STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Marcella Friedman,
Department of Law and Public
Safety, Division of State Police

CSC Docket No. 2018-3696

Request for Reconsideration

ISSUED: FEBRUARY 28, 2020 (WR)

Marcella Friedman, a Communications Systems Technician 2, Department of Law and Public Safety, Division of State Police, represented by Arnold Shep Cohen, Esq., petitions the Civil Service Commission (Commission) for reconsideration of the attached initial decision of the Administrative Law Judge (ALJ), which was deemed adopted as a final decision on June 18, 2018, upholding her removal, effective February 17, 2017.

By way of background, on February 17, 2017 the appointing authority presented the petitioner with a Final Notice of Disciplinary Action (FNDA) which removed her from her position on charges of conduct unbecoming a public employee, misuse of public property and other sufficient cause. Specifically, the appointing authority asserted that the petitioner misused her position as an employee of the New Jersey State Police to obtain a free power generator for her personal use. Upon the petitioner's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

After a hearing, the ALJ determined that the appointing authority had met its burden of proof with regard to all of the charges. In particular, the ALJ found that the petitioner's position was a civilian position and she had no duties on October 31, 2012 because she was on an extended medical leave and was receiving Worker's Compensation. Yet, on that date and while in the immediate aftermath of Superstorm Sandy, the petitioner wore a New Jersey State Police Office of Emergency Management (OEM) jacket and carried a State-issued radio. She told out-of-state vendors selling power generators in a restaurant parking lot that she

had the authority to shut their sales down unless they gave her a free power generator. The ALJ also found that the petitioner was not credible based on her own and other witness' testimony, and the exhibits in the record. As a result, the ALJ upheld the appellant's removal and the initial decision was the forwarded to the Commission for consideration.

However, the Commission did not have a quorum at the time of the ALJ's initial decision, and the appointing authority did not consent to an additional extension of time for the Commission to render its decision. As such, the ALJ's decision was deemed adopted as the final decision pursuant to *N.J.S.A.* 52:14B-10(c). Accordingly, the parties were advised that the ALJ's initial decision was deemed adopted, effective June 18, 2018.

In her petition for reconsideration, the petitioner argues that her removal was inappropriate and should be reversed. In this regard, she submits her exceptions to the ALJ's initial decision since the Commission was unable to review them previously due to the lack of quorum. Initially, the petitioner argues that the ALJ unreasonably disqualified her testimony by applying an unreasonable level of scrutiny not applied to other witnesses. For example, the petitioner states that the ALJ rejected her testimony that she was wearing a fanny pack in the parking lot on October 31, 2012 because she failed to produce other evidence of her wearing the fanny pack, such as old photos. However, the petitioner complains that the ALJ did not scrutinize the testimony of two vendors who sold her the generator. In this regard, the petitioner states that the two vendors testified that they had permission from the police to sell generators in a parking lot and waive sales tax, despite lacking evidence to prove their claim and testimony from the local police chief that he did not give anyone such permission. The petitioner argues that the ALJ "clearly wanted to believe" the two vendors and "decidedly tipped the scales against" her.

Additionally, the petitioner asserts that the ALJ unreasonably found credible the testimony of the restaurant manager, even though he "personally benefited" from the vendors' presence because they allowed him to use one of their generators in return for their use of the restaurant's parking lot to sell generators. The petitioner further asserts that the ALJ "arbitrarily failed to take any significance in the State Police[s]" failure to either interview or present a third vendor who supervised generator sales at the restaurant parking lot as a witness. The petitioner complains that had the supervising vendor been interviewed or testified, it could have been determined whether he had agreed to sell a generator to her. The petitioner observes that the appointing authority "could not provide any direct evidence to contest [her] testimony of an agreed upon price with" the supervising vendor. The petitioner further argues that the ALJ unreasonably concluded that a State Trooper's testimony supported the appointing authority's charges against her. The petitioner observes that the State Trooper admitted to being in the same parking lot as petitioner to buy a power generator for himself while he was in

uniform and presumably on duty. The petitioner complains that she was subject to discipline while the State Trooper was not. Moreover, the petitioner argues that the State Trooper did not personally hear her threaten to shut down the vendors if they did not give her a power generator; she argues that his testimony was based upon hearsay statements the two vendors made to him.

The petitioner states that the she had previously filed Equal Employment Opportunity complaints against individuals employed by the appointing authority and argues that the ALJ should have addressed whether her discipline was in retaliation for her "being a whistleblower." The petitioner further asserts that the ALJ unfairly disciplined her for wearing her OEM jacket, despite the appointing authority's failure to present evidence of a prohibition on wearing the jacket while off-duty. The petitioner also argues that the ALJ improperly relied on judicial notice. For example, she states that the ALJ erred in his explanation of cash closings for real estate deals to dispute her testimony regarding how she paid for the generator in cash. She argues that the ALJ also erred by assuming without any basis that the weather on October 31, 2012 was "cool and wet autumnal weather" and required something heavier than her light OEM jacket. Finally, the petitioner argues that the ALJ improperly weighed law enforcement officers' testimony due to their positions. She notes that "[e]very conflict in testimony between [her] and one of the officers automatically was held in favor of an officer."

In response, the appointing authority, represented by Andy Jong, Deputy Attorney General, initially argues that the petitioner's instant request for reconsideration on the basis that this matter was deemed adopted, does not meet the standard for reconsideration. The appointing authority asserts that the testimony of the State Trooper, vendors and restaurant manager were consistent with each other and contradicted the petitioner's testimony. In this regard, all four testified they saw the petitioner in the parking lot wearing the OEM jacket and a radio. The appointing authority observes that the two vendors testified that the petitioner left the parking lot with the generator before completing an invoice for the generator and that the invoice only had the petitioner's name and the word "donate" on it. Moreover, the vendors testified that the petitioner's invoice differed from those of paying customers and the State Trooper provided a copy of his completed invoice at the hearing. [1]

The appointing authority further asserts that whether the vendors were allowed to sell generators in the parking lot is immaterial in the instant matter. Similarly, the appointing authority argues that the restaurant manager's use of one of the vendors' generators and the State Trooper's buying a generator for personal use is also irrelevant. It states that the supervising vendor was not interviewed

[1] The ALJ found that a typical invoice would have had the purchaser's name, address, method of payment and the purchase amount. The supervising vendor had pre-signed a stack of blank invoices, including the petitioner's.

because he was not a witness to the petitioner's extortion.[2] It contends that the petitioner could have called him to testify.

