

**NORFOLK, SS.**

**COMMONWEALTH OF MASSACHUSETTS**

**TOWN OF BROOKLINE**

\_\_\_\_\_  
IN THE MATTER OF )  
 )  
 )  
TOWN OF BROOKLINE AND )  
PRENTICE PILOT AND )  
ESTIFANOS ZERAI-MISGUN, )  
BROOKLINE POLICE DEPARTMENT )  
\_\_\_\_\_ )

**HEARING OFFICER'S REPORT ON HEARING REGARDING  
TOWN OF BROOKLINE AND  
PRENTICE PILOT AND ESTIFANOS ZERAI-MISGUN**

**APPEARANCES:**

**ATTORNEYS FOR**

**APPOINTING AUTHORITY:**

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**Patricia Correa, Esq.  
First Assistant Town Counsel  
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**ATTORNEYS FOR  
EMPLOYEES:**

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Boston, MA 02111**

**Oren Sellstrom, Esq.  
Lawyers' Committee for Civil Rights  
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61 Battery March Street, 5<sup>th</sup> Floor  
Boston, MA 02110**

**HEARING OFFICER:**

**JAMES B. LAMPKE, ESQ.**

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## **SUMMARY OF DECISION**

For the reasons stated in the within report, upon careful review and consideration of all the evidence and arguments of the parties, I find that the Appointing Authority (Appointing Authority or Town) has just cause to determine that the employees, Prentice Pilot and Estifanos Zerai-Misgun (Employees or Pilot or Zerai-Misgun), violated the Departmental Rules and Regulations in failing to report to duty as alleged by the Town. Accordingly, the Appointing Authority has just cause to take action relative to their separation from employment, up to and including terminating their employment.

## **INTRODUCTION AND STATEMENT OF CASE**

The undersigned was appointed to serve as Hearing Officer for the within matter by the Town of Brookline. The employees who are the subject of the hearing are Prentice Pilot and Estifanos Zerai-Misgun, police officers within the Town's Police Department.

The February 17, 2017 notice to each of the Employees (Exhibits Town -1 and 2) set forth in part the following as the reasons for the hearing:

"The Town of Brookline is committed to assuring that its workplace is free of discrimination, and has taken your complaints of such misconduct very seriously.

Since December 2015, you have reportedly declined to come to work on the basis that your personal safety would be jeopardized by your return, without providing specific information that objectively supports your continued absence on this basis. The Police Chief and the Superintendent have repeatedly invited you to engage in a discussion with them about your concerns so that all parties could move forward with your return, but you have declined to accept that invitation. On November 22, 2016, Police

Chief Daniel O'Leary wrote to you asking you to contact him by December 2, 2016 to discuss your work status. You did not do so. The mediation this past fall 2016 was unsuccessful.

The Town has taken robust and comprehensive efforts to address your concerns and has repeatedly communicated to you and your lawyers detailed information about those steps. These communications by the Town describing its measures have included, but not been limited to, Board of Selectmen Chairman Neil Wishinsky's statement at the January 12 and January 26, 2016 Board of Selectmen meetings; Chief Daniel O'Leary's statement at the January 19, 2016 Board of Selectmen meeting; the Town's Position Statement dated April 2016 in connection with your former MCAD case and the exhibits to it; the Town's June 13, 2016 statement entitled "Brookline Selectmen Release Reports on Investigation of Complaints Within Police Department" and the accompanying reports of Reginald Nunnally and Dr. Gerard Cox; Chief O'Leary's November 22, 2016 letter to you and the attachments to it; Town Counsel Joslin Murphy's December 1, 2016 letter to your attorneys and the attachments to it; and Chief O'Leary's February 2, 2017 letter to you and the attachments to it.

While the Town has kept you apprised of these *steps* throughout your absence, neither you nor your attorneys have accepted the Town's invitation to provide constructive feedback regarding its measures and what more the Town might consider doing to further address your stated safety concerns so that the parties may move forward with your return. The only suggestions the Town received came almost a year into your absence, in a November 21, 2016 letter your attorneys published to the Brookline Tab. That letter called upon the Town to enlist the United States Department of Justice and terminate or otherwise discipline the Police Chief, "at a minimum," and others, steps that are unwarranted in light of the above (including the information reflected in the documents listed above) and for the reasons further explained in Town Counsel Joslin Murphy's December 1, 2016 letter to your attorneys. Her letter called on your attorneys to engage forthwith in a collaborative effort to restore you to work -- as the Town could not continue to hold your position open for much longer - but your attorneys have not done so.

On February 2, 2017, Chief O'Leary wrote to you ordering you to return to work on February 8, 2017. You did not appear. The Town is not aware of any objectively reasonable basis for believing that your personal safety would be jeopardized by your return to work given your lack of

specification of any and the multi-faceted approach by the Town to address your concerns. The Town has continued to carry you as a benefited Town police officer despite your absence of over a year and despite the short-staffing that this has caused. Your leave banks expired months ago and you are on an unauthorized absence. Your failure to appear for work on February 8 was insubordination and failure to follow a direct order.

In light of the foregoing, in accordance with Massachusetts General Laws ("M.G.L.") Chapter 31, section 41, you are hereby given notice that the Town is contemplating discipline up to and including discharge for violation of Sections E ("Orders"), F(l) ("Reporting for Duty"), G(3) ("Neglect of Duty") and G(4) ("insubordination") of the Brookline Police Department's Rules and Regulations."

The notices to each of the Employees were identical except as to the time their particular hearing was scheduled for on March 3, 2017. By agreement of the parties, the two hearings were combined into a single hearing.

The hearing was held and completed on one day, March 3, 2017.

It is important to be clear that this is a hearing under G.L. c. 31, section 41 on charges against the Employees. It is not a hearing or investigation as to the complaints made by the Employees or the Town's responses to those complaints. As commented on below, those have been addressed elsewhere.

That said, it is also important to be clear that racism, discrimination, hostile workplaces, etc. are wrong and need to be addressed wherever it may exist. By no means should the hearing, this report or the Town's actions as a result of same be viewed as condoning racism, discrimination hostile workplaces, etc.

## **ISSUES AND CHARGES**

Based on the notice to the employee, as Hearing Officer I have determined the issues to be:

1. Whether Pilot engaged in the conduct alleged in the notice.
2. If so, did that conduct amount to a violation of the Department's Rules and Regulations cited in the Notice.
3. If so, does the Town have just cause to discipline Pilot, up to and including separation from employment, for the reasons set forth in the February 17, 2017 notice.
4. Whether Zerai-Misgun engaged in the conduct alleged in the notice.
5. If so, did that conduct amount to a violation of the Department's Rules and Regulations cited in the Notice.
6. If so, does the Town have just cause to discipline Zerai-Misgun, up to and including separation from employment, for the reasons set forth in the February 17, 2017 notice.

The notice referred to violations of certain Departmental Rules and Regulations, excerpts of which are:

### **E. ORDERS**

An order is a command or instruction, written or oral, given by a superior officer. All lawful orders, written or oral, shall be carried out fully and in the manner prescribed. Members shall obey any lawful order of a superior including any order relayed from a superior by another member.

1. **General Orders** - General Orders are permanent written orders issued by the Chief of Police outlining policy matters which affect the entire Department. A General Order is the most authoritative written order the Chief issues, and may be used to amend, supersede or cancel any previous order. General Orders remain in full effect until amended, superseded or canceled by the Chief. Arrangements shall be made to include General Orders in the Police Manual. The Implementation of General Orders is subject to the approval of the Board of Selectman, as required by M.G.L c.41 s.97A.
2. **Special Orders** - Special Orders are temporary written orders issued by the Chief of Police outlining instructions covering particular situations. Special Orders are automatically canceled when their objective is achieved.
3. **Personnel Orders** - Orders pertaining to assignments, change of duty assignments, hours of work, administrative matters related to conditions of employment, and employee rights and benefits.
4. **Unlawful Orders** - No member shall knowingly issue an order in violation of any law or any departmental regulation. Unlawful orders shall not be obeyed. The officer to whom the order was given shall notify the ordering officer of the illegality of his or her order. Responsibility for refusal to obey rests with the officer to whom the order was given. He/She shall be strictly required to justify his or her action.
5. **Unjust or Improper Orders** - Lawful orders which appear to be unjust or improper shall be carried out. After carrying out the orders, the officer to whom the order was given may file a written report to the Chief via the chain of command indicating the circumstances and the reasons for questioning the orders, along with his or her request for clarification of departmental policy.

6. **Conflicting Orders** - Should any order given by a superior officer conflict with any previous departmental order, the member to whom such order is given will call attention to the conflict. If the superior officer does not change his or her order to avoid such conflict his or her order will be obeyed, but the member obeying such order will not be held responsible for disobedience of the previous order. It should later be reported to the Chief in writing for clarification.

F. **REQUIRED CONDUCT**

In addition to the specific duties of each individual rank and assignment as set forth in Section II of this Manual, the following provisions are applicable to all members of the Department.

