

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

TIMOTHY GILLESPIE,
Appellant

v.

DEPARTMENT OF STATE POLICE,
Respondent

D-17-078

Appearance for Appellant:

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Commissioner:

Paul M. Stein

DECISION

The Appellant, Timothy Gillespie, acting pursuant to G.L.c.31,§43 and G.L.c.22C,§13, as amended by St.2002,c.43, appealed to the Civil Service Commission (Commission) challenging the decision of the Respondent, the Massachusetts Department of State Police (MSP), requiring him to forfeit ten (10) days of accrued vacation time earned in his position of Massachusetts State Trooper.¹ The Commission held a pre-hearing conference in Boston on May 9, 2017 and held a digitally recorded full hearing at that location on June 14 & 26, 2017.² The full hearing was declared private, with witnesses sequestered. Twenty-eight (28) exhibits were received in evidence at the hearing (JExhs.1-22, 27, 28 & 30-33) and one post-hearing exhibit was submitted

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

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

by the MSP at the Commission's request and marked PHEXh.35.³ The Commission received Proposed Decisions on September 29, 2017.

On September 5, 2018, the MSP submitted a request, to which the Appellant objected, to supplement the record to take administrative notice of two decision of the Massachusetts Department of Labor Relations (DLR) on charges of unfair labor practices which the MSP contends relate, in part, to issues presented in this appeal to the Commission. After review of the request and consideration of the Appellant's objection, I agree that taking administrative notice of the DLR decisions, for what they may be worth, is appropriate and they have been marked as PHEXh.36.⁴

For the reasons stated below, Trooper Gillespie's appeal is denied.

FINDINGS OF FACT

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

Called by the MSP:

- MSP Lieutenant Dennis Brooks
- MSP Lieutenant Kevin Emmett
- MSP Detective Lieutenant James O'Leary
- MSP Captain (now Major) Francis McGinn
- MSP Major (now retired) William Christianson

Called by the Appellant:

- MSP Trooper Timothy Gillespie, Appellant

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

1. The Appellant, Timothy Gillespie is a sworn member of the MSP who has served in the position of State Trooper since July 19, 1982. (*Exhs. 4 & 30; Testimony of Appellant*).

³Exhs.23-26, 29 & 34 were marked for Identification (ID).

⁴ The MSP had previously moved to stay this appeal pending the DLR decisions, to which the Appellant objected and the motion was denied. (Respondent's Motion to Hold Appeal in Abeyance ("MSP Motion to Stay Appeal"); Appellant's Opposition to Motion to Hold Appeal in Abeyance ("Appellant's Opposition to Motion to Stay Appeal") See generally, Town of Dedham v. Labor Relations Comm'n, 365 Mass. 392 (1974), cited in Fernandes v. Attleborough Housing Auth., 470 Mass. 117 (2014)

2. Since 2001, Tpr. Gillespie was assigned to day-shift (7:00 a.m. to 3:00 p.m.) patrol duties with Troop F, a division of the MSP stationed at the Logan Airport Barracks (SP-Logan) located at Building 11, 2 Service Road, Logan Int'l Airport, East Boston, which is sometimes referred to as the "TSA Building". (The MSP occupies the first two floors of the building and the federal Transportation Security Administration (TSA) occupies the third floor). Troop F has the responsibility to provide policing and security services throughout Logan Airport as well as the Seaport District and other MassPort properties. (*Exhs. 15, 27, 28, 30 & 32; Testimony of Appellant, Lt. Emmett, Lt. Brooks, Maj. McGinn & Maj. Christiansen*)

3. At all times relevant to this appeal, Tpr. Gillespie was the duly elected Troop F representative for his union, the State Police Association of Massachusetts (SPAM). As union representative, Tpr. Gillespie had responsibility, among other things, to mediate concerns of SPAM members with MSP management. He also serves as a member of the SPAM Executive Board. (*Exhs. 22, 28 & 30; Testimony of Appellant, Maj. McGinn & Maj. Christiansen*)

4. Immediately prior to the incident that led to the discipline involved in the present appeal, Tpr. Gillespie received an overall "Outstanding" performance evaluation rating from his supervisor, Lt. Kevin Emmett, which covered the period from January through December 2015, including, in particular, a rating of "Outstanding" in the specific performance factor of "Follows Oral and Written Direction of Supervisors". His prior formal disciplinary history included a forfeiture of four (4) vacation days in 2011 and a written reprimand in 2013. (*Exhs. 4, 30 & 31*)

