COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

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

ROBERT PINTO,
Appellant

v.

DEPARTMENT OF STATE POLICE,
Respondent

Case No.: D-11-113

DECISION

This appeal was heard by Commissioner Daniel Henderson whose term on the Commission has now expired. Prior to the expiration of his term, Commissioner Henderson drafted the attached decision which was reviewed and considered by the Commission at an executive session on March 8, 2012.

The Commission adopts the findings of fact stated in Commissioner Henderson's Decision and accepts the conclusion that the Respondent has established just cause for imposing discipline on the Appellant, but that the discipline imposed on the Appellant should be modified because the Respondent failed to meet its burden of proof to establish by a preponderance of substantial evidence all of the facts upon which the discipline was imposed. The Commission concluded, however, that the imposition of a five day suspension was not inappropriate for the violations that had been proved but that the loss of 10 additional days of accrued vacation time was excessive, under all of the circumstances of the case. Accordingly, the five day suspension is sustained, but the discipline will be modified to reduce the loss of accrued vacation time from ten days to five days.

By vote of the Civil Service Commission (Bowman, Chairman; Marquis, McDowell and Stein, Commissioners) on March 8, 2012.

A true record. Attest.

Christopher C. Bowman
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(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.

Notice to:
Joseph P. Kittredge, Esq. (for Appellant)
Jermaine L. Kidd, Esq. (for Respondent

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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V.

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D-11-113

Appellant's Attorney:

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Commissioner:

Daniel M. Henderson[1]

DECISION

The Appellant, Robert Pinto (hereinafter "Trooper Pinto" or "Appellant"), pursuant to M.G.L. c. 31, § 43, filed a timely appeal with the Civil Service Commission (hereinafter "Commission") on April 1, 2011 in response to a disciplinary action taken by the Department of State Police (hereinafter "Department" or "Appointing Authority") where the Appellant was suspended for five (5) days without pay, forced to forfeit ten (10) days

[1] The Commission acknowledges the assistance of Law Clerk Shawn Weiske in the drafting of this decision.

of accrued time, and is subject to a bi-annual audit for two years due to the Appellant's alleged unauthorized use of his State Police issued cruiser for unofficial purposes.

A hearing was conducted at the offices of the Commission on June 29, 2011. Neither party requested a public hearing; the hearing was declared private. The hearing was digitally recorded and copies were provided to both parties. The parties filed post-hearing proposed decisions.

Facts

Thirty-one (31) exhibits were entered into evidence. Exhibit 31 was filed post-hearing as directed at the hearing. Based upon the documents entered into evidence and the testimony of

For the Massachusetts State Police

- Detective Lieutenant David DeBuccia

For the Appellant

- Trooper Robert Pinto

I make the following finding of facts:

1. The Appellant is a Trooper with the Massachusetts State Police, a position he has held since 1992. Trooper Pinto is currently stationed at the State Police Bourne barracks located in Troop D. Trooper Pinto resides in Mashpee. (Testimony of the Appellant)
2. Every member of the State Police is issued a cruiser and a fuel card. The Appellant has a marked cruiser. The fuel card functions like a credit card. No specific State Police Policy and Procedure exists regarding the use of the fuel card although various

memoranda and announcements have been issued by the Department regarding usage. (Testimony of Appellant and Det. Lt. David DeBuccia)

3. The State Police keeps a record of fuel card transactions. Each Trooper is required to input the mileage indicated on the odometer of the cruiser when refueling. Additionally, the cruiser number is to be entered as well. The record keeping mechanism for the State Police maintains and tracks these numbers along with the date, time, gallons of fuel received, and the total cost of the fuel purchase. (Exhibit 6; Testimony of the Appellant)
4. Between May 22, 2007 and August 25, 2008, the State Police performed a fuel audit in an effort to cut costs. The Department constantly reviews the usage of fuel; however, it is unclear whether these reviews are of the same type as the current audit. The audit compared days that the troopers were off-duty with days that the trooper would fuel his cruiser. The audit also flagged any suspicious fuel usage during the audit period. After the audit, individuals who were flagged were asked to explain the past fuel usage.[2] (Exhibits 6 and 8; Testimony of Appellant)
5. The fuel audit flagged the Appellant, and other officers, for days where the Appellant refueled his cruiser on his day off. Detective Lieutenant DeBuccia (Hereinafter "Det. Lt. DeBuccia") from Internal Affairs was selected to investigate the Appellant's case. Det. Lt. DeBuccia has been employed with the State Police for twenty-five (25) years,