1. **Reporting for Duty** - Report for duty whenever so ordered by proper police authorities. Report for duty at the regularly appointed time and not absent him/her self from duty without leave. Be present at all roll calls properly uniformed, equipped and ready for inspection.

G. **PROHIBITED CONDUCT**

The following acts by a member of the Department are prohibited or restricted:

...

3. **Neglect of Duty** - Being absent from assigned duty without leave or failing to take suitable and appropriate police action when any crime, public disorder or other incident requires police attention.
4. **Insubordination** - Failure or deliberate refusal to obey a lawful order issued by a superior, ranking or commanding officer.



The circumstances leading to the Notice can be summarized briefly as follows:

The Employees reported to management various incidents in which they assert that racially insensitive remarks were made to them by other officers, including a supervisor. They further assert that management did not respond appropriately, that the workplace is racially insensitive and that they fear for their safety. The Town asserts in the Notice that it has responded appropriately and reasonably, addressed the complaints and continues to address these issues. The Employees have not reported for work since December of 2015. The Town ordered the Employees to return to work by February 8, 2017. The Employees have failed to return to work as so ordered by the Town. This hearing followed, after due notice to the Employees.

### **APPEARANCES**

The Town's case was presented by Joseph A. Padolsky, Esq., and Patricia Correa, Esq.

The Employees were represented by Hillary Schwab, Esq. and Oren Sellstrom, Esq.

The Employees, through counsel, requested, as is their right under the law, that the hearing be held as a public (open) hearing. The hearing was thus held as a public (open) hearing.

The Hearing Officer notes and appreciates the professional manner in which all counsel acted in representing their clients.

## **EXHIBITS AND OTHER DOCUMENTS<sup>1</sup>**

### **JOINT EXHIBITS**

| <b><u>Number</u></b> | <b><u>Description</u></b> |
|----------------------|---------------------------|
|----------------------|---------------------------|

| <b><u>Number</u></b> | <b><u>Description</u></b> |
|----------------------|---------------------------|
| EXHIBIT NO.          | ITEM                      |

None

### **TOWN OR EMPLOYER EXHIBITS**

| <b><u>Number</u></b> | <b><u>Description</u></b> |
|----------------------|---------------------------|
|----------------------|---------------------------|

| <b><u>Number</u></b> | <b><u>Description</u></b> |
|----------------------|---------------------------|
| EXHIBIT NO.          | ITEM                      |

|      |  |
|------|--|
| T-1  | February 17, 2017 Notice of Contemplated Discipline and Hearing – Prentice Pilot                 |
| T-2  | February 17, 2017 Notice of Contemplated Discipline and Hearing – Estifanos Zerai-Misgun         |
| T-3  | Town of Brookline Police Department Excerpted Rules and Regulations                              |
| T-4  | Town of Brookline Policy Against Discrimination, Sexual Harassment and Retaliation               |
| T-5  | Payroll Reports (Detail Check History and Employee Accruals Earned/Used) – Prentice Pilot        |
| T-6  | Payroll Reports (Detail Check History and Employee Accruals Earned/Used – Estifanos Zerai-Misgun |
| T-7  | Larimore Report (Daily Work Schedule) – Prentice Pilot   |
| T-8  | Larimore Report (Daily Work Schedule) – Estifanos Zerai-Misgun                                   |
| T-9  | September 6, 2016 Letter from Sandra DeBow, Human Resources Director, to Prentice A. Pilot       |
| T-10 | March 9, 2016 Letter from Sandra DeBow, Human Resources Director, to Estifanos Zerai-Misgun      |
| T-11 | Brookline Police Department Special Order # 2015-3   |

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<sup>1</sup> Exhibits are deemed incorporated by reference. Exhibits are denoted as “J-#” for joint exhibits, “T-#” for Town (Employer) exhibits and “E-#” for employee exhibits. The exhibits are contained in an Appendix volume to this report.

- (“Uniform Regulations”)
- T-12 December 22, 2014 Email from Estifanos Zerai-Misgun to Daniel O’Leary
  - T-13 January 13, 2015 Memorandum from Sandra DeBow, Human Resources Director, to Police Chief Daniel O’Leary
  - T-14 February 5, 2015 Memorandum from Daniel C. O’Leary, Chief of Police, to Sandra DeBow, Director Human Resources
  - T-15 March 27, 2015 Email from Estifanos Zerai-Misgun to Daniel O’Leary
  - T-16 April 23, 2015 Email from Leslea Noble to Anthony Ansaldi and attachment
  - T-17 August 7, 2015 Email from Estifanos Zerai-Misgun to Police All
  - T-18 December 11, 2015 Memorandum from Deputy Superintendent Andy Lipson to Chief O’Leary and Superintendent Morgan
  - T-19 December 16, 2015 Letter from Daniel C. O’Leary, Chief of Police, to Patrol Officer Prentice Pilot
  - T-20 December 16, 2015 Meeting Minutes of the Commission for Diversity, Inclusion, and Community Relations
  - T-21 December 18, 2015 Email from Daniel O’Leary to Police All
  - T-22 December 18, 2015 Email to Daniel O’Leary *et al.*  
Subject: Estifanos Zerai-Misgun
  - T-23 December 22, 2015 Letter from Daniel C. O’Leary, Chief of Police, to Patrol Officer Estifanos Zerai-Misgun
  - T-24 December 22, 2015 Memorandum from Daniel C. O’Leary, Chief of Police, to Melvin Kleckner, Town Administrator
  - T-25 December 22, 2015 Memorandum from Deputy Superintendent Andy Lipson to Chief O’Leary
  - T-26 December 23, 2015 Letter from Daniel C. O’Leary, Chief of Police, to P.O. Prentice Pilot
  - T-27 December 23, 2015 Letter from Daniel C. O’Leary, Chief of Police, to P.O. Estifanos Zerai-Misgun
  - T-28 December 23, 2015 Email to Andrew Lipson
  - T-29 December 30, 2015 Letter from Lloyd W. Gellineau Jr., Ph.D., MS, Director-Chief Diversity Officer, to Prentice Pilot

- T-30 December 30, 2015 Letter from Lloyd W. Gellineau Jr., Ph.D., MS, Director-Chief Diversity Officer, to Estifanos Zerai-Misgun
- T-31 December 30, 2015 Brookline Townwide Discussions Posting (Letter from Officers Pilot and Zerai-Misgun)
- T-32 January 5, 2016 Board of Selectmen Meeting Minutes
- T-33 January 7, 2016 Memorandum from Brookline Police Union – Executive Board to All Union Members
- T-34 January 8, 2016 Email from Daniel O’Leary to Police All
- T-35 January 10, 2016 Twitter Posting
- T-36 January 12, 2016 Board of Selectmen Meeting Minutes
- T-37 January 13, 2016 Letter from Sandra DeBow, Human Resources Director, to Officer Prentice Pilot
- T-38 January 13, 2016 Letter from Sandra DeBow, Human Resources Director, to Officer Estifanos Zerai-Misgun
- T-39 January 14, 2016 WGBH Interview Transcript
- T-40 January 15, 2016 Letter from Daniel C. O’Leary, Chief of Police, to Officer Prentice Pilot
- T-41 January 15, 2016 Letter from Daniel C. O’Leary, Chief of Police, to Officer Estifanos Zerai-Misgun
- T-42 January 19, 2016 Board of Selectmen Meeting Minutes
- T-43 January 21, 2016 Memorandum from Chief Daniel C. O’Leary to Patrol Officer Prentice Pilot
- T-44 January 21, 2016 Memorandum from Chief Daniel C. O’Leary to Patrol Officer Estifanos Zerai-Misgun
- T-45 January 25, 2016 Email from Prentice Pilot to Daniel O’Leary
- T-46 January 25, 2016 Email from Estifanos Zerai-Misgun to Daniel O’Leary
- T-47 January 25, 2016 Email from Daniel O’Leary to Prentice Pilot and Estifanos Zerai-Misgun
- T-48 January 26, 2016 United States District Court Amended Complaint, Civ. Action No. 1:15-CV-13987-GAO (excerpts pertaining to allegations of Prentice Pilot and Estifanos Zerai-Misgun)
- T-49 January 26, 2016 Board of Selectmen Meeting Minutes
- T-50 February 5, 2016 Letter from Police Chief Daniel C. O’Leary to Mr. Prentice Pilot
- T-51 February 5, 2016 Letter from Police Chief Daniel C. O’Leary to Mr. Estifanos Zerai-Misgun