The appointing authority asserts that the ALJ did not ignore petitioner's prior complaints against the appointing authority and contends that she failed to present any evidence of a conspiracy against her at the hearing. Finally, the appointing authority rejects the petitioner's assertion that the ALJ improperly relied upon judicial notice. It argues that the ALJ's decision was well-reasoned and supported by the evidence presented. For example, regarding the weather on the date at issue, it observes that the petitioner testified that she was cold and that "it was a nasty day."

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding. The instant request for reconsideration is based on the assertion that the ALJ's initial decision to uphold her removal was in error, and that because of the lack of quorum and the initial decision being deemed adopted pursuant to *N.J.S.A.* 52:14B-10(c), the Commission was unable to review the matter. However, a review of the record in the instant matter reveals that reconsideration is not justified.

Initially, the petitioner presents numerous challenges to the ALJ's initial decision which she asserts were clear material errors. With regard to petitioner's argument that the ALJ's credibility determinations were in error, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See also, In re Taylor*, 158 *N.J.* 644 (1999) (quoting *State v. Locurto*, 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. In the instant matter, it is clear from the record as a whole that the ALJ found the appointing authority's witnesses more credible than the petitioner. The petitioner has presented no evidence which establishes that the ALJ's credibility findings were arbitrary, capricious, unreasonable or not based on the evidence in the record.

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[2] The appointing authority notes that the other two vendors testified he was not present at the transaction because he felt ill.

Despite the petitioner's numerous other objections to the ALJ's initial decision, there is strong evidence in the record to support the contention that the petitioner abused her position as an employee of the New Jersey State Police to obtain a free power generator. In this regard, the petitioner does not deny wearing the OEM jacket which identified herself as a member of the State Police in at least some capacity. Nor does she deny leaving the parking lot with a generator in her possession. The petitioner's argument that she paid $500 for the generator is unconvincing in light of the vendors' invoice bearing her name, the letters "donat[e]," and no reference to $500 the appellant alleged she paid in cash. The Commission observes that the contents of the invoice are consistent with the two vendors' testimony. Thus, since there is more than enough evidence to support the ALJ's findings of fact, the Commission cannot say on the petitioner's remaining objections, *e.g.* the ALJ improperly relied upon judicial notice and gave undue deference to the testimony of law enforcement officers, that the strict standard for reversing the ALJ's findings has been met. Therefore, based on the foregoing, the petitioner has failed to establish that reconsideration is justified in this matter.

ORDER

Therefore, it is ordered that this petition be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 26TH DAY OF FEBRUARY, 2020

Deirdrè L. Webster Cobb

Deirdrè L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

c: Marcella Friedman
Arnold Shep Cohen, Esq.
Andy Jong, Deputy Attorney General
Kelly Glenn
Records Unit

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 4258-17
AGENCY DKT. NO. 2017-2819

IN THE MATTER OF MARCELLA FRIEDMAN, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF STATE POLICE.

Arnold Shep Cohen, Esq., appearing for appellant, Marcella Friedman (Oxfeld Cohen, P.C., attorneys)

Andy Jong, Deputy Attorney General, appearing for respondent, Department of Law and Public Safety (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record closed: February 2, 2018 Decided: March 19, 2018

BEFORE **JEFFREY N. RABIN**, ALJ:

STATEMENT OF THE CASE

Appellant, Marcella Friedman, a Communications Systems Technician at the Department of Law and Public Safety, Division of State Police (the "Department"), appeals the disciplinary action seeking her removal for conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6), misuse of public property, in violation

of N.J.A.C. 4A:2-2.3(a)(8), and violation of SOP[1] F-7 Radio Procedures, in violation of N.J.A.C. 4A:2-2.3(a)(12).

The issues are whether the appellant used her position as an employee of the New Jersey State Police to obtain a free power generator for her personal use; whether such action constituted conduct unbecoming a public official, misuse of public property and violation of SOP F-7 Radio Procedures; and whether the Department acted properly in removing appellant from her position as a Communications Systems Technician 2 at the Department of Law and Public Safety, Division of State Police, for such violations.

PROCEDURAL HISTORY

By Preliminary Notice of Disciplinary Action dated January 28, 2013, appellant was charged with conduct unbecoming a public employee, misuse of public property and violation of SOP F-7 Radio Procedures.[2] A departmental hearing was held on September 26, 2016, and on February 17, 2017, a Final Notice of Disciplinary Action was served, removing her from her position. Appellant filed an appeal, and the Civil Service Commission transmitted this matter to the Office of Administrative Law (OAL), where it was filed on March 28, 2017. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Hearings were held on August 30, 2017, and September 6, 2017. Post-hearing letter-briefs were received on February 2, 2018, and the record closed on that date.

[1] Standard Operating Procedures.

[2] A second Preliminary Notice of Disciplinary Action was issued on January 28, 2013, suspending appellant without pay pending the disposition of criminal charges. Appellant was acquitted of criminal charges for the within incident on January 27, 2016, in Springfield Township (Burlington County) Municipal Court.

FACTUAL DISCUSSION

Stipulated Facts:

1. Governor Chris Christie declared a statewide emergency at 11:30 a.m. on October 27, 2012. Superstorm Sandy made landfall in New Jersey on October 29, 2012 at approximately 8:00 p.m. as a Category 2 storm. On October 31, 2012, more than two million people in New Jersey were without power.

2. Appellant, Marcella Friedman, was on a Personal Medical Leave of Absence from the State Police from April 23, 2012, until August 1, 2012.

3. Appellant was out on Worker's Compensation from the State Police from August 2, 2012, until January 17, 2013.

4. Appellant, Marcella Friedman, was on another Personal Medical Leave of Absence from the State Police from January 18, 2013, until January 30, 2013.

Undisputed Facts from the Hearing:

1. Appellant, Marcella Friedman, was hired by the State Police in 2003, and worked as a Communications Systems Technician 2 at the Department of Law and Public Safety, Division of State Police (the "Department"). She was responsible for maintaining the State Police radio network system.