[2] It can be inferred that a better practice would have been to give proper notice to those individuals who were to be the target of the investigation to ensure proper documentation of relevant information rather than conduct a shadow investigation and create a situation whereby individuals are expected to recall events occurring up to eighteen months prior. The simple approach of a general posting of the change in practice and the expectation of everyone prospectively keeping accurate records would have been the fair and reasonable course of action. Instead, the command staff came up with the idea of an audit and applied it retrospectively without a notice of a change of practice. Dormant, unapplied rules over a long period become the accepted practice by acquiescence. Targeting an individual through this change in practice is fundamentally unfair.

and a Detective Lieutenant for six (6) years. He was assigned to Internal Affairs in 2008 and has since conducted 60-80 investigations. (Testimony of Det. Lt. DeBuccia)

6. During the investigation, Det. Lt. DeBuccia identified eleven (11) dates which were suspicious. Upon completing his investigation, Det. Lt. DeBuccia submitted his findings to his Commanding Officer, Captain Thomas of Internal Affairs. (Exhibit 9; Testimony of Det. Lt. DeBuccia and Appellant)
7. The State Police Trial Board (hereinafter "Trial Board") concluded that the Appellant was in violation of several of the Rules and Regulations of the State Police. (Exhibits 1, 27, 28, 29)
8. General Order of the Department of State Police ADM-28 (hereinafter "ADM-28") DEPARTMENT OF MOTOR VEHICLES dated March 18, 1998 states, in part, "State owned vehicles shall be operated for official use only." Additionally, ADM-28 describes the correct uses of the cruiser and requires members to be in proper duty attire when operating the vehicle. (Exhibit 2)
9. The Rules and Regulations of the State Police Article 5.26.4 States that "no member shall use Massachusetts State Police...cruisers...except for official business." (Exhibit 3)
10. Rules and Regulations of the State Police Article 5.26.5 states that "Members shall operate Massachusetts State Police vehicles in a cautious manner, and in conformance with Massachusetts State Police Policy and Procedure and applicable law." (Exhibit 3)

11. Rules and Regulations of the State Police Article 5.2 states in part that "members shall conduct themselves at all times in such a manner as to reflect most favorable upon themselves and the Massachusetts State Police." (Exhibit 3)
12. Rules and Regulations of the State Police Article 5.8.1 states in part that "members shall perform their duties in such a manner as will maintain the highest professionally accepted performance standards in carrying out the functions and objectives of the State Police." (Exhibit 3)
13. Rules and Regulations of the State Police Appendix "A" DISCIPLINE GUIDELINES outlines four (4) classes of offenses: Class A, Class B, Class C, and Class D. Different violations fall within the various categories. Each Class is prescribed a minimum penalty. A Class B first offense carries a five (5) day minimum suspension and a maximum thirty (30) day suspension. A Class C or D first offense carries a minimum penalty of a written reprimand and up to a five (5) day suspension and two (2) day suspension, respectively. In addition to the above guidelines, the Trial Board, acting as the disciplinary body, may recommend loss a of accrued vacation/personal/holiday time in lieu of a suspension. (Exhibit 4)
14. The Appellant was originally charged with eleven (11) violations of 5.26.4 for using his cruiser for unofficial business, a Class D violation; one (1) violation of 5.26.5 for using his cruiser for unofficial business on various dates, a Class C offense; one (1) violation of 5.2 for unbecoming conduct, a Class B offense; and one (1) violation of 5.8.1 for failing to properly input his mileage when refueling his cruiser, a Class D offense. (Exhibit 1)

15. The Trial Board found the Appellant "NOT GUILTY" of five (5) of the eleven (11) 5.26.4 violations and "NOT GUILTY" of the 5.2 Class B violation. The Appellant was found "GUILTY" of the remaining six (6) 5.26.4 Class D violations, the one (1) 5.25.5 Class C violation, and the one (1) 5.8.1 Class D violation. (Exhibit 27)

16. The Trial Boards charges are summarized:

    a. Charge I, Specification 1: Appellant was found GUILTY of using his cruiser while on a Day Off Regular (hereinafter "DOR") on or about September 16, 2007, and not for official business. 5.26.4 Class D violation. On this day, the Appellant fueled his vehicle on September 16, 2007 and subsequently refueled his vehicle twenty-four (24) minutes into his shift on September 17, 2007.