5. Most MSP uniformed staff assigned are provided an assigned or "take home" cruiser which may be used to commute to and from duty. At Troop F, however, only the command staff (superior officers) and members assigned to certain specialized units (K-9, Explosives Ordinance Disposal [EOD], Detectives, etc.) have assigned or "take home" cruisers. All other troopers

assigned to Troop F (approximately 80% of the uniformed staff) commute to and from work in a personal vehicle for which they receive a stipend of \$40 per day to offset the cost of commuting, and are assigned a cruiser for use on-site during their shift. (*Exh. 15, 27 28; Testimony of Lt. Brooks, Lt. Emmett & Maj. McGinn*)

6. Parking areas are provided on all three sides of the TSA Building:

- Gated Lot: An enclosed, gated parking lot, with approximately 136 spaces, is accessible only by use of an authorized employee ID badge and is primarily dedicated to MSP personnel, although at times, the lot will be opened to accommodate attendees at state, local or federal trainings and classes.. MSP supervisors are provided assigned spaces for their cruisers in this gated lot. Troop F personnel are expected to park their personal vehicles in the remaining unassigned spaces in this lot.⁵

- Cruiser Lot: In addition to the gated lot, supervisors and other officers assigned a take-home cruiser are permitted to park in the area behind the rear of the TSA building where the cruisers used by troopers during a shift are also parked. Personal vehicles are not permitted in this area.

- Short Term Parking: Immediately adjacent to the front entrance of the TSA Building are several spots where MSP personnel are authorized to use for short-term parking, such as coming to drop off a report or meet briefly with a supervisor. These spot are not meant to be used by MSP personnel as an alternative to the gated lot.

- TSA Parking: TSA personnel park in a separate designated area outside the gated lot.

- Visitor Parking: Approximately ten (10) spaces in front of the building (and several spaces for disabled) are designed for visitors coming to TSA or MSP and have clearly marked signage to that effect.

(*Exhs. 15, 20, 27, 28 & 32; Testimony of Major McGinn, Lt. Brooks & Lt. Emmett*)

7. For some time prior to October 2015, a number of Troop F and TSA personnel had become accustomed to using available visitor spaces as an alternative to their designated parking areas (i.e. the gated lot for Troop F and the parking areas reserved for TSA personnel). In particular, there were approximately four MSP members who preferred to park their expensive high-end personal vehicles in an open visitors space. Tpr. Gillespie, who owned a lat-model

⁵ The gated lot once contained more spaces than presently and all MPS personnel were provided a personally assigned space, but the area was reduced in size several years ago to accommodate the construction of another structure, at which time the only assigned spaces were reserved for supervisory personnel. (*Testimony of Maj. McGinn*)

Jaguar, was one of the Troopers who frequently parked in a visitors space. (*Exhs. 17 through 20, 27, 28 & 30; Testimony of Appellant, Lt. Brooks & Lt. Emmett*)

8. In October 2015, Lt. Emmett, the SP-Logan day shift supervisor, began taking note that most, if not all, visitor parking spaces were filled when he arrived for his shift around 6:00 am. Over the next month or two, he intermittently recorded the date/time and license plate numbers and checked later to see if the vehicles were still there. (*Exh. 15; Testimony of Lt. Emmett*)

9. At some point in October 2015, Lt. Emmett ran a query on one of the vehicles parked in a visitor space and determined that it belonged to J.S., a Trooper assigned to Troop F. He also noted that a vehicle he knew to belong to Tpr. Gillespie was parked in another visitor space. He informally spoke to both Troopers and reminded them that they were not to use a visitor space but to park in the gated lot. (*Exh. 15; Testimony of Lt. Emmett*)

10. Later that month, Lt. Emmett saw that Tpr. J.S. had, again, parked his personal vehicle in a visitor space. He again verbally instructed him not to do so. (*Exh. 15; Testimony of Lt. Emmett*)

11. Tpr. Gillespie spoke to Lt. Emmett and, later, to Lt. Brooks (the SP-Logan Station Commander) about the visitor parking situation.⁶ Tpr. Gillespie explained that troopers (including himself) had suffered damage to their personal vehicles when parked in the gated lot, and complained that so long as TSA personnel were also using visitor spaces, it was not fair to enforce the rules against Troopers but not TSA personnel.⁷ Lt. Brooks promised to look into these concerns but, as of January 2016, Tpr. Gillespie had not received a response. (*Exhs, 27, 28 & 30; Testimony of Appellant*)

⁶ I infer that, at all times, in advocating for clarity about the MSP policy for using visitor parking, Tpr. Gillespie acted, in part, in his own self-interest and, in part, in his capacity as the Troop F union representative.