2. The Department provided appellant with State-owned automobiles, repair equipment, radios, cell phones, computers and pagers. She received a radio maintenance shirt as part of a work uniform, but had to buy her own khaki pants to wear. She was issued cold weather gear such as boots, winter jackets, gloves and raingear. She received many State Police jackets over the years, and had an Office of Emergency Management (OEM) jacket. Jackets with State Police logos are available for purchase at the State Police

gift shop and other shops. There was no State Police policy prohibiting civilian State Police employees from wearing jackets with a State Police logo.

3. Appellant had no responsibilities for monitoring or regulating product sales, generators or roadside sales. She had no authority to review permits, shut down vendor sales, fine vendors, confiscate property, and had no arrest powers. Appellant was on extended Medical Leave in October 2012, and had no official duties at that time on behalf of the State Police.

4. On October 30, 2012, the appellant and Lisa Evanko and Cody Evanko were parked at the parking lot at White Dotte Communications, at the intersection of Route 206 and Route 38 in Southampton, NJ ("White Dotte"). White Dotte is a communications company that sells electronics such as walkie-talkies and CB (citizen band) radios, and is also an ice cream/food stand/restaurant. White Dotte was busy that day with generator vendors and purchasers. Lisa Evanko paid $1,700 for a 9,000-watt generator.

5. On October 31, 2012, appellant returned to the parking lot at the White Dotte, with the intention of procuring a generator. Appellant was wearing khaki pants and a blue windbreaker jacket marked with lettering that indicated that it was a New Jersey State Police/OEM jacket. (Exhibit R-1.) Christopher Green, manager of the White Dotte, was allowing vendors from New Hampshire to sell generators in the White Dotte parking lot in return for the use of one of their generators, until Southampton Township official Jody Mazeall arrived and shut down the generator sales because the vendors lacked proper permits.

6. On October 31, 2012, after leaving the White Dotte, appellant drove approximately three miles north on Route 206, and stopped at a lot near the intersection of Route 206 and County Road 537 in Springfield Township (the "Springfield Lot"), with the intention of procuring a generator. She was still wearing khaki pants and a blue windbreaker jacket marked as New Jersey State Police/OEM jacket. (Exhibit R-2.)

7. State Police Lieutenant Nazzareno Nepi was at the Springfield Lot on October 31, 2012, with the intention of procuring a generator. He was dressed in his Class B Utility Uniform, with a State Police logo, and had driven there in an unmarked State Police vehicle. Nepi paid $1,400 for a generator for himself and received a completed invoice with his name, model and serial numbers for the generator, the price, the method of payment (credit card), and a signature from the vendor. (Exhibit R-4.) Nepi returned later to pick up the generator. Nepi called his then-supervisor, Captain Greaney, to advise him that generators were being sold at the Springfield Lot. Greaney drove to the Springfield Lot and purchased a generator for himself.

8. Thomas Whittle, Anthony Grachus and Bobby Jones, current or former employees of Apex Equipment, were at the Springfield Lot on October 31, 2012, selling 8,500 and 9,000-watt generators.

9. Appellant procured a used 8,500-watt generator from Whittle and Grachus on October 31, 2012, at the Springfield Lot. She began to fill-in an invoice, writing in the date of October 31, 2012, her name, Marcella Friedman, and the word "Donat[e]" or "Donat[ion]," but left with the generator before completing the invoice. The signature of Bobby Jones appears at the bottom of the invoice. The invoice does not contain a model number or any description of the generator, or a price for the generator, or any indication of any payment method (cash, credit card or check). (Exhibit R-3.)

Testimony:

For respondent:

Nazzareno Nepi has worked for the New Jersey State Police for thirty-one years. On October 31, 2012, he was the Assistant Bureau Chief at the Fiscal Control Bureau, charged with handling finances and payroll, monitoring expenditures, and handling grant compliance.

Nepi's superior, Captain Greaney, had called Nepi at home, asking him to find him a generator. On October 31, 2012, Nepi started driving towards a store, but then noticed vendors selling generators at the Springfield Lot. Nepi stopped and spoke with Whittle and Grachus, who indicated they were selling 8,500 and 9,000-watt generators. Nepi phoned Greaney to say he had located generators for sale. Greaney arrived and Nepi left the Springfield Lot. Nepi never inquired as to whether Whittle and Grachus had a permit to sell generators at that location, nor did he report the generator sales to anyone at the State with regulatory authority.

Later, on October 31, 2012, a friend of Nepi's also inquired about generators, and Nepi returned to the Springfield Lot to buy him a generator. He saw appellant Marcella Friedman there, dressed in a blue New Jersey State Police/OEM windbreaker. State Police jackets might be available for purchase in stores, but jackets with "Office of Emergency Management" on them can only be obtained from the Emergency Management section.

One of the patrons shopping for a generator at the Springfield Lot told Nepi that he had just seen appellant at a different location and that she had allegedly shut down generator vendors at that other site, and was now trying to shut down generator vendors at the Springfield Lot. Nepi spoke with Grachus, who said appellant was a State Police representative who was questioning vendors about permits, although appellant did not show any official identification to Grachus.

Nepi approached appellant, and they went into a trailer and had a conversation. She told Nepi her name. Nepi asked what she was doing there, and appellant told Nepi that she was at the Springfield Lot to regulate people selling generators, and that she had just shut down generator vendors at a different location. When Nepi asked if she was concerned for her safety because she was working alone monitoring vendors on the side of a highway, she showed Nepi a State Police-issued Motorola radio to indicate that she was not concerned about being alone. That model of radio was given to State Police employees but could not be purchased by civilians in a regular store.

Nepi then spoke with Whittle and Grachus, who said that appellant had threatened them with $1,000 per day fines and with confiscation of their generators, unless they provided her with a free generator. To avoid problems, they had loaded a generator into her truck. Appellant paid no money for the generator. She started filling-out an invoice before she drove off, but left the invoice incomplete. Whittle and Grachus gave Nepi a copy of the appellant-invoice. (Exhibit R-3.)

Nepi then used a credit card to pay $1,400 for a generator for his friend, received a completed invoice, and left with the generator.

