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COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION
MASSACHUSETTS

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PLYMOUTH, ss.

SUPERIOR COURT
PLCV2014-00548-A

RECEIVED

ADAM LEVESQUE

SEP 25 2015

vs.

MA OFF of Attorney General

Administrative Law Division

MASSACHUSETTS CIVIL SERVICE COMMISSION & another¹

MEMORANDUM OF DECISION AND ORDER ON
CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

Plaintiff Adam Levesque ("Levesque") seeks judicial review of a May 1, 2014 decision by the Civil Service Commission ("Commission") affirming the decision of the Town of Middleborough Board of Selectmen ("Board") to terminate Levesque's employment as a police officer. This matter is before the court on the parties' cross-motions for judgment on the pleadings pursuant to G.L. c. 30A, § 14 and Mass. R. Civ. P. 12(c). For the reasons discussed below, Levesque's motion is DENIED, the Town's cross-motion is DENIED and the matter is REMANDED.

ADMINISTRATIVE RECORD

The administrative record, filed by the Commission as its answer in this action, reveals the following. Levesque began his employment with the Middleborough Police Department on July 16, 2001. A February 3, 1969 order by then Police Chief William Werner to all officers states:

- 1) Effective this date any officer of this Department, who is

¹Board of Selectmen of the Town of Middleborough

9/22/15
cc: TKR
JLP

subpoenaed for any court, criminal or civil, will notify the Chief of Police or the desk the name of the case, the date and location, as soon thereafter as reasonably possible.

2) No police officer, special officer, auxiliary officer or matron will discuss any case outside this Department without prior permission from the Chief of Police.

3) In the event of any of the above mentioned Officers are approached by any individual for Police information they will refer the individual to the Police Station. If an individual insists on acquiring information he or she should be advised if they want information from you to summons you to court.

4) There will be no deviation from this order.

Levesque was not aware of this general policy.

In the summer of 2010, the Department initiated a disciplinary investigation against Levesque for allegedly tipping off a drug suspect under surveillance by the Department, compromising the investigation and resulting in the loss of a GPS device. Levesque was represented by Attorney Michael Hanley, counsel for NEPBA Local 76, the Middleborough Patrol Officers Union ("the Union"). In a July 16, 2010 letter to Police Chief Bruce Gates ("Gates"), Lieutenant David Mackiewicz, the officer in charge of internal affairs, found that the charge that Levesque compromised the drug investigation was unsubstantiated. Gates also conducted his own investigation, in which he learned that Levesque lived next door to the suspect and Levesque's wife frequently waited at the bus stop with the suspect's girlfriend. During Gates' investigation, Levesque told Gates that he had discussed the matter with his wife.

In lieu of termination, on August 6, 2010, Levesque, the Town, and the Union executed a Settlement Agreement/Last Chance Agreement ("the Agreement") which stated:

- Levesque denies that he intentionally alerted [the suspect] about the

surveillance. The Middleborough Police Department's internal investigation will find that the charge that Levesque alerted [the suspect] was unfounded;

- Levesque admits to the Department finding that he shared with his wife details of the ongoing investigation of [the suspect] and that this was a violation of the Department's rules and regulations.

- Levesque admits that there is sufficient evidence to support a Department finding that, in the Department's investigation of whether he was responsible for [the suspect] being tipped off, he failed to provide complete information despite specific written and verbal directives given to him by the Chief and that this was a violation of the Department's rules and regulations. Levesque denies that he purposely withheld any information, but admits he could have given more complete and definitive information.

- In consideration of Levesque accepting the discipline imposed by this Agreement and abiding by the other terms of the Agreement, the Town will not pursue additional disciplinary action against Levesque in the disciplinary matter described above.

Under the Agreement, Levesque agreed to a suspension of eight work shifts without pay. The

Agreement further provided:

This is Levesque's last chance to refrain from any other conduct warranting a suspension of any length without pay. If the Police Chief and/or the Board of Selectmen determine that Levesque has engaged in conduct warranting a suspension without pay of any length, including for a failure to comply with any terms(s) of this Agreement, the Town will have just cause to discharge Levesque. Any appeal of the discharge will be limited to the issue of whether the conduct resulting in the suspension without pay of any length occurred. If it is determined in any appeal proceeding that the conduct occurred, dismissal will be the appropriate level of discipline and it is not subject to appeal. The Union and Levesque waive all other rights of appeal, including without limitation any claim under the Union Contract, M.G.L. c. 31 or any other state or federal law.

In 2011, Levesque received training at the Police Academy which included classes on conducting motor vehicle stops. The curriculum outlined the basics of a stop, including how to get

a motorist to safely pull over to the side of the road, the positioning of the police cruiser in relation to the motorist, requesting a driver's license and registration, and issuing a warning or citation.

