

COMMONWEALTH OF PENNSYLVANIA

Bryan N. Kubic	:	State Civil Service Commission
	:	
v.	:	
	:	
Pennsylvania Department of Corrections	:	Appeal No. 27249
Devon M. Jacob		Jonathan W. Kunkel
Attorney for Appellant		Attorney for Appointing Authority

ADJUDICATION

This is an appeal by Bryan N. Kubic challenging his removal from regular Corrections Officer 3 employment with Pennsylvania Department of Corrections. Hearings were held on September 23 and 24, 2013, at the Strawberry Square Complex, in Harrisburg, Pennsylvania before Chairman Scott A. Rainey.

The Commissioners have reviewed the Notes of Testimony and exhibits introduced at the hearing, as well as the Briefs submitted by the parties. The issue before the Commission is whether the appointing authority established a *prima facie* case of the charges cited in appellant's removal letter.

FINDINGS OF FACT

1. By letter dated November 28, 2011, appellant was removed from his position as a Corrections Officer 3, regular status, effective December 1,

2011, on charges of violating Department of Corrections Code of Ethics Section B-10 and B-22; Executive Order 1980-18, Governor's Code of Conduct, Part III;¹ Management Directive 505.7,² Personnel Rules, 13.1 Personal Conduct; Management Directive 530.26, Military Leaves of Absence. Specifically, the letter stated:

You have been formally charged with Theft by Deception-False Impression. This is a felony charge and is related to your employment with the Commonwealth. Specifically, between 2008 and 2011 you engaged in unacceptable conduct and employed improper and deceitful measures when you knowingly mislead [sic] the DOC about scheduled military obligations, abused the military leave privilege for twelve days of paid military leave, and received \$2541.36 in compensation for military leave for these days. . . .

As a Commissioned Officer you are entrusted with a higher standard to lead by example, to conduct yourself professionally and properly at all times, and to submit accurate and timely information and facts. A review of your disciplinary records yields that you received a one (1) day

¹Part III of the Governor's Code of Conduct addresses the procedures to be followed when an employee is formally charged with criminal conduct. As explained below, the criminal charges against appellant were ultimately expunged.

² The letter incorrectly identified this as Management Directive 505.37. N.T. p. 407; Comm. Ex. A.

suspension, served on December 9, 2010, for violation of B10 and B20 of the Code of Ethics. This discipline was imposed when you contacted multiple female employees of the Department and engaged in inappropriate behavior and utilized the Commonwealth email system for non-work related activity.

Comm. Ex. A.

2. The appeal was properly raised before this Commission and was heard under Section 951(a) of the Civil Service Act, as amended.
3. Subsequent to appellant's removal, the criminal charge against appellant alleging theft by deception was dismissed by the court for failure of the prosecution to establish a *prima facie* case and the criminal charge of false impression was withdrawn. The records related to these criminal charges were also expunged. N.T. pp. 16, 337-338.
4. Department of Corrections Code of Ethics Section B-10 provides: "Employees are expected to treat their peers, supervisors and the general public with respect and conduct themselves properly and

professionally at all times; unacceptable conduct or insolence will not be tolerated.”³ AA Exs. 12, 16.

5. Department of Corrections Code of Ethics Section B-22 provides:

An employee shall submit any necessary and/or requested work related reports in a timely manner and in accordance with existing regulations. Reports submitted by employees shall be truthful and no employee shall knowingly enter or cause to be entered any inaccurate, false, or improper information or data, or misrepresent the facts in any Department record or report.

AA Exs. 12, 16.

6. Management Directive 505.7, Personnel Rules, dated November 9, 2010, provides in relevant part:

13.1 Personal Conduct.

(a) No employee of the commonwealth is to engage in scandalous or disgraceful conduct, or any other behavior, on or off duty which may bring the service of the commonwealth into disrepute. Violations of this nature or violations of the commonwealth’s human

³ This provision is identical in the June 1, 1995 version of the Code of Ethics (AA Ex. 16) and the August 1, 2001 version of the Code of Ethics (AA Ex.12).

resources management rules may result in disciplinary action.

AA Ex. 15.

7. Management Directive 530.26, Military Leaves of Absence, dated September 3, 2008, establishes the policy for the use of military leave by employees of the appointing authority and other agencies under the governor's jurisdiction. AA Ex. 14.
8. Permanent employees are entitled to paid military leave for up to fifteen work days during each leave calendar year. Management Directive 530.26 (4)(b)(1)(a).
9. While on military duty, employees may use annual/combined, personal, compensatory, or holiday leave that was accrued before the military leave of absence began. Management Directive 530.26(4)(c)(1).
10. Employees who leave their Commonwealth jobs to perform duty in any branch of the Armed Forces, including any of its Reserve components for training or service, are to be granted military leave without pay in accordance with federal and state law. Military leave without pay must be granted

for all active duty, initial active duty for training, and other active or inactive military training duty. Management Directive 530.26(4)(d)(1)(a-c).

11. Management Directive 530.26 specifies what documentation is required for the use of paid military leave. It provides, in relevant part,

- (1) Documentation may be provided in the form of military orders, written communication from the employee's military unit or Form DD-214.

- (2) Documentation should be received before placing employees on paid leave However, when military personnel are activated with minimal notice, military orders might not be issued until after the activation. Under these circumstances, paid leave . . . should not be withheld while waiting for the military orders to be received. If military orders are not ultimately provided, adjustments to paid leave . . . must be made.

Management Directive 530.26(4)(h).

12. Documentation supporting military leaves of absence is required to be maintained permanently in Official Personnel Folders. Management Directive 530.26(4)(h)(4).

13. Section 5 of Management Directive 530.26 lists the responsibilities of various parties under the military leave policy.
14. Under Section 5(a) of Management Directive 530.26, the employee is required to
 - (1) Provide oral or written notice of military duty and military orders to the supervisor as soon as possible. . . .
 - (3) Report any change or extension of military duty to the Human Resource Office as soon as possible.
 - (4) Provide required documentation to support eligibility for paid military leave
15. Under Section 5(b) of Management Directive 530.26, the supervisor of the employee using military leave is required to “(1) Advise the Human Resource Office of employees’ impending military duty **and forward all military documentation to that office.**” AA Ex. 14 (emphasis added).
16. Under Section 5(c) of Management Directive 530.26, the Human Resource Office where the employee works is required to “(1) Process

absences . . . as appropriate **based on military orders or appropriate written documentation.**”

AA Ex. 14 (emphasis added).

17. From November 20, 1996 until his removal on December 1, 2011, appellant worked for the Department of Corrections. AA Exs. 6, 13.
18. From 2008 through his removal, appellant served as a Lieutenant for Special Projects in the Security Office of Department of Corrections Central Office.⁴ N.T. p. 496.
19. The Office of Security is considered an elite division in Central Office and appellant was “hand-selected” to join the office. N.T. pp. 506-507.
20. As the Lieutenant for Special Projects, appellant served as a project manager and was responsible for revising policies for Department of Corrections’ initiatives; researching technology related to defensive equipment, defensive weapons, and other technological advances; and any other projects assigned by the executive administration. N.T. pp. 499-500.

⁴ The record does not indicate the exact date that appellant received this assignment in Central Office.

21. During part of the time that appellant served as the Lieutenant for Special Projects, his immediate supervisor was Tammy Ferguson, who served as the Chief of Security for the Department of Corrections Central Office until October 2012.⁵ N.T. p. 494.
22. Since January 2013, Ferguson has served as the Deputy Superintendent for Centralized Services at the State Correctional Institution at Benner. N.T. p. 494.
23. At some point prior to May 25, 2011 and continuing from that date until appellant's removal, Captain Robert Cooper, Facility Security Coordinator, was appellant's immediate supervisor. N.T. p. 496; AA Ex. 4.
24. In May 2011, Shirley Moore Smeal, Executive Deputy Secretary for Department of Corrections, was Ferguson's immediate supervisor. N.T. p. 500.

⁵ The record does not indicate the date that Ferguson first started working as the Chief of Security. Ferguson's rank while serving as the chief was major. N.T. p. 496; AA Ex. 4.

25. On May 31, 2011, Ferguson sent an e-mail to Smeal, requesting that she have the Office of Special Investigations and Intelligence (hereinafter “OSII”)⁶ perform an investigation into appellant’s military leave from July 21, 2008 onward. Ferguson attached several documents to her message, including documents she asserted were “for Lt. Kubic’s military leave usage from the period of 2008-present.” N.T. pp. 500, 502; AA Ex. 4.
26. Prior to requesting the investigation, Ferguson had directly contacted appellant’s military unit and requested documents concerning appellant that Army policy prohibits from being provided to the appointing authority. N.T. p. 501.
27. By contacting appellant’s military unit directly, Ferguson violated the Department of Corrections Human Resources and Labor Relations Policy 4.1.1: under the policy, questions regarding the validity of military orders are required to be referred to Department of Corrections office of Human Resources for mediation. N.T. p. 511.

⁶ OSII was formerly known as the Office of Professional Responsibility. N.T. p. 192.

