Decision mailed: 3/1/11
Civil Service Commission

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

KRIS J. BOHNENBERGER,
Appellant

v.

D-09-242

DEPARTMENT OF STATE POLICE,
Respondent

Attorney for the Appellant:

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Attorney for the Respondent:

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Commissioner:

Daniel M. Henderson

DECISION

Pursuant to G.L. c. 31, s. 43 and G.L. c. 22C, s 13, the Appellant, Kris Bohnenberger ("Appellant") appeals the decision of the Department of State Police, ("Department") by way of the Department of State Police Trial Board (hereinafter "Board") to suspend him without pay for forty (40) days, forfeit thirty (30) days of accrued time off, and permanently transfer him. The Board found the Appellant guilty of leaving the Commonwealth while on sick leave (Charge 1,

Specification 1); feigning illness or injury (Charge 2, Specification 1); insubordination by failing to obey an order from Captain Coletta ("Coletta") to remain in the Commonwealth while on sick leave (Charge 3, Specification 1); insubordination by not meeting a deadline issued by Lieutenant Friend ("Friend") (Charge 3, Specification 2); insubordination by missing an extended deadline issued by Friend (Charge 3, Specification 3); and insubordination by not returning Friend's telephone call (Charge 3, Specification 4). The appeal was timely filed. A full hearing was held on August 6, 2009 and November 19, 2009 at the Civil Service Commission. A digital recording of the hearing was made by the Commission. Both parties submitted post-hearing proposed decisions.

FINDINGS OF FACT

Thirty-three (33) Exhibits[1] were entered into evidence at the hearing. Based on the documents submitted and the testimony of the following witnesses

For the Appointing Authority:

- Lieutenant Robert H. Friend, Jr.
- Major (Retired) Gerard A. Coletta, Troop Commander

For the Appellant:

- Kris Bohnenberger
- Sergeant (Retired) Michael Craven

I made the following findings of fact:

1. The Appellant is a Trooper employed at the Bourne barracks of the Massachusetts State Police, a position and rank he has held since June 1992. (Exhibit 31; Testimony of Appellant)

[1] The Department's objections, made on the record, to Exhibits 22, 23, 24, 28, 29, 30, & 33, were taken de bene, subject to later written argument by the parties in post-hearing proposed decisions.

2. Prior to this issue on appeal, the Appellant's disciplinary history involved one incident of verbal abuse on 9/24/1993 and one incident on 4/1/2006 for which he received a reprimand order.[2] He has never been suspended prior to these disciplinary proceedings. His evaluations have consistently reflected acceptable and outstanding service. (Exhibits 1, 31, 29 and Testimony of Craven)
3. Paystation is the Massachusetts State Police Time Entry Report System. (Exhibit 9)
4. General Order of the Department of State Police ADM-11 ("ADM-11") SICK LEAVE- dated June 27, 1997 states in part that sick leave credits are granted in accordance with the applicable Collective Bargaining agreement and the Commonwealth of Massachusetts Rules and Regulations. It further states that "sick leave is granted at the discretion of the Colonel/Superintendent, or his/her designee,..." (Exhibit 9)
5. General Order of the Department of State Police ADM-11B ("ADM-11B") INJURY REPORTING- dated January 22, 1998, states in part that "All recurrent injuries should be reported using the same process as new injuries." Number Seven of ADM-11B states that "if an injured officer is unable to return to duty, the Commanding Officer shall place him/her on ILP Status (an officer who has a recurrence of a previous injury should be placed on "SIC" status"). (Exhibit 10)
6. Members of the State Police using sick leave may only leave the Commonwealth with authorization from their Commanding Officer; or to obtain medical care as prescribed by their licensed medical practitioner. ADM-11 ("ADM-11") SICK LEAVE. (Exhibit 9)
7. ADM-11 grants procedural rights to those suspected of abusing sick leave:

[2] The Internal Affairs Information also lists one other incident as "other" for which the Appellant appears to have received no discipline, and one incident listed "other" for which the Appellant received a Letter of Counseling. (Exhibit 31).

When a supervisor has reason to suspect sick leave abuse, the supervisor has the following options: If a supervisor has reason to suspect abuse in general, [he must] notify the member using SP382. This advises the member that future sick leave may be subject to extra scrutiny; or if a supervisor has reason to suspect abuse in a particular instance s/he shall notify the member using SP384. The member is then required to produce satisfactory medical evidence by submitting SP384 within seven days. Supervisors should have articulable reasons for suspecting abuse before filing SP382. (Exhibit 9)

8. A General Order of the Department of State Police ("ADM-11B") dated January 22, 1998 states a somewhat contradictory procedure for procedures concerning injuries:

> Injured Leave: Members incapacitated by an injury incurred on duty ***shall***[3] be placed on Injured Leave Pending Status (ILP) by their Commanding Officer or designee until examined by the State Police Surgeon. The Board on Claims will determine if and when a member will be officially place on Injured Leave Duty Status (ILD). (Emphasis added) (Exhibit 10)

9. ADM-11B as modified "shall" replacing "should" was effective after the time of the Appellant's time off in November, 2007, yet treated as effective at the time the Appellant's sick leave was approved. (Testimony of Friend, Exhibits 9, 10 and 26) The Appellant's time in dispute was converted from sick time to "ILD for his reoccurrence of injury" after his sick leave request was processed, presumably sometime in 2008.(See undated e-mail from Sue Viall to "Ed" Contained in Exhibit 26).