⁷ According to Tpr. Gillespie, the gated lot was also used by family, friends and local celebrities and was often near capacity, especially during school vacations. He also claimed that MSP senior management seemed to target “his” [Troop F’s] “older guys” for what he called “minor infractions” and they had complained that they were “under a microscope.” Specific corroborating evidence of these assertions was not produced. I note that, typically, a total of approximately 40 MPS personnel were on duty for each shift. (*Exhs. 3, 26ID & 30; Testimony of Appellant*)

12. On January 14, 2016, Tpr. J.S. reported late for duty, missing 7:00 am roll call. Later that morning, Lt. Emmett saw that Tpr. J.S. had, again, parked his personal vehicle in a visitor space and noted that the vehicle had remained there until Tpr. J.S. left work that afternoon. (*Exh.15 &16; Testimony of Lt. Emmett*)

13. On January 15, 2016, Lt. Emmett wrote a Supervisory Observation Report (also referred to as an EES, because it is part of the MSP Employee Evaluation System)⁸. The EES cited the conduct of Tpr. J.S. the previous day, i.e. tardiness and parking in a visitor space. The EES informed Tpr. J.S. that he needed to make sure he allowed enough time to arrive for roll call and that, late or not, he must not park in a visitor space or he will be subject to other direct action. In addressing the EES with Tpr. J.S., Lt. Emmett also addressed other issues of concern that had been brought to his attention by Station Commander, Lt. Brooks, such as proper radio etiquette, wearing his issued cover (hat) while on patrol. (*Exhs. 15, 16 & 26; Testimony of Lt. Emmett*)

14. After the January 14, 2016 incident, Lt. Emmett again wrote up an EES on Tpr. J.S. for two subsequent instances of parking in a visitor space. Disciplinary action was not taken against him, however, as he was scheduled to retire, and did retire, in June 2016. (*Exh.18 & Post Hearing Exh. 35; Testimony of Lt. Emmett*)

15. Following roll call (at approximately 7:15 am) on January 20, 2016, having learned about the EES given to Tpr. J.S. (but not yet having seen the document itself), Tpr. Gillespie approached Lt. Emmett and brought up the conversation Lt. Emmett had with Tpr. J.S. on January 15, 2016 about the various issues that had been addressed in the EES and during the conversation with Tpr. J.S. (*Exhs. 15, 26ID & 30; Testimony of Appellant & Lt. Emmett*)

⁸ An EES is used by MSP supervisors as a temporary record use to memorialize positive and negative performance to commend a job well done or to correct negative behavior, respectively, which is place in an employee's file for use in the next formal annual performance evaluation. An EES is not, in itself considered an award or discipline, but may be forwarded up the chain of command with a recommendation for such action if appropriate. (*Testimony of Maj. McGinn, Maj. Christianson, Lt. Brooks & Lt. Emmett*)

16. When the conversation turned to the subject of parking a personal vehicle in a visitor space, Tpr. Gillespie said something to the effect: “I am parked out front [in a visitor space] right now.” (*Exhs.3,10, 12, 19 & 20; Testimony of Appellant & Lt. Emmett*)

17. Lt. Emmett and Tpr. Gillespie provided different versions of the encounter that then ensued. The preponderance of the credible evidence established the following:

- When Tpr. Gillespie stated that his car was then parked in a visitor space, this prompted Lt. Emmett to get up from his desk and peer out the window where he observed that, indeed, a personal vehicle Lt. Emmett knew to be that of Tpr. Gillespie was then parked in a space reserved for visitors.
- Upon observing Tpr. Gillespie’s car in a visitor space, Lt. Emmett turned to face Tpr. Gillespie and said something to the effect: “You need to move your car. How can I EES one of your guys and not EES you?”⁹
- When Tpr. Gillespie did not respond, Lt. Emmett repeated: “Timmy you need to move your car.”
- Tpr. Gillespie then stated something to the effect: “You can EES me if that’s what you have to do. I’m OK with that. I have broad shoulders.”
- Lt. Emmett responded: “Well, if that is the way it is, an EES will work your way”.
- Lt. Emmett “left it at that” and Tpr. Gillespie went on patrol for the day.

