

NOTICE: All slip opinions and orders are subject to formal revision and are superseded by the advance sheets and bound volumes of the Official Reports. If you find a typographical error or other formal error, please notify the Reporter of Decisions, Supreme Judicial Court, John Adams Courthouse, 1 Pemberton Square, Suite 2500, Boston, MA, 02108-1750; (617) 557-1030; SJCRReporter@sjc.state.ma.us

18-P-1060

Appeals Court

EDWARD McGOVERN vs. STATE ETHICS COMMISSION.

No. 18-P-1060.

Hampden. March 12, 2019. - October 10, 2019.

Present: Desmond, Sacks, & Lemire, JJ.

State Ethics Commission. Conflict of Interest. Administrative Law, Conflict of interest, Substantial evidence, Judicial review. Evidence, Administrative proceeding, State of mind, Expert opinion. Police Officer. Motor Vehicle, Investigation of accident. Probable Cause.

Civil action commenced in the Superior Court Department on February 3, 2016.

The case was heard by Karen Goodwin, J., on motions for judgment on the pleadings.

Vincent A. Bongiorno (Thomas A. Kenefick, III, also present) for the plaintiff.

Norah K. Mallam (Eve Slattery, Special Assistant Attorney General, also present) for the defendant.

DESMOND, J. After an adjudicatory hearing, the State Ethics Commission (commission) determined that Edward McGovern, an Agawam police lieutenant and public employee, had violated the State conflict of interest law, G. L. c. 268A, in his

disposition of a one-car accident involving a fellow Agawam police officer who was off duty at the time. In brief outline, on the evidence before it, the commission found that McGovern had knowingly used his official position to give Danielle Petrangelo an "unwarranted privilege[]" or "exemption[]" of "substantial value," G. L. c. 268A, § 23 (b) (2) (ii), by his failure to arrest or to cite her for any motor vehicle offense, and by his failure to conduct a meaningful investigation, despite having probable cause to believe that Petrangelo operated her motor vehicle the wrong way on Route 5 in Agawam, i.e., driving southbound in a northbound lane, while intoxicated. It was only a fortuity that other motorists escaped harm, by maneuvering their vehicles to the far right northbound lane so as to avoid Petrangelo's sport utility vehicle (SUV), which then was at a stop in the northbound passing lane, with the key still in the SUV's ignition and the engine running, but facing southbound. Responding police officers found Petrangelo sitting on a guardrail, next to her SUV, distraught. McGovern, the senior ranking officer, asked but few questions of the responding officers who had first come on the scene, before he commanded one officer under his supervision to drive Petrangelo home in a cruiser. At least as of 2012, the Agawam Police Department (department) had established a clearly articulated policy that prohibited its

officers from affording "preferential treatment" to anyone in motor vehicle traffic enforcement cases. As to motor vehicle accidents involving intoxicating liquor, the department policy required that officers "shall take appropriate enforcement action" when the officer "determines that the operator is under the influence of alcohol."

McGovern filed a G. L. c. 30A complaint in Superior Court, seeking judicial review of the commission decision. A judge upheld that decision, ruling that it was supported by substantial evidence in the administrative record and free of error or procedural impropriety. Seeking further review in this court, McGovern now asks us to set aside the commission's decision, citing alleged substantive and procedural errors. We affirm.

Background. 1. Facts. We briefly summarize the facts found by the commission. On the evening of June 29, 2012, at about 9:15 P.M., the West Springfield Police Department received an anonymous 911 call reporting a wrong-way driver on Route 5 North. This information was transmitted over the Western Massachusetts law enforcement communications radio system. McGovern heard the report of a wrong-way driver. West Springfield Police Officer Eric Johnson and Agawam Police Officers William Pierson and James Wheeler were all dispatched to find the wrong-way driver. Within minutes, Officer Johnson

located a tan SUV on Route 5 North in Agawam. Officer Johnson brought his cruiser to a halt, "nose to nose" with the front end of the tan SUV, which was stopped in the northbound passing lane of Route 5. Officer Johnson saw Petrangelo sitting on the guardrail next to the passenger side of the SUV. Petrangelo was crying. Officer Johnson knew Petrangelo because both had gone to the same high school, and he knew that she was an Agawam police officer. Soon after, Officer Pierson arrived at the accident scene, as did Officer Wheeler, who came on the scene several minutes later. The SUV's engine was still running when Officer Pierson arrived. Wheeler and Pierson noticed damage on the passenger side of the SUV consistent with it striking a guardrail. Pierson, Wheeler, and Petrangelo were all coworkers at the department. Pierson, who was a close friend of Petrangelo, knew that Petrangelo had been placed on administrative leave from the department pending an internal investigation into an incident in which Petrangelo shot an unarmed woman in the face at the scene of a domestic dispute. Officers Johnson, Pierson, and Wheeler were uncomfortable handling this one-car accident because of their relationship with Petrangelo. Officer Pierson, believing that he had a conflict of interest, contacted his supervisor, Sergeant Anthony

Grasso, for assistance.¹ Sergeant Grasso, who was then handling a different matter, called McGovern and told him that Petrangelo was involved in the Route 5 incident and that the officers at the scene needed assistance from a superior.² McGovern agreed to go to the scene.

