

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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MCAD and CLEVELAND COATS,  
Complainants

Docket No. 14 BEM 00729

v.

MASSACHUSETTS STATE POLICE,  
Respondent  
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Appearances: Lisa Brodeur-McGan and Daniel Montagna, Esqs. for Complainant Coats  
Siobhan E. Kelly, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On March 27, 2014, Cleveland Coats Jr. ("Complainant") filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") alleging that he was subjected to discrimination by the Massachusetts State Police (Respondent) on the basis of race and age pertaining to his removal from Respondent's Executive Protection Unit and his transfer into its Joint Terrorism Task Force.

The MCAD issued a probable cause finding and certified the case for public hearing. A public hearing was conducted on October 21, 22, 25, 28, 29, November 1, 5, 25, 26, December 17, and 18, 2019. The parties introduced sixty-seven (67) joint exhibits and chucks A-E. The following individuals testified at the public hearing: Cleveland Coats Jr., Carmelo Ayuso, Shawn Givhan, Lisa Butner, Aaron Gross, Dermot Quinn, James Duggan, Kevin Scaplen, and Stephan Flaherty.

To the extent the parties' proposed findings are not in accord with or are irrelevant to my findings, they are rejected. To the extent that the testimony and exhibits are not in accord with or are irrelevant to my findings, they are also rejected. Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

## II. FINDINGS OF FACT<sup>1</sup>

1. Complainant Cleveland Coats Jr. (DOB: █████57) is an African-American male who graduated from Massachusetts State Police Training Academy in 1983. Prior to joining the State Police, he was a special/auxiliary police officer in the Town of Lexington and a reserve police officer in the Town of Westford. Complainant testified that he graduated from the Training Academy as number six in his class. Tr. 1 at p. 42. According to Complainant, drill instructors at the Training Academy required that he and the other African American recruits dress as waiters, serve their classmates at a candle-lit dinner, and have their dinner in a separate location. Tr. 1 at pp. 67-68. Two of Complainant's classmates at the Training Academy were Timothy Alben and James Hanafin who, in 2012, became Colonel and Lt. Colonel, respectively, of the State Police. Joint Exhibit 1. Complainant testified that they both laughed during the Training Academy incident described above. Tr. 1 at p. 69. I credit Complainant's testimony regarding the incident.

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<sup>1</sup> The record contains an eleven-volume transcript of the MCAD hearing as well as exhibits. Citations to the transcript consist of the abbreviation "Tr." followed by volume number and page references. Because of security concerns raised by Respondent, the hearing record and exhibits have been impounded.

2. Respondent Massachusetts State Police is a paramilitary force in the Commonwealth under the command of a Colonel who is appointed by the Governor. Tr. 3 at pp. 130, 136. During the relevant period, the force was divided into four divisions, each headed by a Lieutenant Colonel: 1) the Division of Investigative Services; 2) the Division of Administrative Services; 3) the Division of Standards and Training; and 4) the Division of Field Services. Tr. 3 at p.130-131. Majors, Detectives, Captains, Detective-Lieutenants, Lieutenants, Sergeants, and Troopers serve under the Lieutenant Colonels. Tr. 3 at p. 132-134.
3. Complainant's first assignment was a three-year stint in the Division of Field Services as a uniform Patrol Officer (Trooper) out of the Leominster Police Barracks for three years and then out of the Concord Barracks for another three years during which he became a Canine Officer. From 1983 through 2006, Complainant remained in the Division of Field Services. Complainant worked as a Canine Officer for eighteen years during which time he was promoted to Sergeant in 1995. As a Canine Officer, Complainant's duties consisted of conducting building searches, tracking suspects, searching for missing persons, locating evidence, performing crowd control, and looking for narcotics, explosives and arson accelerants. Joint Exhibit 19. After he was promoted to Sergeant, Complainant testified that he sought to attend a supervisory training program called "Sergeant's School" but was told he didn't need to do that because he was a "tactical guy." Tr. 1 at p. 159. Complainant observed that newly-promoted Caucasian Sergeants were allowed to attend the program. Tr. 1 at pp 159-160. According to Complainant, the

program would have assisted him in learning skills such as accessing police data bases and computer systems. I credit Complainant's testimony in this regard.

4. When candidate Deval Patrick ran for Governor in 2006, Complainant volunteered for approximately eight to ten months as a member of the candidate's security team.