In 2012, the Middleborough Police Department received a "Click It or Ticket" Grant through the Massachusetts Executive Office of Public Safety Highway Safety Division. This grant funded overtime shifts to enforce the seatbelt law through high-visibility traffic enforcement. The grant required a minimum of three documented stops per hour, with records maintained in a manner that guarantees accountability during a review or audit. Under the grant, the Department was reimbursed for overtime shifts only after submitting documentation based on Traffic Enforcement Grant Activity Reports that showed compliance with the minimum required stops. On May 14, 2012, Sergeant Beale sent the following email to all officers:

The Click-It or Ticket grant is in effect from Monday, May 14th, to Sunday, June 3rd. The Activity Reports will be in a folder in dispatch, please fill out completely. When done with your grant shift put the Activity Report in my mailbox.

The grant requires 3 stops per hour. Written citations only (no warnings) for any adult or child seatbelt/safety violations.

On May 17, Beale sent a follow-up email that stated:

Clarification on the Click-it or Ticket Grant:

The grant times will be on the schedule for 3 different 4-hour blocks so everyone can have equal opportunity. They are 8am-12pm (Noon), 12pm to 4pm and 4pm to 8pm.

Also, failure, without proper justification, to complete the 3 stops per hour (12 total minimum) could result in the loss of future grants and/or loss of funding for this grant. If you do not complete the 12 stops please notate [sic] on the Activity Sheet the reason so I can document same on my paperwork. An arrest while working the grant shift will obviously affect the amount of stops and this is to be expected.

Tickets should be written.

On May 23, Levesque had a cell phone conversation with William Ferdinand ("Ferdinand") about a problem with a broken window in his vehicle. Ferdinand is Levesque's best friend and a special police officer in the Middleborough Police Department. Ferdinand was working inside the A Prime Gas Station at the time of the conversation, and his car was parked in the A Prime parking lot. Levesque listed this interaction as a motor vehicle stop in his Traffic Enforcement Grant Activity Report.

On May 29, Levesque listed as a stop in his Traffic Enforcement Grant Activity Report that he stopped Ferdinand at the intersection of Plympton and Thompson Streets at 10:25 a.m., with a verbal warning given for speeding. This report was based on a text that Levesque sent Ferdinand stating that he was "stopping" him for speeding. Also on May 29, Levesque listed as a stop that at 10:38 a.m. on Jackson Street, he warned Fran Cass ("Cass") about a defective shock absorber. This report was based on observing Cass's car parked in a town lot. Cass is a close friend of Levesque and is the Middleborough Park Superintendent.

A sergeant in the Department informed Gates that there might be an issue with the stops Levesque had listed under the grant. On June 7, 2012, Gates notified Levesque in writing that he was placed on paid administrative leave while the Department investigated whether he had falsely reported motor vehicle stops on his Traffic Enforcement Grant Activity Reports. The letter from Gates further stated:

- While on paid administrative leave, you are prohibited from exercising any authority or privileges of a Middleborough Police Officer. You must turn in any property of the Department, including your badge, Police Identification card and Sig Sauer P226 weapon serial #U680130. If you need to come to the Police Station, you can

only do so with advance notice to and permission from me.

- You are not to take any action, directly or indirectly, that would tend to discourage, persuade, or retaliate against a witness with respect to that witness' truthful cooperation in this matter, including but not limited to William J. Ferdinand and Francis J. Cass and any employee of the Middleborough Police Department.

- You are not to discuss this matter with anyone except me and if you choose your legal representatives.

Your failure to abide by the terms of your administrative leave and/or obey any of the other directives above will constitute grounds for discipline, up to and including dismissal. This is separate and apart from any discipline that arises from substantiation of any charges that result from the investigation.

Department investigators interviewed Ferdinand on June 7 about the May 29 stop. Levesque knew that he was prohibited from talking to Ferdinand but called him and asked him to come to his house. Levesque told Ferdinand that he had been placed on administrative leave and might lose his job. Levesque asked Ferdinand several times what he told Department interviewers about the "stop." Ferdinand twice replied that he could not discuss it, then eventually told Levesque the interview questions and his responses.

After the investigation, Gates spoke to the Massachusetts Executive Office of Public Safety and the Department did not seek reimbursement under the grant for the overtime worked by Levesque. Gates also informed the District Attorney's Office that Levesque had filed a false report.

The Board is the Town's appointing authority for civil service. Pursuant to G.L. c. 41, § 31, the Board held hearings on June 28 and July 23, 2012 to consider the charge that Levesque filed false reports of traffic enforcement stops of Ferdinand and Cass under the "Click it or Ticket" grant to the Town. The Board also considered the charge that Levesque violated a written order from Gates not

to speak to Ferdinand during the investigation of the false report charge.

Levesque testified to the Board that he was on patrol in connection with the grant overtime when he saw Ferdinand driving on Plymouth Street and going faster than the 20 mph speed limit. Levesque texted Ferdinand: "Stopping u again. ... lol," to which Ferdinand texted back: "What for this time?" Levesque responded: "Speeding. Lol." and Ferdinand texted back: "Thanks a lot jackass."