    b. Charge I, Specification 2: NOT GUILTY.

    c. Charge I, Specification 3: NOT GUILTY.

    d. Charge I, Specification 4: Appellant was found GUILTY of using his cruiser while on a DOR on or about November 21, 2007, and not for official business. 5.26.4 Class D violation. The Appellant refueled his vehicle at 11:04pm while off-duty.

    e. Charge I, Specification 5: Appellant was found GUILTY of using his cruiser while on Sick in Family (hereinafter "SIF") leave on or about January11, 2008, and not for official business. 5.26.4 Class D violation. The Appellant drove to Newton in his cruiser for unofficial business.

    f. Charge I, Specification 6: Appellant was found GUILTY of using his cruiser while on Holiday Falls on Day Off Regular (hereinafter "HDR") leave on or about February 18 2008, and not for official business. This conclusion was

reached by evaluating the mileage records and determining that the Appellant had only driven only sixty (60) miles since his last refueling. 5.26.4 Class D violation.

g. Charge I, Specification 7: NOT GUILTY.

h. Charge I, Specification 8: NOT GUILTY.

i. Charge I, Specification 9: Appellant was found GUILTY of using his cruiser while on a DOR on or about March 31, 2008, and not for official business. This conclusion was reached by evaluating the mileage records. 5.26.4 Class D violation.

j. Charge I, Specification 10: Appellant was found GUILTY of using his cruiser while on a DOR on or about April 25, 2008, and not for official business. This conclusion was reached by evaluating the mileage records. 5.26.4 Class D violation.

k. Charge I, Specification 11: NOT GUILTY.

l. Charge II, Specification 1: Appellant was found GUILTY of using his cruiser on various dates from September 16, 2007 through June 24, 2008, over a nine (9) month period, not in conformance with Massachusetts State Police Policy and Procedure. Specifically, this occurred when the Appellant used his cruiser while on DOR, SIF, or HDR. 5.26.5 Class C violation.

m. Charge III, Specification 1: NOT GUILTY.

n. Charge IV, Specification 1: Appellant was found GUILTY of not imputing the accurate mileage on the odometer of his cruiser when refueling his cruiser on

various dates from May 26, 2007 through August 25, 2008. 5.8.1. Class D violation.

17. Det. Lt. DeBuccia interviewed the Appellant on November 6, 2008 regarding these dates and documented the Appellant's responses. This interview occurred almost eighteen months (18) after the investigation began and two and one half (2 ½) months after the investigation was concluded. (Testimony of Det. Lt. DeBuccia; Exhibits 6 and 8)

18. During the interview, the Appellant could not remember his activities on many of the specific dates; however, in both the interview and testimony before the Commission, he claimed that he was probably doing cruiser maintenance, which is a required practice of all State Troopers per Department of State Police General Order 03. Cruiser maintenance includes washing the car, vacuuming the interior, as well as general mechanical maintenance. The Appellant also stated that he would go to the firing range in order to practice with his service weapons. (Exhibits 9 and 16; Testimony of Det. Lt. DeBuccia and Appellant)

19. In regards to Charge I, Specification 1, the Appellant initially believed that on September 16, 2007 he had picked up his uniform from the cleaners. However, the receipt from the cleaners did not match the date. The Appellant refueled his cruiser twenty-four (24) minutes into his shift on September 17, 2007 after refueling on his day off on September 16, 2007. During this time period the State Police were investigating a string of catalytic converter thefts at various Park and Ride lots in Sagamore, Bourne, Norwell, and off of exit five (5) in Plymouth, which Trooper Pinto participated in. This investigation required the use of unmarked vehicles.

