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COMMONWEALTH OF MASSACHUSETTS  
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CIVIL SERVICE COMMISSION  
MIDDLESEX, ss

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SUPERIOR COURT  
CIVIL ACTION  
NO. 2014-00232

EDWARD MCCORMACK

vs.

MASSACHUSETTS CIVIL SERVICE COMMISSION & another<sup>1</sup>  
(and consolidated cases<sup>2,3</sup>)

**MEMORANDUM OF DECISION AND ORDER ON**  
**EDWARD MCCORMACK AND THE DEPARTMENT OF STATE POLICE'S**  
**CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS**

The consolidated cases now before the court all arose in connection with the suspension, and ultimately termination, of Edward McCormack from his duties as a Massachusetts State Trooper. Following the Massachusetts Civil Service Commission's ("MCSC") review of the disciplinary action taken by the Massachusetts Department of State Police (the "State Police"), McCormack filed a Superior Court action pursuant to G. L. c. 30A, seeking to vacate MCSC's determination that the State Police had just cause to reprimand, suspend, or terminate him for the majority of charges preferred. The State Police likewise filed a c. 30A action, seeking to vacate so much of MCSC's order as awarded McCormack back pay for days he was suspended without just cause. The cases were consolidated with another related action (Middlesex Superior Court Docket No. 2014-00571) and are now before the court on McCormack and the State Police's cross-Motions for Judgment on the Pleadings. After a hearing and review of the parties'

<sup>1</sup> Massachusetts Department of State Police

<sup>2</sup> Massachusetts Department of State Police and Colonel Timothy P. Alden v. Massachusetts Civil Service Commission and Edward McCormack, Middlesex Superior Court, Civil No. 14-00571

<sup>3</sup> Department of State Police v. Massachusetts Civil Service Commission, Middlesex Superior Court, Civil No. 14-00206

submissions, McCormack's motion will be **DENIED** and the State Police's motion will be **DENIED**.

### BACKGROUND

The following facts are drawn from the administrative record.

#### A. Criminal Charges and Disciplinary Action

On April 3, 2008, McCormack was suspended without pay following a duty status hearing, which was conducted pursuant to a State Police internal investigation into reports that McCormack had illegally obtained and abused prescription drugs. On January 7, 2009, A Suffolk County grand jury indicted McCormack on eighteen counts of obtaining a false prescription through fraud and one count of uttering a false prescription, in violation of G. L. c. 94C, § 33(b). Thereafter, on January 12, 2009, the State Police conducted a second duty status hearing, which resulted in McCormack's suspension without pay being extended. As a result of these suspensions, McCormack's gun, badge, and other State Police equipment were confiscated. McCormack did not appeal either suspension.

On December 21, 2009, the Suffolk County Superior Court (Gaziano, J.) ordered that much of the evidence leading to McCormack's indictment be suppressed. On December 5, 2011, the Suffolk County District Attorney's Office *nolle prossed* seventeen of the nineteen counts of the indictment, and on December 7, 2011, McCormack was found not guilty on the remaining two counts.

On March 6, 2013, at the conclusion of its internal investigation, the State Police preferred 62 misconduct charges against McCormack before a State Police Trial Board. Following a three-day hearing at which McCormack declined to testify, the Trial Board found McCormack guilty of 56 of the charges. It recommended that McCormack receive written

reprimands on 4 charges, be suspended without pay on 27 charges, and be terminated on 25 charges. On November 6, 2012, Colonel Timothy P. Alden accepted the Trial Board's findings and recommendations and McCormack was let go. In total, McCormack was suspended without pay for approximately four years and seven months *prior to his termination*.

