

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

CASILLE E. FONSECA,
Appellant

v.

D-17-004

DEPARTMENT OF STATE POLICE,
Respondent

Appearance for Appellant:

Mitchell J. Notis, Esq.
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Appearance for Respondent:

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Commissioner:

Paul M. Stein

DECISION

The Appellant, Casille E. Fonseca, acting pursuant to G.L.c.31,§43 and G.L.c.22C,§13, as amended by 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 suspend him for 270 days from his position of Massachusetts State Trooper.¹ The Commission held three days of evidentiary hearings at the Commission's office in Boston on March 21, 2017, May 8, 2017 and May 9, 2017, which were digitally recorded.² The hearing was declared private. All witnesses were sequestered. Forty-six exhibits were received in evidence at the hearing (Exhs. 1 through 11, 12a-12f, 13-17, 18a-18b,

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

² CDs of the hearing recordings were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CDs to supply the court with the written transcript of the hearings to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

19, 20, 21a-21e, 22 through 28, 29a-29c, 30 through 45) and two additional exhibits were received after the hearing on order of the Commission (PHExh.47 & PHExh.48). Both parties submitted proposed decisions on September 8, 2017.

FINDINGS OF FACT

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

Called by the MSP:

- MSP Detective Lieutenant Steven Hennigan
- MSP Detective Lieutenant (ret.) Timothy Bombard (through Trial Board transcript)
- MSP Lieutenant James Bazzinotti
- MSP Lieutenant Craig McGary
- MSP Trooper Sean Healy
- MSP civilian employee John Ruggiero (through stipulated testimony)
- Dr. R.V.
- Christine C.

Called by the Appellant:

- MSP Trooper Casille E. Fonseca, Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Casille E. Fonseca is a sworn member of the MSP who has served in the position of State Trooper since 1992. At all times relevant to this appeal, Trooper Fonseca was assigned to patrol duties with the Division of Field Services, Framingham Barracks. In addition, he worked approximately six paid details per week. (*Exhs. 20, 35 & 42; Testimony of Appellant*)

2. Trooper Fonseca's Officer History shows the following prior discipline:

- 1996 – Letter or Counselling
- 1996 – Forfeit 1 Vacation Day
- 2000 – Forfeit 3 Vacation Days
- 2003 – Forfeit 5 Vacation Days
- 2004 – Forfeit 15 Vacation Days
- 2007 – Five Day Suspension
- 2007 – Ten Day Suspension
- 2015 – Letter of Counseling\

The 2004 and 2007 disciplines involved incidents in which Trooper Fonseca was reported to have been found sleeping on duty. (*Exhs.34, 35 & 42*)

3. Prior to his employment with the MSP, Trooper Fonseca was employed as a patrol officer with the New Bedford Police Department. (*Testimony of Appellant*)

The Braintree Detail Incident (August 20, 2015)

4. On August 20, 2015, after finishing a regular day shift on patrol, Trooper Fonseca drove home in his assigned, marked MSP cruiser (Ford Explorer Cruiser #1489). Upon arriving home, at 3:03 p.m., he turned off his cruiser radio and his portable radio. (*Exhs. 38 & 39; Testimony of Appellant; Stipulated Testimony of Ruggiero*)

5. At approximately 8:00 p.m. or 9:00 p.m. that night, Trooper Fonseca reported in his cruiser, in uniform, to Canton, to begin working a paid construction detail on the northbound side of Interstate 93 in Braintree. His cruiser radio and portable radio were off when he began the detail. (*Exhs. 38 & 39; Testimony of Appellant; Stipulated Testimony of Ruggiero*)

6. Trooper Fonseca positioned his cruiser in the left-side “high-speed” lanes of Interstate 93, just north of the northbound off-ramp to Exit 6 (Route 37/South Shore Plaza), which had been closed off by a “taper” (a set of cones) that began at Exit 6 and continued north through the “Braintree Split” (where Interstate 93 and State Route 3 merge to become the Southeast Expressway), set up to divert traffic from the construction work ahead by closing off the two left “high-speed” lanes and requiring all traffic to merge into the two right-hand lanes. (*Exhs. 7 & 8; Testimony of Healy & McGary*)³

7. Interstate 93 in the vicinity of Exit 6 is a well-lit, four-lane road, busy even during late evening hours, with commercial buildings on both sides of the highway. The Exit 6 northbound

³ Trooper Fonseca placed the beginning of the taper “set up” where he positioned his cruiser a ‘half mile or more’ south of Exit 6 and said he was so far away from the exit that he could not even see the “exit signs” from his cruiser. (*Exh.35; Testimony of Appellant*) I do not find his testimony credible in this regard, which is inconsistent with the credible testimony of other witnesses, the extract from the on-line “Bing” GPS map of the area in evidence, and the wider road, aerial and street views of the vicinity shown on the same “Bing” map viewed on-line. (*Exhs.6 through 9; Testimony of Healy & McGary; Administrative Notice [www.bing.com/maps]*)

off-ramp and the Exit 6 northbound on-ramp to/from Route 37 are approximately 2000 feet apart, with an open space adjacent to the highway between the two ramps. Immediately north of the Exit 6 on-ramp (from Route 37), Exit 7 on Interstate 93 veers left and eventually merges with Route 3 North about a mile ahead to form the Southeast Expressway at a spot known as the “HOV Building”, which sits in a space separating the northbound and southbound lanes of the highway, totally out of view of Exit 6. Another Trooper was parked at the HOV building and the construction zone continued for some undetermined length northbound beyond the HOV Building. (*Exh. 8; Administrative Notice [www.bing.com/maps]; Testimony of Appellant, Healy & McGary*)

8. Approximately $\frac{1}{2}$ to $\frac{3}{4}$ of a mile south of Exit 6 is a “cut-off” in the median barrier between the northbound and southbound lanes which enables authorized vehicles to make U-turns without having to proceed to the next exit. The next southbound exit (Exit 5) is about two miles from Exit 6. (*Administrative Notice [www.bing.com/maps]; Testimony of Healy*)

9. At approximately 10:30 p.m. on August 20, 2015, the operator of a passenger motor vehicle was traveling northbound on Interstate 93 in a left-hand lane at a high rate of speed (witnesses estimated as fast as 70 MPH). As she approached the “taper” at Exit 6, her car clipped the front end of a vehicle she had attempted to cut in front of as he tried to merge into one of the right-hand lanes. The impact caused her car to begin to roll over, eventually coming to rest at a point between the Exit 6 northbound on-ramp and off-ramp (approximately directly across the highway from the Bernie & Phil’s store located on the southbound side), with the car flipped on its driver’s side and the operator entrapped inside. The vehicle that was cut off struck a third vehicle before also coming to a stop. (*Exhs. 7, 8 & 16; Testimony of Healy & McGary; Administrative Notice [www.bing.com/maps]*)

