the incident. Tr. 9 at p. 89-93; Tr. 10 at 107. Following the incident, Complainant rated Trooper Maguire as outstanding on an employee evaluation because Scaplen said to disregard the matter. Tr. 4 at pp. 60-62.

26. At some point between mid-2012 and mid-2013, an incident occurred at the Boston Seaport Hotel in which the Governor was brought to the wrong room for a meeting. Complainant states that he was assigned to be the catch. According to Complainant, when he arrived an hour before the Governor, he could not locate, physically or by phone, the building's Director of Security. Complainant contacted a uniformed security guard and finally arranged to get into the building, but it was not until the Governor arrived. Tr. 1 at p. 175. Complainant asserts that as driver/advance, Sgt. Flaherty should have arranged for a member of the hotel's security staff to be available when Complainant arrived at the hotel. Complainant states that he raised concerns with Unit Commander Scaplen that Sgt. Flaherty failed to contact the Director of Security which made Complainant "look bad" but his concerns were ignored. Tr. 1 at pp. 176, 183. According to Sgt. Flaherty, he was assigned to be the early driver for the event and on the day prior to the incident, he met with the Seaport Hotel's Director of Security Carmen Tammaro who said that he would not be at the event but that someone from his staff would await the EPU's arrival. Tr. 11 at p. 14. Sgt. Flaherty testified that he relayed this information to Complainant along with the floor of the event. Tr. 11 at p. 15. According to Sgt.

Flaherty, Complainant, as catch, should have led the Governor into the assigned room but that Complainant took the Governor and his party to the wrong floor of the hotel and then remained in the elevator as the Governor got off and went into the wrong room. Tr. 11 at pp. 18-21. Sgt. Flaherty states that the entourage thereafter proceeded to the floor that was communicated to Flaherty on the previous day. Tr. 11 at p. 21. According to Sgt. Flaherty, he apologized to the Governor on the next day. Tr. 11 at p. 24. I credit that Complainant took the Governor and his party to the wrong room but find that blame for the incident belonged to both Sgt. Flaherty and Complainant.

27. EPU Commander Scaplen estimates that he and Complainant traveled together with Governor Patrick on more than ten occasions, including a trade mission to Beijing. Tr. 9 at pp. 40-41. When engaging in overnight domestic or international travel, members of the EPU perform two specific assignments: body and advance. Tr. 9 at p. 34. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] According to Sgt. Flaherty,

Complainant wanted to be the body on such trips, not the advance, because he "didn't have to do anything." Tr. 9 at p. 50; Tr. 11 at pp. 27-28. Captain Scaplen testified that the Governor's staff and other members of the EPU were uncomfortable with Complainant being assigned the role of advance on international travel and that Governor Patrick and his staff asked if Complainant could be removed from the international travel

list. Tr. 9 at p. 46. I do not credit this testimony as it was not corroborated by Governor Patrick or anyone on his staff.

28. According to Sgt. Flaherty, after a trip to France on which Complainant accompanied Governor Patrick and his wife, the Governor told him that Complainant should no longer do international travel and probably should not do domestic travel because he "doesn't do it the same way the rest of you do it." Tr. 11 at p. 31. According to Sgt. Flaherty, the Governor described an incident in which Complainant tried to communicate with someone who didn't speak English by repeating himself in a loud voice. I do not credit this testimony because it was not corroborated by Governor Patrick and because I do not believe that the Governor would report such matters about one sergeant to another officer of the same rank.
29. EPU Commander Scaplen testified that on one occasion when there were restrictions on radios and weapons being brought into China, Complainant, at a Chinese hotel, wore an ear piece that was not attached to a radio but which gave the impression that it was. Tr. 9 at pp. 43-45. I do not credit this testimony.
30. Unit Commander Scaplen testified that Complainant was responsible for keeping track of attendance calendars of members of the EPU and maintaining a yearly inventory of EPU equipment. Tr. 9 at pp. 51-52. According to Scaplen, Complainant committed errors in maintaining attendance records and failed for years to inventory departmental equipment. Tr. 9 at pp. 52-55. I discount these assertions as there is no documentary support for them in any of Complainant's employee evaluations.

31. According to Sgt. Flaherty, on one occasion Complainant was assigned to a threat investigation that originated out of Worcester which he did not pursue after being told by U.S. Marshall John Gibbons, a former threat investigator, that the individual under investigation had a penchant for suing everybody. Tr. 11 at pp 35-42, 99-100. I do not credit this information as it constitutes uncorroborated hearsay.
32. Despite the aforementioned criticisms of Complainant's performance, he received all outstanding job performance evaluations while in the EPU except for his first year which was acceptable. Joint Exhibit 20 at pp. 3260-3269. Complainant's last evaluation in the EPU (January-December 2012) states that he follows policy, procedure and directives; is cooperative; asks appropriate questions and is helpful to those he supervises; displays excellent oral and written skills; is flexible and has excellent interpersonal skills; displays great administrative ability; is always ready to assist and is respectful towards fellow workers and supervisors; delegates responsibility as required; completes reports on time; and is punctual, knows his job, and strives for perfection. Id at 3270. Unit Commander Scaplen acknowledged in his testimony that there is not a single piece of paper that documents any performance deficiencies on the part of Complainant. Tr. 10 at p. 125.
33. According to EPU Commander Scaplen, he did not use the employee evaluation system to document performance deficiencies for "political" reasons, preferring instead speak to employees about deficiencies one-on-one. Tr. 9 at pp. 70-72. However, the State Police Employee Evaluation System requires that negative performance be properly documented, that employees be provided with timely correction of poor performance, and that work improvement plans be implemented for members of the State Police



- performing at an unacceptable level. Joint Exhibit 13. Complainant testified persuasively that Commander Scaplen never criticized his abilities as a member of the Governor's travel team or his advance work as a driver. Tr. 2 at p. 79. Complainant never received a deficient employee evaluation review or a written improvement plan.
34. On December 23, 2012, Trooper Timothy Driscoll transferred into EPU on a non-posted TDY basis. Joint Exhibits 1, 8; Chalk A. At or around the time that Driscoll came into EPU, Trooper Fraser left to go to the airport. Tr. 10 at p. 14.
35. In May 2013, EPU Commander Scaplen was informed by Lt. Governor Murray that he was resigning his office. Tr. 11 at p. 73. Lt. Governor Murray was not replaced since the position of Massachusetts Lieutenant Governor, if vacated during a term in office, is not back-filled. Id. EPU Commander Scaplen testified that he relayed the news about Lt. Governor Murray's impending departure to Deputy Superintendent James Hanafin who was, at the time, second in command of the State Police under Colonel Alben. Tr. 9 at p. 74. According to EPU Commander Scaplen, he was then informed by Deputy Superintendent Hanafin that the EPU would be losing one Sergeant and one Trooper. Tr. 9 at p. 75. The Massachusetts State Police has no policy dictating the number of Sergeants in the EPU. Tr. 10 at p. 21. In terms of overall size, between 2010 and 2013, the EPU fluctuated from eight to twelve members. Chalk A
36. In June 15, 2013, approximately a month after Lt. Governor Murray resigned, Complainant, then aged fifty-seven, and Trooper Deborah Thompson, then aged fifty-three, were removed from the EPU. Tr. 2 at p. 47. Their removal from the EPU reduced the unit from nine positions to seven positions. Joint Exhibits 1, 6. When the removals

took place, EPU Commander Scaplen knew that Sgt. O'Riordan would soon leave the EPU since O'Riordan was on the promotional list for Lieutenant and since the EPU would not retain two Lieutenants. Tr. 2 at p. 128; Tr. 10 at pp. 14-15, 20.