Complainant volunteered to work for the candidate during his off-duty hours, performing such tasks as arriving ahead of time at events, coordinating the candidate's movements inside and outside buildings, and escorting the candidate during campaign events. Tr. 4 at p. 22. The security team operated under the direction of Boston Police Detective Sergeant Aaron Gross. Sergeant Gross was thereafter appointed by Governor Patrick as Colonel of the Environmental State Police, a position he held from 2008-2014. Colonel Gross testified that he, the Governor, and the Governor's wife were all favorably impressed by Complainant's conduct as a member of the security team. Tr. 6 at pp. 190-196. I credit this testimony.

5. Complainant informed then-Sergeant Gross that he was interested in working in the State Police Executive Protection Unit ("EPU") if candidate Patrick were elected. Tr. 4 at pp. 19, 24, 27. Complainant also spoke to then-Detective Lieutenant Hanafin about joining the EPU. Tr. 4 at p. 20.

6. The EPU is a unit within the Division of Investigative Services of the State Police which provides security for the Governor, the Lt. Governor, and, in some instances, the First Lady. Tr. 8 at p. 189. EPU positions are assigned on a non-biddable basis. Members of the EPU are stationed at the State House. They wear business attire, i.e., suits and ties, and are issued unmarked state vehicles along with fuel cards to pay for gas. Tr. 4 at pp.

34-35. EPU members interact with the Secret Service, the State Department, and local police departments. Id. Jobs within the EPU are high prestige, sought-after positions which involve international travel, trips to the White House, and generous overtime. Captain Kevin Scaplen, EPU Unit Commander from 2009 to the present,<sup>2</sup> testified that interest in EPU openings is communicated through "word-of-mouth" and that open positions are filled on a temporary basis before being made permanent. Tr. 8 at p. 191, 199. He described the EPU as a "pretty tight knit group so you have to be a fit within the group." Tr. 8 a p. 193. According to EPU Commander Scaplen, members of EPU have to be accepted by the group as well as have chemistry with the Governor and Lt. Governor. Id.

8. According to Complainant, requesting assistance in securing a sought-after position such as an EPU assignment is a common occurrence. Tr. 4 at pp. 169-170. I credit this testimony notwithstanding Article 5.29.1 of the Rules and Regulations of the Department of State Police, effective January 31, 2001, which states that "No member shall . . . cause any person . . . to intercede on his/her behalf . . . for the purpose of seeking . . . assignment or promotion." Joint Exhibit 30.
9. Non-biddable positions such as those within EPU are filled at the discretion of the State Police Colonel rather than by seniority.<sup>3</sup> Permanent, non-biddable positions are posted, but temporary ("TDY") placements into non-biddable positions are not. Joint Exhibits 2

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<sup>2</sup> Kevin Scaplen will be referred to throughout the decision as Unit Commander, EPU Commander, or Captain except when focusing on a prior period of time during which he held a lower rank.

<sup>3</sup> Biddable positions, by contrast, are typically located in the Division of Field Services and are filled on the basis of seniority. Tr. 3 at p. 129; Joint Exhibit 36.

(ADM 27), 36, 36A, 50 (Art. 28); Tr. 3 at p. 39; Tr. 5 at pp. 15-15. Because temporary assignments into non-biddable positions are not posted, potentially-interested individuals do not receive notification of the openings. The individuals who are hand picked for the assignments then have the opportunity to become familiar with the positions before they are permanently filled. Tr. 3 at pp. 54-54. According to Lt. Carmelo Ayuso, President of the Massachusetts Minority State Police Officers Association, the lack of postings presents an "equal opportunity concern." Tr. 3 at pp 68-69. Lt. Ayuso testified that 99.9 percent of the individuals who receive TDY placements are Caucasian and that individuals are "TDY'd" into non-biddable units as preparation for permanent transfers. Tr. 3 at pp. 39-41, 47-48. Lt. Lisa Butner, who is President of "One Blue,"<sup>4</sup> likewise testified that the failure to post openings for TDY assignments into non-biddable positions works to the benefit favored candidates at the expense of an inclusive selection process.

