COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

DENISE DOHERTY,
Appellant

v.

D-16-24

DEPARTMENT OF STATE POLICE,
Respondent

Appearance for Appellant:

Joseph P. Kittredge, Esq.
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1 Keefe Road
Acton, MA 01720

Appearance for Respondent:

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Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, § 43 and G.L. c. 22C, § 13, as amended by Chapter 43 of the Acts of 2002, the Appellant, Sergeant Denise Doherty (Sergeant Doherty or Appellant), is appealing the decision of the Department of State Police (Department or Respondent), requiring her to forfeit two (2) days of accrued time off. The appeal was timely filed on February 11, 2016, a pre-hearing was held on March 1, 2016 and a full hearing was held on April 8, 2016 at the offices of the Civil Service

Commission (Commission) in Boston, Massachusetts[1].[2] A digital recording of the hearing was made by the Commission.[3] Both parties submitted post-hearing briefs.

FINDINGS OF FACT

Thirty-four (34) exhibits were entered into evidence. Based on these documents and the testimony of:

For the Department[4]:

- N.R.; Private Citizen;
- F.E.; Private Citizen;
- Detective Lt. George Smith; Department of State Police;

For the Appellant:

- Sergeant Denise Doherty

and drawing reasonable inferences therefrom, I make the following findings of fact:

1. The Appellant, Denise Doherty, has been employed by the Massachusetts Department of State Police for approximately twenty-two (22) years and currently holds the rank of Sergeant. (Testimony of Appellant)

[1] The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.
[2] Prior to the commencement of the hearing, the Department filed a Motion to Impound Testimony and Exhibits based on the significant privacy rights and Criminal Offender Record Information ("CORI") issues pertaining to the witnesses and other employees referenced in the case. The Appellant, in turn, filed a Motion for an Open Hearing to which the Department objected based on the same reasoning in support of its Motion to Impound. Finding the Appellant's right to an open hearing was trumped by the aforementioned individuals' privacy rights and the CORI issues, the Commission denied the Appellant's Motion for an Open Hearing. Moreover, the Commission found the Appellant failed to present any evidence as to how she would be harmed or prejudiced without an open hearing as she would still be able to cross-examine witnesses, call her own witnesses, and otherwise present her case.
[3] If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.
[4] Due to the CORI and/or privacy concerns of the civilian witnesses who testified at the hearing in this appeal and/or before the Trial Board, who were interviewed by the Department's Internal Affairs Section, or who were otherwise mentioned in any stage of this matter, and in accordance with the Commission's ruling allowing the Department's Motion to Impound Testimony and Exhibits, the Commission shall reference all such individuals herein by their first and last initials.

2. From 2007 through approximately the end of November 2012, the Appellant was assigned to the Department's Certification Unit where she held the rank of Trooper. During that time, she had a satellite office at the Norfolk County District Attorney's Office in Canton. At the end of November 2012, the Appellant transferred to the Detective Unit assigned to the Norfolk County District Attorney's Office. (Testimony of Appellant and Det. Lt. Smith)

3. The Certification Unit is a unit within the Department's Division of Standards and Training and is responsible for conducting background investigations of new civilian and uniformed employees, and occasionally of new employees of other state agencies. The Certification Unit also provides licensing services for Special State Police Officers ("SSPOs"), private investigators, and private security (also known as "watch guard") companies. (Testimony of Det. Lt. Smith)

4. Sections 22-30 of Chapter 47 of the General Laws govern the licensing of private investigators and watch guard companies. (Testimony of Det. Lt. Smith and Appellant, Exh. 33)

5. Upon receipt of an application for a license to operate a watch guard business, the Certification Unit verifies that the individual applicant's qualifications comply with all statutory requirements and then conducts a background investigation to ensure there are no excluding factors. Once a license is approved and issued to an individual to operate a watch guard company, the Certification Unit typically has no further involvement with the company unless a complaint is made about a licensee. (Testimony of Det. Lt. Smith)

