

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

NICHOLAS INTERNICOLA,  
*Appellant*

*V.*

D-07-158

DEPARTMENT OF STATE POLICE,  
*Respondent*

Appellant's Attorney:

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Respondent's Representative:

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Commissioner:

Daniel M. Henderson<sup>1</sup>

**DECISION**

Pursuant to the provisions of G.L. c. 31, s. 43 and G.L. c. 22C, s. 13 as amended by Chapter 43 of the Acts of 2002, the Appellant, Nicholas Internicola (hereafter

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<sup>1</sup> The Commission acknowledges the assistance of Legal Intern Heather Coons in the preparation of this Decision.

“Internicola” or “Appellant”), is appealing the recommendation of a Department of State Police (hereafter “Department”) Trial Board (hereafter “Board”), that he be suspended for a period of fifteen (15) days. The appeal was timely filed. A hearing was held on January 30, 2008 at the offices of the Civil Service Commission. All witnesses other than the Appellant were sequestered. One (1) audio tape was made of the hearing.

#### **FINDINGS OF FACT:**

Pursuant to the provisions of G.L. c. 31, s. 43, the Appellant Nicholas Internicola (hereinafter “Appellant” or “Internicola”) is appealing the decision of the Respondent, Department of State Police (hereinafter “Appointing Authority” or “Department”) as Appointing Authority, to suspend him for three five – day suspensions without pay, served consecutively from his employment as a Department of State Police Trooper due to his violation of ADM – 25. ADM – 25 prohibits Troopers from overlapping paid detail hours and scheduled work hours, unless approved and accounted for with accrued time such as vacation and personal leave. The Appellant was found guilty for violating ADM – 25 on 7/30/05, 8/4/05, 8/6/05.

Exhibits 1-5 were agreed upon and admitted into evidence. The Department proposed Exhibit 6 and Exhibit 7 to which the Appellant objected. It was ruled that Exhibit 6, (summary of prior discipline) was admitted for a limited purpose; it is impounded and would be considered by this hearing officer only if the discipline in this present appeal is sustained and then only for the purposes of degree or progressive discipline. Exhibit 7(voluminous prior personnel records including prior discipline and investigations of prior discipline) was marked for identification and impounded. However, if during the hearing, any part of Exhibit 7 is admitted for any purpose, the parties were instructed to

identify that part of Exhibit 7 and argue for or against its admission in their post-hearing briefs or proposed decisions. These seven (7) exhibits were received at the hearing and considered as stated above. Based on the documents submitted into evidence and the testimony of:

For the Appointing Authority:

- Captain Thomas W. Stewart, Department of State Police;

For the Appellant:

- Trooper Nicholas Internicola, the Appellant, Department of State Police;

I make the following findings of fact:

1. The Appellant is a Trooper employed by the Massachusetts State Police, a position and rank he has held since approximately 1992 when his former employer, the Metropolitan District Commission Police Department was consolidated with the State Police. (Testimony of Appellant)
2. The Appellant has been a Police Officer/Trooper for twenty – eight (28) years. (Testimony of Appellant)
3. Employees of the Department are prohibited from accepting paid detail assignments that conflict with their regularly scheduled tours of duty, unless authorized by a supervisor, and conditioned upon the employee utilizing accrued benefit time, such as vacation leave, for the period of overlap. (Exhibit 3, Testimony of Stewart and Internicola.)
4. The Appellant Nicholas Internicola was stationed at Troop E, Massachusetts Turnpike for approximately 7 years prior to the investigation subject of this action. (Testimony of Internicola.)

5. Troop E has an independent payroll system such that Troopers assigned to the turnpike are paid by the Massachusetts Turnpike Authority (“Authority”) and not by the Department of State Police. In addition, Troopers that work paid details on the Massachusetts Turnpike are paid through the Turnpike Authority for that work. Troopers could be paid by from up to four different sources: Mass. Turnpike, Mass. Port Authority, State Police and private contractors. (Testimony of Stewart, Internicola.)
6. The Department of State Police is under the supervision and control of the Colonel of State Police. The Colonel is the executive and administrative head of the Department of State Police. The Colonel organizes the Department’s divisions, bureaus, sections and units as he deems necessary. The Colonel appoints heads of these various sectors and assigns employees to them. The Colonel is also mandated to direct all Department inspections and investigations. The Colonel is also mandated to make all necessary rules and regulations for the government of the Department, for reports to be made by employees of the Department and for the performance of the duties of said employees. Under the Colonel’s command as “Staff Officers” are the ranks of: Major and Lieutenant Colonel. “Commissioned Officers” are the ranks of: Lieutenant, Detective Lieutenant, Captain and Detective Captain. “Noncommissioned Officers” hold the rank of Sergeant. Thereafter are the “Uniformed members” or Troopers, who are appointed by the Colonel. (administrative notice G.L. Chap. 22C §§ 1-11)
7. General Order ADM-25 addressed paid details. The Colonel/Superintendent has authority over paid details. The Colonel delegates some authority and discretion over paid details to the “Troop Commander” and the Troop “Paid Detail Officer”.