10. Captain Scaplen testified that Complainant was brought into the EPU per the request of Governor Patrick. Tr. 10 at pp.133-134. Complainant joined the EPU effective November 19, 2006 as a Sergeant on a TDY basis. Joint Exhibit 9 at p. 3404; Tr. 8 at p. 213.
11. At the time Complainant entered the EPU, the Unit Commander was then-Detective Lieutenant Hanafin. Joint Exhibit 1; Tr. 8 at p. 198. Trooper John Fraioli (Caucasian)

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<sup>4</sup> One Blue was established in 2016 to bring together officers who are female, male, minority, LGBTQ, and Caucasian. Tr. 6 at pp. 4-5. Lt. Butner was in the Police Affirmative Action Unit from January 2000 to September 2002. Tr. 5 at p. 119.

joined the EPU on a TDY basis approximately six weeks after Complainant, effective December 31, 2006 per the recommendation of Lt. Governor Timothy Murray. Tr. 8 at p. 201; Joint Exhibit 9, Bate stamp 3405. Steven Flaherty (Caucasian) transferred into the EPU in 2003 and was promoted to Sergeant in 2008. Joint Exhibit 1. Kevin Scaplen, who later became EPU Commander, and Sgt. Flaherty, who remains a member of the EPU, have been friends both inside and outside of work since 1993. Tr. 10 at p. 39.

12. Trooper Fraioli was made permanent in EPU effective July 1, 2007, prior to Complainant. Joint Exhibit 9, Bate stamp 3406, 3408, 3409; Tr. 4 at p. 30. Complainant went to Wes McCravey at the Diversity/Affirmative Action Unit to complain about his position not being made permanent prior to or at the same time as Fraioli's. Complainant was thereafter made permanent effective July 15, 2007. Joint Exhibit 9.

13. According to Complainant, most of the members of the EPU attend a week-long training hosted by the National Governor's Security Association ("NGSA"). The course focuses on uniform techniques for protecting officials in order to promote reciprocity among security officers in different states. Tr. 10 p. 61. Complainant testified that he asked to attend the course when he was appointed to the EPU but that his request was denied. Tr. 1 at p. 163. Captain Scaplen acknowledged that he, Flaherty, Driscoll, and O'Riordan attended the course but that Complainant did not.

14. There are three primary roles in the EPU: the "driver" (aka "body/advance"), the "catch" and the "chase." Tr. 8 at p. 207. The roles are assigned for week-long periods. Tr. 4 at p.

32. [REDACTED]  
[REDACTED]

[REDACTED]

15. According to Captain Scaplen, during the 2006-2013 period, electronic devices such as GPS, Google Maps, Mapquest, and actual maps were used as tools for advance work but were not supposed to be relied upon by a driver. Tr. 8 at pp. 214-215. Captain Scaplen testified that the Governor's advance team asked that Complainant not be assigned to the role of driver because his over-reliance on GPS caused him to take heavily-trafficked routes. Tr. 8 at p. 215-217. Captain Scaplen stated that the Governor's advance team would increase the drive times needed to get to important events by ten to fifteen minutes when they knew that Complainant was the driver. Tr. 8 at p. 218. According to Complainant, however, he was never told to refrain from using GPS to research a route in

preparation for serving as driver. Tr. 2 at pp. 74-77. Complainant stated that Governor Patrick appreciated his use of GPS. Tr. 2 at p. 76.

16. Captain Scaplen testified that when Complainant was assigned as catch, he would lag behind the Governor and his team when entering a location rather than lead the way. Tr. 9 at pp. 6-8. Scaplen estimates that he spoke to Complainant about falling behind more than ten times. Tr. 9 at p. 8. Scaplen testified that when Complainant was assigned as chase, he would also fall behind in his vehicle so that he could not be viewed by the driver of the Governor's vehicle and then would impermissibly use his emergency lights in order to catch up. Tr. 9 at pp. 14-16.
17. In January 2009, then-Capt. Hanafin was promoted to Major. Joint Exhibit 1; Chalk D. He moved out of EPU and into the Office of Division Commander which oversees the EPU. Joint Exhibit 1. Then-Sergeant Scaplen replaced Hanafin as Unit Commander of EPU. Tr. 10 at 6, 8; Chalk D. Complainant had approximately ten years more seniority in the rank of Sergeant than Scaplen, but Hanafin told Complainant that Sgt. Scaplen was being selected as Unit Commander because he was on a promotional list for Lieutenant. Tr. 1 at p. 86.
18. At the time that Sgt. Scaplen was promoted to Unit Commander of EPU, Governor Patrick and his Chief of Staff Brendan Ryan asked him to name Complainant as Executive Officer of the EPU. Tr. 8 at p. 203; Tr. 10 at p. 140. EPU Commander Scaplen testified that the position of Executive Officer within the unit existed in title only and no additional responsibilities were given to Complainant. Tr. 8 at p. 205; Tr. 10 at p. 142. According to Lt. Colonel Quinn, however, an Executive Officer is part of command

staff and is entitled to exercise administrative as well as supervisory responsibility as second in command. Tr. 7 at pp. 72-73.