On November 13, 2012, McCormack appealed his termination to MCSC, pursuant to G. L. c. 22C, § 13. Prior to the hearing, MCSC allowed McCormack's motion to exclude from the hearing the same evidence that Judge Gaziano had excluded in McCormack's criminal case. Accordingly, the State Police were unable to proceed on 19 of the 56 charges of which the Trial Board had found McCormack guilty, leaving 37 charges remaining for MCSC to evaluate. These charges were divided into four cases, discussed in greater detail *infra*: McCormack's conduct during certain motor vehicle stops in January 2010 (Case 1), McCormack's conduct from 2007-2011 relative to a Barnstable District Court probation case involving his girlfriend, "Ms. A," (Case 2), McCormack's conduct following a motor vehicle accident in May 2011 (Case 3), and McCormack's conduct in failing to disclose certain medical information to the State Police and in illegally obtaining prescription narcotics (Case 4).<sup>4</sup>

MCSC conducted a hearing on May 29-31, 2013. On December 20, 2013, the Commission issued a decision in which it found that the State Police had proven by a preponderance of the evidence that they had just cause to impose discipline on all but two charges. In accordance with its findings, MCSC ordered the State Police to determine how many days of McCormack's suspension were attributable to the unsupported charges, and to reimburse McCormack with back pay for those days. Following a motion for reconsideration filed by the State Police, MCSC amended the Decision, finding that there was insufficient cause for the

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<sup>4</sup> For purposes of this decision, the Court adopts MCSC's ordering of the cases, which differs slightly from the order in which the Trial Board considered them.

discipline imposed on five additional charges and requiring the State Police to reimburse McCormack for forty days' suspension without pay.

B. Motor Vehicle Stops (Case 1)

On January 7, 2010, Massachusetts State Police trooper John Kiley stopped McCormack's pickup truck for speeding. McCormack displayed a replica Massachusetts State Trooper badge and informed Officer Kiley that he was "one of you guys." Trooper Kiley permitted McCormack to leave without a citation.

On January 28, 2010, at approximately 1:30 a.m., Yarmouth Police officer Scott Lundegren stopped McCormack for speeding. At this stop, McCormack again displayed his replica badge and made false statements to Officer Lundegren regarding his employment and his brother's employment. McCormack further stated that, when stopped, he was going to "help someone out" and was "just trying to save a life." After letting McCormack leave without a citation, Officer Lundegren and State Police trooper Thomas Fitzpatrick came to believe that McCormack's replica badge was a badge stolen from a retired State Police trooper. At approximately 1:50 a.m., Trooper Fitzpatrick stopped McCormack's truck on suspicion of burglary. Officer Lundegren arrived shortly thereafter, and McCormack falsely stated that he did not know the passenger in his car and that he was not suspended. McCormack was again permitted to leave.

Thereafter, Trooper Fitzpatrick and Officer Lundegren returned to the Yarmouth Barracks, where they learned that McCormack was suspended and had criminal narcotics charges pending, and discussed seizing his badge if he was stopped again. At approximately 2:50 a.m., they learned from dispatch that Yarmouth police officer Mary Gibney had stopped

McCormack for failing to yield at a stop sign and responded to the scene. Trooper Fitzpatrick seized the replica badge and submitted it to his superior officer.

C. Barnstable District Court (Case 2)

On several occasions following his suspension, McCormack displayed a silver badge resembling a police badge, displayed a State Police business card, and in other manners identified himself as a State Police officer to court officers, probation officers, and staff at the Barnstable District Court and the Barnstable Community Corrections Center ("BCCC"), including Assistant Chief Probation Officer Kim Larson, Probation Officer Elzy Tubbs, and Community Corrections Coordinators Joseph Finn and Michael Spellman, all of whom testified to McCormack's actions before MCSC. McCormack represented himself to be a State Trooper in order to gain information about Ms. A's probation. In addition, McCormack photographed Ms. A wearing his State Police badge. Ms. A testified that, at the time, McCormack "specifically told her he could get in trouble for doing so," (MCSC Decision at 72.)<sup>5</sup>

D. Motor Vehicle Accident (Case 3)

On May 10, 2011, McCormack was involved in a motor vehicle accident, for which he was found at fault and was issued a warning for following too close. Immediately after the accident, he displayed what appeared to be a State Police badge in an attempt to intimidate the other driver involved, Mr. M. He further represented himself to be a State Police officer to Town of Barnstable Patrol Officers Jennifer Ellis and Justin Waskiewicz when they responded to the scene, and lied to Officers Ellis and Waskiewicz about the terms of his suspension and how the accident occurred. Detective Lieutenant Dana Pagley also interviewed Mr. M in the course of the Internal Affairs investigation into McCormack's conduct.

