

Decision mailed: 11/7/11
Civil Service Commission
03

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

RAYMOND LECOMTE,
Appellant

v.

CASE NO: D1-10-303

DEPARTMENT OF CORRECTION,
Respondent

Appellant's Attorney:

Richard A. Westgate, Esq.
695 Wareham Street
Middleboro, MA 02346

Appointing Authority's Attorney:

Heidi D. Handler, Esq.
Department of Correction
P.O. Box 946, One Industries Drive
Norfolk, MA 02056

DECISION ON RESPONDENT'S MOTION FOR RECONSIDERATION

The Appellant, Raymond LeComte, brought this appeal to contest the just cause for his termination by the Department of Correction (DOC) from his position as a DOC Correction Officer II (Sergeant). By decision dated October 6, 2011, the Commission allowed the appeal, in part, and modified the discipline from a discharge to a four-month suspension. On October 17, 2011, the DOC duly requested reconsideration of the Commission's Decision on the grounds that (1) the Decision contained inconsistent statements of the relief granted and (2) although the DOC had failed to establish all of the charges asserted against Sgt. LeComte, it had produced sufficient evidence of misconduct that, together with his prior disciplinary history, still warranted his discharge.

The Commission agrees that the October 6, 2011 Decision contained a scrivener's errors, including an error in the relief stated on page 18. The DOC Motion for Reconsideration is granted, in part, and a Corrected Decision is issued herewith. After careful review by the full Commission, a majority of the Commission finds that, except

for the scrivener's error, the Motion for Reconsideration has failed to identify a clerical or mechanical error in the decision or a significant factor the Commission or the presiding officer may have overlooked in deciding the case, as prescribed by 801 CMR 1.01(7)(l). The Commission's October 6, 2011 decision to modify the penalty has appropriately weighted the conflicting evidence concerning Sgt. LeComte's misconduct (which stems from an off-duty incident that he promptly reported) and his prior discipline (which was substantially different in character and degree), as well as a consideration of the treatment of other persons for similar misconduct involving an off-duty incident, and concluded that termination was not warranted but that a four-month suspension was the appropriate remedial discipline.

For the reasons stated above, the Respondent's Motion for Reconsideration is hereby *granted in part* and the October 6, 2011 decision is corrected to clarify that the Commission orders a modification of the penalty from a discharge to a four-month suspension.

Civil Service Commission



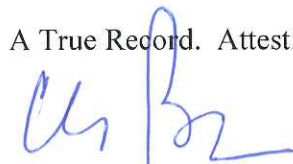
Paul M. Stein
Commissioner

Dated: November 3, 2011

On Motion to Reconsider and Dismiss the Appeal: (Bowman, Chairman [Yes] Commissioners Henderson [No], Marquis [Yes], McDowell [No] & Stein [No]; Commissioner Marquis [Yes] on November 3, 2011

On Motion to Reconsider In Part To Correct Scrivener's Error: (Bowman, Chairman [Aye] Commissioners Henderson [Aye], Marquis [Aye], McDowell [Aye] & Stein [Aye]; Commissioner Marquis [Aye] on November 3, 2011

A True Record. Attest:



Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of a Civil Service Commission's final decision.

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:

Richard A. Westgate, Esq. [for Appellant]

Heidi D. Handler, Esq. [for Respondent]

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

RAYMOND LECOMTE,
Appellant

v.

D1-10-303

DEPARTMENT OF CORRECTION,
Respondent

DISSENT OF CHRISTOPHER BOWMAN

I respectfully dissent.

The instant appeal involves the termination of the Appellant, a sergeant employed by the Massachusetts Department of Correction (DOC). Prior to the incident which resulted in his termination, the Appellant had been disciplined by DOC a staggering thirteen (13) times.

The hearing officer's own findings establish that the Appellant, while dressed in a partial DOC uniform and after identifying himself as a DOC correction officer: rebuffed a police officer's attempt to investigate a 911 call at his home; pushed that police officer in the chest when he tried to pat-frisk him; resisted arrest; and failed to comply with a second police officer's commands which caused the second police officer to restrain the Appellant using a taser gun. The Appellant was charged with disturbing the peace, disorderly conduct; and resisting arrest. He received pre-trial probation for six months regarding the above-referenced charges.

DOC conducted an investigation that included speaking to the Appellant and the two Wareham police officers. After notifying the Appellant, DOC conducted a hearing to

determine whether the Appellant should be disciplined, including the possibility of termination. The Appellant failed to testify at this DOC hearing and DOC drew an adverse inference from his failure to testify.

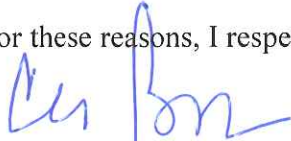
DOC's termination letter stated that the Appellant was terminated after an investigation revealed that he assaulted his son, failed to comply with responding officers, failed to report the matter in writing to DOC; and was less than truthful to investigators.

The majority: 1) concluded that DOC was justified in considering the Appellant's "inappropriate behavior and misconduct" (which included pushing a police officer in the chest while in partial DOC uniform) ; and 2) appears to acknowledge that DOC was justified in determining that the Appellant fudged the truth during the investigation.

Based on these findings alone, coupled with the Appellant's lengthy disciplinary history, DOC had just cause to terminate the Appellant. The majority erred by overruling this valid exercise of discretion by DOC that was free of any personal or political considerations.

In regard to the final charge, regarding violation of DOC's domestic violence policy, I believe the record establishes that DOC had sufficient evidence, at the time they made their decision, to conclude that there was a violation of the zero-tolerance policy, particularly considering that DOC reached this conclusion after drawing an adverse inference from the Appellant's failure to testify at the DOC hearing. Even if DOC had not proven this final charge, however, the other two serious charges, along with the Appellant's prior discipline, warranted the Appellant's termination.

For these reasons, I respectfully dissent.



Christopher C. Bowman
Chairman
November 3, 2011

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

**One Ashburton Place – Room 503
Boston, MA 02108
(617)727-2293**

RAYMOND LECOMTE

Appellant

v.