Levesque further testified that he had seen Cass earlier in the shift and they had a non-related cell phone conversation while he was patrolling in the area of Plympton and Thompson Streets. Cass stated that he was pulling into the lot of the Park Department building on Jackson Street. Levesque drove there, Cass got out of his truck, and they conversed about Park Department matters. While parked there, Levesque noticed that Cass was missing a rear shock absorber on his truck and mentioned it to Cass, who stated that his father was going to fix it. Levesque told Cass that he was working under a grant and intended to list Cass as a stop. Cass said he would be happy to help out but did not want to be entered into the Police Department computer. Finally, Levesque testified that he knew he was prohibited from talking to Ferdinand during the investigation but did anyway and it was a "terrible mistake."

Ferdinand testified that on May 29, he did not drive on Plympton Street at all and that he was never stopped by Levesque that day. Cass testified that during his conversation with Levesque in the Park Department parking lot, Levesque told him that he was going to cite him for a defective shock absorber for the "Click-It or Ticket" program. Cass said okay but asked Levesque not to put it into the computer.

The Board terminated Levesque on July 23, 2012 after finding that he violated the

Agreement. In a written Decision on Disciplinary Charges dated August 6, 2012, the Board concluded that Levesque falsely reported his interactions with Ferdinand and Cass as "stops" on the Traffic Enforcement Grant Activity Reports, making a mockery of the grant program. Because the Chief had to report Levesque's conduct to the District Attorney as exculpatory evidence, his value and effectiveness as a police officer was impaired. The Board further noted that Levesque engaged in conduct unbecoming a police officer and violated Department regulations relating to submitting reports, truthfulness, and neglect of duty. The Board concluded that this conduct constituted just cause to suspend, if not dismiss, Levesque from his position as a police officer.

The Board further found that Levesque's conduct in speaking to Ferdinand in direct violation of the Chief's written order to do so was conduct unbecoming a police officer and insubordination. The Board concluded that this conduct constituted just cause to suspend, if not dismiss, Levesque from his position. Finally, the Board concluded that Levesque's conduct constituted just cause under the Agreement because it was conduct that would warrant suspension without pay. The Board emphasized, however, that Levesque's misconduct was particularly egregious and would provide just cause for his dismissal even without the last chance provision of the Agreement. The Board dismissed Levesque from his position effective immediately and notified him by written decision dated August 6, 2012.

On August 10, Levesque appealed the Board's decision to the Commission pursuant to G.L. c. 31, §§ 42 and 43, arguing that the Town lacked just cause to terminate him. The appeal was heard by a Magistrate from the Division of Administrative Law Appeals on November 27, 2012, January 31, 2013, and February 6, 2013. The Magistrate excluded from evidence proposed exhibits 29 through 54, many of which related to Levesque's claim that he was treated more harshly than another

officer, Officer Lapanna, who recorded as a stop on his grant report an incident in which he pulled his cruiser beside Ferdinand's car at a traffic light and informed him that his inspection sticker had expired. Some of the excluded exhibits were reports from other officers showing their practice of recording motor vehicle stops. Finally, several excluded exhibits related to other officers who were disciplined for violating orders or insubordination. The Magistrate concluded that these other officers were not similarly situated to Levesque because none of them was subject to a Last Chance Agreement.

In front of the Magistrate, Ferdinand testified that he is a special police officer for the Town and was trained at the Auxiliary Training Academy in Plymouth. He has known Levesque since he was 11 years old and they are best friends. He was trained that a motor vehicle stop consists of using blue lights to pull over a motorist for a traffic infraction or some other specific reason, obtaining a license and registration, and giving a warning or a ticket. Ferdinand testified that in May of 2012, his car window was propped up with a doorstop and had been like that for at least a month. Levesque had observed the broken window on other occasions and commented that Ferdinand would have to get it fixed. On May 23, Ferdinand was working inside A.L. Prime and his car was parked in the parking lot. Levesque did not conduct a motor vehicle stop of his car that day. Around 1 p.m., Levesque called Ferdinand but he cannot remember the subject of their conversation.

On May 29, Levesque called Ferdinand and asked him to come to his house. Ferdinand traveled on Plymouth Street to get there. He received a text from Levesque stating that he was stopping him for speeding. Ferdinand testified that he did not believe this text constituted a motor vehicle stop. On June 7, Lieutenant Andrade and Sergeant Graham interviewed Ferdinand about this incident and told him not to speak to anyone else about it or he could be dismissed. Ferdinand

testified in front of the Board on June 28. At some point between those two dates, Levesque contacted him and asked him to come over. Ferdinand brought a six pack of beer to Levesque's house. They discussed the fact that Levesque's dog was dying and Levesque stated that he was on leave for an issue with his traffic stops under the grant. Levesque, who was very emotional, stated that he was worried about his job and Ferdinand responded not to worry about it. Levesque twice asked Ferdinand whether he had been interviewed about the stops and Ferdinand stated that he could not talk about it. Levesque asked again and Ferdinand then disclosed what he had told investigators, adding that he could not lie. Levesque responded that he would never ask him to lie. Levesque did not try to get Ferdinand to change his story or refuse to testify against him. When Ferdinand told the Chief that he had discussed the interview with Levesque, Gates suspended Ferdinand from paid details for two weeks.