To make Route 5 North safe for other motorists, Officers Wheeler and Pierson moved the three police cruisers to the side of the road, and Wheeler then moved the SUV to an access road directly off Route 5. (The only way to enter or to exit this access road was from Route 5.) McGovern arrived at the scene shortly after the vehicles were moved. As the highest ranking officer present, McGovern became the officer-in-charge of the accident scene.³ McGovern, who had known Petrangelo since 2000

¹ At the hearing, Officer Pierson testified: "[Petrangelo] asked me if I . . . was going to arrest her. And I told her that it wasn't my call. A supervisor was en route." Officer Pierson also testified that, based on his observations of Petrangelo, i.e., she had bloodshot eyes, her breath had an odor of alcohol, and she was distraught and crying, he believed that Petrangelo was intoxicated. Officer Pierson further testified: "I believe[,] . . . [k]nowing the vehicle to be hers, I believe she was operating the vehicle [when] it came to its final resting place in the left-hand lane" on Route 5 North, the SUV facing "south" (the wrong way) on that northbound highway. Officers Pierson and Wheeler "assisted" Petrangelo and helped her get situated in the front seat of Pierson's cruiser.

² In the telephone call that Sergeant Grasso initiated to McGovern at approximately 9:30 P.M., Sergeant Grasso informed McGovern that Officers Pierson and Wheeler had "Danielle up there" (on Route 5) and that these officers "needed help" from a supervisor.

when she became a member of the department, recognized Petrangelo's SUV. He noticed that she was then sitting in the front seat of Officer Pierson's cruiser. McGovern also noticed that, apart from the police cruisers on scene, Petrangelo's SUV was the only motor vehicle present. McGovern spoke to Petrangelo. He asked her how she had arrived there, where she had been, and who she had been with; she in turn stated that she had been in Springfield with a friend but "didn't know" how she had gotten there. When McGovern asked if the friend had been driving, Petrangelo's demeanor changed, her tone became serious, and she stated, "[Y]ou're here to hurt me."⁴ McGovern believed that Petrangelo was intoxicated.

After he had finished speaking with Petrangelo, McGovern spoke with the other officers. By then, Sergeant Grasso had arrived at the scene.⁵ McGovern asked Officer Johnson whether

³ As defined in the department rules and regulations, an "officer-in-charge" is an "officer in command of any functional unit or subdivision of the department at any given time . . . responsible for any police action or operation."

⁴ McGovern responded that he was not there to hurt her, but was trying to figure out what had transpired. Petrangelo answered, "[N]o you're not. You're the boss. I know the game. I'm not taking your tests. I'm not going to the hospital. I'm not answering your questions."

⁵ Sergeant Grasso was Petrangelo's direct supervisor. The two then spoke. Petrangelo spoke bluntly, admitting: "I'm sorry. I screwed up. I did it to you again. I'm embarrassed." Sergeant Grasso later testified that he would have arrested Petrangelo, or issued her a citation for operating while

"he had any charges in his city." Johnson confirmed there were none. McGovern asked all three officers (Johnson, Pierson, and Wheeler) if there were any witnesses. The three officers advised that there were no witnesses. McGovern then asked whether the officers had "operation," i.e., whether any officers had evidence that Petrangelo had been driving the SUV. The three officers stated that they did not. McGovern did not ask these officers where the SUV had been found at the scene, or whether Petrangelo had made any statements or admissions. McGovern did not order any of his subordinate officers to make a report of the incident.

Speaking privately with Sergeant Grasso, McGovern stated, "[W]e can't arrest her." McGovern then ordered Officer Pierson to drive Petrangelo to her residence.⁶ McGovern did not order the officers under his charge to arrest or to cite Petrangelo for operating while intoxicated (OUI) or driving to endanger. McGovern, driving his own police car, followed Officer Pierson to Petrangelo's residence.⁷ At the beginning of his next shift

intoxicated, but recurred to the fact that McGovern was then the officer-in-charge and that it was McGovern who had the responsibility to make that decision.

⁶ McGovern ordered Sergeant Grasso and Officer Wheeler to drive the SUV to the Agawam police station.