On November 1, 2012, Nepi went into a State Police internet database and saw that appellant was a civilian state employee in the Communications Bureau, working as a radio technician, but who was out on disability leave from her job. Nepi discussed this matter with appellant's supervisor, (then-Lieutenant) David Brady, who turned this matter over to the State Police Official Corruption Bureau. Nepi filed an official report as to appellant's activities on October 31, 2012. (Exhibit R-5.)

Thomas Whittle, currently an unemployed resident of Traveller's Rest, South Carolina, had worked for approximately fifteen years in the generator sales business. He previously worked for Apex Equipment Company.[3]

Whittle drove from his home with a pickup truck and trailer with approximately 40 generators, to sell at a discount in New Jersey due to Superstorm Sandy. On October 31, 2012, Whittle connected with former Apex salesman Anthony Grachus and current Apex salesman Bobby Jones, to sell generators at the Springfield Lot. They had verbal permission from the Springfield Township chief of police, and were also told it was acceptable to sell generators there by State Police Troopers. Whittle did not recall the names of the chief of police or Troopers.

Appellant Friedman approached Whittle and identified herself as a member of the State Police. She was wearing a dark blue State Police jacket, and carried a police-

[3] Whittle and Anthony Grachus, as well as Lt. Gary Sandes, were permitted to testify by telephone.

style radio/walkie-talkie. She said she was there to monitor generator sales. Appellant asked Whittle about his prices. Whittle told appellant his prices, but appellant thought they were too high. Appellant then told Whittle he was not allowed to sell his generators at the Springfield Lot, despite his protestations that he had permission to sell there.

Appellant told Whittle that she could shut down their sales and confiscate their generators, just as she had done earlier that day at a different site. Whittle began to pack up his generators, with the assistance of appellant. Then appellant told Whittle she would let them continue their generator sales if they gave her a free generator. Whittle offered to reduce his price, but this was still unacceptable to appellant and she threatened to have Whittle, Grachus and Jones arrested.

Bobby Jones was present for only the beginning of the conversation between appellant and Whittle before he left. Appellant spoke with Grachus, and it was Grachus who decided to comply with appellant's demand that they "donate" a free generator to the "State Troopers Association." Whittle loaded the generator onto appellant's truck, and asked her to complete an invoice for the transaction. She wrote down her name and started to write the word "donate" or "donation" on the invoice, but then dropped the invoice-clipboard and drove off with the generator before completing the invoice.

A typical invoice would have had the purchaser's name, address, purchase information (cash, or credit card and credit card information and approval number), and the amount of the purchase price. Bobby Jones had pre-signed a pile of blank invoices before he left.

Whittle was the "money guy." He did not receive any payment from appellant for the generator she received from them. Whittle was standing with Grachus and appellant, and never saw appellant give any money to Grachus.

Christopher Green was the manager of White Dotte Communications, and was at White Dotte on October 31, 2012. He worked there for twenty years. The store lost power due to Superstorm Sandy and was using generators to save its food inventory. Vendors from New Hampshire were in the White Dotte parking lot selling generators.

Green told them to obtain permits, but he did not check for the permits when the vendors returned. Green allowed them to sell their generators in return for them allowing Green to use one of their generators for the store.

Green saw appellant Friedman at White Dotte on October 31, 2012, wearing a State Police/OEM jacket (Exhibit R-1), and walking around talking into a professional, high-end Motorola walkie-talkie, not the kind of model that can be bought by someone at a typical electronics store like a Best Buy. He believed appellant was at White Dotte in an official governmental capacity, although he never heard appellant refer to herself as a State Trooper. Appellant told Green she was at White Dotte to obtain a generator for a recreation center or a church. Green heard appellant threaten to arrest the New Hampshire generator vendors at the White Dotte if they did not give her a free generator.

Green advised the vendors to ignore appellant's threats, but nothing came from their encounter with appellant because shortly thereafter, Southampton Township official Jody Mazeall arrived and shut down the generator sales because the vendors lacked a proper permit.

The White Dotte logo appeared on some invoices issued there, but not because White Dotte gave the vendors permission to sell or because they were associated with each other; a generator vendor apparently took Green's business card and photocopied it onto a blank form of invoice.

Anthony Grachus was a self-employed power equipment salesman from North Carolina, and had been selling power generators for over fifteen years. He was a former employee of Bobby Jones at Apex. He drove to New Jersey with approximately thirty or forty generators to be sold at reduced prices due to Superstorm Sandy. He received verbal permission to sell generators at the Springfield Lot from various local law enforcement officers, the local chief of police, and from State Troopers. Receiving only verbal permission is not unusual in emergency/storm situations. He met up with Whittle and Bobby Jones at the Springfield Lot.

On October 31, 2012, shortly after Bobby Jones left on a break, appellant Friedman approached Grachus at the Springfield Lot. She was wearing a State Police jacket and talking into a walkie-talkie just like the other officers and Troopers who had been there, although unlike other law enforcement officers there, appellant was not wearing a gun. Appellant threatened to arrest Grachus for not having a permit to sell, unless he gave her a free generator. She said she had just shut down generator vendors at White Dotte. He believed appellant was a State Trooper, with the authority to arrest him or fine him if he did not give her a generator.

After discussing this with Whittle, Grachus decided he would comply with appellant's request and would give her a free generator just to get rid of her, but would have to treat this as if it were a donation. He gave her a generator, and gave her an invoice form to complete. Appellant did not pay any money to Grachus for the generator, and she left before completely filling out the invoice. She wrote "Marcella Friedman" on the invoice and the word "Donate."

David Brady is a Major with the New Jersey State Police. In 2013 he was the OEM Bureau Chief, that being the unit head of the "radio maintenance unit." Appellant worked in Brady's department, but did not report directly to Brady. Brady never performed or reviewed appellant's employee evaluations.

On October 31, 2012, appellant was a "Communications Technician 2" for the R.E.R.P. (communications systems for nuclear power plants), a civilian position. On that date, appellant was out on Medical Leave. A person on extended Medical Leave would still be considered an "active" but "off-duty" employee and would not have to return the clothes that had been issued to them. Employees who are off-duty, however, are not supposed to be dressed in their work uniform (although it is not strictly prohibited), and are not permitted to use their State-issued radios.