6. Sometimes the Certification Unit will conduct an administrative inspection of a watch guard company in order to ensure that the licensee is in compliance with the requirements of the statute. In doing so, the Certification Unit checks that the license is current as it is to be renewed annually. It then conducts a site visit to confirm a license is visible and that the company has on file a complete list of current employees as well as copies of affidavits of all employees stating they have not been convicted of a felony or of a crime of moral turpitude. (Testimony of Det. Lt. Smith, Exh. 33)

7. It is the responsibility of the licensee to ensure that all necessary information is correct and to have it on file and available on demand for inspection by the Certification Unit. (Testimony of Det. Lt. Smith, Exh. 33)

8. An individual security officer working for a watch guard company is an employee of that company, not a licensee of the Department. (Testimony of Det. Lt. Smith)

9. The licensing of SSPOs is governed by a different statute (G.L. c. 22C, § 63). All individual SSPOs must be licensed and inspections of all SSPOs are required by statute to be conducted annually by the Department. (Testimony of Det. Lt. Smith)

10. In October 2011, and while a member of the Certification Unit, the Appellant began an inspection of the SSPOs working at a Boston-area college. During the course of her inspection of the SSPOs, the Appellant learned from the college's Chief of Police that the college also utilized private security officers employed by "XYZ Watch Guard Company[5]" (hereinafter "XYZ"). (Testimony of Appellant)

[5] Since the actual name of the watch guard company is not relevant here, it is referred to as XYZ Watch Guard Company or XYZ throughout this decision.

11. The Appellant was not familiar with XYZ and told the Chief she would check to make sure XYZ was licensed. (Testimony of Appellant)

12. Also in October 2011, the Appellant then began an administrative inspection of XYZ and advised its license-holder, J.C., that as part of the inspection, she would need to see the affidavits of XYZ's employees stating that they were never convicted of a felony or crime of moral turpitude. J.C. was unaware that affidavits were required by statute and asked the Appellant for some time in which to get them to her to which the Appellant agreed. (Testimony of Appellant)

13. The Appellant did not receive the affidavits of the 275-300 employees of XYZ until approximately one (1) year later. (Testimony of Appellant)

14. The Appellant subsequently ran Board of Probation (hereinafter "BOP or BOPs") checks on XYZ's employees and determined that 10 – 11 employees had records of felony convictions. She conveyed to XYZ's Director of Government Affairs that some of XYZ's employees jeopardized XYZ's license, but did not give him any specific information as to the issues. She later met with the license-holder and the Director of Government Affairs and told them that she would contact these employees herself and was provided their contact information by XYZ. (Testimony of Appellant)

15. The Appellant began contacting these employees in late November / early December 2012. (Testimony of Appellant)

16. Among those employees was F.E., a black female who has been employed as a technician at a large telecommunications company for thirty-seven (37) years. At

the time, F.E. had also been a part-time employee of XYZ for 8 years and worked weekends at a Boston hospital as a security guard. . (Testimony of F.E., Exh. 17).

17. During the call to F.E., the Appellant identified herself as Trooper Denise Doherty and began asking F.E. personal questions such as where she was born, where she worked, her birthday, and whether she had ever been convicted of a crime. The Appellant then told F.E. she could not return to work for XYZ as a security guard where she had a felony conviction on her record. (Testimony of F.E., Exh. 17)

18. F.E. did not know how to take the conversation as she knew she had no issues of any sort, did not know what the Appellant was talking about, and had not heard anything from her employer about there being an issue. Further, F.E. did not know if it was a joke or a misunderstanding, but admits she was annoyed and dismissive towards the Appellant where the Appellant was calling her asking her personal questions and accusing her of things which did not apply to her. F.E. did confirm her name and where she worked, but otherwise refused to answer any of the Appellant's questions. (Testimony of F.E., Exh. 17)

19. As such, F.E. terminated the call with the Appellant and immediately called her own sergeant to see if he knew anything about her not being able to work. Her sergeant confirmed that that the Department oversees security companies and was involved in conducting a background check of XYZ's employees and that F.E. could not return to work. (Testimony of F.E., Exh. 17)