- T-52 February 8, 2016 Notice of Dismissal of Plaintiff Prentice Pilot and Plaintiff Estifanos Zerai-Misgun, Civ. Action No. 1:15-CV-13987-GAO
- T-53 February 11, 2016 Letter from Hillary Schwab and Oren Sellstrom to Joslin Ham Murphy, Esq., and Patricia Correa, Esq.
- T-54 February 23, 2016 Prentice Pilot Massachusetts Commission Against Discrimination (MCAD) Charge of Discrimination
- T-55 February 23, 2016 Estifanos Zerai-Misgun Massachusetts Commission Against Discrimination (MCAD) Charge of Discrimination
- T-56 February 23, 2016 Lawyers' Committee for Civil Rights and Economic Justice Press Release entitled "African-American Police Officers File Discrimination Complaint Against Brookline"
- T-57 February 26, 2016 Letter from Joslin Murphy, Town Counsel, to Hillary Schwab, Esq. and Oren Sellstrom, Esq.
- T-58 March 3, 2016 Letter from Letter from Joslin Murphy, Town Counsel, to Hillary Schwab, Esq., and Oren Sellstrom, Esq.
- T-59 March 8, 2016 Letter from Hillary Schwab to Joslin Ham Murphy, Town Counsel, and Patty Correa, First Assistant Town Counsel
- T-60 March 8, 2016 Email from Patty Correa to Hillary Schwab and Oren Sellstrom
- T-61 March 10, 2016 Lawyers' Committee for Civil Rights and Economic Justice Press Release entitled "Brookline Denies Paid Leave to African-American Police Officers Charging Discrimination"
- T-62 April 5, 2016 Commission for Diversity, Inclusion, and Community Relations Meeting Minutes
- T-63 April 6, 2016 Email from Estifanos Zerai-Misgun to Daniel O'Leary *et al.* Subject: [Redaction] – P.O. Zerai-Misgun
- T-64 April 15, 2016 Letter from Joslin Murphy, Town Counsel, to Oren M. Sellstrom
- T-65 April 25, 2016 Email from Hillary Schwab to Reginald Nunnally and attached MCAD charges of Prentice Pilot and Estifanos Zerai-Misgun
- T-66 April 25, 2016 Email from Hillary Schwab to Dr. Gerard Cox and attached MCAD charges of Prentice Pilot and Estifanos Zerai-Misgun

- T-67 April 26, 2016 Respondents' MCAD Position Statement Excerpts and Excerpted Exhibits, Nos. 16-BEM-00442 and 16-BEM-00443
- T-68 June 13, 2016 Statement entitled "Brookline Selectmen Release Reports of Investigation of Complaints Within Police Department" and attached reports of Reginald Nunnally and Dr. Gerard Cox
- T-69 June 13, 2016 Letter from Hillary Schwab to MCAD and Withdrawal of MCAD Charges
- T-70 June 20, 2016 Superior Court Complaint
- T-71 June 20, 2016 Lawyers' Committee for Civil Rights and Economic Justice entitled "African-American Police Officers File Lawsuit Against Brookline Allege Hostile Work Environment, Racial Slurs"
- T-72 July 12, 2016 Excerpted Email Chain between Hillary Schwab and Douglas Louison
- T-73 July 27, 2016 Email from Daniel O'Leary to Police All and attached July 16, 2016 Memorandum from Gerard Cox, PhD to Chief Daniel C. O'Leary
- T-74 July 27, 2016 Letter from Mark P. Morgan, Superintendent of Police, to Mr. Prentice Pilot
- T-75 July 27, 2016 Letter from Mark P. Morgan, Superintendent of Police, to Mr. Estifanos T. Zerai-Misgun
- T-76 August 3, 2016 Email from Hillary Schwab to Patty Correa *et al.* and August 4, 2016 Email Response from Joslin Murphy to Hillary Schwab *et al.*
- T-77 August 12, 2016 Email from Oren Sellstrom to Patty Correa and Joslin Murphy
- T-78 August 17, 2016 Email from Joslin Murphy to Oren Sellstrom *et al.*
- T-79 November 1, 2016 Email from Kim McCormick-Stanton to Police All Sworn and attached Shift Bidding Form
- T-80 November 21, 2016 Excerpted Email Chain between Oren Sellstrom and Douglas Louison and attached November 21, 2016 Letter from Oren M. Sellstrom, Esq. to Joslin Ham Murphy, Town Counsel, and Patricia Correa, First Assistant Town Counsel
- T-81 November 21, 2016 Brookline Tab website article entitled "Lawyers for two black Brookline police officers claiming racial harassment suggest Justice Department intervene" and posted November 21, 2016 Letter from Oren M. Sellstrom, Esq. to Joslin

- Ham Murphy, Town Counsel and Patricia Correa,  
First Assistant Town Counsel
- T-82 November 21, 2016 Email from Patty Correa to Oren Sellstrom and Hillary Schwab and attached Shift Bidding Form
- T-83 November 21, 2016 Letter from Hillary Schwab to Joslin Ham Murphy, Town Counsel, Patty Correa, First Assistant Town Counsel, and Douglas I. Louison, Esq.
- T-84 November 22, 2016 Letter from Daniel C. O’Leary, Chief of Police, to Officer Prentice Pilot and attached reports of Reginald Nunnally, report of Gerard Cox, PhD, materials related to the June 2016 antidiscrimination training, materials related to the March 2016 implicit bias training, the June 2016 antidiscrimination policy, and the April 26, 2016 MCAD Position Statement
- T-85 November 22, 2016 Letter from Daniel C. O’Leary, Chief of Police, to Officer Estifanos Zerai-Misgun and attached reports of Reginald Nunnally, report of Gerard Cox, PhD, materials related to the June 2016 antidiscrimination training, materials related to the March 2016 implicit bias training, the June 2016 antidiscrimination policy, and the April 26, 2016 MCAD Position Statement
- T-86 November 23, 2016 Letter from Joslin Murphy to Hillary Schwab and Oren Sellstrom
- T-87 December 1, 2016 Letter from Joslin Murphy to Oren Sellstrom, Esq. and Hillary Schwab, Esq. and attached November 30, 2016 Memorandum from Daniel C. O’Leary to Melvin Kleckner, Town Administrator and December 1, 2016 Memorandum from Daniel C. O’Leary, Chief of Police to Joslin Murphy, Town Counsel
- T-88 December 5, 2016 Letter from Hillary Schwab to Joslin Ham Murphy, Town Counsel, and Douglas I. Louison, Esq.
- T-89 December 6, 2016 Letter from Joslin Murphy to Hillary Schwab, Esq., Steve Churchill, Esq., and Orel Sellstrom, Esq.
- T-90 December 9, 2016 Email from Joslin Murphy to Hillary Schwab and Oren Sellstrom and attached Brookline Police Department policy entitled “Activation & Reintegration of Military Employees”, August 7, 2015

- email from Mark Morgan to Police Command Staff *et al.*, and Article VII (“Hours of Work”) from the collective bargaining agreement
- T-91 February 2, 2017 Letter from Daniel C. O’Leary to Mr. Prentice Pilot and attached November 30, 2016 Memorandum from Daniel C. O’Leary to Melvin Kleckner, Town Administrator and December 1, 2016 Memorandum from Daniel C. O’Leary, Chief of Police to Joslin Murphy, Town Counsel
- T-92 February 2, 2017 Letter from Daniel C. O’Leary to Mr. Estifanos Zerai-Misgun and attached November 30, 2016 Memorandum from Daniel C. O’Leary to Melvin Kleckner, Town Administrator and December 1, 2016 Memorandum from Daniel C. O’Leary, Chief of Police to Joslin Murphy, Town Counsel
- T-93 February 7, 2017 Letter from Oren M. Sellstrom to Joslin Ham Murphy, Town Counsel, and Patricia Correa, First Assistant Town Counsel
- T-94 February 7, 2017 Letter from Joslin Murphy to Oren Sellstrom, Esq. and attached August 4, 2016 email from Joslin Murphy to Hillary Schwab *et al.*
- T-95 February 8, 2017 Email from Mark Morgan to Melvin Kleckner *et al.*

**EMPLOYEE EXHIBITS**

| <u>Number</u> | <u>Description</u>  |
|---------------|---|
| EXHIBIT NO.   | ITEM  |
| E-1           | Civil Action Complaint No. 16-1932B in the matter of Pilot and Zerai-Misgun v. Town of Brookline, etal Suffolk Superior Court   |
| E-2           | Letter dated November 21, 2016 from Oren M. Sellstrom, Esq., Lawyers’ Committee for Civil Rights and Economic Justice and Hillary Schwab, Esq. to Joslin Ham Murphy, Esq., Town Counsel and Patricia Correa, Esq., First Assistant Town Counsel |

In addition to the above listed exhibits, the Town’s attorneys and the Employees’ attorneys each submitted a written statement on behalf of their



clients. These statements, which were substantially read at the hearing, are included with the exhibits introduced by each party.

### **WITNESSES**

Neither party offered any witness testimony. The Town submitted the above documents as support for its case. The Employees submitted the above documents as support for their case. As noted above, the attorneys for the Town and for the Employees also read a statement addressing the issues. Neither Employee chose to testify.

### **SUMMARY OF TESTIMONY**

The proceedings were stenographically recorded and transcribed. The transcript has been provided to the Appointing Authority and a copy of the transcript is submitted with this report. The transcript should be consulted for the full statements made at the hearing. It should be noted that generally statements of counsel are not evidence, but some reliance can be placed on some statements made. However, such statements are not a substitution for witness testimony or introduction of exhibits unless made in the nature of stipulations.