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<sup>5</sup> The Trial Board also imposed discipline on McCormack for bringing Ms. A across state lines in violation of her parole, but MCSC found this charge to be unsupported by a preponderance of the evidence, due to conflicting testimony from equally credible witnesses.

E. Medical Information and Drug Abuse (Case 4)

On December 19, 2001, prior to his entry into the State Police Academy, McCormack filled out a "Back Assessment Form" on which he indicated that he had sustained a back injury in a 1998 car accident, but did not miss any work as a result. However, McCormack had in fact missed several weeks of work, as indicated on his prior 1999 State Police application form. In addition, McCormack failed to disclose that he had sustained, and missed work due to, a further back injury sustained in 1999 in a workplace incident at the Suffolk County Sheriff.<sup>6</sup> Dr. Brian Morris, an employee of the company to which the State Police outsources its medical examinations of candidates, testified that had he known that McCormack had missed work due to back injuries, it would have affected his assessment of McCormack's physical fitness for employment as a State Trooper.

In addition, between 2002 and 2011 McCormack obtained narcotics prescriptions from his dentist, Dr. Robert O'Neill, his primary care physician, Dr. Robert Bonano, and a third doctor, Dr. Lowney. McCormack failed to inform Dr. O'Neill that he was receiving concurrent narcotics prescriptions from Dr. Bonano and Dr. Lowney. Dr. O'Neill would not have issued prescriptions to McCormack had he known of the concurrent prescriptions.<sup>7</sup>

F. Trial Board Disciplinary Action

With regard to Case 1, the Trial Board found McCormack not guilty on Charge 3, Specifications 1 and 4 (Truthfulness). It imposed discipline on Charge 1, Specification 1 (General Conduct), Specifications 1-2 (Conformance to Laws); and Charge 3, Specifications 2-3 (Truthfulness).

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<sup>6</sup> William Sweeney, Director of Human Resources for the Suffolk County Sheriff, testified to this incident.

<sup>7</sup> MCSC's original decision also recites certain facts related to McCormack and Ms. A illegally obtaining Oxycodone/Oxycontin and Suboxone without a prescription, and attempting to obtain heroin. However, because MCSC ultimately found that the Trial Board did not have just cause to impose discipline on the charges related to those facts, they are not relevant to McCormack's present motion.

With regard to Case 2, the Trial Board found McCormack not guilty on Charge 7, Specifications 1-3 (Truthfulness). It imposed discipline on Charge 1, Specifications 1-4 (Violation of Rules); Charge 2, Specification 1 (Unbecoming Conduct) for associating with Ms. A while he knew or should have known that she was involved in illegal activities; Charge 3, Specifications 1-3 (General Conduct); Charge 4, Specifications 1-4 (Conformance to Laws); Charge 5, Specifications 1-2 (Alcoholic Beverages and Drugs); Charge 5, Specifications 1-4 (Abuse of Position); and Charge 7, Specification 4 (Truthfulness).

With regard to Case 3, the Trial Board found McCormack guilty and imposed discipline on all charges: Charge 1, Specification 1 (Violation of Rules); Charge 2, Specification 1 (General Conduct); Charge 3, Specification 1 (Conformance to Laws); Charge 4, Specifications 1-3 (Abuse of Position); and Charge 5, Specifications 1-3 (Truthfulness).