10. The MSP 911 recorded line received three calls which pin-point the time and location of the crash: the first (10:31:20 p.m.) from an eye-witness exiting Interstate 93 onto Route 37; the second (10:32:22 p.m.) from the operator of the vehicle struck by the speeding motorist; the third (10:33:23 p.m.) from a Boston Police Department Sergeant who witnessed the crash as he was en route to his shift and stayed to render aid. (*Exhs. 9 & 16; Testimony of Healy & McGary*)

11. The MSP broadcast the report of the crash over the Department's radio channel H2 (the channel Trooper Fonseca used during his regular patrol duty as well as the channel assigned to the area of his detail) and notified emergency rescue and fire services.⁴ Trooper Sean Healy was patrolling Washington Street in Braintree, a few minutes from the scene of the crash, when he heard the radio report. He immediately proceeded to Interstate 93 South, passed the crash site and returned northbound via the median cut-off. Almost immediately as he travelled north, the crash scene again came into view. When he approached the taper, he moved onto the median, passing to the left of Trooper Fonseca's cruiser (although he did not know who was in the cruiser until later) to reach the location of the rolled over vehicle, several hundred feet north of where Trooper Fonseca's cruiser was parked. He was the first Trooper on scene. The Boston Police Sergeant and others were helping to extricate the entrapped operator. Trooper Healy interviewed these witnesses and reported his findings in an MSP "Motor Vehicle CRASH Report", which included a "not to scale" sketch of the crash scene showing the tipped vehicle attempting an "improper turn" from the travel lane into the adjacent right lane as she approached the beginning of the taper, hitting the vehicle already in that lane. The operator was transported by ambulance to the hospital and her vehicle was, towed away. (*Exhs. 6 through 9, 16 & 35; Testimony of Appellant, Healy & McGary; Stipulated Testimony of Ruggiero*)

⁴ The Trooper posted at the HOV Building was posted within a different patrol area from Trooper Fonseca in Braintree and would have been tuned to a different radio frequency (H1). (*Exh. 6; Testimony of Healy*)

12. MSP Lieutenant Craig McGary, the H4 Station Commander, heard the H2 crash report while working a construction detail on Route 128 in Dedham, approximately 10 to 13 minutes away from the crash via Interstate 93 North. As called for by MSP protocol in such circumstances, not knowing if there were any other Troopers closer to the accident, he immediately proceeded to the scene. He observed several other State Police cruisers on scene, as well as an ambulance and fire apparatus from Randolph and Braintree that had responded, all of which had emergency lights activated. Overall, some 20 to 30 police, fire and EMS personnel had responded to the scene of the crash. (*Exhs 6, 9 & 16; Testimony of Healy & McGary*)

13. After assessing that the personnel on scene had the incident under control, Lt. McGary got back into his cruiser and backed up to the State Police cruiser he had seen parked several hundred feet south of the flipped vehicle. He exited his cruiser, walked over to the driver's side of the parked cruiser, and through the window that had been rolled down, he saw Trooper Fonseca, whom he knew personally, in the driver's seat with sunglasses on his forehead. He thought that Trooper Fonseca appeared a "little out of it". He also observed that "you could see the entire scene" and "quite a commotion" from the vantage point of Trooper Fonseca's cruiser. (*Exh. 9; Testimony of McGary*)

14. At no time prior to his encounter with Lt. McGary did Trooper Fonseca move from the post he had assumed to perform his detail duty. He had not heard the initial H2 radio transmissions because both his cruiser radio and portable radio had been turned off. A "minute or two" after he saw MSP cruisers with blue lights headed south on Interstate 93 and realized "something was happening". He turned on his cruiser radio and thereafter did hear some radio transmissions about the crash and knew that it involved an entrapped motorist. (*Exhs. 6, 9, 16, 35, 38 & 39; Testimony of Appellant, Healy & McGary; Stipulated Testimony of Ruggiero*)

15. Lt. McGary verbally counseled Trooper Fonseca at the scene for his inattentiveness to duty and failure to respond to the accident scene. As did Lt. McGary, any Trooper performing a detail is expected to respond to a “police or personal necessity”, and a rollover with an entrapped operation was definitely a “police necessity”. Although Lt. McGary was not Trooper Fonseca’s supervisor, as an MSP Station Commander, Lt. McGary had authority to initiate a written Employee Evaluation System (EES) report that would be referenced in Trooper Fonseca’s next annual review, but he chose not to do so at that time. (*Testimony of Lt. McGary*)

The Worcester Detail Incident (September 28, 2015)

16. On September 28, 2015, after completing his day shift (7 to 3) Trooper Fonseca and his girlfriend went to a Worcester bar and grill where he had one or two beers before returning home. At approximately 9:00 p.m. that same evening, he reported in uniform for a paid construction detail (for which his original assigned start time was 8:00 p.m.) that was located on Interstate 290 westbound in Worcester, and positioned his cruiser just past Exit 12 (at the beginning of the westbound set-up (cones) that blocked off the right-hand part of the highway. (*Exhs. 13, 14, 17, 18(b); Testimony of Appellant, Hennigan & Bazzinotti*)

17. Three other Troopers worked the Worcester detail that evening, one of whom was MSP Internal Affairs (IA) Division Detective Lieutenant Steven Hennigan, a 25-year veteran with years of prior experience with alcohol related arrests while assigned to the Field Services Division, as well as State Police Academy and in-service training related to operating under the influence and field sobriety testing. (*Exh. 13; Testimony of Hennigan*)

18. Det. Lt. Hennigan reported to the construction foreman at his assigned time of 9:00 p.m. After waiting about an hour to be deployed, he was directed to sit in the westbound set up. As Det. Lt. Hennigan proceeded to his assigned location in his unmarked Ford Taurus, at

approximately 10:15 p.m., he came upon Trooper Fonseca's marked cruiser, pulled in front of it and walked back to the cruiser's driver's side window. (*Exhs. 10 & 13; Testimony of Hennigan*)

19. As he peered into the (un-tinted) window, Det. Lt. Hennigan observed Trooper Fonseca reclined in the driver's seat, leaning to his right, with his head resting on a U-shaped neck pillow and wearing sunglasses. Det. Lt. Hennigan took several pictures using his cellphone, eventually using his flash, and shined his flashlight into the cruiser. Trooper Fonseca then sat up, rolled his window down and greeted him. (*Exhs. 10, 12(a) through 12(f) & 13; Testimony of Hennigan*)⁵

20. At this point, Det. Lt. Hennigan had formed the opinion that Trooper Fonseca had been asleep on duty. He also thought he detected the smell of alcohol inside Trooper Fonseca's cruiser. In a colloquy with him, Trooper Fonseca acknowledged that he had some beers earlier in the day but denied being asleep. (*Exhs. 10, 13 & 20; Testimony of Appellant & Hennigan*)