⁷ Contrary to McGovern's contentions, the commission did not find that he was present when Petrangelo admitted to another officer that she had been driving. Also, the commission could

the following day, Saturday, June 30, McGovern spoke with Acting Police Chief Richard Light about the incident, the latter then indicating that he planned to assign the matter to an internal affairs investigation and advised McGovern not to take any other action in connection with this incident.

2. Procedural history. The commission issued a show cause order to McGovern.⁸ McGovern answered the show cause order. Following McGovern's unsuccessful motion for summary decision,⁹ the commission chair, a retired Superior Court judge, presided at an adjudicatory hearing on September 11 and 15, 2018;¹⁰

reasonably infer that McGovern knew that Petrangelo's purse had been in the SUV.

⁸ "An investigation by the commission occurs in three distinct stages." Doe v. State Ethics Comm'n, 444 Mass. 269, 271 (2005). First, "[a]n initial staff review begins with the commission's receipt of allegations that violations of G. L. c. 268A or G. L. c. 268B have occurred." Id. at 272. Second, the commission may authorize a preliminary inquiry and issue a show cause order to the alleged offending State, county, or municipal employee. See id.; Craven v. State Ethics Comm'n, 390 Mass. 191, 196-197 (1983). Third, in those instances where "the preliminary inquiry indicates reasonable cause to believe that there has been a violation, [G. L. c. 268B, § 4 (c),] directs that the commission 'may, upon a majority vote, initiate an adjudicatory proceeding to determine whether there has been a violation.'" Doe, supra, quoting § 4 (c).

⁹ See 930 Code Mass. Regs. § 1.01(6)(e) (2012) (motion for summary decision, as administrative equivalent of motion for summary judgment). See also Commercial Wharf E. Condominium Ass'n v. Department of Env'tl. Protection, 93 Mass. App. Ct. 425, 427 (2018).

¹⁰ General Laws c. 268B, § 4 (e), authorizes any commission member to administer oaths and to hear testimony or receive

McGovern testified, as did Sergeant Grasso and Officers Pierson, Wheeler, and Johnson. Petrangelo did not testify before the commission.¹¹ Among witnesses who testified on behalf of McGovern was Richard Marchese, a former police officer and chief of the Longmeadow Police Department, and former executive director of the Massachusetts Chiefs of Police Association and Municipal Police Institute.¹² Former Police Chief Marchese testified as an expert and opined that McGovern "should not have done anything differently."

Ultimately, in a comprehensive ten-page decision, the commission concluded that its enforcement division had proven, by a preponderance of the evidence, that McGovern, knowingly or with reason to know, had used his official position, as a department lieutenant, to decide not to arrest or to cite

evidence in "any proceeding" before the commission. Doe v. State Ethics Comm'n, 444 Mass. at 272. The commission shall determine, by a preponderance of the evidence, whether the alleged offender did in fact violate the conflict of interest (c. 268A) or financial disclosure (c. 268B) law. Doe, supra. General Laws c. 268B, § 4 (k), provides for judicial review of final action taken by the commission under either statute. Doe, supra. Upon "commencement of formal adjudicatory proceedings, confidentiality provisions no longer apply." Id.

¹¹ In lieu of testifying before the commission, the parties (and Petrangelo) agreed to offer in evidence an official transcript of her prehearing deposition, conducted on April 1, 2015.

¹² Also testifying in McGovern's case were Officer Wheeler, Agawam Police Lieutenant Jennifer Blanchette, and Agawam Police Chief Eric Gillis.

Petrangelo at the scene, when there was probable cause to do so; that McGovern had failed to conduct a meaningful investigation; and that McGovern had, by his conduct as a whole, provided Petrangelo with "preferential treatment, which amounted to an unwarranted benefit or privilege." The commission imposed a civil fine of \$7,500 against McGovern. McGovern timely appealed from the commission decision and order, filing a complaint for review in the Superior Court.

In Superior Court, after a hearing on cross motions for judgment on the pleadings, a judge upheld the commission decision, ruling that it was supported by substantial evidence and consistent with governing law. The judge ordered that judgment enter for the commission and dismissed McGovern's complaint. This appeal then followed. McGovern argues that the commission's decision is arbitrary, abusive of its discretion, unwarranted by the facts found by the commission, unsupported by substantial evidence, and marred by legal and procedural errors. We disagree.