37. EPU Commander Scaplen testified that Trooper Deborah Thompson did a "fantastic" job in the EPU as far as performance was concerned but that she had an "unfortunate attitude" as far as becoming upset about changes in schedules and assignments and was "at odds" with some of the Governor's staff. Tr. 10 at pp. 76, 87-88. According to Complainant, Scaplen "shunned" Trooper Thompson, did not answer phone calls from her, and said she was getting old for the job. Tr. 2 at pp. 52-53. EPU Commander Scaplen denied that he or other members of the EPU avoided Thompson. Tr. 10 at p. 90. I credit Complainant's testimony over EPU Commander Scaplen's.

38. Unit Commander Scaplen testified that prior to implementing the 2013 downsizing of the EPU, he spoke about the reduction and about Complainant's performance on multiple occasions with the Governor Patrick and his Chief of Staff Brendan Ryan. Tr. 10 at pp. 73, 183. According to Scaplen, the Governor "chose" Complainant for layoff, saying that he [the Governor] was pretty sure who "they" (the selected individuals) were going to be, referring to Thompson and Complainant as "one Trooper who didn't want to do the job anymore and one Sergeant who really couldn't do the job anymore." Tr. 9 at p. 78; Tr. 10 at pp. 74, 79, 189. Commander Scaplen also testified that Chief of Staff Ryan requested that Complainant be given a "soft landing." Tr. 9 at p. 79, Tr. 10 at p. 97. Scaplen states that he relayed the Governor's words to Lt. Colonel Hanafin who, along with Colonel Alben, made the ultimate decisions about the transfers based on the aforesaid input from

the Governor. Tr. 9 at p. 80. Nowhere in Respondent's position statement does it refer to input from the Governor or his Chief of Staff as a basis for the decision to transfer Complainant out of the EPU nor did Governor Patrick or his Chief of Staff corroborate the statements attributed to them. I discredit Respondent's assertion that Complainant's transfer was based on input from the Governor and/or his Chief of Staff.

39. Sergeant Flaherty testified that "everybody" on the Governor's staff knew that the Complainant was going to be transferred out of the EPU. Tr. 11 at p. 45. He stated that the Governor's Chief of Staff asked him whether Complainant could be promoted out of the Unit, and he responded that promotions are limited to individuals placed on promotional lists in accordance with exam grades and other factors. Tr. 11 at 44-46. I do not credit this testimony as it is uncorroborated hearsay and it strains credulity that the Governor's Chief of Staff would have discussed Complainant's employment situation with an individual occupying the same rank as Complainant.

40. According to Sgt. Flaherty, after the decision was made to transfer Complainant out of the Unit, he had a conversation with Governor Patrick while serving as his driver. Sgt. Flaherty quoted the Governor as saying, "we have two people, one person that doesn't want to do the job anymore and one that can't do the job." Tr. 11 at p. 47. I do not credit this testimony as it is uncorroborated hearsay, is an unlikely admission from the Governor to a Sergeant in the EPU with the same rank as Complainant, and unconvincingly mimics the words which EPU Commander Scaplen also claims he was told by the Governor.

41. EPU Commander Scaplen informed Complainant that he was being removed from the EPU while they were in adjacent vehicles in a parking lot in Framingham. Tr. 1 at pp. 193-194. Complainant was shocked. Tr. 1 at 194; Tr. 9 at p. 81. Unit Commander Scaplen did not get out of his car when he conveyed the information about the transfer. Tr. 9 at p. 81.
42. According to Colonel Aaron Gross, who spoke to the Governor approximately twice a month about work-related matters, the Governor never expressed dissatisfaction with Complainant. Tr. 6 at p. 196. When Complainant informed Colonel Gross that he was being removed from EPU, Gross said he would look into the matter and called Chief of Staff Ryan about Complainant's removal. Tr. 6 at p. 207. According to Colonel Gross, Ryan said, "we didn't know anything about that" and offered to check into it, although he did not thereafter contact Gross about Complainant's removal. Tr. 6 at pp. 207-209. I credit Colonel Gross's testimony and take notice of the fact that Colonel Gross came forward to testify under oath whereas Respondent only relies on hearsay attributed to the Governor and his Chief of Staff.
43. On June 16, 2013, Complainant and Thompson were transferred into permanent, non-biddable positions within Respondent's JTTF under the command of then-Major Dermot Quinn who acknowledged that, at the time, there were no openings in JTTF and no posting for the position as required by ADM 27. Joint Exhibit 1; Tr. 7 at pp. 52-3, 80-83. Major Quinn was not consulted by then-Lt. Colonel Hanafin prior to Complainant and Thompson being placed in JTTF. Tr. 7 at p. 84.

44. The JTTF originated after 9/11 to bring local, state, and federal agencies together in order to investigate domestic and international terrorism-related activities affecting New England. Joint Exhibit 31. [REDACTED]

[REDACTED] According to Lt. Duggan, who supervised Complainant at JTTF, assignments in the unit require the ability to use and search a variety of data bases, the interpretation of large amounts of complex information for intelligence purposes, and the drafting of comprehensive reports. Tr. 8 at pp. 111-112. Federal, not state, criminal procedures are applicable to the investigations. Joint Exhibit 31. At all relevant times, the JTTF task force handled potential terrorism investigations in accordance with the U.S. Attorney General's Domestic Investigations and Operations Guide (the "DIOG") which sets forth three categories of cases: 1) assessments of suspicious activity; 2) preliminary investigations; and 3) and full investigations. Tr. 7 at pp. 218-219; Joint Exhibit 31.<sup>8</sup>

45. Trooper Deborah Thompson, rather than work at JTTF, "burned" her unused vacation time and retired. Tr. 2 at p. 176; Tr. 8 at p. 129.

46. Five days after Complainant was removed from the EPU, Trooper Driscoll's TDY assignment in the EPU was extended and he became permanent in the EPU on September 22, 2013. Joint Exhibits 7 & 8; Chalks A & D; Tr. 10 at pp. 32, 147. According to Lt.

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<sup>8</sup> The DIOG is a 500-page manual which establishes JTTF and specifies that the FBI and the Massachusetts State Police agree to abide by the guidelines of the U.S. Attorney General and FBI policies pertaining to General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations, and Foreign Intelligence Collection and Counterintelligence Investigations. Tr. 8 at pp. 126-127.

Ayuso, the removal of a permanent member of the EPU (Complainant) and the retention of a temporary member (Driscoll) who thereafter became permanent was "in a reverse order." Tr. 3 at p. 45.

47. One month after Complainant and Thompson left the EPU, the unit's racial/age composition was as follows: a Caucasian Unit Commander (Scaplen, age 44), two Caucasian Sergeants (Flaherty and O'Riordan,<sup>9</sup> both 48 years old), three Caucasian Troopers (Maguire, Quinn, and Driscoll, ages 43, 50, and 53, respectively, and one African-American trooper (Nathan Thomas, age 50). Joint Exhibits 6 & 53; Tr. 2 at pp. 47-48; Tr. 8 at p. 147. There were no minority supervisors in the unit. Joint Exhibit 6.<sup>10</sup>
48. Following the transfers of Complainant and Thompson, Sgt. Flaherty was named Executive Officer of the EPU and in that capacity he assumed command when EPU Commander Scaplen was out of town or on vacation. Tr. 11 at pp. 88-89.
49. In 2012, Sgt. Flaherty's overtime within the EPU was \$71,969. It increased to \$88,974 in 2013 and to \$100,278 in 2014. Chalk A; Tr. 11 at pp. 117-118. He testified that the increase in his overtime was due, in part, to there being two fewer members of the EPU.

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<sup>9</sup> O'Riordan and EPU Commander Scaplen were classmates at the State Police Training Academy. Tr. 1- at p. 160. O'Riordan remained in EPU until August 9, 2014. Tr. 9 at p. 62. He was made a Lieutenant on the next day, transferred as a Lieutenant into the Violent Fugitive Apprehension Unit, and a month later transferred into the Fire Marshall's Office within the Division of Investigative Services (DIS). Tr. 10 at p. 14, 17; Joint Exhibit 1. Lt. Butner testified that when she attempted to apply for an Internal Affairs position just prior to being made a Lieutenant, she was told that she had to actually be in the rank prior to applying. Tr. 5 at p. 179.