CASE NO: D1-10-303

DEPARTMENT OF CORRECTION

Respondent

Appellant's Attorney:

Richard A. Westgate, Esq.
695 Wareham Street
Middleboro, MA 02346

Appointing Authority's Attorney:

Heidi D. Handler, Esq.
Department of Correction
P.O. Box 946, One Industries Drive
Norfolk, MA 02056

Commissioner:

Paul M. Stein¹

AMENDED DECISION

Raymond LeComte (Sgt. LeComte), the Appellant, acting pursuant to G.L. c. 31, §43, duly appealed to the Civil Service Commission (Commission) from the decision of the Massachusetts Department of Correction (DOC), Appointing Authority, terminating his employment for off-duty misconduct that resulted in arrest on various charges, for failing to report the arrest as required by DOC Rules and Regulations (Blue Book) and for being untruthful during the DOC investigation of the incident. A hearing was held by the Commission on June 3, 2011. The hearing was declared private as no party requested a public hearing. All witnesses were sequestered except Sgt. LeComte and DOC Sgt. Chad Fiola (Sgt. Fiola). Eleven (11) exhibits were received in evidence. The hearing was digitally recorded. Both parties submitted proposed decisions.

¹ The Commission acknowledges the assistance of Legal Intern Thomas Butler in the preparation of this decision.

FINDINGS OF FACT

Based on the Exhibits, the testimony of Officer Daniel Flaherty (Officer Flaherty), Officer Christopher Smith (Officer Smith), Sgt. Fiola, Seth LeComte (Seth), and Sgt. LeComte, and inferences reasonably drawn from the evidence as I find credible, I make the findings of fact set forth below.

Background of the Witnesses

1. The Appellant, Sgt. LeComte, was a full-time tenured Correction Officer II (Sergeant) in the DOC since 1987 until his termination on October 29, 2010. At the time of the incident, Sgt. LeComte was working at MCI-Plymouth. (*Testimony of Sgt. LeComte*)

2. Officer Flaherty has been an officer with the Wareham Police Department (WPD) since 1996. (*Testimony of Officer Flaherty*)

3. Officer Smith has been an officer with the WPD since 1999. (*Testimony of Officer Smith*)

4. Sgt. Fiola has been an officer with the DOC since 1998. In 2005, he was selected for the Office of Investigative Services' (OIS) internal affairs unit and was promoted to Sergeant. He was pending promotion to Lieutenant at the time of the hearing. (*Testimony of Sgt. Fiola*)

5. Seth is the son of Sgt. LeComte and is employed as a landscaper. He is currently twenty-one years old. He completed high school and attended one semester of college. He lives with his father currently and also resided his father's home on and around September 15, 2009. On the day of the incident, he was unemployed. (*Testimony of Seth*)

6. Kyle LeComte (Kyle) is the son of Sgt. LeComte. Kyle is currently twenty-nine years old. On September 15, 2009, he was at his father's house. Kyle did not testify as a witness at the hearing before the Commission due to being at work. (*Testimony of Sgt. LeComte*)

7. Sheri LeComte (Sheri) is the daughter of Sgt. LeComte. She is currently twenty-six years old. Sheri was not living with her father in September 2009, but was at her father's house on September 15 so he could work on her car. Sheri did not testify as a witness at the hearing before the Commission due to being at work. (*Testimony of Sgt. LeComte*)

Disciplinary History

8. On February 23, 1993, Sgt. LeComte received a two-day suspension for "fostering discontent with staff and inmates." (*Exhibit 3*)

9. On November 3, 1993, Sgt. LeComte received a four-day suspension for demonstrating poor judgment when he became lost during a transportation assignment and failed to notify the institution. (*Exhibit 3*)

10. On January 27, 1994, Sgt. LeComte received a one-day suspension for removing keys from a secure area, using another officer's "chit" (equipment), entering a restricted area without permission, and using an inmate's radio to listen to a ball game. (*Exhibit 3*)

11. On September 18, 1995, Sgt. LeComte received a written warning for making unauthorized phone calls while on duty. (*Exhibit 3*)

12. On March 19, 1997, Sgt. LeComte received a three-day suspension for allowing inmates on work detail to purchase and consume alcohol at a convenience store. (*Exhibit 3*)

13. On March 5, 2001, Sgt. LeComte received a reprimand after giving car keys to an inmate without authorization. (*Exhibit 3*)

14. On April 25, 2001, Sgt. LeComte received a one-day suspension for sharing personal information with an inmate. (*Exhibit 3*)

15. On May 13, 2002, Sgt. LeComte received a one-day suspension for taking an inmate on work detail that was not on the roster. (*Exhibit 3*)

16. On September 17, 2004, Sgt. LeComte received a one-day suspension for acting in an unprofessional manner with subordinate staff and relating personal information to an inmate.

(Exhibit 3)

17. On September 9, 2005, Sgt. LeComte received a three-day suspension for bringing a personal VHS to show inmates. *(Exhibit 3)*

18. On May 15, 2006, Sgt. LeComte received a letter of reprimand for violating the dress code. *(Exhibit 3)*

19. On April 13, 2007, Sgt. LeComte received a one-day suspension for allowing an inmate to sleep while on work detail. *(Exhibit 3)*

20. On May 14, 2007, Sgt. LeComte received a five-day suspension for playing handball with inmates and being "less than truthful when questioned" *(Exhibit 3)*

The Events of September 15, 2009 Before the 911 Call

21. Sgt. LeComte testified that on September 15, 2009, he arrived home to find his daughter asking for help with her car. He did not change out of his work uniform. Sgt. LeComte testified that Sheri's car needed its oil changed. *(Testimony of Sgt. LeComte)*

22. Sgt. LeComte testified that his work uniform consisted of a black t-shirt and navy blue BDU pants. He also still wore his work belt, which had some utility cases on it. *(Testimony of Sgt. LeComte)*

23. Sgt. LeComte and Seth testified that while Sgt. LeComte was outside working on Sheri's car, Seth began doing exercises outside. Prior to this, Seth was indoors playing video games and relaxing. *(Testimony of Seth and Sgt. LeComte)*

24. In 2007, Seth had been hospitalized due to fainting at the YMCA and was diagnosed with Syncope, a medical term for fainting. Seth further testified that he had similar episodes

during the following two years that did not result in hospitalization. (*Testimony of Seth, Sgt. LeComte, and Sgt. Fiola; Exhibit 8*)

25. Seth testified that Sgt. LeComte “reassured” him to take it easy because of his medical history. (*Testimony of Seth*)

26. Seth at some point began to feel lightheaded and went indoors to drink some water. (*Testimony of Seth*)

27. Once Seth had the water, he took a seat in the kitchen. However, before he could set the water down, he fainted. The glass fell to the floor and broke. (*Testimony of Seth and Sgt. LeComte*)

28. Seeing her brother faint, Sheri called for Sgt. LeComte. Sheri then made a 911 call. (*Testimony of Sgt. LeComte*)

29. Sgt. LeComte came indoors to find Seth on the floor. He testified that he checked to ensure Seth was unhurt and cleaned up the broken glass. (*Testimony of Sgt. LeComte*)

30. There is no credible direct evidence to dispute the testimony presented by Sgt. LeComte and Seth about the events up to that point. Thus, the Commission takes the above stated facts to be an accurate description of the events that transpired before the 911 call.