Standard of review. Our role in reviewing an administrative agency's final decision and order is defined in G. L. c. 30A, § 14 (7). A court may modify or set aside an agency's decision only if it is determined that the substantial rights of a party were prejudiced because the contested agency decision was (1) in violation of constitutional provisions, (2)

in excess of its statutory authority or jurisdiction, (3) based on an error of law, (4) made upon unlawful procedure, (5) unsupported by substantial evidence, or (6) arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law. G. L. c. 30A, § 14 (7). McGovern has not met his burden to show that the commission decision was marred by such defect or infirmity.¹³

Our review of a commission decision, issued following an adjudicatory proceeding, is confined to the administrative record. We "give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." G. L. c. 30A, § 14 (7). The commission, as the State agency charged with administering G. L. c. 268A, is due "substantial deference in its reasonable interpretation of the statute," Sikorski's Case, 455 Mass. 477, 480 (2009); however, we are mindful that "principles of deference . . . are not principles of abdication" (citation omitted), Commissioner of Revenue v. Gillette Co., 454 Mass. 72, 75 (2009). Accord Shrine of Our Lady of La Salette Inc. v. Assessors of Attleboro, 476 Mass. 690, 696 (2017). In the end, "interpretation of a statute is a matter for the

¹³ As the appellant, McGovern has the "'formidable burden' of showing that the [commission's] interpretation is not rational" (citation omitted). Ten Local Citizen Group v. New England Wind, LLC, 457 Mass. 222, 228 (2010).

courts." Id., quoting Onex Communications Corp. v. Commissioner of Revenue, 457 Mass. 419, 424 (2010).¹⁴ We consider whether the commission decision is supported by substantial evidence, free from error or unlawful procedure, and consistent with its statutory and discretionary authority. Craven v. State Ethics Comm'n, 390 Mass. 191, 201 (1983). "Substantial evidence 'means such evidence as a reasonable mind might accept as adequate to support a conclusion.'" Id., quoting G. L. c. 30A, § 1 (6). A reviewing court may not make a de novo determination of the facts, make different credibility choices, or draw different inferences from the facts as found by the commission. See Pyramid Co. of Hadley v. Architectural Barriers Bd., 403 Mass. 126, 130 (1988).

Discussion. In 1962, the Massachusetts Legislature enacted G. L. c. 268A, the conflict of interest law, which seeks to combat secret dealings, influence peddling, inequality of treatment of citizens, and other activities where a public official or employee is confronted with a conflict of interest.

¹⁴ Though the ultimate duty of statutory interpretation is for the court, "an administrative agency's interpretation of a statute within its charge is accorded weight and deference. . . . Where the [agency's] statutory interpretation is reasonable . . . the court should not supplant [an agency's] judgment." Commercial Wharf E. Condominium Ass'n v. Department of Env'tl. Protection, 93 Mass. App. Ct. 425, 433 (2018), quoting Peterborough Oil Co. v. Department of Env'tl. Protection, 474 Mass. 443, 449 (2016).

See Leder v. Superintendent of Sch. of Concord & Concord-Carlisle Regional Sch. Dist., 465 Mass. 305, 308 (2013);¹⁵ Scuito v. Lawrence, 389 Mass. 939, 946 (1983); Everett Town Taxi, Inc. v. Aldermen of Everett, 366 Mass. 534, 536 (1974). The commission is the agency with the primary civil enforcement responsibility to investigate and to adjudicate alleged violations of G. L. c. 268A and c. 268B.¹⁶

1. Substantial evidence. McGovern contends that the commission "erred by making factual conclusions that were not based on substantial evidence." He challenges three allegedly "arbitrary" subsidiary findings made by the commission: (i) probable cause existed to arrest or to cite Petrangelo for a motor vehicle offense; (ii) no meaningful investigation was done by McGovern at the accident scene; and (iii) he conveyed an unwarranted privilege or exemption to Petrangelo. McGovern asserts that these three findings either were arrived at by the commission based on "its own 'expertise'" or were the product of arbitrary decision-making due (in his view) to the lack of supporting evidence in the record. We are not persuaded.

¹⁵ Citing Report of the Special Commission on Code of Ethics, 1962 House Doc. No. 3650, at 18.

¹⁶ In 1986, pursuant to St. 1986, c. 557, § 194, the Legislature authorized the commission to serve as the "primary civil enforcement agency" for violations of "all sections" of G. L. c. 268A, the Massachusetts conflict of interest statute. Leder, 465 Mass. at 309 n.8.

a. Probable cause, investigation, and unwarranted privilege. McGovern's probable cause arguments isolate each segment or link in the circumstantial evidence chain,¹⁷ as if each such link "had no relation" to the "integrated body" of circumstantial evidence against him. See Commonwealth v. Lykus, 451 Mass. 310, 329 (2008). We decline to adopt such a narrow focus. In assessing whether the commission decision is supported by substantial evidence, we consider the record evidence as a whole,¹⁸ taking into account whatever evidence detracts from the commission decision while recognizing as well that circumstantial evidence, particularly in a one-vehicle OUI accident case (as is involved here), "can carry persuasive value

¹⁷ As an example, McGovern says that the commission "omitted to mention" that he had "doubted" the accuracy of the 911 report of a wrong-way driver or that he had taken steps to "check with dispatch to get more information," which, he says, "did not lessen his doubt." Viewing the evidence through the lens of his "doubt," McGovern rejects categorically that there was probable cause to arrest or to cite Petrangelo. We do not view the evidence in the administrative record through a lens that is most favorable to McGovern, but instead we focus on whether substantial evidence existed to support the agency's findings. See Arthurs v. Board of Registration in Med., 383 Mass. 299, 304 (1981).