With regard to Case 4, the Trial Board found McCormack not guilty on Charge 3, Specification 18 (Conformance to Laws). It imposed discipline on Charge 1, Specification 1 (Unbecoming Conduct); Charge 2, Specification 1 (General Conduct); Charge 3, Specifications 1-17 and 19 (Conformance to Laws); and Charge 4, Specification 1.

G. MCSC Appeal

Pursuant to its ruling on McCormack's motion in limine, MCSC excluded evidence of, and declined to consider, certain of the charges against McCormack in Case 4: Charge 1, Specification 1; Charge 2, Specification 1; Charge 3, Specifications 1-12, 14, and 16; and Charge 4, Specification 3. It upheld the discipline imposed by the Trial Board on Charge 3, Specifications 13, 15, and 19 and on Charge 4, Specification 1.

MCSC then upheld all but two of the Trial Board's remaining disciplinary actions. With regard to Case 2, MCSC found that the Trial Board had failed to support the 10-day suspension

without pay imposed for Charge 3, Specification 1 (General Conduct) and Charge 4, Specification 1 (Conformance to Laws). In both instances, MCSC found that, due to conflicting testimony from otherwise credible witnesses, there was insufficient evidence that McCormack had brought Ms. A across state lines in violation of her parole.

Thereafter, following McCormack's Motion for Reconsideration, MCSC determined on February 6, 2014 that because of its evidentiary ruling on McCormack's motion in limine, it was required to find that the Trial Board had failed to support Case 4 in its entirety, except as to Charge 4, Specifications 1 and 2. The discipline imposed in that case amounted to 30 days' concurrent suspension without pay for Charge 1, Specification 1 (Unbecoming Conduct) and Charge 2, Specification 1 (General Conduct); and termination for Charge 3, Specifications 1-17 and 19 (Conformance to Laws) and Charge 4, Specification 3 (Truthfulness).

With respect to charges for which McCormack was terminated, MCSC found that, absent the excluded evidence, there was insufficient evidence that McCormack made false statements regarding his medical condition, or that he had obtained prescription controlled substances in violation of G. L. c. 94C. Similarly, with respect to the charges for which he was suspended, MCSC found that, absent the excluded evidence, there was insufficient evidence that McCormack fraudulently obtained controlled substances, resulting in his addiction and a criminal complaint against him. Accordingly, MCSC ordered the State Police to reimburse McCormack for the 10 days of unwarranted suspension in Case 2 and the 30 days of unwarranted suspension in Case 4, for a total of 40 days' back pay.

### **DISCUSSION**

Chapter 30A permits a reviewing court to "affirm, remand, set aside or modify an agency's decision . . . if it determines that the substantial rights of any party may have been



prejudiced because the agency's decision is . . . in violation of constitutional provisions . . . based upon an error of law . . . unsupported by substantial evidence . . . [or] arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law." G.L. c. 30A, §14. However, a reviewing court "may not displace an administrative board's choice between two fairly conflicting views [of the evidence], even though the court would justifiably have made a different choice had the matter been before it de novo." *Labor Relations Comm'n v. University Hosp., Inc.*, 359 Mass. 516, 521 (1971). "In reviewing agency decisions . . . it is for the agency, not the courts, to weigh the credibility of witnesses and to resolve factual disputes." *Fisch v. Bd. of Registration in Med.*, 437 Mass. 128, 138 (2002) (internal quotations and citations omitted).

I. McCormack's Motion

McCormack seeks judicial review, and moves for judgment on the pleadings, as to MCSC's Decision that the State Police demonstrated, by a preponderance of the evidence, that they had just cause to terminate McCormack. The gravamen of McCormack's argument is that MCSC's findings of just cause were unsupported by substantial evidence because McCormack is able to offer a different, equally plausible interpretation of the facts underlying each finding. In general, an agency's findings must be accorded deference even if reasonable minds could differ, because the agency is entitled to "[choose] between two fairly conflicting views of the evidence." *Labor Relations Comm'n*, 359 Mass. at 521. The court nonetheless addresses each set of findings in turn.