<sup>10</sup> During the following year, African American Trooper Marque Fraser transferred back into the EPU on a TDY basis and thereafter became permanent in the EPU in May 2015. Tr. 3 at pp. 155-156; Joint Exhibit 9. His return to the EPU increased the number of minorities in the unit to two but there were no minority Sergeants.

Tr. 11 at p. 121. After Complainant and Thompson left the EPU, Sgt. Flaherty never worked H Troop details (road construction) again. Tr. 11 at pp. 81-87; Joint Exhibit 66.

50. During the time that Complainant was in JTTF, he reported to James Duggan who had approximately twelve years less seniority in the rank of Sergeant than Complainant and was twelve years younger than Complainant.<sup>11</sup> Joint Exhibit 1; Tr. 8 at p. 147. Lt. Duggan testified that Complainant seemed very positive about the transfer. Tr. 7 at p. 194. I credit that Complainant may have appeared to be upbeat about the transfer, but I do not believe that his outward appearance was an accurate reflection of how he actually felt.

51. The JTTF position was not a good fit for Complainant. Tr. 7 at p. 63. It consisted of conducting threat assessments of individuals who were potential security threats by investigating their backgrounds, looking for evidence of past involvement with law enforcement, and interviewing those who reported the threats. According to Complainant, it required a "multitude of computer skills and knowledge" to navigate the FBI system. Tr. 4 at p. 103. Complainant testified that he had no specialized computer training or skills to assist him in his JTTF assignment, that he struggled with using the FBI data bases, and that he lacked investigative experience. Tr. 2 at p 187; Tr. 4 at pp 90, 103. Lt. Duggan disputed that technical computer expertise was a preferred skill, but I do not credit the assertion since he justified the selection of a subsequent candidate for a

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<sup>11</sup> Duggan was promoted to Lieutenant on January 12, 2014. From April 2013 until his retirement in 2018, he was assigned to the JTTF where he supervised state troopers. Joint Exhibit 1; Tr. 7 at p. 180; Tr. 8 at pp. 174-174. Lt. Duggan retired from the State Police at age forty-nine with the rank of Detective Lieutenant. He testified that it is typical for members of the State Police to retire in their forties. Tr. 8 at p. 147.

JTTF assignment, in part, based on the individual's advanced technological computer skills which he deemed important for the job. Tr. 8 at pp. 149,160-161. According to Lt. Duggan, Complainant had difficulty following through with threat assessments and drafting reports. Joint Exhibit 32. Lt. Duggan testified that he had to retract the responsibility he gave to Complainant to handle reimbursement requests from JTTF members for overtime because of mathematical errors. Tr. 7 at pp. 204-209.

52. Complainant testified that he did not receive training from then-Sgt. Duggan or from other members of the State Police aside from being told to listen to the FBI's on-line virtual academy, study the DIOG, and ask questions. Tr. 2 at pp. 175-177, 180-181; Tr. 4 at p. 175; Tr. 7 at p. 195, 216; Tr. 8 at p. 21. Complainant was not sent to the FBI Training Academy at Quantico to learn federal law even though such attendance was acknowledged by Lt. Duggan to be "compulsory" for members of JTTF. Tr. 7 at p. 195, 216; Tr. 8 at pp. 128, 177.
53. Complainant testified that he initially had access to a supervisory screen where he could see all cases being investigated by members of JTTF but at some point the screen disappeared. Around the same time, he was directed by Lt. Duggan to refrain from attending supervisory staff meetings. Tr. 3 at pp 182-185.
54. Complainant estimates that he closed five or six cases while in JTTF. Tr. 4 at pp. 93, 102. According to Lt. Duggan, none of Complainant's cases were closed, he made mistakes in his data base checks, and he made numerous grammatical errors. Tr. 7 at pp. 201-202, 224, 229; Tr. 8 at pp.10. Respondent did not submit evidence supporting these assertions from the federal "Guardian National Security Data Base." Tr. 8 at pp. 171-172.



55. On December 12, 2013, then-Sgt. Duggan wrote a memo to Complainant asking that database checks be completed ASAP and reminding Complainant to write in complete sentences, use proper grammar, and check his spelling. Joint Exhibit 61.
56. In early 2014, Lt. Butner reached out to Complainant and Deborah Thompson in preparation for a meeting with Colonel Alben and Deputy Hanafin in February 2014. Lt. Butner sought information about the lack of opportunities for women and minorities stemming from the non-posting of TDY positions by unit commanders and about a lack of diversity in the command staff. Tr. 2 at p. 70. According to Lt. Butner, a disproportionately large number of Caucasian males received TDY opportunities to acquire skills in non-biddable positions which, in turn, limited the ability of women and minorities to gain similar experience and become qualified for non-biddable units. Tr. 6 at pp. 37-43. Lt. Butner prepared two charts: Joint Exhibit 36 showing the percentages of minorities and females in non-biddable positions and Joint Exhibit 36A showing the percentages of minorities and females in Troops A-H biddable positions. The charts show 3.7% minorities in 616 non-biddable positions in comparison to 10.75% male minorities in 2,064 biddable positions.
57. During Lt. Butner's meeting with Colonel Alben and Deputy Hanafin, she was told that performance issues played a role in the removal of Complainant from the EPU and she conveyed this information to Complainant. Tr. 2 at pp. 72-73.
58. On February 5, 2014, Lt. Duggan sent a memo to Major Quinn stating that:
- Complainant fails to meet acceptable standards in many of the basic, as well as specific performance factors for a supervisor. He is unfamiliar with basics such as department policy on inventory of motor vehicles and recoding of interviews, as well as criminal procedure relative to search and seizure [but] In deference to Sergeant

Coats, and considering the learning curve associated with his fairly recent assignment to DIS, I have rated him as acceptable in all performance factors for 2013. I conducted a pre-evaluation meeting with Sergeant Coats on January 29, 2014, and discussed his areas of weakness, how he should address them, and clearly explained my expectations of him for the next rating period.

Joint Exhibit 20 at p. 3273. Lt. Duggan stated that he believes he provided a copy of the letter to Complainant but can't say for sure. Tr. 8 at p. 70. Lt. Duggan testified that despite marking Complainant as acceptable in all categories of performance for the period from June 2013 to December 2013, Complainant's Guardian database entries reflected deficiencies in his command of grammar, punctuation and capitalization. Tr. 8 at p. 10.

59. In conjunction with drafting Complainant's February 2014 evaluation, Lt. Duggan drafted and presented Complainant with a list of performance expectations which addressed wearing proper attire, learning policy and procedure, attending meetings only when assigned, drafting grammatically-correct documents, proof-reading documents to eliminate errors, double-checking addition in response to reimbursement requests, and adhering to assigned functions. Joint Exhibit 20 at p. 3274; Tr. 8 at p. 140. Lt. Duggan told Complainant that he should be familiar with state criminal procedure, rules, policies, and regulations even though JTTF was governed by federal criminal law, that he should no longer attend supervisory staff meetings, and that he should refrain from wearing some items of clothing worn by others in the JTTF. Tr. 2 at pp. 192-193; Tr. 3 at pp. 155-156. Complainant testified that he then shared with Lt. Duggan problems that he had with grammar and spelling since childhood. Tr. 2 at p. 195.

