

The Commonwealth of Massachusetts

Decision mailed: 5/17/10
Civil Service Commission

SUFFOLK, ss.

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

JACK GARVIN,
Appellant

v.

**DEPARTMENT OF
STATE POLICE,**
Respondent

Case No.: D-07-175

DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on May 6, 2010 to acknowledge receipt of the report of the Administrative Law Magistrate dated January 29, 2010 and the objections of the Respondent received by the Commission on April 14, 2010. The Commission voted to adopt the findings of fact and the recommended decision of the Magistrate subject to the following:

CORRECTIONS

The Commission notes the following scrivener's errors -

Page 14, paragraph 3, line 2: The word "cautions" is hereby amended to the word cautious.

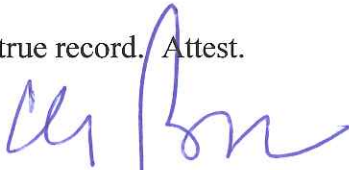
Page 15, paragraph 3, line 7: The word "can" is hereby amended to the word cannot.

Page 17, paragraph 3, line 1: The paragraph is hereby amended by inserting the word "not" after the word has.

A copy of the Magistrate's report is enclosed herewith. The Appellant's appeal is hereby allowed and the Appellant shall be reimbursed for thirty (30) days of pay.¹

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell and Stein, Commissioners) on May 6, 2010.

A true record. Attest.



Christopher C. Bowman
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of this decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have

¹ The Appellant was subsequently terminated and that decision was upheld by the Commission on January 8, 2010. See Garvin v. Dep't of State Police, Docket No. D1-07-245 (2010).

overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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

Notice to:

Scott Dunlap, Esq. (for Appellant)

Heather E. Hall, Esq. (for Respondent)

Richard C. Heidlage, Esq., Chief Administrative Magistrate (DALA)

Notice to:

Scott Dunlap, Esq. (for Appellant)

Heather E. Hall, Esq. (for Respondent)

Richard C. Heidlage, Esq., Chief Administrative Magistrate (DALA)



THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

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BOSTON, MA 02114

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January 29, 2010

D-07-175

Christopher C. Bowman, Chairman
Civil Service Commission
One Ashburton Place, Room 503
Boston, MA 02108

Re: Jack Garvin v. Department of State Police
DALA Docket No. CS-07-1137

Dear Chairman Bowman:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c)(1), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

If either party files written objections to the recommended decision, the opposing party may file a response to the objections within 20 days of receipt of a copy of the objections

Sincerely,

Joan Freiman Fink
Joan Freiman Fink, Esq.
Administrative Magistrate

Enclosure

cc: Scott Dunlop, Esquire
Michael Halpin, Esquire

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COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative
Law Appeals

Jack Garvin,
Appellant,

v.

DALA Docket No. CS-07-1137

Department of State Police,
Appointing Authority.

Appearance for Appellant:

Scott W. Dunlop, Esq.
89 Access Road, Suite 19
P.O. Box 190
Norwood, MA 02062

Appearance for Appointing Authority:

Michael B. Halpin, Esq.
Dept. of State Police
Legal Section
470 Worcester Road
Framingham, MA 01702

Administrative Magistrate:

Shelly Taylor, Esq.

RECOMMENDED DECISION

The appellant, State Police Trooper Jack Garvin, appeals a decision by the Appointing Authority, the Commonwealth Department of State Police ("Department" or "Appointing Authority"), finding him guilty of Conduct Unbecoming in violation of Article 5.2 of the Department's rules and regulations. The Civil Service Commission ("Commission") scheduled this matter for hearing on November 13, 2007 before the Division of Administrative Law

Appeals (“Division”). I held a hearing on that date. Three witnesses testified at the hearing and the Affidavit of Caroline E. Barr, Ex. 11, was admitted over the appellant’s objection. Thirteen exhibits were admitted, including Ex. 8, a copy box full of documents consisting of personnel records, records regarding the investigation of the complaint at issue, and records of prior investigations of Trooper Garvin, which, according to the representation of counsel for the Department, were reviewed in connection with the investigation of the charge at bar. There are three tapes of the hearing before the Division.