19. Complainant asserts that EPU Commander Scaplen would schedule administrative meetings at headquarters at times that he (Complainant) could not attend and would allow Sgt. Flaherty to attend in his place. Tr. 1 at p. 178; Tr. 2 at p. 54. Sgt. Flaherty was given the responsibilities of doing line inspections, making travel arrangements, and serving as liaison to outside agencies including the Secret Service and the State Department. Tr. 11 at pp. 9, 25.
20. Complainant was given the task of combining the EPU's paper records of threats against various Governors into a filing system even though Sgt. Flaherty was the EPU's liaison with the State Police Joint Terrorism Task Force ("JTTF"). Tr. 9 at pp. 27-30. EPU Commander Scaplen states that although he did not specify how the task was to be accomplished, he was "shocked" that Complainant organized the threats by date rather than by the last name of the individuals making the threats. Tr. 9 at pp. 31-32.  
  
Commander Scaplen did not have Complainant collaborate with the JTTF about how to organize the threats in a manner that would be compatible with JTTF's multiple databases of threats. Tr. 10 at pp. 101-103.
21. In April 2011, the EPU consisted of Unit Commander Kevin Scaplen (Caucasian), who was still a Sergeant and three additional Sergeants: Complainant (African-American), Sergeant Stephen Flaherty (Caucasian), and Sergeant Brian O'Riordan<sup>5</sup> (Caucasian).

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<sup>5</sup> O'Riordan came into the EPU on December 26, 2010. Tr. 2 at p. 60.

Joint Exhibit 6. Complainant was the most senior Sergeant in EPU by rank and by age. The EPU also had three Troopers who were Caucasian males (John Maguire, Matthew Quinn, and Mark Coleman<sup>6</sup>), two Troopers who were African-American (Marque Fraser<sup>7</sup> and Nathan Thomas), and one Trooper who was a Caucasian female (Deborah Thompson). Joint Exhibit 6; Tr. 2 at p. 60. Complainant was the direct supervisor of Troopers Maguire and Thompson from at least April 2011 until his removal from EPU. Joint Exhibit 6.

22. EPU Commander Scaplen testified that in 2012, Trooper Marque Fraser jokingly placed a "mock-up" on an EPU wall of various actors and other celebrities portraying members of the EPU in roles from the HBO mini-series "Band of Brothers." Tr. 9 at p. 85. Commander Scaplen stated that he was depicted as being played by Chris Farley or John Candy, that Sgt. Flaherty was depicted as being played by Red Sox manager Terry Francona, and that he (Scaplen) jokingly added that Complainant should be portrayed as "Grady" -- a character from the seventies sitcom Sanford and Son. Tr. 9 at p. 86; Tr. 10 at 92-93. According to Commander Scaplen and Sgt. Flaherty, the incident was a good natured matter about which everyone laughed including Complainant. Id.; Tr. 11 at 51-52, 103.
23. Complainant disputes the assertion that he was called Grady as part of jovial gag involving numerous members of the EPU who were assigned actors in a mock version of the movie "Band of Brothers." Tr. 4 at pp. 77-78. Complainant described the character

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<sup>6</sup> Coleman left the EPU around March 2012. Joint Exhibit 6; Tr. 10 at p. 115, 146.

<sup>7</sup> Fraser entered the EPU in April 2006, approximately six months prior to Complainant. Tr. 11 at p. 67.

Grady as an elderly, disheveled, decrepit black male, maintained that EPU Commander Scaplen persisted in calling him by that name, and stated that it was embarrassing and unacceptable to be associated with such a character. Complainant testified that he asked EPU Commander Scaplen to stop calling him Grady but that Scaplen refused and said that Complainant should retire. Tr. 2 at pp. 35-39; Tr. 4 at 77-79. I credit Complainant's version of the Grady matter over that conveyed by EPU Commander Scaplen and Sgt. Flaherty.