The 911 Call

31. Sgt. LeComte saw that Sheri was on the phone and yelled at her to hang up the phone stating that everything was fine. (*Testimony of Sgt. LeComte*)

32. On cross-examination, Sgt. LeComte testified that Sheri had called “without asking” him. (*Testimony of Sgt. LeComte*)

33. Sgt. LeComte testified that his reasoning for not wanting the police called was that he believed Seth was not covered by medical insurance and he was worried about having to pay if

an ambulance showed up. I find this reasoning suspect, but I do not find that suspicion to be sufficient to persuade me to infer that any misconduct had occurred up to that point, or to disbelieve Sgt. LeComte's testimony about his state of mind or understanding of his insurance coverage at the time. (*Testimony of LeComte*)

34. In fact, it is now undisputed that, in September 2009, Seth was covered by Sgt. LeComte's medical insurance. (*Exhibit 10*)

35. Sgt. LeComte also began to yell at his eldest son, Kyle, who had failed to come to Seth's aid, despite being near the kitchen when Seth fainted. (*Testimony of Sgt. LeComte*)

36. Sheri hung up the phone, but due to the yelling, the 911 operator called back and said an officer would be dispatched. (*Testimony of Officer Flaherty, Officer Smith, and Sgt. LeComte*)

37. Sgt. LeComte testified that he, with the help of Sheri, brought Seth, now conscious, to the couch to lie down. (*Testimony of Sgt. LeComte*)

38. Seth testified only his sister, Sheri, helped him move to the couch. (*Testimony of Seth*)

39. Seth testified on direct examination that he did not talk to anyone between the time of lying down on the couch and talking to Officer Flaherty. However, on cross-examination, he stated that he alerted his brother to the situation outside. (*Testimony of Seth*)

40. Sgt. LeComte testified that he cleaned up the glass before going back outside. (*Testimony of Sgt. LeComte*)

41. Sgt. LeComte went back outside to continue working on Sheri's car. He was working on the car when Officer Flaherty showed up. (*Testimony of Sgt. LeComte & Officer Flaherty*)

The Incident Between Officer Flaherty and Sgt. LeComte

42. Exactly what happened when Officer Flaherty arrived until the time that Officer Smith arrived is disputed. Both Officer Flaherty and Sgt. LeComte testified that their own actions were

entirely appropriate and the other person was entirely in the wrong. There was no testimony or evidence introduced of an impartial witness to the confrontation, and thus it is Sgt. LeComte's and Seth's words against Officer Flaherty's. (*Testimony of Sgt. LeComte and Officer Flaherty*)

43. Officer Flaherty approached the side door of the residence coming from the street, as Sgt. LeComte walked from the car, which was in the backyard, to the side door. (*Testimony of Sgt. LeComte and Officer Flaherty*)

44. Officer Flaherty testified that he approached casually. He stressed that he even had his hands in his pockets. He testified that when Sgt. LeComte first saw him, Sgt. LeComte was at once very hostile and uncooperative from the start. (*Testimony of Officer Flaherty; Exhibit 8*)

45. Sgt. LeComte offered testimony stating that Officer Flaherty behaved unprofessionally upon entering the property. When the two were within a few feet of each other, near the side door, Sgt. LeComte claims that he told Officer Flaherty that he was not needed and that Officer Flaherty responded by saying "you don't tell me, I tell you." (*Testimony of Sgt. LeComte*)

46. Officer Flaherty's testimony corroborates that Sgt. LeComte said that the police were not needed, but Officer Flaherty states that it was hostile in tone. Officer Flaherty testified he attempted to explain his presence and calm Sgt. LeComte down. (*Testimony of Officer Flaherty*)

47. Sgt. LeComte testified that after the initial exchange Officer Flaherty reached out to do a pat-frisk without saying anything else. (*Testimony of Sgt. LeComte*)

48. Officer Flaherty said he feared for his safety due to Sgt. LeComte's attire. He told Sgt. LeComte that Officer Flaherty would need to pat him down. (*Testimony of Officer Flaherty*)

49. Officer Flaherty reached twice again to pat-frisk Sgt. LeComte. Sgt. LeComte pushed away Officer Flaherty in the chest. Officer Flaherty then told Sgt. LeComte that he was under arrest and to place his hands behind his back. (*Testimony of Sgt. LeComte and Officer Flaherty*)

50. Sgt. LeComte refused to comply, stating in his testimony that he wanted to explain and Officer Flaherty would not listen. (*Testimony of Sgt. LeComte and Officer Flaherty*)

51. Officer Flaherty began to use physical force in an attempt to handcuff Sgt. LeComte. A struggle between the two men began. Officer Flaherty stated that he took Sgt. LeComte to the ground no less than three times. (*Testimony of Officer Flaherty; Exhibit 8*)

52. Sgt. LeComte testified that he attempted to reason with Officer Flaherty by claiming he was an officer too. However, Officer Flaherty testified that he did not hear this claim. (*Testimony of Sgt. LeComte and Officer Flaherty*)

53. At some point during the struggle, Seth testified that he heard the noise coming from outside. He further testified that he walked to the side door and saw the two men struggling. After witnessing the struggle, Seth notified his brother, Kyle, and then returned to lie down on the couch. (*Testimony of Seth*)

54. Seth's actions go against what would be an expected reaction when a family member is struggling with another person. It goes against common sense that had Seth seen this, he would go lie back down afterwards. (*Testimony of Seth*)

55. Kyle responded by entering the landing of the side door, at which point Officer Flaherty responded by producing his O.C. spray (mace) and telling Kyle to stay back. Officer Flaherty testified that he intended to use the mace on Sgt. LeComte. However the testimony and situation infer that Officer Flaherty at first intended to keep Kyle away for Officer Flaherty's own safety. Sgt. LeComte saw the mace, and knocked it out of Officer Flaherty's hand. (*Testimony of Officer Flaherty and Sgt. LeComte*)

56. During the struggle, Officer Flaherty made a call for his backup, Officer Smith, to hurry up. Officer Smith arrived on the scene to find Officer Flaherty and Sgt. LeComte in a struggle.

