

**COMMONWEALTH OF MASSACHUSETTS**

**CIVIL SERVICE COMMISSION**

One Ashburton Place: Room 503  
Boston, MA 02108  
(617) 979-1900

**KENNY ORCEL,**

Appellant

**D1-20-140**

v.

**MBTA TRANSIT POLICE,**

Respondent

Appearance for Appellant:

Mitchell J. Notis, Esq.  
Law Offices of Mitchell J. Notis  
32 Kent Street  
Brookline, MA 02445-7902

Appearance for Respondent:

Thomas R. Donohue, Esq.  
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Boston, MA 02116

Commissioner:

Paul M. Stein

**DECISION**

On August 4, 2020, the Appellant, Kenny Orcel, acting pursuant to G.L. c. 31, § 43, appealed to the Civil Service Commission (Commission), challenging the decision of the MBTA Transit Police Department (MBTA Transit Police), Respondent, to discharge him from his tenured position of Transit Police Sergeant with the MBTA Transit Police.<sup>1</sup> The Commission held a remote pre-hearing conference on October 13, 2020 via Webex videoconference and held a remote full hearing via videoconference over three (3) days on January 25, 26, and 27, 2021. The full hearing was declared private, with witnesses sequestered. The remote evidentiary hearings were recorded and a link to the recordings was provided to the parties.<sup>2</sup> Twenty-nine (29) exhibits were received

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<sup>1</sup> The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

<sup>2</sup> After the hearing concluded, the parties arranged for a computer-generated transcript to be prepared from the Webex recording. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal is obligated to submit a certified transcript to the court that conforms to the Webex recording, to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

in evidence at the hearing (*Joint Exhs.1 through 5; Respondent's Exhs.6 through 9; Joint Exhs.10 through 15; Respondent's Exh.16; Joint Exh.17; Respondent's Exh.18, Joint Exhs.19 through 29*).

Three post-hearing exhibits requested by the Commission were received and marked in evidence (*Joint Exhs.30 through 32*). The Commission received proposed decisions from the parties on July 15, 2021. For the reasons stated herein, the Appellant's appeal is denied.

## **FINDINGS OF FACT**

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

*Called by the Respondent:*

- MBTA Transit Police Superintendent Richard Sullivan
- MBTA Transit Police Deputy Chief Sean Reynolds
- MBTA Transit Police Lieutenant Michael Flanagan
- MBTA Transit Police Officer Paul Clooney
- MBTA Transit Police Officer Richard Sieboldt
- Kenny Orcel, Appellant

*Called by the Appellant:*

- Kenny Orcel, Appellant

and taking administrative notice of all matters filed in the case, pertinent law, and inferences from the credible evidence, I find the facts stated below.

1. The Appellant, Kenny Orcel, was appointed to the civil service position of MBTA Transit Police Officer in 2008. He was promoted to the rank of Police Sergeant (over two other officers) on June 10, 2017. (*Pre-Hearing Stipulated Facts*)

2. On the night of July 26, 2018, Sgt. Orcel worked the "Last Half" shift, commencing at 11:30 pm and continuing through 7:30 am the following morning, July 27, 2018. (*Pre-Hearing Stipulated Facts; Testimony of Appellant & Sullivan*)

3. Other MBTA Transit Police Officers on duty during the shift included Sgt. David Finnerty and Officers Dorston Bartlett, Richard Sieboldt, and Paul Clooney (*Pre-Hearing Stipulated Facts; Testimony of Appellant, Sieboldt & Clooney*)

4. The Lieutenant assigned to the shift had called out sick, so pursuant to practice and routine the two Sergeants agreed that Sgt. Finnerty would remain at headquarters as acting Officer-in-Charge (OIC), responsible for directly supervising officers inside MBTA Transit Police Headquarters. This included Officer Richard Sieboldt, the booking officer, and Officer Paul Clooney, assigned to monitor, among other things, video surveillance in taken by cameras at Headquarters and in the field. (*Exhs.6 & 7; Testimony of Sieboldt & Clooney*)

5. As he was the “senior sergeant”, Sgt. Orcel elected to perform the duties of the shift’s Patrol Supervisor. As the Patrol Supervisor, Sgt. Orcel was assigned to a cruiser and was directly responsible for all officers in the field, which included Officer Bartlett, also assigned to patrol duty in a cruiser. (*Pre-Hearing Stipulated Facts; Exh.8; Testimony of Appellant & Sullivan*)

6. A Patrol Supervisor has the responsibility to ensure compliance with all MBTA Transit Police policies and procedures, which includes the duty to scrutinize and approve arrest reports submitted by subordinate officers, ensure that arrests were lawful, reports were truthful, complete and accurate, and any use of force was justified. (*Testimony of Appellant & Sullivan*)

#### The Incident at Ashmont Station

7. At approximately 1:42 a.m. on July 27, 2018, a surveillance camera pointing north on the southbound platform of the Ashmont Station, the last stop on this portion of the Red Line, shows a Red Line train (the last train of the night) stopped at the platform with all doors open. An (unidentified) unarmed female MBTA employee on the platform at the front of the train waves to an employee (MBTA Inspector Goggin) standing on the platform at the rear of the train. At 1:42:46 on the video time stamp, Inspector Goggin enters the front car through a partially visible open door at the lower right of the video and disappears from the video. (*Exh.4H*)

8. According to the time stamp on the video, the following sequence of events unfolds:

- 1:42:55 Female employee waves to police officer [Officer Bartlett] who is walking from the end of the platform toward her. She stands at the open door looking inside**
- 1:43:00 Inspector Goggin exits the subway car carrying a black backpack which he tosses onto the platform and re-enters the subway car**
- 1:43:06 Female employee continues walking south on platform and disappears from video
- 1:43:33 Officer Bartlett enters the front car through the door immediately north of the one used by Inspector Goggin, walks through the car, and disappears from video**
- 1:44:11 Male wearing a black cap and black jacket emerges from partially visible subway door with Officer Bartlett walking approximately one foot behind him; Officer Bartlett does not have a baton in his hand.**
- 1:44:15 Male stands looking north and puts a hood over his head as Officer Bartlett stands approximately three feet to the man's right, also looking north**
- 1:44:19 Officer Bartlett turns and walks south on platform and disappears from video
- 1:44:20 Male disappears from video
- 1:44:46 Train doors close
- 1:44:48 Male's head appears at bottom of video looking to his right and disappears
- 1:44:49 Officer Bartlett's head appears at bottom of video looking north.
- 1:44:50 Officer Bartlett's head disappears, and male's head reappears looking to his right
- 1:44:52 Officer Bartlett's hand appears at bottom of video and points his right index finger toward the escalator just north of where the two men are standing.
- 1:44:55 Subway train departs station in southbound direction toward rail yard.
- 1:44:58 Officer Bartlett again points right index finger toward escalator and male looks in that direction. He does not have his department issued extendable baton (aka MEB) in his hand**
- 1:45:06 Male appears at bottom of video looking south
- 1:45:08 Male takes several steps to right looking at Officer Bartlett whose head appears at bottom of video
- 1:45:09 Officer Bartlett grabs male's right arm with his left hand, spins him around, holding his service baton (MEB) in his right hand, and pushes him toward the escalator. Male is carrying his backpack in his left hand**
- 1:45:16 Inspector Goggin appears at bottom of video, approximately 10 to 15 feet behind the other two men who are approaching an aluminum support column**
- 1:45:19 Male drops backpack as Officer Bartlett pins him against the column**