24. According to Unit Commander Scaplen, on one occasion when the Governor rode his bike in the Berkshires, Complainant created a roadblock by following the Governor in a police vehicle with his emergency lights turned on. Tr. 9 at p. 19. I do not credit that Complainant's driving capabilities were problematic and note that no issues relating to his driving are documented in any of Complainant's performance reviews.
25. On February 1, 2012, Complainant was assigned as the chase for Mayor Kevin White's funeral and Trooper Maguire was the Governor's driver. Tr. 1 at p. 184. According to Complainant, Maguire, who was driving erratically, reported that he had gotten into an accident but did not stop so that license information could be obtained from the other vehicle. *Id.*; Tr. 10 at p. 105. Complainant states that he observed damage to the passenger side of the vehicle that Trooper Maguire was driving. Tr. 4 at p. 43. Complainant testified that he informed EPU Commander Scaplen about the accident but was told, "Don't worry about it, it doesn't concern you" even though it was Complainant's responsibility as chase to handle all law enforcement activity at the scene of an accident. Tr. 1 at p. 188; Tr. 4 at p. 53; Tr. 9 at p. 92; Tr. 10 at pp. 179-180. EPU Commander

Scaplen testified that there was no damage to the other vehicle, but I do not credit this assertion as he acknowledged that the other vehicle was never located and testified that he does not recall speaking to Complainant or Trooper Maguire about the incident. Tr. 9 at p. 89-93; Tr. 10 at 107. Following the incident, Complainant rated Trooper Maguire as outstanding on an employee evaluation because Scaplen said to disregard the matter. Tr. 4 at pp. 60-62.

26. At some point between mid-2012 and mid-2013, an incident occurred at the Boston Seaport Hotel in which the Governor was brought to the wrong room for a meeting. Complainant states that he was assigned to be the catch. According to Complainant, when he arrived an hour before the Governor, he could not locate, physically or by phone, the building's Director of Security. Complainant contacted a uniformed security guard and finally arranged to get into the building, but it was not until the Governor arrived. Tr. 1 at p. 175. Complainant asserts that as driver/advance, Sgt. Flaherty should have arranged for a member of the hotel's security staff to be available when Complainant arrived at the hotel. Complainant states that he raised concerns with Unit Commander Scaplen that Sgt. Flaherty failed to contact the Director of Security which made Complainant "look bad" but his concerns were ignored. Tr. 1 at pp. 176, 183. According to Sgt. Flaherty, he was assigned to be the early driver for the event and on the day prior to the incident, he met with the Seaport Hotel's Director of Security Carmen Tammaro who said that he would not be at the event but that someone from his staff would await the EPU's arrival. Tr. 11 at p. 14. Sgt. Flaherty testified that he relayed this information to Complainant along with the floor of the event. Tr. 11 at p. 15. According to Sgt.

Flaherty, Complainant, as catch, should have led the Governor into the assigned room but that Complainant took the Governor and his party to the wrong floor of the hotel and then remained in the elevator as the Governor got off and went into the wrong room. Tr. 11 at pp. 18-21. Sgt. Flaherty states that the entourage thereafter proceeded to the floor that was communicated to Flaherty on the previous day. Tr. 11 at p. 21. According to Sgt. Flaherty, he apologized to the Governor on the next day. Tr. 11 at p. 24. I credit that Complainant took the Governor and his party to the wrong room but find that blame for the incident belonged to both Sgt. Flaherty and Complainant.

27. EPU Commander Scaplen estimates that he and Complainant traveled together with Governor Patrick on more than ten occasions, including a trade mission to Beijing. Tr. 9 at pp. 40-41. When engaging in overnight domestic or international travel, members of the EPU perform two specific assignments: body and advance. Tr. 9 at p. 34. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

According to Sgt. Flaherty, Complainant wanted to be the body on such trips, not the advance, because he "didn't have to do anything." Tr. 9 at p. 50; Tr. 11 at pp. 27-28. Captain Scaplen testified that the Governor's staff and other members of the EPU were uncomfortable with Complainant being assigned the role of advance on international travel and that Governor Patrick and his staff asked if Complainant could be removed from the international travel

list. Tr. 9 at p. 46. I do not credit this testimony as it was not corroborated by Governor Patrick or anyone on his staff.