¹⁸ We take into account "whatever in the record fairly detracts from [the] weight [of the agency's opinion]," Cohen v. Board of Registration in Pharmacy, 350 Mass. 246, 253 (1966), but "as long as there is substantial evidence to support the findings of the agency, we will not substitute our views as to the facts," Arthurs v. Board of Registration in Med., 383 Mass. 299, 304 (1981). The substantial evidence doctrine is "highly deferential" to an agency. Ten Local Citizen Group v. New England Wind, LLC, 457 Mass. 222, 228 (2010).

equal to or even greater than that of direct proof" (citation omitted). Id. The commission made a supported finding that, in light of the totality of circumstances known to McGovern, probable cause existed to arrest or to cite Petrangelo for a motor vehicle offense.

Among other material evidence supporting the commission decision, we highlight the following facts that are firmly rooted in the record: the 911 call (at about 9:15 P.M.) reporting a wrong-way driver on Route 5 North; the response of the police dispatcher sending two department officers and one from a nearby city to locate the wrong-way driver; the telephone call that Sergeant Grasso initiated to McGovern, at approximately 9:30 P.M., wherein Sergeant Grasso informed McGovern that Officers Pierson and Wheeler had "Danielle up there" (on Route 5) and that these officers "needed help" from a supervisor; McGovern agreed to go to the accident scene on Route 5, a divided multilane highway; at that scene, McGovern knew that the tan SUV was Petrangelo's personal vehicle; apart from the investigating officers, no other individual was at the scene who could possibly have driven the SUV, which was then parked adjacent to the highway;¹⁹ in response to McGovern's queries,

¹⁹ Officer Johnson testified that the only way one could access the side road where the SUV was then parked was from Route 5 itself.

Petrangelo had admitted she "didn't know" how she had gotten there on Route 5; soon thereafter, Petrangelo's responses shifted insofar as she suggested that she would not cooperate with police investigative efforts; McGovern himself believed that Petrangelo then was incoherent, intoxicated, and drunk; and Petrangelo, to the extent she was able, made no suggestion that another person was driving her SUV at the time.

Faced with these same facts, it is indisputable that McGovern did not make any searching inquiry of the investigating officers.²⁰ He did not inquire of Officers Johnson, Pierson, or Wheeler where the SUV was found upon arrival at the scene.

(Officer Johnson testified that he first found the SUV stopped, facing southbound, in the northbound passing lane, with the key in the SUV's ignition, the engine running, and Petrangelo sitting on a guardrail, close by the SUV.) McGovern did not ask how the SUV came to be parked to the side of the Route 5 highway,²¹ or whether Petrangelo made statements or admissions.

²⁰ To the extent that McGovern argues that the commission did not spell out in the show cause order that a subsidiary charge was his failure to conduct a meaningful investigation of the one-vehicle accident, it is enough to point out that the same is subsumed within the overarching OUI (or operating to endanger) probable cause issue. Regardless, he does not argue that he was prejudiced by any lack of specificity in the show cause order.

²¹ By way of contrast, Sergeant Grasso testified that when he first arrived at the accident scene, he had been quickly apprised of the facts by Officer Johnson: namely, that

McGovern, instead, made an unguarded remark to Sergeant Grasso, that "we can't arrest her," which, if nothing more, is relevant of his intent and then-present inclination to let this incident pass without any immediate formal police action against Petrangelo. None of the department officers who testified at the hearing was aware of any other situation where a suspected OUI motorist, driving a vehicle the wrong way on a State highway, had been released by department officers without being arrested or cited for a motor vehicle offense.²² The commission reasonably inferred McGovern's decision to afford Petrangelo preferential treatment was thereafter effectuated when he gave the order to Officer Pierson to drive Petrangelo home, without

"Danielle's" SUV "went southbound on Route 5 and . . . [Officer Johnson] pulled his vehicle nose to nose." Sergeant Grasso further testified that Petrangelo was, in his opinion, "under the influence" and explained on direct examination why he concluded as much at the scene: "She had smelled of alcohol. She had slurred speech [and] glossy eyes, [the] typical symptoms of someone under the influence." Sergeant Grasso testified that the department "could have charged" Petrangelo with "operating under the influence of alcohol, [and] operating to endanger." Sergeant Grasso also referred to the fine for driving the wrong way on a one-way public roadway.