10. Article 9 of the "CBA" or the contract governing the Appellant's employment relationship with the Massachusetts State Police states the following:

> Section 1: An employee shall accumulate sick leave with pay credits at the rate of one and one quarter 1 ¼ work days (10 hours) for each full calendar month of employment. An employee on any leave with pay shall accumulate sick leave credits.
>
> Section 2: Sick leave shall be granted at the discretion of the Colonel to an employee only under the following conditions: when an employee cannot perform his/her duties because he/she is incapacitated by personal illness or injury …

[3] Lt. Friend testified that ADM-11B was updated in 2008 and modified by replacing the word "should" with the word "shall".

Section 6: An employee having no sick leave credits who is absent due to illness may be place, at the employee's discretion, on available vacation leave ... (Exhibit 20)

11. The practice at the Bourne State Police Barracks is that members may substitute vacation time for sick leave. Once the State Police Board on Claims approves the injury is work-related, sick leave or vacation leave will be converted into "injury leave." (Testimony of Craven, Appellant and Coletta)
12. The Department of State Police Rules and Regulations, Article 5 "Insubordination," states that an employee must "promptly obey any lawful [verbal or written] order conveyed to them by any senior member or proper authority." Additionally, employees shall not "behave in any insubordinate or disrespectful manner toward any employee of the Massachusetts State Police." (Exhibit 21)
13. The Appellant was injured in September, 2004. (Exhibits 22, 32) In 2005, the Appellant was placed on Injured Leave Pending Status (ILP). He had surgery in 2006. Physical therapy began shortly thereafter and continues to this day. Multiple medical records from 2007 describe the Appellant's recurrent injury, which has continuously been approved by the Appointing Authority. (Exhibits 22, 23, 26, 28 and 32)
14. In 2005, the Appellant used his vacation time while the reoccurring injury was investigated or approved by the State Police Board on Claims. On March 28, 2006, Coletta sent a To/From to the payroll section retroactively changing the Appellant's records: the designation of 27 dates (8/14/05 to 9/23/05) from ILP status to VAC status and changing the designation of 46 dates (10/18/05 to 12/24/05) to ILD status.(Exhibit 23 testimony of Appellant). Coletta testified that he wrote the March 28, 2006 To/From changing the payroll records at the direction of State Police Headquarters. In 2006, Captain Coletta retroactively

changed the Appellant's vacation time to ILP status. This exemplifies the complexity of exactly applying the policy and the practice of later auditing of records and "officially" changing the leave time status designation. (Test. of Appellant & Coletta Exhibits 23 and 33)

15. The Appellant was not on duty from October 27 through November 24, 2007. The Appointing Authority's Daily Rosters characterize his absence from duty from October 27-November 26 as sick leave. The Appointing Authority's Calendar Year Attendance records show the Appellant was back at work as of November 25. (Exhibits 14, 15 and 25)

16. At the beginning of each calendar year, personnel at the Bourne Barracks reserve vacation time on the "Master Vacation Schedule." (Testimony of Craven, Testimony of Coletta) In early 2007, the Appellant reserved vacation time on the Master Vacation Schedule in the spring of 2007. He requested his direct supervisor, Lieutenant D. Mulkern, Bourne Barracks Station Commander, ("Mulkern"), to use vacation time from October 22 – November 24 in writing and by phone in October of 2007. He also submitted into Paystation this time as vacation days. He communicated all of this information to those officers investigating him. (Exhibits 16 and 19)

17. The Appellant had been in the habit of taking this (October-November) time off for the deer hunting season in Maine, every year for the prior fifteen years. This was well-known to everyone in Troop D. The Appellant had the highest or nearly the highest seniority in the Barracks at the time of this matter, allowing him to have among the first choice of vacation time. (Testimony of Craven and Appellant)

18. On October 10, 2007, the Appellant wrote to Coletta and Mulkern to inform the Department he had complications with his surgically repaired knee. The memo stated:

> This is to inform the Department that I have had some complications with my surgically repaired knee which was injured on duty . . . I consulted with my

orthopedic physician and he recommends that I receive a medical procedure that constitutes several injections. I will receive the first injection on October 19, 2007. Please refer to the attached letter from the surgeon. (Exhibit 26)

