

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

KEVIN PACKARD,
Appellant

v.

D-15-223

DEPARTMENT OF STATE POLICE,
Respondent

Appellant's Attorney:

Gregory P. Benoit, Esq.
Eden, Rafferty, Tetreau & Erlich
238 Shrewsbury Street
Worcester, MA 01604
(508) 795-1601

Respondent's Attorney:

Suzanne T. Caravaggio, Esq.
Office of the Departmental Prosecutor
Department of State Police
470 Worcester Road
Framingham, MA 01702
(508) 988-7029

Commissioner:

Cynthia A. Ittleman

DECISION

Kevin Packard (Appellant or Trooper Packard) filed the instant appeal at the Civil Service Commission (Commission) on December 1, 2015 under G.L. c. 31, s. 43 and G.L. c. 22C, s. 13, as amended by Chapter 43 of the Acts of 2002, challenging the decision of the Department of State Police (Respondent or Department) requiring him to forfeit ten (10) days of accrued time off.¹ The appeal was timely filed.

¹ In addition, the Appellant claimed that he was wrongly bypassed for promotion to Sergeant by the Respondent after the events leading to Respondent's order requiring him to forfeit ten (10) days of accrued time off. However, the Commission has no jurisdiction over bypass appeals at the Department.

The Commission conducted a prehearing conference in the case on December 22, 2015 and a hearing² on February 24 and March 9, 2016 at the Commission offices. The hearing was digitally recorded and the parties received a CD of the proceedings.³ The parties submitted post-hearing briefs in the form of proposed decisions. For the reasons stated herein, by a 4-1 vote, the appeal is allowed.

FINDINGS OF FACT

Based on the forty-nine (49)⁴ exhibits entered into evidence and the testimony of:

Called by Respondent:

- Melissa O'Meara
- Detective Lieutenant Michael E. Farley
- Detective Lieutenant Brian F. Moore
- Trooper John Jakobowski⁵
- Detective Lieutenant Christopher T. Wilcox

Called by the Appellant:

- Trooper Kevin Packard, Appellant

and taking administrative notice of all matters filed in the case; pertinent statutes, including, without limitation, stipulations, pertinent regulations, case law and policies; and reasonable inferences from the credible evidence; a preponderance of evidence establishes the following findings of fact:

² The Standard Adjudicatory Rules of Practice and Procedures, 810 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission, with G.L. Chapter 31, or any Commission rules, taking precedence.

³ If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this CD should be used to transcribe the hearing.

⁴ The forty-nine (49) Exhibits include Exhibits 1 through 43, 44A, 44B, and 45 through 48.

⁵ Trooper Jakobowski appeared by subpoena.

1. The Appellant has been a State Police Trooper since 1988. Beginning in 2008, the Appellant was assigned to the Department's Office of Alcohol Testing (OAT), a unit within the Department's Crime Laboratory located in Devens. The OAT building in Devens was relatively small and some personnel shared offices. The walls between offices were only two-thirds or three-quarters of the height of the ceiling; as a result, if OAT personnel spoke loud enough, they could be heard by other OAT personnel. The Appellant was a training trooper, handling anything related to alcohol testing. The Appellant worked at OAT at all times pertinent to this case. The other uniformed sworn personnel at OAT was Trooper John Jakobowski, also a long time Trooper who was a "training Trooper". Trooper Packard and Trooper Jakobowski shared an office at OAT. Jakobowski and the Appellant were the primary teachers and they engaged other Troopers to share the teaching duties. At OAT, Ms. O, a civilian Laboratory Supervisor, gave the Appellant assignments. The Appellant's uniformed supervisor was Det. Lieut. S in Maynard. The Appellant's job involved training State and local police, as well as military personnel at Hanscom Air Force Base, the District Attorney's office and judges' conferences how to use breathalyzers. When he was training, the Appellant would pack his cruiser with equipment and material, go to a teaching site and teach all day. When he was in the office, he worked on the curriculum, fixed or beta-tested the equipment, made Powerpoint presentations, and worked with a database for breathalyzer tests for officers to use the devices. Prior to OAT, the Appellant had been working in the Traffic section at the Department Headquarters. (Testimony of Appellant, O'Meara and Jakobowski; Exhs. 4, 11, 30, 40 and 42)

2. In addition to Troopers Packard and Jakobowski and Ms. O, other employees of OAT at pertinent times were:

Melissa O'Meara, then-Chemist III, now Director of OAT, began working at OAT in 2011 although she has worked in the Department for more than twenty (20) years

Ms. C, Chemist II, was assigned to OAT in May 2011

Ms. F, Chemist II, began working at OAT in or about 2009

Mr. P, Chemist II, began working at OAT not later than 2011

Ms. D, Administrative Assistant and Acting Program Coordinator, began working at OAT in 2008

Mr. M, intern

Mr. H, part-time intern

Mr. ML, then-intern (now-Department employee elsewhere)

Mr. S, intern

(Testimony of O'Meara, Packard and Jakobowski, Farley; Exhs. 11, 24-27, 29-31, 33-35, 40-43)

3. Ms. O's immediate supervisor was Mr. E. Mr. E's office was not located at OAT.

(Testimony of Ms. O at criminal investigation; Testimony of Jakobowski)

4. Prior to June of 2011, the breathalyzer machines used statewide by both the Department and local police departments were the Alcotest 7110 (the 7110) manufactured by Draeger Safety Diagnostics (hereinafter, "Draeger"), which was located primarily in Texas and Germany. (Testimony of Ms. O during Respondent's criminal investigation; Testimony of Jakobowski and Packard at Commission; Exhs. 11 and 30)

5. The 7110s were provided to barracks within the Department as well as to local police departments for their use. (Testimony of O'Meara and Farley)

6. In addition to training authorities how to use the 7110s, OAT personnel also repaired them or sometimes sent them to Draeger for repair or replacement. (Testimony of Packard and Jakobowski)
7. In or about June 2011, OAT began a pilot program in order to replace the 7110s with the Alcotest 9510 model (9510). (Testimony of O'Meara; Exhs. 11 and 30)
8. Also in or about June 2011, Ms. O'Meara, Chemist III was transferred to OAT. In addition to assisting in the supervision of the day to day operations of the unit, Ms. O'Meara was to aid in the deployment of the 9510s. She shared an office with Ms. O. (Testimony of O'Meara; Exh. 11)
9. One difference between the 9510s and the 7110s is that the 9510s utilize a dry gas canister instead of a liquid simulator solution. (Testimony of O'Meara; Exhs. 12 and 18)
10. Once a dry gas canister was empty, OAT would provide the Department barracks and local police departments with a replacement canister. (Testimony of Packard and O'Meara; Exh. 11)
11. Under the bid for the 9510s, OAT was to return the 7110s to Draeger as part of a buyback program for which OAT would then receive a credit per 7110 toward the purchase of each 9510. (Testimony of O'Meara and Jakobowski)
12. Initially, Mr. R, Vice President of Draeger, indicated OAT should collect the 7110s and store them until such time as Draeger could send an employee for their retrieval. (Testimony of O'Meara and Jakobowski; Exh. 31)
13. At some point thereafter, Mr. R advised Ms. O that Draeger only needed the serial plate and microprocessor from the 7110s and that OAT could otherwise dispose of

the remainder of the machines as it was not worth their while to collect them.