More importantly, the Appointing Authority should review carefully the exhibits submitted as to the offers of proof provided by each party. As no witnesses testified for either party, there is no witness testimony to summarize.

Basically, as a summary of the Town's case, it can be stated that the Employees presented to the Town complaints that racially charged statements were made to them. The Town believes it took appropriate

steps in response to these complaints, including but not limited to having the complaints investigated both in-house and by an independent investigator, hiring a consultant to review the racial climate of the workplace, proceeding to follow up on the recommendations of the investigator and consultant, conducting training programs for all the Department's employees to address these issues, offering the Employees modified work in-house, etc. The Town believes that its actions should have removed any concerns of an unsafe work environment and that the Employees should have returned to work on February 8, 2017 as ordered by the Chief. In failing to do so, they violated the Department's Rules and Regulations as noted in the notice of contemplated disciplinary action. The Town accordingly argues that the Employees have engaged in conduct such that the Town has the right to separate or terminate them from employment.

Basically, as a summary of the Employees' cases, the Employees through counsel, argued that they presented to the Town evidence of racially charged statements being made to them, that an unsafe and racially hostile work environment exists. They contend that the Town's responses were insufficient and that they believed more and stronger action should be taken by the Town. They further contend that the Town did not take appropriate actions to respond to their complaints and that the workplace remains racially hostile and unsafe for them. As such, they argue that they

should not be disciplined for failing to return to work on February 8, 2017 as ordered by the Chief, that they had a basis due to their fears for their safety arising from the alleged racially hostile work environment to not return to work.<sup>2</sup>

As an aid to the Appointing Authority, the following table with citations to the exhibits, fairly summarizes the events and the information presented at the hearing.<sup>3</sup>

|  | Date     | Event   | Cite   | Notes |
|--|----------|---|--|-------|
|  | 3.6.95   | PP hired [left 6.8.01 to pursue other work; rehired 7.26.04]  | T-67, p. 5   |       |
|  | 5.30.12  | EZM hired   | T-67, p. 6   |       |
|  | 2014     | EZM claims that several comments of a racial nature made to him   | T-55, p. 2<br>T-67, p. 2<br>T-70, p. 5                     |       |
|  | 12.22.14 | EZM emails Chief asking for meeting re incidents  | T-12<br>T-67, p. 7   |       |
|  | 12.23.14 | EZM in a meeting with Chief reported incidents; PP also attended meeting, along with third officer; PP also reported at this meeting an | T-54, p. 2,<br>T-55, p. 2<br><br>T-67, p. 2,<br>p. 3, p. 7 |       |

<sup>2</sup> This report concerns a civil service proceeding dealing with whether the Employees should be terminated for the reasons set forth in the notice. It in no way condones any racial statements or retaliation, if any, and makes no finding as to whether the same occurred.

<sup>3</sup> Exhibits introduced are part of the evidence of the case as a whole, and not limited to the party submitting same. No special attention should be given to the fact that one party may have submitted more exhibits than the other. The documents submitted are considered evidence submitted, applicable to both parties, regardless of who submitted the documents. PP refers to Pilot; EZM refers to Zerai-Misgun.

|  |         |   |            |  |
|--|---------|---|------------|--|
|  |         | incident against him<br>(dime store Indian<br>comment)<br><br>Officers discuss with<br>Chief developing training<br>to address racial issues<br>and using resources from<br>Harvard University;<br>Officers will work on this               | T-70, p. 5 |  |
|  | 1.X.15  | EZM identifies to Chief an<br>officer who made<br>statement but asks officer<br>not to be spoken to<br><br>EZM around this time<br>also tells Chief that Chief<br>can use his name in<br>discussing matter with<br>command staff            | T-67, p. 8 |  |
|  | 1.X.15  | Chief meets w. EZM's<br>supervisors and others;<br>discusses EZM's<br>complaints  | T-67, p. 9 |  |
|  | 1.7.15  | Chief has meeting w.<br>command staff;<br>discusses EZM's<br>complaints; instructs staff<br>to address issues at roll<br>calls and make it clear<br>that such conduct not<br>acceptable<br><br>Chief also addressed<br>issues at roll calls | T-67, p. 9 |  |
|  | 1.13.15 | Memo from HR to Chief<br>confirming conversation<br>between them re EZM<br>meeting with Chief   | T-13       |  |
|  |         |   |            |  |

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|  | 1.2015      | EZM calls Chief to report that a Sgt. had id'd him as complainant   | T- 55, p. 3<br>T-67, p. 9<br>T-70, p. 6      |  |
|  |             |   |  |  |
|  | 2.28.15     | EZM hospitalized  | T-67, p. 9                                   |  |
|  |             |   |  |  |
|  | 3.2.15      | EZM begins extended sick leave  | T-67, p. 9                                   |  |
|  |             |   |  |  |
|  | 4.23.15     | 93 members of the Department donate sick time to a bank for use by EZM, as he ran out of accrued benefits   | T- 16  |  |
|  |             |   |  |  |
|  | Spring 2015 | Chief speaks w. PP re prior discussion on his helping design bias training discussed in 12.14; PP indicates he had not done so and suggests Chief proceed w/o him as he did not have time | T-67, p. 20-21                               |  |
|  |             |   |  |  |
|  | 8.11.15     | EZM returns from extended sick leave and is on modified duty and then full duty   | T-67, p. 10                                  |  |
|  |             |   |  |  |
|  | 12.4.15     | PP claims that supervisor used racial slur in conversation with him on this date (jumping jack reference)   | T-54, p. 3<br>T-67, p. 2 p. 23<br>T-70, p. 8 |  |
|  |             |   |  |  |
|  | 12.4.15     | Last day worked by PP   | T- 7, T-67                                   |  |

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| 12.7.15  | <p>PP reports incident to Chief</p> <p>Chief places PP on special assignment paid leave)</p> <p>Chief assigns Deputy Superintendent (DS) to investigate</p> <p>Other officer involved placed on paid leave; DS interviews officer who denies incident</p>   | <p>T-54, p. 4</p> <p>T- 67, p. 2, 13, 14</p> <p>T-70, p. 8</p> |  |  |
|          |   |  |  |  |
| 12.10.15 | Last day worked by EZM  | T- 8, T-67   |  |  |
|          |   |  |  |  |
| 12.11.15 | DS files his report   | T-18   |  |  |
|          |   |  |  |  |
| 12.16.15 | <p>Chief writes to PP that BPD investigation of incident had been inconclusive and matter would now be investigated under Town's HR policy</p> <p>Chief informed PP that he was no longer on special assignment (paid leave) and expected to return to work on December 21, 2015; advised that if he encountered further incidents to report them immediately so that appropriate action can be</p> | <p>T-19</p> <p>T-54, p. 4</p> <p>T-67, p. 14-15</p>            |  |  |

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|  |             | taken<br><br>PP and EZM attend Diversity Commission meeting, stated they felt unsafe at work   | T- 54, p. 4<br>T-55, p. 4<br>T- 70, p. 9                          |  |
|  |             |  |   |  |
|  | 12.18.15    | Chief emails entire Department re incident and reminding Department of anti-discrimination policies  | T-67, p. 15   |  |
|  |             |  |   |  |
|  | 12.21-22.15 | Chief confers with diversity consultant Dr. Cox and hires him to do racial climate review  | T-67, p. 16   |  |
|  |             |  |   |  |
|  | 12.22.15    | Chief has letter delivered to EZM re his statements to Diversity Commission re supervisor being involved in incidents and that DS would contact him to interview him as it was not previously reported that a supervisor was involved<br><br>DS left message for EZM to contact him, but EZM did not | T- 23<br>T-67, p. 16  |  |
|  |             |  |   |  |
|  | 12.22.15    | Employees and supporters appear at Board of Selectmen meeting seeking to discuss matter with Board<br><br>Board did not meet with them at that time but a further meeting was scheduled for January 5, 2016  | T- 54, p. 6<br>T- 55, p. 5<br><br>T-67, p. 16<br><br>T- 70, p. 10 |  |

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|  | 12.23.15 | Chief has letter delivered to Employees that investigation under Town's workplace safety policy would occur; letter instructed that they should contact Chief if their perceived imminent threat   | T- 26,<br>T-27<br>T-67, p.<br>16-17                 |  |
|  | 12.23.15 | Chief has letter delivered to EZM that he was out of accrued time and to contact Chief re his status<br><br>EZM does not contact Chief but contacts Department to have his leave changed to sick leave   | T-67, p.<br>17                                      |  |
|  | 1.5.16   | Board meeting where members of public present and addressed Board on matter<br><br>Diversity Commission presented statement referencing "institutional racism" *<br><br>(* Diversity Commission later stated that its statement was no based on "any substantive inquiry" and was the collective opinion of its members) | T- 32<br><br>T- 67, p.<br>17<br><br>T- 70, p.<br>12 |  |
|  | 1.7.16   | Police Union issues statement supporting safe workplace and  | T-33  |  |