A. Motor Vehicle Stops (Case 1)

McCormack contends that he displayed his replica badge to Officer Lundegren as a "professional courtesy" and that Officer Lundegren declined to cite McCormack for speeding in an exercise of discretion, not because he believed McCormack was a State Police officer.

However, the administrative record reflects that Officer Lundegren testified that McCormack showed Officer Lundegren what appeared to be a State Police badge and identified himself as a State Trooper, leading Officer Lundegren to believe that McCormack was an active State Police officer engaged in official State Police business. Officer Lundegren's testimony, if believed, is clear evidence that McCormack violated Article 5.17.2 of the Massachusetts State Police Rules and Regulations, which provides that "[s]uspended members . . . must not represent themselves as members of the Massachusetts State Police." It was within MCSC's purview to find, as it specifically did, that Officer Lundgren was credible, and therefore to find that the State Police had just cause to impose discipline for a violation of Article 5.17.2.

Similarly, McCormack contends that no substantial evidence supported MCSC's finding that Officer Gibney stopped McCormack for failure to yield at an intersection and properly cited him for two motor vehicle infractions, which constituted just cause for the State Police to impose discipline on Charge 2, Specification 2. Despite MCSC specifically finding that Officer Gibney was credible, McCormack contends that the more plausible explanation for Officer Gibney's behavior is that Officers Lundegren and Fitzpatrick induced her to stop McCormack on a pretext and confiscate his wallet and replica badge. McCormack also advances what is essentially a res judicata argument, namely, that because he was found not responsible on the citation in question, MCSC was precluded from finding that a preponderance of the evidence established that he did, in fact, commit the infraction. However, McCormack cites no authority, nor is the court aware of any, that suggests that an administrative agency is bound by a court's findings in an unrelated proceeding, albeit one arising from the same underlying incident. MCSC was entitled to assess the evidence presented at the May 2013 hearing and to make findings of fact in accordance with

its view of that evidence. See *Fisch*, 437 Mass. at 138. Therefore, it was not arbitrary, capricious, or an abuse of discretion for MCSC to uphold the discipline imposed.

B. Barnstable District Court (Case 2)

McCormack's principal objection to MCSC's upholding almost all of the Trial Board's ruling in Case 2 is that it was unfair of the Trial Board to impose discipline for actions McCormack committed after being suspended without pay and had his State Police equipment confiscated. However, a suspension is not equivalent to a termination. The State Police disciplinary rules specifically bar suspended Troopers from representing themselves to be State Police – as McCormack did, according to the testimony of four witnesses MCSC found to be credible. While McCormack may not believe these rules to be fair, he can dispute neither that he was subject to them, nor that he violated them by representing himself to be a State Police officer while he was suspended.<sup>8</sup>

McCormack also argues that the Trial Board's evidence did not support the charges that McCormack: 1) improperly engaged in a relationship with Ms. A while knowing (at a minimum) that she was on probation for breaking and entering; and 2) improperly allowed her to wear his State Police badge, because Ms. A was not a credible witness. This argument is unavailing; "it is for the agency, not the courts, to weigh the credibility of witnesses and to resolve factual disputes." *Fisch v. Bd. of Registration in Med.*, 437 Mass. 128, 138 (2002) (internal quotations and citations omitted). Moreover, Ms. A's testimony that McCormack knew of her illegal conduct, including her drug habit, is bolstered by testimony from Probation Officers Larson and

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<sup>8</sup> McCormack also contends that, despite his actions, he testified that he did not intend to represent himself to be a State Police officer and that the Barnstable District Court witnesses misunderstood him. To the contrary, MCSC's determination that it was "highly unlikely" that Coordinator Spellman and others "misinterpreted McCormack's remarks" was a credibility determination within MCSC's power to make. He also argues that the discipline cannot logically be imposed for actions taken prior to 2009 because his romantic relationship with Ms. A did not begin until then; however, as MCSC found, McCormack associated with Ms. A while knowing of her illegal actions as early as 2007, even if they were not romantically involved at that time.