Cass testified that he is the Parks Superintendent for the Town and a friend of Levesque. On May 29, 2012, his truck lacked a second shock on the lower left side. He was carrying supplies out of the back of his truck, which was parked in the lot, into the park department building when Levesque pulled into the lot in his cruiser and told Cass that he had a defective shock and was pulling him over under the Click-It or Ticket Grant. Cass stated he would help but did not want the violation entered in the computer and Levesque stated it would not go in the computer. Later, Officer Graham called Cass and then questioned him at the police station about this interaction. Cass also provided a written statement.

Police Chief Bruce Gates testified that a motor vehicle stop involves signaling to the operator of a vehicle to pull over, positioning the cruiser behind the vehicle, asking for a license and registration, and issuing a warning or ticket. Levesque was trained in motor vehicle stops at the

Police Academy between July and December of 2001. Gates testified that in 2010, Levesque was investigated for misconduct. Detectives had put a GPS device on the car of a drug suspect and the device went missing. Detectives learned from the suspect's cousin that Levesque told the suspect he was being watched. Gates gave Levesque a letter with questions about the incident but felt that his answers were evasive and incomplete. Gates interviewed Levesque in the presence of union counsel, Attorney Michael Hanley. Levesque revealed that he had spoken to his wife about the investigation. They lived next door to the suspect and she waited at the bus stop with the suspect's girlfriend. After several months of negotiation, the Union and Town entered into the Agreement and Sergeant Mackiewicz prepared a document for the personnel file stating that the charge was unfounded. Mackiewicz prepared this report three weeks before the parties executed the Agreement but Gates does not know whether Levesque saw it before that date.

Gates testified that the purpose of the Click-It or Ticket grant is to raise awareness about the seatbelt law by making high visibility traffic stops and issuing citations to people not wearing seatbelts. Gates received a report from Lieutenant Andrade and Sergeant Graham that they believed Levesque had falsified his traffic grant activity report by stopping his friends. After reviewing the records, Gates placed Levesque on administrative leave and ordered him not to speak to Ferdinand or Cass. He did not question Levesque about the incidents because under the Agreement, it was the Board's call as to termination. He then referred the matter to the Board as appointing authority. After the first day of the hearing before the Board, Gates asked Levesque to respond to written questions, which he did by invoking his Fifth Amendment privilege based on the advice of counsel. When Ferdinand told him that Levesque had spoken to him about the investigation, Gates issued a separate disciplinary charge for disobeying his order. While off-duty one afternoon, Sergeant

Graham told Cass that Levesque had lied in his grant report.

Gates testified that the incidents with Ferdinand and Cass did not constitute traffic stops under the grant. He admitted that there are not call reason codes for every possible situation and officers are trained to enter the call reason that most closely matches their activity. Gates did not submit reimbursement requests for Levesque's shifts and had to notify the Plymouth County District Attorney that Levesque had falsified a report, which could be used to impeach Levesque at any trial where he testified.

Sergeant Beals testified that he ran the Click-It or Ticket grant for the Town. He sent out two emails to all officers describing the grant program. These emails did not state that traffic stops under the grant should be high-visibility stops. Beals admitted that officers making computer entries into the grant activity reports had the option of not including the names of the drivers involved. Beals opined that based on his Police Academy training and job experience, motor vehicle stops do not involve calling or texting a motorist about a violation. Beals admitted that traffic violations that did not involve an officer using his blue lights to stop a motorist might be recorded in the log as a Code 70 - motor vehicle stop.

Levesque testified that prior to executing the Agreement, he never saw the letter from Lieutenant Mackiewicz concluding that the most serious charge against him was unfounded. If he had seen it, he would not have executed the Agreement because the other two charges were not terminable offenses. He testified that he was not given any training on entering call codes into the police log but was instructed to use the call code that was most appropriate. Code 70 was used for a wide variety of motor vehicle matters, not just traffic stops. Levesque testified that he never intended to mislead anybody by using Code 70 on the grant activity report. He thought that he was

supposed to record all his traffic enforcement activities in the report, regardless of whether they involved pulling over a car with his blue lights. He knew there was no adverse consequence for not making the required three stops per hour. He testified that he wanted to be a detective and that he generated the most arrests and most activity in the department, which others resented. Levesque testified that on the dates in question, he observed actual traffic or safety violations by Ferdinand and Cass. He had never been told not to enforce violations against his friends or Town employees, and there was no policy in place that prohibited giving verbal warnings by telephone. Levesque admitted that he understood that the grant program was to enforce the seatbelt law and that law did not apply to someone whose car was parked or who was not in his car but on his cell phone. Levesque testified that he asked Ferdinand to come over to talk because his dog was dying, his wife had lupus, and the administrative suspension would hurt his family. He did not pressure Ferdinand to change his story or try to influence the investigation. Levesque testified that in the past, he brought several issues to the Union's attention, but admitted that he did not hold a union leadership position and had never pursued a formal grievance.