Troopers working a paid detail are required to file a paid detail form (SPD-2) with the “Paid Detail Officer”. This form is required to be “signed by the state engineer, site foreman, or appropriate Authority and/or Department supervisor.” The Appellant did file the required properly signed form for the three dates (7/30/05, 8/4/05, and 8/6/05) in question and included on the forms the overlap time to be deducted from his accrued vacation time (1.5 hours, 2.5 hours, and 1.5 hours, respectively). (Exhibits 3 & 5, testimony of Stewart and Appellant)

8. General Order ADM-25 also requires “all supervisory personnel” to regularly and frequently monitor and inspect, immediately address, remedy and report all violations of this rule. The “Paid Detail Inspection Form (SP381)” is required to be filed for this purpose. Troop Commanders are directly responsible for the administration and supervision of this policy, including verification of the accuracy of the paid detail of SPD-2 form. (Exhibits 3 )
9. Approximately two months prior to the inception of this investigation, Internicola was transferred from Troop E, Massachusetts Turnpike, to Troop H (Metro Boston area). People assigned to the Troop H can choose to be on a “secondary detail list” in other Troops. Appellant signed up to be on the secondary detail list to Troop E.  
(Testimony of Stewart, Internicola.)
10. Captain Thomas Stewart, the “Troop Executive Office” was directed by Troop E Commander Dunn to conduct a review or audit of Internicola’s work records and make sure that he was taking benefit time to cover for paid details that were done in Troop E, in compliance with ADM-25 and Article 30 of the Collective Bargaining Agreement, (CBA). It is noted that Article 30 was amended by a “Side Letter of

Agreement”, dated 10/28/99. Upon completion of the audit, Captain Stewart was instructed to conduct an investigation into the factual discrepancies presented in the audit and to file a report outlining the results of his investigation. (Exhibits 3, 4; Testimony of Stewart.)

11. Captain Stewart was directed specifically to examine and audit the paid detail and overtime submissions and payments of only the Appellant. (Exhibits 3, 4; Testimony of Stewart.)
12. Captain Stewart found in his audit that there was a practice approved by an unnamed Captain assigned to Troop E that allowed Troopers not to take benefit time deduction for a half an hour lapse between the end of a Trooper’s shift and the beginning of that Trooper’s detail. After Captain Stewart brought this to light, the practice ceased. No disciplinary action was taken against any Trooper or officer related to this practice. (Exhibit 4, Testimony of Stewart).
13. Captain Stewart admitted to being confused when he first found this practice and did not understand it, since it was ‘improper’ to allow what this unnamed Captain had allowed. No discipline was sought against this unnamed Captain. (Testimony of Stewart)
14. Each Trooper’s “Paystation” entries are reviewed and approved by a superior, on a weekly basis. After the Appellant was notified of the entry errors, he corrected the data entries. (Testimony of Stewart)
15. Captain Stewart’s investigation revealed three dates (7/30/05, 8/4/05, and 8/6/05) on which it appeared Trooper Internicola had been paid from two sources, from his regular shift and for paid details that he had worked on the Massachusetts Turnpike,

Troop E. On these dates, Trooper Internicola's details slips contained a line on which he requested the necessary vacation time to cover the overlap (1.5 hours, 2.5 hours, and 1.5 hours, respectively). However, the request was not properly entered into the Troop H "Paystation" system, and thus, Internicola's accrued vacation leave balance was not debited with the cumulative 5.5 hours of leave. (Exhibits 4, 5, Testimony of Stewart, Internicola).