Officer Smith warned Sgt. LeComte that if he did not stop resisting Officer Smith would be forced to use a Taser. Sgt. LeComte did not comply, and Officer Smith used a drive stun (making direct contact with the Taser instead of using it as a ranged weapon) on Sgt. LeComte. Once Officer Smith used the Taser on Sgt. LeComte, Sgt. LeComte was restrained by the officers and placed in Officer Flaherty's squad car. (*Testimony of Officer Flaherty, Officer Smith, and Sgt. LeComte*)

57. Officer Smith testified that he rarely uses his Taser. Furthermore, he testified that it had been almost a year at the time of the Commission's hearing that he had been forced to use his Taser. (*Testimony of Officer Smith*)

58. During the an interview on June 16, 2010 for the DOC investigation of the incident, addressed below, Sgt. LeComte mentioned a third officer arriving after his detention in the squad car, but his presence does not appear anywhere else in the record. (*Exhibit 8a at 5:30*)

59. Sgt. LeComte maintained in his testimony that he acted professionally and that Officer Flaherty did not. (*Testimony of Sgt. LeComte*)

60. Officer Flaherty did not read Sgt. LeComte his Miranda warnings, and did not ask Sgt. LeComte any questions at the scene after the struggle. (*Testimony of Officer Flaherty*)

61. Officer Smith left the premises shortly after Sgt. LeComte was restrained. He did not enter the house or question any witnesses. (*Testimony of Officer Smith*)

62. Officer Flaherty entered the house and attempted to talk to Sgt. LeComte's children. Kyle refused to speak with him. Seth stated that his father "didn't hit him", but nothing more. Officer Flaherty's police report, taken together with Seth's testimony, implies that Seth did not say "he didn't hit me" until well into a conversation with Officer Flaherty and very likely only after some prompting. (*Testimony of Officer Flaherty and Seth; Exhibit 8*)

63. Officer Flaherty testified that Seth had fresh cuts on his face, was sweating, and that there was a table flipped over, glass on the floor in the living room, and a broken chair. (*Testimony of Officer Flaherty; Exhibit 8*)

64. Seth testified that the broken glass was in the kitchen, and that the chair was still upright. He did not mention anything about the table. (*Testimony of Seth*)

65. Officer Flaherty mentions in his official police report that Seth had “fresh marks” on face, but his report did not mention anything about the condition of the house in his police report. When Sgt. Fiola interviewed Officer Flaherty, it was the first mention of the condition of the house that is in the record. This interview, addressed below, took place nine months after the incident. (*Testimony of Seth; Exhibit 8*)

66. Officer Flaherty left after telling Seth that Officer Flaherty knew what had really happened, insinuating domestic abuse, and that if Seth ever changed his story, Seth could contact Officer Flaherty. (*Testimony of Officer Flaherty and Seth*)

67. Officer Flaherty took Sgt. LeComte to the station and charged him with three misdemeanors: 1) disturbing the peace; 2) disorderly conduct; and 3) resisting arrest. Sgt. LeComte testified that he made bail that night and returned for arraignment the next day. (*Testimony of Officer Flaherty and Sgt. LeComte; Exhibit 8*)

68. There was no further police questioning of the LeComte family on the details of September 15 after Officer Flaherty left. (*Testimony of Seth, Sgt. LeComte, and Sgt. Fiola*)

69. No mention was made by Sgt. LeComte, Seth, Sheri, or Kyle about Seth’s medical condition while Officer Flaherty was at the home. The first time Seth’s fainting came up was during the June 2010 interview, addressed below, between Sgt. LeComte and Sgt. Fiola. (*Testimony of Sgt. LeComte, Officer Flaherty, and Sgt. Fiola*)

70. Sgt. LeComte testified that the reason why the medical condition was not mentioned was because it was “obvious.” He further testified that if Officer Flaherty knew the family dynamic, it would be unthinkable for it to have been domestic violence. (*Testimony of Sgt. LeComte*)

71. Sgt. LeComte has not been charged with domestic violence. Officer Flaherty testified that he did not bring charges because there was no complaining victim, but also admitted that a complaining victim is not necessary to bring charges. (*Testimony of Sgt. LeComte and Officer Flaherty*)

72. Despite Sgt. LeComte’s testimony that Officer Flaherty behaved unprofessionally, Sgt. LeComte testified on cross that he considered, but had not filed a complaint against the WPD on the advice of an attorney (not his counsel in this appeal) that it would be more appropriate that such a civil matter come after conclusion of the criminal matter brought against him. (*Testimony of Sgt. LeComte*)

73. On September 18 2009, Sgt. LeComte arrived at work and verbally notified Director of Security Naomi Lymon [also referred to as Naiomi Cruz in some documents] (DOS Lymon) of the charges. (*Testimony of Sgt. LeComte*)

74. Later that day, Sgt. LeComte was called in and put on leave with pay while a DOC investigation was pending. Sgt. LeComte testified that he understood why this occurred. DOS Lymon escorted him from the premises. (*Testimony of Sgt. LeComte*)

75. Blue Book Rule 2(b) requires all employees to submit promptly and in writing any involvement with law enforcement. A June 2006 an inter-office memo stressed compliance with the Blue Book in its entirety. In March 2008, an inter-office memo circulated concerning Blue Book §2(b) and its requirement to submit reports on criminal matters. (*Exhibits 4 & 5*)

76. Sgt. LeComte stated he was aware of Blue Book Rule 2(b) and that he attempted to submit a report when he was being escorted off the property. Sgt. LeComte credibly testified that he was prevented from doing so by the actions of the DOC in expelling him from the facility. (*Testimony of Sgt. LeComte; Exhibit 8*)

77. Sgt. LeComte admits that he never submitted a report, but stated that, after he was escorted off the DOC premises, he was never asked for one. (*Testimony of Sgt. LeComte*)