(Testimony of Jakobowski; Exh. 30)

14. When training barracks and police departments about how to use the 9510s, the OAT trainers would collect the 7110s and bring them back to OAT, where interns disassembled the machines, separated parts to be returned either to the Department's Management Information Section or to Draeger, and put the metal stands from the 7110s, as well as any used dry gas canisters from the 9510s, in boxes to be stored in OAT's boiler room until they could be recycled at the scrap metal yard. (Testimony of O'Meara, Jakobowski and Appellant; Exhs. 11, 40-42)
15. On November 16, 2012, Major James Connolly, Deputy Division Commander of the Forensic Services Group received a call from Dr. V, at the Department Crime Lab, who said that Mr. E said that Ms. O'Meara told him that Ms. O and Trooper Jakobowski had been selling scrap metal from the 7110s and the dry gas canisters from the 9510s and used the proceeds to fund a retirement party for Capt. K, who had also worked at OAT, among other expenses. Major Connelly sent a memo to Lieut. Col. Francis Matthews, Division Commander of Division of Investigative Services (DIS), in this regard, requesting an investigation. (Testimony of Farley; Testimony of O'Meara; Ex. 12)
16. Shortly thereafter, Det. Lieut. Michael Farley, Unit Commander of the Violent Fugitive Apprehension Section (VFAS), was assigned to investigate the report because of the possible criminal implications and because the Department wanted to keep the matter separate from Internal Affairs at that time. (Testimony of Farley; Exh. 31) The VFAS was under the command of Lieut. Col. Matthews. Det. Lieut. Brian Moore, of the Governor's Auto theft Strike Force, was assigned to assist Det.

Lieut. Farley. Both Det. Lieuts. Farley and Moore had considerable investigation experience. However, Det. Lieut. Moore had not conducted a personnel investigation before and Det. Lieut. Farley had not interviewed Troopers outside of his unit.

(Testimony of Farley and Moore)

17. In their criminal investigation, Det. Lieuts. Farley and Moore interviewed fourteen (14) people: Ms. O, then-OAT Laboratory Supervisor; the Appellant; Ms. F, OAT Chemist II; Ms. D, Administrative Assistant and Acting Program Coordinator; Ms. O'Meara, then-OAT Chemist III; Dr. V, then-Director of the state Crime Lab; Ms. C, OAT Chemist II; Ms. P, OAT Chemist II; OAT Interns Mr. S, Mr. ML, Mr. H and Mr. M; Mr. R, then-Vice President of Draeger (manufacturer of the breathalyzer testing equipment then in use by the Respondent); and the owner of a Northampton restaurant where a retirement party was held for Capt. K in October 2012). (Exs. 11, 12, 22 – 30, 33 – 36 and 40) Of the people who were interviewed regarding the criminal investigation, only Ms. O'Meara and the Appellant testified at the Commission hearing. (Administrative Notice)
18. The only interviews that were recorded in the criminal investigation were the interviews of Ms. O and the Appellant. (Exhs. 30 and 40) Either Det. Lieut. Farley or Det. Lieut. Moore wrote memoranda of their interviews with most of the other interviewees approximately one (1) week after the interviews. (Exhs. 11, 12, 24 – 29, and 33-36) Det. Lieut. Farley did not record the other interviewees because he did not know at first that there were Troopers allegedly involved. (Testimony of Farley)
19. Trooper Jakobowski declined to be interviewed in December 2012 during the criminal investigation, invoking his right to counsel. (Exh. 31) However, he agreed

to be interviewed during the subsequent civil investigation in May 2013 and his interview was recorded and transcribed. (Exh. 42)

20. Det. Lieut. Farley interviewed Ms. O'Meara in November 2012 and wrote a summary of Ms. O'Meara's statements approximately one month later. Ms. O'Meara told Det. Lieut. Farley that she did not know where Ms. O and Trooper Jakobowski took the metal but they were gone from the office for a couple of hours when they packed it up and left the office; that they would call the place where apparently they were taking the metal to make sure someone was there to receive the scrap; that they would ask all of the OAT personnel present to help load the OAT vehicles with the metals (including Ms. O'Meara on more than one occasion); that others at OAT knew they were selling the metal for scrap because Ms. O and Trooper Jakobowski openly discussed it on occasion; they loaded up and transported the metals between September, 2011 sometime in 2012; that she saw Ms. O remove money from a file cabinet about that time and, early the next day, Ms. O'Meara photocopied the two (2) groups of cash she found in the file cabinet; on or about November 19, 2012, the new Chemistry Director, Mr. J, told OAT to stop drilling holes in the 9510 canisters but on November 26, 2012 Mr. O'Meara observed Trooper Jakobowski drilling holes in the canisters; Ms. O told Ms. O'Meara that she would use the scrap metal proceeds to pay for Capt. K's retirement party; that Ms. O paid for tickets to the party for herself, Ms. O'Meara, Trooper Jakobowski and his girlfriend, and Ms. P; and that she did not believe that the Appellant "was involved". (Exh. 11) Det. Lieut. Farley also spoke with Ms. O'Meara by phone a few days later and Ms. O'Meara reported that Ms. O (who was home on administrative leave) sent an email message from home to OAT staff saying to "let her know if anyone was questioned about OAT operations." (Id.)

- Further, Ms. O’Meara “was assigned by Major James Connolly” to meet the investigators after hours at OAT to obtain information specifically about the brass cuvette or tube from the 7110s that was being recycled, which they did. (Id.; Testimony of O’Meara)
21. In December 2012, Det. Lieuts. Farley and/or Moore interviewed two (2) men at the scrap metal yard where the OAT metals had been brought for recycling. Det. Lieut. Farley asked the men for information about receiving scrap metal from the State Police. The two (2) men indicated that someone named “John, from the State Police” brought scrap metals to the scrap metal yard and was paid cash for it, and that, on occasion “John” was accompanied by a woman. Neither of the two (2) men could identify Ms. O or Trooper Jakobowski from photo arrays. (Exhs. 22 and 23)
 22. Det. Lieut. Farley and Det. Lieut. Moore interviewed Ms. F in December 2012. Ms. F said that Ms. O and Trooper Jakobowski worked together for many years and that they recycled metals connected to the breathalyzers. Ms. F referenced the Appellant only once, when she was asked whether the Appellant attended Capt. K’s retirement party and Ms. F stated that she did not believe so. (Exh. 25)
 23. Det. Lieut. Farley interviewed Intern Mr. H in December 2012. Mr. H said that he only worked with Trooper Jakobowski regarding the disassembling of the 7110s and that he accompanied Trooper Jakobowski to the scrap metal yard in an OAT vehicle and saw someone at the yard give Trooper Jakobowski money for the metal items that they delivered to the yard that day. Mr. H did not mention the Appellant. (Exh. 26)
 24. Det. Lieut. Farley interviewed Intern Mr. ML. Mr. ML said he disassembled the 7110s and put metal parts in the boiler room as instructed, Ms. O openly told him and other staff to load the metal parts removed from the 7110s into an OAT van, the

Appellant helped load the metal parts into the OAT van at least once, and that Trooper Jakobowski texted Mr. ML to tell him about the criminal investigation and to tell him what to say if he (Mr. ML) was interviewed. (Exh. 27)

25. Det. Lieut. Farley interviewed Mr. R, then-Vice President of Draeger in December 2012. From this interview, Det. Lieut. Farley learned that there was a program to buy back the 7110s for every new 9510 the Respondent bought; that R and Capt. K had agreed that the buyback discount would be automatically applied to the purchase price; that the 7110s would be shipped to Draeger; that Mr. R asked Ms. O to store them at OAT until all the 7110s were collected; that Mr. R would have a Draeger manager pick up the 7110s at OAT and transport them to a shredder for destruction; that months later Draeger's office in Germany wanted some of the 7110 microprocessors; that Ms. O would arrange for the microprocessors to be removed; that Ms. O could take the heavy brass cuvette from the 7110s to a salvage yard to get money for it to support the 7110 program; and that Draeger had done this before. Mr. R did not mention the Appellant. (Exh. 28)