Trooper Pinto stated during the hearing that he may have refueled an unmarked vehicle or allowed another trooper to use his fuel card when investigating these crimes on September 17, 2007. While this was not his explanation during his interview with Det. Lt. DeBuccia on November 6, 2008, it had occurred to him during the time that elapsed between the interview and the hearing that this was a possible explanation for the discrepancy in the fuel records. (Exhibits 9 and 10; Testimony of the Appellant and Det. Lt. DeBuccia)

20. In regards to Charge I, Specification 4, the Appellant stated that he was performing cruiser maintenance on November 21, 2007 at 11:01pm, which included washing, refueling and vacuuming the cruiser. The Appellant stated that he washes his vehicle at a car wash facility at the Sandwich DPW, due to the facility having a water reclamation system and the car wash bay being indoors, making washing the vehicle easier during the winter and summer. Det. Lt. DeBuccia attempted to verify this explanation by interviewing an employee at the wash bay that Trooper Pinto frequents. The employee stated that he has seen Trooper Pinto on numerous occasions but could not recall specific dates. (Exhibit 9; Testimony of Appellant and Det. Lt. DeBuccia)

21. In regards to Charge I, Specification 5, the Appellant stated that during his shift on the night of January 4, 2008, he was informed that his wife was suffering from a migraine headache, which normally renders her incapacitated, while she was visiting family in Newton. In the winter of 2007, the Appellant stated that his wife had undergone a surgery for a brain aneurism. Due to her prior surgery and current migraine, the Appellant deemed the situation an emergency and upon ending his shift,

drove to Newton from the Cape in his cruiser. Trooper Pinto had the opportunity to seek permission or, at a minimum, provide notice of his activities via the radio in his cruiser. However, the Appellant neglected to seek out permission to use his cruiser while off duty for unofficial business and he failed to notify anybody of his cruiser's whereabouts. Upon arrival in Newton, the Appellant parked his cruiser in a locked garage and drove his wife and two sons home to Mashpee. The Appellant subsequently took time off due to his wife's condition. On January 11, 2008, the Appellant got a ride to Newton and drove his cruiser back to Mashpee. On the way home he refueled his cruiser while off-duty in Hanover. The Appellant testified that he did not have explicit permission to use his cruiser for this purpose. According to the Appellant, the distance from the Cape to Newton is roughly forty (40) to fifty (50) miles. (Exhibit 9; Testimony of the Appellant)

22. In regards to Charge I, Specification 6, the Appellant stated that he was performing cruiser maintenance on February 18, 2008 while on holiday leave. (Exhibit 9; Testimony of Appellant)
23. In regards to Charge I, Specification 9, the Appellant again stated that he was performing cruiser maintenance on March 31, 2008 while off-duty. (Exhibit 9; Testimony of the Appellant)
24. In regards to Charge I, Specification 10, the Appellant stated that he was performing cruiser maintenance on April 25, 2008 while off-duty. (Exhibit 9; Testimony of the Appellant)
25. In regards to Charge IV, Specification 1, the Appellant stated that he would enter in the mileage of his cruiser odometer when he refueled, but would sometimes fail to

enter the proper mileage due to laziness. Instead of going back into his cruiser when he had already exited and started entering his information at the pump, he would simply estimate the mileage. The Appellant testified that the inaccurate mileage was inadvertent.(Testimony of the Appellant)

26. Det. Lt. DeBuccia admitted that there was a wide variance among the Troopers for mileage and gas usage. A few of the factors which caused this wide variance was the distance the Troopers had to travel from home to their assigned barracks and the age or efficiency of the engine in the various cruisers. (Testimony of Det. Lt. DeBuccia)

27. Det. Lt. DeBuccia described the final part of his investigation was the interview of the subject to give the Trooper an opportunity for an explanation of their activities on the past dates in question. Det. Lt. DeBuccia had difficulty testifying regarding dates of events contained in his investigative report. He continually had to read the dates from his report, due to his lack of present memory. (Testimony and demeanor of Det. Lt. DeBuccia)

28. The Appellant testified that he tried to answer Det. Lt. DeBuccia's questions based on his memory and past practices. For example he believed that he used his gas card on June 24, 2008 for the pick-up and delivery of a donated television. However, sometime after the interview he came across an e-mail which refreshed his memory that he was actually on a funeral assignment that day. (Testimony of the Appellant)

29. The Appellant stated that he did not seek permission from any supervisor to perform cruiser maintenance while off-duty. However, troopers are allowed to use their cruiser while off-duty if it is for work related matters. Det. Lt. DeBuccia testified that while maintenance of a cruiser while off duty is a potential liability, he would

commend Trooper Pinto for performing cruiser maintenance while off-duty. (Exhibit 9; Testimony of the Appellant and Det. Lt. DeBuccia)

30. Since he learned of the investigation, the Appellant has maintained meticulous records of his fuel usage and has ceased performing cruiser maintenance while off-duty. (Testimony of Appellant)

Conclusion

Discipline by a public employer is appropriate when an "employee has been guilty of substantial misconduct which adversely affects the public interest..." *See, e.g.* Murray v. Second District Court of E. Middlesex, 389 Mass. 508, 514 (1983). 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 Serv. Comm'n, 43 Mass. App. Ct. 300, 304 (1997). *See* Town of Watertownv. Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civil Serv. Comm'n, 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). 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., 359 Mass. 211, 214 (1971); Cambridge, 43 Mass. App. Ct. 300, 304; Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928).