Internal Investigation, Court Appearances, and Discipline

78. The internal investigation by the DOC was assigned to Sgt. Fiola. (*Testimony of Sgt. Fiola; Exhibit 8*)

79. Pursuant to policy due to the ongoing criminal matter, Sgt. Fiola held off on discussing the case with Sgt. LeComte until after the proceedings were completed in June 2010. (*Testimony of Sgt. Fiola; Exhibit 8*)

80. On April 13, 2010, Sgt. LeComte failed to show for a court appearance, and had a Default Warrant issued against him. Sgt. LeComte placed the blame on his lawyer at the time, stating that his lawyer went on vacation and failed to notify him of the date. The court removed the warrant when Sgt. LeComte appeared on April 21, 2010. (*Exhibits 8 & 8a [at 23:00]*)

81. On June 7, 2010, Sgt. LeComte received pre-trial probation for six months. (*Testimony of Sgt. LeComte and Sgt. Fiola; Exhibits 8 & 8a [at 25:00]*)

82. On June 16, 2010, Sgt. Fiola conducted an interview with Sgt. LeComte. The DOC played a few minutes of the interview during Sgt. Fiola's testimony, but introduced the whole interview into evidence as an audio recording. (*Testimony of Sgt. Fiola and Sgt. LeComte; Exhibits 8 & 8a*)

83. During the June 16 interview, Sgt. LeComte discussed that a jury would never find him guilty. He states that he took the pre-trial probation in order to get back to work sooner, while still not admitting to anything. (*Exhibit 8a [at 27:00]*)

84. Sgt. Fiola explained his interpretation of pre-trial probation to Sgt. LeComte during the June 16 interview. In the explanation, Sgt. Fiola told Sgt. LeComte that pre-trial probation contained no admission to any facts. (*Exhibit 8a [at 26:00]*)

85. In the June 16, 2010 interview, Sgt. LeComte explained that the reason for the difference between his story and the police reports was that the police reports were fabricated. (*Testimony of Sgt. Fiola; Exhibit 8a [at 7:15 & 8:20]*)

86. Sgt. Fiola conducted phone interviews with Officer Smith on April 13, 2010 and Officer Flaherty on June 7, 2010. Sgt. Fiola conducted a follow-up interview with Officer Flaherty on June 17, 2010 in order to get Officer Flaherty's opinion on matters raised by Sgt. LeComte's interview. (*Testimony of Sgt. Fiola; Exhibit 8*)

87. Sgt. Fiola completed his investigation report on June 21, 2010 and submitted it for review two days later. (*Exhibit 8*)

88. In his report, Sgt. Fiola stated that Sgt. LeComte admitted to sufficient facts, despite telling Sgt. LeComte his understanding of the opposite. (*Exhibits 8 and 8a at 26:00*)

89. Sgt. Fiola, following procedure not to question potential domestic violence victims, did not question Sgt. LeComte's family as part of his investigation. (*Testimony of Sgt. Fiola*)

90. Sgt. Fiola relied on his interviews with Sgt. LeComte and Officers Flaherty and Smith, as well as the police reports. (*Testimony of Sgt. Fiola; Exhibit 8*)

91. Sgt. Fiola came to the conclusion that Sgt. LeComte violated the General Policy of the Blue Book (General Policy as well as §1 (Rule 1), §2(b) (Rule 2b)), §19(c) (Rule 19(c)), and

§19(d) (Rule 19(d)). Additionally, Sgt. Fiola found that Sgt. LeComte violated 103 DOC 238 (Domestic Violence Policy). (*Testimony of Sgt. Fiola; Exhibit 8*)

92. The relevant parts of the General Policy §1:

§1. "...Nothing in any part of these rules and regulations shall be construed to relieve an employee of his/her primary charge concerning the safe-keeping and custodial care of inmates or, from his/her constant obligation to render good judgment full and prompt obedience to all provisions of law, and to all orders not repugnant to rules, regulations, and policy issued by the Commissioner, the respective Superintendents, or by their authority... Improper conduct affecting or reflecting upon any correctional institution or the Department of Correction in any way will not be excused whether or not it is specifically mentioned and described in these rules and regulations..."

Rule 1. "You must remember that you are employed in a disciplined service which requires an oath of office. Each employee contributes to the success of the policies and procedures established for the administration of the Department of Correction and each respective institution. Employees should give dignity to their position and be circumspect in personal relationships regarding the company they keep and places they frequent."

Rule 2(b). "Report promptly in writing to your Superintendent, DOC Department Head, or their designee, any change of events regarding your residential address, home telephone number, marital status, and any involvement with law-enforcement officials pertaining to any investigation, arrest or court appearance."

Rule 19(c). "Since the sphere of activity within an institution of the Department of Correction may on occasion encompass incidents that require thorough investigation and inquiry, you must respond fully and promptly to any questions or interrogatories relative to the conduct of an inmate, a visitor, another employee or yourself. Pending investigation into the circumstances and your possible involvement therein, you may be detached from activity duty forthwith, however, without prejudice and without loss of pay." (*Exhibit 6*)

Rule 19(d). "It is the duty and responsibility of all institution and Department of Correction employees to obey these rules and official orders and to ensure they are obeyed by others. This duty and responsibility is augmented for supervising employees, and increasingly so, according to rank. Not only are you charged with certain responsibilities while on duty, but you should also keep in mind that any irregularities coming to your attention while off duty, which affects the welfare of an institution, the Department of Correction or its inmates, should be reported to the institution Superintendent or Commissioner of Correction."

(*Exhibit 6*)

93. The Domestic Violence Policy is the DOC's zero tolerance policy for Sexual Assault, Domestic Violence, and Stalking. 238.03 (7) states that:

"Whenever the Department is made aware that an action for abuse against a family or household member is initiated against an employee, a disciplinary proceeding against the employee accused of abuse may be initiated at the discretion of the Commissioner or designee, provided that a Court with appropriate jurisdiction has issued an order as

described in 103 DOC 238.03 (1) – (5), or any other order of protection issued by another jurisdiction.”