After the hearing on November 13, 2007, there were further proceedings before the Commission after the hearing during which this matter was stayed. I am informed that the proceedings before the Commission concluded, and with the permission of the Acting Chief Administrative Magistrate, the parties have been permitted to forgo filing post-hearing memoranda.

A. STIPULATION

1. Counsel for Trooper Garvin has stipulated that if just cause is found for the violation at issue in this proceeding, then such violation constitutes a third and subsequent offense for which a 30-day suspension may be warranted under the applicable rules and regulations of the Department.

B. FINDINGS OF FACT

1. The appellant, Trooper Jack Garvin, began his employment with the Department when he entered the police academy in 1986. At the time of the events at issue, he was a State Police Trooper. Garvin testimony.

2. Prior to this hearing, the Department convened a "trial board" to review the charges against Trooper Garvin. In report dated April 27, 2007, the trial board found Garvin guilty of a single charge, "violation of Article 5.2 of the Rules and Regulations for the governance of the Department of State Police to wit Unbecoming Conduct." The specification for this charge is as follows:

Trooper Garvin...did fail to conduct himself in such a manner as to reflect most favorably upon himself and the Massachusetts State Police while administering Road Test examinations at the Watertown Mall in Watertown. This occurred when he displayed an unprofessional demeanor and erratic or hazardous actions during a session of administering driver's license road tests, which are in direct violation of Article 5.2.

Ex. 1.

3. The finding was based on part of the following testimony, summarized as follows in the trial board report:

Witness #1, Michelle McQuillen, who was with her daughter, who was taking a road examination, testified that Trooper Garvin's behavior was very unprofessional. She stated that Tpr Garvin's attitude was rough and that her daughter felt intimidated by Trooper Garvin's demeanor to the point where her daughter's hands were shaking. She also felt that he was yelling at other applicants. At one point, McQuillen testifies [sic] that Trooper Garvin exits his cruiser with a cup coffee and a cigarette in his hand and yells something about getting another coffee and left the parking lot quickly, which she testified was not an issue. McQuillen then testified that when Trooper Garvin returned to the parking lot, he was backing up at approximately 25-30 mph, which she thought was very dangerous considering it was raining and the roadway was wet. McQuillen also stated that she complained to Cam's Auto School about Trooper Garvin and was referred to the State Police.

Witness #2, Connie Barr, who was also with her daughter, who was taking a road examination, testified that her daughter was intimidated by Trooper Garvin's behavior. At the conclusion of the test, she went to the Cam's Auto School to make a complaint about Trooper Garvin's demeanor. She felt that Trooper Garvin had set a bad example for the kids by smoking and backing up his cruiser at 30-40 mph for approximately 200 yards in the parking lot, which was in close proximity to the applicants and waiting parents.

Witness # 3, Vlad Zeltsner, who is a driving instructor for Cam's Auto School, stated that Trooper Garvin was going to [sic] fast when he exited the parking lot, but did not see him return because he was out on a road test.

Witness #4, Solomon Berhame, who is also a driving instructor for Cam's Auto School, testified that Trooper Garvin yelled at one of his students during the test, which caused a second student in the vehicle to start crying. Berhame also felt that Trooper Garvin's demeanor was very intimidating. He also testified that he observed Trooper Garvin leave the parking lot at approximately 20-30 mph, which he felt set a bad example for the students.

Ex. 1.

4. Witness #1, Michelle McQuillen, and Witness #2, Connie Barr, who testified at the trial board proceeding, also testified before the Division. The other trial board witnesses did not.

5. Section 5.2 of the Department Rules and regulations, "Unbecoming Conduct," provides:

Members shall conduct themselves at all time in such a manner as to reflect most favorably upon themselves and the Massachusetts State Police. Conduct unbecoming shall include that which brings the Massachusetts State Police into disrepute or reflects discredit upon the person as a member of the Massachusetts State Police, or that which impairs the operation, efficiency, or effectiveness of the Massachusetts State Police or the member.

Ex. 15.

6. Connie Barr is a physician. On May 13, 2006, a Saturday, she was at the Watertown Mall, to accompany her 17-year-old daughter, who was taking her driving test for the first time. Her daughter, Caroline Barr, was number 13 in one of two groups of students being tested that day. Barr testimony. Garvin testimony.