In his closing brief, Levesque argued that the Board's decision rested in large part on the existence of the Agreement that was executed "under highly suspicious circumstance," and further argued that the Department was biased against him. Levesque argued that the Agreement was unconscionable because at the time he signed it, the Department withheld from him the fact that an Internal Affairs report exonerated him of the primary charge investigated. Levesque further argued that the Department's investigation of the false reports violated the Internal Affairs policy and was unfair because it was led by officers biased against him. In addition, Levesque argued that the Department failed to discipline another officer who also falsified a traffic grant stop report, and that

terminating him for violating the June 7, 2012 order not to speak to Ferdinand was impermissible under G.L. c. 150B, § 10(a)(1).

The Town argued in its closing brief that Levesque violated the Agreement by engaging in misconduct warranting a suspension without pay. The Town's brief also states: "It is arguable that filing the false reports and/or disobeying the Chief's order not to speak to Ferdinand during the investigation would provide just cause for [Levesque's] dismissal even if there was no LCA."

In a decision dated February 24, 2014, the Magistrate concluded that the Town was justified in terminating Levesque because his conduct in submitting false grant activity reports, discussing a case outside the Department without permission, tampering with a witness, and testifying falsely in front of the Board at the § 41 hearing was serious enough to warrant his suspension and therefore triggered the Agreement. The Magistrate also noted that the filing of a false report may provide just cause for the termination of a police officer. Under the Agreement, any conduct warranting suspension constitutes just cause for termination, with an appeal limited to whether the underlying conduct occurred. The Magistrate concluded that Levesque should not be permitted to argue the validity of the Agreement, as he was represented by counsel in negotiating it. The Magistrate found no evidence that the Town acted based on political considerations, favoritism, or bias, and concluded that the Town had grounds to terminate Levesque under the Agreement.

By decision dated May 1, 2014, the Commission affirmed and adopted the Tentative Decision of the Magistrate, affirming the Board's termination of Levesque's employment and denying his appeal.

Levesque filed this action for judicial review on June 4, 2014, alleging that the Commission's decision was unsupported by substantial evidence, contrary to law, based on unlawful procedure, and

arbitrary and capricious. This Court allowed the parties' joint motion to add to the administrative record the proposed exhibits that were excluded by the Magistrate. Exhibit 30 is a July 26, 2012 letter from Gates outlining an investigation into whether Officer Lapanna falsified a traffic grant activity report with respect to a May 17, 2010 incident involving Ferdinand. The letter states that Gates set up an interview with Lapanna and warned him not to discuss the incident with anyone. Lapanna stated that he had discussed the matter with his wife before receiving that order from Gates. Gates sent a letter to Ferdinand listing questions for him to answer. Ferdinand stated that Lapanna was in his cruiser, his vehicle was properly inspected at the time, and he did not believe Lapanna gave him a warning although they may have discussed his vehicle. In a recorded interview with Gates, Lapanna stated that he pulled up next to Ferdinand when he was driving and told him through the window of his cruiser that he needed an inspection sticker. Lapanna then observed another driver go by without a seatbelt and without a valid inspection sticker, so he left Ferdinand and pulled over that driver to issue a ticket. In the interview, Lieutenant Mackiewicz told Lapanna: "I think from this point going forward you need to be clear with what a stop is." The investigation ended with Lapanna agreeing to a two day loss of vacation pay.

Exhibits 31 through 50 consist of the logs and traffic grant activity reports of different police officers. Exhibit 51 is a disciplinary letter from the Board of Selectmen to Officer Robichau imposing a three month employment suspension and a demotion from Sergeant to patrol officer for serious misconduct consisting of domestic violence against his teenage daughters while in uniform on patrol duty, and giving a supervisor a false account of the incident. Exhibit 52 is a letter of reprimand issued to Officer Collins for failure to comply with an order by Sergeant Perkins to complete a supplemental report about an arrest. The letter states that per department policy, all

reports should be completed in a timely manner and all direct orders are to be followed. Finally, Exhibit 53 is a letter from Chief Gates to Officer Dees imposing loss of a personal day and two extra four-hour bike duty shifts for refusing to obey a direct order to report for duty and violating Department rules regarding reporting for duty.

