

The Commonwealth of Massachusetts

SUFFOLK, ss.

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

**NICHOLAS
INTERNICOLA,**
Appellant

v.

**DEPARTMENT OF
STATE POLICE,**
Respondent

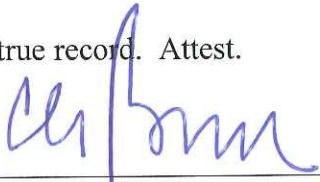
Case No.: D-10-231

DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on August 11, 2011 to acknowledge receipt of the report of the Administrative Law Magistrate dated June 2, 2011. The Commission received comments from the Respondent on July 14, 2011. The Commission voted to adopt the findings of fact and the recommended decision of the Magistrate therein. A copy of the Magistrate's report is enclosed herewith. The Appellant's appeal is hereby *allowed in part*. His discipline is reduced from a sixty (60) days suspension, forfeiture of twenty (20) days accrued time and permanent transfer out of Troop F to fifteen (15) days suspension.

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell and Stein, Commissioners) on August 11, 2011.

A true record. Attest.



Christopher C. Bowman
Chairman

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)(I), 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. *See Curley v. Lynn*, 408 Mass 39, 41-42 (1990).

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.

Notice to:

Scott W. Dunlap, Esq. (for Appellant)
Jermain Kidd, Esq. and LaDonna Hatton, Esq. (for Appointing Authority)
Richard C. Heidlage, Esq. (DALA)



THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

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BOSTON, MA 02114

RICHARD C. HEIDLAGE
CHIEF ADMINISTRATIVE MAGISTRATE

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June 2, 2011


Christopher C. Bowman, Chairman
Civil Service Commission
One Ashburton Place, Room 503
Boston, MA 02108

Re: Nicholas Internicola v. Department of State Police
DALA Docket No. CS-11-16
CSC Docket No. D-10-231

Dear Chairman Bowman:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c)(1), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

Sincerely,



Richard C. Heidlage
Chief Administrative Magistrate

RCH/mbf

Enclosure

cc: Scott W. Dunlap, Esq.
Jermaine Kidd, Esq.
LaDonna Hatton, Esq.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Nicholas Internicola,
Appellant

v.

Docket No. D-10-231
DALA No. CS-11-16

Department of State Police,
Respondent

Appearance for Appellant:

Scott W. Dunlap, Esq.
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100 River Ridge Drive, Suite 203
Norwood, MA 02062

Appearance for Respondent:

Jermaine Kidd, Esq.
LaDonna Hatton, Esq.
Department of State Police
470 Worcester Road
Framingham, MA 02186

Administrative Magistrate;

Maria A. Imparato, Esq.

SUMMARY OF RECOMMENDED DECISION

Although the Appointing Authority had reasonable justification for imposing discipline for the Appellant's failure to report a cruiser crash, there was no reasonable justification for imposing discipline for failure to report for a voluntary overtime shift. The discipline imposed was unduly harsh, amounts to disparate treatment, and was retaliatory.

RECOMMENDED DECISION

Nicholas Internicola is appealing under M.G.L. c. 31, s. 43 the decision of the Appointing Authority, Department of State Police (Department), to suspend him from his position as a state trooper for sixty days, to require him to forfeit twenty days accrued

time off, and to transfer him permanently out of Troop F for failure to report a cruiser crash, and for failure to report for a voluntary overtime shift.

I held a hearing on January 14, 2011 at the office of the Division of Administrative Law Appeals, 98 North Washington Street, Boston, MA. I admitted documents into evidence. (Exs. 1 – 32) Testifying on behalf of the State Police were Trooper Thomas Fritz; Sergeant Timothy Luce; Sergeant Brian Duffy; and Sergeant Gerald Fimiani. The Appellant, Nicholas Internicola, testified on his own behalf.

The record closed on February 23, 2011 with the filing of post-hearing briefs.