(Exhibit 7)

94. On July 12, Deputy Commissioner Karen Hetherson (Deputy Hetherson), agreeing with Sgt. Fiola’s findings, requested that Human Resources hold a Commissioner’s hearing for Sgt. LeComte. *(Exhibit 8)*

95. On September 3, 2010, Sgt. LeComte was notified of the charges against him and the hearing that would be held on September 24, 2010. *(Exhibit 2)*

96. On September 24, 2010, a hearing before Richard Bodurtha (Bodurtha) determined that there was sufficient and credible evidence to conclude that Sgt. LeComte’s conduct violated the rules stated in Finding Nos. 91 through 93 above. *(Exhibit 9)*

97. In Bodurtha’s report, he stated he took an adverse inference to Sgt. LeComte electing not to testify at the September 24 hearing. *(Exhibit 9)*

98. Commissioner Harold W. Clarke (Commissioner Clarke) reviewed the findings of the hearing and on October 29, 2010, notified Sgt. LeComte of his termination *Exhibit 1)*

99. Commissioner Clarke summarized the findings of the DOC, which follows in part:

“The September 24 hearing was convened as a result of an investigation that revealed that on or about September 15, 2009 you physically assaulted your son. As a result of this assault, the police were contacted and responded to your residence. When police responded to your residence you were belligerent, disrespectful, uncooperative, failed to comply with police orders, and actively resisted arrest. ...You failed to report, in writing, your arrest, court appearances, and disposition in the criminal matter referred to above. You were less than truthful when interviewed by a Departmental investigator in connection with the conduct referred to above.”

(Exhibit 1)

100. In order to aid in understanding the events that transpired in and around the house of Sgt. LeComte on September 15, 2009, the Commission asked Seth during his testimony to sketch

out the property. This was used during Seth's and Sgt. LeComte's testimony. The sketch is not intended to be fully accurate or to scale. (*Exhibit 11*)

Officer Flaherty's Report, Investigation Interview, and Commission Testimony

101. A comparison of Officer Flaherty's recollections over time reveal a significant number of differences between his report, the interview conducted by Sgt. Fiola, and his testimony before the Commission. While this may not be intentional, but merely a factor of the long passage of time between the incident and his interview with Sgt. Fiola, and then another year between that interview and the Commission hearing, it still raises questions about the credibility and reliability of his statements. Below is a comparison between the three times on record that Officer Flaherty gave his recollection of the incident. (*Exhibit 8; Testimony of Officer Flaherty*)

Police Report (9/15/2009)	Investigation (6/7/2010 & 6/17/2010)	Commission Testimony (6/3/2011)
Dispatched for 911 hang-up call. Was able to call back and heard yelling in the background, "we are all set."		Dispatched for 911 hang-up call. Was alerted before arriving at residence that 911 operator was able to call back and heard a male yelling in the background "we're all set."
No mention of hands in pockets or observing location of male when he exited cruiser.		Upon arrival, exited cruiser and saw male party in driveway next to a truck. Made his approach with hands in his pockets
LeComte blocked Flaherty from entering house. No mention of Female at side door crying.		Female at side door crying
Spoke with female. At first refused to speak, but then told Flaherty that father and brother were arguing over Seth not having a job. Flaherty then entered the house.		Attempted to speak with female. She went inside and he followed. He initially said she refused to speak to him. He subsequently recalled she told him an argument between LeComte and Seth before going indoors and refusing to speak further.
Saw male on couch with fresh "marks" on his face.	Seth was "sweaty"	Indoors was a male party on the couch with shorts and no shirt on. Sweaty and fresh "cuts" on his face.
No mention of condition inside the house.	"house was a mess" "table was broken"	Broken glass, table, and a chair on the ground.

Conversation began with Seth saying that LeComte and Seth were arguing about Seth working out and not having a job. Seth then said "he didn't hit me."	LeComte's son was not working and playing video games.	Asked what was going on and male on the couch immediately said "he didn't hit me, my father didn't hit me" and kept repeating this. Flaherty then asked what Seth and LeComte were arguing about. Seth mentioned being outside exercising and not having a job.
Flaherty reported he told Seth that if he decided to change his mind that he could contact him for domestic assault and battery charges.	Flaherty was an officer for 16 years and knew that it was a domestic violence issue, not a medical emergency.	Flaherty told Seth that Flaherty knew what was going on here and that if Seth changed his story, he could contact Flaherty at the station.

102. Although Officer Flaherty is fairly consistent in his recollections, some details that he recounted to Sgt. Fiola and the Commission were not in his report, although they were items that would be important to have put in a report of what he "knew" was an incident of domestic violence (i.e. condition of the house), or are stronger evidence than originally reported (i.e. Seth saying "he didn't hit me" right away instead of further into a conversation) and others are simply inconsistent with his assertion that he "knew" this was a domestic violence scene (dispatched by 911 with yelling in background but casually approaching scene and exiting cruiser with his "hands in his pocket". (*Exhibit 8; Testimony of Officer Flaherty*)

CONCLUSION

Summary

The DOC has established through substantial evidence that Sgt. LeComte violated DOC rules and regulations that require DOC correctional officers to conduct themselves in a manner that reflects respect for authority and dignity for their position and to be truthful with DOC investigators. His overreaction in a public confrontation with two Wareham Police Officers, which required that he be subdued with a Taser and placed into police custody, although off-duty, presents a legitimate concern that is reasonably related to his workplace responsibilities as

a DOC sergeant and warrants significant discipline. Although Sgt. LeComte also failed to file a written report of the confrontation, he did promptly disclose the incident to his superiors and, under the circumstances of this case, his failure to follow up with a written report amounted to no more than a technical oversight that does not warrant any additional discipline. The charge of violating the domestic violence policy was based on conjecture, was not supported by substantial evidence and does not reasonably justify imposing discipline. After weighing the evidence as a whole, and considering the charges that DOC proved, the Commission exercises its discretion to modify the penalty from termination to a four-month suspension.

Applicable Legal Standard

A person aggrieved by disciplinary action of an appointing authority made pursuant to G.L. c. 31, §41 may appeal to the Commission under G.L. c. 31, §43, which provides:

“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.”

Under Section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew.” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. The role of the Commission is to determine “whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). See also City of Leominster v.

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

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass. App. Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983) The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in governmental employment decisions.' " Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of the "merit principle" which governs Civil Service Law that discipline must be remedial, not punitive, designed to "correct inadequate performance" and "separating employees whose inadequate performance cannot be corrected." G.L. c.31,§1.

