

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

BRIAN SWEET,
Appellant

v.

DEPARTMENT OF STATE POLICE,
Respondent

CASE NO: D1-10-290

Appellant's Representative:

Joseph P. Kitredge, Esq.
Rafanelli & Kittredge, P.C.
1 Keefe Road
Acton, MA 01720

Respondent's Representative:

Michael B. Halpin Esq.
Office of the Chief Legal Counsel
Department of State Police
470 Worcester Road
Framingham, MA 01702

Commissioner:

Paul M. Stein¹

DECISION

The Appellant, Brian Sweet, acting pursuant to G.L.c.31,§43 and G.L.c.22C,§13, as amended by the Chapter 43 of the Acts of 2002, duly brought this appeal to the Civil Service Commission (Commission) challenging the decision of the Respondent, the Massachusetts Department of State Police (MSP) to terminate him with a Dishonorable Discharge from the position of Massachusetts State Trooper, effective October 28, 2010. The Commission held five days of evidentiary hearings on May 10, 19 & 27, 2011, June 13, 2011 and July 27, 2011, which were digitally recorded. At the request of the Appellant, the hearing was declared public. All witnesses were sequestered. Sixty-five

¹Initial hearings were conducted before Commissioner Daniel Henderson, whose term on the Commission expired prior to his preparing a written Decision. Following his departure, pursuant to M.G.L.c.31,§2(b) and 801 CMR 1.01(11)(e), Commission Chairman Bowman, reassigned the appeal to me. I reviewed the recordings of the hearing, and convened a status conference at which time I decided to reopen the hearing to take additional testimony from the witnesses.

(65) exhibits were received in evidence. The MSP called eight witnesses [Medford Police Department (MPD) Det. Lt. John McLean; MSP Capt. Michael Drummy, MSP Lt. Robert Favuzza, MSP Sgt. Richard Chase, MSP Tprs. Leonard Wilmouth & Marcel Strain, MSP Admin. Sec'y Rhonda Wallace; and Marielena Tecce, a private citizen]. The Appellant testified on his own behalf and called eight witnesses [MSP Lt. Edward Downer, MSP Tprs. Justin Peledge, James Martin, Karl Johnson, Todd Silverio, & Danab Shea, MPD Det. Patrolman Lawrence James, and Attorney Jason Stelmat, Esq.].

By Procedural Order dated March 20, 2013, a sixth day of hearing was held on April 4, 2013, which included administrative notice of related judicial proceedings (marked as Exhibits 66 through 70), additional documents (marked as Exhibits 64A and 71 through 74) and further testimony of four witnesses [Lt. (formerly Sgt.) Chase and Tprs. Johnson, Peledge and Silverio]. The Appellant opted not to testify at this sixth day of hearing despite my request for him to do so. The MSP submitted post-hearing materials marked P.H.Exh. 75 [Confidential] and the Appellant submitted P.H.Exhs. 76 & 77.

Findings of Fact

Based on the exhibits, the stipulations and representations of the parties, the oral testimony of the witnesses, and the inferences reasonably drawn from the evidence that I find credible, I make the findings of fact set forth below.

The Appellant

1. At the time of his appeal, the Appellant Brian Sweet, was a 32 year-old unmarried resident of Tewksbury MA. He became a Massachusetts State Trooper in 2000. He was assigned to Troop A in 2003, initially to the Andover barracks (Station A-1). In 2005, at his request, he was reassigned to Medford (Station A-4) where his core

patrol duties centered on the I-93 corridor from Boston to the New Hampshire border. He was reassigned to Andover in November 2007 where he was placed on restricted duty until he was cleared in April 2008 and remained in Andover until he was discharged in 2010. (*P.H.Exhs. 76 & 77; Testimony of Appellant & Lt. Downer*)²

2. During his career, Tpr. Sweet was one of the highest producers according to the metrics tracked by the MSP, including number of motor vehicle stops, arrests, crash investigations, motorist assists, and investigations. He was recognized by Mothers Against Drunk Driving (MADD) for his record of OUI enforcement and successful prosecution for three consecutive years (2005, 2006 and 2007). (*Testimony of Appellant*),

3. Lt. Edward Downer is a 25-year MSP veteran who supervised Tpr. Sweet during the time Tpr. Sweet was assigned to Andover. Lt. Downer testified that he observed Tpr. Sweet to be a conscientious officer who never did or said anything regarded as posing a threat or risk to the personal safety of anyone. (*Testimony of Lt. Downer*)

4. During Tpr. Sweet's tenure at Medford, in general, he worked the Midnight Shift (11pm to 7:30 am) under the direct supervision of his shift commander, Sgt. Outerbridge and indirect supervision of Lt. Robert Favuzza, the A-4 Station Commander. (*Testimony of Appellant & Lt. Favuzza*)

5. Tpr. Sweet received an annual performance review, called an EES, prepared by the direct supervisor and reviewed by the next level superior office. The two supervisors must meet to discuss every evaluation and agree on the final rating level. (*Exhs. 47, 48 &*

² Tpr. Sweet testified that he was medically cleared for full duty in February 2008 but it took two months for the DSP to reinstate him, which he argues further demonstrates the DSP's animus toward him. This delay seemed clearly unusual and I was dubious that his testimony was accurate, but it was corroborated by the post-hearing documentation submitted by Tpr. Sweet. I draw no adverse inference of bias from these facts, but the documentation does tend to show that Tpr. Sweet's testimony on this subject was, in fact, truthful and supported the inference that he has a good memory for details. (*P.H.Exhs. 76 & 77*)

74; Testimony of Appellant, Lt. Favuzza)

6. According to the EES Manual, ratings have the following meaning:

OUTSTANDING – results are achieved on a consistent basis and significantly surpass acceptable levels of competency. When given, this rating level must be supported by a written statement justifying the rating

ACCEPTABLE – the member meets the acceptable levels of competency. It is anticipated that a majority of ratings will be in this category and written support is not required

NEEDS IMPROVEMENT – member occasionally falls below the acceptable level of competency, which must be supported by a written statement of explanation

UNACCEPTABLE – member’s performance fails to meet acceptable levels of competency and, if after, counseling, the member has failed to improve his/her performance, which must be supported by a written statement of explanation

(Exh.74)

7. Tpr. Sweet’s EES covering calendar year 2006, was prepared by Sgt. Outerbridge on January 17, 2007 and was reviewed by Lt. Favuzza on or about that date. The EES rated Trooper Sweet OUTSTANDING in his Knowledge/Compliance/ Application of Policy & Procedures, Rules & Regulations, Statute Law, Orders and Directives; OUTSTANDING in Initiative and Dependability (“Tpr. Sweet has shown exceptional initiative and dependability in performing his duties. Public demand has increased over the past years for police action in combatting drunk drivers, speeders, irresponsible drivers, incidents if [sic] road rage, etc. Tpr. Sweet has addressed these complaints”); and OUTSTANDING in Patrol/Investigative Ability (Tpr. Sweet continuesnot to only observe the obvious . . . but also has a keen sense for observing other infractions of m/v violations and criminal activity which require good investigative techniques to come to a conclusion.”). Tpr. Sweet received ratings of ACCEPTABLE in all other categories, including, “Follows Oral and Written Direction of Supervisors” and “Cooperation/Interpersonal Skills” and “Police/Community Relations.” He received no

rating of NEEDS IMPROVEMENT or UNACCEPTABLE in any category. (*Exh. 47 (emphasis added); Testimony of Lt. Favuzza*)

8. Tpr. Sweet's EES covering the calendar year 2007, was prepared by Sgt. Outerbridge on January 29, 2008 and was reviewed by Lt. Favuzza on that same date. The EES rated Tpr. Sweet OUTSTANDING in Patrol/Investigative Ability ("Tpr. Sweet is very knowledgeable of the area he patrols . . . Upon investigating and or arrest . . . Tpr. Sweet is very knowledgeable of the processing procedures") and ACCEPTABLE in all other categories. He received no rating of NEEDS IMPROVEMENT or UNACCEPTABLE in any category. (*Exh.48 (emphasis added); Testimony of Lt. Favuzza*)

9. Jason Stelmat is a former Middlesex County Assistant District Attorney, who served as acting supervising attorney at Somerville District Court. He testified from his percipient knowledge of Tpr. Sweet's reputation among his fellow prosecutors and his own percipient knowledge and observation of Tpr. Sweet in numerous situations, including motions, trials and arraignment. He came to count on Tpr. Sweet's work as "always done by the book" and, in those rare situations where there were weaknesses in the case, Tpr. Sweet did not conceal them, but was up-front about it. He described circumstances when Tpr. Sweet confided that he "knew" a motorist he had stopped had drugs in the vehicle, but let the motorist go because, under the law, he didn't have enough to execute a search of the vehicle. Tpr. Sweet was known to go out of his way to complete investigations, often on his own time. According to Atty Stelmat, Tpr. Sweet had a good reputation with prosecutors, who regarded him as highly professional with a good reputation for truth and veracity. Atty Stelmat's testimony was not challenged on cross-examination or through other percipient evidence. (*Testimony of Atty. Stelmat*)

10. James Martin is a veteran Massachusetts State Trooper with 25 years of experience and over ten years of service as a MSP court prosecutor. He, too, vouched for Tpr. Sweet's excellent reputation, with "every District Attorney." He stated that Tpr. Sweet was a pleasure to work with. He also considered Tpr. Sweet a personal friend. *(Testimony of Tpr. Martin)*

11. Tpr. Martin recounted, in undisputed testimony, a specific situation in which a sitting District Court Judge came to him to express gratitude for how Tpr. Sweet handled an emergency situation in which the judge recently had been involved. The judge had been involved in a serious motor vehicle accident and got the impression that the State Trooper first on scene appeared aloof to the situation, but when Trooper Sweet arrived on scene and took charge, his presence had a positive motivating effect on the others at the scene and assured the judge he was in good hands. *(Testimony of Tpr. Martin)*

Prior Discipline

12. Prior to 2007, Tpr. Sweet had been the subject of a number of citizen and internal complaints registered with the MSP Division of Standards & Training (DST), most of which were closed as unfounded or exonerated. Four complaints resulted in counseling in 2001, 2002 and 2004 as a result of conduct that is not specified in the record. Also, Tpr. Sweet accepted a forfeiture of three vacation days and agreed to attend anger management training, after a complaint for conduct that occurred in in 2004 in Chelmsford, MA but is not otherwise specified. Based on the low level of discipline, the absence of subsequent complaints for a period of over two years and Tpr. Sweet's subsequent positive EES rankings, I infer that whatever conduct had been involved was isolated or minor and was appropriately remediated by the prior discipline. *(Exh. 59)*

13. During 2007, six DST complaint files were opened against Tpr. Sweet:

- 1/17/2007 - 2007-DST-0020A - unknown complaint -closed as “unfounded”
- 3/10/2007 - 2007-DST-0071A – citizen complaint – 15 day suspension upheld by Commission and affirmed by unpublished Appeals Court decision
- 5/12/2007 – 2007-DST-0125A – citizen complaint – 5 day suspension and six-month transfer, Commission decision modifying discipline upheld by Superior Court and affirmed by unpublished Appeals Court decision)
- 8/09/2007 – 2007-DST-0189A – citizen complaint (combined with pending 2007-DST-1025A)
- 8/9/2007 – 2007-DST-0205A – Workplace Violence complaint – closed as “unfounded”
- 11/24/2007 – IAS070057 – citizen complaint, closed as “exonerated”

(*Exhs.41A, 42A, 59, 60, 66 through 70 & 73*)

14. On January 3, 2008, DST complaint file 2007-DST-257A was opened, which resulted in his termination and lead to the present appeal. (*Exhs.59*)

15. As indicated, Tpr. Sweet brought two prior appeals before the Commission. The first appeal (Sweet I) challenged his 15 day suspension, which was imposed after a MSP Trial Board found that Tpr. Sweet had kicked a citizen complainant’s car door, without justification, after coming to the assistance of another State Trooper (Justin Peledge), who had spotted a group of 30 to 40 “low riders” (including the citizen complainant) in a Chelsea supermarket parking lot where the operators were known to engage in drag racing. Tpr. Sweet assisted Tpr. Peledge in trapping many of the operators from fleeing. It was not disputed, and Trooper Sweet admitted that, during this encounter, he kicked the complainant’s door. (*Exh.42A; Testimony of Tpr. Peledge*)

16. By Decision dated December 10, 2010, the Commission discredited Tpr. Sweet’s claim that his conduct was justified (finding he “fabricated” the story that the complainant was about to back into Tpr. Peledge) and dismissed the appeal in Sweet I, which decision was affirmed by the Superior Court on March 21, 2011 and by an unpublished Appeals Court decision dated August 24, 2012. (*Exhs.42A,60 & 66*)

17. Tpr. Sweet's second appeal (Sweet II) arose from discipline imposed after a Medford citizen (Mr. W) complained that Tpr. Sweet harassed him and other Medford residents who frequented a particular restaurant in Medford, known as Raso's, that emanated from Tpr. Sweet's encounters on May 9, 2007 and August 9, 2007 with Mr. W, whom he had stopped and cited for speeding (70 mph in a 55 mph zone) and motorcycle equipment violations on those dates, as well as on previous occasions in 2006. (*Exhs. 2, 9, 32, 41A, 51; Testimony of Appellant*)

18. The Sweet II MSP Trial Board found Tpr. Sweet guilty of three of eight charges asserted and, as a result, he received a five day suspension, forfeiture of 10 days of vacation, and was involuntarily transferred from Troop A for six months.