20. Having confirmed with her sergeant that there may be an issue and that the Appellant was in fact an officer with the Department, F.E. called the Appellant

back and attempted to "treat her as a person of authority and continue the conversation." The Appellant "put up a wall with [F.E.]" and very sarcastically said, "Oh now you want to talk to me?" (Testimony of F.E., Exh. 17)

21. The Appellant proceeded to ask F.E. about her personal life and background and questioned her as to her date of birth, her mother's maiden name, where F.E. was born, and whether she had been convicted of certain felonies. F.E. answered all of the Appellant's questions and repeatedly told her the allegations did not pertain to her and that she had never been convicted of a felony. Each time F.E. denied the allegations, the Appellant "shot [her] down" and said that it was her and seemed determined it was F.E. as if she had "solid proof." (Testimony of F.E., Exh. 17)

22. F.E. contacted the Appellant an additional time either that same day or the following Monday looking for more information and assistance so she could return to work. Even after F.E. continued to adamantly deny she had a felony conviction, the Appellant provided her with no assistance. (Testimony of F.E.)

23. F.E. also asked the Appellant if she (the Appellant) could fax her the information that the Appellant was looking at to reach her conclusions. The Appellant refused. (Testimony of F.E. and the Appellant)

24. F.E. found the Appellant to be harsh, negative and mean-spirited during their telephone conversations, but found her to be even more forceful during the second call even though F.E. had provided her with all the information the Appellant had requested. F.E. was also frustrated and really upset every time she finished talking with the Appellant and felt helpless that "someone would have that much

power to take away [her] livelihood for something that [she] didn't do." (Testimony of F.E.; Exh. 17)

25. Moreover, despite F.E.'s repeated assertion that she was never convicted of a felony and that the Appellant's information did not apply to F.E., the Appellant never pointed her in the right direction or offered any guidance as to how to rectify or otherwise resolve the matter. (Testimony of F.E.).

26. In order to find out how to clear her name, on her way to her full-time job that same day, F.E. went to a State Police barracks near her home and, after explaining what had happened with the Appellant, learned from the desk officer that the information of a woman with a very similar name and a different date of birth with a record was appearing on F.E.'s BOP. (Testimony of F.E.)

27. As she received the call from the Appellant on a Friday, F.E. was not able to work her scheduled security shifts that weekend and could not investigate the matter further until early the next week. At that time and after making several telephone calls, F.E. went to the Norfolk County District Attorney's Office as the conviction in question was out of that county. There she met with an assistant district attorney who looked up her information and confirmed what she had learned the prior Friday from the desk officer at the State Police barracks. He also gave F.E. the docket number of the case and directed her to the Norfolk Superior Court Probation Office in Dedham. While she was at the District Attorney's Office, F.E. saw a separate office with the Appellant's name on the placard, but the Appellant was not present. (Testimony of F.E.)

28. F.E. next went to the Norfolk Superior Court Probation Office where she met with a supervisor, Andrea Miller. F.E. provided Probation Officer Miller with her driver's license and recounted what had happened in her telephone conversations with the Appellant and that she was not allowed to return to her job unless she could clear her name. Probation Officer Miller looked up the information, including a photograph of the person in question, and told F.E. it was definitely not her, she had no issues, and she did not have a record of convictions. (Testimony of F.E., Exhs. 12, 17-19, 27)

29. Probation Officer Miller, in F.E.'s presence, called XYZ's Director of Government Affairs to inform him that F.E. did not have a criminal record and stated that she would send him something in writing as to her findings. Also while in F.E.'s presence, Probation Officer Miller called the Appellant and informed her that the docket did not relate to F.E. and that the Appellant needed to do whatever was necessary so that F.E. could return to work. F.E. also heard Probation Officer Miller tell the Appellant, "I would be upset too if I was accused of doing something I did not do." (Testimony of F.E., Exhs. 12 and 17)