**1:45:21 Officer Bartlett gives male three baton (MEB) strikes on his leg. Male collapses to platform. Inspector Goggin stands about 5 to 6 feet away**

**1:45:27 Officer Bartlett pulls male up from floor; Inspector Goggin picks up backpack**

**1:45:37 Officer Bartlett and Inspector Goggin pull male up the escalator and they disappear**  
(Exhs.4H & 26)

9. Additional surveillance videos capture the three men as they emerge at the top of the escalator into the station lobby. Officer Bartlett is carrying his service baton in his left hand. The two men push the male toward the exit and Inspector Goggin shoves him out the door. The male spins around and looks at Inspector Goggin who is several feet away, with Officer Bartlett standing just behind Inspector Goggin. Both men approach the male, he stops and looks at them. Officer Bartlett switches his service baton from his left hand to his right hand and overtakes Inspector Goggin. The male drops his backpack and hat and starts running across the busway. Officer Bartlett picks up the backpack and Inspector Goggin picks up the hat. The two men cross the busway behind the male. By the time the male reaches the other side of the busway, he has gained approximately ten feet ahead of the other two men. He is last seen headed toward the busway's northern exit onto Dorchester Avenue. (Exh.4F @ 1:58:03-1:58:20; Exh.4G @ 1:08:54-1:09:58; Exh.4I @ 00:52:20- 00:52:48; Exh.30)<sup>3</sup>

10. Inspector Goggin returns to the doors from which the men exited the subway station. Although not visible on the video, I infer that Officer Bartlett walked to his cruiser at this time, which was parked at the northern end of the busway, as his cruiser is seen driving toward the exit door where Inspector Goggin is standing. Officer Bartlett opens his driver's door momentarily, turns the cruiser around and drives out the northern exit of the busway onto Dorchester Avenue. (Exh.4G @ 1:09:59 to 1:12:4; Exhs.31 & 32)

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<sup>3</sup> The surveillance camera time stamps do not appear to be synchronized. (See Testimony of Sullivan)

11. At 1:47:21 a.m. on July 27, 2018, MBTA Operations recorded a call from Officer Bartlett in which he reported that he had just “ejected” a male from the Ashmont Station. (*Exh.4A*)

12. Officer Bartlett’s cruiser was equipped with GPS monitoring technology that recorded the cruiser’s location and speed. This GPS data confirms that his cruiser was parked at the Ashmont Station (1900 Dorchester Avenue) until 1:50:49 am. Officer Bartlett then leaves the station, turns onto Dorchester Avenue and proceeds SOUTH, away from Peabody Square, and travels to Hutchinson Street where he stops at 1:52:19 am. (*Exhs.31 & 32*)

13. At 1:51:40 am on July 27, 2018, the Boston Police (BPD) received a 911 call from an unidentified caller who reported a male on the floor of an establishment in the vicinity of 1875 Dorchester Avenue (Peabody Square) who needed emergency medical assistance. BPD dispatched a cruiser at 1:52:47 am and an ambulance (BEMS) at 1:53:40 am, which arrived on scene at 1:55:05 am and 1:56:40 am respectively. The BPD found the male on the corner of Ashmont Street and Dorchester Avenue (Peabody Square), very close to the Ashmont Station. (*Exhs.28, 30 & 32*)

14. At 1:53:09 am, Officer Bartlett’s cruiser begins to move, turns north on Dorchester Avenue and comes to a stop at 1909 Dorchester Avenue at 1:54:39 am (which is where the BPD is holding the male). Officer Bartlett informs the BPD officers that the male is a “suspect” not a “victim”, who just assaulted a police officer. (*Exhs.28, 31 & 32*)

15. Officer Bartlett departs with the male in custody at 1:59:14 am. He radioed MBTA Operations that he is returning with a prisoner arrested for “assault and disorderly”. He returns to MBTA Headquarters with the male prisoner. (*Exhs.1, 4B,4C,4D; 31 & 32*)

16. During booking, Officer Sieboldt, the booking officer, asked Officer Bartlett to remove himself from the booking area after the prisoner became combative and Officer Bartlett was not making any effort to defuse the situation. Officer Clooney, monitoring from inside the monitor

room, alerted Sgt. Finnerty that Officer Bartlett grabbed the prisoner somewhere around his head (around his face or throat)<sup>4</sup> and both officers also then went to the booking area. (*Exhs.6 & 7; Testimony of Sieboldt & Clooney*)

17. Officer Bartlett asked Officer Clooney to play the video from the Ashmont Station involving the prisoner. They returned to the monitor room where Officer Clooney played the video footage showing the encounter on the Ashmont Station platform. (*Exh.6; Testimony of Clooney*)

18. At 2:15:16 a.m., Sgt. Finnerty asks Operation to call BEMS to respond to the male's complaint of "pain to his leg." BEMS arrives, treats the male with an ice pack for a "minor bruise" on his lower right leg, and determined that no further medical treatment was needed. (*Exhs.1, 2 & 4E; Testimony of Sieboldt*)

#### The Incident Report and Supervisor's Review

19. Sgt. Orcel heard the initial radio transmission from Officer Bartlett that he had ejected a male party from the Ashmont Station. He took note but had no reason to take any further action because "we eject people throughout the night all the time." (*Testimony of Appellant*)<sup>5</sup>

20. After hearing Officer Bartlett's second transmission that he had arrested someone and was coming to Headquarters, Sgt. Orcel drove to MBTA Headquarters. (*Testimony of Appellant*)

21. Upon arrival, Sgt. Orcel met Officer Bartlett in the report writing room and reviewed the incident report Officer Bartlett had prepared. The narrative in this initial draft was five or six

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<sup>4</sup> No video of the booking was produced, and the evidence did not establish that Sgt. Orcel or any of the MBTA command staff (other than Sgt. Finnerty) knew of the booking encounter. I am unable to determine if Officer Bartlett's restraints in the booking area could be considered a "choke hold", but his removal from the booking area further demonstrates the egregious nature of Officer Bartlett's violation of the use of force rules.