26. Det. Lieut. Farley interviewed Intern Mr. S in December 2012. Det. Lieut. Farley learned that Mr. S was involved in disassembling the 7110s; that Mr. S believed that only Ms. O and Trooper Jakobowski were actually involved in the metal recycling; that Ms. O told Mr. S to hide the brass cuvettes from the 7110s when Dr. V or Mr. E were expected to be at the OAT office; and that Intern S believed that others in the OAT office knew about the recycling, including the Appellant, because Ms. O and Trooper Jakobowski talked about it openly. (Exh. 29)

27. Det. Lieut. Farley interviewed Ms. D in December 2012. Det. Lieut. Farley learned that Ms. O showed the interns how to disassemble the 7110s; that she (Ms. D) was

- unaware if anyone at OAT received money for the recycled metals; and that she had seen Trooper Jakobowski (not the Appellant) drill holes in the 9150 canisters. (Exh. 24) Ms. D did not mention the Appellant. (Exh. 24; Administrative Notice)
28. Det. Lieut. Moore interviewed Ms. C in December 2012. Ms. C knew little about the metal recycling but she observed, one day, that there was a rush to dispose of the metals in the OAT van because Mr. E was coming to the office and Trooper Jakobowski drove the van away; that Ms. O and Trooper Jakobowski used a drill to drill holes in the canisters to prove that they were empty; and that Ms. O, Ms. P, Ms. O'Meara, and Trooper Jakobowski and his girlfriend went to the retirement party for Capt. K but Ms. C did not. (Exh. 33)⁶ Ms. C did not mention the Appellant other than to say that he trained her how to use the new 9150s. (Administrative Notice)
29. Det. Lieut. Moore interviewed Intern Mr. M's in December 2012. Mr. M reported that Ms. O assigned Mr. M the task of disassembling the 7110s and to save the cuvette; that he put the cuvettes in a box that would be moved to the boiler room; that Ms. O told Mr. M not to disassemble the 7110s when Mr. E was in the office; and that he never saw any money related to the scrap metal. The only thing Mr. M said about the Appellant was that he (the Appellant) "was a little bit passive because he was going through a divorce" (Exh. 34; *see* testimony of Appellant)
30. Det. Lieut. Moore interviewed Ms. P in December 2012. Ms. P believed that the 7110s were dismantled at the direction of Draeger; that she saw the cuvettes and other metal parts; that when the Fire Department told them to remove the metal scraps from the boiler room Ms. O told them to fill the vans with the material and Ms. P assisted; she emptied some of the canisters; Trooper Jakobowski drilled holes in the canisters;

⁶ Draeger had given the OAT something like a wrench in order to depressurize the 9510 dry gas canisters so that they could be disposed of. (Testimony of Jakobowski)

- she attended Capt. K's retirement party but did not know how the party was paid for; and that there were no State Police blue inventory stickers on the 7110s but there are on the 9510s. (Exh. 35) Ms. P did not mention the Appellant. (Administrative Notice) Ms. Powell added that although OAT had a tool for drilling, Trooper Jakobowski brought in his drill for drilling holes in the canisters too. (Exh. 42)
31. In her interview, dated December 12, 2012, Ms. O indicated that she instructed Trooper Jakobowski to locate a metal salvage business at which to recycle the metals; that she used funds from the recycled metals to pay for Capt. K's retirement party; that the Appellant went to the metal scrap yard at least once; that she used approximately \$600 of the recycling money for the OAT chemists to attend the retirement party and for gifts for Capt. K; that the \$600 included payment for Trooper Jakobowski and his girlfriend, Ms. O'Meara, Ms. P and Ms. O to attend the party (others were charged \$45 to attend); the Appellant went with Ms. O and/or Trooper Jakobowski to the metal scrap yard once; that the Appellant did not receive or accept money from the metal scrap yard; that she never saw the Appellant use the drill in the office to drill a hole in the used canisters so they could be recycled; that only Trooper Jakobowski received money for the metal recycling; that the Appellant did not receive money from the metal recycling; that she drilled holes in a couple of the canisters; and that she contacted Trooper Jakobowski about the investigation but not the Appellant. (Exh. 30) Shortly after her interview during the criminal investigation, Ms. O was put on administrative leave. (Testimony of Appellant)
32. The Appellant was interviewed on December 5, 2012. On page 9 (of 76 pages) of the transcript of the interview, the Appellant was advised of his Miranda rights. The Appellant stated that he helped bring the recycled metals to the metal scrap yard

twice; that on one trip, he was with Trooper Jakobowski; that, on the second trip, he was with Trooper Jakobowski and Ms. O; that the first time the he went to the scrap yard, he followed other vehicles to the scrap yard, helped dropped off the metals in the State Police vehicle he was driving, then left before the others and got lost on his way back to OAT; that it was either Ms. O or Trooper Jakobowski who interacted directly with the men at the yard, not the Appellant; that he believed (erroneously) that the metal scrap yard was in Leominster; that he alleged repeatedly that if cash was paid for the metals at the metal scrap yard, he did not know about it – he did not observe money being given at the yard; he stated that he believed the metal recycling was acceptable to Draeger; that Draeger wanted parts of the instruments destroyed so that they could not be used by someone else; that he did not work with the interns; that Ms. O or Trooper Jakobowski would decide when it was time to go to the metal scrap yard; that he did not attend Capt. K's retirement party because he was going through a divorce and had commitments with his children; that sometimes he was out of the office conducting training sessions; and that Trooper Jakobowski drilled holes in the used canisters, not the Appellant. (Exh. 40) At the Commission hearing, the Appellant repeated the allegation that he did not know that OAT received cash for the scrapped metals, adding that he did not find out about the cash until the criminal investigation. However, the Appellant further stated that he knew that scrap yards pay money for scrap metal. (Testimony of Appellant)

33. Det. Lieut. Farley is aware that a uniformed member of the State Police under investigation has certain individual rights beside the right to counsel but he is unfamiliar with them and did not advise the Appellant of such rights in the criminal investigation. (Testimony of Farley)

34. Shortly after the Appellant's criminal investigation interview, he was relieved of duty, then put on restricted duty, taking away his police powers, gun, cruiser, badge and identification, and he was transferred to the Traffic Division in Framingham. He remained on restricted duty for more than one (1) year and was transferred to the Holden barracks, which is in charge of maintenance and related matters. He was returned to full duty after at a regularly scheduled physical examination and transferred to the Brookfield barracks where he is a court liaison officer. (Testimony of Appellant)
35. Based on receipts provided to Det. Lieuts. Farley and Moore by the scrap metal yard during their criminal investigation, the amount of cash paid to Trooper Jakobowski for the recycled metals was \$2,510.50. (Testimony of Farley; Exh. 31)
36. By memo dated January 24, 2013, Det. Lieut. Farley submitted a report about the OAT investigation to Lt. Col. Matthews, DIS Division Commander; Major Hughes, DIS Dep. Division Commander; and Det. Capt. Duggan, DIS Executive Officer. Det. Lieut. Farley's report stated, in part,
- “ ... on Nov. 29, 2012, after interviewing Ms. O'Meara, the investigators obtained authorization to install cameras in the OAT offices that night, visited the OAT office and took photos of the cash in Ms. [O]'s cabinet, a drill used to drill holes in the canisters, a post-it note next to Trooper Jakobowski's desk (in an office shared with the Appellant) with the address and phone number of the metal scrap yard and the price per weight of brass and aluminum, a box containing empty canisters and scrap metal in the boiler room;
- upon interviewing two (2) men at the scrap metal yard, they showed the investigators scrap metal that OAT had recently delivered to the yard by “John S. Police” and receipts for scrap metal that OAT had delivered between June 2011 and November 2012 on which was written “John S. Police” or “John from the State Police”;
- the investigators subsequently seized the cash that was in Ms. O's file cabinet, the post-it note with the information about the metal scrap yard, a 7110 breathalyzer next to Trooper Jakobowski's desk and an empty dry gas canister with a hole drilled in it;