Among the documents submitted by the Appellant was a letter from the Appellant's physician, (Dr. Wilsterman M.D.), dated October 1, 2007, stating the Appellant would be out of work from October 19th through November 23, 2007, due to the medical procedure. (Exhibits 6, 7 and 26)

19. The Appellant submitted sufficient documentation to show that the medical procedure was advised and viable medically. The Department did not present any medical documentation or evidence to medically dispute this fact. However, it is also apparent from the evidence that the Appellant chose or agreed to the date of October 19, 2007 for the first injection. (Testimony of Appellant, Exhibits 6, 7 and 26)

20. On October 10, 2007, the Appellant completed and submitted his Statement in Support of Claim. (Exhibit 26)

21. On October 22, Mulkern informed the Appellant he was in receipt of his "To/From" letter dated October 10, 2007 concerning his injury and informing him of the requirement to file certain medical/injury related forms by October 29, 2007. This letter also stated that pursuant to AMD-11B, the Appellant was placed on sick "SIC" status as of October 17, 2007. He was also informed that he was to report to Health Resources on November 6, 2007 at 1300 hours. (Exhibit 18)

22. On October 24, 2007, Commander Major Gerald Coletta ("Coletta") informed the Appellant by certified mail that he had received the Appellant's e-mail concerning his recurring injury. He informed the Appellant he would be placing him on sick leave statues. Coletta also informed him that he could only leave the State with authorization of his commanding officer

or for medical treatment. The letter informed the Appellant that Lt. Mulkern had been assigned to investigate his claim of recurring injury and had trying to contact him. Coletta referred the Appellant to State Police Administrative procedures set forth in General Order ADM-11 (Sick Leave) and requested completion of (1) Statement in Support of Claim, (2) "Notice of Injury," (3) "To/From" letter, and (4) Authorization for Release of Medical Records. This letter also informed the Appellant that he was scheduled to report to Health Resources on November 6, 2007 at 1300 hours. **Coletta has never sent a certified letter to a State Police member other than this letter to the Appellant.** (Exhibits 8 and 26; Testimony of Coletta)

23. Collette identified the October 24, 2007 letter as being authored by him after "becoming aware" of the recurring injury situation after being "informed" of it. The only reason he sent the letter by certified mail was because he was told by the Lieutenant (Mulkern), that he was having trouble contacting the Appellant.(Exhibit 8 and Testimony of Coletta)
24. At the time of Coletta's request, the Appellant had already submitted his To/From letter to Mulkern, who acknowledged receipt of it on October 22nd. (Exhibit 18)
25. State Police procedures give Superior Officers the right to request a To/From letter, a pre-disciplinary request, from a trooper. In practice, the request to the trooper would be forwarded to the Union Representative, who would send it to union legal and then try to resolve the issue "in house." The process usually involved in waiting for a response from the union legal office and both parties agreeing to extend the deadline for the To/From response. (Testimony of Coletta, Testimony of Craven)
26. Deadlines for response to directives or To/From letters are routinely extended as a matter of common practice. These deadlines are not fixed or hard as a matter of custom and practice.

There is no awareness of any other State Police member ever being disciplined for turning in a report after a report "deadline". (Testimony of Coletta, Craven and Appellant)

27. Craven has been a Troop and Barrack union representative for approximately 8 years during which he dealt with thousands of To/Froms and he always dealt with them in the same way. His experience is that: the union is usually involved in the process; deadlines are routinely extended by agreement verbally, he would never ask for a deadline extension in writing; Lt. Friend never told him of any deadlines; the Appellant told him that he requested an extension to Lt. Friend; he has never known of an interview occurring on the day the To/From is due/submitted; the particular practice in a Troop Barrack or station may vary; the practice is very different from policy; he has never know of a memo being sent to a State Police member by certified mail and he has never heard of a permanent transfer before this case. Craven holds Coletta in very high regard and never had any prior problems working out these union related issues with him(Testimony of Craven)
28. The Appellant has been the union barrack's representative for 9-10 consecutive years in the past, having been elected to one-year consecutive terms. He acted in effect as a "shop steward". He had to address sometime contentious management issues on behalf of union members. This representation led to some antagonism and animosity developing toward the Appellant in the process. (Testimony of Craven and Appellant)
29. Coletta has never charged another State Police member with insubordination. (Testimony of Coletta)
30. Coletta did not testify at the State Police Trial Board hearing in this matter. (Testimony of Coletta)