FINDINGS OF FACT

1. Nicholas Internicola has been a State Police Trooper for more than 30 years. In 2009, he was assigned to the State Police Division of Field Services, Troop F at Logan Airport.
Failure to report damage to cruiser
2. Troopers assigned to Troop F are not assigned to a specific police cruiser. Each Trooper is assigned a cruiser from the cruiser pool for each shift. Prior to beginning his shift, each Trooper is responsible to perform a cruiser inspection and fill out a cruiser inspection form noting any damage to the cruiser. (Testimony, Fritz; Ex. 7.)
3. Under General Order number TRF-20 relative to cruiser crash investigations, all cruiser crashes must be “immediately reported to the Troop Duty Officer of jurisdiction; and documented in a written report.” The Trooper involved in the crash must complete and fax the Preliminary Investigation of Cruiser Crash SP 425 “prior to the completion of tour of duty,” take photographs of

the damage and complete certain forms for the registry of Motor Vehicles.

(Ex. 30, pp. 1 - 2.)

4. On April 6, 2009, Trooper Internicola worked on the 3 – 11 p.m. shift. At about 8 p.m., he was on patrol in cruiser 79F at the Logan Airport parking garage on the top level, which is open to the elements. It was raining. Trooper Internicola was turning left when he hit a small parking pole, the height of which was lower than the cruiser's hood. He got out of the cruiser in the rain to inspect the front bumper. He decided that the slight damage he saw was too insignificant to report. He finished his shift without reporting the incident. (Testimony, Internicola; Exs. 18, 20, 31, 32.)
5. Trooper Thomas Fritz was assigned to cruiser 79F on the next shift beginning at 11 p.m. Trooper Fritz performed a cruiser inspection and completed a cruiser inspection form at the beginning of his shift; he did not see or report any damage on cruiser 79F. The cruiser was parked head in towards the wall on the side of the barracks. (Testimony, Fritz; Ex. 7.)
6. Trooper Fritz then took cruiser 79F to a gas station about 1/8 of a mile away to get coffee. It was then that he noticed the dent on the push bumper. Trooper Fritz called Sgt. Timothy Luce, who was the Desk Sergeant, to report the damage to the push bumper. Sgt. Luce told Trooper Fritz to return to the barracks. (Testimony, Fritz; Luce; Ex. 15.)
7. At the barracks, Sgt. Luce observed the damage to the push bumper. He amended Trooper Fritz's cruiser inspection form to reflect the dent to the push bumper. (Testimony, Fritz; Ex. 7.)

8. On April 7, 2009, Sgt. Luce prepared a memo to the Troop F Patrol Operations Commander with respect to the damage to the push bumper on cruiser 79F. Sgt. Luce noted the three Troopers who had been assigned to cruiser 79F during the three shifts on April 6, 2009. (Ex. 13.)
9. Sgt. Luce checked the prior inspection reports from April 6, 2009 and saw that no damage to cruiser 79F had been reported. He noted that Trooper Internicola had used cruiser 79F on the evening shift of April 6, 2009. (Ex. 14.)
10. On April 7, 2009, Sgt. Luce informed Lt. Bruce Lint of the damage to cruiser 79F. Lt. Lint spoke with Trooper Internicola about the damage. Trooper Internicola “immediately responded that he caused the damage to cruiser 79F by striking a pole during the eve shift of April 07, 2009.” (Ex. 16.)
11. On April 7, 2009, Trooper Internicola prepared a memo to the Commander of Troop F indicating that on the evening of April 6, 2009, while he was making a facility check and “during heavy rain” he hit a pole below his line of sight rolling less than 5 mph. “The impact was so slight and insignificant, that upon initial inspection in the pouring rain the damage I observed was so minor, that I did not feel it was necessary to report. Once brought to my attention, and questioned on the condition of cruiser 79F on the following eve. shift, this officer did not deny responsibility to Lieutenant Bruce Lint and Lieutenant Carmelo Ayuso.” (Ex. 31.)
12. On April 7, 2009, Trooper Internicola prepared a Motor Vehicle Crash Operator Report for the Commonwealth Registry of Motor Vehicles.

(Ex. 20.)