the metal scrap yard provided eight (8) receipts in the amount of \$2,510.50 for scrap metal received from people who drove OAT vehicles to the yard;

the investigators attempted to interview Ms. O but she invoked her right to counsel and she was placed on administrative leave; she subsequently agreed to be interviewed with her counsel present and she was provided a Miranda warning;

the Appellant admitted being involved in two (2) trips to the scrap metal yard but said he did not see any OAT personnel receive money from the yard, nor did he receive any money or benefit therefrom; and

in January 2012, approximately one (1) month after interviewing OAT personnel and others, Det. Lieut. Farley spoke to Draeger Senior Corporate Counsel who told Det. Lieut. Farley that the company was conducting an internal review to see if its employees were involved in wrongdoing and that [Mr. R] “did not have the authority to give the 7110 units to the MSP ...[,] she did not believe Draeger would seek to recover any funds received by OAT employees for the scrapping of the Draeger 7110s but would advise if she was told otherwise by her superiors. ...”. (Exh. 31; Testimony of Farley; *see also* Exhs. 13 – 21))

37. The Appellant was not given a notification letter about the criminal investigation interview, he was not given his Article 27 rights under the pertinent collective bargaining agreement at the criminal investigation interview, nor did he have a union representative or an attorney present. (Testimony of Wilcox and Appellant) He did not receive the Miranda warning until after the interview was well under way. (Testimony of Wilcox) The Appellant agreed to participate in the interview nonetheless, stating that he had nothing to hide. (Exh. 40)
38. Det. Lieut. Wilcox, of the IA Division, never provides a Miranda warning in personnel investigations. It is unclear why the criminal investigators drafted a charge sheet against the Appellant since they conducted a criminal investigation, not a personnel investigation. IA conducts personnel investigations and drafts charges sheets. There is no policy about how to treat a case that began as a criminal investigation but became a personnel investigation. (Testimony of Wilcox)

39. Major Hughes subsequently wrote to Det. Lieut. Farley that the criminal matter was over and asked him to review State Police rules to determine what rules the Appellant's (and Trooper Jakobowski's) actions violated and to issue a summary in that regard. (Testimony of Det. Lieut. Farley; Exh. 32) Det. Lieut. Moore had not drafted such a document before. (Testimony of Moore)
40. In response to Major Hughes' request, the criminal investigators wrote, in pertinent part, that,

Article 5.2 of the rules and regulations states that “[m]embers shall conduct themselves in such a manner as to reflect most favorably upon themselves and the [Respondent]. Conduct unbecoming shall include that which brings the [respondent] into disrepute or reflects discredit upon the person as a member of the Massachusetts state Police, or that which impairs the operation, efficiency, or effectiveness of the Massachusetts State Police of the member.” The Appellant violated this Rule because he, “... transported the [metal] material to the [metal scrap] facility on at least two occasions and was present ... when an exchange of money for this material occurred. Tpr. Packard did this on duty and used a Massachusetts State Police vehicle ... This behavior brings the [Respondent] into disrepute, reflects discredit upon the [Respondent], and reflects discredit on Tpr. Packard. The investigators recommend that this charge be Sustained.” (Exh. 32)

Article Rule 5.3 states, in part, that “[m]embers shall maintain a level of conduct in their personal and business affairs which is in keeping with the highest standards of the law enforcement profession. Members shall not participate in any act which impairs their ability to perform as members of the State Police or causes the State Police to be brought into disrepute.” The criminal investigators wrote that the Appellant violated this Rule because, “... Tpr. Packard participated in the improper disposal of property owned by the Massachusetts State Police/Commonwealth of Massachusetts. He performed these acts while on duty and utilized Massachusetts State Police vehicles. Tpr. Packard furthermore shared a small office with Tpr. John Jakobowski. The investigation determined that Tpr. Jakobowski accepted cash for this property. Tpr. Jakobowski utilized his desk phone to arrange appointments for the sale of this material. A piece of paper listing prices for the material was affixed to the wall next to Tpr. Jakobowski's desk in plain view. Material that appeared to be prepared to be sold was located on the office floor in close proximity to Tpr. Packard's desk. ... [Other OAT personnel] were aware that Tpr. Jakobowski and [Ms. O] were accepting money for this material. Despite his denying any knowledge of this, Tpr. Packard knew or should have known of these improper financial transactions. Tpr. Packard's participation in the disposal of this material impaired his ability to properly perform as a member of the State Police. His actions further caused the [Respondent] to be brought into Disrepute.

Investigators recommend that this charge be Sustained.” (Exh. 32)(emphasis added)

Article 5.6 states, “[m]embers shall not engage in any activities or conduct any personal business or affairs which would cause them to neglect or be inattentive to duty.” The criminal investigators wrote that the Appellant violated this Rule because, “[t]he investigation showed that Tpr. Kevin Packard loaded MSP/OAT vehicles during business hours with Draeger 7110 Breathalyzer components. Tpr. Packard then left his assigned station on at least two occasions and traveled to [the scrap metal yard] with a State Police vehicle filled with metal items while on duty. ... Tpr. Packard further stated that he assisted the scrap employee in off-loading material from the State Police vehicles ... The recommendation is that this charge be Sustained. (Exh. 32)

Article Rule 5.26 states, “[m]embers shall utilize Massachusetts State Police equipment only for its intended purpose and shall not willfully or through neglect, abuse, spoil, damage, lose or wrongfully dispose of Massachusetts State Police equipment.” The criminal investigators wrote that the Appellant violated this Rule because, “ ... he participated in the unauthorized disposal of components of the Draeger 7110 Breathalyzer machines ... Tpr. Packard admitted to transporting Draeger 7110 metal stands, brass cuvettes, and steel items such as rails or hinges to a scrap metal dealer on two occasions. ... [he] claimed not to know the name of the company but described the facility as that of [the scrap metal yard]. Tpr. Packard did not have proper authorization to dispose of this material. Investigators recommend that this charge be Sustained. (Exh. 32)

Article 5.26.4 states, “[n]o member shall use Massachusetts State Police telephones, computers, postage, copiers, facsimile machines, modems, cruisers, or other Massachusetts State Police supplies and equipment accept for official business.” The criminal investigators wrote that the Appellant violated this Rule because he “ ... utilized a Massachusetts State Police vehicle to transport metal to [the scrap metal yard]. ... receipts revealed a total of eight occasions where vehicles associated with the Massachusetts State Police conducted transactions at this facility. In a recorded interview after being read his Miranda Rights, Tpr. Packard admitted to doing so on two occasions while on duty. Investigators recommend that this charge be Sustained.” (Exh. 32)

41. The criminal investigators also issued a separate detailed description of the rules violated by Trooper Jakobowski, stating in pertinent part, that he was a “principal organizer” of the metal recycling activities at OAT. (Exh. 32)(emphasis added)
42. By memorandum dated February 5, 2013, Lt. Col. Matthews, Commanding, DIS, sent the report of Det. Lieuts. Farley and Moore to Lt. Col. Sharon Costine, Commanding, Division of Standards and Training (DST), stating that he (Lt. Col. Matthews) had

