

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

**STEPHEN
McDONOUGH,**

Appellant

v.

**DEPARTMENT OF
STATE POLICE,**

Respondent

Case No.: D-13-136

DECISION

Pursuant to G.L. c. 31, § 2(b) and/or G.L. c. 7, § 4H, a Magistrate from the Division of Administrative Law Appeals (DALA), was assigned to conduct a full evidentiary hearing regarding this matter on behalf of the Civil Service Commission (Commission).

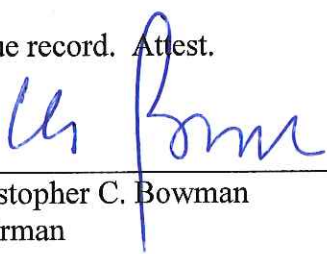
Pursuant to 801 CMR 1.01 (11) (c), the Magistrate issued the attached Tentative Decision to the Commission. The parties had thirty (30) days to provide written objections to the Commission. The Commission received and reviewed the written objections of the Appellant and the Respondent's responses to the Appellant's objections.

After careful review and consideration, the Commission voted to affirm and adopt the Tentative Decision of the Magistrate in whole, thus making this the Final Decision of the Commission.

The decision of the Department of State Police to require the Appellant to forfeit ten (10) days of vacation is affirmed and the Appellant's appeal is *denied*.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis and Stein, Commissioners [McDowell- Absent]) on January 23, 2014.

A true record. Attest.



Christopher C. Bowman
Chairman

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)(I), 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.

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

Notice to:

Joseph T. Kittredge, Esq. (for Appellant)

Sean W. Farrell, Esq. (for Respondent)

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

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

STEPHEN F. McDONOUGH,

Appellant

v.

DEPARTMENT OF STATE POLICE,

Respondent

Division of Administrative Law Appeals

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Boston, MA 02114

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Docket Nos.: D1-13-136, CS-13-519

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Administrative Magistrate:

Angela McConney Scheepers, Esq.

SUMMARY OF TENTATIVE DECISION

The Department of State Police had just cause to discipline the Appellant, a superior officer trained to prevent workplace violence, after he engaged in trading insults and a physical altercation with a subordinate. I therefore recommend that the Civil Service Commission dismiss the appeal.

TENTATIVE DECISION

INTRODUCTION

Pursuant to the provisions of G.L. c. 31, § 43 and G.L. c. 22C, § 13 as amended by Chapter 43 of the Acts of 2002, the Appellant, Stephen F. McDonough (Appellant), is appealing

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the decision of the Department of State Police (Department or Respondent), requiring him to forfeit ten (10) vacation days.

The appeal was timely filed on June 3, 2013. A pre-hearing conference was held on July 9, 2013 at the offices of the Civil Service Commission, One Ashburton Place, Room 503, Boston, MA 02108. Pursuant to 801 CMR 1.01(11)(c), on September 6, 2013, a Magistrate from the Division of Administrative Law Appeals (DALA) conducted a full hearing at DALA, One Congress Street, Boston, MA 02114 in accordance with the Formal Rules of the Standard Rules of Practice and Procedure. 801 CMR 1.01. The hearing was digitally recorded. The witnesses were sequestered.

The Appellant testified on his own behalf. Lieutenant Martin Gaughan, Sergeant James M. Vines and Trooper Stuart A. Banks (Ret.) testified for the Respondent. Seven (7) exhibits were admitted into evidence. I admitted the Appellant's Discipline Appeal Form as Exhibit 8, and the Stipulated Facts, signed by the parties at the July 9, 2013 pre-hearing conference, as Exhibit 9. The Appellant submitted his post-hearing brief on October 16, 2013. The Respondent submitted its post-hearing brief on October 17, 2013, whereupon the record closed.

