

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

MATTHEW WAPLES,
Appellant

v.

**DEPARTMENT OF
STATE POLICE,**
Respondent

Case No.: D-13-295

DECISION

Pursuant to G.L. c. 31, § 2(b) and/or G.L. c. 7, § 4H, a Magistrate from the Division of Administrative Law Appeals (DALA), was assigned to conduct a full evidentiary hearing regarding this matter on behalf of the Civil Service Commission (Commission).

Pursuant to 801 CMR 1.01 (11) (c), the Magistrate issued the attached Tentative Decision to the Commission. The parties had thirty (30) days to provide written objections to the Commission. The Respondent submitted written objections and the Appellant submitted a response to those objections.

After careful review and consideration, the Commission voted to affirm and adopt the Tentative Decision of the Magistrate in whole, thus making this the Final Decision of the Commission.

Mr. Waples's appeal under Docket No. D-13-295 is hereby ***allowed in part***. His forfeiture of five (5) vacation days is reduced to three (3) days.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman and McDowell, Commissioners [Stein – Absent]) on September 18, 2014

Civil Service Commission

/s/ Christopher C. Bowman
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:

Margaret Rubino, Esq. (for Appellant)

Jennifer O'Neill, Esq. (for Respondent)

Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Matthew J. Waples,

Appellant

v.

Docket No. D1-13-295

DALA No. CS-14-136

Department of State Police,

Respondent

Appearance for Appellant:

Margaret A. Rubino, Esq.
Rafanelli & Kittredge, P.C.
1 Keefe Road
Acton, MA 01720

Appearance for Respondent:

Jennifer P. O'Neill, Esq.
Sean W. Farrell, Esq.
Department of State Police
470 Worcester Road
Framingham, MA 01702

Administrative Magistrate:

James Rooney, Esq.

Summary of Recommended Decision

The Department of State Police had just cause to discipline a trooper for violating rules on reporting for duty and neglect of duty by being 20 miles outside his patrol area without permission. However, the preponderance of the evidence shows that the trooper likely spent ten minutes, rather than 50 minutes, in a restaurant while on duty, as a trial board had found. Accordingly, I recommend a modification of the penalty from loss of five to loss of three vacation days.

RECOMMENDED DECISION

Introduction

State Police Trooper Matthew Waples appeals under M.G.L. c. 22C, § 13 from a decision of the Department of State Police that he forfeit five vacation days for violating Department rules regarding reporting for duty and neglect of duty. (Ex. 15.) I held a hearing at the Division of Administrative Law Appeals on March 28, 2014, conducted under the Standard Adjudicatory Rules of Practice and Procedure, 801 C.M.R. § 1.01, *et seq.* I recorded the hearing digitally. The Department offered testimony by three witnesses – Neal Rossi, State Police Sergeant Kenneth Wong, and State Police Captain Thomas Majenski. Trooper Waples testified for himself and offered testimony by Joseph Beale, a former bartender at the Scarlet Oak Tavern in Hingham, Massachusetts.

I admitted fourteen exhibits into evidence at the hearing. I now mark Trooper Waples's appeal and attachments as exhibit 15.

FINDINGS OF FACT

Based on the testimony and evidence presented and reasonable inferences drawn from them, I make the following findings of fact:

1. Matthew J. Waples has been a Trooper with the Massachusetts Department of State Police for 15 years. For the last seven years, he has been stationed at the Department's Norwell Barracks. (Waples Testimony.)
2. The Department assigns patrol areas for each of the barracks it operates. The Norwell Barracks patrol area covers Route 3, from Exit 5 in Plymouth northward to Exit 17 in Braintree, and Route 44 from the Carver/Middleborough line eastward until it intersects with Route 3. (Wong Testimony.) This section of Route 44 is seven miles long. (Waples Testimony.)
3. Troopers stationed at the Norwell Barracks must patrol all roadways to which they are assigned. The desk sergeant has the authority to allow a trooper to deviate slightly from an assigned area and patrol where there is police work to be done. If a trooper assigned a particular area is tied up with an arrest or for some other reason, the other

troopers may be directed to assume responsibility for that area. Troopers are allowed meal breaks during their shifts; they must inform the desk sergeant when taking such a break. (Wong Testimony.) If a trooper were to be 20 miles away from an assigned patrol area, the trooper could not respond quickly to an event occurring in the assigned area (and the speed with which the trooper would have to drive to return to the assigned area would itself present a danger.) (Wong and Majenski Testimony.)