- read the report, that the DA would not seek criminal charges against those involved in the metal scrapping, and he was forwarding the report “for your review and any further disciplinary action deemed appropriate.” (Exh. 45)
43. Between February 5, 2013 and April 11, 2013, Det. Lieut. Wilcox was assigned to investigate this as a personnel matter and he obtained the report and summary of the criminal investigators. (Exhs. 37 and 45; Testimony of Farley)
44. By memorandum dated April 11, 2013, Det. Lieut. Wilcox sent the Appellant a notice that he was the subject of an IA investigation concerning the metal scrapping and that he will need to speak to the Appellant, attaching Major Connelly’s request for an investigation. (Exh. 37)
45. By memo dated May 6, 2013, Det. Lieut. Wilcox again notified the Appellant that he was the subject of an investigation and that Det. Lieut. Wilcox would conduct an interview of the Appellant on May 10, 2013. The memo added,
- “Prior to having conversation with you, I must advise you of your rights concerning personnel investigations and call your attention to Article 27 of the current collective bargaining agreement. For purposes of reasonably apprising you of the allegation, I am providing you with a report authored by Detective Lieutenant Michael Farley....” (Exh. 38)
46. On May 14, 2013, Det. Lieut. Wilcox gave the Appellant a copy of the transcript of the Appellant’s interview during the criminal investigation and advised that his interview was rescheduled for May 16, 2013. (Exh. 39; Testimony of Wilcox)
47. On May 16, 2013, Det. Lieut. Wilcox and Det. Lieut. Michael Barrett interviewed the Appellant. At the interview, the Appellant was represented by attorney Richard Rafferty and a representative of the Appellant’s union. (Exh. 41; Testimony of Wilcox)
48. During the Appellant’s eight (8)-minute IA interview, he stated, in pertinent part, that,

he received a notice for the interview, a report of Ms. O'Meara's allegation and Det. Lieut. Farley's criminal investigation report;

he went to the scrap metal yard twice. At his first trip to the scrap yard, he was told that he could leave as soon as he emptied the metal from the vehicle he was driving. At his second trip to the scrap yard, they only needed one (1) vehicle and Trooper Jakobowski asked him to go with him and they could have lunch afterward;

he did not see the scrap yard personnel pay Trooper Jakobowski or Ms. O for the metal scraps but he believed that someone was getting paid, in contradiction to his interview during the criminal investigation in which he said he was not aware that OAT was receiving payment for the scrap metal;

he did not know where the money was going but, through the investigation, the Appellant learned that some of the money was for the retirement party for Capt. [K], some was for the OAT coffee fund, and some was to buy dinner for Draeger personnel when there were present for training; and

Ms. O was in charge of the metal recycling and told the Appellant that OAT "had the okay" from Draeger to trash the 7110s. (Exh. 41; Testimony of Wilcox)(emphasis added)

49. The Appellant has no prior discipline. (Exh. 4)
50. On May 17, 2013, Det. Lieuts. Wilcox and Barrett interviewed Trooper Jakobowski. Except for the Appellant, Det. Lieuts. Wilcox and Barrett did not interview the other people that the criminal investigators interviewed. (Testimony of Wilcox; Exhs. 41 and 42)
51. During his interview, Trooper Jakobowski first stated that he did not know what the cash from metal recycling would be used for and then admitted that he did; he first denied that he did not tell interns to remove the metals to be recycled from the office when supervisors would be coming to the office and then not denying that that was an accurate statement; and he stated that he did not hide the metal recycling from

supervisor but then conceded that he was involved in hiding the metal recyclables from the OAT supervisors when they visited.⁷ In addition, he stated, in pertinent part, he took metal to the scrap metal yard ten (10) to fifteen (15) times;

the drill in the OAT office belonged to him - it was for drilling holes in the canisters so they could be recycled;

Mr. R was the main contact from Draeger;

he received cash at the scrap metal yard and gave it to Ms. O;

he knew at the time of Capt. K's retirement party that some of the money from the scrap metal was used for the party;

some of the money was for coffee, office essentials and for lunch during Draeger trainings;

he did not know if Ms. O used the money for herself;

he and his girlfriend attended the retirement party but he did not pay for the tickets to attend - money from the metal recycling paid for their tickets;

the Appellant went with him to the scrap metal yard 2 or 3 times;

the Appellant knew that cash was being exchanged for the metal;

Det. Lieut. S, Capt. Mason and Major Connolly did not know that they were recycling the metal;

there were no State Police property tags on the 7110s;

on June 5, 2012, when the criminal investigation began, he texted intern ML, "[t]here's going to be an investigation into what happened to the 7110's, tell them you took the 7110 parts away and gave the other parts to Jako and Barbara"; and

he did not think there was anything wrong with scrapping metal that was "destined for the dumpster" but he would not do it again.
(Exh. 42)

⁷ At the Commission hearing, Trooper Jakobowski also contradicted his personnel interview statements, testifying here that he did not know if Mr. E and Dr. V knew about the metal recycling activities but then stating here that they were not told because they did not ask and they did not need to know. In addition, Det. Lieut. Wilcox, in his personnel investigation report, wrote that Trooper Jakobowski stated in his interview that Ms. O was the person who began the metal recycling activities. (Exh. 43) However, in her criminal investigation interview Ms. O denied that it was her idea. (Exh. 30)

52. For his role in the metal recycling activities, Trooper Jakobowski was transferred to the Traffic Division. (Testimony of Jakobowski)
53. By memo dated June 6, 2013, Det. Lieut. Wilcox informed Capt. David DeBuccia, Commanding IA Section, about his IA investigation stating, in pertinent part, that,
- he reviewed Det. Lieut. Farley's criminal investigation report;
- he notified the Appellant that he was the subject of an investigation;
- he interviewed the Appellant and Trooper Jakobowski⁸;
- he informed the Appellant of his administrative rights;
- the Appellant's criminal investigation interview covered many of the questions that he would ask the Appellant so his interview of the Appellant was limited to his knowledge of cash being exchanged for the scrap metal;
- that the Appellant never saw cash being exchanged for the scrap metal but believed that someone was getting money for it that would be used for Capt. K's retirement party, coffee and other items for the office, and lunch for Draeger staff when they arrived for training;
- Trooper Jakobowski explained the replacement of the 7110s with the 9510s and how certain metal parts were recycled;
- Trooper Jakobowski searched for and found the scrap metal yard to recycle certain metal parts of the 9510s;
- OAT staff also recycled part of the 9510 canisters, which canisters the State Police had bought, and that Trooper Jakobowski drilled holes in the canisters so they were safe to be recycled, as requested by personnel at the scrap metal yard;
- Trooper Jakobowski and his girlfriend attended the retirement party but did not pay for tickets to attend and he knew that money from the metal scrapping paid for the tickets;
- the OAT supervisors were not aware of the metal recycling and Trooper Jakobowski said the supervisors "never asked" about it;
- Trooper Jakobowski texted an intern to inform him of the criminal investigation

⁸ There is some confusion about who accompanied Det. Lieut. Wilcox at the Appellant's interview in May 2013. Det. Lieut. Wilcox's June 5, 2013 report states that Det. Lieut. Steven Kelly interviewed the Appellant but the interview transcript states that it was Det. Lieut. Michael Barrett who participated in the Appellant's May 2013 interview. (Exhs. 41 and 43)

and tell him what to say; Trooper Jakobowski “agreed and understood that by him sending this text message to a witness ... was suspect.”