FINDINGS OF FACT

Based on the documents entered into evidence and the testimony of the witnesses, I make the following findings of fact:

1. The Appellant, Stephen F. McDonough, was hired by the Department as a trooper on April 4, 1988. He became a sergeant on December 7, 1997, and has been assigned to the Brighton Barracks (H-5) for fifteen years. (Exhibit 9; Testimony of the Appellant.)
2. The Appellant worked as the 7:00 a.m. to 3:00 p.m. day shift sergeant. He was responsible for providing leadership and guidance to the troopers under his command. He also

performed specific administrative duties and functions as designated by senior supervisory employees. (Testimony of the Appellant, Testimony of Lt. Gaughan).

3. The Appellant was also responsible for payroll, making sure that H-5 troopers properly completed their hour and time sheets. The troopers entered their work attendance via "PayStation," a computerized payroll system. The Appellant had to make sure that his troopers entered their attendance into PayStation at the close of each weekly pay period. (Testimony of the Appellant, Testimony of Lieutenant Gaughan.)

4. Trooper Stuart Banks (ret.) (Banks) was a trooper for twenty-four years. He was assigned to the day shift at H-5. His duties revolved around motor vehicle accidents, assisting disable motorists, and serving the public. (Testimony of the Appellant, Testimony of Banks.)

5. The Appellant was his supervisor for the past five years. (Testimony of the Appellant, Testimony of Banks.)

6. On July 30, 2011, the Appellant was reviewing troopers' attendance and payroll when he noticed discrepancies on Banks's entries into PayStation. Banks had incorrectly entered his overtime and detail hours. (Testimony of the Appellant.)

7. Because Banks was scheduled to work the following day, the Appellant left a note for him requesting that he correct his PayStation entries when he reported to work. (Testimony of the Appellant.)

8. This was not the first time that the Appellant had dealt with Banks and payroll issues. In the recent past, the Appellant had been ordered to audit Banks's time records for his use of time off and to determine if his leave balances were correct. Although the Appellant afforded Banks the opportunity to justify his time off with the records at the barracks, Banks never did so. As a result of the Appellant's investigation, the Department concluded that Banks

had used time that was not justified, and he was required to reimburse the Department thousands of dollars. Banks was placed on probation, and remained on probation on July 31, 2011.

(Testimony of the Appellant, Testimony of Banks.)

9. On July 31, 2011, Banks was re-assigned to the Milton Barracks (H-7) due to a shortage of staff. (Testimony of the Appellant, Testimony of Banks.)

10. At approximately 9:00 a.m. on July 31, 2011, the Appellant discovered that Banks had been re-assigned to H-7 for the day due to that barracks' shortage of staff. At 9:30 a.m. Banks was en route in his cruiser to H-5 when the Appellant called him on his cellphone, and advised him to correct his PayStation entries before noon. (Testimony of the Appellant, Testimony of Banks.)

11. The PayStation entries could have been corrected at either barracks, H-5 or H-7. (Testimony of the Appellant.)

12. The Appellant and Trooper Banks shared a second phone call wherein Banks sought clarification on what needed to be corrected on his PayStation entries. The Appellant had to repeat himself several times in order for Banks to understand. (Testimony of Banks, Testimony of the Appellant.)

13. Instead of continuing to his assigned shift at H-7, and correcting his PayStation entries there, Banks turned his cruiser around and headed to H-5. Once there, he walked through the front area to a back room, and corrected his PayStation entries on the computer terminal there. (Testimony of the Appellant, Testimony of Banks.)

14. After he had corrected the entries on PayStation, Banks returned to the front area where the Appellant was standing and told the Appellant that he did not like the way he had spoken to him on the phone. The Appellant replied that he did not like the manner in which

Banks had spoken to him. He asked Banks what the problem was, and Banks replied, "You are the problem." (Testimony of the Appellant, Testimony of Banks.)

15. Banks then "got in the Appellant's face" so that their faces were very close together. They then began arguing and bumping their chests against each other. (Testimony of the Appellant, Testimony of Banks.)