DISCUSSION

Pursuant to Chapter 30A, section 14, the court must uphold the Commission's decision unless it is unsupported by substantial evidence, arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law. Police Dept. of Boston v. Kavelski, 463 Mass. 680, 689 (2012); Leominster v. Stratton, 58 Mass. App. Ct. 726, 728, rev. den., 440 Mass. 1108 (2003). The question on judicial review is whether, taking the facts as found, the Commission's action was legally tenable. Leominster v. Stratton, 58 Mass. App. Ct. at 728. The court must give due deference to the Commission's experience, technical competence, specialized knowledge, and discretionary authority. Police Dept. of Boston v. Kavelski, 463 Mass. at 689; School Comm. of Brockton v. Civil Serv. Comm'n, 43 Mass. App. Ct. 486, 490, rev. den., 426 Mass. 1104 (1997). Levesque bears the burden of demonstrating the invalidity of the Commission's decision. See Police Dept. of Boston v. Kavelski, 463 Mass. at 689; Mendonca v. Civil Serv. Comm'n, 86 Mass. App. Ct. 757, 762 (2014).

I. ERROR OF LAW

Levesque contends that the Commission committed several errors of law. Presented with a question of law, the court inquires whether the Commission's decision was legally tenable. School

Comm. of Brockton v. Civil Serv. Comm'n, 43 Mass. App. Ct. at 490. The court reviews questions of law de novo and must overturn a decision that is inconsistent with governing law. Mendonca v. Civil Serv. Comm'n, 86 Mass. App. Ct. at 762. Levesque first argues that the Commission erred in failing to conclude that his termination violated G.L. c. 150E, § 10(a)(1) because Gates' June 7, 2012 order illegally restrained his right to engage in concerted activity under G.L. c. 150E, § 2. Neither the Magistrate nor the Commission addressed this argument.

Section 10 prohibits a public employer from interfering, restraining, or coercing any employee in the exercise of any right guaranteed under Chapter 150E. See G.L. c. 150E, § 10(a)(1). Section 2 gives public employees the right "to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion." G.L. c. 150E, § 2. Gates ordered Levesque not to take any action, directly or indirectly, that would tend to discourage, persuade, or retaliate against a witness with respect to that witness' truthful cooperation in this matter, including but not limited to Ferdinand, Cass, and Department employees, and further ordered him not to discuss the matter with anyone except his legal representatives. Levesque argues that this "confidentiality order" violates his § 2 rights, citing cases under the analogous federal statute, the National Labor Relations Act ("NLRA").

The NLRA bars employer interference with the right of employees to discuss the terms and conditions of their employment with others under § 7 of the Act, which contains the same language as § 2 of Chapter 150E. See National Labor Relations Bd. v. Northeastern Land Serv., Ltd., 645 F.3d 475, 481 (1st Cir. 2011) (NLRA violated by confidentiality provision which barred employee from discussing terms of employment, including compensation, with third parties). This right includes the discussion of discipline or disciplinary investigation with other employees. SNE Enterprises, Inc.,

2006 WL 1807384 at *33 (NLRB June 26, 2006), rev. den., SNE Enterprises, Inc. v. NLRB, 255 Fed. Appx. 642 (4th Cir. 2007). However, even if a employer's confidentiality rule adversely impacts employees' § 7 rights, it does not violate the NLRA if the infringement on employee rights is outweighed by the employer's substantial and legitimate business justification. Id.

This Court concludes that Gates' June 7, 2012 order did not violate Chapter 150E because it was a temporary measure supported by a substantial and legitimate business justification in Levesque's particular case: the need to ensure that witnesses were not influenced, evidence was not destroyed, and testimony was not fabricated in an investigation in which the two key witnesses were Ferdinand, Levesque's best friend and fellow officer, and Cass, a good friend of Levesque and a Town employee. See Desert Palace, Inc., 2001 WL 1187951 at *3 (N.L.R.B. Sept. 28, 2001) (discharge of employees for violating employer's order not to discuss ongoing investigation of drug activity did not violate NLRA). See also Andrade v. Hudson, 21 MCSR 73, 77 (Feb. 15, 2008) (upholding termination of police officer for violating Chief's order not to speak to witnesses during pending investigation and rejecting argument that order prevented him from preparing a defense). Cf. SNE Enterprises, Inc., 2006 WL 1807384 at *34 (NLRA violated by overly broad rule prohibiting employees from discussing any disciplinary action with co-workers where employer's justification, the need to prevent floor fights and one employee's temper, was not sufficient to outweigh employee rights). Thus, the Commission did not err in failing to conclude that Levesque's termination for violating the June 7, 2012 order was illegal under Chapter 150E.

Levesque next argues that the Commission erred in excluding Exhibits 30 through 53 from evidence. An administrative agency has considerable discretion with respect to the admission of evidence. Rate Setting Comm'n v. Baystate Med. Cntr., 422 Mass. 744, 752 (1996); Cherubino v.