- As to the May 9, 2007 stop, the MSP Trial Board found Tpr. Sweet guilty of violating MSP rules and regulations by filing an unauthorized "immediate threat" request with the Registry of Motor Vehicles (RMV), to revoke the citizen's motorcycle registration, based, in part, on the contention that only an operator's license, not a registration, could be revoked for immediate threat and that Tpr. Sweet had not procured a supervisor's approval.
- The MSP Trial Board also found Tpr. Sweet Guilty of untruthfulness, because he failed to update an initial report of the encounter, after he knew or should have known that other Troopers he had reported as eyewitnesses did not, in fact, see the encounter.
- As to the August 9, 2007 stop, the MSP Trial Board found Tpr. Sweet Guilty of operating outside his assigned territory at the time of the stop.

The MSP Trial Board found Tpr. Sweet "Not Guilty" on five of the eight charges that had been asserted in Sweet II:

- His interaction with Mr. W during the vehicle stop on May 9, 2010 was courteous and professional and did not rise to the level of conduct unbecoming a State Trooper
- Tpr. Sweet did not threaten or engage in any conduct unbecoming a State Trooper in respect to any interactions with a citizen by the name of Victor [K] or "any of the other patrons at Raso's Restaurant" at any time prior to August 9, 2007

- Tpr. Sweet was not “attempting to intimidate” Mr. W by stopping him on August 9, 2007 and “the Board believes that the motor vehicle stop was valid for the offenses indicated on Tpr. Sweet’s citation.”
- Tpr. Sweet did not act inappropriately in stopping Mr. W repeatedly even after he had been found not guilty for these same offenses previously. The Board noted: “The fact that Mr. [W] had been found responsible at a Clerk’s hearing adds credence to the motor vehicle stops even though a Judge later reversed the Clerk’s decision. Other troopers also had stopped this vehicle and its operator for the same violations.”³
- Tpr. Sweet was not untruthful in his report about the August 9, 2007 stop

(Exhs 9, 32, 41A & 51)

19. The Commission Decision in Sweet II concluded that the MSP had justification to discipline Tpr. Sweet on two of the three charges. The Commission found that it was common practice for a trooper to operate outside his assigned area toward the end of a shift and that there was no just cause to discipline Tpr. Sweet for that reason. The Commission also found that his involuntary transfer was unduly harsh and modified the discipline to eliminate that part of the penalty. In reaching this conclusion, the Commission specifically relied on evidence of animus on the part of Sgt. Chase, taking administrative notice of the testimony from Tpr. Peledge in Sweet I. (Exh. 41A)

20. In sustaining the discipline for Tpr. Sweet’s untruthfulness and his seeking an unauthorized filing of an “immediate threat” request following the May 9, 2007 stop, the Commission concluded that Tpr. Sweet’s actions were an abuse of his position, taken in retaliation for a perception by Tpr. Sweet that Mr. W was connected with a group of

³ I took administrative notice of Exhibit 1 in Sweet II, which corroborates the Trial Board’s findings and shows that Mr. W was cited twice more for illegally operating his motorcycle after he was last cited by Tpr. Sweet in 2007 and was, again, found responsible by the clerk-magistrate whose decision was again overturned by the district court judge. I also note that, as to the May 9, 2007 stop, although the district court judge overturned the clerk-magistrate he then also found Mr. W responsible for the most serious violation (illegal operation) for which the clerk-magistrate had found Mr. W not responsible. (See Exhs. 9 & 71)

motorcyclists he believed were behind a series of harassing messages made about him [Tpr. Sweet] to the Medford barracks. (*Exh. 41A*)⁴

21. The Commission Decision in Sweet II was affirmed by the Superior Court on June 11, 2011. Tpr. Sweet had argued that the charges (and Trial Board finding) around the filing of the immediate threat request asserted that it was a violation of MSP rules, but did not charge it to be an abuse of position or a retaliatory act. The Superior Court held that Commission was entitled to make such a finding on “de novo” review. The Superior Court also rejected Tpr. Sweet’s motion to supplement the record to include a recent MSP training document which purported to show, contrary to the MSP’s contention at the Commission hearing that an immediate threat request could, indeed, apply to a motor vehicle registration. (*Exhs. 67 through 69*)

22. The Appeals Court, by unpublished decision on March 22, 2013, affirmed the Superior Court’s decision. The Appeals Court held that Tpr. Sweet’s failure to correct his false log note was substantial evidence of untruthfulness that, alone, warranted discipline. As to Tpr. Sweet’s claim that the Commission had “focused heavily on retaliation” and not the “unsatisfactory performance” charge that had formed the second basis for the Trial Board’s discipline, the Appeals Court held that distinction did not prejudice Tpr. Sweet, since his uncontroverted failure to obtain a supervisor’s approval and RMV’s dismissal of the “immediate threat” request was sufficient evidence of the “lack of knowledge of the application of laws”, and, therefore, the MSP had proved the “unsatisfactory performance” that was the original reason given by the MSP for the discipline imposed. (*Exh. 70*)

⁴ Considerable additional evidence about the harassment of Tpr. Sweet alluded to in Sweet II, and which eventually led to a criminal investigation, was produced in the record of this appeal and is addressed in findings below.

The Applicable MSP Rules and Regulations

23. Article 5 of the MSP Rules & Regulations, entitled “RULES OF CONDUCT”, contains, in relevant part to the offenses asserted in this appeal, the following:

5.1 VIOLATION OF RULES

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

5.2 UNBECOMING CONDUCT

Members shall conduct themselves at all times in such manner as to reflect favorably upon themselves and the Massachusetts State Police. Conduct unbecoming shall include that which brings the Massachusetts State Police into disrepute or reflects discredit upon the person as a member of the Massachusetts State Police, or that which impairs the operation, efficiency, or effectiveness of the Massachusetts State Police or the member.

5.12 INSUBORDINATION

5.12.1 Members shall promptly obey and lawful order conveyed to them by any senior member or proper authority. For the purpose of this Article and order can be written or oral.

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

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

5.27 TRUTHFULNESS

5.27.1 Members and civilian employees shall be truthful at all times.

5.27.2 Upon the order of the Colonel/Superintendent, his/her designee, supervisory member, or proper authority, members shall truthfully answer all questions specifically directed and narrowly related to the scope of employment and operations of the Massachusetts State Police which may be asked of them. An invocation of Constitutionally protected Rights shall not be a violation of this Rule.

5.27.3 No member or civilian employee shall in the course of his/her official duties, execute, file or publish any false written report, minutes or statements, knowing the same to be false.

(Exh.14)

24. On March 12, 2004, the MSP promulgated General Order ADM-29 entitled “Workplace Violence”, to implement a zero tolerance policy for workplace violence in accordance with the directive established by Executive Order No. 442 dated October 30, 2002. *(Exhs. 12 & 13)*

25. Workplace violence is defined to include, among other things, any acts between employees and/or the general public which involve

- Intimidation or threats communicated by any means
- Threats and/or acts of intimidation communicated by any means that cause an employee to be in fear of their own safety
- Disruptive or aggressive behavior that causes a reasonable person to be in fear of their own safety or that of a colleague or that causes the disruption of workplace productivity

(Exhs. 12 & 13)

26. ADM-29 establishes a comprehensive plan for preventing, detecting and responding to all incidents of workplace violence. Among the requirements imposed upon supervisory personnel under ADM-29 is the duty to “[m]ake notification to the Workplace Violence Coordinator, within 72 hours of the incident through *SP 390 Workplace Violence Incident Report*.” (Exhs. 12 & 17; *Testimony of Lt. Favuzza*)

Events Leading Up to the February 2007 Incident at Raso’s Grille

27. Raso’s Grille is a public eating and drinking establishment established in 2005 and located at 209 Mystic Avenue (State Route 38) in Medford, MA. Situated a few blocks from the intersection of Harvard Street and Mystic Valley Parkway (State Route 16), it is easily accessible from Interstate 93, Exits 31N & 31S. The restaurant has accommodations for approximately 175 patrons. The business takes its name from its owners, the Raso family, one of whom (Richard Raso) is also a Medford Police Officer. (Testimony of Ms. Tecce. See also www.rasosgrille.com (visited 4/16/2013); local.yahoo.com/info (visited 4/16/2103))

28. The first incident in which Raso’s is featured occurred on December 12, 2006, and involved some of the same individuals who would be involved in the ensuing events as well. The details of this incident are thoroughly documented in contemporaneous

arrest records and memoranda, as well as the testimony provided by Tpr. Sweet and Tpr. Danab Shea, both of whom provided consistent and credible testimony based on their respective clear, percipient memory of the events. None of the private citizens involved were called to testify. (*Exhs 25 & 26; Testimony of Appellant and Tpr. Shea*)

29. While on routine patrol in the early morning hours of December 12, 2006, Tpr. Sweet stopped a Ford passenger car that had excessively tinted windows and an obstructed license plate. Upon exiting his cruiser, Tpr. Sweet noticed that a Ford pick-up truck, which had been following the passenger car, was stopped behind his cruiser. Tpr. Sweet noticed that the truck also had excessively tinted windows. (*Exhs. 25, 26, 39; Testimony of Appellant*)

30. Upon approaching the car, Tpr. Sweet observed two female occupants. The operator was identified [Ms. S]. Tpr. Sweet detected a strong odor of alcohol, asked the operator if she had been drinking, to which she replied, “Yes I had two glasses of wine at Raso’s”. After further observations and the operator’s failure on three different field sobriety tests, Tpr. Sweet placed the operator under arrest for OUI. (*Exhs. 25, 26; Testimony of Appellant*)

31. Tpr. Sweet then verbally identified the passenger in the car as Mrs. M. When Tpr. Sweet advised Mrs. M that he had placed Ms. S under arrest for OUI, Mrs. M stated: “I know, I was trying to get her to leave Raso’s for an hour, she wouldn’t give me the keys. That’s why my husband was following her in his truck and I was riding with her to make sure she got home okay.” (*Exh. 25; Testimony of Appellant*)

32. Tpr. Sweet then retrieved his “tint meter” and measured the tint on the pick-up truck to be 22%, which is over the legal limit of 20%. He issued a civil citation for the

violation to Mr. M (husband of Mrs. M). At this time, Mr. M informed Tpr. Sweet that his neighbor was Marcel Strain, another State Trooper assigned to Medford, and requested “professional courtesy”, i.e., rescind the citation. Tpr. Sweet stated that, regardless of who he knew, his only options were those listed on the back of the citation. Trooper Sweet then took Ms. S into custody and transported her to the Medford barracks where she was booked and released. (*Exhs.25, 26; Testimony of Appellant*)

33. During the booking of Ms. S, Mr. M approached Tpr. Shea and asked to speak to “Brian”. After confirming that he meant Tpr. Sweet, Tpr. Shea informed Tpr. Sweet of Mr. M’s presence. Around this time, a telephone call came into the barracks from Tpr. Strain, who inquired about the case and stated that Mr. M was a good friend. Tpr. Sweet then approached Mr. M at the threshold of the lobby doorway where Mr. M again, asked for “professional courtesy” and was told there was nothing Tpr. Sweet could or would do for him. (*Exhs.25, 26; Testimony of Appellant & Tpr. Shea*)