Tubbs that McCormack specifically sought information about Ms. A's probation. Therefore, it was not arbitrary, capricious, or an abuse of discretion for MCSC to uphold, in large part, the discipline imposed.

C. Motor Vehicle Accident (Case 3)

As with Case 1, McCormack contends that the Trial Board's case was not supported by a preponderance of the evidence because the witnesses who testified on the State Police's behalf – in this case, Officers Ellis and Waskiewicz – were not credible. However, MCSC specifically found the officers' testimony to be a "credible and consistent" account of their interviews of McCormack and of the other driver involved in the accident. Contrary to McCormack's contention, the fact that Mr. M did not testify is not fatal to the State Police's case. While State Police Rule 6.7.6 grants McCormack the right to cross-examine the witnesses against him, it does not follow that McCormack can compel the State Police to present certain witnesses. McCormack was entitled to, and apparently did, cross-examine Officers Ellis and Waskiewicz and contest the accuracy of Det. Lt. Pagley's transcript of her interview with Mr. M. MCSC nonetheless determined that the officers were credible and that McCormack made improper statements to Mr. M and to Officers Ellis and Waskiewicz. That McCormack disagrees with MCSC's determination does not make it arbitrary, capricious, or an abuse of discretion.

D. Medical Information and Drug Abuse (Case 4)

The only portion of this case ultimately upheld by MCSC was Charge 4, Specifications 1 and 2 (Truthfulness).<sup>9</sup> Specification 1 related to McCormack's failure to disclose to his primary care physician that he was also receiving prescriptions from two other doctors. MCSC concluded, based on Dr. O'Neill's testimony, that McCormack had failed to disclose his

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<sup>9</sup> MCSC overturned the remainder of the Trial Board's guilty findings in this Case, partially in its original decision of December 23, 2013 and the rest in its reconsideration decision of February 7, 2014.

concurrent narcotics prescriptions and had therefore “obtained prescription controlled substances through misrepresentation, failure to disclose a material fact, and/or fraud.” (Decision at 83).

McCormack contends that MCSC had insufficient evidence to conclude that the State Police had just cause to discipline him for this Specification, because there was no evidence that he had actually filled any of the duplicate prescriptions. However, as MCSC reasoned, an analogy may be drawn to the criminal law prohibiting fraud in obtaining controlled substances, which prohibits both uttering false prescriptions and “knowingly or intentionally acquir[ing] or obtain[ing] possessions of a controlled substance by . . . fraud . . . including . . . the nondisclosure of a material fact in order to obtain a controlled substance from a practitioner.” G.L. c. 94C, § 33(b). In other words, there is fraud (that is, untruthfulness) in McCormack’s failure to disclose to Dr. O’Neill his prescriptions from Dr. Bonano and Dr. Lowney, because Dr. O’Neill would not have issued the prescription had he known of the other prescriptions. It was therefore not arbitrary, capricious, or an abuse of discretion for MCSC to find that the Trial Board had just cause to discipline McCormack for untruthfulness.

Specification 2 related to McCormack’s failure to disclose on his Back Assessment Form that he had on two prior occasions missed work due to back injuries. MCSC concluded that although the Specification indicates that McCormack’s untruthful assertions about his medical condition took place between 2002 and 2011, “the related Charges and Specifications clearly indicate that it is on these forms at the beginning of his State Police career that McCormack was untruthful regarding his medical condition.” (Decision at 76.) McCormack contends that MCSC’s decision was based on insufficient evidence because of the discrepancy in time period between the Specification as initially stated and the evidence presented at the Trial Board and MCSC hearings, but the Decision makes it clear that MCSC considered this timing issue and

concluded that the State Police had nonetheless adequately supported the charge that McCormack had been untruthful with regard to his back injuries. Without more, the Court cannot conclude that this determination was arbitrary, capricious, or an abuse of discretion.