21. Based on his observations and colloquy with Trooper Fonseca, Det. Lt. Hennigan decided to perform a Field Sobriety Test (FST) on Trooper Fonseca and directed him to exit the vehicle. Trooper Fonseca complied with this order. As he exited his cruiser, Det. Lt. Hennigan noted that Trooper Fonseca was not properly attired or equipped for duty, i.e., he did not wear a "cover" (MSP issued hat) and his duty belt (with firearm) and his safety vest was left on the passenger seat. Det. Lt. Hennigan ordered Trooper Fonseca to correct these deficiencies which he did. Det. Lt. Hennigan also noted that the back seat of the cruiser was cluttered with personal items (later documented in photos), leaving no room to secure a prisoner without first removing the items. (*Exhs. 10, 11, 13, 20, & 21a0 through 21(e); Testimony of Appellant & Hennigan*)

⁵ The Appellant implied that he was being targeted by MSP and that Det. Lt. Hennigan probably knew that the cruiser he came upon was assigned to Trooper Fonseca. I find no reason to discredit the testimony that Det. Lt. Hennigan did not know in advance that Trooper Fonseca was performing a detail in Worcester (outside Trooper Fonseca's normally assigned barracks patrol area) and that he only confirmed that it was Trooper Fonseca after several minutes of trying to get his attention. It is clear that all of Det. Lt. Hennigan's subsequent actions were taken in a professional manner pursuant to MSP policy and procedures. (*Exhs.13, 14, 20; Testimony of Appellant, Hennigan & Bazzinotti*)

22. Prior to performing the FST, Det. Lt. Hennigan contacted the nearby MSP Millbury barracks and requested a Trooper to witness the FST. The Troop C Patrol Supervisor on duty that night was Sergeant James Bazzinotti, who reported to the scene and observed the FST performed by Det. Lt. Hennigan. As a result of the FST, both Det. Lt. Hennigan and Sgt. Bazzinotti concluded that Trooper Fonseca was not intoxicated. (*Exhs. 10, 13, 14 & 20; Testimony of Appellant, Hennigan & Bazzinotti*)

23. Based on his observations, Det. Lt. Hennigan concluded that Trooper Fonseca was unfit for duty. Although not intoxicated, Trooper Fonseca was found out-of-uniform and asleep while on detail duty and did appear to have the odor of an alcoholic beverage on his breath from his prior drinking. At 11:15 p.m., on Det. Lt. Hennigan's order, Trooper Fonseca was temporarily relieved from duty for the remainder of his shift and allowed to drive home in his MSP cruiser. (*Exhs. 10, 11, 13, 14 & 20; Testimony of Appellant, Hennigan and Bazzinotti*)

24. Det. Lt. Hennigan documented his September 28, 2015 encounter with Trooper Fonseca that day via a "Paid Detail Inspection Form" (SP381) directed to the Troop C Commanding Officer, and a "To/From" directed to all supervisors from Trooper Fonseca's station commander (Lt. Blaney), through the Troop H commander (Major Risteen) and the commander of the Division of Field Services (Lt. Col. Amodeo), as well as senior officers in the MSP Division of Standards & Training and Internal affairs Section. (*Exhs. 10 & 11; Testimony of Hennigan*)

The MSP Internal Affairs Investigation

25. By "To/From" dated October 1, 2015 from MSP Internal Affairs Section Det. Lt. Timothy Bombard, Trooper Fonseca was duly informed he was the subject of an Internal Affairs Investigation (#2015-0038) that was "initiated after Detective Lieutenant Steven Hennigan . . . deemed you Unfit For Duty on September 28, 2015 . . . while on a detail on Route 290 . . .

[alleging] that you were sleeping on the detail, not in proper uniform and without issued use of force equipment, had the odor of an alcoholic beverage on your breath, were inattentive to your duties, had non-issued items in your cruiser and that the interior of your cruiser was cluttered and in unsatisfactory condition.” The notice also attached a copy of Det. Lt. Hennigan’s September 28, 2018 “To/From” regarding these allegations. (*Exh. 19*)

26. The initial investigation into the September 28, 2015 encounter with Det. Lt. Hennigan soon expanded to include additional allegations, including Trooper Fonseca’s prior alleged misconduct on August 20, 2015 during the Braintree Detail and his subsequent alleged improper interactions with an optometrist whom he saw to document his request for accommodation for his poor night vision. (*Exhs. 15, 20, 22 through 33, 35 through 37, 40, 41, 46 & PHEXh.48; Testimony of Appellant, Dr. R.V., C.C. & Bombard [via Trial Board Transcript]*)⁶

27. Det. Lt. Bombard collected documents related to the Braintree Detail (*Exhs. 7, 8, 38 & 39*), the Worcester Detail (*Exhs. 10 through 12, 26*), Trooper Fonseca’s medical history (*Exhs. 23 & 40*) and his vision issues (*Exhs. 24, 25, 29, 30 through 32, 36, 37 & 41*). He conducted the following recorded interviews, along with Det. Lt. Timothy O’Leary::

- October 28, 2015 – MSP Det. Lt. Steven Hennigan (*Exh. 13*)
- October 28, 2015 – MSP Sgt. James Bazzinotti (*Exh. 14*)
- November 30, 2015 – MSP Tpr. Castile Fonseca (first interview) (*Exh. 20*)
- December 9, 2015 – Dr. R.V., Optometrist (*Exh. 27*)
- December 9, 2015 – Christine C., Optometrist Office Manager (*Exh. 28*)
- December 9, 2015 – MSP Lt. Craig McGary (*Exh. 9*)
- December 15, 2015 – Dr. J.K., M.D., Surgeon (*Exh. 33*),
- February 10, 2016 – MSP Tpr. Castile Fonseca (second interview) (*Exh. 35*)
- February 17, 2015 – MSP Tpr. Sean Healy (*Exh. 6*)

Det. Lt. Bombard did not testify personally before the Commission, but his investigative reports and excerpts from his Trial Board testimony were received in evidence. (*Exhs 15, 22 & 46*)

⁶ The investigation also looked into allegations that Trooper Fonseca had been inattentive to duty while on a detail in Boston early in 2015, but the investigation concluded that there was insufficient evidence to prove such misconduct and Trooper Fonseca was not formally charged with any violations for such alleged behavior. (*Exhs. 5 & 15*)

Trooper Fonseca's Medical History

28. During his first interview with Det. Lt. Bombard, Trooper Fonseca presented information that he had surgery for a chronic medical condition in March 2014 which the MSP knew, as it had allowed him an accommodation related to that surgery.. (*Exhs. 20, 23, 40 & 41*)

29. Trooper Fonseca told Det. Lt. Bombard that, "if [Det. Lt. Hennigan] smelled alcohol, I admitted to what I did" but, that it "could happen" that that the smell of alcohol seemed to linger longer due to the surgical procedure performed to address his medical condition. (*Exh. 20*).