34. On December 15, 2006, at approximately 1:20 am, Tpr. Sweet stopped a motorcycle operator for speeding. Initially, Tpr. rooper Sweet did not recognize the operator, who was wearing a helmet, glasses and leather gear, but he turned out to be the same Mr. M. who had been involved in the December 12, 2006 incident. Tpr. Sweet administered a sobriety test which Mr. M. passed. Tpr. Sweet issued a citation for speeding and other violations. (*Exhs. 26 & 39; Testimony of Appellant*)

35. The next incident involving Raso’s Grille began just before midnight on January 4, 2007. As Tpr. Sweet entered Route 93 northbound at the Sullivan Square ramp in Somerville, he spotted four motorcycles (three black and one red) traveling at a high rate of speed. He followed the bikers and clocked their speed at 80PMH, noting, as well, that

they had illegally high handle-bars and altered exhaust systems. When the bikers moved from the far left travel lane without slowing down and exited at Route 60 (Exit 32) in Medford, Tpr. Sweet activated his emergency lights. Two bikers pulled over and Tpr. Sweet pursued the other two. Eventually, all the bikers took off and he lost sight of them. He began to search the area. He found two motorcycles fitting the description of those he had attempted to stop parked in front of Raso's Grille. At this point, Trooper Sweet radioed for backup and Trooper Dana Shea arrived to assist. Tpr. Shea noticed that the engines on both motorcycles were noticeably hot to the touch. Eventually, the owners of the motorcycles came outside and identified themselves to Tpr. Shea. Tpr. Sweet recognized the two men as the bikers who had initially pulled over when he initiated pursuit, but then took off after he went after the other two bikers. One of the men was Mr. M. They were cited for failure to stop for a police officer, speeding and various equipment violations. Tpr. Sweet also filed an "immediate threat" request with the RMV to revoke the operator's licenses. (*Exhs.28, 29 & 36; Testimony of Appellant & Tpr. Shea*)

36. A few days later, Tpr. Sweet learned that Raso's was owed by MPD Officer Richard Raso and called him, but Officer Raso never returned the call. (*Exh. 26*)

37. Tpr. Sweet also came to learn that another MPD police officer, Officer B, had approached two other State Troopers at a funeral and asked why Tpr. Sweet was "harassing bikers" in Medford, with specific reference to the January 4, 2007 incident. It was apparent from the account, that Officer B had very specific knowledge about the incident from some source. That same night, Tpr. Silverio, while on desk duty at the Medford barracks, took a phone call from a male who said Tpr. Sweet should "leave the good people of Medford alone and go down to Dorchester where the criminals are." Over

the following two weeks, Tpr. Sweet was informed that additional telephone calls of a similar vein were received at the Medford barracks by Sgts. D'Aiuto and Outerbridge, and Tprs. Silverio, McCarthy, P. Johnson and Cashman. (*Exhs. 26, 27 & 28A*)

38. At the RMV imminent threat hearing on January 9, 2007, the two suspects presented letters (one from Officer B), attesting to the fact that both men were in the company of the authors of the letters at Raso's all evening. According to testimony provided in deposition testimony given by Tpr. D'Aiuto in a civil lawsuit, he was told by the RMV employee who handled immediate threat requests, that the MPD Police Chief had also intervened in the matter and requested "consideration". As a result, the RMV dismissed the revocation requests. (*Exhs. 29,30,40; Testimony of Appellant*)

39. On January 17, 2007, Mr. M filed a complaint with the MSP against Tpr. Sweet. His complaint alleged that he had been harassed by Tpr. Sweet, citing the three incidents described above and ascribing various obscene remarks to Tpr. Sweet. This charge resulted in a DST investigation (2007-DST-0020A). On January 23, 2007, Tpr. Sweet provided a credible, specific and documented response to Mr. M's claims of harassment and improper conduct. On February 23, 2007, the complaint was closed as "Unfounded." (*Exhs.26, 39, 59; Testimony of Appellant*)

40. On January 25, 2007, Tpr. Sweet obtained copies of the documents provided to the RMV. These included unsigned letters from Officer B. and another male, Michael C, claiming that all four men had been "having dinner" at Raso's on January 4, 2007 from 8:15 until "closing", together with a copy of receipts for food and beverages served by "Joseph D". (*Exhs. 29, 30, Testimony of Appellant*)

41. Tpr. Sweet spoke with Officer B on February 15, 2007. Officer B said he had been at Raso's on January 4 and had seen the individuals involved there, but he denied that he wrote any letter to the RMV. He initially agreed to meet Tpr. Sweet the following day. Officer B did not return Tpr. Sweet's subsequent calls to confirm a meeting time, however, and the meeting never occurred. (*Exh. 26; Testimony of Appellant*)

42. Tpr. Sweet attempted to reach the author of the other letter (Michael C) at the phone number provided in the letter. A male voice answered the phone but hung up after Tpr. Sweet identified himself. Messages left upon subsequent calls to the same number were not answered. (*Exh. 26*)

The February 16, 2007 Incident at Raso's Grille

43. At 1:30 pm on February 16, 2007, Tpr. Sweet arrived at Raso's, accompanied by Tpr Silverio, whom Tpr. Sweet had requested as back-up. Tpr. Sweet had worked the previous Midnight shift (11:00 pm to 7:30 am). Tpr. Silverio, his assigned backup, was on his regular duty day at the time. The purpose of the visit was to investigate the alibis provided by the letters to the RMV, and specifically, to interview the waiter "Joseph D" listed on the restaurant receipts. (*Exhs 20, 28A; Testimony of Appellant, Tpr. Silverio, Det. McLean, Det. James & Ms. Tecce*)

44. The receipts contain obvious "red flags" that present circumstantial evidence that does not correlate with the purported alibi of a dinner party of four and clearly warranted investigation. The documents are not in the form of a credit card receipt ordinarily kept by the customer, but appear to be more internal business records of some sort that could only have been produced by someone with access to restaurant data. One receipt shows that the only food ordered was one house salad and one entrée, one bottle of Pellegrino,

one glass of wine and one cup of coffee; the other receipt, shows a total of seven mixed drinks ordered, beginning nearly one hour after the meal receipt was first punched in. Both receipts appear to be charged to the same Visa card (ending in 9123) and state that the number in the Party is “1”. (*Exh.30*)

45. Upon entering Raso’s, the troopers approached Ms. Tecce, the hostess/bartender on duty. Tpr. Sweet asked to speak to Joseph D, and was informed that his shift started at 4:00 pm. Ms. Tecce then left to locate the manager on duty, after which she returned to the bar area and was not in a position to observe Tpr. Sweet thereafter. She did not recall Tpr. Silverio being present. (*Testimony of Appellant, Tpr. Silverio & Ms. Tecce*)⁵

46. MPD Det. Lt. John McLean and Det. Lawrence James, who were having lunch, spotted the troopers come in. Ms. Tecce gave uncontroverted testimony that the MPD officers told Ms. Tecce she “didn’t have to answer” Tpr. Sweet’s questions. Det. Lt. McLean approached Tpr. Sweet and engaged him in conversation. (*Exhs.1, 11; Testimony of Appellant, Tpr. Silverio, Det. Lt. McLean, Det. James & Ms. Tecce*)

47. Det. Lt. McLean testified that he had “no idea” why Tpr. Sweet was there but approached Tpr. Sweet when he heard him inquire about the whereabouts of the bartender and offered to call the restaurant manager on his cell phone. According to Det. Lt. McLean, Tpr. Sweet stated he was investigating “something” and that “a couple of MPD officers were covering it up”. Det. Lt. McLean was the only percipient witness who

⁵ Ms. Tecce also had a subsequent off-duty chance encounter with Tpr. Sweet at the home of a mutual acquaintance, at which time she tried to strike up a conversation by telling him, sarcastically: “I heard you lost your cruiser”. He took offense to the remark and retorted with some derogatory comments directed at her boss, Richard Raso, whom he logically assumed was a conduit for that information. She placed this incident in the “warm” weather months, but it had to relate to Tpr. Sweet’s restricted duty period in the winter of 2007-2008, so I discount somewhat the specific details of her recollection. I do take the encounter as additional evidence that Tpr. Sweet had good reason to believe someone associated with Raso’s had a connection into the DSP Station A-4 Medford barracks. (*Testimony of Appellant & Ms. Tecce*)

testified to hearing Tpr. Sweet use the phrase “cover up”. (*Testimony of Appellant, Tpr. Silverio, Det. Lt. McLean, Det. James & Ms. Tecce*)

48. Neither Ms. Tecce, Det. James, nor Tpr. Silverio recalled hearing the words “cover up.” Tpr. Sweet testified that he told Det. Lt. McLean the investigation “involved a couple of your [MPD] guys” and he was “all set”, or words to that effect. There is no evidence that any other person(s) in the then sparsely populated restaurant took notice of what had occurred. I infer that, while the tone of the conversation would later become raised, the initial exchange between Tpr. Sweet and Det. McLean was normal conversation, and not intended to be overheard. (*Testimony of Appellant, Tpr. Silverio, Det. Lt. McLean, Det. James & Ms. Tecce*)

49. At some point, Det. James injected himself and told Tpr. Sweet: “Your reputation precedes you” to which Tpr. Sweet replied: “What’s that supposed to mean?” The conversation between these two officers then escalated, with Det. James stating: “What don’t you understand about what I just said”, and later calling Tpr. Sweet “Junior” and telling him to “go back out to the street.” Ms. Tecce testified that she turned up the volume on the radio, which I infer to corroborate that the tone of the conversation had changed. Who did the shouting is not clear. Det. Lt. McLean testified that he told Det. James to “calm down.” The entire encounter was over within a few minutes. (*Testimony of Appellant, Tpr. Silverio, Det. Lt. McLean, Det. James & Ms. Tecce*)

50. Det. James was an extremely reluctant witness who appeared only after considerable effort was made to procure his testimony. Originally listed as a MSP witness, he was not called by the MSP and, eventually, after multiple attempts, appeared pursuant to a Commission subpoena issued at the behest of the Appellant. (*Exh. 65*)

51. Det. James provided only a vague recollection of the February 16, 2007 encounter during his testimony. He did not recall Tpr. Sweet using the words “cover up”, and his memory was not refreshed when shown a memorandum he had written in which he made that assertion. He testified that he did not recall calling Tpr. Sweet “Junior”, but “possibly” did so. (*Testimony of Det. James*)

52. Det. James and Det. McLean prepared written statements purporting to describe the February 16, 2007 encounter. Except to the extent those statements are corroborated by direct and percipient testimony from the authors or other witnesses, I give this hearsay diminished weight for several reasons. Neither statement is signed. Det. Lt. McLean’s statement is not dated and is not prepared on any official MPD form. Det. James’s statement is dated February 14, 2008, nearly one year after the incident, and appears on a letterhead of the “MPD/NEMLEC Computer Crime Unit.” The accounts frequently include statements that are more self-serving than factual. Det. James testified that he wrote his statement to “cover my butt” and didn’t think it would be used for any purpose “out of the building”. (*Exhs. 1 & 11; Testimony of Det. Lt. McLean & Det. James*)

53. Tpr. Sweet followed up his visit to Raso’s with a telephone call later that evening to Raso’s. The party he spoke to hung up on him. (*Exh. 28A*)

Subsequent Harassment of Trooper Sweet

54. On February 28, 2007, MSP Medford Station A-4 logged a series of calls from an anonymous caller who inquired how many times Tpr. Sweet has stopped vehicles with handicapped plates. Sgt. Outerbridge was able to “trap” the call and trace it to a Verizon cell phone number. (*Exhs. 27, 31 & 37*)

55. On April 4, 2007, MSP Medford Station A-4 logs two additional obscene phone calls disparaging Tpr. Sweet. These calls were also traced to the same Verizon cell phone number. (*Exhs. 27, 31 & 37*)

56. On May 27, 2007, Tpr. Sweet reported to MSP Medford Station A-4 for his Midnight shift, to relieve the desk officer, Tpr. Danab Shea. Tpr. Shea informed Tpr. Sweet that he had received a call earlier that evening from Tpr. Marcel Strain, who had inquired whether Tpr. Sweet would be working the Midnight shift and what his assignment was. Tpr. Shea told Tpr. Strain that Tpr. Sweet was assigned the desk. Tpr. Sweet called Tpr. Strain's residence and spoke to his wife, who said Tpr. Strain was out for the evening. He eventually reached Tpr. Strain the next evening, and Tpr. Strain said he was "all set." This information troubled Tpr. Sweet because he believed, with good reason, that Tpr. Strain, who lived in Medford, was known to associate with some of the individuals in Medford, including regular patrons at Raso's, who had connections to the recent citations Tpr. Sweet had issued. Tpr. Sweet later came to learn that on the evening in question Tpr. Strain had been seen at a party where some of these individuals were present. As a result, Tpr. Sweet submitted a written report stating that he was concerned that Tpr. Strain's actions had risked putting Tpr. Sweet in personal jeopardy for his safety. (*Exh. 18; Testimony of Appellant, Tpr. Shea & Tpr. Strain*)