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|  |         | opposing racism  |   |  |
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|  | 1.8.16  | Town hires Reginald Nunnally to conduct investigation into Employees' complaints, Town's response, etc. and to make report with recommendations<br><br>Same day Chief emails Department with link to 1.5.16 meeting and the Town's anti-discrimination policy; reminds employees of obligation of no discrimination; asked employees to listen to concerns of co-workers, reflect on their own conduct and act to foster trust and respect | T-67, p. 17<br><br>T-70, p. 13<br><br>p. 18<br><br>T-34 |  |
|  |         |  |   |  |
|  | 1.12.16 | At meeting of Board Employees and supporters press for paid leave; Board offers mediation  | T-36<br><br>T-67, p. 18                                 |  |
|  |         |  |   |  |
|  | 1.13.16 | HR advises Employees of Nunnally's hiring and reiterates Town policy   | T-37, T-38<br>T-67, p. 18                               |  |
|  |         |  |   |  |
|  | 1.14.16 | Employees interviewed by WGBH; Employees indicate they will not return to work pending the investigation; Employees question whether the investigation is independent, feel it is compromised; feel Town   | T-39, p. 9, p. 10<br>p. 13                              |  |

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|  |         | needs to acknowledge why they do not feel safe for them to return to work  |  |  |
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|  | 1.15.16 | Chief writes to Employees encouraging them to participate in investigation and offering mediation  | T-40,<br>T- 41<br>T-67, p. 18                                    |  |
|  |         |  |  |  |
|  | 1.21.16 | Chief writes again to Employees encouraging mediation and offering names of four mediators   | T- 43<br>T-44  |  |
|  |         |  |  |  |
|  | 1.25.16 | <p>Employees email Chief that they will not do mediation “[u]ntil the Chief and Selectmen act to end these deeper systemic issues”; that racism cannot be mediated and referring to an incident from 2010 involving a firefighter;</p> <p>Chief responds re rejection of mediation, which was intended to be conducted by neutral mediator and address their concerns, absence from work and return to work</p> <p>Chief notes that unnamed persons cannot be disciplined and that due process must be provided to all employees</p> | <p>T-45<br/>T-46</p> <p>T-67, p. 18</p> <p>p. 19</p> <p>T-47</p> |  |
|  |         |  |  |  |
|  | 1.26.16 | Employees join pending lawsuit of firefighter  | T-67, p. 19  |  |

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|  |         | Board at meeting expresses hope of discussing complaints with Employees, addressing their concerns and developing path forward   | T-49                               |  |
|  |         |  |                                    |  |
|  | 2.5.16  | Chief writes to Employees to engage in discussion either directly or through mediator; expresses concern re being out on sick leave without required letter from doctor and requests letter by 2.12.16; enclosed information re possible mediators and asks for reply by 2.8.16; Employees do not respond as requested | T- 50<br>T- 51<br><br>T- 67, p. 20 |  |
|  |         |  |                                    |  |
|  | 2.8.16  | Employees withdraw from firefighter's law suit   | T- 52<br>T- 67, p. 20              |  |
|  |         |  |                                    |  |
|  | 2.24.16 | Employees file complaints with MCAD  | T- 54<br>T- 55<br><br>T- 67, p. 20 |  |
|  |         |  |                                    |  |
|  | 2.26.16 | Town offers Employees alternative work assignments within station; advises them re Town's actions in response to complaints (investigations, racial climate review, review of policies, bias training and other training) and sought   | T- 57<br><br>T- 67, p. 20          |  |

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|  |                      | Employees' input  |                              |  |
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|  | 3.3.16               | Town Counsel writes to Employees' attorneys explaining request for paid leave cannot be accommodated under provision they cited; letter also reiterates prior offers for mediation and assignment within station, etc. References lack of responses | T-58                         |  |
|  |                      |   |                              |  |
|  | 3.14-18,<br>28-31.16 | Department holds anti-bias training at Pine Manor College for all employees   | T- 67, p.<br>21              |  |
|  |                      |   |                              |  |
|  | 4.5.16               | Diversity Commission issues statement clarifying earlier statement, that it was members' opinion but not based on any investigation or findings by Commission   | T- 62                        |  |
|  |                      |   |                              |  |
|  | 4.6.16               | EZM seeks IOD status<br><br>Provides additional complaints and more info on prior complaints, including names and clarifications  | T- 67, p.<br>20<br><br>T- 63 |  |
|  |                      |   |                              |  |
|  | 4.15.16              | Town Counsel writes to Employees' attorney addressing issues raised; also reiterates desire to work with them for return to work, mediation, work in the station, etc.; and lack of responses   | T- 64                        |  |

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|--|---------------------|--|-----------------|--|
|  |                     | explaining why in-house work would not be safe, or anyone who threatened them, etc.  |                 |  |
|  |                     |  |                 |  |
|  | 4,25,16             | Employees' counsel letter to Nunnally and Cox providing copies of MCAD filings "to serve as their statements for purposes of your [report; assessment]"  | T- 665<br>T- 66 |  |
|  |                     |  |                 |  |
|  | 6.6-13.16           | Town provides anti-discrimination and inappropriate bantering training to all Department employees; Dr. Cox and HR Director presenters   | T- 73, p. 3     |  |
|  |                     |  |                 |  |
|  | 6.13.16             | Board releases Nunnally and Cox reports; no finding of hostile racial climate or culture of racism but did find probable cause in one claim of EZM and probably cause of sexual harassment in one claim of PP and certain problems and issues that should be addressed; Chief will take steps to foster a more cohesive work environment | T- 68           |  |
|  |                     |  |                 |  |
|  | 6.20.16             | Employees file suit in Suffolk Superior Court against Town; seeks injunctive relief, damages, etc.   | T- 70<br>E- 2   |  |
|  |                     |  |                 |  |
|  | 7.12.16-<br>9.14.16 | Attorneys communicate regarding mediation  | T-72            |  |

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|  | 7.27.16   | Superintendent of Police Morgan writes to Employees requesting to meet with them on August 9, 2016 to discuss return to work on either modified or full-duty status   | T-74<br>T-75   |  |
|  |           |   |  |  |
|  | 8.3-12.16 | Emails between counsel re info requests; also stating issue of returning to work addressed in litigation and mediation; and that communications to Employees should go through counsel; Town explains need to sometimes communicate directly with Employees   | T- 76-78   |  |
|  |           |   |  |  |
|  | 11.21.16  | <p>Employees' attorneys write to Town attorneys setting forth their views as to nature of problem and remedial steps; recaps past complaints; suggests US Department of Justice involvement and discipline or termination of those responsible for hostile work environment, specially including Chief</p> <p>Emails between counsel as to understanding status in view of above letter and mediation discussions</p> <p>Letter from Employees' attorneys to Town</p> | <p>E- 2<br/>T-80</p> <p>T- 80, p. 1-3</p> <p>T- 83</p> |  |

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|  |          | attorneys seeking clarification on modified work offer  |                |  |
|  |          |   |                |  |
|  | 11.22.16 | Chief writes to Employees recapping steps Department has taken, reminding them of unauthorized leave and not having reported to work since 12.2015, stating that their jobs cannot remain open indefinitely and seeking a response by 12.2.16; also enclosed Nunnally and Cox reports and other material  | T- 84<br>T- 85 |  |
|  |          |   |                |  |
|  | 11.23.16 | Town Counsel writes to Employees' attorneys re status of offer of modified duty per their request for status; offer of modified duty offered 9 months ago; refers to steps Town has taken in response to issues; operational needs of Department have changed; modified in-house duty would be for a short-term-re-entry period following which they would be assigned to Patrol Division | T-86           |  |
|  |          |   |                |  |
|  | 12.1.16  | Town Counsel writes to Employees' attorneys responding further to their letter of 11.21.16; outlines actions taken by Town; invites engagement in collaborative effort to   | T-87           |  |

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|  |           | bring Employees back to work; cautions that Town cannot hold their positions available much longer and requests prompt response   |                |  |
|  |           |   |                |  |
|  | 12.5.16   | Employees' attorneys write expressing disappointment with Town's letter of 11.23.16 re change in modified duty offer; opines that Town continues to not recognize and address issues; Employees will not return shift bid forms | T-89           |  |
|  |           |   |                |  |
|  | 12.6.16   | Town responds to Employees' attorneys' letter of 12.5.16; explains return to work transition process leading to regular assignment  | T- 89          |  |
|  |           |   |                |  |
|  | 12.6-9.16 | Emails between counsel seeking information on return to work transition process and providing of that information   | T- 90          |  |
|  |           |   |                |  |
|  | 2.2.17    | Chief writes to Employees referring to prior communications and efforts to discuss with them their return to work; orders them to report for duty on February 8, 2017 at 8:00 a.m.  | T- 91<br>T- 92 |  |
|  |           |   |                |  |
|  | 2.7.17    | Letter from Employees' attorney responding to Chief's letters of 2.2.17; objects to letters going to  | T- 93          |  |



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|  |         | Employees directly;<br>reiterates prior position of<br>Employees  |              |  |
|  | 2.7.17  | Town Counsel responds<br>to Employees' attorney<br>letter of 2.2.17; explains<br>basis for direct delivery to<br>Employees; responds to<br>certain assertions; states<br>that Employees have<br>been absent without<br>authorization and are<br>expected to return to<br>work on 2.8.17 as<br>directed by the Chief | T- 94        |  |
|  | 2.8.17  | Email from<br>Superintendent Morgan<br>to Town officials that<br>Employees did not report<br>for duty as directed by<br>Chief   | T- 95        |  |
|  | 2.17.17 | Notices of disciplinary<br>hearing to Employees,<br>setting forth charges and<br>hearing date of March 3,<br>2017   | T- 1<br>T- 2 |  |
|  | 3.3.17  | Disciplinary hearing held<br>at Town Hall   |              |  |

## FINDINGS

Based upon a careful and thorough review of the documents and evidence received at the hearing, and the reasonable inferences to be drawn therefrom,<sup>4</sup> I make the following recommended findings.