28. According to Sgt. Flaherty, after a trip to France on which Complainant accompanied Governor Patrick and his wife, the Governor told him that Complainant should no longer do international travel and probably should not do domestic travel because he "doesn't do it the same way the rest of you do it." Tr. 11 at p. 31. According to Sgt. Flaherty, the Governor described an incident in which Complainant tried to communicate with someone who didn't speak English by repeating himself in a loud voice. I do not credit this testimony because it was not corroborated by Governor Patrick and because I do not believe that the Governor would report such matters about one sergeant to another officer of the same rank.
29. EPU Commander Scaplen testified that on one occasion when there were restrictions on radios and weapons being brought into China, Complainant, at a Chinese hotel, wore an ear piece that was not attached to a radio but which gave the impression that it was. Tr. 9 at pp. 43-45. I do not credit this testimony.
30. Unit Commander Scaplen testified that Complainant was responsible for keeping track of attendance calendars of members of the EPU and maintaining a yearly inventory of EPU equipment. Tr. 9 at pp. 51-52. According to Scaplen, Complainant committed errors in maintaining attendance records and failed for years to inventory departmental equipment. Tr. 9 at pp. 52-55. I discount these assertions as there is no documentary support for them in any of Complainant's employee evaluations.

31. According to Sgt. Flaherty, on one occasion Complainant was assigned to a threat investigation that originated out of Worcester which he did not pursue after being told by U.S. Marshall John Gibbons, a former threat investigator, that the individual under investigation had a penchant for suing everybody. Tr. 11 at pp 35-42, 99-100. I do not credit this information as it constitutes uncorroborated hearsay.
32. Despite the aforementioned criticisms of Complainant's performance, he received all outstanding job performance evaluations while in the EPU except for his first year which was acceptable. Joint Exhibit 20 at pp. 3260-3269. Complainant's last evaluation in the EPU (January-December 2012) states that he follows policy, procedure and directives; is cooperative; asks appropriate questions and is helpful to those he supervises; displays excellent oral and written skills; is flexible and has excellent interpersonal skills; displays great administrative ability; is always ready to assist and is respectful towards fellow workers and supervisors; delegates responsibility as required; completes reports on time; and is punctual, knows his job, and strives for perfection. Id at 3270. Unit Commander Scaplen acknowledged in his testimony that there is not a single piece of paper that documents any performance deficiencies on the part of Complainant. Tr. 10 at p. 125.
33. According to EPU Commander Scaplen, he did not use the employee evaluation system to document performance deficiencies for "political" reasons, preferring instead speak to employees about deficiencies one-on-one. Tr. 9 at pp. 70-72. However, the State Police Employee Evaluation System requires that negative performance be properly documented, that employees be provided with timely correction of poor performance, and that work improvement plans be implemented for members of the State Police

- performing at an unacceptable level. Joint Exhibit 13. Complainant testified persuasively that Commander Scaplen never criticized his abilities as a member of the Governor's travel team or his advance work as a driver. Tr. 2 at p. 79. Complainant never received a deficient employee evaluation review or a written improvement plan.
34. On December 23, 2012, Trooper Timothy Driscoll transferred into EPU on a non-posted TDY basis. Joint Exhibits 1, 8; Chalk A. At or around the time that Driscoll came into EPU, Trooper Fraser left to go to the airport. Tr. 10 at p. 14.
35. In May 2013, EPU Commander Scaplen was informed by Lt. Governor Murray that he was resigning his office. Tr. 11 at p. 73. Lt. Governor Murray was not replaced since the position of Massachusetts Lieutenant Governor, if vacated during a term in office, is not back-filled. *Id.* EPU Commander Scaplen testified that he relayed the news about Lt. Governor Murray's impending departure to Deputy Superintendent James Hanafin who was, at the time, second in command of the State Police under Colonel Alben. Tr. 9 at p. 74. According to EPU Commander Scaplen, he was then informed by Deputy Superintendent Hanafin that the EPU would be losing one Sergeant and one Trooper. Tr. 9 at p. 75. The Massachusetts State Police has no policy dictating the number of Sergeants in the EPU. Tr. 10 at p. 21. In terms of overall size, between 2010 and 2013, the EPU fluctuated from eight to twelve members. Chalk A
36. In June 15, 2013, approximately a month after Lt. Governor Murray resigned, Complainant, then aged fifty-seven, and Trooper Deborah Thompson, then aged fifty-three, were removed from the EPU. Tr. 2 at p. 47. Their removal from the EPU reduced the unit from nine positions to seven positions. Joint Exhibits 1, 6. When the removals

took place, EPU Commander Scaplen knew that Sgt. O'Riordan would soon leave the EPU since O'Riordan was on the promotional list for Lieutenant and since the EPU would not retain two Lieutenants. Tr. 2 at p. 128; Tr. 10 at pp. 14-15, 20.