4. Desk officers at the Norwell Barracks assign troopers to patrol particular roadways in the territory depending upon how many troopers are on duty. When two troopers are on duty, one trooper typically patrols Route 3 from Exit 12 northward to Exit 17 (known as the “3 North Patrol”), while the other trooper patrols Route 3 from Exit 12 southward to Exit 5 (known as the “3 South Patrol”) and Route 44 from Exit 7 westward to the Middleborough/Carver line (known as the “Route 44 Patrol”). When three troopers are on duty, one Trooper is assigned the 3 North Patrol, another is assigned the 3 South Patrol, and the third Trooper is assigned the Route 44 Patrol. If a fourth trooper is on duty, that trooper patrols the Nantasket Beach patrol area, which includes Hull and parts of Route 228 in Hingham. (Wong Testimony; Ex. 7.)
5. The Department keeps administrative journals or logs that record significant information such as when a trooper begins work, shift assignments, car accidents, and arrests. Log entries are created either by patrol officers or the desk officer. (Ex. 4; Wong Testimony.)
6. On February 4, 2010, Sergeant Wong was the desk officer for the evening shift, from 3:00 p.m. to 11:30 p.m. Three troopers patrolled the territory that evening. Trooper Zakhary was assigned to the Route 3 North Patrol, Trooper Folloni was assigned to the Route 3 South Patrol, and Trooper Waples was assigned to the Route 44 Patrol. Had a trooper asked Sgt. Wong for leave to patrol outside his patrol area, it was Sgt.

Wong's practice, if he granted permission, to note this in the log. (Ex. 4; Wong and Waples Testimony.)

7. Trooper Waples began his shift by covering an appearance by Governor Patrick in Plymouth until 3:50 p.m., and then briefly patrolled Route 44. He then began patrolling Route 3. He did not contact Sgt. Wong to tell him he was no longer on Route 44; however, he did maintain contact with the other troopers working that evening. (Waples Testimony.) He made vehicle stops in Duxbury, Hingham, and possibly Norwell. These stops are not reflected in the administrative log. (Waples Testimony; Ex. 4.)¹
8. At approximately 9:39 p.m. on February 4, 2010, Trooper Waples used his Department-issued credit card to by gas at a Gulf station at 19 Whiting Street, Hingham. He understood that the Department preferred that troopers use the gas card at Gulf stations. Trooper Waples, who lived in Hull then, used that gas station to fill his cruiser four times in February 2010. The gas station is approximately 20 miles away from the eastern-most point of the Route 44 patrol area, where Route 44 intersects Route 3. He had not sought permission to deviate from his Route 44 assignment or informed Sgt. Wong of his location in Hingham. (Waples and Majenski Testimony; Ex. 3.)
9. After refueling his cruiser, Trooper Waples drove to the Scarlet Oak Tavern, which is adjacent to the gas station and connected by a shared parking lot. Trooper Waples stopped there to use the bathroom, which he had done previously while on duty. He had also been to this restaurant when off-duty. (Waples and Majenski Testimony.)

¹ Counsel for Trooper Waples stated in his post-hearing brief that Exhibit 5 reflects that the trooper issued a citation at 4:00 p.m. on February 4, 2010 in Duxbury and issued a written warning on Route 228 in Hingham at 6:40 p.m. Exhibit 5 is a record of the hours that Trooper Waples worked in early February 2010; it contains no information as to what actions he took on the days he worked. Exhibit 4 is the log for February 4, 2010. Neither of the actions noted in the brief is listed in the log.