60. On June 26, 2014, Lt. Duggan held a 2014 employee evaluation progress review meeting with Complainant and his Union representative and drafted two memoranda to Major Quinn about the meeting. Joint Exhibits 32 & 33. Lt. Duggan expressed confusion over the inconsistent quality of Complainant's reports. Joint Exhibit 32. Complainant and his Union representative explained that some of Complainant's reports were written and/or revised by FBI Special Agent Schmidt but that other reports were drafted solely by Complainant. Tr. 4 at pp. 109-110; Tr. 8 at pp. 36-37. Complainant acknowledged that he did not know the elements of the crimes he was investigating. Tr. 4 at p. 112. Complainant explained that he had struggled with grammar and spelling since childhood and reversed words and numbers but had not been formally diagnosed with dyslexia. Joint Exhibit 32; Tr. 2 at p 196-198; Tr. 4 at p. 108. Complainant testified that his cognitive difficulties made it difficult to perform JTTF database checks, to draft reports, and to learn policy, regulations, and criminal procedure but that prior assignments in the Canine Unit and the EPU did not involve such skills. Id. According to Complainant, his disability was not a significant factor in previous assignments and for that reason he had not reported it previously to Respondent. Id.; Joint Exhibit 33. Complainant and his Union representative attempted to negotiate a transfer to an administrative position that was better suited to Complainant's skill set. Tr. 2 at p. 201; Joint Exhibit 32.
61. Following the June 2014 meeting, Lt. Duggan sought documentation of Complainant's learning disability and was told that Complainant did not have a formal diagnosis, although he had taken special classes at school and repeated ninth grade. Joint Exhibit 33; Tr. 8 at p. 42.

62. According to Lt. Duggan, while Complainant was assigned to JTTF, he did not exhaust his overtime allowance of approximately \$17,600 per month which was disbursed by the federal government for performing JTTF work over and above regular tours of duty nor did he take advantage of LNG tanker overtime opportunities. Tr. 8 at 49-55. Lt. Duggan acknowledged that LNG tanker overtime generally took place at undesirable times early in the morning such as 3:00 a.m. in order to minimize disruptions to traffic. Tr. 8 at p. 146.
63. As of July 3, 2014, there was one open Sergeant position in the EPU and two open Trooper positions following Trooper Maguire's transfer out of the unit the prior month. Joint Exhibit 6; Tr. 10 at p. 147; Chalk D. In October 2014, there was a posting for two EPU positions, designated as either Sergeant or Trooper. Joint Exhibit 28. According to EPU Commander Scaplen, these openings were in anticipation of the subsequent election for Governor and Lt. Governor in November 2014 when the EPU would be tasked with providing protection to the incumbent Governor, the Governor-elect, and the Lt. Governor-elect. Tr. 10 at p. 151, 175.
64. Complainant remained in JTTF for a total of fourteen months before being transferred out. Complainant sought a transfer to the Canine Unit because it was an area in which he excelled. Transcript 2 at pp. 166-168, 211. Lt. Colonel Quinn recalls a discussion about the Canine Unit being a better "fit" for Complainant but testified that he could not effectuate this move on his own since the Canine Unit was under the Division of Field Services. Tr. 7 at p. 137. Quinn testified that he has a general, if vague, recollection of calling Division of Field Services Commander Edward Amadeo and speaking to his

subordinate about Complainant transferring into the Canine Unit. Tr. 7 at pp. 137-139.

According to Complainant, even though there was, at the time, no posting for such a position, he believed there was a need for one as evidenced by the fact that a Canine Sergeant from the western sector was brought in on overtime basis to supervise the eastern sector at night. Tr. 2 at pp. 166-168; Tr. 4 at p184.

65. Complainant had a trained canine at home, a German Shepard who left State Police service as a puppy in 2006. Tr. 4 at p. 116. During the approximately eight-year period that the dog was out of service, Complainant states that he continued to train the dog at home in obedience, tracking, evidence recovery, and protection. Tr. 4 at pp. 118-121. Complainant maintains that he and the dog were capable of re-commencing duties in the Canine Unit in 2013. Tr. 3 at pp. 166-167; Tr. 4 at p. 121. According to Complainant, Major Quinn said it was a good idea. Tr. 4 at p. 122.
66. Complainant was not transferred to the Canine Unit. Instead, in August 2014, he reverted to being a uniformed Sergeant in a cruiser upon being transferred to the road as a Patrol Supervisor in Troop A. Joint Exhibit 20 at p. 3275; Tr. 8 at p. 165. Complainant was placed on the evening shift (3:00 p.m.-11:30 p.m.) with a schedule of four days on and two days off. He was assigned to investigate accidents and other matters.
67. In early 2015, approximately six months before he retired from the State Police, Complainant applied for a transfer into its Diversity Unit/Recruitment Division. Tr. 3 at p. 169. Complainant testified that he was informed by the Unit's head, Lieutenant Detective Deb Derise, that she did not want Complainant to use the job as a platform for the "mess that [Complainant] was involved in at Headquarters" which Complainant

interpreted to mean his MCAD charge of discrimination against the State Police. Tr. 3 at pp. 169-171. Another minority individual was placed into the position. Tr. 3 at p. 172.

68. Complainant retired from the State Police in October 2015 after thirty-two years of service. During this time, he was never disciplined or subject to an internal affairs investigation. Tr. 2 at p. 16. After retiring, Complainant worked as a consultant in the fields of active shooter training and workplace safety. tr. 4 at p. 146. He and a partner formed an executive protection program called "Combined Martial Arts Inc." Joint Exhibit 46. Classes are held between one and four times per year.<sup>12</sup>
69. Complainant claims that he lost \$148,000 in overtime between his removal from the EPU and his retirement from the State Police. Tr. 3 at p. 200. Two types of overtime are available within the EPU: scheduled and voluntary. Scheduled overtime is built into the regular shifts of EPU officers for working additional hours during a normal work day and for working every third weekend. Voluntary overtime shifts are also available on a rotating basis. Tr. 3 at pp. 224-225; Tr. 9 at pp. 56-68. Complainant described the overtime in the EPU as "exciting" and "fun" insofar as it included international travel and trips to the White House. Tr. 3 at pp. 238-239.
70. Complainant earned \$57,318.00 in overtime during his last full year in the EPU (2012). During his final six months in the EPU (January through mid-June 2013) he earned

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<sup>12</sup> Evidence pertaining to Complainant's employment after leaving the State Police is not relevant since this matter is limited to Complainant's transfer out of the EPU and into JTTF/Troop A. Litigation is pending in court addressing Complainant's retirement from the State Police. Accordingly, I do not address evidence pertaining to Complainant's subsequent employment as a special part-time police officer with the Town of Lexington or as a teacher of seminars in active shooter trainings and "situational awareness."

\$29,179.00 in overtime. Tr. 3 at pp. 229-232. Complainant's estimation of \$148,000 in lost overtime is based on the overtime income he earned in the EPU in 2012 and 2013, modified by percentage increases in the overtime income of comparator Sgt. Flaherty between June 2013 when Complainant was transferred out of the EPU and October 2015 when Complainant retired. Complainant uses Sgt. Flaherty as a comparator because during the years when Complainant and Sgt. Flaherty both worked in the EPU, their overtime income fluctuated in a comparable manner even though Sgt. Flaherty worked more overtime hours. Tr. 3 at p. 202.

71. In contrast to the overtime that Complainant earned in the EPU, there was less overtime available in JTTF and Troop A and it involved difficult, dangerous conditions. Tr. 3 at p. 231. Between mid-June through December 2013, Complainant only earned \$14,249 in overtime at JTTF; in 2014, Complainant only earned \$13,443 in overtime in JTTF and Troop A; and in 2015, prior to his October retirement, Complainant only earned \$2,682 in overtime in Troop A. Tr. 3 at pp. 232, 235; Chalk B.
72. Complainant, with the approval of the State Police, refereed ice hockey games throughout his state service. Tr. 4 at pp. 132-133; Joint Exhibit 43. The \$30 to \$120 per hour income that Complainant earned refereeing hockey games was considerably less than what he earned in State Police overtime. Tr. 4 at p. 138. Complainant's refereeing activities did not interfere with his ability to earn such overtime. Tr. 3 at pp. 235-236.
73. Complainant testified that he loved being in the EPU and that when he was removed, he had trouble sleeping, became irritable, reclusive, and separated himself from other people including his family. Tr. 3 at pp. 190. He felt stressed-out and apprehensive while in the

JTTF. Tr. 3 at pp 190-192. Complainant stopped attending sports events, socializing with friends, and answering the phone. Tr. 3 at p. 192-193. He experienced trouble sleeping and began to wake up intermittently throughout the night. Id. at 190-191.