28. At the times relevant to the present appeal, appellant served as a Master Sergeant in the United States Army Reserves 3rd Battalion, 80th Regiment, Second Brigade, 100th Division, 80th Training Command (hereinafter, “3rd Battalion”). N.T. pp. 48, 63; Ap. Ex. 7.
29. 3rd Battalion is a signal training unit that trains soldiers for the military occupational specialty (MOS) of signal communications to prepare them for wartime service in the signal area. N.T. p. 37.
30. Appellant is one of the instructors in 3rd Battalion. N.T. p. 72; AA Ex. 1.
31. Joan Robinson has served as a Unit Administrator for 3rd Battalion since 2008. N.T. pp. 28-29.
32. The Regular Level Army System (RLAS) is a computer system which manages information about personnel, resource management, training, and finances (*i.e.*, pay) for every soldier in 3rd Battalion. Robinson has been using this system on a daily basis for over twenty years. N.T. pp. 36-37.

33. If an individual in the Army Reserves misses a regularly scheduled drill weekend, he can make up the time and still be paid by the Army. The soldier is required to complete an RST (reschedule training) form to make up the drill time, unless the soldier is attending a medical exam. N.T. p. 41.
34. Reservists are required to have annual medical and dental exams. The soldier is required to submit forms indicating attendance at a medical or dental exam to Robinson's office through that soldier's first-line leader. N.T. pp. 41-42.
35. A reservist can perform military duty and not be paid by the Army for that duty. N.T. p. 67.
36. From approximately 1997 until November 2012, Amy Gephart served as a Human Resource Analyst 1 at the appointing authority's Central Office. N.T. pp. 94-95.
37. In November 2012, Gephart was promoted to Human Resource Analyst 2 with the appointing authority. N.T. p. 94.

38. Gephart's duties as a Human Resource Analyst 1 included serving as the time and attendance analyst for Central Office. In this capacity, Gephart was responsible for overseeing and insuring that overtime was entered correctly and in a timely manner, processing transactions, and maintaining the official personnel folders for employees. N.T. p. 95.
39. Beginning in June 2010, Gephart was responsible for processing appellant's leave, including military leave. N.T. pp. 145-146.
40. SAP is the Commonwealth's payroll and transaction system. SAP maintains records regarding matters such as hiring, promotions, pay, overtime worked, and leave utilized. N.T. p. 96.
41. Leave is entered into SAP through ESS, a web-based system. Leave is routed electronically to an employee's supervisor for approval or rejection. N.T. pp. 96-97.
42. If a supervisor approves leave in SAP, the approved leave is processed against the employee's leave balance. N.T. p. 97.

43. From July 1, 2008 until October 2011, Stephen Allen worked for OSII as a Corrections Criminal Investigator. N.T. pp. 192-193.
44. OSII investigators (agents) perform a number of functions, including conducting administrative and criminal investigations within the Department of Corrections. N.T. pp. 193-194.
45. On or about June 1, 2011, Allen was assigned to conduct an investigation of appellant for suspected leave abuse. N.T. p. 194.
46. When Allen was assigned the investigation, he was provided with and reviewed a number of documents, including Ferguson's May 31, 2011 e-mail message and the documents attached to that message. N.T. pp. 194, 197; AA Ex. 4.
47. Upon Allen's request, Gephart provided Allen with appellant's leave records and rate of pay for the periods of military leave he was investigating. N.T. pp. 198-199; AA Exs. 2, 3.
48. Using the leave records Gephart provided, Allen identified all military leave that appellant had been granted by DOC between January 1, 2008 and

May 30, 2011. Appellant utilized fifty-eight days of military leave during this period. N.T. p. 199; AA Ex. 2.

49. In calendar year 2008, appellant took nineteen days of military leave. Appellant was granted 8.0 hours of military leave on each of the following dates in 2008: July 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, and 31; August 1; September 19 and 22; October 8, 23, 28, and 31; and November 25. AA Ex. 2.
50. In calendar year 2009, appellant took fifteen days of military leave. Appellant was granted 8.0 hours of military leave on each of the following dates in 2009: March 3, 18, 19, 25, 26, 27, 30, and 31; April 1, 2, 3, and 17; October 19; and November 5 and 6. AA Ex. 2.
51. In calendar year 2010, appellant took fifteen days of military leave. Appellant was granted 8.0 hours of military leave on each of the following dates in 2010: April 16; May 3, 6, 7, 10, 11, 12, 13, 14, 17, 18, and 19; June 25; August 27; and October 18. AA Ex. 2.

52. Between January 1 and May 30, 2011, appellant took nine days of military leave. Appellant was granted 8.0 hours of military leave on each of the following dates in 2011: January 27; April 14 and 15; May 16, 17, 18, 19, 20, and 23. AA Ex. 2.
53. Appellant had submitted documentation in accordance with Department of Corrections policies to support all of his military leave at the time it was granted. N.T. pp. 178-179.
54. After receiving appellant's leave records from the appointing authority, Allen traveled to appellant's military reserve unit, the 3rd Battalion in Wilkes-Barre, and asked if he could obtain training, payroll, and other records regarding appellant's military service with 3rd Battalion. N.T. p. 200.
55. Allen was referred to Robert Tramposch, a Staff Administrator for 3rd Battalion; Allen explained the nature of his investigation to Tramposch. N.T. pp. 201-202; AA Ex. 4.
56. Tramposch provided Allen with appellant's "TL History," which provides the dates appellant was paid by the Reserves for his military duty. N.T. p. 203; AA Ex. 1.

57. Allen compared these military pay records with appellant's leave records from Department of Corrections and compiled a list of fourteen days between January 1, 2008 and May 31, 2011, for which appellant had received paid military leave from Department of Corrections, but for which he did not receive pay from the military. N.T. p. 203; AA Exs. 2, 3, 5.
58. Allen subsequently requested that appellant come to his office for an interview. N.T. pp. 207-208.
59. On July 15, 2011, Allen interviewed appellant. Allen's supervisor, Carole Mattis, was present at the interview. N.T. pp. 211, 215; AA Ex. 6.
60. At the beginning of the interview, Allen provided appellant with his Miranda rights. N.T. p. 208.
61. During the interview, Allen asked appellant only about a few of the fourteen specific dates; appellant indicated he was given alternative military duty on those dates. N.T. p. 212.

62. Appellant advised Allen that his former commanding officer, Lieutenant Colonel Giacobbi,⁷ allowed appellant to attend Veteran's Administration (VA) medical appointments in lieu of regularly scheduled military duty. Appellant also stated that he had documentation for each time he performed regular military duty or went to a medical appointment. N.T. pp. 212-213.
63. Appellant also told Allen during the interview that in the past, he submitted RST (reschedule training) forms in lieu of military drill for some of his VA appointments and was paid for this time by the military. AA Ex. 6.
64. Appellant also told Allen that he did not submit RST forms for every VA appointment, nor was he paid by the military for all of those appointments. AA Ex. 6.
65. During the interview, Allen asked appellant to sign a medical waiver to allow the appointing authority to obtain his records from the VA to verify the dates of his medical appointments. Appellant declined to provide a waiver. N.T. p. 213.

⁷ Giacobbi was subsequently promoted to colonel. N.T. pp. 185, 219-220.

66. As appellant was leaving the interview, he told Allen the he would be able to obtain documents from the VA to show he was at the VA on the dates in question. N.T. p. 214.
67. After the interview concluded, Allen prepared a detailed summary of the interview (“Memorandum of Interview”). AA Ex. 6.
68. Later in the day of the interview, appellant called Allen and asked for the exact dates that were in question, which Allen provided. N.T. p. 216.
69. Allen and another investigator from his office subsequently interviewed Giacobbi. Giacobbi advised them that appellant performed military duties for the Army Reserves for which he was not paid and provided a written statement to that effect. N.T. pp. 220, 293, 298, 317-319.
70. Allen ultimately obtained a document from the Lebanon VA Medical Center listing appointment dates and times for appellant from January 1, 2008 through August 4, 2011. AA Ex. 10.

71. Allen was able to confirm that appellant was attending medical appointments on two of the fourteen days of disputed paid military leave. N.T. pp. 237-238; AA Ex. 10.
72. Allen ultimately created an “Investigative Insert Attachment” which listed the dates appellant had received paid leave from Department of Corrections, but the TL History did not indicate which days appellant received pay from the military. N.T. pp. 204-205. The dates were:

Date	DOC Pay Status
09/19/2008	PD MIL 8 Hours
09/22/ 2008	PD MIL 8 Hours
03/18/2009	PD MIL 8 Hours
04/17/2009	PD MIL 8 Hours
10/19/2009	PD MIL 8 Hours
11/05/2009	PD MIL 8 Hours
11/06/2009	PD MIL 8 Hours
06/25/2010	PD MIL 8 Hours
08/27/2010	PD MIL 8 Hours
10/18/2010	PD MIL 8 Hours
05/20/2011	PD MIL 4 Hours ⁸
05/23/2011	PD MIL 4 Hours

AA Ex. 5.