30. Following the first interview with Trooper Fonseca, Det. Lt. Bombard interviewed Dr. John Kelly, M.D., the surgeon who performed the operation on Trooper Fonseca. Dr. Kelly explained that, as a result of the surgery, the effects of alcohol "hits [his] body quicker". Once in the blood stream, however, it metabolizes the same as anyone else. He had no reason to believe that the odor of alcohol would appear on the breath longer as a result of the surgery, but didn't claim to be an expert on that subject. (*Exh. 33*).

The Vision Issues

31. On November 17, 2015, prompted by notice that he would be interviewed by Internal Affairs in connection with the investigation of the Worcester Detail, Trooper Fonseca went to an optometrist office owned by Dr. R.A.J., located in a well-known eyewear chain store in Marlboro. He saw Dr. R.V., who then worked part-time at that office and part-time in Rhode Island. (*Exhs.20, 24, 27, 29 through 32, 35; PHExh 46; Testimony of Appellant & Dr. R.V.*)⁷

32. The purpose of Trooper Fonseca's visit to the optometrist was to address his severe reaction to bright lights and glare, both during the day and at night, which he had experienced for many years and, according to him, explained why he would have been wearing sunglasses while

⁷ This was Trooper Fonseca's second eye exam at this location. He had been seen there once before on February 18, 2014 by a different optometrist. No records of that visit were produced. (*PHExh.48*)

sitting in (but never while operating) his cruiser at night during a detail. He identified himself as a Massachusetts State Trooper and explained his vision problems with glare and bright lights. He did not disclose the fact that he was under investigation for allegedly sleeping on duty. His main objective was to obtain a doctor's note that he could use to request that the MSP provide tinted windows for his cruiser to alleviate the glare. (*Exhs. 20, 22, 27 through 30, 35 & 46: Testimony of Appellant, Dr. R.V., Christine C. & Det. Lt. Bombard [via Trial Board Testimony]*)

33. After examining Trooper Fonseca, based on his self-reported complaints of photophobia and migraines, Dr. R.V. initially provided a simple, boilerplate note stating that Trooper Fonseca needed tinted windows on his cruiser, consistent with the forms Dr. R.V. had used in other similar circumstances in Rhode Island.⁸ He also wrote a prescription for specially tinted lens to be used to block out night-time glare in the future that, unlike regular polarized sunglasses, could be used while driving day or night. (*Exh. 27 & 35; Testimony of Appellant & Dr. R.V.*)⁹

34. Trooper Fonseca used the prescription to purchase a pair of Oakley® True Digital Sun Tint™ (yellow) glasses at the affiliated eyewear store that same day and picked them up on December 4, 2015. However, he returned Dr. R.V.'s original note to the optometrist's office and requested a more detailed letter explaining the rationale for the need for tinted windows, as he thought MSP would require more information than Dr. R.V. had provided in his initial note. (*Exhs. 31 & 35; Testimony of Appellant*)

35. In response to this request, Dr. R.V. dictated a new note which was typed by the office manager, Christine C., and delivered to Trooper Fonseca. This second note, dated 11/17/15, stated:

“Patient Castile Fonseca DOB [redacted] was seen today for an Eye Exam. During the exam it was found that Mr. Fonseca is very photophobic and also prone to ocular

⁸ The initial note was not produced in evidence, but I find Trooper Fonseca's testimony about it credible. (*Exh. 31*)

migraines if exposed to bright lights All [sic] Mr. Fonseca has mild cataracts which gives him glare issues with bright lights. Due to these findings I feel Mr. Fonseca should wear a good pair of polarized sunglasses during the day and at night must have tinted windows on his work vehicle.”

(Exhs. 20 & 29(a); Testimony of Appellant, Dr. R.V. & Christine C.)

36. When Trooper Fonseca picked up Dr. R.V.’s second note, he noticed the typo (“All” should be “Also”) and asked Christine C. to fix the mistake. At first, Christine C. offered to “white out” the word “All” and write in “Also”, but when Trooper Fonseca told her that “they’re really strict at the Department and they wouldn’t accept that unless if [sic] was typed.” *(Exhs. 28 & 35; Testimony of Appellant & Christine C.)*

37. At that point, Christine C. and Christina S., another member of Dr. R.V.’s staff, collaborated to revise the note, making additional changes, primarily on the initiative of Christina S, which Christine C. described as “other little typos”. Christine C. then typed a new note and, as Dr. R.V. had left for the day, and without Dr. R.V. seeing or approving the revisions, she photocopied his signature from the prior letter and affixed it to the revised note that the two women had drafted. *(Exhs. 24, 29(b), 29(c), .28 & 30; Testimony of Dr. R.V. & Christine C.)*¹⁰

38. As revised by Christine C. and Christina S. the new note stated:

“Patient Casille Fonseca DOB [redacted] was seen today for a routine eye exam. During the eye exam it was found that Mr. Fonseca is very photophobic and is prone to ocular migraines if exposed to bright lights. Also Mr. Fonseca has mild cataracts which gives him glare issues with bright lights. Due to these findings, I feel Mr. Fonseca should wear a good pair of polarized sunglasses during the day and night. He also must have tinted windows on his work vehicle.”

(Exhs 20 & 24; Testimony of Appellant)

39. At his November 30, 2015 interview, Trooper Fonseca presented a copy of the revised note he received. Save for the correction to the typo he requested, until Det. Lt. Bombard started

¹⁰ Little information was provided about Christina S. who did not testify at the Commission hearing.

to read the note to him, he had not noticed the other changes made by Christine C. and Christina S. from the prior draft. (*Exhs. 20, 22; Testimony of Appellant*)

40. At Det. Lt. Bombard's request, Trooper Fonseca executed a release authorizing the MSP to contact Dr. R.V.'s office to obtain his medical records and further information related to his eye examination and the note he provided. (*Exhs. 20 & 25*)

41. Following his first investigatory interview, Trooper Fonseca contacted Dr. R.V. to "just let you know" that MSP would be seeking to get information from him about the note he had just provided to Det. Lt. Bombard. (*Exhs. 27, 35 & 46; Testimony of Appellant & Dr. R.V.*)

42. In anticipation of the interview, Dr. R.V. reviewed Trooper Fonseca's record, which lead him to realize that his note had been materially altered so that appeared to recommend wearing "polarized sunglasses" "during the day and night." Dr. R.V. vehemently denied that he did, or ever would, recommend wearing polarized sunglasses while driving at night. (*Exhs. 15, 22, 27, 30, 35 & 46; PHEXh.48; Testimony of Appellant & Dr. R.V.*)

43. On December 8, 2015, Det. Lt. Bombard and Det. Lt. O'Leary conducted recorded interviews with Dr. R.V. and Christine C. at the offices of Dr. R.A.J., the optometrist/owner for whom they worked. The interviews were conducted in the presence of the Regional Manager of the national eyewear company. They also spoke with the optometrist/owner, Dr. R.A.J., but did not record that conversation. (*Exhs. 15, 27, 28 & 46; Testimony of Dr. R.V. & Christine C.*)

44. The optometrist/owner Dr. R.A.J. was visibly upset by the MSP investigator's visit. She told Det. Lt. Bombard that both Dr. R.V. and Christine C. were leaving her employ. She declined the MSP's request to interview Christina S. She told Det. Lt. Bombard that she was concerned about the "liability thing" and requested that any future contact with her office or employees be directed through her attorney. (*Exhs. 15 & 46*)

45. During his recorded interview, Dr. R.V. recalled speaking with Trooper Fonseca just before the MSP investigators' visit. He did recall bringing up the differences in the note he had authorized and the revised one that Trooper Fonseca said he had given to the MSP. Dr. R.V. said Trooper Fonseca said something to the effect to "go" with the revised version because it "was the letter they had.". When asked if Trooper Fonseca tried to "sway you either way to say anything in particular", however, Dr. R.V. said:

"No, not really. He just said . . . they're coming in, they're gonna ask some questions and just tell them that these are my complaints I had and . . .that's really all he said."