57. In response to a DST investigation of the matter (2007-DST-0130A), Tpr. Strain stated that he was at a "block party" in his Medford neighborhood when an off-duty MBTA officer approached him and inquired about Tpr. Sweet, stating he wanted to talk to him. Tpr. Strain could not provide the off-duty officer's identity or the specific nature of his interest in Tpr. Sweet and did not know how to contact the officer whom he did not

know. Although he presumably passed on the message that Tpr. Sweet was working the desk, no MBTA officer ever called. In his report, Tpr. Strain took offense to Tpr. Sweet calling his residence because it gave his wife “anxiety.” The investigation was closed with no action taken. (*Exh. 19; Testimony of Cpt. Drummy & Tpr. Strain*)

58. Tpr. Strain’s story about the events of May 27, 2007 is implausible, but Tpr. Sweet’s concern for his safety by virtue of this particular event also seems overblown. As noted earlier, by mid-2007, the working relationship between Tpr. Strain and Tpr. Sweet had become an uneasy one, in part, because, Tpr. Strain perceived Tpr. Sweet, considerably his junior in length of service, to be usurping his prerogatives as the senior trooper. Thus, I view this episode through the lens of this apparent mutual distrust and give little weight to either trooper’s view of the behavior of the other. (*Exh. 19; Testimony of Appellant, Capt. Drummy, Lt. Favuzza & Tpr. Strain*)

59. Meanwhile, during the summer of 2007, MSP conducted an investigation of the well-documented harassing phone calls directed at Tpr. Sweet. By late July 2007, MSP Sgt. Alan D. Hunte, the investigating officer, had secured information that positively identified the phone number as one used by an Anthony C. On August 3, 2007, Sgt. Hunte spoke with Anthony C., who said he did not recall ever using the phone number in question but he would think about it and call back in an hour, which he never did. Tpr. Sweet believed Anthony C. was eventually charged criminally, but no specifics were provided. (*Exhs 31, 40 & 52; Testimony of Appellant*)

60. Anthony C. is the brother of Michael C., who was one of the authors of the alibi letters provided to the RMV on behalf of the whereabouts of the two motorcyclists he cited at Raso’s Grille on January 4, 2007. (*Exhs.29 through 31; Testimony of Appellant*)

The August 9, 2007 Incident at Medford Barracks

61. On August 9, 2007, after working his regular Midnight shift, Tpr. Sweet completed a detail assignment and returned to Medford Station A-4 around 9:00 am to report his activity. As described above, during his shift, he had again stopped Mr. W. on his motorcycle for his continued equipment violations and Mr. W. had called the barracks to complain. Tpr. Sweet had also ticketed another Medford citizen that morning by the name of Victor K who later also registered a complaint about Tpr. Sweet. (*Exhs.2 &10; Testimony of Appellant*)

62. As noted earlier, Mr. W's and Victor K's complaints were investigated, together with the May 9, 2007 stop of Mr. W in Sweet II. The citizens' complaints about Tpr. Sweet's on-scene behavior were determined to be unfounded, but Tpr. Sweet was found guilty of citing Mr. W while outside his assigned patrol area without permission, a finding the Commission overturned on appeal. (*Exhs.41A & 51; Testimony of Appellant*)

63. When Tpr. Sweet arrived at Station A-4 on August 9, 2007, Sgt. Chase was the desk officer working the day shift. Sgt. Chase had worked with Tpr. Sweet in Andover and in Medford, but had never been his direct supervisor, as they worked different shifts. (*Exh. 33; Testimony of Appellant & Sgt. Chase*).

64. Tpr. Sweet and Sgt. Chase once had a cordial working relationship, but it had deteriorated in recent months and they no longer engage in conversation. Tpr. Martin had advised Tpr. Sweet to limit his contact with Sgt. Chase. Tpr. Sweet believed his refusal to accede to Sgt. Chase's request that Tpr. Sweet "fix" an OUI citation had irritated Sgt. Chase. Sgt. Chase believed it was his investigation of Tpr. Sweet's behavior in Sweet I which he found Tpr. Sweet responsible for kicking a motor vehicle without justification.

The evidence is not sufficient to permit any inference as to the precise reason for the breakdown between the two men. (*Testimony of Appellant, Sgt. Chase & Tpr. Martin*)

65. The animus that Sgt. Chase held toward Tpr. Sweet, however, for whatever reason, is well-established. Tpr. Peledge appeared and confirmed his testimony in Sweet I, that Sgt. Chase told him “there are people we protect in this job and Trooper Sweet isn’t one of them.” This statement led the hearing commissioner in Sweet I and Sweet II, to conclude that Sgt. Chase held some animus against Tpr. Sweet and I draw the same inference. (*Exhs.41A & 412A; Testimony of Sgt. Chase & Tpr. Peledge*)

66. Tpr. Sweet entered the Medford barracks from the rear door, proceeded past the booking area to the kitchen (also known as the “Troopers’ room”), where he deposited his detail time record and departed. Sgt. Chase was on duty in the desk area, adjacent to the kitchen. (*Testimony of Appellant & Sgt. Chase*)

67. Sgt. Chase’s direct testimony before the Commission, as to what he remembered of that incident, in its entirety, is as follows:

Q. Did you see Brian Sweet that morning [8/9/2007]?

A. Yes.

Q. Can you tell us about that encounter?

A. Well, at some point, I saw Brian Sweet in the kitchen area of the barracks and I said hello to him.

Q. Did he respond to your . . . ?

A. No, he ignored me.

Q. Is that the first time he ignored you?

Q. First time ever?

Q. Ever. Do you recall?

A. First time when I think he ignored me on a direct “hello”, yeah.

Q. Did anything else happen relative to that encounter with Brian Sweet?

A. Yeah, at some point, after he didn’t acknowledge my hello or greeting I went to the desk area and began to assume my desk duties and at some point I heard some loud noises coming from the kitchen area.

Q. Do you recall what time Brian Sweet came in? Do you recall what time that encounter occurred?

A. No, I don’t, Sometime in the morning.

- Q. Can you tell us where the kitchen area is relative to where you work?
- A. Just a room next door. It has only one doorway in between. They're pretty much together except just one doorway.
- Q. How soon after did you speak to Lt. Favuzza . . . Do you remember what time you had a conversation with Lt. Favuzza?
- A. No, late morning sometime.
- Q. And what was the conversation about with Lt. Favuzza?
- A. With regard to Trooper Sweet's recent behavior.
- Q. Do you recall how you described Brian Sweet's behavior?
- A. Just recall that I had expressed to the Lieutenant that I had an uneasy feeling about Trooper Sweet. I was feeling a little bit apprehensive around him and I was feeling a little bit threatened around him.
- A. As a result of that conversation with Lt. Favuzza were you ordered to do anything?
- A. Yes.
- Q. And what was that? What was the order?
- A. I was ordered to write a report, we call a To/From on my feelings on the matter.
- Q. And did you comply?
- A. Yes.

(Testimony of Sgt. Chase)(emphasis added)

68. Sgt. Chase 's To/From, dated August 15, 2007, states:

"On 8-9-07, at approximately 0900 hours . . . I began a routine conversation with the station commander Lt. Favuzza. . . . During my conversation I discussed my concerns for my safety, due to some of the recent behavior of [Brian Sweet]. I stated to the lieutenant that I don't know what the trooper is capable of. I made the statement that I'm afraid he might come into the barracks and shoot the place up. Lt. Favuzza asked me to articulate my feelings on the matter but I cannot. I just have an overall uneasy feeling of insecurity around Tpr. Sweet based on the following observations:

. . . I recently investigated a citizen's complaint against Tpr. Sweet and found the complaint to be sustained. . . .he has made statements. . . not to me directly but were conveyed to me that he was planning on some sort of retaliation . . . I know these statements cannot be proven but it does add to my heightened sense of awareness around Tpr. Sweet .

In another matter Tpr. Sweet has shown his willingness to retaliate and torture the motoring public. The very morning I spoke to the lieutenant in regards to Tpr. Sweet's recent behavior, the barracks received another complaint from a gentleman Tpr. Sweet had stopped in the past . . . I have been made aware of certain threats Tpr. Sweet has made against parties involved in the citizen's complaint.

I have spoken recently to Tpr. Marcel Strain, who was also involved in some sort of incident with Tpr. Sweet. . . . He also stated that he made a report in regards to him feeling threatened by Tpr. Sweet.

My last but not least feeling on the matter is like I have previously relayed in this report. I have always maintained some sort of rapport with Tpr. Sweet. Within the past few weeks I have attempted to say hello to him and he has ignored me. The morning of August 9th Tpr. Sweet came to the barracks to put his overtime on the clip board. I again attempted to say good morning to him and he ignored me. I did not push the issue, as he walked around the desk and kitchen area for the next few minutes and was being very aggressive in the way he handled himself. This was shortly after he stopped the gentleman involved in the complaint against him for the fifth time.”

(Exh.3; Testimony of Sgt. Chase) (emphasis added)

69. Tpr. Sweet recalls his presence at the barracks on August 9, 2007. He recalled that, as he walked in, Sgt. Chase was in the desk area, and he spun his chair around, saying nothing. He recalled seeing two other troopers, Karl Johnson and Brian Talbot, present in the booking room as he walked in. When first confronted about the episode months later, he denied “banging things in a loud manner” and did not “drop, slam or throw anything to the floor or table which may have made a loud noise”. Tpr. Johnson had neither a recollection of Tpr. Sweet’s presence nor of anything else remarkable about the events of that morning. (Exhs 7 & 33; Testimony of Appellant & Tpr. Johnson)

70. Shortly after Tpr. Sweet departed, Lt. Favuzza arrived. Sgt. Chase related the complaint from Mr. W. that had been received during the prior shift and then said, as Lt. Favuzza reported it, something to the effect that he [Sgt. Chase] was afraid that Tpr. Sweet was unstable and could someday “snap” and “shoot everyone in the barracks” or “shoot the place up.” (Exh. 2 & 3; Testimony of Lt. Favuzza & Sgt. Chase)

71. Sgt. Chase testified that his statement was simply an off-hand remark made between two supervisory officers who were also close friends and that he never intended the statement to be taken seriously. However, when Lt. Favuzza pressed him to write a report that would endorse or recant the statement, he chose to stick with his statement, as described above. (Exhs. 2 & 3: Testimony of Lt. Favuzza & Sgt. Chase)

The First Internal Work Place Violence Investigation

72. Lt. Favuzza and Sgt. Chase prepared “To/From” reports that were sent up the chain of command to the Troop A commanding officer, Major Kelly, and thence to the DST, which opened a complaint file (2007-DST-0205A). Although originally forwarded to a DST Harassment Unit officer, the investigation was returned to Troop A and assigned to Capt. Michael Drummy for investigation. (*Exh.2 ,3 ,59, 64 & 64A; Testimony of Capt. Drummy, Lt. Favuzza & Sgt. Chase*)

73. Capt. Drummy reviewed all the To/From reports prepared by Lt. Favuzza and Sgt. Chase, unrecorded interviews of Sgt. Chase, Sgt. D’Aiuto and Tpr. Christopher Maher. None of the information obtained by Capt. Drummy rose to the level of percipient evidence of any act on Trooper Sweet’s part that could reasonably be construed as a threat or intimidation toward any one. In his investigative report, dated October 4, 2007, to Troop A Commander Major Kelly, Capt. Drummy wrote:

I find that the basis of the complaint was not factual, but was based on rumors and opinions. Sergeant Chase . . . never felt threatened in any way by Trooper Sweet. . . . He never intended this to be made into a Workplace Violence investigation. . . . Since there is no evidence of any workplace violence, I do not find it necessary to interview Trooper Sweet on the matter.⁶ I recommend that this investigation be closed and classified with a finding of “**Unfounded**”.