⁸ For May 20 and 23, 2011, Allen concluded appellant had performed four hours of military duty. AA Ex. 5. Allen concluded that for the remaining four hours of military leave on these days, appellant was not performing military duty because the TL History did not list these dates as dates he was paid by the military. N.T. pp. 204-205; AA Ex. 5.

73. Allen used appellant's hourly rate of pay by Department of Corrections and the number of hours of leave the appointing authority was challenging for each of the twelve days to calculate the value of paid military leave appellant received from the Commonwealth. N.T. pp. 204-205; AA Ex. 5.
74. From approximately March 2008 until September 2012, John Biondo served as a Human Resource Officer 3 at Department of Corrections Central Office. N.T. pp. 374-375.
75. While working in Central Office, Biondo was assigned to provide oversight, guidance, and support for certain program areas, one of which was the Security Office. N.T. p. 376.
76. By letter dated October 7, 2011, appellant was notified that a pre-disciplinary conference (hereinafter "PDC") would be held on October 14 to allow appellant to respond to the charges of violating: Governor's Code of Conduct, Part III; Management Directive 505.37, Personnel Rules, 13.1 Personal Conduct; Management Directive 530.26, Military Leaves of Absence; and Code of

Ethics Section B-7, B-10, B-14, and B-22.

Specifically, the letter stated:

You are in violation of the Governor's Code of Conduct and Personnel Rules when formally charged with Theft by Deception-False Impression and Receiving Stolen Property, which is criminal conduct related to your employment with the Commonwealth and which constitutes a felony. The charges reflect that you engaged in unacceptable conduct when you knowingly abused the Military Leave privilege and received paid military leave from the DOC totaling \$2,541.36 for twelve military duty dates and employed improper and deceitful measures to mislead the DOC about actual scheduled military obligations. . . .

AA Ex. 11.

77. Biondo served as the chairman of PDC panel and selected Steve Davis and Smeal to serve on the panel. Davis was the director of the Department of Corrections Bureau of Education. N.T. pp. 377-378.
78. The PDC was conducted on October 14, 2011 and was tape recorded by Tracy Como, a Clerk Typist for the Division of Labor Relations. N.T. pp. 429-430.

79. At the PDC, appellant submitted an affidavit from Command Sergeant Major Peter Kelly. N.T. pp. 394, 399, 448, 451; Ap. Ex. 8.
80. Kelly's affidavit stated that from 2007 until June 2010, he served as appellant's superior officer and assigned appellant duties and administered payroll, including appellant's pay. Ap. Ex. 8.
81. Kelly's affidavit stated that the duty reflected in the pay records may or may not be the day on which the military duty was actually performed. Ap. Ex. 8.
82. Kelly's affidavit further stated that between September 2009 and May 2011, appellant performed many assignments at home or away from the base, including: online training courses; annual fitness performance tests; medical, dental and other VA visits; assisting Kelly with programs which involved preparing spreadsheets and periodic telephone and e-mail contact with Kelly; and traveling to local recruiters and making phone calls on behalf of the Reserves. Ap. Ex. 8.

83. Kelly's affidavit also stated that not all of appellant's military duties would be reflected on the military pay records. Ap. Ex. 8.
84. At the PDC, appellant also presented two witnesses by phone: Giacobbi and Sam Montgomery. Montgomery works at the Department of Corrections training academy. N.T. p. 395.
85. At the end of the PDC, appellant stated that he could provide additional documentation if he were given another week to do so. N.T. p. 395.
86. During the week following the PDC, appellant provided a memorandum from Giacobbi dated October 18, 2011, addressed to Department of Corrections, and signed by Giacobbi as "LTC, MI, Commanding (April 2008-May 2011)." Ap. Ex. 7.
87. Giacobbi's memo stated, in relevant part:
1. I verify and certify that Master Sergeant (MSG) Bryan Kubic performed military duty on the following days.
 - a. 19 and 22 September 2008
 - b. 18 March, 17 April, 19 October, 5-6 November 2009
 - c. 25 June, 27 August, 18 October 2010

d. 20 and 23 May 2011.

2. These duties included but were not limited to electronic training from a home computer to comply with time-sensitive U.S. Army mandated training requirements, recruiting duties, Army school system support, and Soldier medical readiness appointments.

3. Due to the nature of the contemporary U.S. Army Reserve training environment, the scope of responsibility associated with MSG Kubic's rank and time in service, and the nature of the U.S. Army pay system, MSG Kubic may have performed duty for which he was paid on a different date or for which he was not paid at all.

...

5. Point of contact for this memorandum is the undersigned at 724-787-8215.

Ap. Ex. 7.

88. The PDC panel met the week after receiving Giacobbi's statement and concluded that it was insufficient. N.T. pp. 396-397.
89. The panel found all of the charges in the PDC notice established except the charges of violating Code of Ethics Sections B-7 and B-14. N.T. pp. 398, 414, 473.

90. The panel wrote a synopsis of their conclusions and provided it to Ferguson. N.T. p. 473.
91. Ferguson did not have the authority to remove an employee, but she recommended that appellant be removed, which was forwarded up her chain of command, ultimately resulting in appellant's removal. N.T. p. 566.
92. Under Section 7 of the Department of Corrections Human Resources and Labor Relations Procedures Manual 4.1.1, the PDC panel is required to take minutes of the PDC. The Manual provides: "A copy of the minutes shall be provided to the employee at his/her request. In the event that a transcript or tape recording is made of the conference, the employee shall be provided with a copy of the transcript or tape at his/her request." N.T. pp. 385, 426-427.
93. At 11:16 a.m. on October 14, 2011, after the PDC concluded, appellant sent an e-mail requesting a copy of the transcript and tape recording of the PDC. At 4:09 p.m. that day, Biondo responded to appellant and indicated that it was not the

Commonwealth's practice to release investigatory materials while an investigation is still in progress. N.T. pp. 429-431.

94. At 3:17 p.m. on October 18, 2011, appellant sent Biondo another e-mail indicating that while he understood that the investigation was not complete, he was requesting a copy of all documents and recordings related to the investigation to which he was entitled. N.T. p. 432.
95. On December 11, 2011, appellant sent another e-mail to Biondo stating that since the investigation was now completed, appellant was requesting copies of the PDC proceedings and all recordings and documents that he is entitled to regarding this case. N.T. p. 433.
96. The appointing authority never provided an audio recording of the PDC to appellant. N.T. pp. 435-436.
97. Biondo failed to secure the tape recording of the PDC. Como eventually re-used the tape, in the process, recording over the recording of appellant's PDC. N.T. pp. 435-436, 439.

DISCUSSION

The issue in the present appeal is whether the appointing authority established just cause for appellant's removal from his regular status position of Corrections Officer 3. The appellant was charged with violating several policies regarding his use of military leave between 2008 and 2011. Comm. Ex. A. The removal letter stated in relevant part:

You have been formally charged with Theft by Deception-False Impression. This is a felony charge and is related to your employment with the Commonwealth. Specifically, between 2008 and 2011 you engaged in unacceptable conduct and employed improper and deceitful measures when you knowingly mislead [sic] the DOC about scheduled military obligations, abused the military leave privilege for twelve days of paid military leave, and received \$2541.36 in compensation for military leave for these days. . . .

Comm. Ex. A. A detailed description of the charges is included in Finding of Fact 1.

In an appeal challenging the removal of a regular status employee, the appointing authority has the burden of establishing just cause for the personnel action. *Mihok v. Department of Public Welfare, Woodville State Hospital*, 147 Pa. Commw. 344, 348, 607 A.2d 846, 848 (1992); 71 P.S. §§ 741.807, 741.951(a); 4 Pa. Code § 105.15. The criteria for determining just cause must be job-related and in some manner rationally and logically touch upon the employee's competency and ability to perform. *Mihok*, 147 Pa. Commw. at 348, 607 A.2d at 848. The appointing authority also has the burden of proving the substance of the charges underlying the removal. *Long v. Commonwealth of Pennsylvania, Pennsylvania Liquor Control Board*, 112 Pa. Commw. 572, 575, 535 A.2d 1233, 1235 (1988).

Prior to the testimony of any witnesses at the September 23, 2014 hearing, counsel for appellant entered a motion that the charges upon which the removal were based could not be established because the criminal charges against appellant had been dismissed. N.T. p. 16. Counsel noted that the charge of theft by deception was dismissed by the court for failure of the prosecution to establish a *prima facie* case. A second charge regarding false impression was withdrawn following the filing of a *habeas corpus* petition. N.T. p. 16. The district attorney did not re-file charges against appellant during the applicable statute of limitations. N.T. p. 16. Furthermore, the court granted a motion by appellant to expunge the criminal records related to these charges.⁹ N.T. p. 16. Counsel for appellant asserted that since the removal letter indicated that the removal was based upon pending, work-related felony criminal charges against appellant at the time of his removal, the appointing authority could not establish criminal charges that were work-related to demonstrate just cause for removal.¹⁰ N.T. p. 17. In response, counsel for the appointing authority noted that the criminal charges pending against appellant at the time of his removal were not the sole basis for his removal: the appointing authority had also charged appellant with violating two provisions of the Code of Ethics and two Management Directives. N.T. pp. 19-20.