16. The Appellant said, "Stu, you have to back off." He then shoved Banks away from him. Banks approached the Appellant and got their faces close together. The two then engaged in a shoving contest. Banks said to the Appellant, "You pushed me." The Appellant replied that he had not. Banks called the Appellant a "bitch." The Appellant then hit Banks in the face, giving him a bloody lip. The Appellant then pinned Banks's arms to his sides so that he could not retaliate. (Testimony of the Appellant, Testimony of Banks.)

17. On July 31, 2011, Sergeant James M. Vines (then Trooper Vines) was at H-5, preparing to work out in a back room, when he heard the Appellant and Banks arguing. Vines, a trooper for thirty years, became a sergeant on March 12, 2012. At the time of the incident, Vines had been working for the Appellant for less than a year. (Testimony of Vines.)

18. Vines left the back room and came out to the front area. He approached the parties in order to separate them. When the Appellant asked for assistance, Vines held Banks's hands to his sides. Banks then said to the Appellant, "Nobody likes you." The Appellant repeated this phrase back to the Appellant. The Appellant also said, "Why don't you leave." (Testimony of Vines, Testimony of Banks.)

19. Vines then escorted Banks out of the H-5 Barracks building. Banks told Vines that he was not happy because he had to fix his payroll. Vines advised Banks to go to Milton, call Brighton, and try to resolve what was going on between him and the Appellant. As Banks

walked toward his cruiser, Vines turned around and re-entered H-5 in order to continue his workout. (Testimony of Vines, Testimony of Banks.)

20. On July 31, 2011, Martin J. Gaughan (Lt. Gaughan) was assigned to Troop "H" Headquarters (HHQ), located in South Boston. He had served the Department for twenty-five years and had become a lieutenant in June 2011. On June 31, 2011, Lt. Gaughan was serving as the shift supervisor for the day-shift. (Testimony of Lt. Gaughan.)

21. At 9:50 a.m., the Appellant telephoned Lt. Gaughan, requesting that a lieutenant respond to H-5 because he and Banks had come to blows. The Appellant never mentioned that he was defending himself. Lt. Gaughan informed the Appellant that he was the only lieutenant working, so it would not be possible for him to leave HHQ. Lt. Gaughan advised that both the Appellant and Banks should come to HHQ. The Appellant then had to end the call because another line was ringing. The conversation was very short. (Exhibit 7; Testimony of the Appellant, Testimony of Lt. Gaughan.)

22. Banks was in his cruiser when he received a radio transmission to go to HHQ. Banks then re-entered H-5, still agitated. From the back room, Vines was unaware that Banks had re-entered the building. Banks said to the Appellant, "What do you want me to say, bitch." He asked if the Appellant was serious, and if he had to go to HHQ. (Testimony of Banks, Testimony of the Appellant.)

23. The Appellant called Lt. Gaughan again. This time the Appellant informed Lt. Gaughan that he had telephoned Banks regarding PayStation issues, advising Banks to come into H-5 to correct his mistakes. The Appellant informed Lt. Gaughan that the telephone conversation became heated and ended abruptly. The Appellant recounted that when Banks arrived at H-5, he began arguing with the Appellant. Banks bumped the Appellant's chest and

engaged in pushing with the Appellant. The Appellant said that he then punched Banks and split his lip. (Exhibit 7; Testimony of the Appellant, Testimony of Lt. Gaughan.)

24. Lt. Gaughan then advised the Appellant to stay at H-5. Lt. Gaughan then called Major Grenham, who ordered that Lieutenant Edward Connolly be contacted to conduct an investigation. (Exhibit 7; Testimony of the Appellant, Testimony of Lt. Gaughan.)