Justification for discipline is determined 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).

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 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 Serv. Comm'n, 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). However, "it is not within the authority of the Commission…to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority." City of Cambridge, 43 Mass. App. Ct. at 304.

G.L.c.31, Section 43 vests the Commission with the authority to affirm, vacate or modify the penalty imposed by the appointing authority. The Commission has been delegated with "considerable discretion", albeit "not without bounds", to modify a penalty imposed by the appointing authority, so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. See Faria v. Third

Bristol Division of the Dist. Ct. Dep., 14 Mass. App. Ct. 985, 987 (1982); Police Commissioner of Boston v. Civil Serv. Comm'n., 39 Mass. App. Ct. 594, 602 (1996)."It is well to remember that the power to modify is at its core the authority to review and, when appropriate, to temper, balance, and amend. The power to modify penalties permits the furtherance of uniformity and equitable treatment of similarly situated individuals. It must be used to further, and not to frustrate, the purpose of civil service legislation, i.e., 'to protect efficient public employees from partisan political control' . . .and 'the removal of those who have proved to be incompetent or unworthy to continue in the public service'." Police Comm. Boston, 39 Mass. App. Ct. 594, 600; See Faria, 14 Mass. App. Ct. 985, 987 (1982).

In deciding whether to exercise discretion to modify a penalty, the Commission's task "is not to be accomplished on a wholly blank slate". Unless the Commission's findings of fact differ materially and significantly from those of the appointing authority or interpret the relevant law in a substantially different way, the Commission is not free to "substitute its judgment" for that of the appointing authority, and "cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation." Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823 (2006). If "1) there [are] no findings of political considerations, other improper bias, or inequitable treatment; 2) the town's decision involved a discretionary disciplinary decision regarding the enforcement of important standards of conduct; and 3) the charges for which discipline had been imposed were still satisfied by the remainder of the inappropriate conduct, the different subsidiary fact findings [do] not justify modification of discipline by the Commission." Id. at 826; See e.g. School Comm. v. Civil Serv. Comm'n, 43 Mass. App. Ct. 486 (1997)

(modification of discharge to one-year suspension upheld); Dedham v. Civil Serv. Comm'n 21 Mass. App. Ct. 904 (1985) (modification of discharge to 18-months suspension upheld); Trustees of the State Library v. Civil Serv. Comm'n, 3 Mass. App. Ct. 724 (1975) (modification of discharge to 4-month suspension upheld)

It is the function of the Commission to determine the credibility of the testimony presented before it. *See* School Committee of Wellesley v. Labor Relations Commission, 376 Mass. 112, 120 (1978); Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission, 401 Mass. 526, 529 (1988); Doherty v. Retirement Board of Medford, 425 Mass. 130, 141 (1997). The Commission holds its disciplinary hearings on a de novo basis, upon which it makes its own findings of fact. Sullivan v. Municipal Ct. of Roxbury, 322 Mass. 566, 569 (1948); Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983); City of Leominster v. Stratton, 58 Mass. App. 726, 727-728 (2003).

The Commission, upon reviewing the evidence, holds that the Appellant's appeal is *allowed* in part and *dismissed* in part.

Trooper Pinto violated Articles 5.26.4 and 5.8.1, consistent with the findings of the State Trial Board in Charge I, Specification 5 and Charge IV, Specification 4, respectively. The remaining five (5) Article 5.26.4 violations and one (1) Article 5.26.5 violation are hereby reversed.