(*Exhs.3, 10, 12, 19 & 20; Testimony of Appellant & Lt. Emmett*)¹⁰

18. Later that morning, Lt. Emmett took a photograph showing Tpr. Gillespie’s vehicle remained in the visitor’s space and documented that the vehicle did belong to Tpr. Gillespie. (*Exhs. 17, 20 & 33; Testimony of Lt. Emmett*)

⁹ Lt. Emmett also testified that he thought he first stated that Tpr. Gillespie needed to move his car as he was moving from his desk to the window, but agreed that he probably spoke in a very low tone and agreed that Tpr. Gillespie may not have heard him this first time. (*Testimony of Appellant & Tpr. Gillespie*)

¹⁰ According to Tpr. Gillespie, Lt. Emmet never got up from his desk, never looked out the window (claiming, initially, that his car was not visible from the window and, then, stating that maybe it was visible) and said he never heard Lt. Emmett tell him to move his car during the initial conversation right after roll call. The Internal Affairs investigator and the Trial Board did not find his “recollection” credible, and neither do I. (*Exhs. 3, 10; Testimony of Appellant & Det. Lt. O’Leary*)

19. Lt. Emmett was in the process of writing up an EES incident report concerning the encounter with Tpr. Gillespie when Troop F Captain/ Executive Officer (now Maj.) McGinn called (Lt. Emmett) to report to his office for his annual performance..¹¹ In the course of their discussion, Lt. Emmett mentioned that he was drafting an EES on Tpr. Gillespie, which prompted Capt. McGinn to inquire about the circumstances that resulted in the need for Lt. Emmett to write up such an EES. (*Exh. 15; Testimony of Maj. McGinn & Lt. Emmett*)

20. Upon learning that the nature of the EES involved a report that Tpr. Gillespie had refused to move his car from a visitor space after being told to do so, Capt. McGinn brought Lt. Emmett to the Troop F Commander, Maj. Christiansen, where he repeated the information that Lt. Emmett had just relayed to Capt. McGinn about the incident with Tpr. Gillespie that morning. (*Exhs. 15 & 28; Testimony of Maj. McGinn, Maj. Christiansen & Lt. Emmett*)

21. Maj. Christiansen ordered Lt. Emmett to draft a To/From memo to him and Capt. McGinn, which he later completed, along with the EES report, before leaving for the day. In addition to describing the initial incident, the To/From (entitled Refusal of Trooper Timothy Gillespie . . . to Obey Direct Order) also related the subsequent encounter between them when Lt. Emmett delivered the EES report to Tpr. Gillespie (who had stayed after hours on an overtime or detail shift). (*Exhs. 12, 15, 19 & 28; Testimony of Maj, Christiansen & Lt. Emmett*)

22. Later that day, Lt. Emmett called Tpr. Gillespie into his office and presented him with the completed EES. Tpr. Gillespie said he would not sign it and left the office without reading the document. (*Exhs. 3, 10, 12, 15, 19 & 30; Testimony of Appellant & Lt. Emmett*)

23. When Tpr. Gillespie eventually decided to read the EES, he went back to see Lt. Emmett, claiming that the EES was a complete fabrication that set him up for refusing to obey a direct

¹¹ Capt. McGinn was promoted in January 2017 and assumed the position of Troop F Commander upon the retirement of his predecessor, Maj. Christiansen. (*Testimony of Maj. McGinn & Maj. Christiansen*)

order, which he knew, in effect, was insubordination. At this time, he also renewed his objections that nothing was being done to keep TSA employees out of the visitor spaces and stated an intention to begin to ticket them himself. (*Exh. 30; Testimony of Appellant & Lt. Emmett*)

24. Tpr. Gillespie also went to see Maj. Christiansen and vented his frustration for being set up for discipline on an EES that he, again, called a complete fabrication. Maj. Christiansen replied that Tpr. Gillespie needed to get union representation. (*Exh. 28 & 30; Testimony of Appellant & Maj. Christiansen*)¹²