10. Trooper Waples parked his cruiser next to the walkway leading to the restaurant, went into the Royal Oak Tavern to use the restroom, and after emerging from the restroom, walked past the bar. The bartender, Joseph Beale, who knew him, offered him a diet soda, which he accepted. (Beale and Waples Testimony.)
11. Neil Rossi had been at the Royal Oak Tavern since 7:30 p.m. for a dinner meeting of the Boston Police Foundation. At around 9:45 p.m. he walked past the bar and saw a state trooper in uniform. He and some friends left the restaurant briefly to look at a Bentley parked in the lot. He came back in, introduced himself to Trooper Waples, and asked the trooper if he knew State Police Lieutenant Michael Valair, who he said was also on duty that night. Trooper Waples told Mr. Rossi that he did not know Lt. Valair. Two women asked Trooper Waples where he got his boots. He told them the boots were state-issued. Trooper Waples put what was left of his drink down and left. (Rossi and Waples Testimony.) Mr. Beale estimated that Trooper Waples was in the restaurant for around ten minutes. (Beale Testimony.)
12. After Trooper Waples left the Royal Oak Tavern, he continued to patrol Route 3, and then finished his shift by patrolling Route 44. (Waples Testimony.) His employee time entry report lists him as having worked a full eight-hour shift on February 4, 2010. (Ex. 5.)
13. That evening, after Trooper Waples left the Royal Oak, Mr. Rossi called Lt. Valair to kid him about one of his troopers not knowing him; he had no intention of filing a complaint. He told Lt. Valair that Trooper Waples had been at the Scarlet Oak Tavern in uniform, and did not know the lieutenant's identity. (Rossi Testimony.)
14. Later, Lt. Valair called Mr. Rossi and told him "they" would like to have a citizen complaint filed about what happened at the Royal Oak Tavern, which Mr. Rossi took to mean that the lieutenant's superiors wanted a complaint filed. He agreed to do so,

but initially he wanted the complaint to be anonymous, although he later agreed to his name being revealed. (Rossi Testimony.)

15. Lt. Valair prepared a complaint based on his conversation with Mr. Rossi. The complaint accused Trooper Waples of being in the bar area of the restaurant for about one hour and of having parked his cruiser directly in front of the restaurant entrance, blocking it, and compelling the anonymous complainant to ask the trooper to move the cruiser. (Ex. 10.) Mr. Rossi believes he may have told Lt. Valair that the cruiser should have been moved, but he did not tell Trooper Waples to move it. (Rossi Testimony.)
16. On February 18, 2010, Captain Thomas Majenski was assigned to investigate the complaint. He checked the administrative journals for February 4, 2010 and found no journal entries to show that Trooper Waples was unavailable for duty or took time off from his shift for dinner or any other reason. Capt. Majenski went to the Royal Oak Tavern on February 25, 2010 and spoke with three employees, two of whom remembered seeing Trooper Waples in the bar that evening, but gave conflicting estimates of how long he had been there that evening. One bartender said Trooper Waples usually stayed 5 to 10 minutes, while another bartender thought he might have stayed 25 to 30 minutes that night. Capt. Majenski did not speak to Mr. Beale, the bartender who served Trooper Waples, because he was not working that evening. The captain spoke with Mr. Rossi on March 5, 2010. He estimated from his cell phone records reflecting calls to his wife at 9:45 p.m. (when Trooper Waples was there) and 10:45 p.m. (after he left) that Trooper Waples had been at the Royal Oak for approximately 50 minutes. (Ex. 9; Majenski Testimony.)
17. Captain Majenski ordered Trooper Waples to submit a report within fourteen days in answer to the complaint. Trooper Waples submitted a report dated February 27, 2010, in which he acknowledged that he had been at the Royal Oak Tavern in the evening on

February 4, 2010, and claimed that he left the Tavern within five minutes of arrival.

(Exs. 8 and 9.) Because Trooper Waples had made his position clear, Capt. Majenski did not interview him. (Majenski Testimony.)

18. On March 11, 2010, Captain Majenski filed a report sustaining the complaint. He concluded that Trooper Waples left the Tavern more than five minutes after he arrived, but could not conclude exactly how long he stayed. (Ex. 9.)
19. On December 20, 2013, a Department trial board held a hearing regarding charges that Trooper Waples had violated Department Rules and Regulations Article 5.2 (unbecoming conduct) by parking his car inappropriately at a restaurant and engaging in conversation with patrons for an inappropriate period of time, Article 5.5 (reporting for duty) by leaving his patrol area without permission, and Article 5.6 (neglect of duty) by being 20 miles outside his patrol area in a restaurant bar for a minimum of 45 minutes. The trial board found him not guilty of conduct unbecoming an officer, but guilty of violating Department rules on reporting for duty and neglect of duty. (Exs. 11 and 12.)²
20. On December 23, 2013, the Department Colonel/Superintendent Timothy P. Alben directed that Trooper Waples forfeit five vacation days as a result of the trial board finding. (Ex. 12.)
21. Trooper Waples timely appealed. (Ex. 15.)