Previously, Complainant enjoyed riding a mountain bike, but after his removal from the EPU, he stopped engaging in this activity. Tr. 3 at p. 194. He also stopped refereeing college ice hockey, limiting himself to refereeing slower-paced high school ice hockey games. Tr. 3 at pp. 194-195. Complainant testified that he was embarrassed and disgusted at the way he had been treated. His removal from the EPU caused him to lose interest and joy in his work, lose the reverence he previously felt for the State Police as an organization, and lose the feeling that being a member of the State Police was one of the most important parts of his life. Id. I credit the aforementioned description of Complainant's emotional distress. As a witness, Complainant presented as a dignified, taciturn individual whose composed demeanor camouflaged a depth of emotion that was sincere and heartfelt. In quiet yet convincing words, Complainant expressed deep pain and betrayal resulting from his removal from the EPU and transfer into positions that he was ill-prepared to handle.

### III. CONCLUSIONS OF LAW

#### Disparate Treatment

M.G.L. c. 151B secs. 4(1) and (1B) prohibit employers from discriminating against an employee on the basis of age and race. This case must be resolved on the basis of indirect evidence of such discrimination notwithstanding several disturbing and credible allegations which arguably constitute direct evidence of racial and age-based disparate treatment. The



first involves a Training Academy dinner in 1983 during which drill instructors required Complainant and other African-American recruits to dress as waiters, serve their classmates at a candle-lit dinner, and have their dinner in a separate location. The second involves EPU Commander Scaplen referring to Complainant as an elderly, bumbling African-American character from a 1970's sitcom. Such matters undeniably detract from Respondent's efforts to cast itself as an equal opportunity employer, but they do not satisfy the rigorous requirements of direct evidence. The former is a decades-old matter that was perpetrated by individuals who were drill instructors at the Training Academy. Although Colonel Alben and Lt. Colonel Hanafin were present during the incident as classmates of Complainant and were seen to be laughing, they did not hold leadership positions at the time and their laughter could have been a nervous reaction to an embarrassing situation. The latter matter was insulting to Complainant but could have been a misguided attempt at humor on the part of EPU Commander Scaplen. Neither incident satisfies the high bar for direct evidence, i.e., evidence which leads to the "inescapable or at least highly probable" inference of racial or age bias within the three hundred days preceding the filing of the complaint as required in Wynn & Wynn, P.C. v. MCAD, 431 Mass. 655, 665 (2000) *quoting* Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 300 (1991). Nonetheless, to the extent that these incidents reveal stereotypical attitudes offensive to officers within protected classes, they provide background support for the matters discussed below.

Since the case rises or falls on the basis of indirect evidence of discrimination, the three stage burden-shifting model enunciated in Wheelock College v. MCAD, 371 Mass. 130 (1976) comes into play. Complainant must first satisfy the requirements of a prima facie case

by producing evidence that he: 1) is a member of a class protected by G.L. c. 151B; 2) performed his job at an acceptable level; 3) was subjected to adverse action; and 4) similarly-qualified persons not of his protected class were treated differently in circumstances that would raise a reasonable inference of unlawful discrimination. See Abramian v. President and Fellows of Harvard College, 432 Mass. 107, 116 (2000) (elements of prima facie case vary depending on facts); Sullivan v. Liberty Mutual Insurance Company, 444 Mass. 34 (2005); Knight v. Avon Products, Inc., 438 Mass. 413 (2003). The Supreme Court characterizes the burden of establishing a prima facie case of disparate treatment as "not onerous," requiring only that a qualified individual establish circumstances "which give rise to an inference of unlawful discrimination." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Blare v. Huskey, 419 Mass. Mass. 437 (1995).

Complainant's spotless disciplinary record and outstanding employee evaluations over a thirty-two year state police career, his unceremonious removal from the EPU while substantially younger Caucasian members were allowed to remain, and his transfer into JTTF for which he lacked computer skills rather than placement into the Canine Unit where he previously thrived for eighteen years, all support a prima facie case of disparate treatment discrimination based on race and age. Complainant, at age fifty-seven, was transferred out of the EPU after seven years despite receiving outstanding evaluations in the unit, no discipline, and no work improvement plans or suggestions. That his transfer into JTTF and later into the Division of Field Services constituted adverse action is manifest by the fact that he earned substantially less in overtime and paid details, lost the prestige of being an Executive Officer in a sought-after unit involving international travel and prominent people, was thrust into a

position for which he lacked training and aptitude, and was ultimately returned to the road work as a uniformed officer after decades of specialty assignments. See Yee v. Massachusetts State Police, 481 Mass. 290, 296 (2019) (recognizing that a lateral transfer of an employee in the Massachusetts State Police from one troop to another may be an adverse action under c. 151B where the positions offer different opportunities to earn overtime and obtain paid details).

Complainant's treatment stands in stark contrast to the manner in which younger, Caucasian males were treated in the EPU. Whereas Complainant was ousted from the unit, Officers Maguire, Driscoll, O'Riordan, and Quinn were retained despite having less seniority and/or lower rank than Complainant and no better employee evaluations. Approximately six months prior to Complainant being transferred out of the unit, Trooper Driscoll, a Caucasian male, was brought into the EPU on a temporary basis and was made permanent after Complainant's departure. Once Complainant left the EPU, it had only one African-American member, Nathan Thomas, who was not a supervisor as Complainant had been, and by the end of 2014, there were six new officers in the EPU of whom five were Caucasian. The average age of EPU members after Complainant, age fifty-seven, and Deborah Thompson, age fifty-three, were no longer in the unit was substantially lower than it had been previously. These factors undermine Respondent's assertion that Complainant's transfer was due, at least in part, to a need to downsize the EPU after Lt. Murray resigned and supports Complainant's charges of disparate treatment based on race and age.

Since the foregoing circumstances support a prima facie case of discrimination based on age and race, the burden of production shifts to Respondent to articulate and produce

credible evidence to support legitimate, nondiscriminatory reasons for its action. See Abramian, 432 Mass. 116-117, Wynn & Wynn P.C v. MCAD, 431 Mass. 655, 666 (2000); Wheelock College v. MCAD, 371 Mass. at 138. If Respondent does so, Complainant, at stage three, must persuade the fact-finder by a preponderance of evidence that Respondent's articulated reasons were not the real ones but a cover-up for discrimination. See Wynn & Wynn, 431 Mass. at 666 citing Abramian, 432 Mass. at 117-118; Knight v. Avon Products, 438 Mass. at 420, n.4; Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001). The determination that one or more of the articulated reasons is false permits, but does not require, the trier of fact to infer discriminatory animus. See Wynn & Wynn, 431 Mass. at 666 (third step of circumstantial method of proof may be satisfied by proof that one or more of the reasons advanced by the employer is false which can lead to an inference of discriminatory animus). Complainant need not disprove all of the alleged non-discriminatory reasons proffered by the employer, only that "discriminatory animus was a material and important ingredient in the decision making calculus." Chief Justice for Administration and Management of the Trial Court v. Massachusetts Commission Against Discrimination, 439 Mass. 729, 735 (2003).