16. When brought to Trooper Internicola's attention, he stated that if he had not had vacation time taken out of his account, then it should have been done. On these three dates, Appellant had requested on the detail slip, 1.5 hours of vacation, 2.5 hours of vacation and 1.5 hours of vacation. He had also requested and received a supervisor's permission to accept the detail, causing his request and approval for vacation time in the amounts specified to be entered into the Troop H Master Duty Roster, an official document maintained daily by the Department. (Testimony of Internicola, Stewart).
17. At the time Trooper Internicola was assigned to Troop E, when a Trooper submitted these detail slips similar to those contained in Exhibit 5, vacation time was automatically deducted from that person's balance. Corrective entries for accrued time being used to prevent overlaps were handled by the Detail Office or Troop Duty Office. Further, weekly payroll in Troop E was handled by supervisors, i.e. Troopers did not submit their own payroll, or use the "Paystation" system found in Troop H. (Testimony of Internicola.)
18. Internicola, in writing, explained that, if the 5.5 hours of accrued time had not been deducted, that it was an "oversight" on his part, and requested that the time be

deducted. Significantly, all of these three instances occurred within days of each other, during the same pay period. (Exhibits, 4, 5, Testimony of Stewart, Internicola.)

19. As a result of his investigation, Captain Stewart only recommended that Trooper Internicola be reprimanded and properly trained in the use of the Troop H “Paystation” payroll system. He did not recommend further discipline or a suspension of any length. (Exhibit 4, Testimony of Stewart)
20. Appellant testified that when he entered Troop H approximately two months prior to the details in question, he was not provided any training in the Troop H “Paystation” payroll system. He had not used Paystation at his prior assignment at the Turnpike. He found the new Paystation system “confusing” and tried to follow as best he could, what he was told to do. (Testimony of Internicola)
21. In Troop H, supervisors are tasked with reviewing and approving each Trooper’s Paystation submission on a weekly basis. For the week containing the three discrepancies, a supervisor approved Internicola’s Paystation submission, though the submission was in conflict with the Troop H Master Duty Roster with respect to the 5.5 hours of time. (Testimony of Stewart, Internicola.)
22. After Captain Stewart’s audit was completed, Trooper Internicola was given a training session in the Troop H “Paystation” program by his Sergeant. He has not had any discrepancies since that time, and has properly made all required entries in Paystation. (Testimony of Stewart, Internicola)
23. Other Troopers who have had improper payroll entries identified by supervisors were required to fill out a paper form or “payroll discrepancy form”, to correct accrued leave balances, without being subjected to the disciplinary process. These types of



paper corrections were usually done before the Monday payroll and were the only method of correcting the original entries. The changes were then made by the payroll department from the payroll discrepancy forms. Captain Stewart testified that this type of payroll correction “happens frequently” ( Testimony of Stewart, Internicola)

24. Appellant contends that the combination of the Master Duty Roster (showing his request and a supervisor’s approval for 1.5, 2.5 and 1.5 hours of vacation), his written detail slips (showing his request for 1.5, 2.5, and 1.5 hours of vacation), and his lack of training in the proper use of the Paystation system, and the failure of a supervisor to bring up his lack of proper entry when the weekly payroll form was approved, were mitigating factors, and demonstrated his intention to comply with ADM-25.

(Testimony of Internicola)

25. Notwithstanding the corrective action (training in Paystation) having been successful, the Department ignored Captain Stewart’s recommendation, and charged Internicola with violating ADM-25. He was found guilty by a Trial Board of violating ADM-25 on each of these three discrepancies. Trooper Internicola as a result of these three guilty findings was sanctioned with a suspension without pay for five days on each offense, to run consecutively. He served a total of 15 days suspension without pay.

(Exhibit 4, testimony of Stewart)

26. Both the Appellant and Captain Stewart testified in a straight-forward responsive manner. They had the demeanor and presentation of professional law enforcement personnel under oath. I did not find any inconsistency or other indication of them being less than truthful in their answers. I find their testimony to be credible and reliable. (Testimony and demeanor of Appellant and Captain Stewart)

## CONCLUSION

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 rules 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); School Committee of Brockton v. Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997) See Town of Watertown v. Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995); Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). Discipline is “justified” if it is “done upon adequate reasons sufficiently supported by credible evidence, when weighted by an unprejudiced mind, guided by common sense and correct rules of law.” Sullivan v. Municipal Court of Roxbury District, 342 Mass. 612 (1948), Police Comm’r of Boston v. Municipal Court of West Roxbury District, 368 Mass. 501 (1975). 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). In reviewing an appeal under G.L. c. 31, § 43, 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). See Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

As the matter before the Civil Service Commission is *de novo*, credible evidence of misconduct must be presented before the Commission. It is the function of the agency hearing the matter to determine what degree of credibility should be attached to a witness’ testimony. School Committee of Wellesley v. Labor Relations Commission, 376 Mass. 112, 120 (1978); Doherty v. Retirement Board of Medicine, 425 Mass. 130, 141 (1995). The hearing officer must provide an analysis as to how credibility is proportioned amongst witnesses. Herridge v. Board of Registration in Medicine, 420 Mass 154, 165 (1995).