31. Coletta was aware of grumblings from some regarding the Appellant's time off. He was aware of complaints from Sgt. Doug Lynch regarding the Appellant's injury leave. Lynch felt that it was affecting morale. Lynch and the Appellant had been friends at one time and Lynch had previously been a supervisor at the Bourne Barracks. He did not know whether Lynch was upset as a State Police member or personally. (Testimony of Coletta)
32. Sometime before Friday November 2, 2007, the Appellant wrote an e-mail with the subject "Re-occuring injury," in which he informed Coletta he had filled out the paperwork requested, provided information about his past medical treatment, and gave dates of future (knee injections) medical treatment. (Exhibit 26)
33. Sometime in early November, Appellant's Union Representative Sergeant Michael Craven ("Craven") told the Appellant he was "all set" to go to Maine, though the letter telling the Appellant not to leave the Commonwealth was not rescinded. Craven believed he could do this based on a conversation with Coletta at one of several informal meetings at the local diner. However, Craven was not aware at that time of the certified letter sent by Coletta to the Appellant on October 24, 2007.(Testimony of Craven)
34. Coletta admitted to meeting Craven at a diner which was his practice to discuss various current union related matters. However, he does not recall the specifics of meetings with Craven at the diner or the specifics of the many conversations he had regarding the Appellant, or concerning the Appellant's time off. He did not recall telling Craven that he was "under some pressure" to look into the issue of the Appellant's time-off or that the Appellant was "all set" to travel to Maine. (Testimony of Coletta)
35. The Appellant left the Commonwealth for hunting trips to Maine on several occasions during the relevant October-November, 2007 period. However, he did return for several reasons

including the ordered appointment with Health Resources on November 6th. (Exhibits 11, 14, 17 and 24, testimony of Appellant)

36. Trooper Cardoza, a trooper in the Appellant's barracks, was placed on Injured Leave Pending status for a recurring injury in 2005 when ADM-11B was in effect. (Testimony of Appellant)

37. On December 4, Coletta assigned Lieutenant Robert Friend, Troop D of the Bourne Barracks, ("Friend"), to investigate the Appellant for possible abuse of sick leave. Friend's report was due on December 28, 2007. (Exhibits 4 and 16)

38. On December 7, Friend telephoned the Appellant to notify him of the personnel investigation against him. Despite the State Police Department's directives, under ADM-11 requiring supervisors to notify the member suspected of sick leave abuse by using SP382, there is no such form in the record, nor were any of the witnesses aware of the existence of such a form. Also against custom, Friend did not meet with the Appellant to inform him of the allegations but rather called him while the Appellant was on duty. During the phone call, Friend gave the Appellant a response due date of December 14, 2007, including a To/From letter. Friend informed the Appellant that when he submitted his material, he would conduct an interview with him. (Exhibits 10 and 16; Testimony of Coletta and Friend)

39. The Appellant did not work on December 7, 8, 10, 11, 14, 15, 16 and 17 of 2007. Friend did not work on December 13 -15, 2007, but worked a day shift on December 16, 2007. As a result, December 9 and 12 of 2007 were the only days he and the Appellant worked the same days. Friend is very reluctant to contact Troopers when they are off-duty.(Testimony of Friend, Exhibits 12 and13)

40. On December 17, 2007, Coletta formally recommended the Commonwealth approve the Appellant's injury as job-related. (Exhibit 26)

41. On December 17, 2007, the Appellant e-mailed Friend to ask for an extension because of his difficulties in getting in touch with his union attorney and his supervisior. Friend extended the deadline to Thursday, December 20, 2007. (Exhibit 16)

42. Friend did not work on December 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31 of 2007 and January 1, 2008. (Exhibit 16)

43. On December 18, 2007, the Appellant sent Friend an e-mail through his Attorney at the union legal office, with the subject "tpr kj bohnenberger to/fr." In this e-mail, the Appellant stated "I submitted my Paystation as vacation throughout the Procedures until the Re-occuring injury is approved, then I'll be at ILP status, and (sic) credited with my vacation … At no time did I request sick leave …" (Exhibit 24)

44. Friend maintains he never received a "To/From" letter from the Appellant dated December 18th despite the fact the e-mail is in evidence. However it is not clear from that e-mail that it was actually sent to Friend. (Exhibits 16 and 24)

45. On December 18, 2007, Mulkern wrote an Initial Injury Report for the Appellant. In this report, Mulkern confirmed the Appellant had already written a "To/From" letter on October 10, 2007: "Trooper Bohnenberger advised, via a To/From dated October 10, 2007 and received on October 17, 2007, that he was experiencing some complications with his surgically repaired knee…" (Exhibit 24)

46. On December 20, the Appellant had his report approved and submitted it to the station secretary to be typed on the letterhead, consistent with the practice in Troop D. (Testimony of Appellant)

47. On December 22, when the Appellant was ***off-duty***, Friend called the Appellant's ***personal cell phone*** and left a message to call him. The Appellant testified that his personal cell phone was turned off and he did not receive this message. (Testimony of Friend and Appellant)

48. Friend in the meantime was off-duty on vacation time and did not return to duty until January 1, 2008. Upon his return Friend found Appellant's report in his mailbox, dated December 26, 2007, the next day that the station secretary was at work. (Testimony of Friend and Appellant, Exhibit 13)

49. (Exhibits 3 and 16)

50. On January 14, 2008, the State Police Board on Claims approved the Appellant's claim of injury. The Board states that "time lost as a result of this injury should be entered into Paystation as ILD – Injured in Line of Duty." (Exhibit 26)