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<sup>4</sup> As no witnesses testified there is no credibility determinations to be made of witnesses.

## GENERAL FINDINGS

1. Pilot is an African-American male.
2. He has been a member of the Brookline Police Department since 1995, except for approximately three years during which he left to pursue other employment, being re-hired in 2004, serving in the rank of Police Officer and assigned as a Patrol Officer.
3. Zerai-Misgun is an African-American male.
4. He has been a member of the Brookline Police Department since 2012, serving in the rank of Police Officer and assigned as a Patrol Officer.
5. On December 23, 2014 the Employees met with the Police Chief and reported incidents involving what they believed to be racially charged statements made to them.
6. As relates to Pilot, this included a statement made by a commanding officer that he looked like a "dime store Indian" while performing a traffic assignment.
7. As relates to Zerai-Misgun, this included:
  - a. A police lieutenant, upon seeing him in an unmarked police cruiser, stating in front of several other officers, "What the fuck? Who would put a black man behind one of those?"
  - b. An officer stating to him, "I can't believe a black guy without a college degree scored higher than me on the exam."
  - c. Other officers referring to him as an "11FI" while he was in plain clothes, which stands for "Field Interview" or "Field Investigation" and means a suspicious individual who should be stopped and questioned.
  - d. Another officer stating to him, "I almost ran you over – I can't see you when it's dark unless your eyes are open."
8. At this meeting, among other things, the Chief discussed with the officers the four of them working together to develop anti-bias

training and involving resources from Harvard University. The officers were to work on gathering information.

9. This also led to a series of responses, including generally the Chief meeting with the command staff, all employees being reminded of the Town's anti-discrimination and work-place policies.
10. Zerai-Misgun went out on extended medical leave starting February 28, 2015 and returning August 11, 2015.
11. During Zerai-Misgun's medical leave, his co-workers contributed 93 days of sick leave to a bank for his use as he ran out of accrued benefits during his medical leave.
12. Pilot reports to the Chief on December 7, 2015 that on December 4, 2015 a supervisor spoke to him in a racially inappropriate manner, saying "why don't you pull over to the curb, get up on the sidewalk and give me some n\*\*\*\*\* jumping jacks and I'll put in a good word for you."
13. After December 4, 2015 and continuing to the present, Pilot has not returned to work.
14. The Chief assigned the Deputy Superintendent to conduct a Departmental Investigation.
15. Pilot was placed on special assignment (paid leave).
16. The Department's investigation resulted in the complaint being found inconclusive as the Supervisor denied using the "n" word, saying that he said "naked" or "nude" jumping jacks and there was no evidence to corroborate the complaint or the response from the Supervisor.
17. The matter was referred to the Town's Human Resources Department for further action under the Town's policies.
18. Pilot was informed he is no longer on special assignment and is to return to his regular assignment by December 21, 2015. Pilot does not return to duty.<sup>5</sup>

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<sup>5</sup> This itself could have resulted in charges against Pilot for disobeying an order of the Chief.

19. The Chief reminds the Department that discrimination is prohibited.
20. After December 10, 2015 and continuing to the present, Zerai-Misgun has not reported to work.
21. Around December 21, 2015 the Chief consults with Dr. Gerard Cox, a diversity consultant, and hires him to do racial climate review of the Department.
22. On December 23, 2015 the Chief advised the Employees that an investigation under the Town's workplace safety policy would be undertaken and that they were to contact him if they perceived an imminent threat.
23. The Chief also advises Zerai-Misgun on December 23, 2015 that he is out of accrued time and to contact the Chief to discuss his status.
24. Zerai-Misgun does not contact the Chief, but requests the Department to change his leave to sick leave.
25. On or about January 8, 2016 the Town hires Reginald Nunnally to conduct an investigation into the Employee's complaints. Nunnally is recommended as an independent investigator by someone at the NAACP.
26. On January 12, 2016 the Employees and various supporters appear at the Board of Selectmen's meeting and urge the Town to place the Employees on paid leave. The Town offers mediation instead.
27. On January 14, 2016 the Employees explain in an interview by WGBH that they will not return to work pending the investigation and that they do not feel safe at work and that Town needs to acknowledge why they do not feel safe.
28. On January 15, 2016 the Chief writes to the Employees encouraging them to participate in the investigation and offering mediation to facilitate their return to work.
29. One January 21, 2016 the Chief writes again to the Employees encouraging mediation and offering the names of four mediators.

30. On January 25, 2016 the Employees email the Chief that they will not participate in mediation “[u]ntil the Chief and selectmen act to end these deeper systemic issues” and that racism cannot be mediated.
31. On the same day, the Chief responds to the Employees that the mediation was to be conducted by neutral mediator and address their concerns. The Chief also reminds them that unknown persons cannot be disciplined and that due process must be provided to all employees (referring to those accused of acting in a racially hostile manner).
32. On February 5, 2016 the Chief writes to the Employees seeking to engage in discussions- either directly or through a mediator. The Chief also expresses concern that they are not reporting to work purportedly being on sick leave, but they have not submitted the required medical letters to be out. The Chief also provides names of possible mediators and asks them to contact him by February 8, 2016.
33. The Employees do not contact the Chief as he requested.
34. Around February 26, 2016 the Town offered the Employees alternative work assignments within the Police Station and advised them of steps being taken by Town to address their concerns and seeking their input.
35. On March 3, 2016 the Town Counsel writes to the Employees’ attorneys reiterating prior offers for mediation and assignment within the Station
36. On April 15, 2016 the Town Counsel writes to the Employees’ attorneys reiterating the desire to work with them through mediation and providing work for them within the Police Station.
37. During the period of June 6, 2016 through June 13, 2016 the Town provided anti-discrimination and inappropriate bantering training to all Department employees, led by Dr. Cox and the Town’s Human Resources Director.
38. On June 13, 2016 the Board releases the Nunnally report and the Cox report.

39. Dr. Cox did not find a hostile racial climate or culture but did recommend actions to be taken by the Town and employees to improve the work-place environment.
40. Nunnally found probable cause in one of Zerai-Misgun's complaints, and probable cause in one of Pilot's complaints but as a violation of the sexual harassment policy and not the discrimination policy. Nunnally also made suggestions to the work-place environment.
41. On June 20, 2016 the Employees file suit in the Suffolk Superior Court. They had previously joined in a pending law suit by a firefighter against the Town but eventually withdrew from that suit.
42. Between July 12, 2016 and September 9, 2016 the attorneys for the parties communicated regarding mediation and participated in mediation.
43. On July 27, 2016 the Superintendent of Police wrote to the Employees requesting a meeting on August 9, 2016 to discuss their return to work on either a modified or full-duty basis.
44. Between August 3, 2016 and August 12, 2016 emails are exchanged between counsel, including where the Employees' attorneys state that the issue of returning to work is to be addressed in the litigation and mediation.
45. On November 21, 2016 the Employees' attorneys write to the Town setting forth their views of the nature of the problems and their position that as remedial steps the United States Department of Justice must be brought in and that those responsible for the wrongful acts and hostile work environment must be disciplined or terminated, including specifically the Chief.
46. During this time, emails are exchanged between counsel for the parties regarding the status and mediation discussions.
47. Also on November 21, 2016 a letter is sent from the Employee's attorney to the Town seeking clarification on the Town's previously made offer in February of 2016 of modified duty within the Station.
48. On November 22, 2016 the Chief wrote to the Employees recapping the Town's responses to their complaints and concerns.

The Chief reminds them they are on an unauthorized absence from work. The Chief cautions them that their jobs cannot remain open indefinitely and that he needs a response from them by December 2, 2016.