<sup>5</sup>Sgt. Orcel later told Superintendent Sullivan that Officer Bartlett confirmed to him that he (Officer Bartlett) originally intended only to eject the male from the station. Officer Sieboldt testified to the same effect. (*Exhs.7 & 8; Testimony of Sullivan & Sieboldt*) Although this is hearsay evidence, I find it credible and corroborated by the BPD CAD report (Exh.28), the MBTA's GPS data (Exh.31), and the undisputed evidence that, until Officer Bartlett heard the BPD dispatch call, he never put out a call of his own that he was searching for anyone, which would have been standard procedure for an officer conducting a "area search" for a suspect. (*Exh.16; Testimony of Appellant & Sullivan*)

sentences long. It did not contain elements of a crime, probable cause for an arrest, or any basis for use of force. Officer Bartlett said Sgt. Finnerty would help him fix the report and “it will be all set so don’t worry.” (*Exhs.6 & 8; Testimony of Appellant, Clooney & Flanagan*)<sup>6</sup>

22. After speaking with Officer Bartlett, Sgt. Orcel then went to the monitor room where the video surveillance footage of Officer Bartlett’s encounter with the prisoner was being uploaded for Sgt. Finnerty, who had been alerted by Officer Clooney to the use of force issue at headquarters shown on the Ashmont Station video he had just played for Officer Bartlett. Sgt. Orcel, along with Officer Sieboldt and Office Clooney, watched the video clip showing the encounter on the subway platform [Exh.4H] as well as at least one of the three available video clips showing the prisoner’s ejection from the station. [Exhs.4F, 4G & 4I]. (*Exhs.6. 7 &.8; Testimony of Appellant, Flanagan, Sieboldt & Clooney*)

23. Sgt. Finnerty had what others saw as an expression of “shock” as he viewed the video of the baton strikes. His jaw dropped and his eyes open widely. He said something to this effect: “This is bad” and “Wow, this is worse than what [another named MBTA officer] did and they went to jail.” (*Exh.8; Testimony of Flanagan & Sieboldt*)

24. Sgt Orcel said he did not recall that Officer Bartlett was present while he watched the video clips the second time Officer Clooney played them. Although the GPS data is not definitive, it appears to show that Officer Bartlett’s cruiser remained in the vicinity of Headquarters for less than thirty (30) minutes. (*Exhs.8 & 31; Testimony of Appellant*)

25. After the officers had viewed the video clips, Sgt. Finnerty produced a second version of the incident report on behalf of Officer Bartlett. As redrafted by Sgt. Finnerty, the narrative stated:

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<sup>6</sup> The original draft of Officer Bartlett’s report was “overwritten” when Sgt. Finnerty rewrote it. The original could not be recovered and was not introduced at the Commission hearing. (*Testimony of Sullivan*)



1. On Friday July 27, 2018 at 1:45 AM, I Officer Bartlett [was] on directed patrol at Ashmont station . . . when I was alerted by Red line Inspector Patrick Goggin . . . for a person refusing to get off of the front train car. . . .

2. . . . I responded to the front car and was directed to the male party who was sleeping inside. I approached the male . . . woke him, and advised him that it was the last stop and the train was going out of service. I ordered [male] to get off the train. As I attempted to assist [male] up from the seat and out of the train, he became combative jumping up from the seat and lunged his body toward me. [Male] tensed his muscles, took a fighting stance and stated to me, “get out of my face!” I escorted [male] off the train, and as we exited the train car, [male] immediately sat down on the platform and refused to leave.

3. I took control of [male] and began escorting him to the escalator on the platform. [Male] jerked his body, turned back into my face and began resisting saying “get your hands off me!” [Male] continued to move trying to break free from my grasp. Based on [male’s] actions, the continued tensing of his muscles and his assaultive behavior, I perceived a threat to my immediate safety. At that time I struck [male] three times in his lower right leg in the calf muscle with my department issued baton. [Male] stopped his assaultive and resisting behavior and fell to the ground. I regained control of [male] as he stood up and began to walk out of the station and with the assistance of Inspector Goggin, we escorted [male] out of the station. As we passed through the doors and entered the busway, [male] jerked away from my grasp, dropped his backpack and . . . started making threats to fight me saying “I’ve got something for you!” As I stepped toward [male] to place him into custody, he started running away out of the busway.

4. After [male] fled the busway, I returned to my cruiser in the busway and began an area search. [Male] was spotted in the Peabody square area at the corner of Dorchester Ave. and Ashmont st. [sic] and I was able to place him under arrest with the assistance of Boston Police Officer Wheeler . . .

5. I transported [male] to Transit police headquarters, to be booked per department policy. While being processed in the booking area, the defendant complained of leg pain. Boston EMS was notified and . . . was evaluated for a minor bruise on his lower right leg area . . . no further medical treatment was needed.

(Exh.2) (*emphasis added*)

26. After review of Sgt. Finnerty’s first draft, Officer Orcel directed two changes to the narrative before he would approve it:

Paragraph 3. The sentence beginning “As we passed through the doors to the busway . . .” was changed to read: “It was my intention to place him under arrest, when [male] jerked away from my grasp dropped his backpack and started making threats to fight me saying “i’ve [sic] got something for you!” As I stepped toward [male] to place him into custody, he ran away out of the busway, and left his backpack behind. I asked him to come and retrieve his backpack which he refused at which time I tossed it to him.”

Paragraph 4. A sentence was added to the end of the paragraph stating: “[Male] was placed under arrest and charged with resisting arrest, trespassing, and assault and battery on a police officer.”