Chairman Rainey denied the motion at the hearing and proceeded to allow testimony by the appointing authority because the underlying conduct noted in the removal letter was still at issue in the appeal. This included the allegations that appellant engaged in conduct that violated the Code of Ethics and

⁹ The appointing authority subsequently stipulated that the criminal charges against appellant were expunged. N.T. pp. 337-338.

¹⁰ The charges related to the Governor's Code of Conduct were based upon the filing of criminal charges. Part III of the Governor's Code of Conduct addresses the procedures to be followed when an employee is formally charged with criminal conduct.

Commonwealth Management Directives. N.T. pp. 24-25. Consequently, at issue in the present appeal is whether the appointing authority established the conduct underlying the charges. Specifically, whether the appointing authority established that between 2008 and 2011 appellant “engaged in unacceptable conduct and employed improper and deceitful measures” by “knowingly mislead[ing] the DOC about scheduled military obligations, abused the military leave privilege for twelve days of paid military leave, and received \$2541.36 in compensation for military leave for these days.” Comm. Ex. A.

In support of its removal, the appointing authority presented the testimony of Joan Robinson, Amy Gephart, Stephen Allen, Anne George, John Biondo, and Tammy Ferguson.

The leave underlying the charges are twelve dates on which appellant utilized paid military leave from the appointing authority between September 19, 2008 and May 23, 2011. AA Ex. 5. Appellant’s military leave was the subject of an investigation conducted in 2011 by Stephen Allen, who at that time served as a Corrections Criminal Investigator in OSII. N.T. pp. 191, 193. The investigation was initiated upon the request of Tammy Ferguson, who previously served as appellant’s immediate supervisor. N.T. pp. 496, 500; AA Ex. 4.

Allen testified that when he was assigned the investigation, he was provided with a number of documents, including military orders for appellant and e-mail messages that had been sent by Ferguson with her May 31, 2011 e-mail message requesting that an investigation be conducted. N.T. p. 194; AA Ex. 4. Allen reviewed Ferguson’s e-mail and the documents attached to that message. N.T. p. 197. *See* Finding of Fact 25. Allen also requested the appellant’s leave

records and rate of pay for the periods of military leave he was investigating from Amy Gephart, who was the time and attendance analyst for Department of Corrections Central Office. N.T. pp. 95-96, 198-199; AA Exs. 2, 3.

Allen testified that he used the leave records Gephart provided to identify all military leave that appellant had taken between January 1, 2008 and May 30, 2011. N.T. p. 199; AA Exs. 2, 3. During that time period, appellant was granted fifty-eight days of military leave, each full day representing eight hours of leave. AA Ex. 2. This included nineteen days of military leave in 2008, fifteen days of military leave in 2009, fifteen days of military leave in 2010, and nine days of military leave between January 1 and May 30, 2011. AA Ex. 2. *See Findings of Fact 49 through 52.*

Allen testified that he subsequently traveled to appellant's military reserve unit, the 3rd Battalion in Wilkes-Barre, and met with Lieutenant Colonel William Smith. N.T. p. 200. Allen explained the nature of the investigation he was performing and asked if Smith could provide him with appellant's training, payroll, and other records regarding his military service with 3rd Battalion. N.T. p. 200. Smith referred Allen to Robert Tramposch, a Staff Administrator for 3rd Battalion. N.T. pp. 201-202; AA Ex. 4. Allen also explained the nature of his investigation to Tramposch. N.T. p. 202. Tramposch provided Allen with appellant's "TL History" from January 2008 through July 11, 2011. N.T. p. 203; AA Ex. 1. This document provides the pay records for appellant's military service. N.T. p. 47; AA Ex. 1. It includes the dates appellant was paid by the Reserves for his military duty.

Allen testified that he compared these payroll records with appellant's leave records (AA Exs. 2, 3) from Department of Corrections. N.T. p. 203. Allen then prepared a list of days for which appellant had received paid military leave from Department of Corrections, but for which he did not receive pay from the military. N.T. p. 203; AA Ex. 5. Allen then used appellant's hourly rate of pay by Department of Corrections for each of these days to calculate the value of paid military leave appellant received from the Commonwealth. N.T. pp. 204-205; AA Ex. 5. Allen ultimately created an "Investigative Insert Attachment" which listed the dates and pay appellant had received. N.T. pp. 204-205; AA Ex. 5. This attachment listed the following:

Date	DOC Pay Status	Military Duty Date	Comments
09/19/2008	PD MIL 8 Hours	No Record	No Military Duty Performed
09/22/ 2008	PD MIL 8 Hours	No Record	No Military Duty Performed
03/18/2009	PD MIL 8 Hours	No Record	No Military Duty Performed
04/17/2009	PD MIL 8 Hours	No Record	No Military Duty Performed
10/19/2009	PD MIL 8 Hours	No Record	No Military Duty Performed
11/05/2009	PD MIL 8 Hours	No Record	No Military Duty Performed
11/06/2009	PD MIL 8 Hours	No Record	No Military Duty Performed
06/25/2010	PD MIL 8 Hours	No Record	No Military Duty Performed
08/27/2010	PD MIL 8 Hours	No Record	No Military Duty Performed
10/18/2010	PD MIL 8 Hours	No Record	No Military Duty Performed
05/20/2011	PD MIL 8 Hours	05/20/2011 (AM 4 Hours)	Performed 4 Hours of Military Duty. DOC loss of 4 hours.
05/23/2011	PD MIL 8 Hours	05/23/2011 (AM 4 Hours)	Performed 4 Hours of Military Duty. DOC loss of 4 hours.

AA Ex. 5. Allen explained that the Comment "No Military Duty Performed" meant that Allen was unable to find in the TL History that appellant had been paid by the military for that particular date. N.T. p. 205. Allen also included his

calculation of the total payment appellant had received for paid military leave from Department of Corrections for the above dates: \$2,541.36. AA Ex. 5. Allen testified that this represented the amount of loss to the Commonwealth.¹¹ N.T. p. 206.

Allen further testified that he then requested that appellant come to his office for an interview. N.T. pp. 207-208. Allen's supervisor, Carole Mattis, was present at the interview, which was conducted on July 15, 2011. N.T. pp. 211, 215; AA Ex. 6. Allen testified that at the beginning of the interview, he provided appellant with his Miranda rights because there was a possible loss to the Commonwealth related to his leave. N.T. p. 208. Allen testified that he asked appellant about "a couple specific dates" and appellant indicated he was given alternative military duty on those dates. N.T. p. 212. Appellant explained that his former commanding officer, Lieutenant Colonel Giacobbi, allowed appellant to attend Veteran's Administration (VA) medical appointments in lieu of regularly scheduled military duty. N.T. p. 212. Appellant stated that he had documentation for each time he performed regular military duty or went to a medical appointment. N.T. pp. 212-213. Allen asked appellant to sign a medical waiver so that the appointing authority could obtain his records from the VA to verify the dates of his medical appointments. N.T. p. 213. Appellant declined, stating that he did not want the appointing authority to have access to his medical records. N.T. p. 213. Allen advised appellant that they could obtain a search warrant for his records. N.T. p. 214. Appellant stated that he wanted to speak with his attorney, so Allen

¹¹ Initially, Allen identified fourteen dates in question. AA Ex. 6. Allen eventually received documentation indicating appellant had medical appointments at the Lebanon VA Medical Center on two of the fourteen dates. Allen deemed this sufficient to remove these dates from the dates of military leave he was investigating. N.T. pp. 237-238. See discussion below of the documentation Allen received from the Lebanon VA Medical Center (AA Ex. 10).

concluded the interview. N.T. p. 214. As appellant was leaving, he told Allen that he would be able to obtain documents from the VA to show he was at the VA on the dates in question. N.T. p. 214.

After the interview concluded, Allen prepared a detailed summary of the interview (“Memorandum of Interview”). AA Ex. 6. Allen’s memorandum indicates that appellant stated during the interview that in the past, he submitted RST (reschedule training) forms in lieu of military drill for some of his VA appointments and was paid for this time by the military. AA Ex. 6. But appellant also stated that he did not submit RST forms for every VA appointment, nor was he paid by the military for all of those appointments. AA Ex. 6.

Allen further testified that later in the day of the interview, appellant called him and asked for the exact dates that were in question. Allen provided them to appellant. N.T. p. 216. Allen and another investigator from his office subsequently interviewed Giacobbi. N.T. p. 220. Allen admitted that during his interview, Giacobbi advised him that appellant performed military duties for the Reserves for which he was not paid and provided Allen with a written statement to that effect. N.T. pp. 293, 298, 317-319. Allen ultimately obtained a document from the Lebanon VA Medical Center listing appointment dates and times for appellant from January 1, 2008 through August 4, 2011.¹² AA Ex. 10.