51. In a January 16, 2008 e-mail, Sue Viall of the State Police Health Resources requested the Appellant's sick time from October 13, 2007 to November 21, 2007 be converted to ILD for his reoccurrence of injury. The date of this e-mail is unknown but is presumed to be in 2008. (Exhibit 26)

52. On January 6, 2007, Friend had the Dispatcher issue a **"Code 7" alert** to the Appellant. A Code 7 alert is a telephone call being placed every 5 minutes to the person to report to the Barracks forthwith upon receipt. At 2:35 PM, that day, the Appellant responded to the Code 7 by telephone, which call was transferred to Friend. Friend thereupon ordered the Appellant to report forthwith to the Middleboro Barracks. The Appellant reported in person to the Middlboro Barracks at 3:35 PM that day to Lt. Friend, as directed. Friend said he took this approach since the Appellant had missed two deadlines, (12/14 and 12/20). Friend requested an interview with the Appellant to occur then. The Appellant quoting the CBA declined to do

so until he had union representation with him. Friend then filed insubordination charges against the Appellant for not following orders on that date, but on this charge **(Charge III Specification 5) he was found not guilty.** (Testimony of Friend, Exhibits 2 & 3) The Appellant believes that **Friend was "very agitated and upset"** with him for refusing to be interviewed on January 6th without union representation present. (Testimony of Appellant)

53. On January 11, 2007, Friend conducted a rescheduled interview with the Appellant when union representatives were present. It is only appropriate to conduct an interview when a union representative is present. Coletta believed that it was unnecessary for Friend to issue the unusual "Code 7" for the Appellant's interview on January 6th and that he should simply have rescheduled it for a time when union representation could be present. (Testimony of Coletta)

54. Lt. Friend testified about initially calling the Appellant on the Appellant's personal cell phone on December 7th to inform him of the investigation. This was one day after Friend's To/From to Appellant. (Exhibit 5) Friend was asked about the accuracy of informing the Appellant of the details, including the deadline of December 14th for the To/From. Friend defended his memory of the details of the call by testifying that he keeps "copious notes" and puts them on his computer. Regarding the conveyance of an order/firm deadline of December 14th for a response; he testified "I take any request from a superior to be an order". He admitted to learning from Capt. Regan and Lt. Sears on December 13th, that the Appellant was requesting an extension. He admitted that he had no conversation with the Appellant between December 7th and 14th. He testified that he received a call from the Appellant on December 17th and confirmed to Appellant that the December 7th call was an order for the To/From and an interview to both occur on December 14th then he extended the deadline to

December 20th for both the To/From and interview. Friend claimed that even though he was off-duty on December 20th, he would have come in for the interview. (Testimony of Friend)

55. Lt. Friend testified repeatedly and emphatically that his telephone conversations with the Appellant on December 7th and December 17th both conveyed clear and unequivocal orders that the To/From response and the interview were to occur on the same date; first on December 14th and then rescheduled and ordered to occur on December 20th. Lt. Friend's final report of January 11, 2008 also clearly states these claimed orders. (Testimony of Friend and Exhibit 16) However, Friend's To/From to the Appellant on December 6, 2007 clearly states the contrary; that is "As soon as your to-from is submitted, I will need to interview you regarding this complaint. We can schedule that interview at your earliest convenience." (Exhibit 5)

56. The Appellant testified that he first learned of the investigation from Lt. Friend on December 7th. He did not believe the December 14th date for the To/From was hard or fixed given the established routine of getting extensions for union legal review and representation. Lt. Friend did not mention a deadline or any urgency in their December 17th telephone conversation, nor did he mention that he (Friend) was under a December 28th deadline to complete his report. He also thought that since it was the Holiday season affecting schedules, that an extension would be automatic. He has never heard of an interview occurring on delivery of a document without legal review and representation present. That would be an "ambush". (Testimony of Appellant)

57. Lt. Friend testified that he had been previously in charge of approximately 12-15 investigations. However, he could not remember if he had ever been asked for an extension

of a deadline for a To/From in any of those investigations. This is an example of Friend's poor memory. (Testimony of Friend)

58. Lt. Friend displayed a shaky memory at times and had his memory refreshed on direct and cross-examination by viewing documents. He admitted to developing the habit of writing contemporaneous notes or computer entries so that he did not have to rely on his memory. He appears to be straight forward and as accurate as his memory allows him to be. I do not believe that his sporadic lack of memory, especially of critical details or events is attributed to any intent to deceive or mislead. Yet, his sporadic memory loss also weakens his claim of an accurate memory on other matters or events. However, he failed to explain why he did not send the Appellant clear and concise e-mails of his purported orders, instead of calling him on the phone and believing that he conveyed the order clearly in the conversation. A verbal telephone order is subject to mistakes or omissions on both sides. (Exhibits and testimony, testimony and demeanor of Friend, reasonable inferences)