²² Officer Pierson testified that he did not want to announce Petrangelo's name over the police radio broadcast system, so he had used his own cellular telephone to contact Sergeant Grasso. On cross-examination, Pierson admitted that, "by not conducting an investigation" of Petrangelo, department officers were showing her "preferential treatment."

an arrest or citation.²³ These facts, without more, constitute substantial evidence "as a reasonable mind might accept as adequate to support [the] conclusion," G. L. c. 30A, § 1 (6),²⁴ arrived at by the commission: namely, that McGovern had probable cause at the scene to arrest or to cite Petrangelo for OUI, or operating to endanger and, by declining to do so, despite a written policy of the department that prioritized arresting persons reasonably suspected of OUI, McGovern provided an unwarranted privilege or exemption to Petrangelo, a fellow department officer, not available to other motorists in like

²³ To all these facts, McGovern was obliged to apply his police experience and common sense. See Commonwealth v. Silva, 366 Mass. 402, 407 (1974). McGovern had time to assess the situation at hand and was not compelled to decide on a course of action within minutes. See Commonwealth v. Sumerlin, 393 Mass. 127, 129-130 (1984), cert. denied, 469 U.S. 1193 (1985).

²⁴ "The standard is more stringent than abuse of discretion, and less than preponderance of the evidence; 'an agency's conclusion will fail judicial scrutiny if "the evidence points to no felt or appreciable probability of the conclusion or points to an overwhelming probability of the contrary"' (citation omitted). Duggan v. Board of Registration in Nursing, 456 Mass. 666, 674 (2010). See Cobble v. Commissioner of the Dep't of Social Servs., 430 Mass. 385, 390 (1999) ("substantial evidence standard is thus fairly characterized as a test of rational probability"). "Thus conceived, the substantial evidence test accords an appropriate degree of judicial deference to administrative decisions, ensuring that an agency's judgment on questions of fact will enjoy the benefit of the doubt in close cases, but requiring reversal by a reviewing court if the cumulative weight of the evidence tends substantially toward opposite inferences." Id. at 391. This is not a case where the cumulative weight of the evidence tends substantially toward inferences at odds with the agency's findings.

circumstances. We are obliged to defer to the commission's right as the trier of fact, in performing its adjudicatory function, to draw inferences from testimonial accounts and the documentary evidence before it. School Comm. of Brookline v. Bureau of Special Educ. Appeals, 389 Mass. 705, 716 (1983).

In effect, McGovern's broad contentions of factual error by the commission are foreclosed by two well-settled corollaries of the substantial evidence doctrine, both of which are apt here. First, a reviewing court may not displace an agency's deliberative choice between two fairly conflicting views of the record evidence. See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988) (court "may not displace" agency's choice between "two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo" [citation omitted]). See also Dotson v. Commissioner of Revenue, 82 Mass. App. Ct. 378, 385 (2012). Here, McGovern, in essence, asks us to consider the evidence anew, highlighting the version of the facts most favorable to him, but that is not our charge in reviewing an agency's final decision made after an adjudicatory hearing. The second corollary is that, in such circumstances of contradictory testimony, it is for the presiding officer and the commission, not the court, to make determinations of witness credibility and to give whatever

weight certain evidence is due. Fisch v. Board of Registration in Med., 437 Mass. 128, 138 (2002).

At the heart of this case, albeit as an overlay to the substantial evidence doctrine, is the familiar probable cause standard. "Probable cause to arrest 'exists, where, at the moment of arrest, the facts and circumstances within the knowledge of the police are enough to warrant a prudent person in believing that the individual arrested has committed or was committing an offense.'" Commonwealth v. Jewett, 471 Mass. 624, 629 (2015), quoting Commonwealth v. Franco, 419 Mass. 635, 639 (1995). "In dealing with probable cause . . . we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent [individuals], not legal technicians, act." Commonwealth v. Hason, 387 Mass. 169, 174 (1982), quoting Brinegar v. United States, 338 U.S. 160, 175 (1949). Moreover, probable cause is a matter of common sense and experience. An "objective test" is used to determine whether probable cause exists, not a subjective test. Franco, supra.