25. After speaking with Maj. Christiansen, Trooper Gillespie moved his personal vehicle from the visitor space to the gated lot. (*Exh. 30; Testimony of Trooper Gillespie*)¹³

26. On January 21, 2016, Maj. Christiansen forwarded Lt. Emmett's To/From to his commanding officer, Lt. Col. Amodeo, Division of Field Services, with a request that an Internal Affairs investigation be conducted into Tpr. Gillespie's actions. Maj. Christiansen also spoke personally with Lt. Col. Amodeo to explain that he was requesting an investigation by Internal Affairs, rather than by anyone on the command staff at the Troop level, due to the nature of the incident and, in particular, the fact that Troop F command staff credibility was an issue, which warranted independent review. (*Exhs. 11 & 28; Testimony of Maj. Christiansen*)

27. On January 22, 2016, Tpr. Gillespie was informed that an Internal Affairs investigation was initiated into a complaint that he had been insubordinate towards Lt. Emmett as outlined in the January 20, 2016 To/From memo which was provided to Tpr. Gillespie. (*Exhs. 13 & 14*)

¹² In February 2016, the MPS did issue a written directive that clarified the SP-Logan parking policy. (*Order 2016-FHQ-001*)

¹³ The To/From memo reported that, when presented with the EES report Tpr. Gillespie challenged Lt. Emmett to EES him again or charge him with insubordination because he would park there again. Tpr. Gillespie denies making such a statement. It is not disputed that, following his encounter with Maj. Christiansen, Tpr. Gillespie did move his car and never, again, parked it in the visitor lot. The discipline in this matter was imposed solely for Tpr. Gillespie's behavior in the initial colloquy right after roll call; Tpr. Gillespie was exonerated for his subsequent behavior, which is not disputed, in issuing parking tickets on vehicles parked in the visitor spaces that he claimed were owned by TSA employees or other unauthorized users. (*Exhs. 1 through 3, 9, 15, 23ID through 25ID, 28 through 30; Testimony of Appellant, Lt. Emmett, Lt. Brooks, Maj. McGinn & Maj. Christiansen*)

28. The Internal Affairs investigators collected over two dozen exhibits and held recorded interviews with Lt. Emmett (January 26, 2016), Tpr. J.S. (February 1, 2016), Lt. Brooks (February 2, 2016) Maj. Christiansen (February 9, 2016) and Tpr. Gillespie (August 23, 2016) Interviews were also conducted of certain TSA personnel who had been the subject of ticketing by Tpr. Gillespie following the January 20, 2016 incident. (*Exhs. 10, 15, 26ID, 27, 28 & 30*)

29. On September 22, 2016, the Internal Affairs investigator submitted a report that detailed the information gathered during the investigation and concluded with two recommendations:

- A. Regarding the allegation that Trooper Timothy M. Gillespie . . . was insubordinate when he refused to obey the order of Lieutenant Kevin Emmett to remove his personal vehicle from the visitors parking area in front of SP-Logan on January 20, 2016, there is sufficient evidence to support employee misconduct – **SUSTAINED**.
- B. Regarding the allegation that Trooper Timothy M. Gillespie . . . inappropriately targeted TSA employees’ vehicles in the visitors parking area in front of SP-Logan for issuance of parking tickets on several dates in January of 2016, this incident occurred, but the employee’s actions were lawful and proper – **EXONORATED**.

(*Exh. 10; Testimony of Det. Lt. O’Leary*)

30. On April 14, 2017, a duly convened Trial Board issued unanimous Findings and Recommendations, to wit:

“Regarding . . . Charge1, Specification 1 (Insubordination) . . . Trooper Gillespie . . . on or about January 20, 2016, did fail to promptly obey a lawful order conveyed to him by a senior member of proper authority. This occurred when Trooper Gillespie failed to comply with a lawful order issued by Lieutenant Kevin D. Emmett . . . to remove his personal vehicle from the visitors’ parking area in front of SP Logan . . .in direct violation of Article 5.12.1.¹⁴ This is a Second Offence Class “B” violation.”