*(Exhs. 27 & 35: Testimony of Appellant & Dr. R.V.)*¹¹

46. By Certified Mail letter dated December 17, 2015, Dr. R.A.J.'s office notified Trooper Fonseca that "the letter from 11/17/2015 about needing sunglasses and tinted windows was an incorrect letter. The letter that you received was not approved or signed by Dr. [R.V.]. We are sending you a copy of the correct letter with this mailing." Enclosed was an identical copy of the initial version of the note (Finding No. 35). *(Exhs. 29(a) & PHExh.48)*

47. By To/From dated January 6, 2016, sent through the Troop H chain of command, Trooper Fonseca made a "Request for Permission to Install Window Tinting", to which he attached the initial version of Dr. R.V.'s note (with the typo "All" for "Also" included) enclosed with the optometrist's Certified Mail letter dated December 17, 2015 and called the "correct letter" (Finding Nos. 35 & 46) as support for his request the window tint." *(Exhs. 36 & 37)*¹²

48. The second recorded interview of Trooper Fonseca on February 10, 2016 focused on the validity of the diagnosis of Trooper Fonseca's vision issues, the inconsistent notes he received from the optometrist and his efforts to contact Dr. R.V. between the first recorded interview

¹¹ I find that Trooper Fonseca did not intend that Dr. R.V. represent that he was recommending sunglasses for night driving. He knew that the MSP would never allow driving at night with polarized sunglasses (as opposed to his wearing them to reduce glare when stationary at a detail).. *(Testimony of Appellant)*

¹² The MSP took no action on this request. *(Exhs. 35; Testimony of Appellant)*

(November 30, 2015) and the interviews with Dr. R.V. and Christine C. (December 8, 2015). Trooper Fonseca brought with him the tinted eyeglasses that he was prescribed to wear at night to reduce glare.¹³ He maintained his position that, save for the typo he found, he did not “orchestrate” changes in the letter at any time (specifically, he disputed “one thousand percent” the suggestion that he asked to have the letter include permission to wear polarized sunglasses at night). He admitted that he made several attempts to speak to Dr. R.V. after learning that the MSP would be contacting him, but did not recall how many tries it took to reach him. (*Exh. 35*)

49. On March 23, 2016, Trooper Fonseca was examined by an ophthalmologist, Dr. E.A.S., MD, who opined, in part:

“The patient . . . is a Massachusetts State Trooper who works both daytime and night work details. . . . He has recently been wearing tinted eyeglasses with some symptomatic relief. At night, he wears a yellow tint which screens out blue and ultraviolet light and during the day he wears a more standard darkening sunglass.”

“A complete eye examination was performed. . . .”

“DIAGNOSIS: The present diagnosis is long standing photophobia . . . , associated with dry eyes and mild lens changes. . . . [H]e should be able to perform full work even without glare protection [sic] however, his comfort appears to be enhanced by tinted lenses. I don’t expect the condition will improve or worsen . . . He may benefit from a dry eye treatment.”

(*Exh. 41; Testimony of Appellant*)

MSP Disciplinary Proceedings

50. By To/From dated April 15, 2016, Det. Lt. Bombard reported the results of his IA investigation. After a twenty-one page statement of the facts, Det. Lt. Bombard concluded that twelve of the fourteen allegations of Trooper Fonseca’s misconduct were sustained. (*Exh. 15*)¹⁴

¹³ At the Commission hearing, Trooper Fonseca seemed to equate tinted prescription lens with “polarized” lenses, which I construe as a layperson’s misunderstanding of the undisputed technical differences between them, as explained by Dr. R.V.. (Testimony of Appellant & Dr. R.V.)

¹⁴ The two allegations of misconduct that were not sustained included: (1) the complaint that Trooper Fonseca had maintained his cruiser in “cluttered and unsatisfactory condition” and (2) the allegation of inattention to duties during a detail in Boston in early 2015. (*Exh. 15*)

51. Following the IA report, an MSP “Charge Sheet” charged Trooper Fonseca with violation of four Rules and Regulations for the governance of the MSP, as follows:

Charge I – Article 5.2 (Unbecoming Conduct) – Failing to conduct himself in such manner as to reflect most favorably upon himself and the MSP; and in doing so brought the MSP into disrepute, reflected discredit upon himself as a member of the MSP, and/or impaired the operation, efficiency, or effectiveness of the MSP or the member.

Specification I – Misrepresented to Dr. R.V. the purposes of the medical letter requested on or about November 17, 2015

Specification II – Improperly requested Dr. R.V.’s staff make changes to the medical letter written on November 17, 2015.

Specification III – Improperly asked Dr. R.V. to make misrepresentations to IA investigators.

Charge II – Article 5.8 (Unsatisfactory Performance) – Unwilling or unable to perform assigned tasks, and/or failure to conform to work standards established for the members rank, title, or position.

Specification I – Sleeping and/or inattentive to duty (wearing sunglasses at night and utilizing a neck pillow) on 9/28/15 paid detail in Worcester.

Specification II – Failing to wear appropriate uniform parts and issued use of force equipment on 9/28/15 paid detail in Worcester.

Specification III – Sleeping and/or inattentive to duty on 8/20/15 paid detail in Braintree.

Charge III – Article 5.10 (Alcoholic Beverages and Drugs)

Specification I - Appearing for or on-duty with odor of alcoholic beverage on his breath on 9/28/15 paid detail in Worcester.

Charge IV – Article 5.27 (Truthfulness) – Failing to be truthful at all times

Specification I – Indicating he did not consume alcoholic beverages on a Medical History Questionnaire provided to his optometrist.

Specification II – In IA interview, denied requesting changes to Dr. R.V.’s 11/17/15 note.

Specification III – In IA interview, stating he was unaware of changes to Dr. R.V.’s note.

Specification IV – In IA interview, stating he was unaware of IA meeting with Dr. R.V.

Specification V – In IA interview, stating his paid detail position was “half mile or more” away from the spot of the “rollover crash” on August 20, 2015 on Route 93 in Braintree.