(*Exhs. 2, 3 & 4; Testimony of Capt. Drummy*) (*emphasis added*)

74. Immediately upon receipt, Major Kelly forwarded Capt. Drummy’s report to his superior, Lt. Col. Smith, Division of Field Services Commander and Lt. Col. McGovern, then the DST Commander. Col. Smith approved the recommendation on 10/22/2007. DST closed the investigation as unfounded on that same date. (*Exhs. 59, 64 & 64A*)

⁶Prior to submitting his report, Capt. Drummy had conferred with DST Major Berurman Ellison, officer in charge of the Harassment Unit, and specifically discussed whether or not it was necessary to interview Tpr. Sweet. (*Exhs. 64 & 64A; Testimony of Capt. Drummy*)

75. No Workplace Violence Form 390 was ever filed. At no time during the course of this investigation did Tpr. Sweet have any knowledge that he was the target of such an investigation. (*Testimony of Appellant; Capt. Drummy & Lt. Favuzza*)

76. Tpr. Sweet first came to learn that he had been under investigation for a workplace violence incident during a “duty status” hearing on December 5, 2007, which was scheduled in response to the November 27, 2007 citizen’s complaint that alleged Tpr. Sweet had used excessive force in effecting an arrest on November 27, 2007. It was as a result of that duty status hearing that Tpr. Sweet was placed on restricted duty. As noted earlier, Tpr. Sweet was exonerated from the citizen’s complaint, declared fit by two psychiatrists and, eventually, returned to duty in April 2008. (*Exhs. 59, 73, 76 & 77; Testimony of Appellant; Stipulation of Counsel*)

The Second Internal Work Place Violence Investigation

77. At a meeting on or about December 19, 2007, Major Kelly verbally directed Capt. Drummy to conduct a further investigation of the allegations of workplace violence against Tpr. Sweet. The new assignment, as he understood it, was “to conduct an interview with Trooper Brian Sweet to address an allegation of workplace violence and to clarify his actions and behavior in regard to his interactions with Sergeant Chase on the morning of 8-9-07.” (*Exh. 2; Testimony of Capt. Drummy*)

78. On or about January 3, 2008, a new DST complaint number (2007-DST-0257A) was assigned to the investigation. The official(s) who ordered these actions are not identified and evidence is not conclusive as to the date this action was initially ordered. The only paper-trail that was introduced consisted of a hand-written memorandum from Lt. Col. Smith to Major Kelly, dated 12/3/2007, which Capt. Drummy remembers having

been shown at the time of his meeting with Major Kelly. The memo, which had a notation for a different DST file (2007-DST-0260A), states that the original “invest was ‘kicked back’ from DST” for two reasons: (1) to conduct an interview with Tpr. Sweet; and (2) to investigate statements regarding Tpr. Sweet behavior made in Lt. Favuzza’s To/From that “constituted insubordination”.⁷ (*Exh.46; Testimony of Capt. Drummy*)

79. Captain Drummy began his second investigation with another interview of Sgt. Chase on December 19, 2007 and submitted his report to Major Kelly on February 15, 2008. During this time, he interviewed Tpr. Sweet, and conducted two more interviews of Sgt. Chase; three more interviews of Lt. Favuzza; interviews of MSP Captain Edward Amodeo, Troopers Marcel Strain, Chris Maher, and all six troopers assigned to the Midnight shift (Obear, Kalil, Wilmoth, Hodgson, Cooke and Kerrigan); MSP Administrative Assistant Rhonda Wallace; a Tewksbury firefighter (James Giasullo), MPD Detective McLean, MPD Officer Raso, MPD Internal Affairs Officer Capt. Alan Doherty. Victor K and Ms. Tecce. (*Exh. 5*)

80. Capt. Drummy did not record his interviews, save for his interview of Tpr. Sweet, and had no personal recollection of them. His direct testimony consisted mainly of reading his report into the record. The report is replete with hearsay (much of it totem pole hearsay) from parties who did not testify at the Commission hearing, and covers subjects that range far afield from the scope of the investigation as Capt. Drummy originally described it. In fact, Capt. Drummy’s report characterized many of the

⁷ The statements, contained in ¶4 of the To/From referenced in Lt. Col. Smith’s memo : “Sergeant Chase explained that since the time he investigated a complaint against Trooper Sweet, his relationship with Trooper Sweet had been different. . . . [H]e and Trooper Sweet no longer exchange conversation. . . .[A]ny dealings . . . with Trooper Sweet are usually very abrupt. . . .[W]hen he and Trooper Sweet have been in the same company, which is usually in the A-4 desk, Trooper Sweet has ignored him and has slammed and/or thrown objects against the desk.” (*Exh. 2*) (*emphasis added*)

statements in his report as “rumors”. He took no steps to confirm such rumors with a percipient witness to the facts alleged and found none during his investigation. Thus, I do not credit as true any of these alleged hearsay statements and “rumors” contained in the report that have not been corroborated by sworn testimony of a percipient witness or other reliable evidence in the record. (*Exh.5; Testimony of Capt. Drummy*)

81. For example, Capt. Drummy supported his report with information contained in a February 7, 2008 To/From in which Sgt. Chase reported that “I was informed by Trooper Maher that he had heard through the rumor mill that Trooper Sweet planned on some sort of retaliation against me” and that “around the same period . . . I overheard other troopers at the barracks talking about how Trooper Sweet planned on getting the parties at Raso’s. . . . Trooper Maher . . . does remember telling me that he heard unsubstantiated rumors about Trooper Sweet . . .The original conversations were so long ago that I cannot attach any one comment to any trooper with any certainty.” (*Exhs. 5 & 8*)

82. Similarly, statements attributed to Tpr. Sweet by Sgt Chase contained in Capt. Drummy’s report, concerning alleged retaliatory threats in or about 2003 against Tewksbury firefighters, were not supported by any direct evidence. Sgt. Chase gave no testimony on that subject. The 2003 contemporaneous official MSP administrative logs, arrest reports and citations show that Tpr. Sweet duly stopped several Tewksbury residents for legitimate reasons (including one for possession of heroin). These records also contain a contemporaneous official MSP report that the same person Capt. Drummy had interviewed had been the one who went to Tpr. Sweet’s residence to have a ticket fixed. (*Exhs. 5, 21 through 24: Testimony of Tpr. Sweet, Sgt. Chase & Tpr. Martin*)

83. Neither Victor K nor Tpr. Maher appeared as witnesses before the Commission. Sworn statements from each of them denying the hearsay statements attributed to them in Capt. Drummy's report concerning Tpr. Sweet's alleged threats against patrons of Raso's restaurant (an affidavit from Victor K and sworn testimony by Tpr. Maher at the MSP Trial Board) were received in evidence and, on their face, carry far more indicia of reliability. I also give diminished weight to the purported statements attributed to Tpr. Maher, as well as those of Ms. Wallace in Capt. Drummy's interviews of them, which were not consistent with the sworn testimony of those witnesses at the Trial Board or before the Commission, respectively, and in view of the additional fact that they were interviewed in the presence of one or more of their superior officers. (*Exhs.5, 8, 9, 34, 35 & 52; Testimony of Capt. Drummy & Ms. Wallace*)

84. For example, Capt. Drummy reported Ms. Wallace to have made statements such as she considered Tpr. Sweet a "very angry man" and had asked that the barracks locks be changed after he was reassigned. In her testimony before the Commission, Ms. Wallace denied ever asking to have the locks changed and volunteered that she "liked Brian", who was "always nice" to her and "cared about her personal comfort." She agreed it was intimidating to be interviewed in the presence of her direct supervisor, Lt. Favuzza. (*Exhs. 5; Testimony of Capt. Drummy, Lt. Favuzza & Ms. Wallace*)

85. The only new information specific to the 8-9-2007 incident in Capt. Drummy's second report came from his December 19, 2007 interview with Sgt. Chase:

On 12-19-07 I reinterviewed Sergeant Chase . . . to further clarify Trooper Sweet's "aggressive" behavior . . . referred to in his To-From of 8-15-07. . . . *Sergeant Chase related the same sequence of events that were contained in the previous investigation. . . . Trooper Sweet had come into the station to put overtime on the clipboard. Sergeant Chase stated that he greeted Trooper Sweet, but that Trooper Sweet did not respond to the greeting. Trooper Sweet then went into the kitchen*

area in the room behind the desk where he heard things banging around loudly. When asked to be more specific, Sergeant Chase stated that it sounded like a file cabinet being slammed and something heavy like a stapler hitting the floor. When asked if he noticed if anything had been damaged in the room after the fact, he stated "No". I then requested that he submit a To-From to me detailing his responses. Due to upcoming scheduled vacation time and holidays for Sergeant Chase and myself, this To-From was not received until 1-10-08.

(Exh. 5)

86. Sgt. Chase's To-From (actually dated January 11, 2008), states:

On the morning of August 09, 2007, I was assigned to the desk when Trooper Sweet came into the barracks. I attempted to say good morning to him when he ignored me. He then went around the corner into the kitchen and I could hear what sounded like loud noises. I heard what I thought was the filing cabinet being closed too firmly and several other unexplained loud noises.

(Exh. 6) (*emphasis added*)

87. Capt. Drummy interviewed Tpr. Sweet on January 29, 2008. His attorney was present. Also present were Tpr. Julie Demers (whom I infer was a union representative) and Capt. Edward Amodeo, as a witness. According to the interview transcript, the information to which Tpr. Sweet was privy at that point consisted of three documents: (1) Sgt. Chase's August 15, 2007 To/From; (2) Capt. Drummy's October 4, 2007 report; and (3) Sgt Chase's January 11, 2008 To-From. The rest of the information that Capt. Drummy obtained during his investigation were not provided to Tpr. Sweet until a later date. Specifically, Tpr. Sweet had no notice that he was also under investigation for his February 16, 2007 visit to Raso's. (*Exh. 7; Testimony of Appellant & Capt. Drummy*)

88. Capt. Drummy posed prepared questions, which Tpr. Sweet answered:

Q. Have you ever made any type of threat of physical violence or retaliation against Sergeant Chase, either to Sergeant Chase personally or to someone else at the Medford barracks?

A. No I have not.

Q. Have you ever made any type of threat of physical violence or retaliation against any other officer assigned to the Medford barracks?

A. No I have not.

Q. Have you ever made mention or made known to any person, any type of threat of physical violence or retaliation against any officer at the Medford barracks? This is slightly different because of made and type of threat, this is made mention of or made known any type of threat.

A. No I have not.

Q. Have you ever made mention or made known to any person, any type of threat of physical violence or retaliation against any civilian who had made a complaint against you or was a witness against you?

A. Absolutely not.

Q. On the morning of August 9th, 2009, you were at the four hour LNG overtime assignment beginning at 900 hours. Do you recall that assignment?

A. Yes I do.

Q. On that same date, Sergeant Chase stated that he had come in to work for the day shift, he further stated that you had come into the barracks to enter your overtime on the clipboard. He attempted to say good morning to you and stated you ignored him. Do you recall this incident?

A. No I do not.

Q. Do you recall Sergeant Chase greeting you?

A. He never greeted me.

Q. Next question was, did you ignore Sergeant Chase's greeting, so obviously that would be no as well?

A. Correct.

Q. After this had occurred, did you enter the kitchen area behind the desk and start banging things in a loud manner?

A. Absolutely not.

Q. Did you open or close any file cabinets?

A. Ahmm – I don't remember.

Q. Did you drop, slam or throw anything to the floor or table which may have made a loud noise?

A. No I did not.

(Exh. 7)

89. Capt. Drummy filed an eight-and-a half page, single spaced report on February 15, 2008 report. He concluded that there was sufficient evidence that Tpr. Sweet was insubordinate and violated the workplace violence rules on August 9, 2007, as well as evidence of two counts of untruthfulness, specifically, for: (1) denying he ever threatened physical violence or retaliation against a civilian who had complained or testified against him, and (2) denying he didn't ignore Sgt. Chase's greeting and didn't go into the kitchen

thereafter and start banging things. (*Exh. 7*)

90. Capt. Drummy did not interview Tpr. Silverio about the February 16, 2007 incident and did not interview Tprs. Johnson and Talbot about the August 9, 2007 incident, all of whom were potential percipient witnesses according to the MSP official daily logs. Also, Capt. Drummy's report makes no mention of the fact that he did interview Tpr. James Martin, whose gave positive feedback about Tpr. Sweet's good reputation with court personnel, based on his percipient knowledge as a court prosecutor, and had corroborated Tpr. Sweet's account of the 2003 incident in which he was asked to fix the ticket for a Tewksbury firefighter. (*Exh. 5; Testimony of Capt. Drummy, Tpr. Martin & Tpr. Johnson*)

91. On February 25, 2008, Major Kelly wrote a memo to Lt. Col. Smith and Lt. Col. McGovern concurring in Capt. Drummy's conclusions. (*Exh. 15*)

92. One year later, on February 6, 2009, Lt. Col Francis Mathews, then DST commander, initiated formal disciplinary action against Tpr. Sweet for offenses on "February 16, 2007, August 9, 2007 and various other dates in 2007 in the City of Medford":

- Unbecoming Conduct (Charge I, Specification I) for conduct on February 16, 2007, August 9, 2007 and "various other dates in 2007";
- Insubordination (Charge II, Specification I) for disrespectful conduct toward Sgt. Chase on August 9, 2007;
- Violation of the Workplace Violence Rules (Charge III, Specification I) for his "disruptive" conduct "on February 16, 2007, August 9, 2007 and various other dates in 2007" that "caused his colleagues and the public to be in fear of their safety"; and
- Untruthfulness (Charge IV, Specification I) for "his answers to several questions" during his January 29, 2007 interview with Capt. Drummy.