The Appointing Authority did not have reasonable justification to suspend the Appellant for fifteen (15 days) without pay. There was no reliable evidence to show that the Appellant intentionally violated ADM – 25. He attempted to comply with the new “Paystation” system as best he could, without proper training and believed that he was doing so. He immediately corrected his mistakes once he was trained on the “Paystation” system. Similarly, the Department failed to show that, by a preponderance of the evidence, the appellant violated Rule 5.1 by failing to adhere to policy TRF-10. Rule 5.1 states: “[m]embers shall not commit, nor cause to be committed, any act or omit any act which constitutes a violation of any Massachusetts State Police Rule, Regulation, Policy, Procedure, Directive, or Order.

However the organization and administration of the Department of State Police is strictly hierarchical, with near absolute authority residing in the head of the Department, the Colonel. The Colonel delegates some of that authority down through the ranks of “Staff Officers, Commissioned and Noncommissioned Officers” and supervisory officers. The rules and regulations of the Department are laid out in a scheme of increasing responsibility and accountability for their enforcement, the further up the chain of command. However, here Captain Stewart was directed to audit only the Appellant’s compliance with the payroll entry and accounting rules. Despite Stewart’s finding of an “unnamed Captain” allowing the regular practice of no deduction from accrued time for one-half hour between a scheduled shift and a paid detail, no discipline was sought against this Captain and the benefiting Troopers and officers. Indeed, no investigation of other Troopers’ or Officers’ compliance with the payroll entry rules was even conducted.

There is a lack of disciplinary evidence showing of prior discipline or prior notice for this or a similar type of rules violation. The Appellant was newly assigned at Troop H and should have been given some consideration in complying with the new "Paystation" payroll entry system. Discipline of this magnitude, three- five day suspensions for a total of fifteen days is relatively severe. The fact that the three alleged violations all occurred in a short period of less than a week's time, due to the same error, should have been considered in mitigation. The error that the Appellant committed was akin to one continuing act or omission not three separate ones. The Appellant acted or omitted out of mistake not intent. There was no discipline history to show that the Appellant had a series of violations of this type, which could have been considered as constructive notice to the Appellant.

The Appointing Authority did not train the Appellant in the use of "Paystation" at his new assignment, Troop H (Metro Boston). The Appellant and other Troopers at his previous assignment Troop E, (Turnpike) did not use the "Paystation" payroll system. The Appellant has shown that he never received any training in the use of "Paystation" and that his previous Troop E did not use this payroll system.

Troop Commander Dunn ordered an audit and subsequent investigation of the Appellant's payroll entry practices shortly after the Appellant transferred to Troop H. It would have been preferable to have the Appellant called in by his immediate supervisor for a review, notice and remedial action if warranted. Furthermore, the Appointing Authority did not give the Appellant fair warning that he had been making improper entries on his Paystation payroll account. Then when the Appellant was notified of his erroneous entries, he was not allowed the opportunity to rectify the errors like other

officers and Troopers. It was common practice for Troopers to overlap time in transition from a regular shift to a detail shift. The overlap time would be later corrected by deductions charged to the Trooper's accrued time, such as vacation, holiday or personal time. This deduction was accomplished by the subsequent submission of a "payroll discrepancy form". Then the Trooper's Paystation account would be changed on the basis of the payroll discrepancy form, prior to the Monday payroll finalization. Captain Stewart testified that this procedure happened "frequently" and use of the "payroll discrepancy form" was a regular occurrence. None of the Troopers, who used this method, nor the supervisors who signed off on it was disciplined. The unnamed Captain who approved the improper practice of the half-hour overlapping time without the deduction from accrued time also was not disciplined. The non-discipline of the other Troopers, supervisors and the unnamed Captain for similar practice is blatant disparate treatment. Yet, the Appellant had the excuse of being new at Troop H and untrained in the Paystation system. The Appellant was not allowed to rectify his mistake like others that were similarly situated. For others in a situation where "Paystation" does not accurately reflect the hours worked for the week, he or she will fill out a payroll discrepancy form and the correct hours are deducted from that officer's total. Nonetheless, the Appellant was not afforded this opportunity and the Appointing Authority charged him with violating ADM – 25.