49. On November 23, 2016 the Town Counsel replied to the Employees' attorney's letter regarding the modified duty offer. The Town Counsel explains that over the nine months since the offer was made, the Departmental needs have changed. The modified in-house duty would be for a short-term-re-entry period and followed by their being returned to their regular assignments.
50. During this time there is a further exchange of communications between counsel for the Employees and the Town on various aspects of the situation. The Town reiterated the steps it has and is taking to address the concerns. The Employees' attorneys reiterate that they do not feel the Town recognizes the problem or is properly addressing it.
51. On February 2, 2016 the Chief wrote to the Employees and ordered them to report for duty on February 8, 2017, 8:00 a.m.
52. The Employees failed to report for duty on February 8, 2017 as directed by the Chief.
53. On February 17, 2017 notices of a disciplinary hearing scheduled for March 3, 2017 are sent to the Employees by the Town, setting forth various charges.
54. On March 3, 2017 the disciplinary hearing is held. At the request of the parties, the hearings are combined into one hearing addressing the charges against both Employees.

### **SUBSIDIARY FINDINGS**

The Subsidiary Findings shall be presented following the outline of the Issues and charges set forth above. It is noted that these Issues and charges as framed by the Hearing Officer are derived from a fair review of the Notice and evidence presented at the hearing and are presented in this

fashion for ease of review. The totality of the charges and issues is what must ultimately be considered by the Appointing Authority.

The Subsidiary Findings relate to:

1. Whether Pilot engaged in the conduct alleged in the notice.
2. If so, did that conduct amount to a violation of the Department's Rules and Regulations cited in the Notice.
3. If so, does the Town have just cause to discipline Pilot, up to and including separation from employment, for the reasons set forth in the February 17, 2017 notice.
4. Whether Zerai-Misgun engaged in the conduct alleged in the notice.
5. If so, did that conduct amount to a violation of the Department's Rules and Regulations cited in the Notice.
6. If so, does the Town have just cause to discipline Zerai-Misgun, up to and including separation from employment, for the reasons set forth in the February 17, 2017 notice.

The Department Rules and Regulations the Employees are charged with violating are:

**E. ORDERS**

An order is a command or instruction, written or oral, given by a superior officer. All lawful orders, written or oral, shall be carried out fully and in the manner prescribed. Members shall obey any lawful



order of a superior including any order relayed from a superior by another member.

1. **General Orders** - General Orders are permanent written orders issued by the Chief of Police outlining policy matters which affect the entire Department. A General Order is the most authoritative written order the Chief issues, and may be used to amend, supersede or cancel any previous order. General Orders remain in full effect until amended, superseded or canceled by the Chief. Arrangements shall be made to include General Orders in the Police Manual. The Implementation of General Orders is subject to the approval of the Board of Selectman, as required by M.G.L c.41 s.97A.
2. **Special Orders** - Special Orders are temporary written orders issued by the Chief of Police outlining instructions covering particular situations. Special Orders are automatically canceled when their objective is achieved.
3. **Personnel Orders** - Orders pertaining to assignments, change of duty assignments, hours of work, administrative matters related to conditions of employment, and employee rights and benefits.
4. **Unlawful Orders** - No member shall knowingly issue an order in violation of any law or any departmental regulation. Unlawful orders shall not be obeyed. The officer to whom the order was given shall notify the ordering officer of the illegality of his or her order. Responsibility for refusal to obey rests with the officer to whom the order was given. He/She shall be strictly required to justify his or her action.
5. **Unjust or Improper Orders** - Lawful orders which appear to be unjust or improper shall be carried out. After carrying out the orders, the officer to whom the order was given may file a written report to the Chief via the chain of command indicating the circumstances and the reasons for questioning the

orders, along with his or her request for clarification of departmental policy.

6. **Conflicting Orders** - Should any order given by a superior officer conflict with any previous departmental order, the member to whom such order is given will call attention to the conflict. If the superior officer does not change his or her order to avoid such conflict his or her order will be obeyed, but the member obeying such order will not be held responsible for disobedience of the previous order. It should later be reported to the Chief in writing for clarification.

#### **F. REQUIRED CONDUCT**

In addition to the specific duties of each individual rank and assignment as set forth in Section II of this Manual, the following provisions are applicable to all members of the Department.

- (1) **Reporting for Duty** - Report for duty whenever so ordered by proper police authorities. Report for duty at the regularly appointed time and not absent him/her self from duty without leave. Be present at all roll calls properly uniformed, equipped and ready for inspection.

#### **G. PROHIBITED CONDUCT**

The following acts by a member of the Department are prohibited or restricted:

...

- (3) **Neglect of Duty** - Being absent from assigned duty without leave or failing to take suitable and appropriate police action when any crime, public disorder or other incident requires police attention.

(4) **Insubordination** - Failure or deliberate refusal to obey a lawful order issued by a superior, ranking or commanding officer.

I. As relates to Pilot:

A. Whether Pilot engaged in the conduct alleged in the notice.

B. If so, did that conduct amount to a violation of the Department's Rules and Regulations cited in the Notice.

C. If so, does the Town have just cause to discipline Pilot, up to and including separation from employment, for the reasons set forth in the February 17, 2017 notice.

A. Whether Pilot engaged in the conduct alleged in the notice.

55. The findings made above are adopted.

56. Pilot was ordered by the Chief to report to duty on February 8, 2017.

57. Pilot failed, without good cause or justification, to report to duty as ordered.

58. Pilot engaged in the conduct cited in the notice.

B. If so, did that conduct amount to a violation of the Department's Rules and Regulations cited in the Notice.

59. The finding made above are adopted.

60. The Department Rules and Regulations, as relates to Orders, provides in part that:

i. "All lawful orders, written or oral, shall be carried out fully and in the manner prescribed." (Section E, Orders, Introduction)

ii. “3. Personnel Orders- Orders pertaining to assignments, change of duty assignments, hours of work, administrative matters related to conditions of employment and employee rights and benefits.”

61. The order of the Chief for Pilot to report to duty on February 8, 2017 at 8:00 a.m. was a lawful written order which Pilot was required to carry out fully and in the manner indicated.

62. The order to report to duty was a Personnel Order under the Departmental Rules and Regulations.

63. By failing to report to duty as ordered by the Chief, Pilot violated Departmental Rules and Regulations, E. Orders.

64. The Department Rules and Regulations, as relates to F. Required Conduct, provides in part that:

i. “In addition to the specific duties of each individual rank and assignment as set forth in Section II of this Manual, the following provisions are applicable to all members of the Department.”

ii. “(1) Reporting for Duty- Report for duty whenever so ordered by proper police authorities. Report for duty at the regularly appointed time and not absent him/her self from duty without leave. Be present at all roll calls properly uniformed, equipped and ready for inspection.”

65. The order from the Chief to report to duty was a lawful order by proper police authorities.
66. It was incumbent on Pilot to obey that order to report to duty.
67. It was incumbent on Pilot to not absent himself without approved leave.
68. Pilot did not have approved leave excusing him from reporting for duty as ordered.
69. By failing to report to duty as ordered by the Chief, Pilot violated Departmental Rules and Regulations, F. Reporting for Duty.
70. The Department Rules and Regulations, as relates to Prohibited Conduct, provides in part that:
- i. “(3) Neglect of Duty- Being absent from assigned duty without leave ...”.
  - ii. (4) Insubordination- Failure or deliberate refusal to obey a lawful order issued by a superior, ranking or commanding officer.”
71. Pilot was assigned duty as stated in the notice from the Chief.
72. Pilot did not report to duty as ordered and thus was absent without leave.
73. The order from the Chief was a lawful order Pilot was required to obey.
74. By not reporting to duty as ordered, he failed to obey said order.
75. By not reporting to duty as ordered, he engaged in a deliberate refusal to obey the order.

76. By failing to report to duty as ordered by the Chief, Pilot violated  
Departmental Rules and Regulations, G. Prohibited Conduct.

C. If so, does the Town have just cause to discipline Pilot, up to and including separation from employment, for the reasons set forth in the February 17, 2017 notice.

77. The Findings made above are adopted.

78. Pilot, by his conduct, violated the above cited four Departmental Rules and Regulations.

79. Because he did so, the charges are established and just cause exists for the Town to discipline Pilot for said violation, up to and including separation from employment, for the reasons set forth in the February 17, 2017 notice.

II. As relates to Zerai-Misgun:

A. Whether Zerai-Misgun engaged in the conduct alleged in the notice.

B. If so, did that conduct amount to a violation of the Department's Rules and Regulations cited in the Notice.

C. If so, does the Town have just cause to discipline Zerai-Misgun, up to and including separation from employment, for the reasons set forth in the February 17, 2017 notice.

A. Whether Zerai-Misgun engaged in the conduct alleged in the notice.

80. The findings made above are adopted.

81. Zerai-Misgun was ordered by the Chief to report to duty on February 8, 2017.

82. Zerai-Misgun failed, without good cause or justification, to report to duty as ordered.

83. Zerai-Misgun engaged in the conduct cited in the notice.

B. If so, did that conduct amount to a violation of the Department's Rules and Regulations cited in the Notice.

84. The finding made above are adopted.

85. The Department Rules and Regulations, as relates to Orders, provides in part that:

- i. "All lawful orders, written or oral, shall be carried out fully and in the manner prescribed." (Section E, Orders, Introduction)
- ii. "3. Personnel Orders- Orders pertaining to assignments, change of duty assignments, hours of work, administrative matters related to conditions of employment and employee rights and benefits."