Board of Registration of Chiropractors, 403 Mass. 350, 359 (1988). The court affords the agency's evidentiary rulings great deference and the refusal to consider certain evidence requires reversal of an administrative decision only if it resulted in a denial of substantial justice. Box Pond Ass'n v. Energy Facilities Siting Bd., 435 Mass. 408, 423 (2001); Rate Setting Comm'n v. Baystate Med. Cntr., 422 Mass. at 752. Levesque contends that he was prejudiced by the Magistrate's exclusion of Exhibits 30 and 51 through 53 because they demonstrated his disparate treatment by the Department.

The Commission should promote the principle of equitable treatment of similarly situated individuals and to that end, may modify any penalty imposed by the appointing authority. Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 824 (2006); Police Commissioner of Boston v. Civil Serv. Comm'n, 39 Mass. App. Ct. 594, 599-600 (1996). Here, however, the Magistrate did not abuse her discretion in excluding the exhibits at issue as irrelevant because the other officers disciplined were not similarly situated to Levesque in all relevant respects, without differentiating or mitigating circumstances that would distinguish their situations. See Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. 122, 129-130 (1997). As noted by the Magistrate:

The Appellant complained that he received disparate treatment in comparison to other police officers who also submitted inaccurate grant activity reports. However, no other police officer stood in the Appellant's shoes. The Appellant was the only police officer who was subject to a Last Chance Agreement. No other police officer documented a motor vehicle stop in the Click-It or Ticket program based on a telephone call or a text message. No other police officer implicated a fellow officer or Town officials in inaccurate grant activity reports. No other police recorded interactions with friends as motor vehicle stops.

Thus, the excluded evidence did not support a disparate treatment defense, and the Magistrate

considered but expressly rejected the argument that the Department's decision was based on improper political considerations or bias.

Nor did the Magistrate abuse her discretion in excluding Exhibits 31 through 50, the traffic logs and grant activity reports of several other officers in the Department. Levesque argues that these exhibits were relevant to show his lack of intent to file a false report by demonstrating that other officers also believed that Code 70 could be used to record events that did not involve pulling over a motorist using police blue lights. However, the Magistrate properly concluded that these exhibits were not relevant because the finding that Levesque falsely reported motor vehicle stops was based on not only Levesque's failure to pull over a motorist with blue lights but also the fact that he issued warnings by phone or text where no seatbelt violations could possibly be observed, and the violators were his close friends and fellow Town employees. Accordingly, the Magistrate's failure to consider Exhibits 30 through 53 did not amount to an error of law resulting in a denial of substantial justice.

II. SUBSTANTIAL EVIDENCE

Levesque further argues that the Commission's conclusion that he filed false reports was not supported by substantial evidence because there was insufficient evidence that he knew the reports were false. See Commonwealth v. Kelley, 35 Mass. App. Ct. 745, 748 (1994) (offense of filing false report requires an intentional or knowing untruth). Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion, taking into account whatever in the record fairly detracts from its weight. Police Dept. of Boston v. Kavelski, 463 Mass. at 692; Covell v. Department of Social Serv., 439 Mass. 766, 783 (2003). The Magistrate's conclusion that

Levesque falsely reported motor vehicle stops in his traffic grant activity reports and that he did so knowingly depends largely on her disbelief of Levesque's testimony providing an innocuous explanation for his conduct. Assessing the credibility of witnesses is the task of the magistrate, and the court must defer to such determinations upon judicial review. Leominster v. Stratton, 58 Mass. App. Ct. at 729. The Commission, not the court, is the sole judge of the credibility and weight of the evidence before it. Police Dept. of Boston v. Kavelski, 463 Mass. at 694; Leominster v. Stratton, 58 Mass. App. Ct. at 728. Accordingly, there was substantial evidence for the conclusion that Levesque knowingly filed false reports.

III. FAILURE TO ALLOW CHALLENGE TO AGREEMENT

Finally, Levesque contends that the Commission erred in terminating him pursuant to the Agreement without giving him the opportunity to challenge its validity. "The Commission should give great weight to the provisions of a Last Chance Agreement, a voluntary agreement between an employer and an employee, which typically in lieu of immediate termination, effectively puts an employee on notice that any further discipline will result in [his] termination." Davis v. Newton, 20 MCSR 402, 405-406 (2007). The Commission cannot substitute its judgment for that of the appointing authority regarding the wisdom or necessity of last chance agreements. Attleboro v. Civil Serv. Comm'n, 2014 WL 223004 at *2 (Mass. App. Ct. Rule 1:28), rev. den., 467 Mass. 1104 (2014) (city properly terminated employee for OUI after he refused to agree to LCA). As noted by the Magistrate, Levesque was represented by Union counsel in negotiating the Agreement.