At stage two, Respondent maintains that Complainant improperly secured his EPU position through the intercession of others in violation of state police policy and that his tenure in the EPU from November 2006 through June 2013 was replete with performance issues. Alleged deficiencies include the charge that Complainant mishandled the creation of a combined filing system of threats against various governors when he organized the material by dates rather than by names of the individuals making the threats. Respondent asserts that

Complainant over-relied on GPS when serving as the Governor's driver, took longer than other drivers to travel to events, and impermissibly used his emergency lights when assigned as chase in order to catch up with the Governor's vehicle. Respondent asserts that Complainant, when performing the role of chase, lagged behind the Governor and his team when entering a location rather than lead the way. Respondent cites an occasion when Complainant allegedly created a roadblock by using emergency lights on a police vehicle to follow the Governor's bike in the Berkshires and describes another incident in which Complainant allegedly brought Governor Patrick into the wrong room of the Boston Seaport Hotel for a meeting. Respondent maintains that Complainant preferred to function as the Governor's "body" because he "didn't have to do anything," flouted a restriction on bringing radios and weapons into China by wearing an ear piece that gave the impression it was attached to a radio, and embarrassed Governor Patrick on trips abroad by communicating with non-English speakers by repeating himself in a loud voice. Respondent asserts that Complainant failed to accurately and punctually document attendance calendars and failed to inventory EPU equipment as assigned. Finally, Respondent asserts that Complainant failed to pursue a threat investigation after being told that the individual under investigation had a penchant for suing everybody. These accusations, described by ranking members of the EPU, are sufficient to satisfy Respondent's stage two burden of production.

Despite the litany of accusations described above, at stage three the allegations that Complainant engaged in improper and/or negligent conduct while serving in the EPU are convincingly debunked. For instance, the suggestion that Complainant violated State Police Rule 5.29.1 by having individuals intercede on his behalf to secure an EPU position ignores

the fact that it was the Governor Patrick himself who took steps to secure Complainant's placement in the EPU. Surely, the Governor's preference in regard to members of his personal security team overrides any such regulation. Complainant candidly acknowledged that in 2006, he spoke to then-Sergeant Gross and then-Lieutenant Hanafin about his interest in working in the EPU if then-candidate Patrick were elected. That such a request accorded with State Police practice was acknowledged by Captain Scaplen who testified that interest in EPU openings was communicated through "word-of-mouth."

There can be no doubt that Complainant's efforts to secure a position within the EPU showed initiative, not interference. By volunteering to work on then-candidate's Patrick's security detail in 2006, Complainant proved his worth as a future member of the Governor's executive protection team. I credit Colonel Gross's testimony that he, the Governor, and the Governor's wife were all favorably impressed by Complainant's skills. Accordingly, there is no credible evidence that Complainant flouted the state police system in pursuing a transfer into the EPU.

Turning to alleged performance issues, the accusations of negligence and poor performance by Complainant in the EPU are, for the most part, limited to the testimony of EPU Commander Scaplen and his good friend and subordinate Sgt. Flaherty. The accusations reflect their point of view, but were not addressed at the time when they allegedly occurred and are convincingly refuted by Complainant. For instance, the allegation that Complainant failed to perform his job as catch during a Seaport Hotel event is contradicted by Complainant's testimony that it was Sgt. Flaherty who failed to fulfill his role as the "advance" by arranging for Complainant to be admitted into the building. The allegation that

Complainant mishandled the creation of a filing system of threats against various governors is contradicted by the fact that threat assessments are the purview of JTTF yet Complainant was assigned to organize file cabinets containing paper records of threats against prior Governors when Sgt. Flaherty was the EPU's liaison to JTTF.

The claims that Complainant over-relied on GPS when serving as the Governor's driver, took longer than other drivers to travel to events, used his emergency lights when assigned as chase, and lagged behind the Governor and his team when performing as chase are concerns first expressed years after the fact, with no documentary support and no testimonial corroboration by the Governor's team. Rather than credit such assessments, I believe Complainant's assertion that he was a careful driver whose reliance on GPS was appreciated by Governor Patrick. Accusations about Complainant's conduct abroad such as wearing an ear piece in China and attempting to communicate with non-English speakers by repeating himself in a loud voice are similarly unpersuasive. No explanation was proffered for why Complainant would wear an ear piece that was not connected to any device and, thus, had no function. The allegation that Complainant caused embarrassment by raising his voice during trips abroad is contradicted by his uniformly soft-spoken demeanor over the course of an eleven-day public hearing and his unfailing composure at the hearing under stressful circumstances.

Most of the foregoing assertions were made at the public hearing by EPU Commander Scaplen whose credibility was not as persuasive as Complainant's. One example of his less than convincing testimony is the account of a matter involving Trooper Maguire at Mayor Kevin White's funeral. Commander Scaplen contradicted Complainant's assertions that

Trooper Maguire was involved in a car accident and that there had to be damage to the other vehicle as evidenced by damage to the vehicle driven by Trooper Maguire. Despite contradicting Complainant's account, Commander Scaplen acknowledged that he does not recall ever speaking to Complainant or Trooper Maguire about the incident.

It is noteworthy that despite a voluminous written record, there is no documentary evidence of any performance deficiencies on the part of Complainant while a member of the EPU. In fact, Complainant's yearly performance evaluations during his seven-year tenure there are outstanding. Complainant's last evaluation in the EPU (January-December 2012) states, among other positive attributes, that he follows policy, procedure, and directives, is cooperative, displays excellent oral and written skills, displays great administrative ability, is always ready to assist, completes reports on time, is punctual, knows his job, and strives for perfection.

The written praise of Complainant's performance flies in the face of Captain Scaplen's testimonial assertions that Complainant failed to maintain attendance calendars and inventories of EPU equipment, ignored a directive to not wear an ear piece in China, did not pursue a threat investigation after being told by U.S. Marshall John Gibbons that the individual under investigation had a penchant for suing everybody, and liked being assigned as "body" because he "didn't have to do anything." Commander Scaplen testified at the public hearing that he did not document Complainant's performance deficiencies in the employee evaluation system for "political" reasons. What he meant by "political" reasons was not explained nor was it explained why such reasons took precedence over an evaluation system which mandates that employees be given feedback in order to help them improve



their performance and/or challenge negative assessments. Had Complainant been informed about alleged issues which existed with his performance in the EPU, he could have contested them by using the appeal procedures of the employee evaluation system or he could have used the criticism as a basis for changing his performance. These opportunities were denied to Complainant in the guise of "political" deference. Even if EPU Commander Scaplen did not want to use the employee evaluation system to document performance deficiencies for the reason he asserted at the public hearing, the praise of Complainant's performance in his EPU reviews exceeds what would be expected in regard to an employee with the performance issues now attributed to Complainant.

In addition to the lack of documentary support for Complainant's performance deficiencies in the EPU, the derogatory statements about Complainant that are attributed to the Governor and his Chief of Staff are unconvincing. I decline to credit that such statements were made by the Governor and his Chief of Staff for the following reasons. First, the statements are pure hearsay. Neither Governor Patrick nor Chief of Staff Brendan Ryan came forward to testify at the public hearing, nor did they submit affidavits in support of Respondent's position. Second, Respondent's position statement makes no reference to the Governor playing any role in choosing Complainant for transfer out of the EPU. According to Complainant's "Motion to Preclude Certain Evidence and Position Arguments Disclosed Two Weeks Prior to Hearing," Respondent did not raise the Governor's dissatisfaction with Complainant until five years after commencement of this action, on the eve of the public hearing. Third, the likelihood that the Governor or his Chief of Staff would discuss a proposed transfer of one Sergeant (Complainant) with a fellow Sergeant (Sgt. Flaherty)

defies credulity. According to Sgt. Flaherty, the Governor told him that Complainant should no longer participate in travel details because he "doesn't do it the same way the rest of you do it." I do not believe that the Governor would convey such an opinion about one officer to another officer of the same rank. Moreover, the fact that both Commander Scaplen and Sgt. Flaherty both claim to have heard the very same words from Governor Patrick (allegedly describing Complainant and Trooper Thompson as "one Trooper who doesn't want to do the job anymore and one Sergeant who really can't do the job anymore") does not establish corroboration as much as a coordinated defense. Finally, it defies credulity that Governor Patrick would have played a role in removing from his security detail the only African-American Sergeant in the EPU given the principles of diversity and equal opportunity enunciated in his Executive Order 526. Joint Exhibit 52.