59. The Appellant and Lt. Friend had conflicting schedules, extensive time-off periods and the other circumstances identified here that rendered the scheduling of a To/From response and interview to be difficult. The specifics of their telephone attempts, messages and conversations are difficult to definitely establish. (Exhibits and testimony, reasonable inferences)

60. Lt. Friend raised the issue of the Appellant having only 112.30 hours available for vacation at the beginning of November, 2007 and that his total time he designated to be taken as vacation at that time totaled 128 hours; thereby implying that he would have had negative vacation time if he took his planned vacation. However, the evidence has shown that the amount of time and status designation of the time taken can be subsequently adjusted and is

done so routinely as a matter of administration or accounting practice by the Department. (Testimony of Friend, Exhibits and testimony, reasonable inference)

61. On January 11, 2008, Friend submitted his 8 page report and recommended the Board rule that the Appellant had abused sick time and had been insubordinate by disobeying orders. (Exhibit 16)

62. On April 28, 2009 and May 5, 2009, the Massachusetts State Police Trial Board, held a hearing for the allegations against the Appellant. It ruled the Appellant was guilty of the following[4]:

- Charge I, specification I: violating rule 5.1 (Violation of Rules) by leaving the Commonwealth while on sick leave contrary to General Order ADM 11 between the dates of October 19 and November 24, 2007;
- Charge II, specification I: violating Rule 5.7 (Fictitious Illness or Injury Report): by falsely reporting himself injured or otherwise attempting to deceive a member of the State Police as to the condition of his health beginning on October 10, 2007 and continuing through November 24, 2007;
- Charge III, specification I: violating Rule 5.12 (Insubordination) by failing to obey Coletta's October 24, 2007 order that because of his sick leave status, he was not to leave the state;
- Charge III, specification II: violating Rule 5.12 (Insubordination) by not obeying Friend's December 7, 2007 order to respond to sick leave abuse allegations with a "To/From" letter by December 14, 2007;
- Charge III, specification III.: violating Rule 5.12 (Insubordination) by not obeying Friend's December 17th order to complete the report by December 20, 2007;
- Charge III, specification IV: violating Rule 5.12 (Insubordination) by not obeying Friend's order to return his phone call when the order was left on the Appellant's personal cell phone while off duty on December 22, 2007.
  (Exhibits 2 and 3)

[4] The Appellant was **found not guilty** of Charge III, specification V, (Insubordination) in violation of Article 5.12. 1, a, by failing to promptly obey a lawful order conveyed to him by Lt. Friend on January 6, 2008.

63. Appellant was notified of his discipline, to forfeit of thirty (30) days accrued time off, suspension without pay for forty (40) days, and a permanent transfer from Troop D, on May 7, 2009. (Exhibit 3)

CONCLUSION

The Civil Service Commission has jurisdiction over state-police disciplinary proceedings. Hackett v. Department of State Police, 22 MCSR 70 (2009). The role of the Commission is to determine "whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge v. Civil Serv. Comm'n, 43 Mass. App. Ct. 300, 304 (1997). Reasonable justification means the Appointing Authority's actions were based on adequate reasons supported by credible evidence, when guided by common sense and correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civil Serv. v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971).

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision." Watertown v. Arria, 16 Mass. App. Ct. 331, 332 (1983). *See* Commissioners of Civil Service v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003). Appointing Authorities have discretion to discipline employees; however, personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. Cambridge, 43 Mass. App. Ct. at 304.

The Appointing Authority's burden of proof is one of a preponderance of the evidence which is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956).

A. Leaving the Commonwealth and failing to follow orders to remain in the Commonwealth

1. Charge I, Specification I (leaving the Commonwealth contrary to General Order ADM-11)

The factual question for the Commission is why Coletta and the Appellant possess such divergent views of the characterization of the Appellant's days off in October and November of 2007.

The Appellant is a long-time veteran with the state police, having served in the State Police Bourne Barracks for nearly eighteen years. On October 10, 2007, he properly followed procedures to report a claim of a reoccurring knee injury. His immediate supervisor, Mulkern, and his Troop Commander, Coletta, told the Appellant that as a result of his report, he was on sick status as of October 17, 2007 and ordered him not to leave the Commonwealth.

The Appellant's union representative, believing the Appellant was "all set" to leave the Commonwealth based on a meeting with Coletta, told the Appellant going to Maine for vacation was permissible. The Appellant travelled to Maine, believing he was on vacation time as he had requested, particularly as he had entered his vacation days into the State Police's payroll system. At no time during the State Police's investigation and subsequent Trial Board proceedings or Commission hearing has the Appellant denied leaving the Commonwealth. The Appellant did not officially request sick leave time. He requested his vacation time according to the practice of the barracks, believed his vacation time request had been approved in accordance with barracks practice, and took time accordingly.