7. The road tests were arranged by Cam's Auto School at the Watertown Mall. Driving instructors from the auto school had prepared the students for their road test examinations. The driving school asks all students who sign up for Saturday road tests to arrive at the same time in the morning, which means that there can be long waits for some. Garvin testimony.

8. Trooper Garvin was on a paid detail, assigned with Trooper Kathleen Gould to administer road tests to students of Cam's Auto School on the 13th. Trooper Gould, who had a longer shift, was to administer 22 road tests. Trooper Garvin, who had a shorter detail, had 11 tests to administer. Garvin testimony.

9. It was raining that day, at times coming down pretty hard, and there was a long wait. Dr. Barr recalled testifying at the trial board that she could not remember what the weather was, but she later recalled that it had been raining, because, in thinking over her trial board testimony, she remembered umbrellas and that she had not exited her vehicle to speak to an acquaintance because of the rain. Barr testimony.

10. As the parents and students waited in the mall parking area, Dr. Barr saw two state troopers arrive, one male, Trooper Garvin, and one female. Both were in uniform. Barr testimony.

11. Dr. Barr saw Trooper Garvin get out of his cruiser and address the group through a public address system, saying 'don't be nervous' or something nice like that. Barr testimony.

12. The students were taken in groups of two to be tested in a car provided by the auto school. For each test, the students were accompanied by a driving instructor and one of the two troopers on detail. Barr testimony. Garvin testimony.

13. Dr. Barr noticed that one trooper's test took 6 minutes and the other trooper's took 20 minutes. She was trying to figure how long she and her daughter would have to wait. From time to time, she got out of the car to see and hear what was going on.

14. On one of several occasions when Dr. Barr exited her car to try to see or hear what was going on, she heard Trooper Garvin say something about coffee and having to get rid of coffee. After the fourth or fifth group of students had been tested, Dr. Barr saw Trooper Garvin leave. Barr testimony.

15. Dr. Barr saw Trooper Garvin return 10-15 minutes later, driving his cruiser in reverse 'at a high rate of speed' along the back of the mall in the parking area where students and parents were waiting in their cars. Barr testimony.

16. Dr. Barr does not know how fast Garvin was going at the time he drove in reverse. Barr testimony.

17. Dr. Barr estimated that Garvin drove in reverse a distance between 200 and 250 yards, less than the size of a football field. Barr testimony.

18. Dr. Barr was "completely taken aback" because she felt that someone could have walked behind the cruiser and gotten hurt. It felt to Dr. Barr that the manner in which Garvin drove was unsafe. Barr testimony.

19. Dr. Barr did not see any cars or people in the path of the cruiser and did not see anyone jump out of the way. She did not see the cruiser come to rest. Barr testimony.

20. She observed that Trooper Garvin was smoking as he got out of the car. She does not know what happened to the cigarette. She did not see him extinguish it. Barr testimony.

21. Dr. Barr continued to wait with her daughter while Trooper Garvin resumed administering tests. According to Dr. Barr, while he did so, he left his cruiser running and unattended for at least 45 minutes. Barr testimony.

22. After her daughter's test was complete, Dr. Barr complained to the driving school. She wanted to know about what if anything had happened in the car. She did not complain to the Department, but someone from state police later contacted her. Barr testimony.

23. Dr. Barr's daughter did not pass the test. She told her mother she failed because she did not back up in a straight line and did not adequately stop at an intersection. Barr testimony.

24. Dr. Barr's daughter told her that when she was in the car waiting for the first student to start his test, the trooper was not wearing his seatbelt; from what she could hear from her position in the back seat, the student driver did not want to start driving while trooper was not belted. Dr. Barr understood from what her daughter told her that there was some kind of "challenging" about the seatbelt and she thought this must have been intimidating. Barr testimony.

25. Dr. Barr knows Michelle McQuillen and has been in contact with her subsequent to May 13, 2007, but they have not discussed their testimony at the trial board or the hearing before the Division. Barr testimony.

26. Michelle McQuillen was also at the mall on May 13, 2006 for her daughter's first road test. When they arrived, they were told that the troopers would call names from their lists and they would call kids one or two at a time. McQuillen testimony. They didn't know in what order students would be called, so each time a group came back from a road test, students and/or parents would get out in order to hear if their name was called. McQuillen testimony.