37. EPU Commander Scaplen testified that Trooper Deborah Thompson did a "fantastic" job in the EPU as far as performance was concerned but that she had an "unfortunate attitude" as far as becoming upset about changes in schedules and assignments and was "at odds" with some of the Governor's staff. Tr. 10 at pp. 76, 87-88. According to Complainant, Scaplen "shunned" Trooper Thompson, did not answer phone calls from her, and said she was getting old for the job. Tr. 2 at pp. 52-53. EPU Commander Scaplen denied that he or other members of the EPU avoided Thompson. Tr. 10 at p. 90. I credit Complainant's testimony over EPU Commander Scaplen's.
38. Unit Commander Scaplen testified that prior to implementing the 2013 downsizing of the EPU, he spoke about the reduction and about Complainant's performance on multiple occasions with the Governor Patrick and his Chief of Staff Brendan Ryan. Tr. 10 at pp. 73, 183. According to Scaplen, the Governor "chose" Complainant for layoff, saying that he [the Governor] was pretty sure who "they" (the selected individuals) were going to be, referring to Thompson and Complainant as "one Trooper who didn't want to do the job anymore and one Sergeant who really couldn't do the job anymore." Tr. 9 at p. 78; Tr. 10 at pp. 74, 79, 189. Commander Scaplen also testified that Chief of Staff Ryan requested that Complainant be given a "soft landing." Tr. 9 at p. 79, Tr. 10 at p. 97. Scaplen states that he relayed the Governor's words to Lt. Colonel Hanafin who, along with Colonel Alben, made the ultimate decisions about the transfers based on the aforesaid input from

the Governor. Tr. 9 at p. 80. Nowhere in Respondent's position statement does it refer to input from the Governor or his Chief of Staff as a basis for the decision to transfer Complainant out of the EPU nor did Governor Patrick or his Chief of Staff corroborate the statements attributed to them. I discredit Respondent's assertion that Complainant's transfer was based on input from the Governor and/or his Chief of Staff.

39. Sergeant Flaherty testified that "everybody" on the Governor's staff knew that the Complainant was going to be transferred out of the EPU. Tr. 11 at p. 45. He stated that the Governor's Chief of Staff asked him whether Complainant could be promoted out of the Unit, and he responded that promotions are limited to individuals placed on promotional lists in accordance with exam grades and other factors. Tr. 11 at 44-46. I do not credit this testimony as it is uncorroborated hearsay and it strains credulity that the Governor's Chief of Staff would have discussed Complainant's employment situation with an individual occupying the same rank as Complainant.

40. According to Sgt. Flaherty, after the decision was made to transfer Complainant out of the Unit, he had a conversation with Governor Patrick while serving as his driver. Sgt. Flaherty quoted the Governor as saying, "we have two people, one person that doesn't want to do the job anymore and one that can't do the job." Tr. 11 at p. 47. I do not credit this testimony as it is uncorroborated hearsay, is an unlikely admission from the Governor to a Sergeant in the EPU with the same rank as Complainant, and unconvincingly mimics the words which EPU Commander Scaplen also claims he was told by the Governor.

41. EPU Commander Scaplen informed Complainant that he was being removed from the EPU while they were in adjacent vehicles in a parking lot in Framingham. Tr. 1 at pp. 193-194. Complainant was shocked. Tr. 1 at 194; Tr. 9 at p. 81. Unit Commander Scaplen did not get out of his car when he conveyed the information about the transfer. Tr. 9 at p. 81.
42. According to Colonel Aaron Gross, who spoke to the Governor approximately twice a month about work-related matters, the Governor never expressed dissatisfaction with Complainant. Tr. 6 at p. 196. When Complainant informed Colonel Gross that he was being removed from EPU, Gross said he would look into the matter and called Chief of Staff Ryan about Complainant's removal. Tr. 6 at p. 207. According to Colonel Gross, Ryan said, "we didn't know anything about that" and offered to check into it, although he did not thereafter contact Gross about Complainant's removal. Tr. 6 at pp. 207-209. I credit Colonel Gross's testimony and take notice of the fact that Colonel Gross came forward to testify under oath whereas Respondent only relies on hearsay attributed to the Governor and his Chief of Staff.
43. On June 16, 2013, Complainant and Thompson were transferred into permanent, non-biddable positions within Respondent's JTTF under the command of then-Major Dermot Quinn who acknowledged that, at the time, there were no openings in JTTF and no posting for the position as required by ADM 27. Joint Exhibit 1; Tr. 7 at pp. 52-3, 80-83. Major Quinn was not consulted by then-Lt. Colonel Hanafin prior to Complainant and Thompson being placed in JTTF. Tr. 7 at p. 84.