13. On April 9, 2009, Captain Daniel F. Risteen, Troop F Executive Officer, assigned Sgt. Brian Duffy to investigate the damage to cruiser 79F. Sgt. Duffy filled out a Troop F Cruiser Crash & Injury Check-off List. He also took a picture of a concrete pole in the parking garage. (Testimony, Duffy; Exs. 17, 18.)
14. On or about May 11, 2009, Troop F Commander Concannon prepared a Cruiser Crash Review Form finding that Trooper Internicola did not exercise due care and was at fault. Commander Concannon recommended that Trooper Internicola be issued a Letter of Counseling. (Ex. 21.)
15. Under the Mass. State Police Rules and Regulations, a letter of counseling is a formal document specifying the member's deficiency. If the letter of counseling is placed in the member's personnel file, the member may write a rebuttal to be placed in his file. A letter of counseling expires one year from the date of issue and a member may request its removal from his file at that time. If a second letter of counseling is filed prior to the expiration of the first letter of counseling, the member may request removal from his file on the expiration date of the most recent letter. (Ex. 4, p. 4, section 6.3.)
16. Many of the cruisers in the Troop F cruiser pool have damage that has never been repaired. Cruiser 79F is still in use; the push bumper has never been repaired. (Testimony, Fritz; Luce; Duffy; Ex. 8.)
17. As of April 5, 2010, the only other Trooper who has been disciplined since 2000 for failing to report a cruiser accident was issued a Letter of Counseling

for failure “to conform to work standards established for your position when you failed to take appropriate action when reporting the extent of damage to your cruiser, elevating the classification to a Type II cruiser crash.” This was the Trooper’s Second Offense Class C violation. (Ex. 12.) Under the Discipline guidelines, a second Class C violation merits “Suspension of not less than one (1) day nor more than fifteen (15) days.” (Ex. 4, Appendix “A.”)

Failure to report for overtime shift

18. Trooper Internicola failed to report for an overtime shift at Hanscom Field in Bedford, MA beginning at 11 p.m. on Sunday, June 21, 2009 and ending at 7 a.m. on Monday, June 22, 2009. (Testimony, Fimiani; Internicola; Ex. 23.)
19. At 11 p.m. on Sunday, June 21, 2009, Trooper Internicola was on an airplane flight from Chicago to Boston. (Testimony, Internicola.)
20. When Trooper Internicola signed up for the overtime shift, he thought he was signing up for a shift that began at 11 p.m. on Monday, June 22, 2009. The shift he signed up for was the “Mid Shift for 06-22-09.” (Testimony, Internicola; Ex. 26.)
21. Trooper Internicola went to Chicago on Wednesday, June 17, 2009. The overtime list was posted on Thursday, June 18, 2009. When Trooper Internicola’s flight landed in Boston at about 12:45 a.m. on Sunday night/Monday morning, he found a cell phone call telling him that he had missed his shift. (Testimony, Internicola.)

22. Lt. Dean Bennett filed a Supervisory Observation Report dated June 22, 2009 noting that Trooper Internicola failed to report for the overtime shift, finding that he was “derelict in your duties by not reporting to an assignment.” (Ex. 22.)
23. On the same date, Lt. Bennett sent a memo to Trooper Internicola ordering him to “prepare a To-From to my attention regarding the reasons for your failure to appear. Please submit this to me by June 29, 2009.” (Ex. 23.)
24. By memo of June 29, 2009, Trooper Internicola indicated, “At the time of signing up for the following weeks work, it was not my intention to be available for the mid shift on Sunday night into Monday. But, Monday into Tuesday because I knew I would be returning late Sunday night. This was a legitimate mistake on my part, and in no way done maliciously or deliberately to thwart my responsibility for duty. My flight from Chicago was departing at 2200 hrs. (Local Chicago time) arriving Boston at approximately 0100 hrs. Monday morning.” (Ex. 24.)
25. When Trooper Internicola did not arrive for his shift on Sunday, June 21, 2009 at 11 p.m., the Duty Officer was unable to reach him. The Duty Officer then consulted the Mid Shift Overtime Availability list with no takers. The Duty Officer contacted Trooper Hogdon at 11:45 p.m. who accepted the shift. (Exs. 25, 26.)
26. Sergeant Gerald Fimiani was assigned on July 8, 2009 to conduct a complaint investigation of the incident. By memo of July 20, 2009, Sgt. Fimiani found