DISCUSSION

The Department of State Police had just cause to discipline Trooper Waples for violating Department rules regarding reporting for duty and neglect of duty. I recommend that the discipline imposed be modified to require him to forfeit three days rather than five days' vacation time to reflect that, insofar as the neglect of duty charge is concerned, the

² There is no explanation in the record to explain why more than three years passed between Capt. Majenski's report and the trial board hearing.

evidence does not support the charge that he spent 45 minutes or more in a restaurant when he was on duty.

Legal Standard

Under M.G.L. c. 31, § 43, as it applies here per M.G.L. c. 22C, § 13, the Civil Service Commission must determine whether the trial board's decision is supported by a preponderance of the evidence showing that there was "just cause" or "reasonable justification" for the action it took. *See City of Cambridge v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 300, 304, 682 N.E.2d 923, 925 (1997). Reasonable justification means that the trial board's decision was based on "adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind guided by common sense and by correct rules of law." *City of Cambridge*, 43 Mass. App. Ct. at 304, 682 N.E.2d at 926, quoting *Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex*, 262 Mass. 477, 482, 160 N.E. 427, 430 (1928). A disciplinary action, such as this, is justified if 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, 451 N.E.2d 408, 412 (1983).

The Civil Service Commission may modify the sanction imposed by the trial board, but in deciding whether to do so it must resolve "not whether it would have acted as the appointing authority [or, in this case, the trial board] 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, 451 N.E.2d 443, 445 (1983). When analyzing whether reasonable justification exists:

the commission must focus on the fundamental purposes of the civil service system-to guard against political considerations, favoritism, and bias in governmental employment decisions. . . . When there are, in connection with personnel decisions, overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission. It is not within the authority of the commission, however, to substitute

its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.

Town of Falmouth v Civil Serv. Comm'n, 61 Mass. App. Ct. 796, 800, 814 N.E.2d 735, 739, quoting *City of Cambridge*, 43 Mass.App.Ct. at 304, 682 N.E.2d at 926. Even if the Commission finds some facts different from those found by the appointing authority, if “the charges for which discipline had been imposed were still satisfied by the remainder of the inappropriate conduct” that the Commission found, then the Commission must affirm the discipline imposed. 61 Mass. App. Ct. at 802-803, 814 N.E.2d at 740.

Ultimately, when considering penalty modification:

The Commission is guided by “the principle of uniformity and the ‘equitable treatment of similarly situated individuals’ [both within and across different appointing authorities]” as well as the “underlying purpose of the civil service system ‘to guard against political considerations, favoritism and bias in governmental employment decisions.’ ” *Falmouth v. Civil Service Comm'n*, 447 Mass. 814, 823 (2006) and cases cited. Even if there are past instances where other employees received more lenient sanctions for similar misconduct, however, the Commission is not charged with a duty to fine-tune employees’ suspensions to ensure perfect uniformity. See *Boston Police Dep’t v. Collins*, 48 Mass. App. Ct. 408, 412 (2000).

Leeman v. City of Haverhill, 26 MCSR 327, 333 (2013).

A. Violation of Article 5.5.3 – Reporting for Duty

Rule 5.5.3 of the Department Rules and Regulations requires that:

A member assigned to a patrol area or post shall not leave the patrol area or post except for police necessity or personal necessity. If required to quit such patrol or post, members shall first receive permission to leave from the duty assignment supervisor or proper authority.

(Ex. 13.)

On February 4, 2010, Trooper Waples was assigned to patrol Route 44. At 9:39 p.m. and for some period thereafter, he was 20 miles away from his assigned area, and had not sought permission from the desk sergeant to deviate from his assigned patrol. The evidence establishes that a minor deviation from the patrol area was an acceptable practice at the

Norwell Barracks so long as the trooper was performing police work.³ I accept Trooper Waples's testimony that he had been performing police work throughout the evening, but 20 miles outside his patrol area was by no stretch of the imagination an allowable minor deviation. A trooper that far away from an assigned patrol area would have difficulty responding quickly to an event in his assigned area and the speed with which he would have to travel in an effort to respond timely would itself present a danger. (Finding of Fact 3.)