(*Exhs. 3 & 6 through 8*)

31. The Trial Board found that Tpr. Gillespie’s “intentions may have been honorable”, but his actions constituted a failure to obey a lawful order. The Trial Board recommended the minimum

¹⁴ Article 5.12.1 states: “Members shall promptly obey any lawful order conveyed to them by any senior member of proper authority. For the purposes of this Article an order can be written or verbal.” (*Exh. 5*)

punishment for a second Class B violation prescribed by the MSP Rules & Regulations, i.e., 10 days loss of accrued time (in lieu of suspension).(*Exhs.3 & 6 through 8*)

32. On April 19, 2017, MSP Colonel McKeon issued Personnel Order 17PER130 finding Tpr. Guilty of Charge 1, Specification and ordering him to forfeit ten (10) days accrued time off. This appeal duly ensued. (*Exhs. 1 & 2; Claim of Appeal*)

33. By ruling dated July 12, 2018, the Commonwealth of Massachusetts Department of Labor Relations (DLR) issued rulings in two related administrative proceeding (SUP-17-5969, 6019) alleging charges of prohibited practices brought by SPAM for, among other things, alleged retaliation by the MSP against Tpr. Gillespie for engaging in protected union activity by disciplining him for insubordination in April 2017. The rulings found no probable cause for the alleged prohibited labor practice based on the claim of retaliatory discipline by the MSP against Tpr. Gillespie.¹⁵ The DLR administrative rulings (and the underlying DLR investigative recommendations) appear to be duly promulgated official records of the DLR. I take administrative notice of these rulings. (*PHExh.36*)

APPLICABLE LEGAL STANDARD

G.L.c.31,§41-§45, made applicable to MSP members (Troopers) by G.L.c.22C,§13, requires that discipline of a tenured member may be imposed only for “just cause” after due notice and hearing (which must be conducted prior to imposing discipline other than a suspension¹⁶ from the payroll for less than five days) and a written notice of decision that states “fully and

¹⁵ The DLR did find that SPAM had shown probable cause of prohibited practices for certain unrelated statements by Maj. McGinn and Lt. Emmett’s action in cutting a lock on a locker belonging to Tpr. Gillespie. (*PHExh.36; Testimony of Lt. Emmett*)

¹⁶ Forfeiture of accrued pay has been construed as equivalent to suspension and subject to hearing and notice requirements of c.31. See Johnson v. Sup’tt of Mass. State Police, 416 Mass. 616 (1993); Doherty v. Mass. Civil Service Comm’n, Suffolk C.A. 2016-02143-H (Sup.Ct.2018) (Ullmann, J.); Dep’t of State Police v. Civil Service Comm’n, 24 Mass.L.Rptr.35, 2008WL1932961 (2008) (MacDonald, J.); Mass. Dep’t of State Police v. Civil Service Comm’n, Suffolk C.A..07-3766-A (Sup.Ct. 2008) (Qunlan, J.) The MSP notice of discipline acknowledged Trooper Gillespie’s right to a c.31 appeal from the forfeiture decision (*Exh. 1*).

specifically the reasons therefore.” G.L.c.31,§41. An employee aggrieved by such disciplinary action may appeal to the Commission, pursuant to G.L.c.31,§42 and/or §43, for de novo review by the Commission “for the purpose of finding the facts anew.” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited.

The Commission’s role is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). See also Police Dep’t of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm’n, 38 Mass.App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, rev.den., 390 Mass. 1102 (1983).

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence¹⁷, when weighed by an unprejudiced¹⁷ mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971); City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) See also Mass. Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001).

The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm’n, 43 Mass.App.Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass.

¹⁷ It is within the hearing officer’s purview to determine the credibility of live testimony. E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003). See Embers of Salisbury, Inc. v. 37 Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988); Doherty v. Ret. Bd. of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003) (where witnesses gave conflicting testimony, assessment of their relative credibility cannot be made by someone not present at the hearing).

508, 514 (1983) The Commission is guided by “the principle of uniformity and the ‘equitable treatment of similarly situated individuals’ [both within and across different appointing authorities]” as well as the “underlying purpose of the civil service system ‘to guard against political considerations, favoritism and bias in governmental employment decisions.’ ” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of “merit principles” which govern civil service law that discipline must be remedial, not punitive, designed to “correct inadequate performance” and “separating employees whose inadequate performance cannot be corrected.” G.L. c.31,§1.

G.L.c.31, Section 43 vests the Commission with “considerable discretion” to affirm, vacate or modify discipline but that discretion is “not without bounds” and requires sound explanation for doing so. See, e.g., Police Comm’r v. Civil Service Comm’n, 39 Mass.App.Ct. 594, 600 (1996) (“The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio . . . accorded the appointing authority”) Id., (*emphasis added*). See also Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983).