As revised, Sgt. Orcel approved the report as the Approving Officer. (Exh.3) (*emphasis added*)

27. In the Duty Supervisor/OIC Command Staff Shift Briefing (as of 0600 hours), Sgt. Finnerty wrote the following in the section on “Prisoners in Custody”:

Assault, Resisting Arrest, Trespassing. 07/27/2018, Case #2018-6590, Ashmont Station: While conducting a directed patrol at Ashmont Station, an Officer was directed to the front car of the last southbound train at the platform. The train, being taken out of service had a male party onboard that was refusing to get off. The Officer was directed to the male party, identified as [redacted] by a Red Line Inspector. The male party continued to refuse to get off the train, and jumped up, lunging toward the Officer, tensing his body and getting in the Officer’s face. The Officer escorted [male] off the train, where [male] sat down on the platform refusing to get up. The Officer gained control of [male] and began to escort him from the station. [Male] resisted, and jerked his body toward the Officer, who struck [male] in the lower right leg (calf muscle area) with his baton. [Male] was escorted to the entrance of the station where he broke free, challenged the Officer to a fight. The Officer attempted to place [male] into custody, however [male] fled. The Officer with the assistance of Boston Police caught up to [male] in Peabody Square and he was placed into custody. During the booking process, Boston EMS . . . determined [male had] a minor soft tissue injury and no treatment was needed. **[Male] is currently held.**

(Exh.3) (**emphasis in original**) (*emphasis added*)

28. When MBTA Transit Deputy Police Chief Reynolds arrived at Headquarters about 6:00 a.m., Sgt. Finnerty informed him that there had been a use of force that “looked bad.” (*Testimony of Reynolds*)

29. Deputy Chief Reynolds notified Superintendent Sullivan and began to review the available Ashmont Station video clips. When Superintendent Sullivan arrived approximately 15 to 20 minutes later, and after reviewing the video clips, they both concluded that the baton strikes by Officer Bartlett involved an excessive use of force (in response to a situation that was probably a Level 2 and no more than a Level 3 on the spectrum of risk assessment – see Finding Nos. 45 through 47 below) and that the subsequent arrest was unlawfully made without probable cause. At

approximately 9:00 a.m. they ordered that the male prisoner be released. (*Testimony of Sullivan & Reynolds*)

The Internal Affairs Investigation

30. By a To/From memorandum dated August 7, 2018, Deputy Chief Reynolds informed Sgt. Orcel that the MBTA Transit Police had opened an investigation into his actions and he would be called to an interview in the future that would be “solely investigatory in nature”. The memo advised Sgt. Orcel of his rights under applicable federal and state laws (so-called Garrity, Carney and Weingarten rights). (*Exh.5*)

31. On September 18, 2018, Superintendent Sullivan interviewed Sgt. Orcel. Sgt. Orcel was represented by Attorney Douglas Louison, Esq. and Sgt. Michael Flanagan, President of his Union, the Sergeants Association. Also present was Deputy Chief Reynolds. The interview lasted approximately two hours. It was interrupted on three occasions to permit Sgt. Orcel to caucus privately with his attorney and union representative. (*Exh.8; Testimony of Appellant; Sullivan, Reynolds & Flanagan*)

32. By memorandum dated September 20, 2018, Superintendent Sullivan accurately memorialized his recollection of the substance of the (unrecorded) interview. (*Exh.8; Testimony of Sullivan, Reynolds & Flanagan*)

33. As stated in his September 20, 2018 memo and affirmed under oath during his testimony at the Commission hearing, after completing his interview of Sgt. Orcel, Superintendent Sullivan formed the conclusion that “Orcel presented himself as absent any moral compass who did not hesitate to omit facts to diminish and/or deflect any responsibilities he had as a supervisor . . . to shield another officer [and] to inhibit our quest to determine the truth . . . Orcel at times displayed profound incompetence as to his role as a supervisor . . . . In my professional assessment of this

interview, I believe Orcel was untruthful and attempted to obstruct an official Department investigation. Orcel only admitted to particular facts after consulting with his attorney and after multiple attempts at the truth.” (*Exh.8; Testimony of Sullivan*)

34. In particular, Superintendent Sullivan’s memorandum cited the following problematic matters that occurred during Sgt. Orcel’s interview performance:

- Sgt. Orcel initially said that hearing Officer Bartlett’s two radio calls about 10 minutes apart did not raise any “red flags” and he didn’t see any duty to respond since he “wasn’t dispatched”, which Superintendent Sullivan thought was an odd response because a supervisor is not expected to be “dispatched” but routinely responds to calls to make sure the officer is performing his duties properly.
- After he had seen Officer Bartlett’s “brief and woefully inadequate” report and viewing what he thought were “inappropriate” baton strikes, Sgt. Orcel denied that there was any discussion amongst the officers who were in the monitor room. Superintendent Sullivan said that didn’t seem plausible. Sgt Orcel took an eighteen (18) minute break to caucus with his attorney and union president and, when he returned, related Sgt. Finnerty’s statement about how what Officer Bartlett did was worse than what another MBTA officer did who “went to jail”. He explained that he didn’t say so before because he “didn’t want to throw him [Finnerty] under the bus.”
- When asked if he knew who rewrote Officer Bartlett’s report, Sgt. Orcel said he had no idea. Superintendent Sullivan didn’t believe him, and after another ten (10) minute private caucus, Superintendent Sullivan repeated his question and, this time, Sgt. Orcel said he knew Sgt. Finnerty wrote it because he [Finnerty] told him that he did.

- Sgt. Orcel’s explanation for why he directed further changes to the version of the report as rewritten by Sgt. Finnerty — to justify why Officer Bartlett picked up the male’s backpack and threw it at him to “lure” him back so he could arrest him – didn’t make sense. Superintendent Sullivan believed Sgt. Orcel should have known that no “prudent” officer attempting to effect an arrest would act that way.
- Sgt. Orcel deferred to Sgt. Finnerty as “guru” of Use of Force reports and [as the OIC] Sgt. Orcel believed Finnerty had “positional” authority over him. Superintendent Sullivan found this statement an abdication of his personal responsibility as the patrol supervisor.
- Overall, Superintendent Sullivan concluded that Sgt. Orcel’s omissions of facts and attempt to shield himself and another officer’s failures, constituted untruthfulness, an attempt to obstruct an official investigation, and “profound incompetence”.