25. At 10:07 a.m., Banks arrived at HHQ. Lt. Gaughan did not observe any injury to Banks's face. After he was advised that Lt. Connolly would be handling the investigation, Banks kept repeating that the incident should not have gone this far. Banks sat in the Duty Office and used his telephone. (Exhibit 7; Testimony of the Appellant, Testimony of Lt. Gaughan.)

26. Lt. Connolly later called the Appellant at H-5, but, upon advice of counsel, the Appellant refused to speak to him. (Testimony of the Appellant.)

27. The Internal Affairs Department investigated the Appellant's conduct. The Appellant was charged with violating Rules and Regulations for the governance of the Department of State Police, and a complaint issued under Investigation #IAS #2011-037. (Exhibits 2, 3 and 4.)

28. The Complaint listed the charges as follows:

Charge I. Violation of Rules. Specification I. Article 5.1
... [the Appellant] on or about July 31, 2011, did conduct himself in such a manner to violate a Massachusetts State Police Rule, Regulation, Policy, Procedure, Order, or Directive This occurred when Sergeant McDonough violated State Policy and Procedure ADM-29 relative to Workplace Violence. This action is in direct violation of Article 5.1. This is a Class "B" violation.

Massachusetts State Police Rules and Regulations Article 5.1 (Violation of Rules) provides:

Members shall not commit, nor cause to be committed, any act(s) or omit any act(s) which constitute(s) a violation of any Massachusetts State Police Rule, Regulation, Policy, Procedure, Order or Directive.

State Policy and Procedure ADM-29, Workplace Violence provides:

... The Department shall maintain zero tolerance for workplace violence and ensure the workplace environment remains free from any form of violence.

Workplace violence shall include, but is not limited to:

- Intimidation or threats communicated by any means;
- Physical assault and/or battery;
- Threats and/or acts of intimidation communicated by any means that cause an employee to be in fear of their *[sic]* own safety;
- Disruptive or aggressive behavior that causes a reasonable person to be in fear of their own safety or that of a colleague or that causes disruption of workplace productivity; ...

Disciplinary Action

Any employee found to have engaged in any act of workplace violence, in violation of this policy, is subject to disciplinary action up to and including termination. ...

Responsibilities for the position of supervisor under ADM-29 include:

... Aggressively monitor the workplace to prevent and detect workplace violence;
Take appropriate corrective action to stop workplace violence;
Immediately report any incident of workplace violence to the Troop/Section Duty Officer and the Workplace Violence Safety Incident Team Member ...

(Exhibits 2, 3 and 4.)

Charge II. Conformance to Laws. Specification I. Article 5.4.1

... [the Appellant] on or about July 31, 2011, did fail to conform to the laws of the United States, specifically the laws of Massachusetts. This occurred when Sergeant McDonough committed an Assault and/or Assault & Battery on Trooper Stuart Banks. This action is in direct violation of Article 5.4.1. This is a Class "B" violation.

Massachusetts State Police Rules and Regulations Article 5.4.1 (Conformance to Laws)

provides:

Members shall obey all laws of the United States and of any country, state, or local jurisdiction in which the members are present.

(Exhibits 2 and 3.)

Charge III. Insubordination. Specifications I and II. Articles 5.12.1 and 5.12.3
Specification I.

... [the Appellant] on or about July 31, 2011, did assault, strike, threaten, draw or lift up any weapon, or feign violence against any employee of the Massachusetts State Police. This occurred when Sergeant McDonough committed an Assault

and/or Assault & Battery on Trooper Stuart Banks. This action is in direct violation of Article 5.1. This is a Class "A" violation.
Specification II.

...[the Appellant] on or about July 31, 2011, did use threatening or insulting language or behave in any insubordinate or disrespectful manner toward any employee of the Massachusetts State Police. This occurred when Sergeant McDonough used inappropriate language and behaved in a disrespectful manner toward Trooper Stuart Banks. This action is in direct violation of Article 5.12.3. This is a Class "B" violation.