- that the complaint was sustained because Trooper Internicola failed to report for his overtime assignment on June 21, 2009 at 11 p.m. (Ex. 27.)
27. About a month before this incident the policy changed so that when a Trooper signed up for a Monday midnight *paid detail*, his work began at 11 p.m. on Monday. When signing up for a Monday midnight *overtime* shift, the work began on Sunday night at 11 p.m. (Testimony, Internicola.)
28. When Trooper Internicola signed up for the Monday midnight overtime shift, he thought he was signing up to begin on Monday night at 11 p.m. This was the first overtime shift he had signed up for since he had been stationed at Logan. (Testimony, Internicola.)
29. As of January 2, 2011, the starting times for overtime and paid detail work are treated in the same manner. (Ex. 28.)
30. Trooper Internicola is not aware of any other Trooper who has been disciplined for failing to report for an overtime shift. (Testimony, Internicola.)
31. When a Trooper fails to report for a voluntary overtime shift, the shift commander will seek to find a replacement from the call list. (Testimony, Fritz, Luce, Duffy, Fimiani.)

Discipline

32. By letter of July 29, 2009, Lieutenant Colonel Francis J. Matthews notified Trooper Internicola's counsel that Trooper Internicola was charged with violation of Article 5.1, Violation of Rules, and violation of Article 5.8.2,

Unsatisfactory Performance, with respect to the cruiser accident. He recommended a 30 day suspension without pay. (Ex. 1.)

33. By letter of October 26, 2009, Lieutenant Colonel Francis J. Matthews notified Trooper Internicola's counsel that Trooper Internicola was charged with violation of Article 5.1, Violation of Rules, and violation of Article 5.8.2, Unsatisfactory Performance for "failure to report for his assigned detail"¹ on June 21, 2009. He recommended a 10 day suspension without pay. (Ex. 2.)
34. On August 27, 2009, the Civil Service Commission issued a decision in an unrelated case² finding that the Department of State Police did not have just cause to discipline Trooper Internicola. The 15 day suspension he had received in this matter was overturned. (Testimony, Internicola.)
35. In November 2009, a Personnel Order issued to overturn the 15 day suspension. (Testimony, Internicola.)
36. Lieutenant Colonel Jack Dunn offered Trooper Internicola a negotiated deal with respect to the instant charges: If Trooper Internicola would forgo the 15 days of pay due to him from the prior case, the State Police would impose only a 15 day suspension for the current cases. (Testimony, Internicola.)
37. Trooper Internicola did not agree to the deal. He received the money due him for the overturned suspension in July 2010. (Testimony, Internicola; Ex. 29.)
38. On August 31, 2010, a Trial Board convened with respect to the instant charges. On September 1, 2010, the Trial Board issued its findings and recommendation. The Trial Board concluded that Trooper Internicola

¹ Trooper Internicola failed to report for an *overtime* shift, not for a *paid detail*.

² Civil Service docket number D-07-158, Ex. 6.

- violated Article 5.1, Violation of Rules and Article 5.8.2, Unsatisfactory Performance with respect to his failure to report the cruiser crash. (Ex. 3.)
39. The Trial Board concluded that Trooper Internicola violated Article 5.1, Violation of Rules, Article 5.8.2, Unsatisfactory Performance, and Procedure ADM-25 relative to *paid details* with respect to his failure to report for his overtime shift on June 21, 2009. (Ex. 3.)
40. The Trial Board recommended a 30 day suspension without pay, plus forfeiture of 10 days of accrued time with respect to the cruiser incident, and an additional 30 day suspension without pay, and forfeiture of an additional 10 days of accrued time for failing to report for his overtime shift. The Trial Board also recommended that Trooper Internicola be permanently transferred out of Troop F. (Ex. 3.)
41. By letter of September 2, 2010, Colonel Marian J. McGovern, Superintendent, informed Trooper Nicola that he was suspended without pay for 60 days, that he would forfeit twenty days of accrued time off, and that he was permanently transferred out of Troop F. (Ex. 3.)
42. Trooper Internicola's previous discipline consisted of: 1) a letter of counseling in July, 2004; 2) a forfeiture of 10 days of accrued time and a transfer from Turnpike Headquarters to South Boston Headquarters in March 2005; and 3) forfeiture of 15 days of accrued time in September 2005, affirmed by the Civil Service Commission. (Ex. 6.)
43. Trooper Internicola's alleged infractions with respect to the cruiser crash and the missed overtime shift are deemed to be his third, fourth, fifth and sixth

Class C violations. Under the Discipline Guidelines, third and subsequent Class C offenses merit "Suspension of not less than fifteen (15) days up to and including termination." (Ex. 4, Appendix "A.")