Lt. Col. Mathews's proposed discipline for these violations, should Tpr. Sweet elect to

waive his right to a Trial Board hearing to contest the charges, was a 60-day suspension without pay. (*Exh. 53*)

93. On December 17, 2009, the charge sheet against Tpr. Sweet was revised to include the recent decisions of the Commission, upholding his prior discipline in Sweet I and Sweet II. (*Exhs. 16, 61*)

94. The Appellant proffered evidence to suggest that the change in proposed discipline was motivated by animus that emanated from a series of attempts by defense counsel to obtain information about Tpr. Sweet's disciplinary records, and which the MSP was required to devote resources to oppose (apparently, with complete success). While somewhat plausible, I do not find there is a sufficient nexus between the two situations to warrant any inference that they materially influenced how the MSP viewed Tpr. Sweet's case. (*Exhs. 55 & 56: Testimony of Appellant*)

95. On April 10, 2010, the new DST commander, Lt. Col. John Dunn, revised the proposed discipline against Tpr. Sweet to a recommendation of "Termination". (*Exh. 54*)

96. A Trial Board convened on October 7, 2010 to hear Tpr. Sweet's case. On October 27, 2010, the Trial Board found Tpr. Sweet Guilty of all four charges and recommended the following discipline:

Charge I, Specification I – Unbecoming Conduct – One year suspension without pay
and permanent transfer from Troop A

Charge II, Specification I – Insubordination – Six months suspension

Charge III, Specification I – Workplace Violence – Termination

Charge IV, Specification I – Untruthfulness – Termination.

(*Exh. 44*)

97. On October 27, 2010, then Superintendent Col. Marian McGovern adopted the recommendations and ordered Tpr. Sweet dishonorably discharged from his position, effective the following day. This appeal duly ensued. (*Exhs. 43 & 58; Claim of Appeal*)

98. At the Commission hearing, the MSP called only one witness, Tpr. Leonard Wilmoth, with percipient evidence of any actual confrontation with Tpr. Sweet. Tpr. Wilmoth could not place the event in time, but Tpr. Sweet recalled it was sometime in 2006. The facts of the confrontation, were not substantially disputed. Tpr. Sweet responded to a motor vehicle scene to find a deer that had been struck. He put down the deer with his side arm, which distressed the motorist, who called Medford barracks to complain. Tpr. Wilmoth was on desk duty and processed the complaint. This upset Tpr. Sweet, as he believed, based on his experience, the facts patently did not warrant initiating a formal complaint and subjected Tpr. Wilmoth to a verbal tirade. Tpr. Wilmoth called the episode an “isolated incident” that was being “overblown” and testified that he had no problems before or since that time with Tpr. Sweet. No disciplinary action stemmed from this episode. (*Testimony of Appellant & Tpr. Wilmoth*)

Evidence of Disparate Treatment

99. Pursuant to pre-hearing discovery orders, the DST produced a list of approximately 150 disciplinary actions taken against other Troopers charged with unbecoming conduct (111), insubordination (9), workplace violence (8) untruthfulness (13) or a combination of those offenses (25). Three cases resulted in a dishonorable discharge. The specific conduct underlying only two of the disciplines was provided and most cases involved first offenses, so that little weight can be given to those other cases as comparable discipline. (*Exh. 50*)

100. The two disciplinary cases for which some detail was provided both involved Troopers who were charged with fourth offenses of unbecoming conduct. One involved a failure to attend court that resulted in dismissal of a motor vehicle violation appeal and

the second involved the failure to secure a weapon which resulted in the Trooper's son using the weapon to assault another minor. Both Troopers waived their right to a Trial Board Hearing and received suspensions of seven days and forfeiture of 20 days accrued vacation, respectively. (*Exh. 50, P.H. Exh.75A[Confidential]*)

101. At my request, the MSP also provided additional information about the Workplace Violence investigations listed in the discovery response, all first offenses, which resulted in discipline ranging from a letter of counseling to suspensions of up to 30 days and an involuntary transfer for a one year period. One case in which the officer had been accused of verbally confronting another and spitting at him was settled by agreement and the officer voluntarily resigned. Workplace Violent Incident Reports were prepared in six of the seven cases in which a workplace violence claim was asserted. (*P.H. Exh.75[Confidential]*)

102. Of the seven incidents of workplace violence alleged, four investigations concluded that the conduct did not rise to the level of a violation of ADM-29, the workplace violence rule, including:

- (2009-2010) Bullying, harassment and threats of violence that lacked “professionalism” over a two-year period that lacked “professionalism required of a commissioned officer” but insufficient to determine that the actions were “a deliberate undertaking to create a hostile and retaliatory work environment directed at [the victim].” (*P.H. Exh.75C[Confidential]*)
- (2008) Trial Board finding of “Not Guilty” of violation of ADM-29 for verbal threats and physical touching (grabbing an arm). (*P.H.Exh.75F[Confidential]*)
- (2009) Officer who lost his temper and spit at MSP employees contributed to

a “dysfunctional situation” that resulted in transfer out of the section, but did not warrant a charge of workplace violence. In concurring with the recommendation not to charge a violation of AMD-29 and to order verbal counseling instead, DST Chief of Staff, Capt. David Otte, stated:

“Although ADM-29 prohibits “disruptive or aggressive behavior that causes the disruption of workplace productivity”, and the conduct of [name redacted] might violate the letter of the policy, I do not believe that a single incident of yelling and swearing violates the spirit and intent of the policy, and that to prosecute that charge in this instance would depreciate the meaning of the charge and possibly set an unfortunate precedent. Pragmatically, I also believe that it would be difficult to obtain a conviction on that charge at a Trial Board.”

(P.H.Exh.75H[Confidential])

- (2005) Verbal exchange over period of several hours including a challenge to a physical confrontation “did not rise to the level of a workplace violence incident”.

(P.H.Exh. 75I [Confidential])

The Testimony at the April 2013 Reopened Hearing

103. As the March 20, 2013 Procedural Order provided, over objections of the MSP and the Appellant, I reopened the record in this matter to hear from certain witnesses who had given percipient testimony about the two key events that formed the basis for the decision to discipline Tpr. Sweet and whose credibility was a factor in my assessment of their testimony.

104. I first heard from Tpr. Silverio, who was present as the back-up for Tpr. Sweet during the February 16, 2007 trip to Raso’s Grille. He appeared in uniform and testified without hesitancy. His testimony was convincing. I was persuaded by his explanation for his lack of recollection of any unusual or inappropriate behavior by Tpr. Sweet, and for stating that, as a relatively new Trooper, he would have spoken up if he had seen or heard

anything improper, namely, that he was not personally accused of participating in the alleged confrontation with the MPD detectives and he had no reason to put his own honesty on the line and fabricate a story to protect Tpr. Sweet, whom he didn't know that well. (*Testimony of Tpr. Silverio*)

105. Tpr. Johnson also appeared in uniform and testified without hesitancy. My questions for him concerned the apparent discrepancy between his lack of recollection of seeing Tpr. Sweet on August 9, 2007 and Tpr. Sweet's testimony that he saw Tprs. Johnson and Talbot in the booking room that morning when he came in to record his overtime. After reviewing the daily log, Tpr. Johnson did recall that he had come to the Medford barracks to book a prisoner after making an arrest at about 7:10 am that morning and that he was also present at the barracks shortly before 9:00, in his capacity as the narcotics officer, to retrieve drugs for delivery to Tpr. Talbot to take to court. He confirmed that he did not clearly recall how long he was in the barracks, whether or not he left at any time or stayed through the two entries, or whether or not Tpr. Talbot came to the barracks to retrieve the narcotics or whether he met Tpr. Talbot at court to deliver the narcotics. Tpr. Johnson persuaded me that he was testifying truthfully and would confirm only what he knew with reasonable certainty, as experienced law enforcement professionals are trained and expected to testify. (*Testimony of Tpr. Johnson*)

106. Sgt. (now Lt.) Chase was recalled and I questioned him at length about some of the apparent inconsistencies and memory lapses in his prior testimony and written statements by him or attributed to him by Capt. Drummy and Lt. Favuzza. Unlike all the other Troopers who testified before or after him, Lt. Chase was the only witness to exhibit hesitancy and nervousness in his demeanor. He did explain how his testimony

and statements about what he remembered at various points in time could be reconciled, and I believe his core testimony that he saw Tpr. Sweet go into the kitchen area on the morning of August 9, 2007 and, thereafter, heard noises coming from the kitchen area that he assumed were caused by Tpr. Sweet. I also believe Lt. Chase did gesture or speak to Tpr. Sweet when he first saw him, but I heard no convincing proof that Lt. Chase honestly knew exactly when or where the encounter occurred. I also infer that then Sgt. Chase, assigned to desk duty, knew that Tpr. Johnson (and possibly Tpr. Talbot) were in the barracks at or around the same time and I take note of his apparent failure to mention that to Lt. Favuzza or Capt. Drummy at any time. (*Exh. 6 through 8, 33; Testimony of Capt. Drummy, Lt. Favuzza, Sgt. [and now Lt] Chase & Tpr. Johnson*)

107. I do find disingenuous Lt. Chase's most recent explanation for why, after hearing noises in the kitchen (assumed to be a stapler hitting the floor and a file cabinet being slammed shut), he did nothing to ascertain exactly what was happening, namely, he wanted to stay clear of Tpr. Sweet. I credit as more plausible Sgt. Chase's inaction as consistent with the perception of a brief, innocuous disruption than with anything that portended imminent risk of harm to him or anyone else, especially in view of Sgt. Chase's other statements and testimony to the effect that he never intended the incident to lead to any action taken against Tpr. Sweet. (*Exhs. 3 & 4; Testimony of Sgt. Chase*)

108. The fourth witness to testify before me was Tpr. Justin Peledge. He presented with a low-key demeanor and a clear and unwavering recollection of the statement attributed to Sgt. Chase to which he testified in two prior Commission hearings. In response to questions about the context in which Sgt. Chase made the statement, or his motivation for doing so, he stated that he took it to mean: "Don't protect him." He could

not say why, but he assumed Sgt. Chase “said it for a reason.” The subject of “protecting” a Trooper had not been mentioned until Sgt. Chase did so. I found Tpr. Peledge’s testimony persuasive. (*Testimony of Tpr. Peledge*)

109. Lt. Chase was recalled a second time and asked about the statement attributed to him by Tpr. Peledge. Lt. Chase emphatically denied making the statement or any similar statement with specific reference to Tpr. Sweet. He said he did tell Tpr. Peledge something to the effect: “Do not lie. Don’t put your career on the line” by embellishing or making things up to protect “anyone.” I do not find this self-serving recollection as credible as the testimony from Tpr. Peledge. (*Testimony of Lt. Chase & Tpr. Peledge*)

110. Tpr. Sweet stood on his prior testimony and declined to appear at the April 4, 2013 hearing. Pursuant to the March 20, 2013 Procedural Order, the Appellant was put on notice that his failure to testify were grounds for adverse inferences to be drawn against him. (*Colloquy at April 4, 2013 Hearing*)

CONCLUSION

A. Summary of Conclusion

The Massachusetts State Police did not establish just cause to terminate Tpr. Sweet. While his behavior is reminiscent of what this Commission found to justify a prior 15-day suspension imposed on him in Sweet I and a 20-day suspension and loss of vacation imposed in Sweet II, the evidence presented in support of the latest charges falls well short of the preponderance of evidence that can justify more than another increment of further remedial discipline. Most of the evidence marshaled against him is merely a rehash of charges that he faced in the past, or which he has served his punishment and, in some cases, for which he actually was previously acquitted. The proof of misconduct on

the two key dates – February 16, 2007 and August 9, 2007 – rests on claims of rudeness supported entirely by testimony from three witnesses with proven animus against him. There was not one percipient or unbiased witness to a single act of violence or threat of violence against anyone. He cannot be found untruthful for denying what was never proved to be true by a preponderance of evidence.