(Exhs. 1 & 5)

52. On November 30, 2016, and MSP Trial Board convened and heard evidence on the charges asserted against Trooper Fonseca. Trooper Fonseca was present and was represented by counsel but did not testify. *(Exhs. 2 through 4 & 43; Testimony of Appellant)*

53. On December 13, 2016, the Trial Board issued its Finding and Recommendations, concluding that Trooper Fonseca was guilty on all offenses, save for Charge 1/Specification III (allegedly ordering Dr. R.V. to make misrepresentations to IA investigators) and Charge

IV/Specification I (alleged misrepresentation about consumption of alcohol on optometrist's Medical Questionnaire). The Trial Board recommended that Trooper Fonseca be suspended without pay for 60 days (Charge 1 – Unbecoming Conduct and Charge 3 – Alcohol & Drugs), 180 days (Charge 2 – Unsatisfactory Performance) and 270 days (Charge 4 – Truthfulness), the suspensions on all offenses to run concurrently. (*Exhs. 2 through, 4 & 43*)¹⁵

54. On January 5, 2017, MSP Colonel/Superintendent McKeon approved the findings of the Trial Board and ordered that Trooper Fonseca be suspended without pay for a total of 270 days, beginning January 15, 2017 through and including October 11, 2017. (*Exhs. 44 & 45*).

55. This appeal to the Commission duly ensued. (*Claim of Appeal*)

Findings Concerning Alleged Bias

56. By complaint with the MSP Harassment Unit, Trooper Fonseca asserted that Det. Lt. Hennigan's handling of the Worcester Detail incident on September 28, 2015, and the ensuing IA investigation, was retaliation for Trooper Fonseca's giving testimony in support of another trooper's prior, unrelated harassment claim. (*Testimony of Appellant & Det. Lt. Hennigan*)

57. Det. Lt. Hennigan and Trooper Fonseca were classmates at the Police Academy. They had little interaction since graduating in 1992. In 2006 or 2007, Det. Lt. Hennigan was sent to investigate a cruiser accident involving Trooper Fonseca for which he found Trooper Fonseca not responsible. The only other incident between them occurred about a year or two prior to the Worcester Detail incident, when Det. Lt. Hennigan counseled Trooper Fonseca after finding his rear view mirror covered over with "Post-It" notes blocking the view. (*Testimony of Det. Lt. Hennigan*)

¹⁵ According to the MSP's Disciplinary Guidelines, the penalties for violations of the offenses for which the Trial Board found Trooper Fonseca guilty are as follows: (1) Charge I (Class B 2nd offense – 10 to 60 days suspension without pay; (2) Charge II (Class C 3rd offense) – 15 day suspension to termination; (3) Charge III (Class B 2nd offense) – 10 to 60 day suspension; and (4) Charge IV (Class A 1st offense) – 30 day suspension to termination. (*Exh.4*)

58. The Harassment Unit (separate from the IA Unit) investigated Trooper Fonseca's complaint and exonerated Det. Lt. Hennigan of the harassment charges. (*Testimony of Det. Lt. Hennigan*)

59. During his cross-examination at the Commission hearing, Trooper Healy became exasperated with the questioning and, at one point, whispered a vulgar and offensive comment to the MSP counsel about Trooper Fonseca's attorney. I did not hear the comment, but Trooper Fonseca's attorney did hear it. Upon further questioning, Trooper Healy admitted to making the comment and acknowledged that his comment was inappropriate.. (*Testimony of Trooper Healy*)

APPLICABLE 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).

Under Section 43, the Commission makes a de novo review “for the purpose of finding the facts anew.” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. The role of the Commission is to determine “whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). See also City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev.den., 440 Mass. 1108 (2003); Police Dep’t of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm’n, 38 Mass.App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, rev.den., 390 Mass. 1102 (1983).

An action is “justified” if it is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law.” Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971); City of 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 determines justification for discipline by inquiring, “whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service.” School Comm. v. Civil Service Comm’n, 43 Mass.App.Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983)¹⁶

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

¹⁶ The “just cause” standard applicable to disciplinary decisions is distinct from the standard calling for more deference to appointing authorities 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).

as the “underlying purpose of the civil service system ‘to guard against political considerations, favoritism and bias in governmental employment decisions.’ ” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of “merit principles” which govern civil service law that discipline must be remedial, not punitive, designed to “correct inadequate performance” and “separating employees whose inadequate performance cannot be corrected.” G.L. c.31,§1.

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 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 . . . 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. It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. See, e.g., Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003) 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). The Commission takes 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).

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

“[T]he power to modify is at its core the authority . . . 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’ . . . [Citations]”

Id., (*emphasis added*). See also Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983).

SUMMARY OF CONCLUSION

Applying these principles to the facts presented in this appeal, the MSP has just cause to discipline Trooper Fonseca. By a preponderance of the evidence, the MSP proved that, by his unprofessional behavior and inattention to duty in Braintree on August 20, 2015 and in Worcester on September 28, 2015, Trooper Fonseca violated MSP rules of conduct expected of him, namely, Article 5.8 (Unsatisfactory Performance) and Article 5.10.4 (Alcoholic Beverages and Drugs). The MSP also met its burden to prove by a preponderance of evidence that Trooper Fonseca violated MSP Rule 5.27 (Truthfulness) by his statements to IA investigators concerning his actions and inaction while on duty in Braintree on August 20, 2015.

The MSP failed, however, to meet its burden to prove that Trooper Fonseca’s conduct related to his interactions with the optometrist’s office violated MSP Rule 5.2 (Unbecoming Conduct)

or that he violated MSP Rule 5.27 (Truthfulness) by his statements to MSP internal affairs investigators regarding it.

In consideration of the nature of the untruthfulness for which Trooper Fonseca was justly disciplined, by which he tried to downplay his unsatisfactory performance in violation of Rule 5.8, the MSP's 180-day and 270-day suspension for those infractions, respectively, is reasonably justified. Although I find that the 60-day suspension for Trooper Fonseca's other relatively minor, first violation of Rule 5.10.4 (Alcoholic Beverages and Drugs), is unduly harsh, modification of that penalty would not change the total length of the suspension (270 days) that remains appropriate for the proven misconduct, as all penalties were served concurrently. Thus, the 270-day suspension stands.