The jacket issued to an employee in the Communications Department would state "Communications" on the jacket, but the custom-designed jackets with the State Police/OEM logos on them were also distributed to some communications workers. Some equipment does get retrieved from employees out on Medical Leave; appellant's

State-issued vehicle and laptop were both retrieved from her because of her Medical Leave. Appellant had been issued a Motorola STX 5000 radio, the same model of radio issued to State Troopers; this radio had not been retrieved from appellant when she went on Medical Leave.

On November 2, 2012, Brady received a call from Nepi, inquiring about the appellant. Brady confirmed that appellant worked for him. Nepi told Brady about the appellant and the generator on October 31, 2012. Brady confirmed that appellant was on Medical Leave. Brady referred this matter to his superior, Captain Mark Muse, and then had nothing more to do with the investigation.

Appellant had filed numerous complaints against many State Police employees. She had been disciplined for a "lack of candor" during investigations of the complaints she had filed.

Gary Sandes is currently a corporate investigator for TD Bank. Before that, he was with the New Jersey State Police for almost twenty-six years, as a State Trooper and a casino detective. He was also assigned to the narcotics and internal affairs departments, and with the Official Corruption Bureau. He was unit leader of the Official Corruption Bureau in October 2012, and conducted the investigation of appellant. He filed two formal written reports on this matter. (Exhibits R-9 and R-10.) These reports included copies of Nepi's report.

Sandes interviewed both Whittle and Grachus. They said that on October 31, 2012, appellant identified herself to Whittle as an inspector for the State Police, at the Springfield Lot. She wore a State Police/OEM jacket and carried a radio. Whittle and Grachus both told Sandes that appellant was "verbal" and "agitated" as she indicated she wanted a generator but did not want to pay for one. She threatened Whittle and Grachus with arrest or fines for violation of ordinances, and claimed to have shut down generator vendors at a separate location. Whittle and Grachus eventually capitulated and gave appellant a free generator. Sandes received a copy of the incomplete appellant-invoice from Nepi, and acknowledged that a proper invoice should have

shown the price, model number and payment method; appellant's invoice had only her name and the word "Donate."

Sandes was unsuccessful in his attempts to schedule a formal interview with appellant. But he reached her on her cellphone. Appellant began to act defensive, and told Sandes that she had purchased a generator for $2,000 and therefore would not have stolen a generator. Sandes asked for a copy of an invoice for the $2,000 generator, but appellant never provided one. She said she never spoke with Nepi.

Hours later, appellant telephoned Sandes at his home. She said on October 31, 2012, she actually purchased a generator for $500 cash that she had taken out of an A.T.M., and would be able to produce a receipt. She said she gave that generator to a church, but would not reveal its name or location. When appellant refused to schedule a formal interview, Sandes ended the conversation.[4]

Sandes had not seen any bank records indicating that appellant had taken $500 out of a bank or A.T.M.

Sandes contacted the Burlington County Department of Consumer Affairs, and was informed by the director, Renee Borstad, that there had been no complaints filed against Whittle and Grachus. She said Southampton Zoning official Jody Mazeall provided her with a photograph of appellant at the White Dotte. Borstad provided the photograph to Sandes; it showed appellant wearing khaki pants and a State Police/OEM windbreaker.

Sandes interviewed White Dotte manager Christopher Green on November 15, 2012. Green saw appellant at White Dotte on October 31, 2012, wearing a State Police jacket, and carrying and speaking into a radio. Green overheard appellant's conversation with the generator vendors at White Dotte in which appellant told the vendors she wanted two free generators, and that the vendors could be arrested by the State Police. Appellant never stated she was a Trooper. Mazeall arrived, dispersed the

[4] Sandes typically records such conversations, but his tape player at home was broken.

vendors, and took a photograph of appellant, who was wearing khakis and a State Police jacket.

Sandes interviewed Jody Mazeall on November 15, 2012. Mazeall saw appellant at White Dotte on October 31, 2012, wearing the State Police/OEM jacket. Mazeall spoke with appellant, who told him that she had been ripped off by being sold a bad generator. Mazeall asked appellant why she didn't report this to her fellow State Police, and she told him that this was a personal issue. Mazeall never told Sandes he had seen appellant with a radio.

Sandes learned that appellant had given a generator to David Palmer as payment for staying in his home while she was between residences.

As part of his investigation, Sandes was made aware of a check for $1,600 made payable to appellant, from Lisa Evanko (daughter of David and Eleanor Palmer). Sandes spoke with Evanko on December 7, 2012, who told him that on October 30, 2012, she and her son Cody travelled with appellant to White Dotte. Evanko wanted to purchase a generator and pay by check, but the vendors were not accepting checks. Appellant then gave Evanko $1,600 in cash towards the $1,700 purchase price, and Evanko's son paid the final $100 in cash. Evanko then reimbursed appellant by writing her a check for $1,600.

Sandes had not seen any bank records indicating that appellant had taken $1,600 out of a bank or A.T.M. on or before October 30, 2012.

Evanko stated that the generator which appellant procured on October 31, 2012, was given by appellant to David Palmer, and that David Palmer then sold it to David Marshall. Sandes spoke with Marshall, who confirmed that he had purchased a generator from David Palmer.

Sandes conducted a formal interview with Evanko on January 8, 2013. Evanko provided an invoice for the generator she purchased from the vendors at the White Dotte on October 30, 2012. It was for a 9,000-watt model, not the same model which

appellant procured on October 31, 2012; appellant gave David Palmer an 8,500-watt model. Evanko knew that Marshall needed a generator, so she arranged for Marshall to buy a generator from David Palmer. The serial number on the generator Marshall bought from David Palmer is the same as the model number of the generator appellant procured from Whittle and Grachus on October 31, 2012. Sandes later obtained a photocopy of a check from Marshall to David Palmer, dated November 5, 2012, in the amount of $1,000.

Sandes did not know any of these State Police employees before he began this investigation, except for Nepi. There was no conspiracy to get appellant fired.

For appellant:

Eric Trout was a police officer with Springfield Township for twenty-four years. He has been Chief of Police since 2011, and served in that capacity during Superstorm Sandy. He never spoke with any generator salesman at Routes 206 and 537 in Springfield. He never gave permission to anyone to sell generators. He was not aware that anyone was selling generators at that location and had not received any complaints about generator sales.