With respect to the affirmed Article 5.26.4 violation, Trooper Pinto admitted that he used his cruiser to drive from the Cape to Newton after his shift on January 4, 2008 in response to what he deemed to be a medical emergency involving his wife. During testimony, Trooper Pinto admitted that in hindsight he should have asked for permission to drive his cruiser to Newton. Additionally, Trooper Pinto was informed of his wife's

condition during his shift, yet did not feel it was severe enough to end his shift early and drive to Newton. Per the universal understanding of the word emergency, a true emergency cannot afford a delay and requires immediate attention. Here, Trooper Pinto decided to work for the remaining portion of his shift after hearing of his wife's migraine headache rather than immediately leaving work and driving to Newton. Furthermore, rather than erring on the side of caution and informing his superiors of a situation he deemed to be an emergency via radio, Trooper Pinto took it upon himself to drive his cruiser to Newton without informing anyone of his activities.

Given Trooper Pinto's actions, the Commission cannot deem the situation an emergency and excuse the use of the cruiser. If the situation was not an emergency, it would be reasonable to conclude that Trooper Pinto should have returned home before driving to Newton so that he could change vehicles. Trooper Pinto testified that he was patrolling the Cape on that day. Regardless of where he was patrolling on the Cape, his home in Mashpee would not have been a major detour if he had decided to park his cruiser at home and drive his personal vehicle to Newton. While the Commission can sympathize with the situation he was facing, the undisputed fact is that Trooper Pinto used his State issued cruiser for a non-business related purpose when he drove to Newton. Accordingly, the State Trial Board properly found Trooper Pinto guilty of Charge I, Specification 5, in violation of Article 5.26.4.

The Commission also affirms Charge IV, Specification I, a violation of Article 5.8.1 for unsatisfactory performance. Trooper Pinto admitted that he failed to accurately input the correct mileage when using his fuel card to refuel his cruiser. During testimony, Trooper Pinto stated that the inaccurate entries were attributed to laziness, rather than

deception. Failure to input the mileage constitutes a failure, however small, to perform satisfactorily. While no formal policy regarding the usage of the fuel cards exists, the fact that upon each refueling the trooper must input the mileage in order to receive fuel creates an implied acknowledgement of a procedure that must be followed. Therefore, Trooper Pinto's numerous failures to accurately input his mileage when refueling constitutes an unsatisfactory performance in violation of Article 5.8.1.[3]

The Department has not shown, by a preponderance of the evidence, that the Trial Board had reasonable justification to find Trooper Pinto guilty of Charge I, Specification 1, Charge I, Specification 4, Charge I, Specification 6, Charge I, Specification 9, Charge I, Specification 10, and Charge II, Specification 1. As noted above, the Commission is authorized to modify the discipline imposed after conducting its "de novo hearing for the purpose of finding facts anew" Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006)

Charge I, Specifications 1 and 4, assert that Trooper Pinto used his cruiser while off-duty for purposes other than official use. The Department presented testimony and evidence indicating that Trooper Pinto used his cruiser while off duty on September 16, 2007 and November 21, 2007. The problem herein rests on the fact that neither the Department, nor the Appellant, produced any direct evidence to indicate the activities of Trooper Pinto on these specific days. In fact, the Department relies on pure speculation in its assertions of improper use and presents no rebuttal to Trooper Pinto's testimony. Further, rather than presenting evidence of actual unofficial use, the Department has shifted the burden to Trooper Pinto to recall his activities which occurred over a year

[3] It seems the Department has failed to take into account the commuting distance that certain State Troopers must drive on a daily basis as well as the variation in fuel efficiency among the different cruisers.

prior to the investigation. Such an insuperable task cannot be expected to be performed with any type of accuracy, even by those with the best memory.

In support of Charge I, Specification 1, the Department presented a fuel record indicating that Trooper Pinto refueled twenty-four (24) minutes into his shift on September 17, 2007 after refueling on his previous day off on September 16, 2007. Trooper Pinto testified that at that time a substantial number of catalytic converter thefts had occurred in the Bourne, Plymouth, Sagamore, and Norwell areas and in response the Department was utilizing unmarked vehicles to thwart further criminal activity. In regards to the fuel usage, Trooper Pinto stated that he may have been assigned to an unmarked vehicle on that day and refueled the unmarked vehicle rather than his cruiser. The Department has presented no evidence that can actually prove unofficial use on September 16, 2007 nor have they presented any evidence to rebut Trooper Pinto's explanation for his fuel usage. The Commission credits Trooper Pinot's testimony and finds no evidence to support a guilty finding of Charge I, Specification 1.