B. Applicable Civil Service Law

A tenured Massachusetts State Trooper aggrieved by a disciplinary decision imposed by the MSP pursuant to M.G.L.c.22C,§13, may appeal to the Commission for a de novo review under G.L. c.31, §43, which provides:

If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority. (emphasis added)

See, e.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev.den., 440 Mass. 1108 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411 (2000); Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). McIsaac v. Civil Service Comm'n, 38 Mass.App.Ct. 473, 477 (1995); Watertown v. Arria, 16 Mass.App.Ct. 331, rev.den., 390 Mass. 1102 (1983). In performing its function:

“[T]he commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew. . . . [in] ‘a hearing de novo upon all material evidence and a decision by the commission upon that evidence and not merely. . . a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before

the appointing officer' . . . For the commission, the question is . . . 'whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision.' ”

Leominster v. Stratton, 58 Mass.App.Ct. 726,727-728 (2003) (affirming Commission decision rejecting evidence of appellant's failed polygraph test and domestic abuse orders and crediting appellant's exculpatory testimony) (*emphasis added*). cf. Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (inconsequential differences in facts found insufficient to hold justification unreasonable)

The Commission is guided by “the principle of uniformity and the ‘equitable treatment of similarly situated individuals’ [both within and across different appointing authorities]” and 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. It is also a basic tenet of the “merit principle” which governs 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.

The term ‘just cause’ must be construed in light of the purpose of the civil service legislation in which it appears. The purpose is to ‘free public servants from political pressure and arbitrary separation. . . but not to prevent removal of those who have proved to be incompetent or unworthy to continue in the public service. [citation] ‘[I]n order to carry out the legislative purpose, the appropriate inquiry is whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service.’ [citations]

School Comm. of Brockton v. Civil Service Comm'n, 43 Mass.App.Ct. 486,488, rev.den.

426 Mass.1104 (1997). See also Murray v. Second Dist. Ct., 389 Mass. 508,514(1983) ⁸

An appointing authority's burden of proof by a preponderance of evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1982). An action is justified if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928).The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001). The Commission is entitled to "due weight for its experience, technical competence, and specialized knowledge, as well as to the discretionary authority conferred upon it. . .This standard of review is highly deferential to the agency on questions of fact and reasonable inferences drawn therefrom.' " Brackett v. Civil Service Comm'n, 447 Mass. 233, 241-42 (2006) and cases cited.

⁸ The Appeals Court has distinguished the standard of "just cause" applicable to disciplinary decisions from the more deferential standard applicable in hiring decisions which come to the Commission under a different section of the Civil Service Law (G.L.c.31,§2(b))."We think that the standards are materially different. Simply put, a municipality should be able to enjoy more freedom in deciding whether to appoint someone as a new police officer that in disciplining an existing tenured one." See "Memorandum and Order on the Plaintiff's Motion for Judgment on the Pleadings", City of Attleboro v. Massachusetts Civil Service Comm'n, C.A. BRCV2011-00734 (MacDonald, J), citing City of Beverly v. Civil Service Comm'n, 78 Mass.App.Ct.182,191 (2010).

It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance.” E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003) (where live witnesses gave conflicting testimony at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing)

Applying these principles to the facts presented in this appeal, the MSP had failed to meet its burden to prove just cause to dishonorably discharge Brian Sweet from his position as a Massachusetts State Trooper.

C. Charge 1 - Unbecoming Conduct (One Year Suspension and Permanent Transfer from Troop A)

The MSP Trial Board found that Tpr. Sweet engaged in conduct unbecoming a State Trooper by the “discourteous and unprofessional” manner in which he spoke to and conducted himself in his interaction with the MPD detectives at Raso’s on February 16, 2007. The preponderance of the evidence does not support this conclusion.

The accounts of the incident by Det. Lt. McLean and Det. James contain the only evidence that would possibly support this charge. As set forth in the findings of fact, the written accounts of the encounter do not have sufficient reliability to form the basis for a conclusion that Tpr. Sweet’s behavior was inappropriate. In fact, Det. James admitted that he wrote his statement to “cover his butt”, which is a tacit admission of his own discourteous behavior on that occasion – a clear display of his own personal animus

toward a fellow law enforcement officer engaged in a lawful investigation – that was, more likely than not, what precipitated any subsequent elevated exchange of words between them. I give considerably more weight to the testimony of Tpr. Silverio who saw nothing inappropriate about the tenor of the encounter between Tpr. Sweet and Det. Lt. McLean or Det. James.

As to the exchange between Tpr. Sweet and Det. Lt. McLean about the purpose of Tpr. Sweet's visit, except in one minor respect, the testimony is largely consistent. Tpr. Sweet stated that he told Det. McLean that he was investigating a matter that "involved a couple of your guys" and was "all set." If that was all there was to it, certainly, there was nothing unbecoming or discourteous about being so circumspect or declining to enlist the aid of the MPD in the investigation, especially given the strong evidence that Tpr. Sweet had come to learn that one or more MPD officers may, in fact, have been party to providing a false alibi to the RMV. In addition, Tpr. Sweet had already made an effort to contact both the police officer who owned Raso's as well as the officer who had authorized one of the alibi letters, and both of them appeared unwilling to cooperate.

Det. Lt. McLean stated that Tpr. Sweet said the MPD officers were "covering up" something. Tpr. Sweet was not asked directly about whether he denied using those words and I did not have the opportunity to ask that question as Tpr. Sweet did not testify at the reopened hearing. I have doubt that an experienced investigator such as Tpr. Sweet would be that forthcoming with a MPD officer about an on-going investigation of one or more of his MPD colleagues, but absent a specific, credible denial and the failure of Tpr. Sweet to testify at the reopened hearing, I will infer that "covering up" something, or words close to that effect, were used.

Even assuming the phrase “covering up” was used, however, given the context, Tpr. Sweet’s choice of those words exchanged with a seasoned law enforcement officer cannot be considered conduct unbecoming a State Trooper. Tpr. Sweet had plenty of reason to believe that someone in the MPD was involved in a “cover-up” and had good reason to share his intelligence with another member of the MPD. If anything, Tpr. Sweet could have been even less circumspect and he could have chosen to let Det. Lt. McLean know what should have been obvious, i.e., that MPD personnel were a target, not welcome participants, in his investigation at that point. The true gravamen of Det. Lt. McLean’s pique likely was that he couldn’t pry more specific information from Tpr. Sweet about what he knew or where his State Police investigation might be going

The Commission does recognize that law enforcement officers are vested with considerable power and discretion and must be held to a high standard of conduct, especially when it comes to the exercise of their authority. “Police officers are not drafted into public service; rather they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.” Police Comm’r v. Civil Service Comm’n, 22 Mass.App.Ct. 364, 371, 494 N.E.2d 27, 32 rev.den. 398 Mass. 1103, 497 N.E.2d 1096 (1986). The alleged offense here, however, was, at the most, a brief exchange of words between experienced law enforcement officers, which no one took seriously for nearly a year. The tension escalated because of insulting remarks made to Tpr. Sweet by Det. James. These remarks included Det. James telling Tpr. Sweet to “hit the street, Junior”, which he could justifiably take to be an unwarranted attempt to meddle in his investigation.

In sum, the MSP has failed to meet its burden to prove just cause to discipline Tpr. Sweet for his actions at Raso's on February 16, 2007.

D. Charge 2 - Insubordination (Six Months Suspension)

Trooper Sweet was found guilty of insubordination for his conduct on August 9, 2007, when he “ignored Sergeant Chase after being spoken to” and “then went in to the kitchen area and proceeded to bang items around and make loud noises.” The preponderance of the evidence does not support a finding of insubordination based on the alleged fact that Tpr. Sweet “ignored” Sgt. Chase’s greeting. Although the evidence of Tpr. Sweet’s disruptive behavior in the kitchen is exceedingly thin, I am obliged to conclude that the MSP has met its burden of proof of those limited facts.

The preponderance of the evidence does not prove that Tpr. Sweet “ignored” Sgt. Chase’s greeting. Sgt. Chase initially characterized his overture as an “attempt” to greet, and only later added that he had actually said “hello.” His testimony and statements at various times leaves considerable doubt that he has a clear memory of what actually happened. The evidence does not support the conclusion that, even if Sgt. Chase, said “hello”, Tpr. Sweet heard it and, even if he did hear it, was there any evidence to suggest he had any reason to expect that Sgt. Chase would be offended if he didn’t get a “hello” back. According to Sgt. Chase, the two men were not on speaking terms and this was, in fact, the first time Sgt. Chase “attempted” to say hello since the relationship had become frosty. Even with the broad discretion to enforce order and discipline within a paramilitary organization such as the MSP, one ambiguous instance of neglecting to say “hello”, while boorish, does not rise to the level of “substantial misconduct . . . impairing

the efficiency of the public service” that calls into question Tpr. Sweet’s “ability to perform [his] official responsibilities”.

As to Tpr. Sweet’s conduct in the kitchen, however, the evidence did establish that Sgt. Chase heard some sort of unusual noises coming from the kitchen area and that he reasonably assumed Tpr. Sweet was the only person in the kitchen at the time. No witness actually knew who or what had caused the noises. Sgt. Chase assumed it was a stapler hitting the floor or a file cabinet being closed. However, Sgt. Chase demonstrated a poor memory for the events of August 9, 2007, generally, and his predisposed animus against Tpr. Sweet, coupled by his perception of having been “ignored”, are factors that are likely to have colored his memory and detract from the weight of his testimony. Although Tpr. Johnson, and possibly Tpr. Talbot were also in the barracks that morning, and would have investigated any unusual noise if they had heard it, Tpr. Johnson could not place his whereabouts with sufficient certainty and his lack of memory of anything unusual is not conclusive one way or the other and does not fully discredit Sgt. Chase’s testimony in this regard. Had Tpr. Sweet testified at the reopened hearing, he might have been able to persuade me that Tpr. Johnson and/or Tpr. Talbot were present with him, but I will not draw that inference. I also have considered that Tpr. Sweet’s disciplinary record has included prior instances that required “anger management” training.

I am not convinced, however, that the evidence supports the charge of insubordination. While it is reasonable to assume that Tpr. Sweet did something that caused the noise, there is no credible evidence to support an inference that the noise was the result of any action by Tpr. Sweet directed toward Sgt. Chase or anyone else. Even if Sgt. Chase had testified to that effect, I would not credit that testimony for the reasons stated above.

Without some evidence of such a nexus or motivation, as opposed to the inference that it was the consequence of personal frustration that may or may not even have been work-related, or the result of a simple mishap, the charge of insubordination rests on speculation and cannot stand.

E. Charge of Workplace Violence (Termination)

Concisely put, the charge of workplace violence against Tpr. Sweet is much ado about nothing. Capt. Drummy's first investigation of this charge resulted in a conclusion of "Unfounded", which was approved through the chain of command and the complaint was closed. When a second investigation was opened several months later, Capt. Drummy was engaged to perform a very specific assignment – to interview Tpr. Sweet and look into whether the August 9, 2007 incident also might support a charge of insubordination. This was no cause to conduct a new full-blown investigation of the work-place violence issue. Capt. Drummy's motive for doing so, whether on his own initiative or on the orders of a superior, is inexplicable. It was not supported by anything in the documentation or testimony about his assignment. Nevertheless, his second investigation – spanning three months and encompassing more than twenty interviews touching on subjects dating back as far as 2003 – failed to produce a single percipient witness to any act or threat of workplace violence by Tpr. Sweet.