Marcella Friedman, the appellant, was hired in 2001 as a Radio Technician with the New Jersey Department of Corrections before joining the New Jersey State Police in 2003 as a Technician 2. She received a blue radio maintenance shirt as part of a work uniform, and had to buy her own khaki pants to wear. She owned an Office of Emergency Management jacket but could not remember when she obtained it. People in her position wear State Police jackets all the time. There are no restrictions on when and where they can wear State Police jackets.

She purchased a new home on October 22, 2012, in Hamilton, New Jersey, after previously living in Surf City, New Jersey. On that date she was collecting Worker's Compensation. She paid cash at her real estate closing because she could not get a mortgage.

Because repairs were being done to her new home in Hamilton, New Jersey, appellant temporarily moved in with "Aunt Wanda,"[5] and was living out of boxes.

After Superstorm Sandy hit, Lisa Evanko was going to borrow a generator from a friend in Tabernacle, New Jersey. In the mid-afternoon of October 30, 2012, Lisa Evanko, Cody Evanko and appellant drove in appellant's pickup truck towards Tabernacle. They passed White Dotte and saw vendors selling generators there. After picking up the generator from Lisa Evanko's friend in Tabernacle, they drove back north and stopped at White Dotte.

The White Dotte lot was busy with generator vendors and purchasers. Appellant was there for a couple of hours on October 30, 2012. Two lines were set up, one for cash purchases and one for credit card purchases. They were not accepting checks. Appellant did not trust how the vendors were taking credit card information, so she gave Lisa Evanko $1,600 in cash to purchase herself a 9,000-watt generator.

As appellant was living out of boxes and did not have a lot of clothes available, on October 30, 2012, she put on the blue State Police/OEM jacket that was in her car. Appellant had her personal cellphone with her. She was not carrying a work cellphone or a radio. She wore a small black leather fanny pack, which she had worn every day for seven or eight years, because she kept an epi-pen in there in case of any food allergy emergencies. (Exhibit P-2.)

After Evanko chose the model of generator she wished to purchase at White Dotte, appellant, Lisa Evanko and Cody Evanko drove from White Dotte back to Tabernacle, approximately fifteen to twenty minutes, to return the generator they had picked up earlier from Lisa Evanko's friend. They did this to make room in appellant's pickup truck for Evanko's newly purchased generator.

[5] "Aunt Wanda" was referred to as Eleanor Palmer's daughter. She may have been referring to Eleanor's daughter, Lisa Evanko.

No vendors at White Dotte asked her about her State Police/OEM jacket. She never told anyone that she was a State employee. She never asked anyone at White Dotte on October 30, 2012, to give her a free generator.

After returning the borrowed generator to Tabernacle and driving back to White Dotte to pick up Evanko's new generator, they drove back to Aunt Wanda's house, and someone unloaded the generator. Evanko reimbursed appellant for the $1,600 cash she lent her by writing appellant a check for $1,600.

On October 31, 2012, David Palmer told appellant that he wanted a second generator, so he could help his neighbors out. Palmer was especially in need of power, because Aunt Wanda had a pacemaker. Appellant went out, on her own initiative, and drove alone to White Dotte to procure another generator.

When she arrived at White Dotte on October 31, 2012, one of the vendors recognized her, because she had been there the day before and because she purchased a generator with cash. She handed the vendor $1,700 cash to purchase another generator, but did not get a receipt. Just then, Southampton Township inspector Jody Mazeall began shutting down the generator vendors. Later, people just assumed that appellant had shut them down because she was wearing the State Police/OEM jacket; she never told vendors at White Dotte on October 31, 2012, that she could shut them down.

In the craziness of the vendors being shut down by Mazeall, the vendor refused to return her $1,700 cash, and took away the generator she was about to purchase. She walked inside the White Dotte to speak with the manager, Christopher Green, but he would not help her. There were police and township officials around but she did not want to ask for their help in getting back her $1,700 cash because she was embarrassed and this was a personal matter. She then chased the vendor down; he cursed at her, but then gave appellant her $1,700 cash back. Both Mazeall and appellant took photographs of the vendors' trucks, which contained hundreds of generators.

Appellant had $1,600 cash on October 30 and at least $1,700 cash on October 31, 2012, because she had cash left over from her recent real estate purchase. She was unable to get a mortgage because she was receiving Worker's Compensation, so she used cash to buy her new home.

Someone at White Dotte then told appellant that vendors up the road were selling generators. Since this was on her way home, she drove up Route 206 to a vacant lot by Routes 206 and 537 and the Esquire Diner (the Springfield Lot). Those vendors had U-Hauls and only a small number of generators.

Around 3:00 p.m., appellant got out of her vehicle at the Springfield Lot, still wearing the blue State Police/OEM jacket. She had no radio with her. She saw Lieutenant Nepi; she and Nepi had worked together before. Nepi asked her how her knee was doing. Nepi said he was there to purchase a generator, and appellant saw him take possession of two generators.

Appellant chose the 8,500-watt model generator. Bobby Jones told her the cash price would be $500, a discounted price because this was a used generator. She was not aware of what condition this used generator was in or why it had been returned. Jones took the $500 from appellant, and signed his name to her invoice in front of her. She never spoke with Whittle or Grachus. Jones wasn't feeling well and wanted to leave, so he told Whittle and Grachus to load a used 8,500-watt generator into appellant's truck, and to write "Donate" on appellant's invoice. She wrote her name on the invoice, and Jones said to not worry about writing in her address or anything else, because the rest of the details of the generator were included in the warranty paperwork he had given her.

Appellant returned to David Palmer's house, where she was staying, and gave him the generator she had just purchased. But she did not consider this as payment to a relative for staying with them. By the time she gave the generator to Palmer, the electricity in their house was back on. Appellant had no idea Palmer intended on reselling her generator.

When Sandes called to discuss this matter with her, she thought this was some kind of prank. She called Sandes back a few hours later and denied the accusations. She was too busy to schedule a formal interview with Sandes because she was still moving out of her last home on Long Beach Island, and also had to go to the doctor regarding her leg.