30. After being told by F.E. that the Appellant's information was incorrect and that F.E. did not have a record, the Appellant took no steps to confirm the conviction belonged to F.E. The Appellant also did not run the CJIS Web RMV check which Probation Officer Miller had run even though the Appellant had access to the system, used to run such reports "all the time," and admitted it takes a minute to run such a report. (Testimony of Appellant)

31. As a result of the assistance F.E. obtained from Probation Officer Miller, F.E. was able to return to her security position with XYZ the following weekend. She was compensated for the pay she missed the prior weekend relative to the 16 hours she was scheduled to work, but was not compensated for the additional 16 hours she normally would pick up from working two double shifts. (Testimony of F.E., Exh. 17)

32. Approximately one and one-half years later, XYZ lost the security contract for F.E.'s work location and it was awarded to another company. Wanting to ensure there would be no further issues with the same wrong information interfering with her background check with her new employer, F.E. contacted the Appellant and left her a voicemail message. The Appellant never returned the call nor did she forward the information to anyone in the Certification Unit in order to assist F.E. Rather, the Appellant forwarded the voice mail message to her attorney. (Testimony of F.E. and Appellant).

33. Another security guard that the Appellant contacted was N.R. N.R. received a call on his cellular telephone from the Appellant. At the time, N.R. had been an employee of XYZ for almost 4 years and was currently assigned to a Boston area health center as a security guard. (Testimony of N.R., Exhs. 12, 14 and 16).

34. N.R. stated that, during the call, the Appellant identified herself as Trooper Denise Doherty, asked him to confirm that he was N.R. and that he worked for XYZ, and then told him he could not return to work for XYZ and would have to resign. N.R. was taken aback and shocked as he had no prior knowledge that she was going to call him nor did he have any idea what the Appellant was talking

about. N.R. tried to ask the Appellant questions as to why he was being let go and what he was supposed to do since the Appellant told him he was not to return to work. The Appellant told N.R. she did not know what he was supposed to do, but that he could not work for XYZ, that she had done a background check on him, and that he had lied on his application that he did not have a felony. (Testimony of N.R., Exh. 16).

35. N.R. told the Appellant he did not know he had a felony conviction. (Testimony of N.R., Exh. 16)

36. The Appellant further told N.R. that if he went back to work then she could take him to court for perjury for having lied on his affidavit. (Testimony of N.R.)

37. N.R. knew at the time of this telephone call with the Appellant that he had a criminal record from approximately twenty (20) years prior, but was unaware that he had a felony conviction and had always answered "no" when asked on employment applications in the past if he had ever been convicted of a felony. N.R. was under the impression he had a misdemeanor and mistakenly thought that the offenses from twenty (20) years prior were from when he was a juvenile (he was actually 18 years of age at the time). Moreover, prior to this telephone call, N.R. never had an issue with his employment due to his criminal record. (Testimony of N.R.)

38. N.R. told the Appellant he previously had worked for another employer and that the Department had checked his record every two years in order for him to get a security badge, but that he had never had an issue. (Testimony of N.R.)

39. Shortly before receiving the call from the Appellant, N.R. had attended three (3) interviews for a position with a different company, but ultimately did not get the job. Not knowing why and concerned that perhaps his prior criminal record was somehow impeding his ability to obtain this new position, N.R. had begun the process of getting his record sealed. (Testimony of N.R.)

40. N.R. also told the Appellant that he was already in the process of sealing his record. The Appellant replied that it did not matter if he sealed it and that he could not go back to work since he had stated on his affidavit that he did not have a felony conviction. (Testimony of N.R., Exh. 16)

41. N.R. found the Appellant to be "very rude from the get-go," arrogant, adamant and stern towards him about saying he could not return to work and that she did not care about what he had to say. N.R. took issue with her lack of professionalism during the call and thought she should have been more lenient in her tone and how she spoke with him, and that she was not sympathetic to the fact she was calling him on the telephone and stating what she knew but of which he was unaware. He further described his interaction with her as if she were upset at something and taking it out on him or that she had a personal issue with him even though he had never met her before. (Testimony of N.R., Exh. 16)

42. After speaking with the Appellant, N.R., who was scheduled to work within the next day or two, contacted his supervisor at XYZ and learned there was a pending investigation with the Department and that he could not return to work. (Testimony of N.R.)