Trooper Jakobowski did not deny that he told an intern to remove certain of the metals when civilian supervisors were coming to the office; and

“[a]fter a thorough and comprehensive investigation/review of all available information contained within this report, it is this officer’s request that this case be closed at this time.” (Exh. 43; Testimony of Wilcox)

54. Det. Lieut. Wilcox did not adopt the charge sheets prepared by the criminal investigators. (Testimony of Wilcox)
55. Notwithstanding Det. Lieut. Wilcox’s recommendation to close the case, at an undesignated time the IA Division issued a Charge Sheet against the Appellant substantially different from the charges summary drafted by the criminal investigators. (Exhs. 9 and 32)
56. The IA Division Charge Sheet states that the Appellant violated,
 - Article 5.2, Unbecoming Conduct, when he “improperly engaged in the transportation, sale, and/or scrapping of Breath Test Instruments and associated equipment”, a class B violation;
 - Article 5.6, Neglect of Duty, when he “drove a State Police Vehicle to a Metal Scrap Facility while on duty for the purpose of improperly disposing of materials”, a class B violation; and
 - Article 5.26, Use of Equipment, when he “assisted in disposing of Breath Test Instruments and associated equipment”, a class B violation.
(Exh. 9)
57. The Respondent received an offer to plead guilty to the charges and waive his right to a Trial Board. A condition of the offer was that the Appellant agree to be removed from the 2012 sergeants promotional list. The Appellant rejected the plea offer and exercised his right to a Trial. He was bypassed for promotion thereafter.⁹ (Testimony of Appellant; Exh. 6)

⁹ G.L. c. 22C, s. 13 provides jurisdiction to the Commission regarding disciplinary matters at the State Police but it does not provide jurisdiction over State Police bypasses.

58. On November 17, 2015, a Trial Board conducted a hearing regarding the charges against the Appellant. (Exh. 2) The Appellant was represented by attorney Benoit at the Trial Board hearing. (Exh. 1) The Appellant did not testify at the Trial Board hearing. (Testimony of Appellant)
59. On November 19, 2015, the Trial Board found that Appellant guilty of the three (3) charges in the IA Division Charge Sheet, recommended that the Appellant be required to forfeit five (5) days of accrued time for each of the charges, which was the minimum sanction, and that the sanction for two (2) of the charges be imposed concurrently, yielding a total loss of ten (10) days of accrued time. (Exh. 2; *see* Exh. 8 (the Respondent's Discipline Guidelines))
60. By memo dated November 23, 2015, Col. McKeon, Superintendent, informed the Appellant that he found the Appellant guilty of the three (3) charges against him, ordered that he shall forfeit ten (10) days of accrued time off, and advised that the Appellant could appeal the decision pursuant to G.L. c. 22C, s. 13, G.L. c. 31, ss. 41-45 and Article 6 of the Respondent's Rules and Regulations. (Exhs. 1 and 3)
61. The Appellant filed the instant appeal. (Administrative Notice)
62. Trooper Jakobowski, who had received discipline in the past, waived his right to a Trial Board regarding the scrap metal recycling and agreed to the following discipline: suspension without pay for fifteen (15 days), forfeiture of fifteen (15) days of accrued time, and payment of restitution of \$300. (Testimony of Jakobowski)
63. Ms. O resigned and is no longer employed by the Respondent. (Testimony of Moore)
64. Ms. O'Meara is now the head of the OAT. (Testimony of Jakobowski)
65. The Respondent's firearms range has approval to recycle equipment and buy equipment for the range. (Testimony of O'Meara)

Applicable Law

G.L. c. 22C, § 13 provides,

“Any uniformed member of the state police who has served for 1 year or more and against whom charges have been preferred shall be tried by a board to be appointed by the colonel or, at the request of the officer, may be tried by a board consisting of the colonel. Any person aggrieved by the finding of such a trial board may appeal the decision of the trial board under sections 41 to 45, inclusive of chapter 31. A uniformed officer of the state police who has been dismissed from the force after trial before such a trial board, or who resigns while charges to be tried by a trial board are pending against him, shall not be reinstated by the colonel.”

G.L. c. 31, § 43, provides:

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

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, *rev.den.*, 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm’n, 43 Mass.App.Ct. 486, 488, *rev.den.*, 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514, (1983) By virtue of the powers conferred by their office, police officers are held to a high standard of conduct. “Police officers are not drafted into public service; rather, they

compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question, their ability and fitness to perform their official responsibilities.” Police Commissioner of Boston v. Civil Service Commission, 22 Mass.App.Ct. 364, 371 (1986). With regard to members of the State Police Department, it is traditionally an elite force subject to more arduous duties than municipal police and to quasi-military discipline. O’Hara v. Commission of Public Safety, 367 Mass. 376, 380 (1975).

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36, 133 N.E.2d 489 (1956).

“The commission’s task . . . is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether ‘there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision,’” which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823 (2006); *see also* Watertown v. Arria, 16 Mass.App.Ct. 331, 334, *rev. den.*, 390 Mass. 1102 (1983) and cases cited. The adverse inference is appropriate when the opposing party “ . . . has established a case adverse to the party invoking the privilege.” Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823 (2006)(citations omitted).

Under G.L c. 31, s. 44, the Commission “may . . . modify any penalty imposed by the appointing authority.” Id. However, absent significant differences between the Commission’s

findings of fact and those found by the appointing authority, or a substantially different interpretation of the relevant law, “the commission is not free to modify the penalty imposed by the [appointing authority] on the basis of essentially similar fact finding without an adequate explanation.” Town of Falmouth, 447 Mass. 814 at 824 (citing Police Comm’r of Bos. v. Civil Serv. Comm’n, 39 Mass. App. Ct. 594, 600 (1996)).

It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [Commission] upon which a court conducting judicial review treads with great reluctance.” Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003); *see* Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 141 (1997). *See also* Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003).

Presiding Officer’s Credibility Determinations

Based upon my observations of the witnesses as each testified and my review of the witnesses’ testimony, and other evidence in the record, I make the following credibility determinations.

Ms. O’Meara was credible in that her testimony was straightforward, her responses reflected careful consideration, she had firsthand knowledge of many of the events about which she testified, she had detailed knowledge about the OAT and its operations, she reported the metal recycling activities knowing that her supervisor was involved in it, and her testimony was generally consistent with the statements she made in the criminal investigation.

Det. Lieut. Farley was generally credible as an experienced criminal investigator, he recalled the many steps in which he was personally involved in the criminal investigation, and he answered questions directly and he acknowledged that he had not conducted a criminal

investigation involving a member of the Department outside his unit in this manner before and where the subject of the criminal investigation was subsequently the subject of a personnel investigation. He also acknowledged that he did not provide notice to the Appellant of his rights as are provided in an IA investigation.

Det. Lieut. Moore was generally credible as an experienced criminal investigator, he recalled his more limited role in conducting the criminal investigation and a number of details of the statements that he and Det. Lieut. Farley received from a number of witnesses, he acknowledged that this was the first time that he participated in this type of investigation and that IA usually conducts such investigations, and he provided mostly direct responses to questions, although he did not adequately respond when asked why they recorded the interview of the Appellant and Ms. O but not the other witnesses.

Trooper Jakobowski, who appeared by subpoena, had diminished credibility because he gave inconsistent statements, or statements that conflicted with supported statements made by other witnesses in his personnel investigation interview and at the Commission hearing regarding whether the OAT supervisors knew about the metal recycling activities. At varying times, he stated that the supervisors did not know about the metal recycling, that the supervisors did not ask about the metal recycling activities, and that they did not need to know about the metal recycling; that he did not recall hiding the metals to be recycled but later acknowledged it; and that he did not know what money was used for that they received for the recycled metals and then he acknowledged that he knew. In addition, Trooper Jakobowski's credibility was effected by his refusal to be interviewed during the criminal investigation and because he communicated with an OAT intern to tell him what to say if the criminal investigators contacted him (the intern).