I note that, despite the wide net cast by Capt. Drummy's investigation, he did not speak to any of the three troopers (Johnson, Talbot or Silverio) who might actually have provided percipient knowledge of the two incidents he wound up focusing on. Capt. Drummy left out of his report the information he received from Tpr. Martin that discredited the "rumors" heard by others about Tpr. Sweet's reputation, and, apparently,

mischaracterized the information received from Ms. Wallace, who actually testified that she “liked Brian”, who was “always nice” to her. The extensive inquiry made into the Raso’s Grille incidents, which were not part of the assignment or covered in Capt. Drummy’s interview of Tpr. Sweet and, in large part, duplicated the investigation that resulted in Sweet II, also raises an eyebrow. Similarly, the considerable effort made to reach back to collect hearsay and rumors about 2003 incidents in Tewksbury, without examining the official records or seeking any response from Tpr. Sweet, smacks of “piling on”, i.e., an indiscriminate search for additional charges wholly unrelated to the purported assignment.

I also note that the preponderance of evidence supports the inference that, in fact, Tpr. Sweet was not prone to resort to violence to resolve workplace issues. When he had a conflict with Tpr. Strain, he went through channels. When his relationship with Tpr. Chase deteriorated, he took advice from Tpr. Martin and simply limited his interactions (or what Sgt. Chase characterized as being “ignored”). His EES reviews for 2007 and 2008 gave no clue that his performance in the area of “Cooperation/Interpersonal Skills” was considered deficient in any way.

Finally, the timeline in this matter is wholly inconsistent with a serious concern for workplace safety. The first investigation was not conducted by the MSP Harassment Unit, but was referred back to the field unit. The directive for the second investigation did not even mention workplace violence. The MSP took nearly a year (until February 6, 2009) after Capt. Drummy completed his second investigation to decide to proffer charges against Tpr. Sweet after receiving Capt. Drummy’s February 15, 2008 second investigation report. It was more than another year (April 5, 2010) before the DST

commanding officer approved initiating disciplinary action. Clearly, no one in the chain of command could have taken seriously Sgt. Chase's hyperbole that Tpr. Sweet was capable of "shooting up the place" or could have believed that Tpr. Sweet was a continuing risk for workplace safety that rose to the level of a terminable offense. Were there any legitimate fear in that regard, it would seem scandalous that it took three years for the MSP to act on that concern.

F. Charge of Untruthfulness (Termination)

The Trial Board found Tpr. Sweet guilty of untruthfulness for his alleged false statements to Capt. Drummy during his January 29, 2008 interview, as well as his untruthfulness in his testimony before the Trial Board, denying his "disruptive behavior." As to the latter offense, the Commission has established that a finding of alleged untruthfulness at the appointing authority disciplinary hearing is not a proper grounds for imposing discipline, as an Appellant must be given notice in advance of his hearing of the grounds for the proposed discipline (as required by G.L.c.31,§41). See Doherty v. Town of Bourne, CSC No. D1-11-64, 25 MCSR 195 (2012). If an appointing authority chooses to discipline a tenured employee for untruthfulness at a hearing on a pending discipline, it requires a separate notice and further hearing on that charge. Id.

Tpr. Sweet also was found to have made unspecified "statements to investigators that were untrue", specifically, that he had falsely denied that he "engaged in retaliatory acts against the public as well as other members of the barracks." The preponderance of the evidence presented in this case does not support this broad conclusion. There was not one percipient witness (either a member of the MSP or the public) called to testify at the Commission hearing who described any such retaliatory acts or threats. Tpr. Maher

denied under oath at the Trial Board that he had even heard hearsay to that effect. Similarly, Victor K denied under oath any claims of retaliation made against him.

I also note that the Trial Board's conclusion in Sweet II actually exonerated Tpr. Sweet from most of the alleged complaints made by the private citizens in that prior case. The Trial Board found that "Trooper Sweet's interactions with [Mr. W.] on May 9, 2007 did not rise to the level of being discourteous or unprofessional"; that his subsequent stop of Mr. W. on August 9, 2007 did not violate any MSP rules of conduct; and that he was not "attempting to intimidate" Mr. W. The Sweet II Trial Board also "did not find any conclusive evidence that Tpr. Sweet threatened Mr. K or any of the other patrons at Raso's Restaurant."

I do conclude that Tpr. Sweet was untruthful in his answers to Capt. Drummy about his behavior at the Medford barracks on August 9, 2007. While he may plausibly deny that he did not ignore Sgt. Chase's "greeting", his selective memory about his subsequent behavior in the kitchen is not credible. He was certain that he did not "start banging things in a loud manner", did not remember opening or closing any file cabinets or that he did "drop, slam or throw anything to the floor or table which may have made a loud noise." His Trial Board testimony – in which he answered a question about his alleged "slamming things around" by stating: "That's what happens when you have to justify a statement like he made" – does tend to support the conclusion that he knew he did something in the kitchen that fit the scope of the question Capt. Drummy had asked him on January 29, 2008.

There is no direct evidence, however, of what Tpr. Sweet actually did in the kitchen on August 9, 2007. On the one hand, it could be fairly argued that it is unfair to hold Tpr.

Sweet responsible for untruthfulness in how he responded to Capt. Drummy's questions without specific percipient evidence of what he actually did. The evidence clearly demonstrated that Tpr. Sweet had an excellent reputation as a credible and truthful witness in court, and that he was someone who always "went by the book", sometimes more than others might, and never knowingly bent the rules. There is no evidence that Tpr. Sweet's apparent inclination to shade the facts when his personal reputation, especially as it pertains to his temper, is on the line does not appear to extend to more serious matters, such as prosecution of law enforcement actions. For the most part, to the extent I was able to weigh his testimony in this appeal against other evidence in the record, Tpr. Sweet's excellent memory and veracity is corroborated by the documentary evidence and testimony of other witnesses

On the other hand, I cannot overlook the fact that Tpr. Sweet was found to have been untruthful by this Commission in the past in similar circumstances involving circumstantial proof of his unseemly behavior. In Sweet I, Tpr. Sweet admitted to kicking a citizen's car but "fabricated" a story that he thought the car's engine was still running and could have hit a fellow trooper wedged between that car and another. In Sweet II, Tpr. Sweet failed to correct an incident report after learning that a fellow Trooper had not seen Tpr. Sweet's encounter with Mr. W. as he had originally written. (The Trial Board eventually concluded that Tpr. Sweet had acted appropriately despite the fact that there was no witness to corroborate it.) Similarly, Tpr. Sweet's denial that he caused any unusual noises in the kitchen is not credible, although, as it turned out, there is insufficient proof that the behavior, in and of itself, would have warranted any discipline.

The quality of truthfulness is one of the most essential traits required of law enforcement officers. See City of Cambridge v. Civil Service Comm'n, 43 Mass. 300, 303 (1997) (“a demonstrated willingness to fudge the truth in exigent circumstances was a doubtful characteristic for a police officer. . . . It requires no strength of character to speak the truth when it does not hurt.”) See also Phillips v. Town of Hingham, 24 MCSR 267 (2011) (police officer terminated for untruthfulness about inappropriate “horseplay” with civilian employee while on duty); Desharnais v. City of Westfield, 23 MCSR 418 (2010) (officer damaged cruiser in “cowboyish” spins and then untruthfully denied his antics); Mozeleski v. Chicopee, 21 MCSR 676 (2008) (lying to cover-up inappropriate conduct during a late-night traffic stop); Rizzo v. Town of Lexington, 21 MCSR 634 (2008) (police officer failed to report use of force and later misrepresented level of force used); Layne v. Town of Tewksbury, 20 MCSR 372 (2007) (police officer denied using profanity directed to accident victims)

On balance, it does appear that Tpr. Sweet was less than truthful about his behavior on August 9, 2007. Tpr. Sweet was clearly on notice when he was interviewed by Capt. Drummy that his conduct in the kitchen was under suspicion. Given the substantial evidence in this record of his good memory and veracity in other respects, had he admitted his behavior (as he did in Sweet I), his justification might well have been credible. Without his appearance at the reopened hearing, however, I was unable to observe his testimonial demeanor on this point first hand. While his decision not to appear may have been a strategic judgment with advice of counsel, it left me with little basis to conclude that questions addressed to the candor of his recollection about August 9, 2007 would not have been favorable to him.

In sum, in this one limited respect, I conclude that the evidence proves that Tpr. Sweet was not truthful in his answers to Capt. Drummy's questions about the goings on in the Medford barracks kitchen (but not as to the "greeting") on August 9, 2007.

Modification of Penalty

As the facts established before the Commission do vary substantially from those upon which the MSP Trial Board relied, the Commission has discretion to modify the penalty imposed. See, e.g., Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. G.L.c.31,§43 vests the Commission with the authority to affirm, vacate or modify the penalty imposed by the appointing authority. The Commission has been delegated with "considerable discretion", albeit "not without bounds", to modify a penalty imposed by the appointing authority, so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. E.g., Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594,600 (1996) and cases cited.

"It is well to remember that the power to modify is at its core the authority to review and, when appropriate, to temper, balance, and amend. The power to modify penalties permits the furtherance of uniformity and equitable treatment of similarly situated individuals. It must be used to further, and not to frustrate, the purpose of civil service legislation, i.e., 'to protect efficient public employees from partisan political control' . . . and 'the removal of those who have proved to be incompetent or unworthy to continue in the public service'."

Id., 39 Mass.App.Ct. at 600. (*emphasis added*). See Faria v. Third Bristol Div., 14 Mass.App.Ct. 985, 987 (1982) (remanded for findings to support modification), Compare School Committee v. Civil Service Comm'n, 43 Mass.App.Ct. 486, rev.den., 426 Mass. 1104 (1997) (modification of discharge to one-year suspension upheld); Dedham v. Civil Service Comm'n 21 Mass.App.Ct. 904 (1985) (modification of discharge to 18-months suspension upheld); Trustees of the State Library v. Civil Service Comm'n, 3 Mass.App.Ct. 724 (1975) (modification of discharge to 4-month suspension

upheld) with Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) (minor, immaterial differences in facts found by Commission and appointing authority did not justify modification of 180 day-suspension); Town of Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct. 796 (2004) (modification of 10-day suspension unsupported by material difference in facts or finding of political influence).

Several factors weigh in the balance in deciding whether to modify the penalty imposed by the MSP on Charge 4 – Untruthfulness. The conduct that Tpr. Sweet attempted to conceal was largely inconsequential, although it was consistent with the perception that had led him to be sent to anger management in the past. It also was not the first time he had been found to have fudged the truth. His behavior suggests an emerging pattern that cannot be ignored.

In this case, however, the MSP does not come to the Commission with totally clean hands. Virtually all of the charges and specifications brought against Tpr. Sweet were unfounded. The most serious charge of workplace violence and the dishonorable discharge that was meted out for that alleged offense is wholly without merit. The MSP built its case against Tpr. Sweet from rumor, innuendo and stale claims; relied heavily on witnesses whose animus and petty grievances against Tpr. Sweet were matters of record; and distorted or overlooked evidence that fairly impeached the credibility of his critics. It is implausible to believe that the MSP would choose to judge one of its members by such a seriously flawed process unless it was driven, or at least infected by, pre-disposition or ulterior motive at some level. After considering all of the facts and circumstances, Tpr. Sweet's untruthfulness in failing to take full responsibility for his behavior in this instance, while also a serious offense, cannot justify his dishonorable discharge.

I conclude that the Commission should exercise its discretion to modify the penalty from dishonorable discharge to a sixty-day suspension without pay, and authorize a return to permanent duty thereafter without further loss of compensation or benefits. I believe this degree of incremental remedial discipline, on balance, is the appropriate remedy that properly accounts for Tpr. Sweet's prior disciplinary history, is sufficiently severe to ensure that Tpr. Sweet can be trusted to comport himself appropriately upon reinstatement and provides both Tpr. Sweet and the MSP the fresh start that will enhance the chance for him to continue to make a valuable contribution to the public through his service with the MSP. This modification reduces the discipline to a remedial suspension equivalent to the maximum penalty initially recommended by the DST's commanding officer after his review of the results of the two-year investigation into Tpr. Sweet's conduct.

Accordingly, for the reasons stated above, the appeal of the Appellant, Brian Sweet, is *allowed in part*.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman [Absent]; Ittleman, Marquis, McDowell & Stein, Commissioners) on May 16, 2013.

A True Record. Attest:

Commissioner

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 the 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 a Civil Service Commission's final decision.

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

Notice to:

Joseph P. Kittredge, Esq. (for Appellant)

Michael B. Halpin, Esq. (for Respondent)