44. The JTTF originated after 9/11 to bring local, state, and federal agencies together in order to investigate domestic and international terrorism-related activities affecting New England. Joint Exhibit 31. [REDACTED]

[REDACTED] According to Lt. Duggan, who supervised Complainant at JTTF, assignments in the unit require the ability to use and search a variety of data bases, the interpretation of large amounts of complex information for intelligence purposes, and the drafting of comprehensive reports. Tr. 8 at pp. 111-112. Federal, not state, criminal procedures are applicable to the investigations. Joint Exhibit 31. At all relevant times, the JTTF task force handled potential terrorism investigations in accordance with the U.S. Attorney General's Domestic Investigations and Operations Guide (the "DIOG") which sets forth three categories of cases: 1) assessments of suspicious activity; 2) preliminary investigations; and 3) and full investigations. Tr. 7 at pp. 218-219; Joint Exhibit 31.<sup>8</sup>

45. Trooper Deborah Thompson, rather than work at JTTF, "burned" her unused vacation time and retired. Tr. 2 at p, 176; Tr. 8 at p. 129.

46. Five days after Complainant was removed from the EPU, Trooper Driscoll's TDY assignment in the EPU was extended and he became permanent in the EPU on September 22, 2013. Joint Exhibits 7 & 8; Chalks A & D; Tr. 10 at pp. 32, 147. According to Lt.

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<sup>8</sup> The DIOG is a 500-page manual which establishes JTTF and specifies that the FBI and the Massachusetts State Police agree to abide by the guidelines of the U.S. Attorney General and FBI policies pertaining to General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations, and Foreign Intelligence Collection and Counterintelligence Investigations. Tr. 8 at pp. 126-127.

Ayuso, the removal of a permanent member of the EPU (Complainant) and the retention of a temporary member (Driscoll) who thereafter became permanent was "in a reverse order." Tr. 3 at p. 45.

47. One month after Complainant and Thompson left the EPU, the unit's racial/age composition was as follows: a Caucasian Unit Commander (Scaplen, age 44), two Caucasian Sergeants (Flaherty and O'Riordan,<sup>9</sup> both 48 years old), three Caucasian Troopers (Maguire, Quinn, and Driscoll, ages 43, 50, and 53, respectively, and one African-American trooper (Nathan Thomas, age 50). Joint Exhibits 6 & 53; Tr. 2 at pp. 47-48; Tr. 8 at p. 147. There were no minority supervisors in the unit. Joint Exhibit 6.<sup>10</sup>
48. Following the transfers of Complainant and Thompson, Sgt. Flaherty was named Executive Officer of the EPU and in that capacity he assumed command when EPU Commander Scaplen was out of town or on vacation. Tr. 11 at pp. 88-89.
49. In 2012, Sgt. Flaherty's overtime within the EPU was \$71,969. It increased to \$88,974 in 2013 and to \$100,278 in 2014. Chalk A; Tr. 11 at pp. 117-118. He testified that the increase in his overtime was due, in part, to there being two fewer members of the EPU.

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<sup>9</sup> O'Riordan and EPU Commander Scaplen were classmates at the State Police Training Academy. Tr. 1- at p. 160. O'Riordan remained in EPU until August 9, 2014. Tr. 9 at p. 62. He was made a Lieutenant on the next day, transferred as a Lieutenant into the Violent Fugitive Apprehension Unit, and a month later transferred into the Fire Marshall's Office within the Division of Investigative Services (DIS). Tr. 10 at p. 14, 17; Joint Exhibit 1. Lt. Butner testified that when she attempted to apply for an Internal Affairs position just prior to being made a Lieutenant, she was told that she had to actually be in the rank prior to applying. Tr. 5 at p. 179.

<sup>10</sup> During the following year, African American Trooper Marque Fraser transferred back into the EPU on a TDY basis and thereafter became permanent in the EPU in May 2015. Tr. 3 at pp. 155-156; Joint Exhibit 9. His return to the EPU increased the number of minorities in the unit to two but there were no minority Sergeants.