Det. Lieut. Wilcox's testimony was credible in that he has considerable knowledge and experience with internal investigations, he responded directly to questions about which he had knowledge; he acknowledged that the process used in this case to investigate the Appellant was unusual, noting some procedural shortcomings prior to the internal investigation; that although he relied upon the information provided by the criminal investigators, he declined to adopt the charge sheet that the criminal investigators drafted and drafted the IA charge sheet based on his understanding of the pertinent events and the IA process.

The Appellant's testimony was generally credible in that his description of his limited participation in the metal recycling was supported by a number of the witnesses' statements in the criminal investigations. However, the Appellant was not credible with regard to his knowledge of the money that the OAT obtained by recycling the metal parts from the breathalyzer equipment. Specifically, the Appellant stated on a number of occasions, in the interviews he gave in the criminal and personnel investigations and during his testimony at the Commission, that he did not know, at the time, that the OAT office was receiving money for the recycled metal parts. However, in his testimony at the Commission, the Appellant conceded that he knows that people receive compensation for scrapping metal as a general matter and that he did know that the OAT office was receiving money for the scrap metal they delivered to the scrap metal yard.

Analysis – Minority Conclusion of Commissioner Ittleman

The Respondent has established by a preponderance of the evidence that it had just cause to discipline the Appellant for his participation in the scrap metal recycling activities at OAT in violation of Article 5.2 of the Respondents Rules and Regulations, concerning unbecoming conduct; Article 5.6 of the Rules and Regulations, concerning neglect of duty; and Article 5.26 of the Rules and Regulations, regarding use of equipment. On two (2) occasions while on duty,

the Appellant was involved in transporting the metal parts to the scrap metal yard, on one occasion by driving an OAT vehicle containing the metal parts to be recycled and, on the other occasion, riding in an OAT vehicle driven by Trooper Jakobowski. While on duty, the Appellant also assisted in loading the metal parts into OAT vehicles to be taken to the scrap metal yard and assisted in unloading the metals at the yard. Further, the Appellant told the criminal investigators that he did not know that OAT personnel were receiving money for the metal scraps at the scrap metal yard and yet he admitted to the IA investigator that he believed there was compensation for the metal scraps. Although there is some confusion about who owned the metal parts that were recycled and, therefore, whether the OAT was authorized to recycle them, the parts were not owned by OAT personnel and they were not authorized to dispose of them and to obtain money for recycling them for social events. The ownership of the dry gas canisters for the 9510s is not in question – they were purchased by the State Police – and OAT was not authorized to recycle them and receive money for them for social events. The Respondent’s firearms range had approval to recycle equipment and buy equipment for the range; the OAT did not. That Ms. O, as the Appellant’s civilian supervisor, asked the Appellant to participate in some of the unauthorized metal recycling activities does not relieve the Appellant of responsibility for his participation. The offsite civilian and uniformed OAT supervisors did not authorize the Appellant to participate in the recycling activity by loading the metal parts into an OAT vehicle, driving an OAT vehicle or accompanying Trooper Jakobowski in an OAT vehicle to transport the metal parts to the scrap yard, and unloading the metal parts at the metal scrap yard, all while on duty.¹⁰ Further, I draw an adverse inference against the Appellant for his failure to testify at the Respondent’s hearing.

¹⁰ During the Appellant’s criminal investigation interview and Trooper Jakobowski’s personnel investigation interview, the investigators indicated that the Respondent had recently addressed at least one (1) other case involving misappropriation of metal parts. Exhs. 40 and 42. In Deyermund v Department of State Police, 27 MCSR 125 (2015), the Commission denied the appeal, finding, *inter alia*, that the appellant in that case issued a “deficient

There are a number of mitigating factors in this case but they do not undermine the finding here that the Respondent had just cause to discipline the Appellant for his participation in the metal recycling activities. Rather, it appears that the Respondent took them into consideration in making its determination with regard to the discipline it imposed on the Appellant. For example, unlike Ms. O and Trooper Jakobowski, the Appellant was a relatively minor participant in the recycling activities; he was led to believe that Draeger authorized the disposal¹¹; he did not drill holes in the canisters; he, like some other OAT personnel, were out of the office conducting training sessions sometimes and, thus, did not observe all that was involved in the recycling activities; he did not receive money from the scrap metal yard; he did not instruct the interns how to remove the metal parts for recycling; he is not the person who located the scrap metal yard; he only went to the yard twice (unlike Trooper Jakobowski, who reported bringing scrap metal to the scrap metal yard more than ten (10) times); he was not the beneficiary of the funds obtained from the metal recycling like Trooper Jakobowski and others; he did not tell any witnesses what to tell, or not tell the criminal investigators, like Trooper Jakobowski did; and he had no disciplinary record, unlike Trooper Jakobowski, and the Appellant was disciplined here as a first offense. Notwithstanding such mitigating factors, it is clear that the Appellant was involved in the recycling activities, he did so while on duty, he used OAT vehicles in transporting the scrap metal to the scrap metal yard while on duty, and assisted in disposing of certain breathalyzer parts. The Appellant's conduct violated the Respondent's Rules and Regulations concerning unbecoming conduct, neglect of duty and regarding the use of

and misleading" report about missing copper wire taken from or around the Department's Marine Unit in Boston by one of the Unit's mechanics with whom he was well acquainted. Mr. Deyermond received a forty-five (45) day suspension. While Trooper Packard's conduct in the instant matter is substantially different from the conduct at issue in Deyermond, it warrants discipline nonetheless.

¹¹ In fact, as noted above, it was not until the Respondent conducted the investigations that anyone from Draeger said that the recycling was not permitted. Specifically, the criminal investigators spoke by phone with an attorney for the company and the attorney asserted that Mr. R, whom Ms. O said authorized the recycling, was not authorized to permit the recycling of the metal parts. Also, questions of ownership of the breathalyzer parts arose here but were not resolved. For example, at least some of the equipment apparently did not have state identification tags. However, these matters do not undermine the determination here.

equipment. The Appellant's actions in these regards constitute substantial misconduct which adversely affects the public interest by impairing the efficiency of public service and warrant discipline.

Having determined that discipline is warranted in this case, the question remains whether the discipline meted out to the Appellant by the Respondent merits modification. Modification may be appropriate when the Commission's factual findings or application of applicable law varies from those of the appointing authority and/or when there is evidence of bias, for example, that the employee received disparate treatment. The process used by the Respondent in this case appears to be different from the norm, raising the question of disparate treatment. While the Appellant was subjected to a criminal investigation without the rights associated with an IA investigation, he was given a Miranda warning and he was subsequently the subject of a personnel investigation in which he was accorded the appropriate rights. However, ADM-14, regarding Personnel Investigations, specifically provides that "[n]othing in this policy should prevent members from taking appropriate and timely action for any allegations of criminal activity or criminal acts." Exh. 44A. Thus, the Respondent is authorized to pursue a criminal investigation or an internal investigation as may be appropriate. Another question involves application of the internal investigation process. Specifically, the Respondent's rules on internal investigations appear to apply to cases resulting from external complaints. Although this case does not involve an external complaint against the Appellant, the Respondent appears to have afforded him the rights accorded to such employees when it conducted the personnel investigation in this case.

In further determining whether an appellant has experienced bias or disparate treatment, the Commission reviews how similarly situated employees are treated. Of the three (3) people whose employment was affected by the investigations, the Appellant was affected the least,

which was appropriate given the limited level of his involvement in the metal recycling activities compared to the involvement of Ms. O and Trooper Jakobowski. Ms. O resigned and is no longer an employee of the State Police Department. Trooper Jakobowski, who incurred discipline previously, was suspended without pay for fifteen (15) days, was required to forfeit fifteen (15) days of accrued time, and was required to pay restitution in the amount of \$300. By comparison, the Respondent imposed on the Appellant a forfeiture of five (5)-days of accrued time for each of the three (3) charges of which the Appellant was found guilty but also determined that the forfeiture for two (2) of the charges were to be imposed concurrently, thereby reducing the forfeiture from fifteen (15) days to ten (10) days. Under the Respondent's Discipline Guidelines (Exh. 8), the lowest sanction for a first such offense is suspension of not less than five (5) days. For these reasons, I find that the discipline imposed by the Respondent on the Appellant does not reflect bias or disparate treatment warranting modification.