Overtime v. Paid Details

44. Working overtime and working on paid details are distinguishable events. When working overtime, a Trooper performs his normal patrol duties. When working a paid detail, the Trooper's work is not part of his regular patrol duties. A Trooper working a paid detail might maintain safe and efficient traffic flow at roadway work sites, and/or provide crowd control and security at major sporting, civic and special events. A paid detail is a "voluntary assignment paid for by an outside entity which has been authorized by the Colonel/Superintendent." (Ex. 9.)
45. The Collective Bargaining Agreement (CBA) addresses overtime and paid details in separate sections. Article 8, Section 2 indicates that an employee shall be compensated at the rate of time and one half of his regular hourly rate of pay for authorized overtime work performed in excess of his regular shift, tour of duty, or regularly scheduled work week. (Ex. 5, p. 7.)
46. Overtime shifts may be filled only by Troopers assigned to Troop F. A Trooper may be ordered to work an overtime shift if the shift is not filled voluntarily. (Testimony, Internicola, Duffy, Luce, Fimiani.)
47. A paid detail is voluntary. A Trooper cannot be ordered to work a paid detail. All Troopers who work a paid detail, regardless of rank, are compensated at the detail rate. Paid details are open to any State Trooper. Paid details are

governed by General Order ADM-25 and Article 30 of the CBA. (Testimony, Internicola, Duffy, Luce, Fimiani; Ex. 9; Ex. 5, pp. 32-33.)

CONCLUSION AND RECOMMENDATION

The role of the Civil Service 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.” *City of Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300, 304 (1997). An action is “justified” when it is done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rule of law. *Id.* at 304, quoting *Selectmen of Wakefield v. Judge of First District Court of E. Middlesex*, 262 Mass. 477, 482 (1928); *Commissioners of Civil Service v. Municipal Ct. of the City of Boston*, 359 Mass. 211, 214 (1971). 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.” *Murray v. Second Dist. Ct. of E. Middlesex*, 389 Mass. 508, 514 (1983).

The Appointing Authority’s burden of proof is one of a preponderance of the evidence, which is established “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). If the Commission finds by a preponderance of the evidence that there was just cause for an action taken against an

Appellant, the Commission shall affirm the action of the Appointing Authority. *Town of Falmouth v. Civil Service Commission*, 61 Mass.App.Ct.796, 800 (2004).

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, 334 (1983).

Cruiser accident

The Appointing Authority had reasonable justification to discipline the Appellant for his failure to report the cruiser crash. Such failure violates Rule 5.1, Violation of Rules; Rule 5.8.2., Unsatisfactory Performance; and General Order TRF-20 relative to Cruiser Crash Investigation.

The Appellant had a clear duty, enunciated in TRF-20, to report immediately the cruiser crash to the Troop Duty officer, document the incident in a written report, complete and fax the Preliminary Investigation of Cruiser Crash SP 425 prior to the completion of his tour of duty, take photographs of the damage and complete certain forms for the Registry of Motor Vehicles. The Appellant failed to follow these directives because he thought the damage to the cruiser was insignificant based on his examination of the push bumper in the rain on the top level of the Logan parking garage. He apparently failed to re-examine the push bumper at the end of his tour of duty.

The Appellant also violated Rule 5.1: “Members shall not commit, nor cause to be committed, any act(s) or omit any act(s) which constitute(s) a violation of any

Massachusetts State Police Rule, Regulation, Policy, Procedure, Order, or Directive,” because he violated TRF-20.

The Appellant violated Rule 5.8.2: “Unsatisfactory performance may be demonstrated by ... the failure to conform to work standards established for the member’s rank, title or position.”