The Commission also must take into account the special obligations the law imposes upon police officers, who carry a badge and a gun and all of the authority that accompanies them, and which requires police officers to comport themselves in an exemplary fashion, especially when it comes to exhibiting self-control and to adhere to the law, both on and off duty. “[P]olice officers voluntarily undertake to adhere to a higher standard of conduct Police officers must comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel. . . . they implicitly agree that they will not engage in conduct which calls into question

their ability and fitness to perform their official responsibilities.” Attorney General v. McHatton, 428 Mass. 790, 793-74 (1999) and cases cited. See also Falmouth v. Civil Service Comm’n, 61 Mass.App.Ct. 796, 801-802 (2004); Police Commissioner v. Civil Service Comm’n, 39 Mass.App.Ct. 894, 601-602 (1996); McIsaac v. Civil Service Comm’n, 38 Mass.App.Ct. 473, 475-76 (1995); Police Commissioner v. Civil Service Comm’n, 22 Mass.App.Ct. 364, 371, rev.den. 398 Mass. 1103 (1986) See also Spargo v. Civil Service Comm’n, 50 Mass.App.Ct. 1106 (2000), rev.den., 433 Mass. 1102 (2001).

ANALYSIS

The MSP has proved that it had just cause to impose discipline upon Tpr. Gillespie for his failure to “promptly obey [the] lawful order” conveyed to him by a superior, i.e, the need to move his personal vehicle to the gated parking area designated for that purpose. I credit the testimony and other evidence presented by the MSP that proved Tpr. Gillespie was given such a lawful order and did not obey it in a timely fashion as MSP Rule 5.12 requires. Although he may have had bona fide reasons to believe that he had done nothing wrong (in choosing to park his personal vehicle in an area reserved for visitors), that belief does not excuse his failure to comply with a superior officer who made it clear that this underlying behavior was not acceptable and required prompt corrective action.

First, the issue before the Commission does not turn on whether Lt. Emmett was lawfully entitled to direct Tpr. Gillespie (and other Troop F personnel) to park their personal vehicles only in the designated gated area and demand that they not make use of visitor spaces. The authority of the MSP Troop F command staff to decide where MSP personnel are permitted to park, and to enforce its decisions, cannot be disputed. While there may be some reasonable dispute about the best practices for regulating the competing interests in providing appropriate parking access to

SP-Logan personnel, compliance with the rules, as they may be established from time to time, is not a matter of personal discretion. The fact that MSP had not responded to Tpr. Gillespie's requests for action on the parking issues does not excuse his personal defiance. Tpr. Gillespie, especially, as a SPAM union representative and member of its Executive Board, knows that, when given a lawful order with which he may happen to disagree, he is obliged to comply with the order and, separately, follow through with a proper protest through appropriate channels (i.e., what is sometimes called the duty to "obey and then grieve").¹⁸

Second, I am persuaded by the preponderance of the credible evidence that, despite Tpr. Gillespie's assertion to the contrary, Lt. Emmett did, in fact, "convey" a "lawful order" that obliged Tpr. Gillespie "promptly" to move his car from the visitor area to the gated lot. Although the MSP's witnesses provided somewhat different recollections about the events of January 20, 2016, on the material issue of whether or not a lawful order was conveyed to Tpr. Gillespie "to move his car", I credit the testimony of Lt. Emmett that he did so, probably more than once, during the initial encounter with Trooper Gillespie right after roll call. While I find it plausible that Tpr. Gillespie may not have heard every word uttered by Lt. Emmett, it does not ring true to me that he did not see Lt. Emmett get up, walk past him, look out the window and state directly, at least once, to his face, words to the effect: "Timmy, you have to move your car." I do not credit Tpr. Gillespie's claim that Lt. Emmett's description of this aspect of the encounter was a "complete fabrication."

¹⁸ The reasonableness of the SP-Logan parking arrangements is not before the Commission. I note, however, that some of the concerns expressed by Tpr. Gillespie seem less than compelling. For example, he claimed that there were only about four or five troopers with "high-end" cars who utilized the visitor spaces and, with 136 available spaces in the gated lot, it seems improbable that reasonable minds could not design suitable ways to accommodate those troopers' fear of having their cars "dinged" by unknown parties, assuming such a problem was considered a legitimate concern that needed to be addressed. Similarly, Tpr. Gillespie claimed that, between the MSP troopers and the TSA personnel using the visitor lot, it filled up early every day, which would only seem to exacerbate the problem that bona fides visitors would never be able to find a spot, giving more support to MSP's rationale for keeping troopers' personal vehicles from using those spaces for all-day or all-night parking.