/s/ Cynthia A. Ittleman
Cynthia A. Ittleman
Commissioner

Analysis – Majority Conclusion (Bowman, Chairman; Camuso, Stein & Tivnan, Commissioners)

After review of the extensive record, including the thorough and comprehensive findings of fact and credibility assessments of the Presiding Commissioner, a majority of the Commission respectfully concludes that the Respondent failed to meet its burden to prove, by a preponderance of evidence, that Trooper Packard is guilty of the misconduct with which the Respondent charged him and, therefore, the majority concludes that the Appellant's appeal must be allowed.

The Department called only two witnesses who, arguably, had any percipient knowledge of Trooper Packard's alleged misconduct, one of whom (Trooper Jakobowski) the Presiding Officer found not to be credible due to his inconsistent statements, testimony that was rebutted

by other credible evidence, and lack of recollection on relevant facts. Ms. O’Meara, the Department’s one credible witness, acknowledged her own direct participation (as well other OAT staff) in helping to load up OAT vehicles with disassembled breathalyzer parts knowing they were to be taken to the scrap yard. Ms. O’Meara, however, never actually went to the yard herself and had no knowledge that Trooper Packard ever went there either. She testified, and the Presiding Commissioner found that she did not believe that Trooper Packard “was involved”. She knew Ms. O and Trooper Jacobowski went to the yard and knew for months that those two were collecting money to spend on a retirement party and other unofficial purposes.¹² She could hear Trooper Packard and Trooper Jakobowski talking at work, although she did not testify that she ever heard either of them discussing the recycling project specifically. After the scandal broke and Ms. O resigned, Ms. O’Meara was promoted to take over as OAT’s Director.

Trooper Packard’s testimony, which the Presiding Officer found “generally credible”, was substantially consistent with his recorded statements, both at his criminal investigatory interview and during his internal affairs interview. Unlike Trooper Jakobowski, who declined to participate in the criminal investigation, Trooper Packard said he “had nothing to hide” and spoke freely. His statements and Commission testimony were also largely consistent with the other evidence presented to the Commission.

This evidence established, as the Presiding Officer concluded, that Trooper Packard had “limited participation” in the recycling activities. He knew, as did all the other staff, that the 7110 components had been extracted and stored in the boiler room for some time before being moved by Trooper Jakobowski to a scrap yard. He also knew that Trooper Jakobowski later began drilling holes in the empty 9510 canisters and that they were also stored and then taken to

¹² The Department cited Ms. O’Meara’s testimony at the Commission hearing to the effect that she had informed Ms. O’s supervisor about the recycling of the breathalyzer parts as early as the “Spring 2012”, which would put her report about six months before any action was taken to investigate such allegedly suspicious activities. As it is not clear that the Presiding Commissioner credited this particular testimony, the majority does not take that information into account in reaching its conclusion.

the scrap yard. On one occasion, when there was an unusually large amount being taken for recycling, Trooper Packard personally helped load the metal into OAT vehicles, followed the vehicles in his own cruiser and helped unload the metals at the scrap yard. He accompanied Trooper Jakobowski on one other occasion as a passenger. On neither occasion did he observe Trooper Jakobowski receive any money. He knew that scrap yards did pay for metal scrap and assumed “someone” was getting paid for the metal. Unlike Ms. O’Meara, Trooper Packard never saw the cash in Ms. O.’s cabinet, never knew she used the money for a party and other personal expenditures and only learned those facts after the criminal investigation was initiated.

Most of the evidence introduced at the Commission hearing was hearsay, often multi-layer hearsay uncorroborated by any witness’s testimony. It consisted largely of information collected by the Department’s investigators whose recollections were based mainly on reports prepared days, and perhaps longer, after conducting non-recorded interviews with the witness. None of these personnel who were interviewed – save for Ms. O. and Troop Jakobowski – had percipient knowledge of Trooper Packard’s participation or the financial aspects of the operation. Indeed, Trooper Packard’s name never came up in most of the interviews.

While some slight inconsistency might arguably be read into how Trooper Packard described his hypothetical awareness of the financial aspects of the recycling operation, the Commission majority finds nothing that warrants any inference that he assumed that there was something unlawful about what was being done with the scrap metal or with the compensation that was being paid for it. Rather, the evidence established that he knew no more, and in some cases knew far less, than any other OAT staff member or supervisory personnel about the operation (most of whom were not disciplined at all).¹³ He, as did all other staff, assumed that the recycling of the 7110 parts had the vendor’s approval. The spent 9510 canisters were not

¹³ It bears notice that Trooper Packard was not disciplined for being less than truthful or failing to come forward to report the alleged suspicious activity. Had that been part of the charged misconduct, it clearly would raise issues of disparate treatment, in view of the pass given to other staff and supervisory level OAT personnel on this point.

marked with OAT inventory control numbers. There was no evidence that the OAT staff in general, and Trooper Packard in particular, had been formally (or informally) trained on the rules for disposal of surplus property. They were generally aware that the Department firing range had been approved to recycle metal. The evidence that Trooper Packard assumed “someone” was getting paid for the scrap metal hardly supports the inference that the Department would have the Commission draw that, therefore, Trooper Packard must have been a knowing participant in an unlawful scheme, and, in particular, that he knew that the scrapping operation was “improper”, that the payments were not being transmitted to duly authorized personnel, and/or that he knew that the money was being diverted “improperly”.

Absent probative evidence of improper behavior, however, the Department has not proved that Trooper Packard engaged in the misconduct with which he was charged, which was premised on the Department’s specifications that Trooper Packard (a) “improperly engaged” in the transportation, sale, and/or scrapping of OAT equipment (Charge 1, Specification 1); (b) Trooper Packard drove a State Police vehicle to a metal scrap facility while on duty “for the purpose of improperly” disposing of materials (Charge 2, Specification 1); or (c) Trooper Packard “did improperly use or dispose” of such materials (Charge 3, Specification 1). As the evidence established none of those charges, the Department has failed to meet its burden to establish just cause for the discipline imposed.¹⁴

Paul M. Stein
Paul M. Stein, Commissioner
For the Majority

¹⁴ The majority acknowledges that Trooper Packard did not testify personally at his Trial Board hearing. Our conclusion has taken into account the adverse inference that the Department was permitted to draw, but that fact does not alter our conclusion that the Department’s proof still remains insufficient to establish the charges against him. We note that Trooper Packard was represented by counsel at the Trial Board, he had freely waived his Miranda rights while still a subject of a criminal investigation, and he testified credibly before the Commission. Under all of the circumstances, we do not believe his choice to rest on his prior recorded statements at the Trial Board rises to the level of “silence” that warrants discrediting all the other credible, probative evidence in his favor.

Conclusion

For all of the above stated reasons, the appeal of Trooper Packard, under Docket No. D-15-223, is *allowed*

By 4-1 vote of the Civil Service Commission (Bowman, Chairman [AYE]; Camuso [AYE], Ittleman [NO], Stein [AYE] and Tivnan [AYE]) on July 20, 2017.

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

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

Notice to:

Gregory P. Benoit, Esq. (for Appellant)

Suzanne T. Caravaggio, Esq. (for Respondent)

Elisabeth M. Baker, Esq. (for Respondent)