43. N.R. later had two subsequent calls with the Appellant relative to the sealing of his record. On the first occasion, N.R. called the Appellant to inform her he had gotten his record sealed to which she stated it, in fact, was not sealed. She was again rude to him and did not offer him any direction as to the next step needed; he learned only from later speaking with the Clerk's Office in the East Boston District Court that the application still had to be approved in Boston. During his last and final call to the Appellant several months after her initial call to him, N.R. told the Appellant that his record should be all sealed and asked what was going on with his job status. The Appellant's tone at that time was different and she said that it was out of her hands and that she would pass the information on to XYZ. (Testimony of N.R., Exh. 16).

44. Once his record was officially sealed, N.R. returned to his position with XYZ in March of 2013. (Testimony of N.R., Exh. 16).

45. In addition to N.R. and F.E., the Appellant also contacted several other employees of XYZ who she believed had felony convictions. The Department interviewed these individuals, in addition to N.R. and F.E. (Exhs. 12, 14, 20 and 25).

46. As a result of the Department's investigation, the Appellant subsequently was charged with violating several Rules and Regulations of the Massachusetts State Police arising from her interactions with the employees of the watch guard company, her administrative inspection of it, and her actions which ensued during the investigation. For purposes of the instant appeal, however, the Commission is only evaluating Charge 1, Specifications 1 – 5, the offenses for which the Appellant subsequently was found guilty. (Exhs. 1, 4-5, and 11)

47. Massachusetts State Police Rules and Regulations, Article 5.8.1 (Unsatisfactory Performance) states that State Police "[m]embers shall maintain sufficient competency to properly perform their duties and assume the responsibilities of their positions. Members shall perform their duties in such a manner as will maintain the highest professionally accepted performance standards in carrying out the functions and objectives of the State Police." (Exh 7)

48. A Department Trial Board subsequently was convened, and after hearing evidence, found the Appellant guilty of violating Article 5.8.1. (Exhs. 1, 4 and 5)

49. The specific findings of the Trial Board are as follows:

Charge I

Violation of Article 5.8 of the Rules and Regulations for the governance of the Department of State Police to wit: Unsatisfactory Performance

Specification I

In that Trooper Doherty #2513, Massachusetts State Police, Division of Investigative Services, SP Detectives-Norfolk, on or about November 2012, failed to maintain sufficient competency to properly perform her duties in such a manner as to maintain the highest professionally accepted performance standards in carrying out the functions and objectives of the State Police. This occurred when Trooper Doherty was rude while engaged in a phone conversation with Mr. [NR] regarding his employment with [XYZ] and further informed him that he must resign from his employment. This action is in direct violation of Article 5.8.1. This is a Class "C" violation.

Specification II

In that Trooper Doherty #2513, Massachusetts State Police, Division of Investigative Services, SP Detectives-Norfolk, on or about November 2012, failed to maintain sufficient competency to properly perform her duties in such a manner as to maintain the highest professionally accepted performance standards in carrying out the functions and objectives of the State Police. This occurred when Trooper Doherty was rude while engaged in a phone conversation with Ms. [FE] regarding her employment with [XYZ] and further informed her that she must resign from his [sic] employment. This action is in direct violation of Article 5.8.1. This is a Class "C" violation.

Specification III

In that Trooper Doherty #2513, Massachusetts State Police, Division of Investigative Services, SP Detectives-Norfolk, on or about November 2012, failed to maintain sufficient competency to properly perform her duties in such a manner as to maintain the highest professionally accepted performance standards in carrying out the functions and objectives of the State Police. This occurred when Trooper Doherty was rude while engaged in a phone conversation with Mr. [DC] regarding his employment with [XYZ] and further informed him that he must resign from his employment. This action is in direct violation of Article 5.8.1. This is a Class "C" violation.