27. At some point, Ms. McQuillen say Trooper Garvin get out of the testing vehicle and walk to his cruiser, yell something to all the kids, and leave. His tone, and the fact that he had coffee in one hand, struck her as being a little abrupt for the proceeding. McQuillen testimony. McQuillen testimony.

28. It sounded to Ms. McQuillen as if Trooper Garvin said something about being on his second cup of coffee or needing a second cup of coffee. His tone was such that it made Ms. McQuillen "feel that things weren't going well." McQuillen testimony.

29. Ms. McQuillen saw Trooper Garvin drive off and return no more than 5 to 8 minutes later, driving in reverse in the parking area at the back side of the mall, where cars do

sometimes pass. To Ms. McQuillen, "it felt very unnecessary" for Garvin to drive in this fashion and he was "definitely" driving over 20 mph, "too fast for backing up." McQuillen testimony.

30. Ms. McQuillen estimated that Trooper Garvin drove in reverse a distance of at least four to five hundred feet.

31. Ms. McQuillen was concerned about this because another car could have been leaving with other kids to be tested, and another car could have been leaving the mall via that route. McQuillen testimony.

32. Ms. McQuillen's feeling was that Trooper Garvin drove in reverse too fast, given the rain, in an area where other vehicles could possibly have been coming or going. McQuillen testimony.

33. Ms. McQuillen could not opine as to whether Trooper Garvin was operating safely, nor whether speed was safe, but felt his speed was "probably more than it needed to be." McQuillen testimony.

34. McQuillen could not recall whether she saw any cars or people put in danger because of Garvin's actions. She never told anyone that she saw anyone in danger. McQuillen testimony.

35. When Trooper Garvin returned, Ms. McQuillen saw him exit the cruiser with a cup, a cigarette and clipboard. McQuillen testimony.

36. Ms. McQuillen has no idea what happened to the cigarette. McQuillen testimony.

37. Ms. McQuillen was upset and almost pulled her daughter from the proceeding because she felt the behavior and demeanor was not appropriate to a licensing exam with teenagers and set a bad example. She felt Trooper Garvin's behavior was dangerous and unprofessional. McQuillen testimony.

38. Ms. McQuillen's daughter was shaking when she returned from her road test. Her daughter said she had been unable to back up in a straight line, and may have mentioned that she had been unable to parallel park. McQuillen testimony.

39. Ms. McQuillen testified that she had no sympathy for daughter for failing the test and losing composure in a stressful situation. McQuillen testimony.

40. Ms. McQuillen's daughter told her that, in the presence of two or three others in the testing vehicle, Trooper Garvin asked her if he was being a jerk. McQuillen testimony.

41. Ms. McQuillen later called the auto school to complain and registered a complaint with the state police. McQuillen testimony. Ex. 7.

42. The Affidavit of Caroline E. Barr was sworn before a notary under the pains and penalties of perjury on November 9, 2007, four days before the hearing in this matter. Ex. 11.¹

43. Ms. Barr purports to attest that the Trooper Garvin "was demeaning, intimidating, belittling, rude, and aggressive," "intimidating and unprofessional." Ex. 11.

44. Barr attests that she

observed the Trooper exit a test vehicle and state that he had two cups of coffee and needed to take care of the situation (or words to that effect.) I then observed him enter a State Police Cruiser and race-off [*sic*] out of the parking lot. Shortly after this, I observed the State Police cruiser being driven by the same Trooper, in reverse, at a speed of approximately thirty (30) miles per hour through the parking lot.

Ex. 11.

45. Barr attests that she "also observed the Trooper smoking cigarettes." Ex. 11.

¹ I admitted Ex. 11 over the objection of Trooper Garvin's counsel. Department counsel conceded that no prior notice was given that the testimony of an out-of-state witness would be offered in the form of an affidavit.

46. Barr also attests:

Eventually, I was a passenger during another (male) student's road test. During his road test, the Trooper initially refused to put his seatbelt on when the driver asked everyone in the car to do so. Before eventually putting his seatbelt on, the Trooper made a comment (or uttered words to the effect) about the law not applying to people over the age of sixteen and encouraged the driver to operate the vehicle while he was not belted.

Ex. 11.

47. Trooper Garvin testified that on May 13, 2006, he was on a paid detail working with Trooper Kathleen Gould. Garvin testimony.