The commission was entitled to use its common sense and experience to determine whether the totality of the facts and circumstances known to McGovern at the scene were adequate to warrant a prudent police officer to believe that Petrangelo operated a vehicle on a public way while under the influence of

intoxicating liquor, G. L. c. 90, § 24 (1) (a) (1), or operating a motor vehicle negligently, G. L. c. 90, § 24 (2) (a),²⁵ or both.²⁶ There was no error. We turn to McGovern's related contentions.

b. Expert testimony. Contrary to McGovern's view of the case, the commission did not substitute its expertise for evidence. "Although an agency may not use its expertise to build the case for or against a litigant, it may apply its

²⁵ For a defendant to be convicted of OUI, the Commonwealth must prove beyond a reasonable doubt that the defendant (1) operated a motor vehicle, (2) on a public way, (3) while under the influence of intoxicating liquor. G. L. c. 90, § 24 (1) (a) (1). See Jewett, 471 Mass. at 635. A prudent police lieutenant in this same situation could reasonably infer that Petrangelo had operated her SUV on Route 5 while under the influence, and had operated that vehicle in an unsafe manner, i.e., negligently, if not recklessly, so as to endanger the public, in violation of G. L. c. 90, § 24 (2) (a). See Commonwealth v. Zagwyn, 482 Mass. 1020, 1020 (2019); Commonwealth v. Ferreira, 70 Mass. App. Ct. 32, 34 (2007). Drunkenness, while relevant to a finding of negligent operation, is not in and of itself sufficient for purposes of convicting a defendant of this offense. See Ferreira, supra at 35. It is the conduct of operating a vehicle in a negligent manner so as to endanger the public that is proscribed, not the act of harming another. Commonwealth v. Constantino, 443 Mass. 521, 526-527 (2005). "Negligence . . . in its ordinary sense, is the failure of a responsible person, either by omission or by action, to exercise that degree of care, vigilance and forethought which . . . the person of ordinary caution and prudence ought to exercise under the particular circumstances" (citation omitted). Commonwealth v. Angelo Todesca Corp., 446 Mass. 128, 137 (2006). "A finding of ordinary negligence suffices" to establish negligent operation so as to endanger (citation omitted). Id.

²⁶ These two offenses are not duplicative because they involve distinctly separate factual issues. See Commonwealth v. Woods, 414 Mass. 343, 354 (1993).

expertise to evaluate the evidence." Doe, Sex Offender Registry Bd. No. 89230 v. Sex Offender Registry Bd., 452 Mass. 764, 781 (2008) (Spina, J., concurring). "The inferences drawn from the evidence in this case were largely matters of common experience and common sense, not matters of specialized or technical knowledge." Arthurs v. Board of Registration in Med., 383 Mass. 299, 312 (1981). In the calculation of probable cause, reasonable inferences may be considered, drawn from commonsense, everyday experience, and the perspective of experienced law enforcement officers. See Commonwealth v. Kennedy, 426 Mass. 703, 708-711 (1998). Accord Commonwealth v. Humberto H., 466 Mass. 562, 566 (2013). But the existence of probable cause is a question of law. Commonwealth v. Brennan, 481 Mass. 146, 149 (2018). The commission could decide the question for itself and was not obligated to defer to the views of any particular police witness, expert or otherwise.

McGovern also contends that expert testimony was necessary to establish that his investigation of the accident was inadequate or fell below what would be required of a reasonably prudent officer in his position. We disagree. Expert testimony was not required to prove an ethical violation under G. L. c. 268A, § 23 (b) (2) (ii).²⁷ General Laws c. 268A, § 23, does

²⁷ "Although an agency or board may not sit as a silent witness where expert testimony is required to establish an

not focus specifically on the police but on public officials and employees, a proper subject of regulation. See Edgartown v. State Ethics Comm'n, 391 Mass. 83, 90 (1984). Here, the responding department officer, Pierson, was aware, in the initial moments at the scene, of the inherent conflict of interest that he faced because the intoxicated motorist was an off-duty fellow department officer.²⁸ See generally W. Buss, The Massachusetts Conflict-of-Interest Statute: An Analysis, 45 B.U. L. Rev. 299, 301 (1965) ("The objective of conflict-of-interest legislation is primarily to eliminate in advance undesirable pressures on a public employee resulting from potentially conflicting pulls of private and public forces -- conflicting pulls which may undermine the employee's ability to

evidentiary basis for its conclusions, Arthurs, [383 Mass.] at 310, [the commission was] free to evaluate evidence in light of its own technical expertise, and to draw inferences regarding the legal effect of the conduct at issue." Langlitz v. Board of Registration of Chiropractors, 396 Mass. 374, 381 (1985). The probable cause standard, as mentioned, deals with "the factual and practical considerations of everyday life on which reasonable and prudent [individuals], not legal technicians, act." Hason, 387 Mass. at 174, quoting Brinegar, 338 U.S. at 175. Similarly, lay opinion testimony was admissible to speak to an individual's intoxication; no expert testimony was required. Also, relevant department policies and procedures were admitted in evidence. In these circumstances, the commission applied a narrow set of legal standards to the specific facts of record. See Vitale v. State Racing Comm'n, 13 Mass. App. Ct. 1025, 1026 (1982).