*(Exh.8; Testimony of Sullivan. Reynolds & Flanagan)*

35. By letter dated September 28, 2018, the MBTA Transit Chief of Police informed Sgt. Orcel that he was placed on paid administrative leave pending completion of the MBTA’s investigation and any further disciplinary proceedings. *(Exh.10)*

#### Criminal Proceedings

36. On March 6, 2019, a Suffolk County Grand Jury indicted Sgt. Orcel for making a False Report by a Public Employee, in violation of G.L c. 268, § 6A, and as Accessory After the Fact to Assault by means of a Dangerous Weapon (a baton), in violation of G.L. c. 274, § 4. *(Exh.11)*

37. Sgt. Orcel moved to suppress all statements made to the MBTA on the grounds that the statements were obtained in violation of his constitutional rights.<sup>7</sup> The Suffolk County District

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<sup>7</sup> Apparently, the MBTA had not properly disclosed Sgt. Orcel’s potential criminal liability (as opposed to his collective bargaining rights), and his representatives did not know, prior to the interview of Sgt. Orcel’s potential criminal exposure. In retrospect, Lt. Flanagan, the Union President, believed that the interview ought to have been

Attorney concluded that “the Commonwealth would be prevented from utilizing statements made by Sgt. Orcel during his [September 18, 2018] interview” and, therefore “would not be able to meet its burden of proving each and every element of the indictment beyond a reasonable doubt . . . .” A Nolle Prosequi was entered terminating the prosecution against Sgt. Orcel. (*Exhs.12 through 14*)

#### Disciplinary Proceedings

38. By letter dated June 8, 2020, Chief Green informed Sgt. Orcel that a disciplinary hearing would be held on June 30, 2020 to consider whether there was just cause to discharge or otherwise discipline him for his conduct on July 27, 2018 and on September 18, 2018, citing five specific charges of misconduct involving violations of MBTA General Orders Chapters 50, 62, 100, 101, 143, 170 and 171: (I) Failure to Supervise and Conduct Unbecoming; (II) Dereliction of Duty and Conduct Unbecoming; (III) Violation of Massachusetts General Law (i.e., G.L. c. 268, § 6A & G.L. c. 274, § 4) ; (IV) Untruthfulness; and (V) Sick Time Abuse. (*Exhs.15, 20 through 26*)

39. On June 30, 2020, a disciplinary hearing was held before a Hearing Officer designated by Chief Green. The MBTA introduced twenty (20) exhibits and called one witness, Superintendent Sullivan. Sgt. Orcel appeared with counsel, but the lawyer did not cross-examine Superintendent Sullivan or call Sgt. Orcel to testify. (*Exh.16*)

40. On July 29, 2020, the Hearing Officer issued his report, which concluded that the MBTA had proved just cause to support four of the five charges (Charges I, II, III & IV). He found insufficient proof of just cause to support the sick time abuse charge (Charge V). (*Exh.18*)

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suspended when it turned to matters that could implicate Sgt. Orcel in any crimes. (*Testimony of Flanagan & Reynolds*)

41. By letter dated July 29, 2020, Chief Green accepted the findings of the Hearing Officer and concluded that “[t]hese findings warrant your employment with the MBTA Transit Police Department be terminated [e]ffective immediately.” (*Exhs.17 & 29*)

42. This appeal to the Commission duly ensued. (*Exh.19*)

#### MBTA’s Policies and Procedures

43. The MBTA Transit Police is a law enforcement agency of the Commonwealth that provides police services to patrons and employees of the MBTA while on MBTA property and in MBTA vehicles. MBTA police officers have all the powers and responsibilities conferred upon police officers in cities and towns of the Commonwealth. (*Exh.2; Administrative Notice [St.1968, c.664]*)

44. Chapter 100 (General Order No. 2017-19) and Chapter 101 (General Order 2016-19) entitled “Standards of Conduct” contains the MBTA’s Mission Statement, Oaths of Office & Honor, and Code of Ethics. These General Orders describes the primary mission of the MBTA Transit Police Department as being “to safeguard lives and property within our transportation system and uphold the constitutional rights of all people by following a set of core values that reflect the finest nature of policing, which are: Fairness, Truthfulness, Professionalism, Perseverance. Treating All Persons with Dignity and Respect, Service Before Self, and Integrity.”

Among the standards to which all MBTA Transit Police Officers are held:

- **Truthfulness** is interpreted in the broadest sense. It is more than avoiding outright lies. Rather, it is an implied spirit of openness that requires even unintended misperceptions to be corrected when discovered rather than allow them to persist. Truthfulness means that all employees, from the very top of the organization to the bottom, admit mistakes when they are made, and take responsibility for their decisions.
- **Professionalism.** . . . Officers willingly adhere unwaveringly to the high standards that policing imposes upon them, and they are committed to doing their very best at all times, under all circumstances. This commitment to excellence is the cornerstone of the Department’s service model.
- **Integrity** means “doing the right thing when no one is looking”. The nature of policing is such that most of the Officer’s work is done out of sight of their supervisors. Officers must

be relied on to conduct themselves in a way that reflects favorably on the Police Department and on the profession itself.

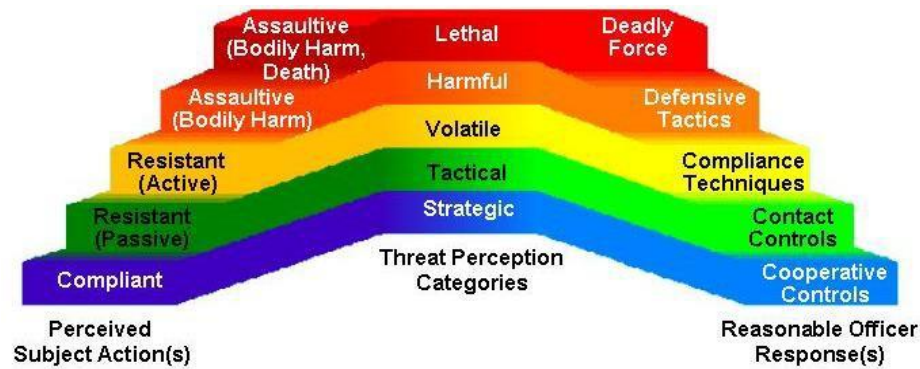
- **Code of Ethics.** The fundamental duty of a law enforcement Police Officer is to serve mankind; to safeguard lives and property; to protect the innocent against deception, the weak against oppression or intimidation, and the peaceful against violence or disorder; and to respect the Constitutional rights of all citizens to liberty, equality and justice.
- **Behavior.** Officers shall abide by ordinary and reasonable rules of good conduct and behavior and shall not commit any act tending to bring reproach or discredit upon himself or herself or the Department. "Conduct Unbecoming an Officer" shall include that which tends to indicate that the Officer is unable or unfit to continue as an MBTA Transit Officer or tends to impair other employees or the operation of the Department.
- **Criminal Laws.** Whether on or off duty, employees shall not knowingly commit any criminal offense under any laws of the United States, the Commonwealth of Massachusetts, or any other jurisdiction in which the employee is present.
- **Use of Force.** In making arrests or while engaged in the performance of their duties, Officers shall use reasonable force when force is used to accomplish lawful objectives.