Rather than credit Respondent's claim that input from Governor Patrick and his Chief of Staff played a role in Complainant's removal, I believe Colonel Gross who presented a contrary view. According to Colonel Gross, he had regular conversations with Governor Patrick during the latter's tenure in office, and the Governor never expressed dissatisfaction with Complainant's performance. Colonel Gross quoted Chief of Staff Ryan as saying "we didn't know anything about that" when asked about Complainant's transfer. This testimony, given under oath, is more credible than Respondent's hearsay claims that it acted in conformity with the Governor's views.

The parties also differ in their versions of the so-called "Grady" matter, pertaining to Complainant's allegation that he was given the nickname of an old, disheveled, and bumbling African-American character from a 70's sitcom "Sanford and Son." EPU Commander

Scaplen testified that in 2012, Trooper Marque Fraser jokingly placed a "mock-up" on a wall of various actors and other celebrities portraying members of the EPU in roles from the HBO mini-series "Band of Brothers." Commander Scaplen stated that he was depicted as being played by Chris Farley or John Candy and that he, Scaplen, jokingly suggested that Complainant should be portrayed as "Grady" an elderly, bumbling African-American character from the 1970's sitcom. According to Commander Scaplen and Sgt. Flaherty, the incident was a good-natured jest about which everyone laughed including Complainant. According to Complainant, however, being called "Grady" by Commander Scaplen was not part of a larger joke involving numerous members of the Unit but, rather, an insult directed to him alone. Complainant testified that he asked Commander Scaplen to stop calling him "Grady" but that Scaplen refused.

I credit Complainant's version of the "Grady" matter over that conveyed by EPU Commander Scaplen and Sgt. Flaherty. The circumstances of the alleged gag presented by Captain Scaplen and Sgt. Flaherty at the public hearing were belabored and unconvincing whereas Complainant testified in a convincing manner that there was no gag, just Commander Scaplen calling him an unflattering name. Notably, Trooper Fraser did not testify at the hearing in support of Respondent's position. While the incident, even as portrayed by Complainant, is insufficient to constitute direct evidence of discrimination, it lends support to the findings of disparate treatment based on age and race as does credible testimony that EPU Commander Scaplen said that Trooper Thompson was getting old for the job and that he informed Complainant of his removal from the EPU while they were in adjacent vehicles in a parking lot in Framingham.

Additional support for Complainant's charge of race discrimination is found in the composition of the EPU before, during, and after Complainant's tenure in the unit. It is noteworthy that Complainant joined the EPU on a temporary basis *before* Caucasian Trooper John Fraioli, but Complainant was not made permanent until *after* Fraioli received permanent status. It was only after Complainant took issue with Fraioli receiving permanent status first that Complainant was made permanent, effective July 15, 2007.

Jumping ahead several years to 2012, two troopers left the EPU for other assignments. Despite their departures and the anticipated loss of Sgt. O'Riordan upon becoming a Lieutenant, Complainant and Trooper Thompson were transferred out of the EPU in June 2013 allegedly in order to downsize the unit. I do not credit this assertion because the EPU had already decreased by two troopers, Sgt. O'Riordan was expected to depart in the near future, the TDY assignment of Trooper Driscoll was extended and thereafter made permanent, and there was a posting in 2014 for two additional EPU positions. Lt. Ayuso characterized the granting of permanent status to Trooper Driscoll at nearly the same time that Complainant was removed from his permanent assignment as in the "reverse order."

Rather than stem from a need to downsize the unit, it appears that Complainant's transfer was in furtherance of what EPU Commander Scaplen described as the goal of securing EPU candidates with the right chemistry to fit into and be accepted by the group. Such a goal was facilitated by the non-posting of TDY specialty assignments by unit commanders which permitted the selection of favored individuals and resulted in a lack of opportunities for women and minorities. Because temporary assignments into non-biddable positions are not posted, a wide swath of potentially-interested individuals do not receive

notification of the openings. The individuals who are hand-picked for the assignments then have the opportunity to become familiar with the positions before they are permanently filled. According to Lt. Carmelo Ayuso, President of the Massachusetts Minority State Police Officers Association, the lack of postings presents an "equal opportunity concern." Lt. Ayuso testified that 99.9 percent of the individuals who receive TDY placements are Caucasian and that individuals are "TDY'd" into non-biddable units as preparation for permanent transfers.

Lt. Lisa Butner, President of "One Blue," likewise testified that the failure to post openings for TDY assignments into non-biddable positions works to benefit favored candidates at the expense of an inclusive selection process. Lt. Butner cited statistics to support the claim that TDY assignments into non-biddable positions were disproportionately granted to Caucasian males at the expense of minority and female employees. According to the statistics, in 2014, only 3.7% of 616 non-biddable positions were occupied by minorities whereas minority males occupied 10.75% of 2,064 biddable/troop positions. Such evidence supports Complainant's contention that by evading posting requirements, TDY assignments allow individuals to be hand-picked for specialty unit positions where they acquire the skills that enable them to subsequently receive permanent status in the specialty slots.

Following the removal of Complainant from the EPU, Sgt. Flaherty was named Executive Officer of the unit. He succeeded Complainant in that role, but unlike Complainant who had no meaningful duties associated with the title, Sgt. Flaherty assumed command of the unit when EPU Commander Scaplen was out of town or on vacation. Complainant, for his part, was transferred to the State Police Joint Terrorism Task Force

(JTTF) under the command of then-Major Dermot Quinn. Quinn acknowledged that at the time the transfers took place, there were no openings in JTTF and there were no postings for the position as required by ADM 27. Major Quinn was not consulted by then-Lt. Colonel Hanafin prior to Complainant and Trooper Thompson being placed in JTTF. By all accounts the assignment was not a good "fit" for Complainant.

Complainant had no specialized computer training or skills to assist him in his JTTF assignment, he struggled with using the FBI data base, he lacked investigative experience, and he had difficulty drafting reports. Lt. Duggan disputed that technical computer expertise was a preferred skill for the position, but his testimony is not convincing. Nor was Lt. Duggan convincing about the adequacy of the training given to Complainant. I credit Complainant that he received some assistance from FBI staff but not from Lt. Duggan or any other members of the State Police. Complainant's so-called training was essentially limited to listening to FBI materials online, being instructed to study a federal manual, and being allowed to ask questions. He was not sent to the FBI Training Academy at Quantico to learn federal law even though such attendance was deemed "compulsory" for members of JTTF. Instead, he was told to study state rules of criminal procedure which are not applicable to JTTF investigations. Complainant was denied access to a supervisory screen where he could see all cases investigated by members of JTTF, and he was directed by Lt. Duggan to refrain from attending supervisory staff meetings.

According to Lt. Duggan's public hearing testimony, Complainant failed to close any cases while he served in JTTF, made errors in his data base checks, and made numerous grammatical and spelling errors. Lt. Duggan's dissatisfaction with Complainant's

performance in JTTF is documented in a December 2013 memo to Complainant, in a February 2014 memo to Major Quinn, and in a list of performance expectations given to Complainant in conjunction with his employee reviews. Complainant acknowledged having difficulty performing JTTF database checks, drafting reports, and learning policies, regulations, and criminal procedure. He attributed these deficits to a lack of training and to a life-long struggle with grammar, spelling, and the reversal of words and numbers.

The aforementioned shortcomings make clear that Complainant's transfer into the JTTF was not the "soft landing" which Governor Patrick's Chief of Staff allegedly requested. Respondent characterizes JTTF positions as sought-after, but there is no evidence that it was an assignment which Complainant ever sought. Success in JTTF did not play to Complainant's strengths as did his former assignments in the Canine Unit and the EPU. In June 2014, Complainant and his Union representative attempted to negotiate a transfer to an administrative position that was better suited to his skills.