Failure to report for voluntary overtime shift

The Appointing Authority did not have reasonable justification to discipline the Appellant for “failure to report for his assigned detail” under ADM-25 because the Appellant did not fail to report for an assigned detail. He unintentionally failed to report for a voluntary overtime shift which is not regulated by ADM-25.³

The Appellant should not have been charged with violation of ADM-25. He was arguably in violation of the Reporting for Duty regulation, Rule 5.5: “Members shall report for duty at the time and place required by assignment or orders ...” He was not charged with violating Rule 5.5, however.

The Appellant did not intentionally fail to report for his voluntary overtime shift. When he signed up for the midnight shift of Monday, June 22, 2009, the Appellant thought he was signing up to begin his overtime shift at 11 p.m. on Monday. The policy had changed before this incident so that a Monday midnight *paid detail* began at 11 p.m. on Monday, but a Monday midnight *overtime* shift began at 11 p.m. on Sunday.

³ The Appointing Authority insists ADM-25 refers to overtime as well as paid details because a paid detail is “a voluntary assignment paid for by an outside entity,” in this case MassPort. It is unclear that MassPort is an outside entity since the Appellant’s paychecks were issued by MassPort. (Ex. 29.) Regardless, paid details and overtime are distinguishable.

This was certainly a confusing system, and as of January 2011 the system was changed so that the starting times for paid details and overtime shifts are consistent.

No other Trooper has been disciplined for failing to report for a voluntary overtime shift.

The Appellant should not be disciplined for failing to report for a voluntary overtime shift because: 1) the Appointing Authority charged him under a regulation that is unrelated to his conduct; 2) the Appellant did not intentionally fail to report; he misunderstood a confusing policy with respect to the starting times of paid details versus overtime shifts; and 3) no other Trooper has been disciplined for failing to report for a voluntary overtime shift.

Discipline

Although the Appointing Authority had reasonable justification for disciplining the Appellant for failure to report the cruiser crash, the discipline imposed (60 day suspension, forfeiture of 20 days of accrued time, and permanent transfer out of Troop F), is unduly harsh, amounts to disparate treatment and is retaliatory.

The only other Trooper who has been disciplined for failing to report a cruiser accident since 2000 received a Letter of Counseling, although this was his second Class C violation that merited a suspension of not more than 15 days under the Discipline Guidelines.

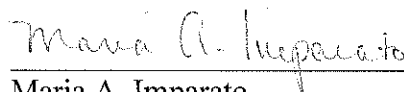
There is no evidence that any other Trooper has been disciplined for failing to report for a voluntary overtime shift. Sgt. Luce was uncertain whether he knew of any Trooper who had been disciplined for missing a voluntary overtime shift. Sgt. Duffy did not know of any other Trooper who had been disciplined for missing a

voluntary overtime shift. Sgt. Fimiani is aware of one Trooper who failed to report for an overtime shift at Hanscom in 2010; he received a Supervisory Observation Report that is not deemed to be discipline. The Appellant is not aware of any Trooper who has been disciplined for failing to report for a voluntary overtime shift.

The harsh discipline imposed upon the Appellant appears to be in retaliation for the reversal of a 15 day suspension by the Civil Service Commission, and the Appellant's refusal to accept the offer of Lieutenant Colonel Jack Dunn to forgo the fifteen days of back pay owed to him as a result of the Commission's reversal in exchange for a fifteen day suspension in the current case.

In view of the fact that the only other Trooper since 2000 who failed to report a cruiser accident was given a Letter of Counseling, and in view of the fact that no other Trooper has been disciplined for failing to report for an overtime shift, and in view of the retaliatory nature of the discipline imposed, I recommend that the Civil Service Commission reduce the Appellant's discipline to a fifteen day suspension which is the discipline the Department would have imposed if the Appellant had accepted the offer of settlement. A fifteen day suspension is also a reasonable discipline for a third Class C offense for failure to report the cruiser crash.

DIVISION OF ADMINISTRATIVE LAW APPEALS



Maria A. Imperato
Administrative Magistrate

DATED: **JUN - 2 2011**