Appellant had filed numerous employment complaints against co-workers over a ten-year period. She had previously met with an Officer Ingram and with Major Brady regarding specific employment issues; Ingram pulled out a gun and threatened her and her family, calling them "a bunch of thugs," until Brady had Ingram "stand down." It was after leaving that meeting that appellant went to her doctor, and she has been out on Medical Leave since then. She filed a complaint, resulting in several officers and civilian employees being suspended. She suggested that the within accusations against her are revenge for her having filed complaints against fellow employees. Appellant is a lesbian; she has been called names because of that, and her co-workers created a hostile work environment and did things to her in an attempt to get her to leave her job.

Credibility:

In evaluating evidence, it is necessary to assess the credibility of the witnesses. Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality or internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950).

A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521–22; see D'Amato by McPherson

v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may also reject testimony as "inherently incredible" when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Further, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), *certif. denied*, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

After having the opportunity to review the evidence and observe his testimony, the testimony of **Nazzareno Nepi** is accepted as credible and truthful. He was at the Springfield Lot on the day of the incident in question, and had the opportunity to witness and personally converse with the appellant as well as witnesses Whittle and Grachus, who later corroborated Nepi's testimony. He exhibited no prejudice during his testimony, but rather answered questions clearly and authoritatively.

Accordingly, Nepi's testimony is accepted as truthful and credible, and therefore it is accepted as **FACT** that: State Police jackets are available for purchase in stores, but jackets with "Office of Emergency Management" on them can only be obtained from the Emergency Management section. Appellant showed Nepi her State Police-issued Motorola radio that she was carrying. That model of radio is given to State Police employees but cannot be purchased by citizens in a regular store. Whittle and Grachus told Nepi that appellant threatened them with fines and with confiscation of their generators, unless they provided her with a free generator, and that appellant did not pay for the generator she took from them.

Thomas Whittle, one of the generator vendors at the Springfield Lot, was permitted to testify by telephone by agreement of both parties. I could not visually observe Whittle's testimony, but was able to observe the tone of his voice and facility of

his answers. He directly witnessed appellant at the Springfield Lot on October 31, 2012, and his testimony was corroborated by that of other witnesses. He answered questions quickly and clearly, from the point-of-view expected from a person who was the alleged victim of malfeasance.

Whittle testified that he received verbal permission to sell generators from State troopers and the local chief of police. Springfield Chief of Police Eric Trout testified that he was unaware of generator sales at the Springfield Lot and that he never gave anyone permission to sell generators. Thus, while Whittle may have received permission from other troopers and law enforcement officers, and may have been uncertain as to the ranks of the officers he spoke with, his statement that he received permission from the chief of police does not appear to be correct. The possible illegality of his generator sales did not impact on appellant's actions at the Springfield Lot, however, nor was Whittle's testimony impeached by Trout's testimony.

Accordingly, Whittle's testimony is accepted as truthful and credible, and the following can be accepted as **FACT**: appellant Friedman approached Whittle and identified herself as State Police. Appellant carried a police-style radio/walkie-talkie. Appellant informed Whittle that she was at the Springfield Lot on October 31, 2012, to monitor generator sales. Appellant told Whittle he was not allowed to sell his generators at the Springfield Lot, that she could shut down his vending, confiscate his generators and/or have Whittle and Grachus arrested. Appellant claimed to have shut down generator sales at a different location earlier that day. Appellant told Whittle she would let their generator sales continue if Whittle and Grachus gave her a free generator. Bobby Jones was not present for the entirety of Whittle's conversation with appellant, and left before appellant obtained a generator. It was Grachus who decided to comply with appellant's demand that they "donate" a free generator. Whittle loaded the generator onto appellant's truck. Whittle asked appellant to complete an invoice for the transaction. A typical invoice would have the purchaser's name, address, purchase information (cash, or credit card and credit card information and approval number), and the amount of the purchase price. Bobby Jones pre-signed a pile of blank invoices before he left to take a break. Whittle did not receive any payment from appellant for

the generator she received from them. Whittle was standing with Grachus and appellant, and never saw appellant give any money to Grachus.

The testimony of **Christopher Green** is accepted as credible and truthful. In testifying as to what transpired at White Dotte on October 31, 2012, Green answered questions clearly, without any apparent bias or prejudice.

Accordingly, it is accepted as **FACT** that: Green was at White Dotte on October 31, 2012. Green allowed vendors from New Hampshire to sell generators in the White Dotte parking lot, in return for them allowing Green to use one of their generators for the store. Appellant Friedman was at White Dotte on October 31, 2012, wearing a State Police/OEM jacket, and walking around the lot talking into a professional, high-end Motorola walkie-talkie. Appellant was at White Dotte to obtain a generator. Appellant threatened to arrest the New Hampshire generator vendors at White Dotte if they did not give her a free generator. Southampton Township official Jody Mazeall arrived and shut down the generator sales because the vendors lacked a proper permit.

Anthony Grachus, one of the generator vendors at the Springfield Lot, was permitted to testify by telephone by agreement of both parties. I could not visually observe Grachus' testimony, but was able to observe the tone of his voice and facility of his answers. He directly witnessed appellant at the Springfield Lot on October 31, 2012, and his testimony was corroborated by that of other witnesses. He answered questions clearly and thoughtfully, from the point-of-view expected from a person who was the alleged victim of malfeasance.

As with Whittle, Grachus testified that he received verbal permission to sell generators from State troopers, local law enforcement officers, and the local chief of police. Springfield Chief of Police Eric Trout testified that he was unaware of generator sales at the Springfield Lot and that he never gave anyone permission to sell generators. Thus, while Grachus may have received permission from other troopers and law enforcement officers, and may have been uncertain as to the ranks of the officers he spoke with, his statement that he received permission from the chief of police does not appear to be correct. The possible illegality of his generator sales did not

impact on appellant's actions at the Springfield Lot, however, nor was Grachus' testimony impeached by Trout's testimony.