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived

from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956). See also Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65 (2001) The Commission is guided by, but is not obliged to follow strictly, the rules of evidence applied in a judicial proceeding, and may credit, in its sound discretion, reliable hearsay evidence that would be inadmissible in a court of law. See, e.g., Doe v. Sex Offender Registry Board, 459 Mass. 603 (2011); Costa v. Fall River Housing Auth., 453 Mass. 614, 627 (2009).

It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. "[T]he assessing of the credibility of witnesses is a preserve of the [Commission] upon which a court conducting judicial review treads with great reluctance." E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003) (where live witnesses gave conflicting testimony at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing)

G.L. c.31, Section 43 also vests the Commission with authority to affirm, vacate or modify the penalty imposed by an appointing authority. The Commission has been delegated with "considerable discretion," albeit "not without bounds," to modify a penalty imposed by the appointing authority, so long as the Commission provides a rational explanation for how it has

arrived at its decision to do so. E.g., Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594,600 (1996) and cases cited. See Faria v. Third Bristol Div., 14 Mass.App.Ct. 985,987 (1982) (no findings to support modification)

In deciding to exercise discretion to modify a penalty, the commission's task "is not to be accomplished on a wholly blank slate." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983).

"After making its de novo findings of fact, the commission must pass judgment on the penalty imposed, a role to which the statute speaks directly. G.L. c.31,§43. . . . Here, the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether "there was reasonable justification for the action taken by the appointing authority in the circumstances found by the Commission to have existed when the appointing authority made its decision.' "

Id. See also Town of Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct. 796, 800 (2004) quoting Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 600 (1996). ("The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded to the appointing authority.") Thus, when it comes to the review of the penalty, unless the Commission's findings of fact differ materially and significantly from those of the appointing authority or interpret the relevant law in a substantially different way, the commission is not free to "substitute its judgment" for that of the appointing authority, and "cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. cf. School Committee v. Civil Service Comm'n, 43 Mass.App.Ct. 486, rev.den., 426 Mass. 1104 (1997) (modification of discharge to one-year suspension upheld); Dedham v. Civil Service Comm'n 21 Mass.App.Ct. 904 (1985) (modification of discharge to 18-months suspension upheld); Trustees of the State Library v. Civil Service Comm'n, 3 Mass.App.Ct. 724 (1975) (modification of discharge to 4-month suspension upheld)

Applying these principles to this appeal the Commission finds that DOC met its burden on certain charges, but did not sustained its burden of proving a violation of the DOC's, Domestic Violence Policy.

General Policy Violation and Rule 1 Violation:

Sgt. Fiola's investigation found that Sgt. LeComte violated the General Policy and Rule 1 which, broadly stated, demands respect for authority and dignity to their position. Sgt. LeComte's behavior would clearly violate the General Policy and Rule 1 if his conduct was on-duty. However, Sgt. LeComte was off-duty during the time of the incident.

There are two main exceptions to the general rule that an employee cannot be disciplined for off-duty conduct. The first exception requires a nexus between the employer and the incident. The second exception examines the nexus between the employee's conduct and the employee's continuing fitness for the job. See School Comm. Of Brockton v. Civil Serv. Comm'n, 43 Mass. App. Ct. 486, 491 (1997).

The DOC argues that its rules of conduct implicitly apply equally on-duty and off-duty, citing a 1998 Commission's in Cullen v. Department of Correction, 21 MCSR 220 (1998) and a 1995 Appeals Court decision in McIsaac v. Civil Service Comm'n, 38 Mass.App.Ct. 473 (1995). I do not read either decision so broadly as to hold that DOC officers hold positions that impliedly deem all off-duty conduct subject to discipline without a showing of an appropriate factual nexus. The Cullen case involved the termination of a correctional officer who had engaged in repeated misconduct, including lewd public behavior and alcohol abuse, as a result of which he was placed under strict conditions of probation that were a matter of public record. McIsaac involved a police officer whose intoxicated behavior resulted in the discharge of his police firearm which seriously wounded a family member. Neither case expressly addressed the nexus

rule or involved a corrections officer, as opposed to an armed, although off-duty police officer and the Commission has not adopted any special rules regarding off-duty conduct of correctional officers that eliminated the need to establish a nexus in order to justify discipline. Compare Lynch v. Department of Correction, 23 MCSR 696 (2010) (dismissing appeal of corrections officer who, while in uniform and during his scheduled working hours, engaged in obscene and offensive behavior at a public rest stop that resulted in his arrest) Rodrigues v. Department of Correction, 22 MSCR 643 (2009) (set aside three-day suspension of corrections officer for alleged misconduct while in uniform because behavior had no nexus to his job)

In the present case, the substantial evidence does establish an appropriate nexus between Sgt. LeComte's public confrontation with two Wareham Police Officers and his fitness to serve as a DOC sergeant. This case parallels Tosca v. Department of Correction, 22 MCSR 162 (2009), in which the Commission dismissed an appeal arising when a correction officer received a three-day suspension for conduct unbecoming an officer (based upon the General Policy and Rule 1) after being charged with resisting arrest when at his home.

Sgt. LeComte was home and partially in uniform. Of more significance is the fact that Sgt. LeComte acknowledged that he attempted to identify himself as a DOC officer. Although Officer Flaherty apparently did not hear, or did not credit these attempts, the fact remains that Sgt. LeComte had the intention to use his position as leverage to excuse his resisting arrest.

I have no doubt that both Sgt. LeComte and Officer Flaherty share some responsibility in the escalation of the incident. I cannot credit Officer Flaherty's claim that, upon arriving at a reported domestic violence scene to which he was urgently dispatched, rather than take precautions to prepare for a potential physical confrontation, he casually exited the cruiser with he "hands in his pockets". This statement leads me to infer that Officer Flaherty, indeed, may

have shown more initial hostility toward Sgt. LeComte than he acknowledged, which is understandable, and later downplayed his own role to defuse a possible retaliatory abuse of force claim. However, Officer Flaherty's behavior is not being questioned here. The fact remains that Sgt. LeComte must take responsibility for his lack of good judgment under stress, whether completely of his creation or not. In the course of the performance of his duties as a DOC sergeant, it is reasonable to expect that exemplary calmness under pressure is an essential requirement of the job. Thus, the DOC is justified to consider his inappropriate behavior and poor judgment in this case as grounds for discipline.