Records indicate that Trooper Pinto refueled his cruiser, while off-duty, on November 21, 2007 at 11:04pm. The Department, again, presented no evidence that Trooper Pinto was actually using his vehicle in an unofficial capacity. Instead, the Department is speculating. Trooper Pinto testified that he was vacuuming his cruiser and refueling in preparation of his next shift. Per the State Police Policy, all vehicles must be properly maintained. Therefore, vacuuming and refueling, being a product of routine maintenance, would fall under the category of "official use."

While the time of refueling raises suspicion, Trooper Pinto, credibly, testified that he works different hours and at the time he was accustomed to being awake during the night.

In light of this claim, the essential question thus presents itself: Does the Department have evidence of unofficial use? The answer is a resounding "No." Refueling and vacuuming at night indicates nothing more than refueling and vacuuming at night. The evidence by the Department reveals nothing that would indicate that Trooper Pinto was using his marked cruiser in an unofficial capacity, only that he was refueling prior to his next shift. The Commission cannot entertain an inference that Trooper Pinto was using his cruiser for unofficial use without evidence to support it. Simply stated, the State Board relied upon speculation under the guise of evidence, in issuing its disciplinary action regarding Charge I, Specification 4.

Legitimate reasons for Trooper Pinto's use of his cruiser on September 16, 2007 and November 21, 2007 were offered by the Appellant with no evidence to rebut these claims being presented by the Department. A disciplinary action cannot be said to have reasonable justification if it relies on pure speculation in lieu of evidence. Therefore, the Department has failed to show, by a preponderance of the evidence, that Trooper Pinto used his vehicle in an unofficial capacity on September 16, 2007 and November 21, 2007.

The crux of Charge I, Specifications 6, 9, and 10 is the odometer mileage entries as recorded by Trooper Pinto when refueling. The Department must show, by a preponderance of the evidence, that the State Board had reasonable justification to implement the recommended discipline. The only facts that the Department has convincingly established is that the mileage entries input by Trooper Pinto were inaccurate. In fact, this is undisputed. Trooper Pinto readily admitted to inaccurately recording his mileage when refueling. The erroneous mileage entries necessarily indicate

a dearth of reliability in the evaluation of fuel usage if relying on the mileage entries alone. Absent additional evidence, no verifiable method for measuring the consumption of fuel exists if the mileage entries reflect nothing more than a series of falsehoods. Permitting a disciplinary action based on such inconsistencies violates the fundamental understanding of what constitutes "reasonable justification." Simultaneously relying on erroneous fuel mileage entries to prove excessive fuel usage, while imposing a disciplinary action for the same erroneous fuel mileage entries, is the text book example of hypocrisy. The Department has failed to show, by a preponderance of evidence, excessive fuel usage based on the mileage entries of the fuel card as outline in Charge I, Specifications 6, 9, and 10.

Charge II, Specification 1 is duplicative of all the Specifications under Charge I. Charge II, Specification 1 was in response to the multiple violations of Article 5.26.4. Since the evidence supports only one (1) out of five (5) of these violations, the Commission finds that the Department has not shown, based on the preponderance of the evidence, that the State Board had reasonable justification for Charge II, Specification 1.

Based on the testimony presented and the evidence introduced, the Commission finds that there is insufficient evidence to conclude that Trooper Pinto is guilty of Charge I, Specifications 1,4,6,9,10, and Charge II, Specification 1. However, the Commission finds the Department to have shown, by a preponderance of the evidence, that the State Board had reasonable justification to conclude that Trooper Pinto was guilty of Charge I, Specification 5 and Charge IV, Specification 1. The suspension of five (5) days is to be modified to a suspension of one (1) day and the Appellant is not required to forfeit ten (10) days of accrued time. The Appellant may be subject to a bi-annual fuel audit for two

(2) years. Four (4) days of lost pay due to suspension and ten (10) days of accrued time shall be restored to the Appellant.

For all the above reasons, the Appellant's appeal under Docket No. D1-11-113 is hereby ***allowed*** in part and ***dismissed*** in part.

Civil Service Commission,

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Daniel M. Henderson
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and McDowell, Commissioners) on March 8, 2012.

A true Copy. Attest:

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Commissioner
Civil Service Commission

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.

Notice to:
Joseph P. Kittredge, Atty. (for Appellant)
Jermaine L. Kidd, Atty. (for Appointing Authority)