Since this incident, notice and training in "Paystation", the Appellant has not had any more discrepancies in his "Paystation" submissions. When his failure to perfect deduction of the 5.5 hours from his accrued vacation balance was brought to his attention, Appellant in writing admitted that this was an "oversight", and requested that the 5.5 hours be

deducted from his balance of accrued time. He incorrectly assumed that he would be allowed to fill out a payroll discrepancy form, as other similarly situated employees had been allowed to do. As a result of his audit, Captain Stewart, the second-highest ranking officer in Troop H, recommended that Trooper Internicola be reprimanded, and trained in the proper use of Paystation. The Appellant was subsequently trained in the use of Paystation, and has had no further payroll discrepancies; however, the Employer sought and implemented further significant punitive measures in the form of (3-five day) or a fifteen day suspension without pay.

However, the Employer was unable to provide any evidence of *intentional* misconduct by the Appellant. The evidence showed that there was a failure to provide training and oversight on the Employer's behalf. The evidence further revealed significant indicia of Appellant's *attempt* to comply with ADM-25, though he was ultimately unsuccessful. Finally, the evidence indicated that the Appellant was subjected to punitive measures, whereas others similarly situated had not. Upon receipt of proper training in the use of the technologically driven payroll system, Appellant has successfully complied with ADM-25 since the September, 2005 improper entry.

A basic principle underlying most disciplinary procedures is that management must have "just cause" for imposing the discipline.

One definition of "just cause" lists these seven tests or elements for determining whether management had just cause for disciplining an employee: See decision of Arbitrator Carroll Daugherty in Enterprise Wire Co., 46 Lab. Arb. (BNA) 359 (1966)

1. Was the employee adequately warned of the consequences of his conduct? The

warning may be given orally or in printed form. An exception may be made for certain conduct, such as insubordination or that is so serious that the employee is expected to know that it will be punishable.

2. Was the employer's rule or order reasonably related to efficient and safe operations on the job?
3. Did management investigate before administering the discipline? The investigation normally should be made before the decision to discipline is made.
4. Was the investigation fair and objective?
5. Did the investigation produce substantial evidence or proof of guilt?
6. *Were the rules, orders, and penalties applied evenhandedly and without discrimination? If enforcement has been lax in the past, management cannot suddenly reverse its course and begin to crack down without first warning employees of its intent. (Emphasis added)*
7. Was the penalty reasonably related to the seriousness of the offense and the past record?

In sum, these just cause tests or elements as outlined above were not sufficiently established by the Department, in this present matter.

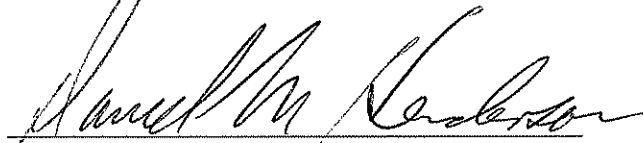
The Commission finds that the Employer's remedial action in notifying and training the Appellant in the use of "Paystation" was proper. However, the Appointing Authority did not have reasonable justification to suspend the Appellant without pay because there was not any reliable evidence of intentional misconduct on the Appellant's behalf.



Therefore, the Employer has not sustained its burden of proving that there was reasonable justification to suspend Appellant without pay.

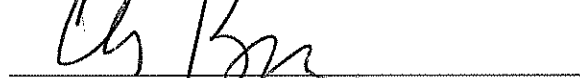
For all of the above reasons, the appeal under Docket No. D- 07-158 is hereby **allowed**. The Appellant shall be returned to his position without any loss of pay or other benefits.

Civil Service Commission,

  
Daniel M. Henderson,  
Commissioner

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman voted No, Stein voted Yes, Henderson voted Yes, Taylor voted Yes and Marquis voted No, Commissioners) on August 27, 2009.

A true record. Attest:

  
Commissioner

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

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

Notice:

Scott W. Dunlap, Atty.  
Michael Halpin, Atty.  
John Marra, Atty. (HRD)