¹² On August 4, 2011, Allen obtained a search warrant from a Magisterial District Judge in Lebanon County for appellant’s medical appointment dates and times for 2008, 2009, 2010, and 2011 at the Lebanon VA Medical Center. N.T. p. 230; AA Ex. 8. According to Allen, he attempted to serve the search warrant, but the Lebanon VA Medical Center records department did not provide the records to him. N.T. p. 233. After speaking with the appointing authority’s chief counsel, Allen drafted a statement, dated August 8, 2011, signed by himself and Mattis, explaining the nature of their investigation, and requesting the medical appointment dates and times that appellant was treated during 2008, 2009, 2010, and 2011. N.T. p. 234; AA Ex. 9. It was in response to this letter that the center sent the document listing the dates and times of appellant’s medical appointments. AA Ex. 10.

Ann George, the Privacy and Freedom of Information Act officer at Lebanon Valley VA Medical Center, testified about the records of appointments for individuals who obtain medical treatment at the center. N.T. pp. 340-341. George testified that the center retrieved appellant's medical appointment files in 2011 for the Department of Corrections. N.T. pp. 345-347. The center provided a list of all of appellant's medical appointments on file at the center from January 1, 2008 through August 4, 2011. N.T. pp. 350, 359; AA Ex. 10.

Allen testified that he compared the list of appointments he received from the Medical Center (AA Ex. 10) with the appellant's paid military leave record from the Department of Corrections (AA Ex. 2). N.T. p. 237. According to Allen, for two of the dates appellant was on military leave from Department of Corrections but for which Allen had not received payroll records indicating that appellant was paid by the military, the Medical Center records provided to Allen indicated that appellant had medical appointments. N.T. pp. 237-238. These dates were ultimately dropped from the dates for which appellant was ultimately disciplined. N.T. pp. 237-238. As noted above, there were twelve remaining dates of paid military leave for which the Medical Center records provided to Allen did not indicate that appellant had medical appointments. N.T. pp. 237-238. Allen testified during his investigation, appellant never provided the documents that he said that he would to support military duty that he worked. N.T. p. 244. As a result of his investigation, appellant was charged with leave abuse for the twelve days in question because the appointing authority could not substantiate that appellant had performed military duty on those dates. N.T. p. 244. This resulted in a PDC. N.T. p. 244.

During cross-examination, Allen testified that when he obtained the appellant's leave records from Gephart, there were no military records in appellant's personnel file. This was cause for concern for Allen. N.T. pp. 262-263. Allen further acknowledged that he relied on the dates listed in the TL History (AA Ex. 1) as the dates that appellant was paid by the military. N.T. p. 246. He conceded that he did not know whether appellant did, or did not, perform military duty on the days that he was paid by the military. N.T. p. 246. He also admitted that he does not know if the military's RST policy allows individuals at times, to perform military duties on one date but to receive military pay on a different date. N.T. pp. 246-247. Allen further admitted that he was advised during the course of his investigation that there were days that appellant performed military duty, but for which appellant was not paid by the military. N.T. p. 249. Allen testified that he was not advised of which dates between 2008 and 2011 appellant performed military duty but did not receive pay. N.T. p. 249. Allen admitted that he did not include this information in his investigation, nor did he advise John Biondo at the PDC that appellant had performed military duties on certain days and the military did not pay him for those duties. N.T. p. 249.

The appointing authority also presented the testimony of Joan Robinson, who served as the Unit Administrator for 3rd Battalion since 2008. N.T. pp. 28-29. Robinson testified that 3rd Battalion is a signal training unit. It trains soldiers for the military occupational specialty (MOS) of signal communications so that they can be prepared to go to war in the signal area. N.T. p. 37. Appellant is one of the instructors in 3rd Battalion. N.T. p. 72; AA Ex. 1. Robinson testified that she keeps information in the Regular Level Army System (RLAS) for every soldier in 3rd Battalion. N.T. p. 36. RLAS includes information

about personnel, resource management, training, and finances (pay) for each soldier. N.T. pp. 36-37. Robinson has been using this system on a daily basis for over twenty years. N.T. p. 37.

Robinson was also questioned about Army records indicating which days appellant received pay from the Army for his military drills from January 2008 through July 2011. N.T. pp. 47-48; AA Ex. 1. Robinson testified that if a soldier misses a regularly scheduled drill weekend, he can make up the time and still be paid by the Army. N.T. p. 41. The soldier is required to complete an RST form to make up the drill time, unless the soldier is attending a medical exam. N.T. p. 41. Soldiers are required to have annual medical and dental exams. N.T. p. 41. The soldier is required to submit forms indicating attendance at a medical or dental exam to Robinson's office through that soldier's first-line leader. N.T. pp. 41-42. However, Robinson testified that while an RST form is supposed to be completed if there is a change in schedule, she did not know whether there was an RST submitted for every change to appellant's duty schedule. N.T. pp. 66-67. Robinson did not review appellant's military file.¹³ N.T. pp. 65-66. Robinson also testified that a reserve soldier can perform military duty and not be paid by the Army for that duty. N.T. p. 67. Robinson testified that her duties do not include assignment of military duties, nor oversight of appellant's performance of military duties. N.T. p. 72.

The appointing authority presented Amy Gephart to testify concerning appellant's military leave records at Department of Corrections. From approximately 1997 until November 2012, Gephart served as a Human Resource Analyst 1 at the appointing authority's Central Office. N.T. pp. 94-95. Gephart's

¹³ Robinson was testifying only about the military pay reflected on the TL History. N.T. pp. 57, 66.

duties in that position included serving as the time an attendance analyst for Central Office. N.T. p. 95. Gephart was responsible for insuring that overtime was entered correctly and in a timely manner, processing transactions, and maintaining the official personnel folders. N.T. p. 95. Beginning in June 2010, Gephart was responsible for processing and approving appellant's leave, including military leave.¹⁴ N.T. pp. 145-146.

Gephart testified that in June 2011, Allen asked her for appellant's leave records. N.T. p. 100. Gephart retrieved appellant's records in SAP from 2008 until the beginning of 2011 and provided them to Allen. N.T. p. 100; AA Ex. 2. Gephart was also questioned about several policies applicable to military leave. These policies included Management Directive 530.26, "Military Leaves of Absence," dated September 3, 2008 (AA Ex. 14); Management Directive 505.7, "Personnel Rules," dated November 9, 2010 (AA Ex. 15/Ap. Ex. 3); and the provisions in the Department of Corrections' "Human Resources and Labor Relations Procedures Manual" addressing military leave, "Section 49-Military Leaves of Absence," revised September 2009 (Ap. Ex. 2).

Department of Corrections "Human Resources and Labor Relations Procedures Manual, Section 49—Military Leaves of Absence," primarily defers to the Commonwealth policies governing military leave. Ap. Ex. 2. This section of the Manual

[O]utline[s] the responsibilities and procedures for authorizing military absences with or without pay, **and with or without benefits**, as well as procedures pertaining to any employee on a military absence. Procedures are pursuant to **and contained within Management Directive**

¹⁴ According to Gephart, beginning April 1, 2013, the Human Resources Service Center within the Office of Administration handles the military leave for all Commonwealth agencies. N.T. pp. 99-100.

(MD) 505.7, Personnel Rules, and MD 530.26, Military Leaves of Absence.

Ap. Ex. 2 (emphasis in original). This section has subsections delineating the actions required by the employee (A), actions required by the supervisor (B), and actions required by the Field Human Resource Officer (C). An employee “is required to provide written orders either before or after military duty *when such service lasts for periods more than 30 calendar days (i.e., Form DD-214).*” Ap. Ex. 2 (emphasis in original). The policy specifically states that “*Upon receipt of acceptable documentation, an employee may be entitled to paid absence.*” Ap. Ex. 2 (emphasis in original).

Management Directive 530.26 is the Commonwealth’s policy governing military leaves of absence. AA Ex. 14. It expressly covers leaves of absence for employees who perform military duty in any reserve component of the Armed Forces. M.D. 580.26 (1). Under this policy, a permanent employee such as appellant is entitled to paid military leave for up to fifteen work days during each leave calendar year. N.T. pp. 112-113; M.D. 580.26(4)(b)(1)(a). Section 4 of this Directive specifies what documentation is required to determine eligibility for paid leave. It provides, in relevant part:

h. Required Documentation. Documentation is required to determine eligibility for the use of paid leave, continuation of benefits, payment of a monthly stipend and the right to return to work

(1) Documentation may be provided in the form of military orders, written communication from the employee’s military unit or Form DD-2214.

(2) Documentation should be received before placing employees on paid leave or when continuing benefits and paying a monthly stipend for periods of unpaid military leave. . . .

(4) Documentation supporting military leaves of absence is to be maintained permanently in Official Personnel Folders.

M.D. 530.26(4)(h).