However, it may be appropriate for the Commission to consider the circumstances that gave rise to a particular Last Chance Agreement. Davis v. Newton, 20 MCSR at 406 (declining to give

LCA weight where employee was later acquitted of drug charges that formed basis for agreement and city had never conducted an independent investigation of that misconduct). Here, Levesque contends that he should not be terminated based on an agreement that is unconscionable because the Department withheld from him Lieutenant Mackiewicz's July 16, 2010 letter concluding that the primary charge of tipping off the drug suspect was unsubstantiated. If Levesque had known of that conclusion, he would not have executed the Agreement but instead would have challenged the two remaining charges against him, which were weak in merit and arguably were non-terminable offenses.² This Court concludes that in fairness, the Commission should have addressed whether in light of the circumstances of its execution, the Agreement was a proper basis on which to terminate Levesque.³

The Commission relied primarily on the Agreement in upholding Levesque's termination. With respect to the false reports, the Magistrate stated: "The Appellant's filing of inaccurate reports provided just cause for the appointing authority to issue discipline including suspension, thereby triggering the Town's right to dismiss the Appellant under the terms of the LCA. The filing of a false report in and of itself *may provide just cause* for the termination of a police officer." (emphasis

²It appears that Levesque's argument, in substance, is one of fraudulent inducement rather than unconscionability. See Machado v. System4 LLC, 471 Mass. 204, 218 (2015) (contract is unconscionable if terms are oppressive to one party who had no meaningful choice and was subject to unfair surprise); Commerce Bank & Trust Co. v. Hayeck, 46 Mass. App. Ct. 687, 692, rev. den., 430 Mass. 1104 (1999) (fraudulent inducement is proven by evidence that one party made misrepresentation of material fact to induce other to enter into contract, and other party reasonably relied on false statement in entering contract).

³There was testimony from which the Magistrate could have concluded that Mackiewicz's July 16, 2010 letter was the product of the parties' negotiations and that its substance was known to all before execution of the Agreement. However, the Magistrate did not make any findings on this issue, instead concluding that the appeal was not the proper forum in which to argue the validity of the Agreement.

added). In addition, the Magistrate concluded: "I find that the Appellant's misconduct warranted suspension. The Town has to prove nothing further, and thus has sufficient grounds to terminate the Appellant pursuant to the LCA." Thus, the Commission's analysis of just cause with respect to the false reports was dependent on the existence of a valid Agreement.⁴

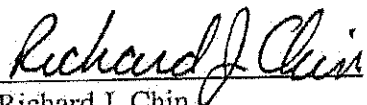
There is no doubt that police officers are held to a high standard of truthfulness and a demonstrated willingness to "fudge the truth" is a significant problem. See Falmouth v. Civil Serv. Comm'n, 61 Mass. App. Ct. 796, 801 (2004) (upholding 10 day suspension of police officer for lying during investigation and filing false report). Cf. Meaney v. Woburn, 18 MCSR 129, 133-135 (2005) (upholding termination of police officer with prior disciplinary record who lied during investigation of his misconduct, filed a false report, released a non-public police incident report, and engaged in other conduct unbecoming an officer). Nonetheless, it is not clear from the record that the Commission would have found termination to be the proper sanction in the absence of the Agreement. The decision repeatedly emphasized that Levesque's conduct warranted suspension, which automatically justified termination under the Agreement. The terms of the Agreement precluded Levesque from appealing whether termination was the appropriate level of discipline. The Commission may have felt constrained from exercising its equitable authority to modify the penalty selected by the appointing authority. Accordingly, this matter is remanded to the Commission for

⁴This Court acknowledges that with respect to disobeying Gates's order not to talk to Ferdinand, the Magistrate stated: "The Appellant's conduct in the instances of witness tampering and his later untruthfulness at the § 41 hearing is so egregious, that I find that they provided sufficient reason for his termination, even in the absence of a LCA. The Appellant's behavior lacked integrity. He comported himself without maturity, common sense, or good judgment." Nonetheless, the focus of the decision is the filing of false reports, and the Magistrate made repeated references to the Agreement in upholding Levesque's termination.

a determination of whether the Agreement should be deemed binding and whether just cause exists independent of the Agreement to terminate Levesque. See Smith v. Director of the Div. of Employ. Sec., 376 Mass. 563, 568 (1978) (remand appropriate where agency, charged with weighing evidence and assessing credibility in first instance, must make finding on material issue).

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Levesque's Motion for Judgment on the Pleadings be **DENIED**, the Town's Cross-Motion for Judgment on the Pleadings be **DENIED**, and this matter be **REMANDED** to the Commission for the limited purpose of considering the validity of the August 6, 2010 Last Chance Agreement and whether Levesque's conduct constitutes just cause for termination independent of the Agreement.


Richard J. Chin
Justice of the Superior Court

DATED: September 21, 2015

Entered 9/22/15