Specification IV

In that Trooper Doherty #2513, Massachusetts State Police, Division of Investigative Services, SP Detectives-Norfolk, on or about November 2012, failed to maintain sufficient competency to properly perform her duties in such a manner as to maintain the highest professionally accepted performance standards in carrying out the functions and objectives of the State Police. This occurred when Trooper Doherty was rude while engaged in a phone conversation with Mr. [JR] regarding his employment with [XYZ] and further informed him that he must resign from his employment. This action is in direct violation of Article 5.8.1. This is a Class "C" violation.

Specification V

In that Trooper Doherty #2513, Massachusetts State Police, Division of Investigative Services, SP Detectives-Norfolk, on or about November 2012, failed to maintain sufficient competency to properly perform her duties in such a manner as to maintain the highest professionally accepted performance standards in carrying out the functions and objectives of the State Police. This occurred when Trooper Doherty was rude while engaged in a phone conversation with Mr. [JRE] regarrding his employment with XYZ and further informed him that he must resign from his employment. This action is in direct violation of Article 5.8.1. This is a Class "C" violation.

50. The Appellant has received no prior discipline. (Exh. 6).

51. After reviewing the Appellant's disciplinary history, the Trial Board recommended the Appellant receive the following discipline as to each of the five (5) offenses for which she was found guilty: Article 5.8.1: forfeiture of two (2) days of accrued time. The Trial Board further recommended that the sanctions for Charge 1, Specifications 1 - 5 (Article 5.8.1) be imposed concurrently for a total loss of two (2) days of accrued time. (Exh. 4)

Legal Standard

G.L. c. 31, § 43 provides:

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

evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law," Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service," School Comm. v. Civil Service Comm'n, 43 Mass. App. Ct. 486, 488 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983).

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

Under section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew," Falmouth v. Civil Service Comm'n, op.cit. and cases cited. However, "[t]he commission's task.. .is not to be accomplished on a wholly blank slate. After making its de novo findings of fact, the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether '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'," which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority, Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006), quoting internally from Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983) and cases cited.

Analysis

In late November and early December of 2012, the Appellant contacted several employees of XYZ via telephone and informed them that they could not return to work for XYZ as they had felony convictions on their criminal records. The issue before me is not whether the Appellant was correct in her assertion that these employees could no longer work for XYZ because they had a felony conviction. Rather, the issue before me is whether, by a preponderance of the evidence, the State Police has shown that the Appellant was unprofessional in her dealings with these employees when she contacted them on the telephone.

To answer this question, I relied heavily on the testimony of two (2) XYZ employees who were contacted by the Appellant in 2012. I found both F.E. and N.R. to be credible witnesses. Notwithstanding the significant time that has elapsed between the time of the

calls (2012) and this hearing (2016)[6], both witnesses had a good recollection of what transpired during those calls. Their testimony, even under cross examination, was largely consistent with the statements they gave to the State Police at the time. Further, they both appeared to take their sworn testimony before the Commission seriously. They listened to the questions and provided thoughtful answers without any noticeable attempt to overreach or paint the Appellant in an unfavorable light. In short, their testimony rang true to me.

Based on F.E.'s credible testimony, I have concluded that the Appellant was harsh, negative, sarcastic and mean-spirited during their phone conversations. The Appellant, even during her testimony before the Commission, seemed almost disconnected from the consequential nature of the information she was sharing with these individuals and the immediate impact it would have on their livelihoods. In the case of F.E., the Appellant's cavalier attitude resulted in a serious injustice. Had the Appellant actually *listened* to F.E., and run one additional query that would have taken *seconds*, she would have learned that there was a real question as to whether F.E. had ever been convicted of a felony (<u>which she was not</u>). The Appellant, even after F.E. requested it, refused to provide F.E. with F.E.'s own CORI record, which the Appellant was relying on to reach what was ultimately determined to be a false conclusion. Further, the Appellant did not provide F.E. with any proper guidance regarding how to get this matter corrected. Remarkably, the Appellant, during her testimony before the Commission, stated that she would not have done anything differently based on the information she has today.