Gephart testified that under Management Directive 530.26, an employee who is seeking a day of unpaid military leave, and who is not seeking a stipend, is not required to submit any documentation regarding his military duty to the appointing authority, provided he is within his fifteen day annual allotment of military leave. N.T. p. 125. Gephart also testified that if documentation is required under 4(h)(1), Management Directive 530.26 does not specify what type of written communication is required from the employee's military unit. N.T. pp. 125-126. Gephart testified that under the Department of Corrections policy (Human Resources and Labor Relations Procedures Manual), she would accept any of the following written documentation to support paid military leave: a DOC verification form verifying attendance at military obligations;¹⁵ a memo from the employee's military unit; an affidavit signed by a military leader; a letter signed by the employee's supervisor in the military; or a written document from a colonel, lieutenant colonel, or field supervisor. N.T. p. 127. Gephart further testified that the supporting documentation she has primarily seen when an employee has requested paid military leave are military orders. N.T. pp. 172-173. If an employee submits a request for military leave and provides military orders, Gephart considers this valid leave. N.T. pp. 173-174. Gephart has accepted a memo or letter from a colonel or lieutenant colonel as documentation to support paid military leave. N.T. p. 174. Gephart testified that such documents just need to note the dates the employee will be performing, or has performed military duty

¹⁵ This is the "Verification of Attendance at Military Obligations" form which is included as Attachment A of Section 49 of the Human Resources and Labor Relations Procedures Manual. Ap. Ex. 4.

and have a signature on it. N.T. pp. 175-176. Gephart also testified that the October 18, 2011 memorandum to Department of Corrections from Giacobbi would be sufficient documentation for her to approve paid military leave for appellant. N.T. p. 184; Ap. Ex. 7. The October 18, 2011 memorandum, signed by Giacobbi, addressed all twelve dates of paid military leave being questioned by the appointing authority and affirmatively stated that appellant had been performing military duties on those dates. Ap. Ex. 7. This document was presented following appellant's PDC. N.T. pp. 178, 189. Gephart testified that under the military leave policy, the appointing authority does not further inquire into the nature of the actual military service; they just look at whether an individual with authority from the military can state that military duty was performed. N.T. p. 185.

Concerning Management Directive 530.26's requirement (section 4(h)(4)) that documentation supporting military leave is to be maintained permanently in Official Personnel Folders, Gephart acknowledged that the appointing authority failed to do this and she does not know why the documentation was not retained. N.T. p. 128. Gephart also acknowledged that there is nothing in Management Directive 530.26 that requires the employee to re-submit documentation after the appointing authority has approved the military leave to verify what the employee was doing while on the military leave. N.T. pp. 129, 138.

Gephart testified that she never saw a problem with appellant's leave during the time she was responsible for approving it. N.T. p. 151. Gephart testified that with the exception of July 11, 2011, when she approved appellant's leave, all required documentation to support the leave had been submitted. N.T. pp. 145-146. July 11, 2011, was appellant's last day of military leave and was not

one of the dates of military leave allegedly inappropriately taken.¹⁶ N.T. p. 147. Ultimately, the appointing authority stipulated that appellant had submitted documentation in accordance with Department of Corrections' policies to support his military leave at the time it was granted. N.T. pp. 178-179.

John Biondo served as a Human Resource Officer 3 at Central Office from approximately March 2008 until September 2012. N.T. pp. 374-375. Biondo testified that in this capacity, he was assigned to provide oversight, guidance, and support for certain program areas in Central Office. N.T. p. 376. One of these was the Security Office where appellant was assigned. N.T. p. 376. Biondo assembled the PDC panel and served as the chairman. N.T. pp. 377-378. Biondo selected Steve Davis and Shirley Moore Smeal to serve on the panel. N.T. p. 378. Davis was the director of the Department of Corrections Bureau of Education. N.T. p. 378. Smeal was the Executive Deputy Secretary for Department of Corrections. N.T. p. 500. Biondo also scheduled the dates for the PDC and sent out the PDC notice. N.T. p. 378; AA Exs. 10, 11. *See* Finding of Fact 76 for the charges recited in the PDC notice.

Biondo further testified that the PDC was held on October 14, 2011. N.T. pp. 380-381; AA Ex. 11. Allen was present at the PDC and read the charges against appellant. N.T. p. 381. Tracy Como, a Clerk Typist for the Division of Labor Relations, was also present and made an audio recording of the PDC. N.T. pp. 435, 439. Under Section 7 of the Department of Corrections Human Resources and Labor Relations Procedures Manual 4.1.1, the PDC panel is required to take minutes of the PDC. N.T. p. 385. The Manual specifically provides: "A copy of

¹⁶ Gephart testified Ferguson asked her if they could contact appellant and ask for his military orders for this day. Gephart checked with Human Resources and was advised not to seek documentation for that day. N.T. pp. 146-147.

the minutes shall be provided to the employee at his/her request. In the event that a transcript or tape recording is made of the conference, the employee shall be provided with a copy of the transcript or tape at his/her request.” N.T. pp. 426-427.

Biondo testified that appellant stated that he had documentation to support the specific days of paid military leave, but that his attorney had this documentation and advised appellant not to submit it to the appointing authority. N.T. p. 392. Appellant did submit an affidavit from Command Sergeant Major Peter Kelly at the PDC. N.T. pp. 394, 399, 448, 451; Ap. Ex. 8. In the affidavit, Kelly stated that from 2007 until June 2010, he served as appellant’s superior officer in the Army Reserves. In that capacity, he assigned appellant duties and administered payroll, including appellant’s pay. Kelly stated that senior non-commissioned officers, such as appellant, often perform assignments that are completed from home or away from the base. Ap. Ex. 8. Senior non-commissioned officers keep track of their time performing military duties and submit the time worked to Kelly later. Kelly then compiles the amount of time that was worked and inputs that time into the military pay system on a particular date. Consequently, the duty reflected in the pay records may or may not be the day on which the military duty was actually performed. Ap. Ex. 8. The affidavit stated that between September 2009 and May 2011, appellant performed many such duties, including: online training courses such as risk management and IT awareness; annual fitness performance tests; medical, dental and other VA visits; assisting Kelly with programs which involved preparing spreadsheets and periodic telephone and e-mail contact with Kelly; and traveling to local recruiters and

making phone calls on behalf of the Reserves. Kelly's affidavit also stated that not all of appellant's military duties would be reflected on the military pay records. Ap. Ex. 8.

Biondo testified that appellant also presented two witnesses by phone at the PDC: Giacobbi and Sam Montgomery. Montgomery works at the Department of Corrections training academy. N.T. p. 395. Biondo testified that at the end of the PDC, appellant stated that he could provide additional documentation if he were given another week to do so. N.T. p. 395. Biondo told appellant that they wanted appellant to provide "hard documentation regarding the military dates and the duty that was performed on those dates in the form of some kind of military records, not just in the form of another affidavit or statement." N.T. pp. 395-396.

Biondo testified that at the "end of that week," appellant provided another statement from Giacobbi. N.T. p. 396. This statement was a memorandum dated October 18, 2011, addressed to Department of Corrections. The subject line of the memorandum was "Military Duty of Master Sergeant Bryan N. Kubic." Ap. Ex. 7. The memo stated, in relevant part:

1. I verify and certify that Master Sergeant (MSG) Bryan Kubic performed military duty on the following days.
 - a. 19 and 22 September 2008
 - b. 18 March, 17 April, 19 October, 5-6 November 2009
 - c. 25 June, 27 August, 18 October 2010
 - d. 20 and 23 May 2011.

2. These duties included but were not limited to electronic training from a home computer to comply with time-sensitive U.S. Army mandated training requirements, recruiting duties, Army school system support, and Soldier medical readiness appointments.

3. Due to the nature of the contemporary U.S. Army Reserve training environment, the scope of responsibility associated with MSG Kubic's rank and time in service, and the nature of the U.S. Army pay system, MSG Kubic may have performed duty for which he was paid on a different date or for which he was not paid at all.

...

5. Point of contact for this memorandum is the undersigned at 724-787-8215.

The memo was signed by Giacobbi as "LTC, MI, Commanding (April 2008-May 2011)." Ap. Ex. 7.

Biondo testified that the PDC panel met the week after receiving Giacobbi's statement and concluded that it was insufficient, because it did not match the type of duty with the with the dates of "supposed military duty." N.T. pp. 396-397. The panel found all of the charges in the PDC notice established except the charges of violating Code of Ethics Sections B-7 and B-14. N.T. pp. 398, 414, 473. A synopsis was written and then provided to Ferguson. N.T. p. 473.

Biondo testified about how appellant's conduct violated the policies noted in the removal letter. Appellant violated Section B-10 by receiving paid military leave when he was not performing any paid military duty. Consequently, appellant was not conducting himself properly or professionally. N.T. p. 402. Appellant violated Section B-22 by accepting paid military leave for days he did

not perform military duties and submitting reports that he had performed military duties. Consequently, appellant was misrepresenting facts to the Department of Corrections. N.T. p. 403. Biondo further testified that appellant violated Section 4(h) of Management Directive 530.26 by “not providing hard documentation in the form of military orders or from the unit or from the military, the Army, regarding dates of paid military leave that he received for supposedly performing military duty.” N.T. pp. 405-406.

Biondo was also questioned about the procedures followed during the PDC. He testified that Allen remained at the PDC after he read the charges “in case there were other questions” that could be specifically directed to the investigator. N.T. p. 415. Biondo testified that having the investigator present at the PDC is not the usual practice, but he has done so before. N.T. p. 415.