Misconduct Related to the August 20, 2015 Braintree Detail

As to the Braintree Detail, save for Trooper Fonseca's (untruthful) version of events, the documents and testimony of all other percipient witnesses show a consistent picture of the detail set-up and accident scene. This credible evidence established that a motorist was traveling northbound on Route 93 at a high rate of speed. As she approached the slower moving traffic at the construction "taper" set up near the Exit 6 off-ramp to Route 37 that had closed off the two left hand "high speed" lanes, she attempted to merge into the slower moving traffic that had already moved over into the open right hand lanes as directed by the "arrow board" set up to signal approaching motorists of the approaching taper. In so doing, she cut off another motorist already in a right hand lane, whose vehicle, in turn, struck a third vehicle in the line of traffic. The speeding motorist's vehicle rolled over several times until coming to rest on the side of the road at a point between the two Exit 6 off-ramp where the motorist remained entrapped until rescued by fire safety responders. Witnesses placed the accident directly across the highway

from a nearby “Bernie & Phil’s”, on a well-lit, busy part of the highway, at approximately 10:30 p.m. Multiple fire apparatus and State Police cruisers responded in emergency mode (“lights and sirens”) within minutes of the dispatch sent over the MSP radio after receiving several 911 calls from witnesses on the scene (one of whom was a Boston Police Sergeant on his way to work), with approximately two dozen public safety personnel ultimately on-scene.

I find Trooper Fonseca’s account of this incident problematic and not credible for a number of reasons. He placed the location of his cruiser “more than half a mile” from the Exit 6 ramp and stated he was so far away, he couldn’t even see the exit signs. He also said traffic (which all witnesses agreed was busy) had blocked his view and that he did not see the crash or rollover or any of the fire apparatus responding. He initially said he had his radio turned down but later admitted he had it turned off at the time of the crash and turned it because he knew “something was happening” after he saw other cruisers speeding past him. He said he learned of the entrapped operator from hearing the radio transmissions but did nothing to come to assist. I do not find his explanation credible or consistent with other credible evidence in several material respects..

First, claiming the “taper” was set up more than a half a mile from Exit 6 would place it nearly parallel with the “cut off” that Trooper Healy used to reverse direction as he sped to the scene. Trooper Healy and Lt. McGary had the accident scene in sight after he made his U-turn., Both Trooper Healy and Lt. McGary placed Trooper Fonseca’s vehicle positioned close inside the “taper” within 75 yards, or less, from the overturned vehicle. This version is inconsistent with all other evidence about the accident scene.

Second, it is not credible that the “taper” would have started so far away from the Exit ramp, nearly back to the “cut-off”, which would mean either: (1) the motorist was speeding (estimated

70 mph) for a half mile in busy traffic before cutting off another vehicle, or (2) the roll-over carried her vehicle a half-mile or more before coming to rest. Neither scenario is plausible.¹⁷

Third, I find no plausible explanation for Trooper Fonseca's complete disinterest in the crash. The fact that he did not have either his cruiser or mobile radio turned on while working his detail, alone, indicates an inattention to duty. Moreover, even after he admitted to hearing about the crash, he took no action in response to the loud and tumultuous scene within his earshot and view. He either saw the accident and chose to remain preoccupied with whatever else he was doing, or didn't see anything because he was so distracted (or possibly asleep). This level of inattention falls far short of what the MSP can reasonably expect of an on-duty Trooper and establishes just cause for discipline.

Fourth, Trooper Fonseca's (somewhat shifting) version of the incident, both during the investigation supports the MSP's conclusion that he was untruthful about it. His prevarication is so far at variance with the truth that it cannot be discounted as an "honest" mistake. His plainly meant to deny taking any responsibility for his inattentiveness to duty that night. 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

¹⁷ The Appellant made much of the discrepancies in the distance estimates from the crash given by Trooper Healy and Lt. McGary. I have discounted much of Trooper Healy's testimony due to his demeanor at the Commission hearing, but both officers, and the preponderance of other evidence, place Trooper Fonseca in the vicinity of the Exit 6 ramps and nowhere near the "cut off" more than a half mile away.

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)

Misconduct Related to the September 28, 2015 Worcester Detail

First, the evidence is compelling that Trooper Fonseca was asleep in his cruiser while working a construction detail when Det. Lt. Hennigan came upon him on September 28, 2015. This was not his first offense for inattentiveness. Whether Trooper Fonseca was asleep or was simply preoccupied with something, he clearly was so inattentive to duty that he failed to notice Det. Lt. Hennigan approach his vehicle, even after Det. Lt. Hennigan tried to get his attention and snapped several photographs. Had he been approached by someone with less than honest intent, the consequences for mischief would have been significant. Moreover, Trooper Fonseca was assigned to monitor his surroundings for the purpose of ensuring safe passage for vehicles in the construction site. His inattention to this duty is sufficient proof of misconduct that warranted discipline.

Second, the undisputed evidence established that Trooper Fonseca had consumed at least one beer a few hours before reporting to the Worcester detail. The preponderance of the evidence supports the conclusion that Det. Lt. Hennigan perceived an odor of alcohol on Trooper Fonseca's breath. Det. Lt. Hennigan would not have gone to the lengths he did to conduct a field sobriety test after calling for an impartial witness to be present had he not detected such an odor. Even Trooper Fonseca offered the explanation that his medical condition might have caused him to retain the smell of alcohol for a longer period than normal, even after one beer.

However, Trooper Fonseca was immediately forthcoming about having had a beer before coming on duty and the undisputed evidence showed that was not intoxicated. The imposition of the maximum 60-day suspension prescribed under MSP guidelines appears more influenced by the MSP's conclusions about Trooper Fonseca's other misconduct that night than a fair intent to remediate this specific, somewhat minor violation. While some discipline is justified (the MSP is entitled to ensure that the public not encounter a Trooper who smells of alcohol for whatever reason), I find that a suspension at the lower end of the range (10 days) is more consistent with basic merit principles to remediate, not punish, for this offense..

Misconduct Related to the Optometrist

The MSP failed to establish just cause for discipline based on the charges of misconduct related to Trooper Fonseca's efforts to obtain special eyeglasses and window tinting to protect against glare due to his photophobic condition, and his alleged untruthfulness to investigators about those efforts.

Trooper Fonseca's main focus had always been on getting tinted windows for his cruiser. He never sought or attempted to obtain permission to wear polarized sunglasses at night. The allegations to the contrary were not supported by the evidence presented at the Commission hearing. The MSP's conclusion was based on confusion (which all parties shared) about the medical issues (equating, for example, "tinted prescription eyeglasses" with "polarized sunglasses") and speculative assumptions that are not supported by Dr. R.V.'s testimony or the very poor demeanor and inconsistent memory of the staff member responsible for altering his note and forging his signature. The optometrist's staff (and the owner of the practice) had a clear motive to avoid legal exposure for the errors they committed or enabled. Moreover, the one staff member (Christiana S.), who was actually responsible for orchestrating the changes to

Dr. R.V.'s notes, allegedly to fix a few "little typos", was not permitted to be interviewed by the MSP investigators and was not called to testify at the Commission hearing.