Massachusetts State Police Rules and Regulations Article 5.12.2 (Insubordination) provides:

Members shall not assault, strike, threaten, draw or lift up any weapon, or feign violence against any employee of the Massachusetts State Police.

Massachusetts State Police Rules and Regulations Article 5.12.3 (Insubordination) provides:

Members shall not use threatening or insulting language or behave in any insubordinate or disrespectful manner toward any employee of the Massachusetts State Police.

(Exhibits 2 and 3.)

29. The Appellant had no previous disciplinary history. (Testimony of the Appellant.

30. On May 13, 2013 and subsequent dates, the Trial Board convened at State Police Headquarters in Framingham, Massachusetts and held a hearing pursuant to Article 6 of the Rules and Regulations. The Trial Board members were Captain Thomas J. Majenski as President, Lieutenant Robert J. Ferraro as Member and Lieutenant Robert E. Teves as Secretary.

(Exhibits 1, 5 and 6.)

31. After careful review of the evidence, on May 15, 2013 the Board voted unanimously and made the following findings:

Charge #1, Specification #1, Guilty; Forfeit 5 days of vacation
Charge #2, Specification #1, Guilty; Punishment concurrent with Charge #1, Specification #1
Charge #3, Specification #1, Guilty; Forfeit 5 days of vacation
Charge #3, Specification #2, Guilty; Punishment concurrent with Charge #3, Specification #1

Total forfeit of 10 days of accrued vacation time

32. The Trial Board heard testimony that the Appellant had struck Banks in the face causing a split lip. The Board found that by such conduct, the Appellant violated Department policy and Procedure ADM-29. Although the Appellant argued self-defense, the Board found that the level of threat did not rise to the amount of the violence used. The Board found that the Appellant's actions constituted a violation of Article 5.1 and found him guilty of Charge #1, Specification #1. (Exhibit 6.)

33. The Board stated that it was disheartening that the Appellant was in a position to de-escalate the situation, but did not possess the skills to do so. The Board wrote that the Appellant had an obligation to himself, Banks and the Department to act like a sergeant when confronted by Banks. The Board found that the Appellant's testimony that he was allowing Banks to vent does a disservice to the rank of sergeant and supervisor in the Department. The Board found that on July 31, 2011, the Appellant failed to perform as a sergeant on the Massachusetts State Police. (Exhibit 6.)

34. Still on probation, Banks retired before facing discipline for the July 31, 2011 event. Because he was subject to charges at his retirement, he received a general discharge rather than an honorable discharge. (Testimony of Banks, Testimony of Gaughan.)

35. On May 20, 2013, Colonel/Superintendent Timothy P. Allen approved the May 15, 2013 findings of the Trial Board. He imposed the forfeiture of ten (10) days of accrued time upon the Appellant on May 21, 2013. (Exhibits 1 and 9.)

36. On June 3, 2013, the Appellant filed an appeal with the Commission. (Exhibit 8.)

CONCLUSION AND ORDER

A. *Applicable Legal Standards*

A tenured Massachusetts State Trooper aggrieved by a disciplinary decision imposed by the Department pursuant to M.G.L. c. 22C, § 13, may appeal to the Commission for a de novo review 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. (emphasis added.)

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." *Cambridge v. Civil Service Comm'n*, 43 Mass. App. Ct. 300, 304, *rev. den.*, 426 Mass. 1102, (1997). *See also 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.* (2000); *McIsaac v. Civil Service Comm'n*, 38 Mass App. Ct. 473, 477 (1995); *Watertown v. Arria*, 16 Mass. App. Ct. 331, 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. of Boston*, 359 Mass. 211, 214 (1971); *Cambridge v. Civil Service Comm'n*, 43 Mass. App. Ct. 300, 304, *rev. den.*, 426 12 Mass. 1102, (1997); *Selectmen of Wakefield v. Judge of First Dist. Ct.*, 262 Mass. 477, 482

(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 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).