48. Trooper Gould, who had been assigned a longer shift, was to administer 22 road tests. Trooper Garvin was working a shorter detail and had 11 tests to administer. Garvin testimony.

49. Garvin had done road tests at the Watertown Mall before May 13, 2006. He asked the person from Cam's Auto School which students he would be testing and was given a list. Garvin testimony.

50. At some point during the morning on the 13th, Trooper Garvin told a driving school staff member that he needed a break because he had had three cups of coffee already. He then proceeded to leave in his cruiser. Garvin testimony.

51. There is a Dunkin Donuts in the vicinity. Trooper Garvin did not go to Dunkin Donuts. He went to a nearby auto body shop to use the restroom. Garvin testimony.

52. Trooper Garvin drove along a mall access road at the back of the mall in a parking area. He estimated his speed at 20 – 25 mph when departing the mall parking area. He returned to the mall parking area by driving in reverse taking the same route by which he had exited. Garvin testimony.

53. Trooper Garvin estimated that on the return trip, he drove at a speed on the return at 15-20 mph and traveled in reverse a distance of approximately 300 feet. Garvin testimony.

54. There were no moving vehicles and no pedestrians anywhere in the vicinity when Trooper Garvin returned to the testing area and he did not consider his driving in reverse at all unsafe, erratic or hazardous. Garvin Testimony. *See also* Barr testimony.

55. Garvin testified that he backed up for 'no real reason' other than that he thought it was expedient; reversing his route would be faster than turning the vehicle around, and he had in mind that parents and students had been waiting a long time would want to be finished as soon as possible. Garvin testimony.

56. No one said anything to Trooper Garvin about his operation of the vehicle. According to his testimony, this was "a non-issue." Upon his return from using the restroom, he continued to take students and driving instructors out on road tests, and he completed all the tests he was assigned to administer. Garvin testimony.

57. Trooper Garvin does not recall smoking on the May 13, 2006. His understanding is that under Department rules, he is permitted to smoke in his cruiser if there are no other occupants in the vehicle. When he does smoke in the cruiser, his practice is to extinguish his cigarette in the ashtray. Garvin testimony.

58. Garvin gives what he described as a "thorough" test designed to evaluate the student's technical ability – skills such as backing up, parking, looking before making a turn, and having a general awareness of their situation. He tries to maintain banter to put them at ease but also asks questions to test the student's understanding about things such as junior-driver rules, and to make them think about what they're doing when driving a car. Sometimes he

intentionally does not put on his seatbelt to see if the driver makes note of it and is paying attention. Garvin testimony.

59. Garvin testified to his belief that he is unique among those who administer road tests, in that he always requires the driver to demonstrate the ability to back up 50 feet in a straight line in order to pass the road examination. Garvin testimony.

60. Only five of eleven students Trooper Garvin tested on May 13, 2006 passed the road test. No one expressed any concerns to Garvin about this. Garvin testimony.

61. Trooper Garvin did not recall anything unusual about the road tests he administered on May 13, 2006; at the time, no concern or complaint was brought to his attention. He did not recall specific students or the reasons why some students did not pass, but assumed this was due to an inability to drive safely. Garvin testimony.

62. Trooper Garvin does not consider his conduct that day to have set a bad example. With particular respect to driving in reverse, he felt, on the contrary, that he was showing the students that he was not asking them to do anything he did not also have to do.

63. Trooper Garvin does not consider his operation of the cruiser that day "at all" unsafe. Garvin testimony.

64. Trooper Garvin's postulated that new drivers and students being tested have a tendency to drive at slower than normal speeds; seeing this in contrast a police cruiser moving a normal speed could have given the impression that the police car was speeding.

65. Trooper Garvin was not aware that anyone perceived his conduct on May 13, 2007 as rude. He does not believe he was at all rude. Garvin testimony.

66. Trooper Gould finished 22 road tests before Trooper Garvin finished 11 tests. He inferred that there was a time difference because he and Trooper Gould, respectively, gave different tests. Garvin testimony.

67. Trooper Garvin testified that he did not yell at anyone that day. Garvin testimony.

68. Trooper Garvin does not recall whether or not he left the cruiser running. He testified that if he did so, the cruiser would have been locked, because his uniform practice is to lock the cruiser if ever he leaves the engine running. Garvin testimony.