Coletta placed the Appellant on sick leave. The Appellant's vacation days entered into Paystation were converted to sick days by someone other than the Appellant. Given that Coletta had in 2005 incorrectly designated and subsequently changed the Appellant's Paystation status entries, that subsequent audit and re-designation of payroll entries was not uncommon and probably a routine administrative or accounting process. The totality of the record shows there may have been motivation by someone, to place the Appellant on sick leave instead of granting vacation leave or injured leave pending, as barracks practice had done for at least one other trooper in the barracks during this same period. Coletta had heard complaints in the barracks by other troopers about the Appellant's off-duty time, and though he testified he bore no ill will toward the Appellant, he admitted to some unique events here and chose to follow strict State Police policy and not well established practice in this matter.

Placing the Appellant on sick leave, not injured leave pending, would be improper if it was motivated by informal complaints, mere gossip around the water cooler, rather than by policy and procedure. At first blush, this decision seems marked by political influences or objectives unrelated to merit standards, such as complaints by other troopers in the barracks. There are obvious factors indicating disparate treatment and/or selective enforcement against the Appellant.

On the other hand, the Appointing Authority has followed its own procedures listed in General Order ADM-11. When Coletta placed the Appellant on sick leave, he informed him of that decision and formally made the Appellant aware of the resulting consequences of that decision through a certified letter. Despite the fact that barracks practice was to take vacation as each trooper requests and in accordance with seniority, the Appellant was unambiguously informed in writing (certified mail) by Major Coletta, Commander of Troop D that he was not to

leave the Commonwealth because he was on sick leave status. He was also informed that his claim for recurring injury was being investigated. The Appellant's attempts to modify or rescind this clear order were ultimately unsuccessful. The order remained in effect. It was not rescinded or modified prior to him leaving the Commonwealth for his hunting trip. The Appellant thus did not follow General Order ADM-11, violating Article 5.1.

However, there are factors in support of the Appellant's belief that he had been given oral permission to leave the Commonwealth. In addition he proceeded in a manner that was open and in apparent compliance with established past practice. There are the clear overtones of targeting or selective enforcement toward the Appellant due to some animosity felt by some State Police members. This animosity centered on the amount of time-off including injury leave that the Appellant took and his outside business activities. Although these factors do not completely absolve the Appellant of responsibility; they do call for a modification of the penalty imposed. Keeping in mind the Commission's duty to investigate reasonable justification for an Appointing Authority's action, not whether the Commission would have acted in the same manner, common sense and correct rules of law demonstrate the Appellant did commit this single violation, albeit in a qualified manner. He did not comply, despite some mitigation, with a clear written order, a violation of General Order policy of the Department. **The Appointing Authority has proven by a preponderance of the credible evidence in the record on Charge I, Specification I.**

2. Charge II, Specification I (falsely reporting an injury or otherwise attempting to deceive a member of the State Police as to the condition of his health.)

The Appellant's injury was approved, both initially and as a reoccurring injury, by the Appointing Authority. This injury was a reoccurring knee injury sustained while the Appellant was on duty for which the Appellant had received treatment over several years. On record are

sufficient medical records from the Appellant's doctors, as well as State Police records, asserting the true and accurate nature of this approved injury.

Receiving information of suspected abuse of sick leave, Coletta initiated an investigation into the Appellant's sick leave on December 4, 2007; a date long after the Appellant had returned from what he believed was his vacation time. The investigation is marked by a lack of procedural due process with regard to State Police Department Policies. The Appointing Authority did not notify the Appellant his vacation time was denied. The Appellant was not notified of the sick leave investigation until returning from what he believed to be his vacation. The Appointing Authority began an investigation with full knowledge of the Appellant's request for vacation time and disregarding the long-standing barracks policy of reserving vacation time on the Master Schedule.

Additionally, the Appointing Authority violated its own procedures by not submitting a SB382 in violation of ADM 11B when it investigated the Appellant's alleged use of sick time. Friend's investigative methods included trying to bully the Appellant into a meeting at which no union representation was allowed and for which no notice was given. Friend attempted to discipline the Appellant for attending a meeting with no notice, but was unsuccessful.

Procedurally and substantively, the investigation into the Appellant's use of sick time does not show any report of a fictitious injury. Taken as a whole, the record does not support Appointing Authority's decision to find the Appellant guilty of deceiving a member of the State Police as to the condition of his health. **The Appointing Authority has not proven by preponderance of the credible evidence in the record on Charge II, Specification I.**

B. Charges of Insubordination

3. Charge III, Specification I (insubordination by failing to promptly obey an order on October 24, 2007)

Coletta's direct order to the Appellant on October 24 was to remain in the Commonwealth while under sick leave. It is redundant to punish a member of the State Police twice, once for not following an administrative rule, and then again for not following the order to follow the rule, when the order is given simultaneously with the administrative rule. Major Coletta issued a direct order to not leave the Commonwealth while on sick leave and the Appellant did not follow that order. This Charge and Specification is duplicative of Charge I Specification I for which the Appellant has been found in violation. See above. **The Appointing Authority has not proven by preponderance of the credible evidence in the record on Charge III, Specification I.**

4. Charge III, Specification II and III, (insubordination by failing to promptly obey Friend's orders on December 17, 2007 and December 22, 2007).