*(Exhs.22 & 23)*

45. Chapter 171 (General Order 2017-02) entitled "Use of Force in Response to Resistance/Aggression", provides specific rules to which all officers are required to strictly adhere whenever verbal and/or physical action is taken, in response to resistance or aggression, including, the use of firearms or a baton (MEB), among other devices. *(Exh.171)*

46. The MBTA adheres to a universally accepted Use of Force pyramid, used by the Massachusetts Municipal Police Training Committee (MPTC), which sets forth five (5) Levels of Threat Perception from "Strategic" (Level 1) to "Lethal" (Level 5). Use of an MEB is considered a less-than-lethal defensive tactic that is justified only at Level 4, in response to a Threat from Perceived Assaultive Behavior that risks Bodily Harm to an Officer. It would not be appropriate as a Compliance Technique at Level 3.





(Exh.171; Testimony of Sullivan, Reynolds & Flanagan)

47. General Order 171 also prescribes that whenever an officer uses an MEB or any physical force at Level 3 (Active Resistance) or above, a separate “Blue Team” report must be completed by the officer, reviewed by his supervisor, and forwarded up the chain of command. Chapter 62 (General Order 2018-06) entitled “Supervisory Span of Control”, Chapter 143 (General Order 2016-27) entitled “Field Patrol Procedures”, and Chapter 170 (General Order 2016-39) entitled “Arrest”, specify additional responsibilities of supervisory officers. These responsibilities include, among others, reviewing and approving subordinates’ reports to ensure they are properly completed as required; ensuring that arrests are valid, made with probable cause and only after considering less restrictive alternatives; and ensuring that use of force incident to an arrest is reasonably employed to prevent escape and/or protect the officer or others from harm. (Exhs.21, 24 & 25: Testimony of Sullivan)

48. The MBTA command staff, up to the Chief of Police, are available 24/7 by pager to all supervisors for support and consultation. (Testimony of Sullivan & Reynolds)

The Appellant’s Defense of His Actions

48. At the Commission hearing, as he told Superintendent Sullivan during the September 18, 2018 interview, the Appellant acknowledged that, based on everything he now knows, Officer Bartlett’s report contained false statements about the arrest. He reconciled that admission with his

contention that he, himself, had done nothing wrong, by stating that what he meant was, in hindsight, he now realizes that Bartlett's incident report contained statements that were false, but, at the time he approved the report, "I have to believe my officers" and there possibly "might" have been assaultive behavior against Officer Bartlett in the subway car and/or when they were both on the subway platform but out of view of the camera that justified an arrest which, in his discretion, Officer Bartlett chose not to act on immediately. (*Testimony of Appellant*)

49. The Appellant similarly drew a distinction between what he now knows and the information he knew at the time of the incident to explain his handling of the use of force issue. He acknowledged that nothing on the videos clips – those he saw on July 27, 2018 as well as the others introduced into evidence at the Commission hearing – showed "assaultive behavior" that justified the three baton strikes. He agreed that the male's behavior, to the extent it was visible on the videos, never rose above a Threat Level 2. He justified his actions on July 27, 2018 on the basis that the video does not show all of the encounter and it was too soon for him to conclude that an illegal use of force had occurred, which would ultimately be up to a "Blue Team" to determine after a more comprehensive review than he had time to perform that night. (*Testimony of Appellant*)

50. The Appellant reconciled his inconsistent statements before and after taking breaks to consult with counsel during the September 18, 2018 interview on the grounds that he misunderstood the questions. For example, when asked about what discussion had ensued immediately after the officers on the shift viewed the video clips, he initially professed lack of knowledge because he was not actually in the monitor room but stood outside looking through a window and (although he could see into the room) he didn't have "first-hand" knowledge of the

discussion inside. He wouldn't "throw anyone under the bus" in an investigation by repeating something he did not actually hear first-hand. (*Testimony of Appellant*)

### **APPLICABLE LEGAL STANDARD**

Sections 41 to 45 of G.L. c. 31 allow discipline of a tenured civil servant for "just cause" after due notice, a hearing (which must occur prior to discipline other than a suspension from the payroll for five days or less), and a written notice of the decision that states "fully and specifically the reasons therefor." G.L. c. 31, § 41. An employee aggrieved by such disciplinary action may appeal to the Commission, pursuant to G.L. c. 31, § 42 and/or § 43, for de novo review by the Commission "for the purpose of finding the facts anew." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006). As prescribed by G.L. c. 31, § 43, ¶ 2, the Appointing Authority bears the burden of proving "just cause" for the discipline imposed by a preponderance of the evidence.

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.

The Commission determines just cause for discipline by inquiring "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass. App. Ct. 486, 488, rev. den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983).

The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as

the “underlying purpose of the civil service system ‘to guard against political considerations, favoritism and bias in governmental employment decisions.’” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. See also Town of Brookline v. Alston, 487 Mass. 278 (2021) (analyzing broad scope of the Commission’s jurisdiction to enforce basic merit principles under civil service law); Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971) (appointing authority must provide “adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law” for discharge of public employee), citing Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) (justification for discharge of public employee requires proof by a preponderance of evidence of “proper cause” for removal made in good faith). It is also a basic tenet of merit principles, which govern civil service law, that discipline must be remedial, not punitive, designed to “correct inadequate performance” and “[only] separating employees whose inadequate performance cannot be corrected.” G.L. c. 31, § 1.

Section 43 of G.L. c. 31 also vests the Commission with “considerable discretion” to affirm, vacate or modify discipline but that discretion is “not without bounds” and requires sound explanation for doing so. See, e.g., Police Comm’r v. Civil Service Comm’n, 39 Mass. App. Ct. 594, 600 (1996) (“The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio . . . accorded the appointing authority”). See also Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983).

The Commission takes into account the special obligations imposed upon police officers, who carry a badge and a gun and all of the authority that accompanies them, and which requires them to comport themselves in an exemplary fashion, especially when it comes to exhibiting self-control

and to adhere to the law, both on and off duty. “[P]olice officers voluntarily undertake to adhere to a higher standard of conduct . . . [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 . . . they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.” Attorney General v. McHatton, 428 Mass. 790, 793-74 (1999) and cases cited. See also Falmouth v. Civil Service Comm’n, 61 Mass. App. Ct. 796, 801-802 (2004); Police Commissioner v. Civil Service Comm’n, 39 Mass. App. Ct. 894, 601-602 (1996); McIsaac v. Civil Service Comm’n, 38 Mass. App. Ct. 473, 475-76 (1995); Police Commissioner v. Civil Service Comm’n, 22 Mass. App. Ct. 364, 371, rev. den. 398 Mass. 1103 (1986). See also Spargo v. Civil Service Comm’n, 50 Mass.App.Ct. 1106 (2000), rev.den., 433 Mass. 1102 (2001).