86. The order of the Chief for Zerai-Misgun to report to duty on February 8, 2017 at 8:00 a.m. was a lawful written order which Zerai-Misgun was required to carry out fully and in the manner indicated.

87. The order to report to duty was a Personnel Order under the Departmental Rules and Regulations.

88. By failing to report to duty as ordered by the Chief, Zerai-Misgun violated Departmental Rules and Regulations, E. Orders.

89. The Department Rules and Regulations, as relates to F. Required Conduct, provides in part that:

i. “In addition to the specific duties of each individual rank and assignment as set forth in Section II of this Manual, the following provisions are applicable to all members of the Department.”

li “(1) Reporting for Duty- Report for duty whenever so ordered by proper police authorities. Report for duty at the regularly appointed time and not absent him/her self from duty without leave. Be present at all roll calls properly uniformed, equipped and ready for inspection.”

90. The order from the Chief to report to duty was a lawful order by proper police authorities.

91. It was incumbent on Zerai-Misgun to obey that order to report to duty.

92. It was incumbent on Zerai-Misgun to not absent himself without approved leave.

93. Zerai-Misgun did not have approved leave excusing him from reporting for duty as ordered.

94. By failing to report to duty as ordered by the Chief, Zerai-Misgun violated Departmental Rules and Regulations, F. Reporting for Duty.

95. The Department Rules and Regulations, as relates to Prohibited Conduct, provides in part that:

i. “(3) Neglect of Duty- Being absent from assigned duty without leave ...”.



ii. "(4) Insubordination- Failure or deliberate refusal to obey a lawful order issued by a superior, ranking or commanding officer."

96. Zerai-Misgun was assigned duty as stated in the notice from the Chief.

97. Zerai-Misgun did not report to duty as ordered and thus was absent without leave.

98. The order from the Chief was a lawful order Zerai-Misgun was required to obey.

99. By not reporting to duty as ordered, he failed to obey said order.

100. By not reporting to duty as ordered, he engaged in a deliberate refusal to obey the order.

101. By failing to report to duty as ordered by the Chief, Zerai-Misgun violated Departmental Rules and Regulations, G. Prohibited Conduct.

C. If so, does the Town have just cause to discipline Zerai-Misgun, up to and including separation from employment, for the reasons set forth in the February 17, 2017 notice.

102. The Findings made above are adopted.

103. Zerai-Misgun, by his conduct, violated the above cited four Departmental Rules and Regulations.

104. Because he did so, the charges are established and just cause exists for the Town to discipline Zerai-Misgun for said violation, up to and including separation from employment, for the reasons set forth in the February 17, 2017 notice.

## **FURTHER DISCUSSION**

The Town has established sufficiently the charges as noted above made against the Employees and has established just and good cause for discipline up to and including separating them from the Town's employment.

This case concerns the failure of the Employees to comply with lawful orders issued by the Chief to report for duty. It appears that the defense of the Employees is based on their dissatisfaction with the Town's responses to their complaints and that therefore justifies their disobeying a lawful order of the Chief. That is not, in the totality of this this situation, a good defense.

As commented on above, this case is not a review or investigation of the sufficiency of the Town's responses to the Employees complaints, other than to the limited extent of observing that the Town did respond in a number of ways. The Town's response to their complaints and complaints regarding the racial climate of the Department has been addressed in various actions by the Town, including but not limited to the hiring of an independent investigator, the hiring of an expert to review the racial climate of the Department, both the investigator and expert providing suggestions to address issues and enhance the workplace environment, training for employees on several topics related to the workplace, reminders by the Town of its anti-discrimination and workplace safety policies, etc.

It is understandable that the Employees and their attorneys are disappointed that disciplinary action has not been taken against those accused of

engaging in wrongful action. However, that appears to be the result of a lack of corroborating evidence. As the Chief pointed out to the Employees, everyone involved has due process rights. It is indeed unfortunate for the Employees and the Town that in the various incidents there was no evidence to corroborate the Employees version or the version of the accused. If there had been such evidence it would have been more likely that the investigation would not have resulted in some cases with a finding of it being inconclusive. The Employees and their attorneys would no doubt want and expect their due process rights if they were accused of something. Similarly, the accused would want and expect their due process rights.

The fact that the Town is not able to determine what really happened in the absence of additional evidence does not mean that the Town does not take the matter seriously. It is noteworthy that the Town, even in the absence of corroborating evidence, took several actions to address workplace issues.

The responses by the Town are not apparently satisfactory to the Employees or their attorneys. That does not however make them any less of a response or a less than appropriate response. While the Employees and their attorneys are free to express their views of the Town's responses and suggest what they feel should be done, they do not have the right to mandate to the Town how it should or must respond. Nor do they have the right to refuse to fulfill their duties as police officers until the Town agrees with them.

The Town's responses appear to be meaningful and a sincere and good faith effort to address the issues. Mere dissatisfaction by the Employees to the responses by the Town does not make them any less meaningful, sincere and in good faith, any more than the Town not adopting their suggestions making the suggestions any less meaningful, sincere or in good faith. The simple fact of the matter is that the course of action to be taken is decided by the Town, not the Employees or their attorneys. In weighing various options, the law vests that determination in the hands of the Town.

That the Employees and their attorneys believe that an outside agency such as the United States Department of Justice should be brought in to deal with the issues and that certain employees of the Town should be disciplined and if necessary terminated for their involvement in the issues and response is clear from their statements, particularly exhibits E-2 and T- 20. However, the Employees do not get to make those decisions.

The order to return to work was issued and it was incumbent on the Employees to comply with it. By not doing so, they violated the order and engaged in conduct violating the Departmental Rules and Regulations.

Neither Employee has reported to work since December of 2015. The Town has tried to work with them to bring about their return to work. The Town even offered that they would initially be assigned to work in the Station. The Town

reached out numerous times to the Employees directly and through their attorneys to meet with them to discuss their return to duty. <sup>6</sup>

It is unfortunately clear from the documentary evidence that the Employees did not want to meet to discuss their return to work until the Town accepted conditions set forth by the Employees and their attorneys. See for example T-45, T-46, E-2. The Town was under no obligation to accept those preconditions in order to meet with the Employees and their attorneys.

Speaking generally, racism, discrimination, and actions creating an unsafe workplace all have no place in society and should be opposed and eliminated. This hearing and the report and recommendations cannot be taken to detract from that message. In order to properly address such issues complained of by the Employees, as well as good public policy, the Town has taken a number of steps outlined in this report and in the exhibits. The Town has reached out numerous times to the Employees to be part of the process to address the issues. The Employees and their attorneys have made suggestions as to some of the ways these issues can be addressed. If the Employees and their attorneys insist on conditioning their further participation in the process on the Town having to first agree to their suggestions, that is their choice. That does not excuse the Employees from reporting to work if they wish to remain employees of the Town.

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<sup>6</sup> See for example the timeline table above and in particular the dates of January 16, 2016, January 21, 2016, January 25, 2016, February 5, 2016, February 26, 2016, March 3, 2016, April 15, 2016, July 27, 2016, November 22, 2016, November 23, 2016, December 1, 2016, December 6, 2016 and December 6-9, 2016.

However, as relates to the continued employment of the Employees, the Town needs to move forward. Not having the Employees return to work means that the Department is not operating at the level it can and should be operating. Their positions have been held for them since December of 2015. As the Town has noted on several occasions, it cannot continue to keep their positions open. If they do not wish to return to work- particularly in view of a clear order from the Chief- the Town has little choice but to move forward and separate them from employment.

Separation from employment- i.e. termination- is the appropriate action for the Town to take at this time. The record is replete with communications urging the Employees to return to work and reminding them that their positions cannot be kept unfilled indefinitely. A clear and unambiguous order to report to duty was issued by the Chief. They have chosen not to comply with it and thus they have failed to obey it. A suspension will not solve the problem of these two positions not being filled. There is no position to demote the Employees to.

The outcome here is unfortunate for all parties. The Employees care for the community and their positions. They are well regarded in the community and within the Department. This was acknowledged by the Town and is evident by the community support shown at the hearing. The Town has made an investment in their training and service to the community. However, this stalemate must end.

Having found the violations alleged to have occurred, termination is the appropriate disposition. Therefore, it is my recommendation that the Employee be terminated from their positions within the Brookline Police Department in view of their violation of the Departmental Rules and Regulations and in particular their failure to report to work as ordered by the Chief.

### **CONCLUSION**

The charges and conduct stated in the notice are established as set forth above.

Just and good cause exists for their separation/termination from employment.

This matter is now transmitted to the Appointing Authority for such further action as it deems appropriate.

Respectfully submitted,

*James B. Lampke*

JAMES B. LAMPKE, ESQ.  
HEARING OFFICER

DATE: April 7, 2017