C. CONCLUSIONS OF LAW

The applicable statutes state in pertinent part as follows.

Any uniformed member of the state police who has served for 1 year or more and against whom charges have been preferred shall be tried by a board....*Any person aggrieved by the finding of such a trial board may appeal the decision of the trial board under sections 41 to 45, inclusive of chapter 31.*

G.L. c. 22C, § 13 (2002) (*emphasis supplied*).

If it is the decision of the appointing authority, after hearing, that there was just cause for an action taken against a person pursuant to the first or second paragraphs of this section, *such person may appeal to the commission as provided in section forty-three.*

G.L. c. 31 § 41 (*emphasis supplied*).

If a person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall... appeal in writing to the commission, he shall be given a hearing....

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

G.L. c. 31 § 43

The record in this case compels the conclusion that the Department has not met its burden to show just cause to suspend Trooper Garvin, for lack of sufficient evidence of “reasonable justification for the action taken...” *Cambridge v. Civ. Serv. Comm’n*, 43 Mass. App. Ct. 300, 304 (1997). As discussed below, the only competent evidence to support the charge of consists of opinions characterizing the trooper’s demeanor and behavior, without facts demonstrating an adequate basis for sustaining the finding of conduct unbecoming.

The Department seeks to impose discipline on the ground that Trooper Garvin “displayed an unprofessional demeanor and erratic or hazardous actions during a session of administering driver’s license road tests,” “in direct violation of Article 5.2.” Ex. 1. The specification does not indicate what conduct the Department deems unprofessional, erratic or hazardous or the trooper did that ‘directly’ violated the applicable rule.

Although the focus of the Department’s case at hearing was Trooper Garvin’s action driving in reverse, he was not cited for failure to operate his vehicle in a cautions manner and in conformance with State Police procedure and applicable law, which would be a violation of Article 5.26.5 of the Department rules. *See* Ex. 15. This suggests that (1) the trial board rejected the testimony of the trial board witnesses, who characterized his driving as unsafe, (2) the Department credited the testimony and considered Garvin in violation, but chose not to sanction the conduct for its own reasons, or (3) the conduct to which the witnesses testified did not violate the rule. In any case, the operable distinction between unsafe driving under Article 5.26, and “hazardous or erratic actions,” as charged, does not appear.

Although the witnesses attested to their impression that Garvin was speeding, I find no credible basis upon which to find that he was. The appointing authority’s witnesses testified with considerable equivocation about the speed and safety of Garvin’s driving and conceded they

could not render an informed opinion on this critical point. I credit their testimony and believe they were genuinely concerned about the possibility of someone getting hurt. Their testimony, however, does not establish that Garvin was operating unsafely, and it tends to confirm Garvin testimony that saw no person or property was endangered by Garvin's actions. Trooper Garvin testified credibly that he operated safely at all times.

State police are professional drivers. Presumably, driving in reverse is something they are trained to do safely and something they do often, if not routinely in the course of their work. It is a skill in which a trooper can be expected to have more expertise than a member of the general public. The fact that two lay witnesses were alarmed at the sight of a police cruiser going in reverse in an area where one would not expect to see this area does not establish that it was hazardous or erratic for Garvin to have done so. While it may have 'felt unsafe,' upon review of the entire record here, I find Garvin's hypothesis plausible and consistent with all the other evidence before the Division, *i.e.*, the examinees, on the occasion of their first road test, were driving at lower-than-normal speeds; this, in contrast with the unusual sight of a cruiser operating in reverse in the mall parking lot, may have given the impression that Garvin was going too fast.

As to the evidence that the trooper was observed smoking, the appellant was not charged with use of tobacco in a violation of Department Rule 5.11. *See* Ex. 15. Here, as above, this suggests that (1) that the Department did not credit the testimony regarding the trooper's smoking, (2) despite evidence of a violation, for whatever reasons, the Department declined to charge Trooper Garvin with this offense, or (3) the conduct to which the witnesses testified did not violate the rule. Although the Commission may disagree, I conclude that if the department did not seek discipline on the basis of the trooper's smoking, the Division can recommend a

suspension on account of it. For these reasons, to the extent the finding of conduct unbecoming rests on the operation of the vehicle or smoking, the finding cannot be sustained.