[6] There is no excuse for the period of time that it took the State Police to investigate and process this matter. On multiple occasions involving several recent appeals, I have reminded the State Police of this and urged them to expedite the disciplinary process.

Despite this disturbing level of unprofessionalism by the Appellant, F.E., a thirty-seven (37) year employee at a telecommunications company who supports her family by working a second job as a security guard, had faith that other state employees would assist her. She was right. A Trooper working the desk at the South Boston police barracks quickly identified the problem and told F.E. how she could rectify the problem, ultimately leading F.E. to a supervisor by the name of Andrea Miller in the Norfolk County Probation Office. Ms. Miller exhibited an appropriate degree of *empathy* for F.E., identified the discrepancy and personally called both the Appellant and F.E.'s employer to set the record straight: F.E. did not have a felony conviction on her record. Unfortunately for F.E., she had already lost thirty-two (32) hours of pay, of which XYZ commendably agreed to compensate her for sixteen (16) hours.

Similarly, I credit the testimony of NR that the Appellant was rude, arrogant and unsympathetic during their conversation.

As a public employee, the Appellant has an inherent duty to serve the public-at-large. In the matter at hand, a State Police officer, especially one with over twenty (20) years of experience, reasonably should have known that delivering such potentially devastating news relative to these employees' livelihood, especially when doing so over the telephone and, as in almost all the cases, with no advance knowledge of the call, could be a difficult call to make. It was incumbent upon the Appellant to be polite and courteous regardless of the reactions she may have received from the recipients of her calls, and to provide them with the appropriate "customer service" in answering their questions, pointing them in the right direction, and otherwise offering assistance. Instead, the Appellant left these employees confused, upset, believing they had no job, and on their

own trying to navigate their way through the criminal justice system in order to remedy the situation. As such, and based on the credible testimony of N.R. and F.E, I have found that Appellant's interactions with these employees were unprofessional and her performance unsatisfactory, warranting discipline.

Having determined that it was appropriate to discipline the Appellant, I must determine if the State Police was justified in the level of discipline imposed – a sixteen (16)-hour forfeiture of accrued time.

"The … power accorded the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded the appointing authority." Falmouth v. Civ. Serv. Comm'n, 61 Mass. App. Ct. 796, 800 (2004) quoting Police Comm'r v. Civ. Serv. Comm'n, 39 Mass. App. Ct. 594, 600 (1996). Unless the Commission's findings of fact differ significantly from those reported by the appointing authority or interpret the relevant law in a substantially different way, the commission is not free to "substitute its judgment" for that of the appointing authority, and "cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation." E.g., Falmouth v. Civil Service Commn, 447 Mass. 814, 823 (2006).

The Commission is also guided by "the principle of uniformity and the equitable treatment of similarly situated individuals" [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system … to guard against political considerations, favoritism and bias in governmental employment decisions. " Falmouth v. Civil Service Commission, 447 Mass. 814, 823 (2006) and cases cited.

Even if there are past instances where other employees received more lenient sanctions for similar misconduct, however, the Commission is not charged with a duty to fine-tune an employee's discipline to ensure perfect uniformity. See Boston Police Dep't v. Collins, 48 Mass. App. Ct. 408, 412 (2000).

The State Police determined that a two (2)-day forfeiture of accrued time was appropriate for *each* of the unprofessional interactions here, but chose to have those penalties served concurrently, resulting in only a two (2)-day forfeiture of accrued time. Given the rather egregious degree of unprofessionalism here, I find the discipline imposed here relatively lenient and certainly not worthy of a downward modification by the Commission.

Conclusion

The discipline imposed by the State Police is affirmed and the Appellant's appeal is ***denied***.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 9, 2016.

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

Under the provisions of G.L c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:
Joseph P. Kittredge, Esq. (for Appellant)
Suzanne T. Caravaggio, Esq. (for Respondent)