It is remarkable that Friend, while investigating the Appellant's sick leave, missed the Appellant's December 18th e-mail giving him a To/From letter. Also remarkable is Friend's expectation that the off-duty Appellant to contact him immediately after a phone message left on his personal cell phone. Friend's decision to file insubordination charges even though the Appellant had asked for an extension of the deadline, the first time in over twenty years someone had been disciplined for requesting an extension, similarly demonstrates a lack of just cause to discipline the Appellant. Taken as a whole, the circumstances support a finding that the Appellant reasonably followed Friend's orders, as a matter of established practice.

On December 17, the Appellant e-mailed Friend to ask for an extension because of his difficulties in getting in touch with his union attorney and his supervisor while writing his response to the investigation. Friend extended the deadline to Thursday, December 20, 2007. For a December 20th deadline, the Appellant submitted his response to the allegations with a Dec. 20th e-mail. He followed that response with a letter dated December 26. During these days,

the Appellant and Friend worked only two of the same days, precluding potential opportunities for discussion. The Appellant followed proper and customary barracks procedures concerning Friend's orders.

The Appointing Authority, however, was not as forthcoming. Long term practices were overlooked by the Department in proceeding against the Appellant. Policy was strictly interpreted and applied to the Appellant despite established practice at variance or contrary to it. The relevant practices even varied among the different Troops, barracks or stations. No witness could recall ever seeing some of the Department's unique actions which occurred in this case (certified mail, discipline for missed deadlines, a Code 7 alert, interviews without union representation and a permanent transfer, etc.) Friend denied receiving the Appellant's To/From letter, and Coletta told the Appellant he needed one despite Mulkern's Oct. 22, 2007 admission of receipt. Friend's testimony clearly contradicted other witnesses' testimony and even his own December 6, 2007 To/From. Moreover, Craven and Coletta, with over forty years experience between them, had never seen or heard of anyone being punished for insubordination for a late or insufficient To/From letter. These facts indicate that something other than good faith practice was at play in charging the Appellant for insubordination towards Friend on December 17 and 22, 2007. **The Appointing Authority has not proven by preponderance of the credible evidence in the record on its Charge III, Specifications II and III.**

To conclude, the Appointing Authority has proven, by a preponderance of the evidence, that it had just cause for disciplining the Appellant only for Charge I Specification I (leaving Massachusetts while on sick leave, in disobedience of a clear and direct order not to leave Massachusetts while on sick leave). The Appellant had notice he was on sick leave but left the Commonwealth in violation of ADM-11 and a direct order.

However, there is considerable and cumulative evidence of inappropriate motivation that warrants the Commission modifying the discipline for the single charge proven here in consideration of the determination that the five (5) other charges are unproven. The evidence indicates that the Appointing Authority was attempting to punish the Appellant for many years of going hunting at his family property in October and November, not for one year's dispute between designation of sick or vacation time. There was no reasonable justification and a lack of credible evidence for charging the Appellant with falsely reporting himself injured and for insubordination towards Lt. Friend. Guided by common sense and correct rules of law, we find these charges do not stand up to the substantial evidence and find that the Appellant was truthful, obeyed direct orders except for the single charge, and followed normal protocol and procedures with regard to Lt. Friend and his investigation. The discipline of a forfeiture of thirty (30) days accrued time off, suspension without pay for forty (40) days, and a permanent transfer, is thus harsh, punitive and unwarranted under the totality of the circumstances found here. The prosecution of the Appellant was selective and motivated by unpermitted considerations. The unprecedented permanent transfer imposed here was disciplinary in nature and intent. *See* Sweet v. Department of State Police, decision 22 MCSR 736, (2009)

Therefore, for all of these reasons The Appellant's appeal under Docket No. D-05-332 is hereby ***allowed in part with a modified penalty***.

The Appellant's discipline is modified and reduced to a total of fifteen (15) days suspension; so that the remainder of the penalty is vacated. He is to be returned to his position without any loss of pay or other benefits other than the fifteen day suspension. The permanent transfer is rescinded as of the date of receipt of this decision and the Appellant should be returned to the Bourne Barracks to resume the performance of his duties there.

The Appellant's appeal under Docket No. D-05-332 is hereby ***allowed in part with a reduced penalty as stated above.***

Civil Service Commission,

Daniel M. Henderson
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Henderson, McDowell and Stein Commissioners) [Marquis absent] on February 24, 2011.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. The motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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

Notice to:
Scott W. Dunlap, Atty. (for Appellant)
Michael B. Halpin, Atty. (for Appointing Authority)