"The commission's task . . . is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . 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.'" *Falmouth v. Civil Service Comm'n*, 447 Mass. 814, 823 (2006). *See Watertown v. Arria*, 16 Mass. App. Ct. 331, 334, *rev. den.*, 390 Mass. 1102 (1983) and cases cited.

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. Department 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).

B. The Respondent had Just Cause to Discipline the Appellant

The Department of State Police has shown, by a preponderance of the evidence, that it had just cause to discipline the Appellant.

It is undisputed that, after an argument over payroll issues, the Appellant struck Banks in his face on July 31, 2011 and split his lip. Although Lt. Gaughan did not observe any injury to Banks's face, Banks, Vines and the Appellant all testified that the Appellant had a split lip. Thus the weight of the evidence support the conclusion that Banks had a split lip. The Appellant was charged and later found guilty by the Trial Board of violating the Rules and Regulations of the Department Article 5.1 (Violation of Rules), Article 5.4.1 (Conformance to Laws), and Articles 5.12.2 and 5.12.3 (Insubordination).

In its complaint, Internal Affairs charged the Appellant with Charge # I, Specification #1, a violation of Article 5.1, Violation of Rules. The Trial Board found that on or about July 31, 2011, the Appellant conducted himself in such a manner to violate a Massachusetts State Police Rule, Regulation, Policy, Procedure, Order, or Directive. This occurred when the Appellant violated State Policy and Procedure ADM-29 relative to Workplace Violence by striking Banks in the face and causing a split lip.

Although the Appellant testified that his actions were in self-defense after Banks threw two punches at him, the Trial Board found that the force used exceeded the amount required to counter the threat. I conclude that the Appellant struck Banks in the face in violation of State Police Article 5.1 (Violation of Rules).

In its complaint, Internal Affairs charged the Appellant with Charge # 2, Specification #1, a violation of Article 5.4.1, Conformance to Laws. The Trial Board found that on or about July 31, 2011, the Appellant failed to conform to the laws of the United States, specifically the laws of Massachusetts. This occurred when the Appellant committed an assault and/or assault and battery on Banks.

As stated above, although the Appellant claimed that his actions were in self-defense after the Appellant tried to punch him twice, the Trial Board found that the force used exceeded the amount required to counter the threat. In neither phone call to Lt. Gaughan, did the Appellant mention self-defense or two punches from the Appellant. When Lt. Connolly first questioned the Appellant about the altercation, the Appellant refused to discuss the matter upon advice of counsel. There was no record in Lt. Gaughan's memorandum to Major Grenham of Banks being the aggressor.

The Board found that the Appellant's testimony of being assaulted by Banks was not credible. Banks credibly testified before DALA that he swore at the Appellant, and was disrespectful and insubordinate to the Appellant. However, he maintained that he never raised his hand to the Appellant.

I find that Banks was credible. The Appellant's claim of self-defense after Banks threw two punches at him is not credible. Based on a preponderance of the credible evidence, I conclude that the Appellant, in fact, punched Banks in the face, in violation of State Police Article 5.4.1 (Conformance to Laws).

In its complaint, Internal Affairs charged the Appellant with Charge # 3, Specification #1, a violation of Article 5.12.2, Insubordination. The Trial Board found that the Appellant admitted

to striking Banks on July 31, 2011 in violation of the article which states that members shall not assault, strike, threaten ... violence against any employee of the Department.

Although the Appellant testified that he was unaware of any animosity between him and Banks before July 31, 2011, sergeants cannot supervise through the use of physical force. I find that the Appellant struck Banks in the face in violation of State Police Article 5.12.2.

(Insubordination).