Thus, the preponderance of the evidence, including the fact that Trooper Fonseca did not testify at the Trial Board (resting his defense, instead, on his unequivocal statements to the investigators which he credibly affirmed at the Commission hearing on these issues about the optometrist)¹⁸ falls short of establishing that Trooper Fonseca acted improperly in any way, either (1) to influence Dr. R.V. or his staff to authorize the patently absurd use of "polarized" sunglasses for nighttime wear which neither one intended, or (2) to influence Dr. R.V. to support that version of events after the fact. The most probable scenario established by the preponderance of evidence showed that it was Dr. R.V.'s staff who took it upon themselves to rewrite his note to fix the "typos", not realizing (although as professionals they should have paid more attention to the details) that the "improvements" actually created greater ambiguity, not less. Trooper Fonseca was not the source of those ambiguities. He cannot be faulted for missing these unintended mistakes that not even the professional staff knew they were creating.

Alleged Bias

Believing that Det. Lt. Hennigan had a personal animus against Trooper Fonseca, stemming from Trooper Fonseca having given testimony in support of a fellow Trooper's harassment claims against the MSP, Trooper Fonseca filed a separate harassment claim against Det. Lt. Hennigan. After investigation, the MSP concluded that Trooper Fonseca's claim of harassment by Det. Lt. Hennigan was unfounded. At the Commission hearing, Trooper Fonseca offered

¹⁸ Trooper Fonseca's testimony at the Commission hearing on the issues surrounding his interactions with Dr. R.V. and his staff, which I find credible, was consistent in all material respects with his statements to the IA investigators, that I also find truthful. That was not the case with the other charges of misconduct which I found were supported by the evidence, as to which Trooper Fonseca's defense, both during the IA investigation and at the Commission's de novo hearing, was generally not credible and, as noted, in some respects, untruthful. Thus, while taking account of his failure to testify at the Trial Board does not lead me to change my conclusions on the charges related to the optometrist, it does amplify my conclusions on the other charges of misconduct and untruthfulness for which I conclude the discipline was warranted.

general opinion testimony but no specific, credible evidence of Det. Lt. Hennigan's animus or that of any other specific MSP personnel. I find that Det. Lt. Hennigan's actions in coming upon Trooper Fonseca on September 28, 2015 followed MSP procedure. The fact that Det. Hennigan sought out a third party witness to observe him perform the sobriety test, and waited for him to arrive before conducting the test, belies the suggestion that he was out to "get" Trooper Fonseca.

The other claim of bias lodged by Trooper Fonseca was against Trooper Healy. I agree that the unprofessional outburst by Trooper Healy, who muttered an epithet against Appellant's counsel at the Commission hearing, casts serious doubt about that witness's impartiality. Accordingly, I do take that doubt into account in weighing his testimony and discount any of his testimony that was not corroborated by other credible evidence. I note, however, that, in most respects, Trooper Healy's testimony describing the Route 93 crash scene was consistent with the testimony of Lt. McGary (who was sequestered during Trooper Healy's testimony). I found Lt. McGary presented as an articulate, professional and credible witness.

Modification of the Penalty

Since the facts as found above, after a de novo hearing before the Commission, do differ in some material respects from those found by the MSP on which it relied in finding Trooper Fonseca guilty of the charges against him, I considered whether the Commission should modify the penalty imposed upon him. In particular, the MSP did not establish just cause for discipline on any of the charges of Unbecoming Conduct or Untruthfulness related to the optometrist. I also concluded that, while discipline for the violation of the Alcohol and Drug rules was justified, the minor nature of the violation probably warranted a modification of the penalty.

However, the charges of misconduct that do warrant discipline include (1) Unsatisfactory Performance for inattention to duty during both the Worcester and Route 93 construction details (for which MSP imposed a 180 day suspension) and (2) Untruthfulness for knowingly making false statements to the MSP about the Route 93 incident (which he repeated at the Commission hearing). In view of the nature of the unsatisfactory performance that was established here, the history of Trooper Fonseca's prior discipline, and noting that the facts found here on those two particular charges do not vary substantially from those upon which the MSP based its discipline, I conclude that the Commission is not warranted to modify those penalties.

The Untruthfulness charge about the Braintree detail presents a more complex issue. Of the five specifications of alleged untruthfulness, four related to alleged false statements made by Trooper Fonseca concerning his interaction with Dr. R.V. and his staff, none of which have been proven (one rejected by the MSP Trial Board and the remaining three failed the preponderance of evidence test before the Commission). In addition, the charge of Unbecoming Conduct that related to the interaction with the optometrist failed the preponderance of evidence test before the Commission. That leaves Trooper Fonseca's false statements related to his conduct at the Braintree accident scene as the only proven incident of Untruthfulness.

Untruthfulness by a State Trooper is among the most serious forms of misconduct that brings discredit upon the Trooper and the MSP as well as risks a claim that the Trooper is "damaged goods" whose untruthfulness may become an issue for impeaching him in a criminal trial in which he or she is called to testify. See, e.g., MASS.R.CRIM.P. 14(a)(1)(A); Commonwealth v. Laguer, 448 Mass. 585 (2007); Commonwealth v. Tucceri, 412 Mass. 401 (1992); Commonwealth v. Daye, 411 Mass. 719 (1992); Commonwealth v. Gallerelli, 399 Mass. 17 (1987); Commonwealth v. Wilson, 381 Mass. 90 (1980) See also, Kyles v. Whitley, 514 U.S.

419 (1995); United States v. Bagley, 473 U.S. 667 (1985); United States v. Agurs, 427 U.S. 97 (1976); Giglio v. United States, 405 U.S. 150 (1972) ; Brady v. Maryland, 373 U.S. 83 (1963)

In addition, having proven that Trooper Fonseca’s performance at the Braintree accident scene warranted a 180-day suspension, I find that it would not be appropriate to modify the penalty for that single instance of untruthfulness. Such a modification would mean that Trooper Fonseca suffers no additional sanction for lying about his behavior in an attempt to excuse it and would provide no remedial value to ensure correction of both the underlying behavior and the untruthfulness about it, in the future. Accordingly, what amounts to an additional penalty of 90 days suspension for dishonesty about on-duty performance that warranted a six-month suspension, is a reasonable sanction. Thus, modification of the 270-day suspension for the single act of untruthfulness is not warranted. I certainly appreciate that the Appellant has good reason to view the penalty as severe, but so was the infraction.

Finally, to the extent I have not addressed any of the other issues raised by the parties, they “have not been overlooked. . . . [N]othing in them . . . requires discussion.” McCormack v. Department of State Police, 92 Mass.App.Ct. 1103, 2017 WL 3469601 (Rule 1:28), *citing* Commonwealth v. Domanski, 332 Mass. 66, 78 (1954). In particular, I need not revisit the issues raised by the Appellant’s Motion to Compel and for Sanctions as the Appellant has not pressed those matters and they are not material to this Decision.

CONCLUSION

Accordingly, for the reasons stated, the appeal of the Appellant, Casille E. Fonseca, in Appeal D-17-004 is *dismissed* and the 270-day suspension is affirmed.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein

Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein & Tivnan, Commissioners) on June 21, 2018.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by 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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

Suzanne T. Caravaggio, Esq. (for Appellant)

Mitchell J. Notis, Esq. (for Respondent)