The duty imposed upon a police officer to be truthful is one of the most serious obligations he or she assumes. Thus, an appointing authority has just cause to discipline and/or terminate a police officer who repeatedly demonstrates his “willingness to fudge the truth”. “[P]olice work frequently calls upon officers to speak the truth when doing so might put into question a search or might embarrass a fellow officer.” Falmouth v. Civil Service Comm’n, 61 Mass. App. Ct. 796, 801 (2004), citing City of Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 303-305, rev. den., 428 Mass. 1102 (1997) (“It requires no strength of character to speak the truth when it does not hurt.”) See, e.g., Desmond v. Town of West Bridgewater, 27 MCSR 645 (2014); Ung v. Lowell Police Dep’t, 24 MCRS 567 (2011); Gallo v. City of Lynn, 23 MCSR 348 (2010). See also Minoie v. Town of Braintree, 27 MCSR 216 (2014); Everton v. Town of Falmouth, 26 MCSR 488 (2013), aff’d, SUCV13-4382 (2014); Gonsalves v. Town of Falmouth and cases cited, 25

MCSR 231 (2012), aff'd, SUCV12-2655 (2014); Keating v. Town of Marblehead, 24 MCSR 334 (2011).

The corollary to the serious consequences that flow from a finding that a law enforcement officer or applicant has violated the duty of truthfulness requires that any such charges must be carefully scrutinized so that the officer or applicant is not unreasonably disparaged for honest mistakes or good faith mutual misunderstandings. See, e.g., Boyd v. City of New Bedford, 29 MCSR 471 (2016) (honest mistakes in answering ambiguous questions on NBPD Personal History Questionnaire); Morley v. Boston Police Dep't, CSC No. G1-16-096, 29 MCSR 456 (2016) (candidate unlawfully bypassed on misunderstanding appellant's responses about his "combat" experience); Lucas v. Boston Police Dep't, 25 MCSR 420 (2012) (mistake about appellant's characterization of past medical history).

### **ANALYSIS**

The MBTA Transit Police established by a preponderance of the evidence that it had just cause to terminate the employment of the Appellant for substantial misconduct which adversely affects the public interest by impairing the efficiency of public service. In particular, the Appellant's handling of the Ashmont Station incident on July 27, 2018, fell woefully short of what was required of him as an MBTA Police Sergeant and supervisor. By his actions and inactions, he facilitated an unlawful arrest and incident report that he knew or should have known contained false information and which disregarded a use of force that he knew or should have known did not comply with MBTA policies and procedures. In addition, when he was asked to explain his conduct at an investigatory interview and at the Commission hearing, rather than acknowledge his mistakes, he became evasive and continued to assert that he had done nothing wrong. This misconduct goes to

the core values of integrity, honesty and professionalism expected of him as an MBTA Transit Police Sergeant and fully justified the decision to discharge him from his position.

First, the Appellant is the only person who, after viewing the video clips showing Officer Bartlett's interaction with the male subject at the Ashmont Station, even during the Commission hearing, would not rule out the possibility that there "might" have been a justification for the baton strikes visited upon that person on July 27, 2018.<sup>8</sup> Even the Appellant agreed that nothing on the video shows the male subject engaged in more than Level 2 "Passive Resistant" behavior which justifies more than "Contact Control" under the Use of Force Model at the time Officer Bartlett wielded the three baton strikes. The Appellant's position is not credible and his serious misperception of the rules governing use of force casts grave doubt on his suitability to serve as a police officer. "Defensive Tactics" (such as a strike with an MEB) that can be "Harmful" to the person (and, here, did cause physical injury, leading the subject to collapse and suffer a bruised leg) are justified only when a subject is engaged in "Assaultive Behavior" at Threat Level 4.

The Appellant's supposition that "assaultive behavior" may have happened off-camera is not supported by a preponderance of the credible evidence presented to the Commission.<sup>9</sup> In fact, the on-camera visual evidence recorded after each key off-camera episode—namely, what happened in the subway car and when the subject allegedly sat down on the platform—is inconsistent with such alleged "off-camera" assaultive behavior and strongly suggests that an assault was unlikely. The subject leaves the subway car with Officer Bartlett several feet behind, with no baton out and

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<sup>8</sup> Criminal charges against Sgt. Finnerty (and Officer Bartlett) remained pending at the time of the Commission hearing and each of them claimed Fifth Amendment privileges against self-incrimination and declined to appear in response to subpoenas served on them by the MBTA. (*Exh.27*) I credit the testimony of the other witnesses, including the Appellant, to infer that, on first seeing the video of the baton strikes, Sgt. Finnerty, too, had no doubt that the use of force was excessive.

<sup>9</sup> The MBTA requested the Commission to take administrative notice that, after the record in this appeal had closed, on July 13, 2021, the male subject had filed a federal civil rights action against the MBTA, and Messrs. Bartlett, Finnerty and Orceel in their individual capacities. (U.S.D.C. Mass. Civil Action No. 1:21-cv-11147-FDS). I take notice that a Complaint was filed but I give the allegations of the Complaint no weight in deciding this appeal.

with the officer exerting no physical control of the subject. Officer Bartlett then turns his back on the subject and disappears out of view. Then, as the two men emerge from “off-camera,” Officer Bartlett takes his baton out into his right hand on the platform only after he has pointed twice with an unarmed right hand to the escalator. He strikes the subject only after they have moved more than a subway car length toward the escalator, with Inspector Goggin close behind. Moreover, even if any arguably “assaultive behavior” had occurred “off-camera”, a Level 4 MEB strike is not justified once the assaultive behavior ended and the subject became compliant (or, at the worst, no more than passively resistant), as the video plainly shows.

Further, the Level 4 MEB strike shown on the video required Officer Bartlett to prepare a separate “Blue Team” report to document the use of force. It was Sgt. Orcel’s supervisory responsibility to ensure that such a report was prepared, to approve it, and to forward it up the chain of command. This additional dereliction of duty further compounds the Appellant’s failure to adhere to MBTA rules and regulations. I do not credit the Appellant’s excuse that he didn’t need to comply with these requirements of the Use of Force protocols because Superintendent Sullivan and Deputy Chief Reynolds were already aware of the incident and had taken control.

Second, the Appellant failed to fulfil his duties as a patrol supervisor by his actions and inactions after learning of Officer Bartlett’s ejection of the male subject at the Ashmont Station and his arrest ten minutes later in Peabody Square. I agree that the Appellant cannot be faulted for not responding to the scene after hearing Officer Bartlett’s first transmission that he had ejected someone from the Ashmont Station (which was closing down after the last train of the night). While it would have been prudent for him to inquire what level of force was necessary to “eject” the subject, the ejection of a person is not unusual and, at that point, he had learned of nothing specific to raise any “red flags” about the incident.