Third, I am convinced that, as the situation unfolded, Lt. Emmett found himself in a difficult position. Had Tpr. Gillespie's EES percolated up through the station commander (Lt. Brooks), rather than the Troop command structure (Capt. McGinn & Maj. Christiansen) – it is likely that Tpr. Gillespie might have escaped with a lesser discipline, if not entirely unscathed, and that may well have been what Lt. Emmett and Tpr. Gillespie had originally expected.¹⁹ However, upon coming to learn of the incident, Capt. McGinn and Maj. Christiansen were wholly within their lawful authority to direct Lt. Emmett to process the matter through them and, they, in turn, took the prudent and lawful steps to forward the matter further up the command structure. I need not consider what might have been, if Lt. Emmett had not be asked about the matter by his superiors or chosen to provide them less than the unvarnished truth, as I find he did.

Fourth, I have carefully considered Tpr. Gillespie's claim that he was treated differently, both procedurally and substantively, from other similarly situated troopers who had committed the similar violations. While it is true that his case was handled by Internal Affairs rather than through a more local investigation, I agree with the MSP's justification for following that process in this particular case. As Maj. Christiansen explained, his decision was actually intended to provide a more "independent" review of the matter than might have been the case if a member of the Troop F command structure was asked to investigate allegations of peers in the command structure. Similarly, I do not find that the situation involving Tpr. J.S. demonstrates that the MSP provided disparate treatment of that trooper over Tpr. Gillespie. As indicated above, Tpr. Gillespie was disciplined for insubordination; Tpr. J.S. was reprimanded for a parking violation, not insubordination. When he did subsequently violate the order to stay out of the visitor parking area, he, too was scheduled to be processed for further discipline, which never

¹⁹ Lt. Brooks had suggested that he might have taken less umbrage at Tpr. Gillespie's behavior than did others did, noting that, in general, parking violations were typically addressed "verbally." (*Exh. 27; Testimony of Lt. Brooks*)

took place when that trooper decided to retire. Finally, I take note that Tpr. Gillespie's discipline included a four-day forfeiture for a prior (2011) "Class B" violation.

Fifth, I have also considered Tpr. Gillespie's contention that his discipline was retaliatory in nature, attributed to his position and/or advocacy as a SPAM representative. While there was no dispute that Tpr. Gillespie was engaged in a variety of union activities, including litigation, that challenged certain Troop F actions as unlawful labor practices, the evidence did not establish a sufficient nexus, through direct evidence or by inference, that his union activities – even those related directly to the parking issue – played a material role in the discipline involved. In this regard, I note that the Troop F command decision to devolve the investigation to Internal Affairs, and the ultimate recommendations being through a Trial Board, are significant indicators that show a lack of nexus to Tpr. Gillespie's advocacy on behalf of Troop F members. Finally, I take notice of the DLR decisions noted earlier, which found that Tpr. Gillespie's 2016 discipline was not taken in retaliation for any of his union activities. While the Commission may not be expressly bound by that decision, I find it persuasive and corroborative of the conclusion I reach in the matter from the other evidence described above that was presented to the commission. See generally, Town of Dedham v. Labor Relations Comm'n, 365 Mass. 392 (1974), cited in Fernandes v. Attleborough Housing Auth., 470 Mass. 117 (2014)

Sixth, I have considered, whether the Commission should exercise its discretion to modify the discipline imposed. Here, save for the findings above that Tpr. Gillespie did move his car at the end of the day on January 20, 2016 and did not again park in a visitor space, the findings of fact set forth above do not materially differ from those upon which the Trial Board's recommendation was grounded and the penalty imposed by the MSP Colonel for the offense.

Accordingly, I conclude that this is not a matter on which the penalty imposed should be modified.

For these reasons, the Appellant's appeal under Case No. D-17-78 is hereby **DENIED**.

Civil Service Commission

/s/ Paul M. Stein
Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman [absent], Stein and Tivnan, Commissioners) on October 24, 2019.

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:

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