Trooper Waples asserts nonetheless that the discipline imposed on him was arbitrary because he and other troopers routinely patrol outside their assigned areas without seeking permission and are never disciplined for doing so. He submitted excerpts from logs for February and March 2014 that reflect 17 instances in which troopers took an action outside of their assigned patrol areas. Sgt. Wong was questioned about these instances, but he had no personal knowledge of them because he was no longer working at the Norwell Barracks.

Thirteen of the instances involved actions by troopers who were assigned to patrol the Nantasket Beach area. Sgt. Wong testified that the Nantasket Beach patrol area tended to be quiet in the winter, and hence it was not unusual for troopers assigned that area in February and March to be found patrolling elsewhere. How far outside their areas they were is difficult to determine because the exact boundary of the Nantasket Beach patrol area is hard to fathom from Sgt. Wong's description that this patrol area encompasses Hull and parts of Route 228 in Hingham. Counsel for Trooper Waples asserts in his closing brief that a motor vehicle stop on February 14, 2014 on Route 3 in Duxbury made by a trooper who was assigned the Nantasket Beach patrol area was ten miles outside his area. Whether it is ten miles outside the patrol area cannot be verified exactly based on the record, but it would appear possible because Duxbury is separated from Hull and Hingham by a few towns and the map of Route 3 and the surrounding areas that is in the record suggest that ten miles is a plausible estimate –

³ Exactly what constitutes an allowable minor deviation from a patrol area is not clear from the record, but what is clear is that a trooper is expected to remain reasonably near to an

and, as such, would more than the minor deviation from a patrol area that Sgt. Wong testified was allowable.

Nonetheless, a trooper working outside of an assigned patrol area would not pose a reporting for duty issue if the trooper had sought and been granted permission to patrol elsewhere. Whether these troopers had informed the desk sergeants that they were working outside of their assigned area cannot be verified from the logs or from the testimony. If the logs routinely reflected instances in which a desk sergeant gave permission for a trooper to work outside of an assigned patrol area, then it would be a simple matter to determine whether a trooper was acting with or without permission. That is evidently what Capt. Majenski expected when he examined the log for February 4, 2010 to see if it reflected whether Trooper Waples had permission to patrol outside his assigned area. But in none of the logs submitted for 2014 or for February 4, 2010 is there any indication that a trooper had received (or had been denied) permission to patrol outside of an assigned area.⁴ Sgt. Wong testified that he routinely makes an entry in a log when he allows a trooper to patrol outside an assigned area, but he could not say that all other desk sergeants do the same. Without information in the February and March 2014 logs about whether permission was sought or granted to patrol outside an assigned area or without testimony from someone who was familiar with the events of the relevant shifts, which Sgt. Wong was not because he did not work at the Norwell Barracks then, it is nearly impossible to tell whether these troopers were acting in conformance with the rule on reporting for duty or not. There are, as well, according to Sgt. Wong, reasons why a trooper might be outside his assigned area that would not necessarily be reflected in the logs. He testified that in a few instances it was likely that a trooper took an

assigned patrol area so that if anything arises in that area, the trooper can quickly respond to it.

⁴ The log for February 4, 2010 reflects that Trooper Waples was to begin his shift in Plymouth in connection with an appearance by Governor Patrick and thereafter assume his responsibility to patrol Route 44. (Ex. 4; *see* Finding of Fact 7.) The log for February 27, 2014 shows that the trooper assigned to patrol Nantasket Beach on the evening shift was to

action while on the way to work, on the way to an assigned area, or on the way home. A trooper might also have been directed temporarily to a different area because another trooper was busy with an arrest or accident.

Absent more complete information, the logs submitted into evidence do not show that the Department routinely allowed troopers to patrol far outside of their assigned areas without consequences. Hence, they are not proof that the Department singled out Trooper Waples for discipline for behavior it otherwise accepted. In none of the instances noted in the logs is there any indication that a trooper was as far outside an assigned patrol area as Trooper Waples was on February 4, 2010. At twenty miles out from his assigned area, Trooper Waples was not in a position to quickly and safely respond to an event on Route 44. The Department thus had reasonable grounds to discipline him.