That situation changed, however, when he learned, about ten minutes later, that Officer Bartlett was bringing in a prisoner for assaulting a police officer. The Appellant recognized that those circumstances did call for him to respond and he dutifully returned to Headquarters to get the details as required by his position as the shift supervisor. Upon his arrival at Headquarters, however, despite the numerous “red flags” that had arisen, the Appellant showed little interest in fulfilling his duty to get to the truth of the matter.

The first red flags include the fact that the arrest had taken place off MBTA property. While an MBTA police officer can effect such an arrest if in pursuit of a suspect who committed an offense on MBTA property, that was not what happened here. Officer Bartlett never informed his supervisor or broadcast for backup that he was searching for a suspect who had just assaulted him, as he should have done if he actually were in pursuit. Rather, it was more than ten minutes after Officer Bartlett “ejected” the subject that he reported again. The video in the busway shows Officer Bartlett’s initial cruiser movement was to drive away from the northern exit where the male party was last seen, park in front of the exit from which the men had exited the station and appear to engage in conversation with Inspector Goggin. Only after doing all that does he drive off and turn SOUTH, away from where the male subject was last seen running. The Appellant knew all of that before, and most definitely soon after, returning to Headquarters on July 27, 2018.

These circumstances unquestionably called for a supervisor’s heightened scrutiny.<sup>10</sup> The Appellant, however, showed no interest in getting into these “details”. He discounted Officer Bartlett’s own story that, in effect, implied an admission that the assault was fabricated only after arriving on scene to find the BPD was responding to a 911 call for medical assistance by the male

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<sup>10</sup> The Appellant did not check the GPS records, but, had he done so, I find that Officer Bartlett’s cruiser movements shown in the busway immediately after he left the busway, heading away from the direction in which the male party was last seen, also raise “red flags” that his actions were inconsistent with those expected of a competent police officer in pursuit of a criminal suspect who had just assaulted him.

party and Officer Bartlett then told the BPD that the man was not a “victim” but a “suspect” in an ABPO (assault and battery on a police officer) so that he could take the subject into custody.

Similarly, the Appellant saw Officer Bartlett’s initial report that failed to meet the minimum requirements of an incident report or use of force report and, yet, he let Sgt. Finnerty (who had no percipient knowledge of the incident) flesh out the details, including the alleged off-camera assault(s) never actually witnessed by Sgt. Finnerty. Sgt. Orcel viewed the videos of the male being escorted by Officer Bartlett up the escalator, running away after being pushed out the door, and seeing Officer Bartlett driving his cruiser back to the door from which the male was ejected, all of which were consistent with an uneventful “ejection”, but wholly inconsistent with an assault, on- or off- camera, or an ensuing pursuit. In the face of these additional “red flags, rather than taking the time to get to the truth of matters, the Appellant simply chose to “believe his officers”. He showed no interest in questioning Officer Bartlett about the obvious discrepancies between the video and what Officer Bartlett had told him was the real (post-hoc) reason for the arrest, even after seeing that there was no assaultive behavior shown anywhere in the videos. He also ignored the horror expressed by his fellow officers, including Sgt. Finnerty, after they viewed the videos. In fact, he exacerbated his colleagues’ deceptive behavior by suggesting additions that doubled-down on the false narrative about what took place in the busway and when Officer Bartlett formed an intention to arrest, in direct conflict with the videos and with what he knew to be appropriate behavior on the part of an officer who had been assaulted or intended to effect an arrest.

Third, I am satisfied that Superintendent Sullivan’s memorandum of September 20, 2018, is a fresh, reliable, and materially accurate record of the interview with Sgt. Orcel conducted two days earlier on September 18, 2018, and as both he, Deputy Chief and his union representative, Lt. Flanagan, credibly substantiated during their Commission testimony. I do not credit the

Appellant's contention that he was threatened or misunderstood the questions he was asked until after his counsel and union representative explained them to him. He was ably represented. Professing confusion or surprise about the questions is just further confirmation that he did not appreciate, or did not take seriously, any responsibility on his part for the mistakes that were made on July 27, 2018. As noted above, any experienced police officer such as Sgt. Orcel knows that he must "speak the truth" even "when doing so might put into question a search [or other possible unlawful behavior] or might embarrass a fellow officer." Falmouth v. Civil Service Comm'n, 61 Mass. App. Ct. 796, 801 (2004). Sgt. Orcel's repeated reticence to provide complete and responsive answers to the questions until expressly prompted to be honest is a classic example of an officer who is "willing to fudge the truth" to cover up mistakes and fits precisely the definition of untruthfulness as soundly articulated in the MBTA's own rules:

Truthfulness is interpreted in the broadest sense. It is more than avoiding outright lies. Rather, it is an implied spirit of openness that requires even unintended misperceptions to be corrected when discovered rather than allow them to persist. Truthfulness means that all employees, from the very top of the organization to the bottom, admit mistakes when they are made, and take responsibility for their decisions.

(See Exhs.22 & 23)

Fourth, I also note that, rather than taking the opportunity for "misperceptions to be corrected when discovered rather than allow them to persist", as the MBTA rules expressly require, the Appellant chose not to testify at the Appointing Authority hearing below. Such a failure to testify, even if the decision is based on asserting a right against self-incrimination, also warrants an adverse inference against the Appellant, especially as to his truthfulness.

Fifth, I have concluded that the Commission would not be warranted to modify the discipline here. The facts upon which the MBTA arrived at its decision to terminate the Appellant's employment do not vary in any substantial way from the facts I have found after hearing the evidence in this appeal. I also have not overlooked the fact that the Appellant had no prior

disciplinary history before the incident that led to his termination. Had the Appellant's misconduct been limited to mistakes he made as a supervisor, a demotion from Sergeant to Police Officer could have been fairly considered. However, where the Appellant's misconduct implicates not only a failure to supervise but, also, a serious lack of candor and integrity—specifically, overlooking and/or trying to cover his mistakes and those of others rather than admit them and promise to correct them—the MBTA had just cause here to impose the ultimate discipline of termination.

## **CONCLUSION**

For these reasons, the Appellant's appeal under Docket No. D1-20-140, is hereby **DENIED**.

Civil Service Commission

/s/ Paul M. Stein  
Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chair; Ittleman, Stein and Tivnan, Commissioners [Camuso – Absent]) on October 7, 2021.

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)(1), 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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d)

Notice:

Mitchell J. Notis, Esq. (for Appellant)

Thomas R. Donohue, Esq. (for Respondent)