Rule 2(b) and 19(d) Violation:

Rule 2(b) states, in part, that all employees must "report promptly and in writing...any involvement with law-enforcement officials pertaining to any investigation arrest, or court appearance." Sgt. LeComte claims that he tried to write a report but was denied the opportunity because he was being escorted off the premises. Whether or not this was correct, Sgt. LeComte never submitted a report, and so the DOC had reasonable justification to find that Sgt. LeComte violated Rule 2(b) and 19(d). However, since the Department was kept abreast of the events through Sgt. Fiola's investigation, Sgt. LeComte not being allowed to write a report on the day he was escorted off the premises, and Sgt. LeComte never being asked for a report when he was detached, this violation is merely a technicality, and not one worthy of any significant additional punishment when viewing this incident as a whole.

Rule 19(c) Violation:

Rule 19(c) is a charge of untruthfulness during an investigation. As indicated above, there is good reason to infer that neither the accounts from Officer Flaherty nor Sgt. LeComte tell the full story. However, a DOC Corrections Officer is entrusted by the citizens of the Commonwealth to

secure prisoners. In their daily affairs, a DOC Sergeant may find themselves embroiled in a he-said she-said dispute with prisoners and other DOC Corrections Officers. Due to this, a DOC Sergeant must be able to objectively perceive and report on alleged abuse of force complaints. Excessively self-serving reports do not benefit the good order and discipline required with a DOC facility. If a DOC Sergeant skews the story in his favor, and therefore be found not credible in the future, prisoners may use that to their advantage. Credibility and objectivity is important enough to a DOC Sergeant, both in duties and in consequences, that a charge of untruthfulness should be taken very seriously. Although the analogy between corrections officers and police officers is not completely apt (police officers regularly testify in court while corrections officers do not), the Commission has noted that untruthfulness is a proper matter for discipline, whether it is the product of intentional deceit or subjective denial and misperception of the incident. See, e.g., Robichau v. Town of Middleboro, 24 MCSR 352 (2011) (police sergeant suspended and demoted for lack of objectivity in perceiving and reporting his off-duty domestic violence behavior)

Sexual Assault, Domestic Violence and Stalking Violation:

The DOC's Domestic Violence Policy (103 DOC 238) states a zero tolerance policy for domestic violence. There seem to be two kinds of violations of the policy that justify disciplinary action to be taken. First, Section 238.03, which principally concerns restraining orders, states that the DOC may begin disciplinary proceedings against an employee if an action for abuse is initiated. (Exhibit 7, 103 DOC 238.03(7)) The second basis for a violation is found in Section 238.07, which is labeled as "Procedures for Investigating and Disciplining Abusers", states that "Acts of sexual assault, domestic violence or stalking, regardless of where they occur,

shall not be tolerated and may result in discipline [ranging from an oral warning or reprimand to, and including, termination]" (Exhibit 7, 103 DOC 238.07(4))

The substantial evidence does not warrant a finding that domestic violence occurred on or around September 15, 2009. Here, no restraining order or other charges were ever lodged against Sgt. LeComte. The principal evidence that any form of domestic violence had occurred was Officer Flaherty's uncorroborated and subjective hunch that "he knew what was going on." Seth testified otherwise. The charges against Sgt. LeComte did not include a domestic violence charge. Officer Flaherty's police report, as noted earlier, leave out many facts that a prudent police officer who had come upon a scene of domestic violence would have recorded and reported. There was no follow-up investigation on any domestic violence issues. Even taking into account Seth's motive to avoid making trouble for his father, I find his version of what happened to be largely credible. His version was not effectively impeached through cross-examination or rebutted by any other percipient and credible testimony. I fully recognize that proof of domestic violence is often difficult, but that does not excuse the proponent of such a heinous offence from marshaling the evidence necessary to establish it. On this record, I cannot find that the DOC presented sufficient evidence to warrant my conclusion, by a preponderance of the evidence that any act of domestic violence had occurred at the LeComte home that would justify imposing any discipline for violation of the DOC's Domestic Violence Policy.

Remedy

Since the DOC has sustained some, but not all of the charges against Sgt. LeComte, and the facts as found by the presiding Commissioner do vary in material respect from the facts alleged by the DOC upon which they relied to terminate Sgt. LeComte, the Commission must consider whether or not, on the fact as found by the Commission, the penalty imposed by DOC

nevertheless remains appropriate or should be modified. In two recent cases, the Commission has affirmed discipline that was substantially less severe than that meted out to Sgt. LeComte. See Robichau v. Town of Middleboro, 24 MCSR 352 (1011) (on-duty police sergeant suspended for three months and demoted to patrol officer in a case of proven domestic violence and untruthfulness); Tosca v. Department of Correction, 22 MCSR 162 (2009) (three-day suspension of corrections officer for involvement in an incident of resisting arrest).

In consideration of these prior cases, as well as the particular facts of this case, including Sgt. LeComte's prior disciplinary record, the fact that he was not on-duty and that the most serious charge of domestic violence was not substantiated, the Commission is justified to exercise its discretion to modify the penalty against Sgt. LeComte. His past record of discipline does weigh against him, as does his failure to testify on his own behalf at the appointing authority hearing, but neither of these factors is completely dispositive. Sgt. LeComte's prior discipline involved non-violent behavior, primarily in showing poor judgment and leniency toward inmates. None of the prior misconduct considered serious enough to warrant more than a brief, remedial suspension (the longest being a five-day suspension on one occasion for playing handball with inmates). There is no reason shown in the record, taken as a whole, which reasonably suggests that remedial discipline short of termination will not be effective to ensure that Sgt. LeComte conforms his future behavior to the standards that the DOC is entitled to expect.

Accordingly, for the reasons stated and pursuant to its authority under G.L.c.31, §43, the Commission shall modify the penalty imposed against Sgt. LeComte from termination to a four-month suspension (effective October 29, 2010) and he shall be entitled to be restored to any other benefits to which he is entitled. The appeal of the Appellant, Raymond LeComte, is hereby ***allowed in part*** with the modified discipline noted above.

Civil Service Commission



Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Henderson, McDowell, and Stein, Commissioners); Bowman, Chairman [absent]; Marquis, Commissioner [absent] on October 6, 2011

A True Record, Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision as stated below.

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:

Richard A. Westgate (for Appellant)

Heidi D. Handler (for Appointing Authority)