This leaves only the trial board finding that Trooper Garvin's demeanor was unprofessional. The Department has not specified in what respect Trooper Garvin's demeanor was deficient. In the posture, one must infer that the Department accepted the opinions of the witnesses to this effect. The only evidence on this point is subjective characterizations and by the witnesses' descriptions of their subjective reactions to the trooper, without facts from which one can determine if these characterizations are reliable.

A careful review of the record suggests several scenarios. Trooper Garvin's demeanor may have been unprofessional in some unspecified way; or he may have been entirely appropriate, albeit a tough examiner; or something in between. The evidence is far from dispositive. Take, for example, the incident with the seatbelt, the subject of Dr. Barr's testimony and her daughter's affidavit. Although Dr. Barr testified that this must have been 'intimidating,' it may be that Garvin purposefully left off his seatbelt, in a legitimate attempt to evaluate the student's capacity to maintain resolve when passenger steadfastly refuses to comply, a circumstance teen and other drivers are reasonably likely to encounter. This is not *per se* unprofessional. Similarly, although there is some indication that the trooper yelled as he was leaving to use the restroom, there is no way to determine if this was really rude, or an attempt by the trooper to be courteous, by attempting to explain his departure to the waiting group and let them know he would be back shortly; raising his voice in order to be heard above the group of people in their cars waiting in the rain.

Likewise, the episode of driving in reverse may have been intended to save time and send a constructive message, although at least two of the adults in attendance did not see it that way. One view is that this set a bad example. Another is that new drivers and state troopers are in

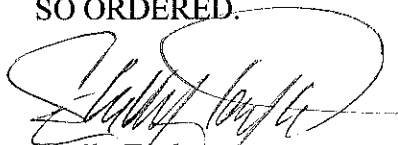
different positions with respect to what is and is not appropriate, and whether teen drivers can be expected to appreciate this distinction is a matter of opinion.

With great respect for the opinions of the parents, who clearly acted out of legitimate concerns, I am obliged to assess justification for charge at issue by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." *School Comm. v. Civil Service Comm'n.*, 43 Mass. App. Ct. 486, 488, *rev.den.*, 426 Mass. 1104 (1997); *Murray v. Second Dist. Ct.*, 389 Mass. 508, 514 (1983). On the record here, this showing has not been made. It is clear that the witnesses found something objectionable in the trooper's demeanor. Although people may have been intimidated, it is fair to say a first-time driving test administered by a uniformed state trooper is an inherently intimidating situation for many, even if the officer is a consummate professional by any standard. Perhaps most significant in assessing the trooper's professionalism is that despite the fact that the children of the witnesses against him failed their driving tests, at the hearing neither witness attributed these failures to the trooper's demeanor or any misconduct on his part. In at least this key respect, *i.e.* evaluating drivers' competency, Trooper Garvin's professionalism was not questioned. It strikes me that the witnesses may have perceived Garvin as too gruff. Observations such as these, however, are often in the eye of the beholder, and do not rise to the level of a violation of the applicable rules.

For the foregoing reasons, I conclude that the Department has established that Trooper Garvin was guilty of "substantial misconduct which adversely affects the public interest...", *id.*, or "[c]onduct... which brings the ...State Police into disrepute or reflects discredit upon the person as a member of the Massachusetts State Police...", Article 5.2, Ex. 15. I therefore recommend that the Commission direct the Appointing Authority to vacate guilty finding on the charge at issue.

Finally, I note for the record that the Department has urged a review of Trooper Garvin's entire record, including investigations pertaining to events other than those of May 13, 2007. The Department argues that Garvin has displayed a pattern of misconduct justifying the discipline imposed in this case. Included in this record, for example, is a "synopsis" of charges, some sustained and others not, involving allegations of harassment other inappropriate conduct involving women. These are serious allegations which I presume the Department has addressed. They are not before me; although the trooper's prior record would be relevant on the issue of whether the sanction is a proper exercise of progressive discipline under Department policy, the charge at issue here has not been sustained, and therefore, I do not reach the issue of whether the sanction is legal.

SO ORDERED.



Shelly Taylor
Administrative Magistrate

DATED:

1/29/10