Concerning the recording of the PDC, Biondo admitted that on October 14, 2011 after the PDC concluded, appellant sent an e-mail requesting a copy of the transcript and tape recording. N.T. pp. 429-430. Later that day, Biondo responded to appellant and indicated that it was not the Commonwealth’s practice to release investigatory materials while an investigation is still in progress. N.T. p. 431. On October 18, 2011, appellant sent Biondo another e-mail indicating that while he understood that the investigation was not complete, he was requesting a copy of all documents and recordings related to the investigation to which he was entitled. N.T. p. 432. Biondo testified that to his knowledge, the recording of the PDC still existed at this time. N.T. p. 432. Appellant sent another e-mail to Biondo on December 11—after appellant had been removed—stating that since the investigation was now completed, appellant was requesting copies of the PDC proceedings and all recordings and documents that he is entitled to regarding this

case. N.T. p. 433. Biondo testified that at the time of this e-mail, he believes that the recording of the PDC no longer existed. N.T. p. 433. Biondo acknowledges that he should have secured the tape. He explained that this was the first PDC he had conducted at Department of Corrections.¹⁷ N.T. pp. 435, 439. After Biondo had listened to the recording and made changes to Como's transcription for the minutes of the PDC to reflect what was on the recording, Como re-used the tape, in the process recording over the recording of the PDC. N.T. pp. 435-436.

Biondo testified that the PDC panel was not aware that supporting documentation for the military duty had been submitted for appellant's military leave at the time it had been approved by the appointing authority. N.T. pp. 480-481. Biondo further testified that after military leave had been granted and approved by the appointing authority, there was no policy that required submission of hard documentation that detailed what specific military duties had been performed on the days of military leave. N.T. pp. 468-469, 483. When asked where this requirement came from, Biondo testified, "It's required as part of the investigation of the pre-disciplinary conference. . . . That was a requirement that we wanted to see documentation . . . that proved that he performed specific duty on specific dates and received paid military leave for it." N.T. p. 469.

Deputy Ferguson, who served as appellant's immediate supervisor prior to the initiation of the OSII investigation of his leave, testified that appellant was subsequently under the direct supervision of Captain Cooper. N.T. p. 496. Since January 2013, Ferguson has served as the Deputy Superintendent for

¹⁷ Biondo also testified that at the time of the PDC, he had only been with the Department of Corrections for approximately six months. N.T. pp. 435, 439. However, Biondo's testimony regarding his work history indicated that he worked in Central Office for approximately four-and-a-half years as a Human Resource Analyst 3. That would mean that Biondo began working in Central Office in approximately March 2008—over three-and-a-half years prior to the PDC. N.T. p. 374.

Centralized Services at the State Correctional Institution at Benner. N.T. p. 494. Ferguson testified about appellant's duties during his assignment at Central Office, her supervision of appellant, her initiation of the investigation of appellant's leave usage, and her decision to recommend appellant's termination.

Ferguson testified that she requested that her supervisor, Shirley Moore Smeal, have OSII conduct an investigation of appellant's military leave. N.T. p. 500. Ferguson did this in a May 31, 2011 e-mail to Smeal, to which Ferguson attached several documents, including documents she asserted were "for Lt. Kubic's military leave usage from the period of 2008-present." N.T. pp. 500, 502; AA Ex. 4. According to Ferguson, she requested the investigation because she had requested some documents from the Army, but the Army's policies prohibited them from providing these documents to the appointing authority. N.T. p. 501. These were documents that were, in her words, "outside the realm of the scope of the Department of Corrections." N.T. p. 501.

Ferguson testified that appellant was a role model for line staff, particularly since he was in the Office of Security, which she described "an elite division" in Central Office that appellant was "hand-selected" to join. N.T. pp. 506-507. Ferguson testified that it was appellant's military leave in May 2011 that she initially questioned. N.T. p. 508. She further admitted that the investigation ultimately revealed that appellant had been properly paid for those dates of military leave he had taken in May 2011. N.T. pp. 508-509. Ferguson explained that the investigation continued even though the investigation cleared appellant for these dates, "because there was suspicion that there were other periods of leave that were granted where the actual military [duty] was not performed." N.T. p. 509. Other periods of time were investigated by OSII at Ferguson's direction because

Captain Hoffman had advised her that appellant's "attendance at military duty had been problematic." N.T. pp. 510-511; Ap. Ex. 9. Ferguson also acknowledged that when she contacted appellant's military unit directly, she violated the Department of Corrections Human Resources and Labor Relations Policy 4.1.1. Specifically, Ferguson admitted that if there was a question regarding the validity of military orders, that issue is to be referred to the Office of Human Resources for mediation. N.T. p. 511.

Ferguson also testified that she reviewed appellant's side of the issue when she reviewed a packet of information which included the minutes of the PDC, Giacobbi's October 18, 2011 memorandum (Ap. Ex. 7), and the affidavit by Command Sergeant Major Kelly (Ap. Ex. 8). N.T. pp. 514, 516. These documents were submitted by appellant at or following his PDC.¹⁸ N.T. pp. 178, 399, 448, 451, 516. Ferguson acknowledged that Giacobbi's October 18, 2011 memorandum complied with the requirements of Management Directive 530.26, specifically section (4)(h)(1), which discusses acceptable documentation required to be submitted by the employee to establish eligibility for paid military leave. N.T. pp. 521, 539; Ap. Ex. 7. According to Ferguson, written communication from the employee's military unit is sufficient to meet the requirements of this provision. N.T. p. 539.

¹⁸ Biondo testified at several points that appellant provided the affidavit from Kelly at his October 14, 2011 PDC. N.T. pp. 399, 448, 451. However, the affidavit indicates that it was executed on November 14, 2011. Ap. Ex. 8. Whether the affidavit simply has the wrong month listed (November instead of October) or was submitted after the PDC is not ultimately relevant. The PDC panel permitted appellant to submit additional information after the PDC. N.T. pp. 395-396. That additional information, as well as the information gathered during the PDC, was considered when the PDC panel re-convened. The panel considered the affidavit of Kelly as well as the memorandum from Giacobbi in its determination regarding whether or not the charges against appellant had been established. N.T. pp. 396-397. Similarly, Ferguson acknowledges that she had this information prior to the time that she recommended that appellant be removed from his position. N.T. pp. 514, 516.

Ferguson further testified that while she did not have the authority to remove an employee, she made the recommendation that appellant be removed, which was forwarded up her chain of command, ultimately resulting in appellant's removal. N.T. p. 566. Ferguson admitted that at the time she was reviewing the information from the PDC and determining whether appellant should be removed, she did not know whether appellant was or was not performing military duties on the leave dates in question. N.T. p. 564. Nor was Ferguson aware of any evidence that appellant was **not** performing military duty on any of the dates in question. N.T. pp. 530, 564. Ferguson stated: "There is no evidence, period." N.T. p. 530. Regarding why appellant was then terminated, she responded, "There's no evidence to substantiate that he was there, and there is no evidence to substantiate he was not there. The documentation does not exist." N.T. p. 530.

Ferguson was also asked why appellant was asked to re-submit documentation to prove that he had performed military duties for days he had previously requested military leave, had supported the request with documentation, and had it approved by the appointing authority. N.T. pp. 531-532. Ferguson testified that it was appellant's duty to prove that he had performed military duty on these days that the appointing authority had already approved, "Because military leave usage and payment for military leave compensation expires at the end of the performed duties." N.T. p. 532. Ferguson acknowledged that there was no policy which required appellant to re-submit documents regarding his military duty. N.T. p. 535. She also admitted that she was not aware of any policy which would require an employee to specify the particular military duties being performed while the employee was on military leave. N.T. p. 538.

Ferguson also testified that if appellant had been performing unpaid military duty, that would be sufficient for him to receive paid military leave from the appointing authority. N.T. p. 550. Ferguson acknowledged that she did not know how the military pay system worked and whether or not unpaid military duty would show up on appellant's military pay records. N.T. p. 550. Ferguson was also never aware of whether the appointing authority ever audited appellant's unpaid military duty. N.T. p. 550.

Appellant's Motion to Dismiss the Charges and Sustain his Appeal

Under Commission Rule 105.15(a), in a removal hearing under Section 951(a) of the Act, the appointing authority is required to present evidence to establish the conduct underlying the charges against appellant. 4 Pa. Code § 105.15(a). At the close of the appointing authority's case, appellant entered a motion to sustain his appeal based upon the appointing authority's failure to establish a *prima facie* case in support of the charges.¹⁹ N.T. pp. 567, 568-572. Further hearing on this appeal was continued pending the consideration of this motion by all three Commissioners and the parties were permitted to submit Briefs in support of their legal arguments. N.T. pp. 582-583. We hereby grant appellant's motion for the reasons below.