The position sought by Complainant was in the Canine Unit where he had previously excelled. Complainant's fitness for that assignment was corroborated by Lt. Colonel Quinn who recalls that he attempted to facilitate Complainant's transfer into the Canine Unit during the time that Complainant was assigned to JTTF. I am not persuaded that the lack of a posting for a Canine Sergeant is significant since there was no posting for JTTF Sergeant when Complainant was transferred there. Despite the lack of a posting for a Canine Unit position, there is evidence that a supervisor in the Canine Unit's western sector worked overtime in the Canine Unit's eastern sector at night. At the time, Complainant had a German Shepard at home who had received early training in the Canine Unit. These factors

support the claim that Complainant and his dog, in 2013, were capable of re-commencing duties in the Canine Unit.

Notwithstanding Complainant's efforts to obtain an assignment consistent with his skill set, he was not transferred to the Canine Unit. Instead, on or around August 24, 2014, he was transferred to the road as a patrol supervisor in Troop A, reverting to being a uniformed sergeant in a cruiser on the 3:00 p.m.-11:30 p.m. shift with a four-day on and two-days off schedule. Complainant thereafter sought a transfer into the State Police Diversity Unit/Recruitment Division, but he was denied that position as well, for reasons being litigated elsewhere. He subsequently retired from the State Police in October 2015.

Returning an officer to roadwork when the officer has not requested such an assignment, moving him to an evening shift when he previously worked days, and placing him on a rotating schedule when he previously enjoyed weekends off are manifestations of the same discriminatory animus that Respondent displayed when it unceremoniously removed Complainant from the EPU. There was no genuine effort to place Complainant in a position which played to his strengths but rather, a series of assignments following his removal from the EPU that would encourage him to retire.

For the aforementioned reasons, I conclude that discriminatory animus based on a combination of race and age was the motivating reason for transferring Complainant out of the EPU and into JTTF/DIS. See Yee v. Massachusetts State Police, 481 Mass. 290, 296 (2019) *citing* Verdrager v. Mintz, Levin, Cohen, Glovsky & Popeo, P.C., 474 Mass. 382, 396 (2016).

#### IV. REMEDY



Upon a finding that Respondent has committed an unlawful act prohibited by the statute, the Commission is authorized to award damages to make the victim whole. See G.L. c. 151B sec. 5. In addition to damages for lost wages and benefits, if warranted, the Commission is also authorized to award damages for emotional distress resulting from Respondent's unlawful conduct. See Stonehill College v. MCAD, 441 Mass 549 (2004). Awards for emotional distress "should be fair and reasonable, and proportionate to the distress suffered." Id. at 576. Some of the factors to be considered are: "(1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the Complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm..." Id. The Complainant "must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress." Id.

#### A. Lost Overtime

Complainant claims that he lost \$148,000 in overtime between his removal from the EPU and his retirement from the State Police. There are two types of overtime available within the EPU: scheduled and voluntary. Scheduled overtime is built into the regular shifts of EPU officers for working additional hours during a normal work day and for working every third weekend. Voluntary overtime shifts are also available on a rotating basis. Complainant described the overtime in the EPU as "exciting" and "fun" insofar as it included international travel and trips to the White House.

Complainant's assertion that he lost \$148,000 in overtime between his removal from the EPU and his retirement from the State Police is an estimation, but one that is supported by his

history of overtime earnings in the EPU and the overtime income of comparator Sgt. Flaherty between June 2013 (when Complainant was transferred out of the EPU) and October 2015 (when Complainant retired).

During 2012, Complainant's last full year in the EPU, he earned \$57,318.00 in overtime. Between January and mid-June 2013, his final six months in the EPU, Complainant earned \$29,179.00 in overtime. Because the overtime earned by Complainant and Sgt. Flaherty fluctuated in a comparable manner while they worked together in the EPU, it is fair to assume that Complainant's overtime would have increased in a manner similar to Sgt. Flaherty's had Complainant remained in the unit even though Sgt. Flaherty worked more overtime than Complainant.

Complainant earned considerably less overtime in JTTF and Troop A than in the EPU, not because his interest in earning overtime decreased, but because overtime in JTTF and Troop A was not as plentiful as that in the EPU and involved more difficult and dangerous conditions. Between mid-June 2013 and the end of 2013, Complainant only earned \$14,249 in overtime at JTTF; in 2014, Complainant earned \$13,443 in overtime in JTTF/Troop A; and in 2015, prior to his October retirement, Complainant only earned \$2,682 in overtime in Troop A. These amounts are irrelevant to what Complainant would have earned in the EPU between 2013 and 2015 other than to serve as an offset in computing lost overtime due to Complainant's discriminatory removal from the EPU. It is likewise irrelevant what Complainant earned as an ice hockey referee during this period because the income that Complainant earned refereeing ice hockey games -- between \$30 to \$120 per hour -- was

considerably less than what he earned in overtime and there is no evidence that referring ice hockey in the past ever interfered with Complainant's ability to earn overtime.

Based on the foregoing, I conclude that Complainant is entitled to \$148,000 in lost overtime between his removal from the EPU and his retirement from the State Police

B. Emotional Distress Damages

Insofar as emotional distress damages are concerned, I credit that Complainant's removal from the EPU was emotionally devastating for him. He described in compelling terms that he loved being in the EPU and that his experiences in the unit was "exciting" and "fun." When he was removed, he became irritable, reclusive, and separated himself from other people including his family. He felt stressed-out and apprehensive while in the JTTF. Complainant stopped attending sports events, socializing with friends, and answering the phone. He had trouble sleeping and began to wake up intermittently throughout the night. Previously, Complainant enjoyed riding a mountain bike but after his removal from the EPU, he stopped engaging in this activity. He also stopped refereeing college ice hockey, limiting himself to refereeing slower-paced high school ice hockey. Complainant testified that he was embarrassed and disgusted at the way he had been treated. His removal from the EPU caused him to lose interest and joy in his work, lose the reverence he previously felt for the State Police as an organization, and lose the feeling that being a member of the State Police was one of the most important parts of his life.

The aforementioned description of Complainant's emotional distress appears to only scratch the surface of what Complainant experienced. As a witness, Complainant presented as a dignified, taciturn individual whose composed demeanor camouflaged a depth of

emotion that was sincere and heartfelt. In quiet yet convincing words, Complainant expressed deep pain and betrayal resulting from his removal from the EPU and his transfer into a Unit that he was ill-prepared to handle. I conclude that Complainant is entitled to \$250,000 in emotional distress damages caused by his discriminatory removal from the EPU.

#### V. ORDER

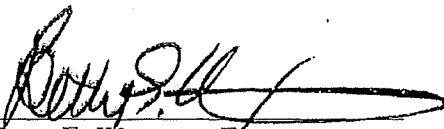
In accordance with the foregoing findings of fact and conclusions of law and pursuant to the authority granted to the Commission under G.L. c. 151B, sec. 5, Respondent is order to:

- 1) Cease and desist from all acts of discrimination;
- 2) Pay Complainant \$148,000 in lost income with interest at the rate of twelve per cent per annum. Said interest shall commence on the date that the complaint was filed and continue until paid or until this order is reduced to a court judgment and post-judgment interest begins to accrue;
- 3) Pay Complainant the sum of \$250,000 in emotional distress damages with interest at the rate of twelve per cent per annum. Said interest shall commence on the date that the complaint was filed and continue until paid or until this order is reduced to a court judgment and post-judgment interest begins to accrue;
- 4) Conduct, within one hundred twenty (120) days of the receipt of this decision, a training of Respondent's senior managers and supervisors who make decisions related to assignments and promotions including the Colonel, Lt. Colonels, etc., down to the rank of Lieutenant. Such training shall focus on discrimination based on race and age. Respondent's chosen trainer shall submit a draft training agenda to the Commission's Director of Training at least one month prior to the training date, along with notice of the

training date and location. The Commission retains the right to send a representative to observe the training session. Following the training session, Respondent shall provide to the Commission the names of persons who attended the training.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission pursuant to 804 CMR 1.23. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 26<sup>th</sup> day of June, 2020



Betty E. Waxman, Esq.,  
Hearing Officer