²⁸ At the adjudicatory hearing, Officer Pierson testified: "At the time, I felt it would be a conflict of interest for one officer to investigate a fellow co-worker and . . . officer."

perform his [or her] public function disinterestedly and which are likely to undermine the confidence of the public in the employee's governmental service"). "In matters of ethics, appearance and reality often converge as one." Liteky v. United States, 510 U.S. 540, 565 (1994) (Kennedy, J., concurring).

2. Interpretation of G. L. c. 268A, § 23. McGovern also argues that the commission misconstrued the state of mind element in G. L. c. 268, § 23, by attributing to him the collective knowledge of all the police officers at the scene. He argues that such collective knowledge, while appropriate in determining whether police have probable cause, see, e.g., Commonwealth v. Gullick, 386 Mass. 278, 283-284 (1982), is inappropriate under G. L. c. 268A, where the question is his own individual intent. It suffices to say that, solely by reference to facts known to McGovern or those that the commission could reasonably find that he had ignored (e.g., where the SUV was found on the highway), the commission made the only logical inference as to McGovern's state of mind, at the accident scene, based on the record evidence. What McGovern knew, or chose to ignore at the scene, were issues for the commission to resolve as trier of fact. We see nothing in the commission decision suggesting that the commission attributed any other officer's knowledge to McGovern.

Bearing on the probable cause and ethical calculus is the fact that police officers hold a position of special trust.²⁹ "[V]iolations of the law" take on a "different symbolic dimension when committed by those sworn to uphold it." Matter of Prager, 422 Mass. 86, 94 (1996), quoting Rhode, *Moral Character as a Professional Credential*, 94 Yale L.J. 491, 587 (1985). A precise and detailed description of the acts that constitute unethical conduct under § 23 is not attempted in the statute. "Words of general import and broad scope are used." Attorney Gen. v. Tufts, 239 Mass. 458, 490 (1921). The "unwarranted privileges or exemptions" must be shown to have been provided by the public official or employee, who, knowingly or with reason to know, used his "official position" to give preferential treatment to another based on ties of kinship or loyalty. G. L. c. 268A, § 23. These are phrases of wide and

²⁹ "[T]here are certain forms of employment which carry a position of trust so peculiar to the office and so beyond that imposed by all public service that conduct consistent with this special trust is an obligation of the employment." Springfield v. Civil Serv. Comm'n, 469 Mass. 370, 379 (2014), quoting Perryman v. School Comm. of Boston, 17 Mass. App. Ct. 346, 349 (1983). Police officers fall into such a category. Springfield, *supra*. Police officers "'voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens,' and must 'comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel.'" *Id.*, quoting Attorney Gen. v. McHatton, 428 Mass. 790, 793-794 (1999). See Police Comm'r of Boston v. Civil Serv. Comm'n, 22 Mass. App. Ct. 364, 371 (1986).

common signification. It is not necessary for us to undertake to limit by definition that which the Legislature has seen fit to describe in ample outline. McGovern has not met his burden to show that the commission erred in construing the statute that it is charged to enforce. That said, neither the commission decision nor this court's affirmance of the judgment should be read as restricting or otherwise confining the exercise of police officer discretion in the disposition of motor vehicle-related incidents. "The decisions of law enforcement officers regarding whether, when, how, and whom to investigate, and whether and when to seek warrants for arrest are based on considerations of, and necessarily affect, public policy." Sena v. Commonwealth, 417 Mass. 250, 256 (1994). That discretion in this instance was not unbridled because the department policy then in place mandated that its officers "shall take appropriate enforcement action" (immediate arrest or citation) in instances when the officer believes the operator of a motor vehicle was driving while under the influence of alcohol, as discussed supra.

3. Other contentions. We find no merit to McGovern's remaining contentions that (i) the commission "ignored" the expert evidence presented through the testimony of former Police Chief Marchese, or (ii) the commission misused certain documentary evidence -- a letter from the Hampden County

district attorney, dated October 24, 2012, which in fact was the subject of a joint stipulation by the parties, agreeing to that document's admissibility, or (iii) the Superior Court judge "assum[ed]" a fact-finding role in reviewing the decision of the commission. These contentions do not deserve any extended analysis. See Passatempo v. McMEnimen, 461 Mass. 279, 300 (2012); Boston v. Rochalska, 72 Mass. App. Ct. 236, 237 n.3 (2008). See also Southern Worcester County Regional Vocational Sch. Dist. v. Labor Relations Comm'n, 377 Mass. 897, 903 (1979) (in c. 30A cases, appellate court gives no special weight to decision of Superior Court).

Conclusion. Thus, we affirm the judgment entered in the Superior Court upholding the commission decision and order.³⁰

Judgment affirmed.

³⁰ We deny McGovern's request for attorney's fees pursuant to G. L. c. 268B, § 4 (k).