After careful review of the record, we find that the appointing authority has failed to present sufficient evidence to support the charges against appellant. Specifically, the appointing authority has failed to present credible evidence to establish that appellant knowingly misled the appointing authority

¹⁹ Commission Rule 105.15(b)(8) provides that an appellant may enter a motion to dismiss the charges against appellant (*i.e.*, sustain the appeal) due to the appointing authority's failure to establish a *prima facie* case. 4 Pa. Code § 105.15(b)(8).

about scheduled military obligations, abused his military leave privilege for twelve days of paid military leave, and improperly obtained \$2,541.36 in compensation for military leave on days during which appellant did not perform military duties. Despite having charged appellant with intentional misconduct, it is apparent that the appointing authority made certain presumptions during the course of their investigation and discipline of appellant that do not withstand scrutiny and attempted to shift the burden of disproving those presumptions to appellant.²⁰

One of the presumptions that the appointing authority made is that if the military pay records did not indicate appellant was paid for military duty on a certain day, or his records from the Lebanon VA Medical Center do not show an appointment for that day appellant did not perform military duty on that day. This presumption is unwarranted. The appointing authority never accounted for the fact that appellant had performed military duties but did not receive military pay for those duties. The appointing authority also never accounted for the fact that there may have been days for which appellant performed duties and received military pay, but the date of payment noted in the military records was not the same as the date that the duty was performed.

An additional problem is that the appointing authority concluded that since appellant stated during his interview (and subsequent PDC) that he had documentation to support his previously granted military leave and that the

²⁰ The appointing authority has the legal burden of proving the charges against appellant and establishing that the conduct underlying those charges demonstrates just cause for removal. An appointing authority cannot avoid this legal burden by arguing that the appellant has failed to disprove the presumptions that the appointing authority made.

appointing authority did not find the documentation that appellant submitted between the start of the investigation and his removal sufficient, that establishes appellant was not performing military duty. We reject this conclusion.

We note that the “military records” that the appointing authority was apparently seeking—the “hard documentation”—is not required by any of the applicable leave policies, nor does it accurately reflect what appellant said²¹ that he could provide during the investigation. The context in which appellant’s statement that he could provide documentation regarding his military duty was initially made is critical. It was during a July 2011 interview conducted by Allen in the course of the investigation inquiring about leave that occurred between 2008 and 2011—leave which had been approved by the appointing authority at the time it was taken and for which appropriate documentation had been submitted at the time the leave was approved. N.T. pp. 178-179. Appellant had taken fifty-eight days of military leave during this time period. Two years and ten months after the first day of leave at issue, appellant was being questioned about military duty during an interview that began with Allen reading appellant his Miranda rights. Particularly significant is that appellant’s statement about having medical documentation of VA appointments was made in response to only **a few** of the initial fourteen dates in question. Allen admits that he did not provide appellant with all of the dates in question: he “mentioned one or two dates” and at the time of his testimony, Allen could not remember which dates he provided. N.T. p. 265.

²¹ Our determination regarding what appellant said during the investigation and PDC process is based directly on the record developed during the testimony of Biondo and Allen, both appointing authority witnesses.

Additionally, when Allen reviewed the appointment records from the Lebanon VA, they indicated that appellant, in fact, had medical appointments during two of the fourteen dates in question at the time of appellant's interview. N.T. pp. 266-267. Appellant stated during his interview that Giacobbi authorized him to attend medical appointments in lieu of other military duties. But Allen's own memorandum of the interview indicates that appellant also advised him that he was not paid for all of the VA appointments and that he had a number of appointments due to issues appellant was having as a result of his son's death and being fit for military duty. AA Ex. 6. Appellant also told Allen during this initial interview that he performed a lot of training as part of his military duties and that he would be able to present proof to Department of Corrections that he was either attending VA appointments or performing other military duties. N.T. p. 267. The appointing authority has simply failed to present credible evidence to establish that appellant engaged in "improper and deceitful measures" or "knowingly misled" the Department of Corrections about his military obligations or leave.

Furthermore, we note that appellant **did** in fact, provide documentation during the investigation and PDC process indicating that he had performed military duty while he was on paid military leave from the appointing authority. This included the October 18, 2011 memorandum from Giacobbi, which addressed all twelve dates in question and satisfied the requirements for documentation to demonstrate military duty under the applicable Commonwealth and Department of Corrections policies. Additionally, Gephart, the individual who had served as the Department of Corrections Time and Attendance analyst, testified that Giacobbi's memorandum would be sufficient to establish performance of military duties under the applicable military leave policies.

The appointing authority has asserted that while appellant submitted documentation during the investigation concerning his military duty on the twelve days in question, he did not submit **sufficient** documentation to satisfy the appointing authority that he performed military duties on these days. Essentially, the appointing authority was requiring appellant to prove to Department of Corrections satisfaction that he performed military duties on the twelve days in question. When Department of Corrections concluded that the documentation appellant provided was not sufficient to establish that he had performed military duties, it concluded that appellant improperly used military leave and misled the appointing authority. This is not a sound conclusion, particularly given that this documentation met the criteria under the applicable policies to establish performance of military duties and the appointing authority had approved the leave at the time it was taken based on other documentation appellant had submitted. The appointing authority's reliance on this unsound conclusion does not satisfy its burden of presenting evidence to establish the charges.

Furthermore, the appointing authority's argument concerning the insufficiency of the documentation appellant provided during the investigation and PDC is particularly problematic given the appointing authority's failure to abide by applicable policies governing maintaining and preserving military leave records and records related to the PDC process. The appointing authority did not retain the documents appellant provided to support his military leave when it was granted in the appellant's Official Personnel Folder. This is in direct violation of the mandate to retain these records in Management Directive 530.26. Biondo did not secure and maintain the audio recording of the PDC, something he was required to do in order to comply with the Department of Corrections own procedures and despite knowing that appellant had requested a copy of the recording the same day as the

PDC and on two subsequent occasions. Ferguson, who initiated the request for an investigation, did so after she was no longer appellant's supervisor and after she had violated Department of Corrections policy by contacting appellant's military unit directly.

It is clear to the Commission that despite the Department of Corrections failure to properly retain all of the supporting military documentation in appellant's Official Personnel File, the appointing authority, or at least Ferguson, did have some of the military documentation utilized to support and grant appellant's military leave as of May 31, 2011. Copies of certain verification forms were included as attachments to Ferguson's May 31, 2011 e-mail requesting the initiation of the investigation. AA Ex. 4. The appointing authority provided no legitimate explanation regarding why Ferguson had possession of these documents when they were not maintained in appellant's Official Personnel File. The appointing authority also determined that the initial dates that Ferguson questioned from May 2011 were determined to be dates that appellant was, in fact, performing military duties. But Ferguson recommended that appellant be removed from his position, despite the fact that she acknowledged that the appointing authority had **no evidence** that appellant was not performing military duties on the days in question. N.T. pp. 530, 564. Ferguson was the only witness the appointing authority presented who testified that she had direct input into the decision to remove appellant after the PDC panel found the charges substantiated. Even if we were to disregard all of the other factors discussed above, Ferguson's admission alone would be dispositive of whether the appointing authority established the charges against appellant, which require proof that appellant was not performing military duty on the twelve days in question.

Having found that the appointing authority failed to establish a *prima facie case* of the charges against appellant, we are granting appellant's motion to dismiss the charges against him. Consequently, there is no need for further hearings on this appeal to permit appellant to present a response to the appointing authority's presentation. We sustain appellant's appeal challenging his removal and are ordering him reinstated to his position with back pay from the effective date of his removal. Accordingly, we enter the following

CONCLUSION OF LAW

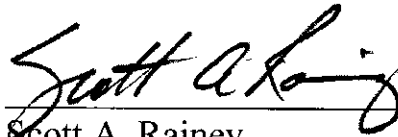
The appointing authority has failed to present a *prima facie case* in support of the charges against appellant and has failed to establish just cause for removal under Section 807 of the Civil Service Act, as amended.

ORDER

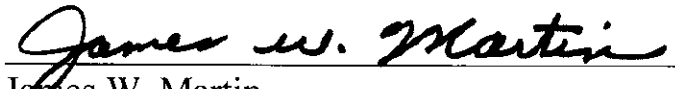
AND NOW, the State Civil Service Commission, by agreement of its members, sustains the appeal of Bryan N. Kubic challenging his removal from regular Corrections Officer 3 employment with the Pennsylvania Department of Corrections and overrules the action of the Pennsylvania Department of Corrections in the removal of Bryan N. Kubic from regular Corrections Officer 3 employment, and orders the return to duty of appellant to regular Corrections Officer 3 employment within thirty (30) calendar days with reimbursement of wages and emoluments since December 1, 2011, less wages earned and benefits

received under the Public Laws of Pennsylvania as established by a sworn statement to be submitted by appellant. We further order that within thirty (30) calendar days of the mailed date of this opinion, the appointing authority shall submit written notice of compliance with this Order to the Executive Director of the State Civil Service Commission.

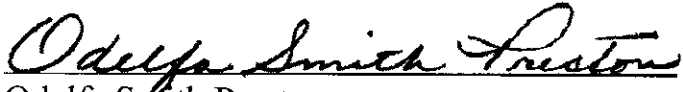
State Civil Service Commission



Scott A. Rainey
Chairman



James W. Martin
Commissioner



Odelfa Smith Preston
Commissioner

Mailed: April 24, 2014