## II. The State Police's Motion

The State Police seek judicial review, and move for judgment on the pleadings, as to so much of the MCSC Decision as orders the State Police to reimburse McCormack for 40 days' suspension without pay. The Decision was based on its finding that there was no just cause to discipline McCormack on five of the fifty-six charges MCSC reviewed on appeal, and that therefore back pay was warranted for the forty days of McCormack's four-and-a-half year suspension without pay attributable to those five charges. The State Police do not dispute MCSC's exclusion of evidence pursuant to its ruling on McCormack's Motion In Limine, nor do they dispute that MCSC properly found that, because of the aforementioned ruling, it was required to find Case 4 unsupported in its entirety. Rather they contend that MCSC's order to award back pay was based upon an error of law, and thus subject to reversal, for two reasons.

The State Police first contend that McCormack was suspended during the forty days in question as a result of duty suspension hearings, which he failed to timely appeal and over which MCSC has no jurisdiction. However, MCSC's reconsideration Decision of February 7, 2014 made it clear that it recognized its lack of jurisdiction over duty suspension hearings and was not requiring the State Police to reimburse McCormack "retroactive to August 3, 2008," i.e., for the period he was suspended without pay as a result of duty suspension hearings. (Reconsideration Decision at 2; see also Reconsideration Decision at 2 n. 4 ("there is an anomaly wherein a State Police officer may be suspended without pay via a Trial Board and seek a remedy [here] but if he is suspended without pay via a duty status hearing, he is not authorized to seek a remedy here"))).

Rather, MCSC's Decision and reconsideration Decision make it clear that the suspensions without pay that it was reviewing were the ones the Trial Board itself imposed in Case 2, Charge 3, Specification 1 and Charge 4, Specification 1 (10 days' concurrent suspension without pay) and in Case 4, Charge 1, Specification 1 and Charge 2, Specification 1 (30 days' concurrent suspension without pay). It is therefore clear the MCSC acted within its authority to review the Trial Board's actions when it reviewed those suspensions.

The State Police also contend that even if MCSC reviewed the correct suspensions, MCSC only has authority to order back pay in cases where an officer is reinstated, which McCormack was not. For this proposition, they rely on G.L. c. 31, § 43, which provides that "[i]f the [MCSC] 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 . . ." On the State Police's interpretation, these are MCSC's only options: it must affirm the action of the appointing authority (here, the State Police) *in toto*, or it must return the employee to his position.

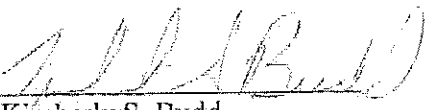
However, in a separate sentence, § 43 explicitly provides that MCSC "may *also* modify any penalty imposed by the appointing authority" (emphasis added). The qualifier "also" makes it clear that MCSC's authority to modify penalties is separate from and cumulative with its authority to affirm or reverse the action of the State Police. Massachusetts courts have traditionally treated a suspension as discipline imposed, not as a mere change in status prior to the imposition of actual discipline. See, e.g., *O'Hara v. Comm'r of Public Safety*, 367 Mass. 376 (1975) (suspension of State trooper without hearing did not violate trooper's 14th Amendment right to due process *because* trooper could thereafter contest suspension at discharge hearing).

Therefore, it was not an error of law for MCSC to modify the penalty (i.e., the suspension and concomitant loss of pay) imposed on McCormack by awarding back pay to McCormack for the forty days of suspension it found the State Police had lacked just cause to impose.

**ORDER**

It is therefore **ORDERED** that Edward McCormack's Motion for Judgment on the Pleadings be **DENIED** and that the Department of State Police's Motion for Judgment on the Pleadings be **DENIED**.

August 6, 2015

  
Kimberly S. Budd  
Justice of the Superior Court