B. Violation of Article 5.6 – Neglect of Duty

Rule 5.6 of the Department Rules and Regulations provides that:

Members shall not engage in any activities or conduct personal business or affairs which would cause them to neglect or be inattentive to duty.

The charge that Trooper Waples neglected his duty was based on two allegations: that Trooper Waples was 20 miles away from where he was assigned and that he spent a minimum of 45 minutes in a restaurant bar while in uniform and on duty. (Ex. 11.) It is undisputed that Trooper Waples, when he was at the Royal Oak Tavern, was 20 miles away from his Route 4 assignment. What is disputed is how long he spent there.

The evidence shows the Trooper Waples used the restroom at the Royal Oak, accepted a soda from a bartender he knew, had a brief conversation with Mr. Rossi about Lt. Valair and with two women about his state-issued boots, and then left without finishing his soda. I also accept Mr. Rossi's testimony that he left the restaurant briefly to look at a Bentley parked

spend the first hour of the shift patrolling Route 3 South and Route 44. (Ex. 14.) No other deviations from regular shift assignments are noted in the logs in the record.

outside, saw Trooper Waples on his way out, saw the trooper again when he came back into the restaurant, and only then spoke to him.

Altogether, these events could have occurred in quick succession, but likely took more than the five minutes Trooper Waples estimated. There is nothing in the record to suggest that Mr. Rossi was paying particular attention on February 4, 2010 to the time Trooper Waples spent in the Royal Oak. His 50 minute estimate (*see* Finding of Fact 16) came one month later and was based on two cell phone calls one hour apart. I have no doubt that Trooper Waples was at the Royal Oak at 9:45 p.m., which was minutes after he refueled at the gas station next door. How long he stayed at the Royal Oak cannot readily be determined by the call Mr. Rossi made one hour later to his wife after the trooper had left.

The best estimate comes from Mr. Beale, the bartender who served Trooper Waples a soda, but who was not interviewed as part of the investigation. He testified that the trooper spent around ten minutes in the restaurant, which seems to be about the length of time the events just described might have taken.

Because I find it more likely that Trooper Waples spent 10 minutes or so rather than 50 minutes in the Royal Oak, I conclude that he was not engaging in sufficiently lengthy personal business at the Royal Oak to cause him to neglect of his duty in violation of Rule 5.6. However, he still was 20 miles away from his assigned patrol area. There is no evidence that he needed to go that far away from Route 44 to find a restroom. By being that far away from his assigned area, he was neglecting or being inattentive to the duty he had to patrol Route 44, for the same reason as expressed earlier in the discussion of the reporting for duty charge.

The neglect of duty charge against Trooper Waples was based on both how far away he was away from his assigned patrol area and his presumed lengthy stop he made at the Royal Oak while in uniform. The trial board's ruling does not spell out whether it found both of these elements were proven, but because the ruling was simply that Trooper Waples had

neglected his duty, I assume the trial board's decision was based in part on its conclusion that Trooper Wales had spent around 50 minutes at the Royal Oak while on duty. Although the central problem with Trooper Waples's actions on February 4, 2010 was his decision to drive 20 miles away from his patrol area without informing the desk sergeant or obtaining permission, had he spent 50 minutes in a restaurant while on duty, that itself would have been a serious breach and no doubt would have convinced the trial board to assess a five day loss of vacation days against the trooper. I have found more credible the testimony of Mr. Beale that the trooper spent far less time at the Royal Oak. The trial board did not have the opportunity to consider Mr. Beale's estimate because he was not working the day Capt. Majenski interviewed the Royal Oak staff. After conducting a *de novo* hearing, my finding of the time Trooper Waples spent at the Royal Oak restaurant differs significantly from the trial board finding. Based on the preponderance of the credible evidence presented at the hearing, I find that Trooper Waples did not spend an inordinate amount of time at a restaurant while on duty. Accordingly, I recommend that the penalty of forfeiture of five vacation days be reduced to three days. This modification accounts for the findings that, by being 20 miles outside of his patrol area, Trooper Waples violated the reporting for duty and neglect of duty rules, but he did not violate the neglect of duty rule by spending an inordinate amount of time at a restaurant.

DIVISION OF ADMINISTRATIVE LAW APPEALS

James P. Rooney
First Administrative Magistrate

Dated: July 11, 2014