In its complaint, Internal Affairs charged the Appellant with Charge # 3, Specification #2, a violation of Article 5.12.3, Insubordination. The Trial Board found that the Appellant used inappropriate language and behaved in a disrespectful manner toward Banks on July 31, 2011 in violation of the article which states that members shall not use threatening or insulting language or behave in any insubordinate or disrespectful manner toward any employee of the Department. Vines heard raised voices and shouting between the Appellant and Banks. Vines grew so concerned that he entered the room and separated the parties. Vines testified that he heard the Appellant, in a disrespectful manner, speaking with a raised voice and shouting at Banks that he should leave and that, "Nobody likes you." Furthermore, the Appellant's statements and actions toward a subordinate officer under these circumstances were not only disrespectful and unbecoming, but fell below the standards expected of a Department of State Police superior officer. I find that the Appellant's remarks were in violation of State Police Article 5.12.3 (Insubordination).

Based on a preponderance of the credible testimony given and other evidence presented, the Appellant failed to conduct himself in a manner befitting a superior officer when confronted by Banks. On July 31, 2011, the Appellant had an obligation to himself, Banks and the Department to take appropriate supervisory action in order to defuse this tense situation. He was

mandated by the mantle of a superior officer to monitor the workplace to prevent, detect and take corrective action to prevent workplace violence.

At all relevant times of the instant matter, the Appellant was a supervising sergeant, and Banks was his subordinate. The Appellant had supervised Banks for five years. The Appellant was well acquainted with Banks's foibles and workplace issues. The Appellant testified that Banks had a drinking problem which may have played a role in his workplace absences. The Appellant disingenuously testified that there was no animus between him and Banks. However, the Appellant had recently investigated Banks for previous PayStation entry irregularities, and the Department had ordered Banks to pay back thousands of dollars for hours he had been incorrectly credited. As a matter of fact, on July 31, 2011, Banks was still on probation as a result of the Appellant's investigation. Thus, as a supervisor, the Appellant could have foreseen that Banks would be particularly sensitive or resentful about the order to correct new payroll entries, and handled him accordingly.

Instead, on July 31, 2011 the Appellant failed to perform as a trained professional and failed to behave in a manner becoming a superior officer of the Department of State Police. He took the unprofessional alternative of engaging in schoolyard behavior by trading insults with a subordinate and striking him. This behavior required the intervention of another subordinate in order to de-escalate the incident. Armed officers should not be engaged in shouting matches that lead to physical behavior such as shoving and punching. This is dangerous to the combatant officers and officers in the vicinity, and it reduces the efficiency of the Department. Fortunately, this behavior took place in a barracks, not a public place.

Banks retired rather than face the prospect of further discipline while he was already on probation. Because of his probation and the pending charges from Internal Affairs, Banks received a general discharge rather than an honorable one.

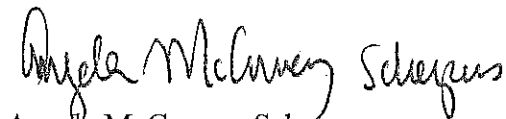
The Department cannot allow superior officers to behave in this manner without penalty. At all times relative to this incident, the Appellant bore the greater responsibility as a sergeant charged with enforcing the Rules and Regulations of the Department. Instead of monitoring the workplace for workplace violence and taking corrective action to prevent the same, the Appellant engaged in workplace violence with a subordinate trooper. The Department had just cause to discipline the Appellant and has stated sound and sufficient grounds for doing so.

There is no evidence that the Department's decision was based on political considerations, favoritism or bias. There is no evidence of inappropriate motivations or objectives that would warrant a reduction in the ten-day forfeiture imposed by the Colonel. Thus the Department's discipline of the Appellant is "not subject to correction by the Commission." *Cambridge*, 43 Mass. App. Ct. at 305.

Based on the preponderance of credible evidence presented at the hearing, I conclude that the Department of State Police had just cause to discipline the Appellant Sergeant Stephen F. McDonough through a forfeiture of ten days of vacation. Accordingly, I recommend that the appeal be dismissed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS



Angela McConney Schepers
Administrative Magistrate

DATED:

NOV 14 2013