Accordingly, Grachus' testimony is accepted as truthful and credible, and the following can be accepted as **FACT**: Grachus drove to New Jersey with approximately thirty or forty generators to be sold at reduced prices due to Superstorm Sandy. Grachus met Whittle and Bobby Jones at the Springfield Lot, and all three were present there on October 31, 2012. Appellant Friedman approached Grachus at the Springfield Lot, wearing a State Police jacket and talking into a walkie-talkie. Appellant threatened to arrest Grachus for not having a permit to sell, unless he gave her a free generator. Appellant claimed to have just shut down generator vendors at White Dotte. Grachus believed appellant was a State Trooper, with the authority to arrest him or fine him if he did not give her a generator. Grachus made the decision to give appellant a free generator. Grachus gave her a generator, and gave her an invoice form to complete. Appellant did not pay any money to Grachus for the generator.

David Brady provided reasoned testimony, speaking with authority and displaying a great deal of knowledge as to the workings at the State Police. His testimony is accepted as truthful and credible.

Accordingly, it is accepted as **FACT** that: appellant Friedman's position as a Communications Technician 2 for the State Police is considered a civilian position. A civilian employee on extended Medical Leave would not have to return the clothes that had been issued to them. Jackets with State Police/OEM logos were distributed to some communications workers. Appellant had been issued a Motorola STX 5000 radio, the same model of radio issued to State Troopers. Appellant's Motorola STX 5000 radio had not been retrieved from her when she went on Medical Leave. Off-duty employees are not permitted to use their State-issued radios. Appellant had conflicts with other employees, and had filed numerous complaints. Appellant had been disciplined for a "lack of candor" during investigations of the complaints she had filed.

Gary Sandes was permitted to testify by telephone by agreement of both parties. I could not visually observe Sandes' testimony, but was able to observe the tone of his

voice and facility of his answers. Sandes testified based on his investigation of appellant, and much of his information came from interviews of persons who testified at the within Hearing. His answers appeared unbiased and informed, and his testimony is accepted as truthful and credible.

Accordingly, it is accepted as **FACT** that: Sandes was with the State Police Official Corruption Bureau in October 2012, and conducted the official investigation of appellant Friedman. Sandes was unsuccessful in his attempts to schedule a formal interview with appellant. Sandes spoke with appellant by telephone on November 4, 2012, and she stated that she had purchased a generator for $2,000 and did not steal a generator. Appellant never produced an invoice for the $2,000 generator. Appellant denied speaking with Nepi at the Springfield Lot. Hours after their initial telephone call, appellant telephoned Sandes at his home, and told him that on October 31, 2012, she had actually purchased a generator for $500 cash that she had taken out of an A.T.M., and would be able to produce a receipt. Appellant never produced a receipt for a $500 bank or A.T.M. withdrawal. Appellant told Sandes that she gave the generator to a church, but would not reveal its name or location. When appellant refused to schedule a formal interview, Sandes ended their telephone conversation. Sandes typically recorded investigative conversations but his recorder malfunctioned during this conversation at his home. Sandes received a copy of a photograph of appellant at White Dotte on October 31, 2012, from Renee Borstad at the Burlington County Department of Consumer Affairs, which Borstad had received from Southampton Zoning official Jody Mazeall; that photograph showed appellant wearing khaki pants and a State Police/OEM windbreaker. Appellant gave the 8,500-watt generator she had procured on October 31, 2012, to David Palmer, with whom she had been staying. Sandes spoke with Palmer's daughter, Lisa Evanko, on December 7, 2012, and again on January 8, 2013. Evanko stated that she and her son Cody travelled with appellant to White Dotte on October 30, 2012, so Evanko could purchase a generator. Evanko wanted to pay by check, but the vendors were not accepting checks. Appellant Friedman gave Evanko $1,600 in cash towards the $1,700 purchase price for a 9,000-watt generator, and Cody Evanko gave her the final $100 in cash. Evanko received a completed invoice for her purchase. Evanko later reimbursed appellant by writing her a check for $1,600. There were no bank records indicating that appellant had taken

$1,600 out of a bank or A.T.M. on or before October 30, 2012. David Palmer sold the 8,500-watt generator appellant had given him to David Marshall for $1,000. There was no conspiracy to get appellant fired.

Eric Trout was a credible witness, and therefore it is accepted as **FACT** that: Trout was unaware of generator sales at the Springfield Lot. Nobody ever asked him for permission to sell generators at the Springfield Lot, and Trout neither met with or gave permission to any generator salesmen at the Springfield Lot.

Appellant **Marcella Friedman** was not a credible witness. She appeared defensive at times, and was evasive in much of her testimony. There were many inconsistencies in her testimony.

Appellant told Sandes in a telephone interview that she did not recall speaking with Nepi at the Springfield Lot on October 31, 2012, but Nepi and appellant both testified that they spoke with each other at the Springfield Lot.

Appellant claims to have paid $500 for a generator on October 31, 2012, but there is no proof that she paid for the generator, and neither Whittle nor Grachus received any payment for the generator she took. Appellant told Sandes on the telephone that she gave the generator to a church, without revealing its name or location, when in fact she gave the generator to David Palmer.

Appellant said she gave the generator to David Palmer for free. Despite an assertion in appellant's Post-Hearing Brief that she gave the generator to Palmer as "in kind" payment for allowing her to stay temporarily in his home (Exhibit P-3, page 29), in her testimony appellant denied that she gave Palmer the generator as rent payment. (Transcript September 6, 2017, page 143.) Beyond these contradictory statements, appellant never explained why she gave Palmer a free generator.

There were also contradictions regarding Palmer's need for a second generator. Appellant testified that she went generator shopping again on October 31, 2012, because David Palmer wanted a second generator, to help friends out. But David

Palmer already had access to two generators: the one his daughter Lisa Evanko purchased at the White Dotte on October 30, and the generator that appellant and Evanko borrowed from Evanko's friend in Tabernacle that same date. If David Palmer told appellant on October 30 that he needed two generators, appellant would not have driven back to Tabernacle to return the borrowed generator. If David Palmer told appellant on October 31 that he needed a second generator, appellant could have driven back to Tabernacle to borrow the generator again from Evanko's friend.

Additionally, appellant justified this need for a second generator by testifying that "Aunt Wanda" had a pacemaker. She did not explain a nexus between Wanda's pacemaker and a generator, but pacemakers are battery-driven, and do not get plugged into a source of electricity. There was also something amiss in Palmer selling the generator that appellant gave him for free, receiving $1,000 from Marshall and yet not reimbursing appellant the $500 she claims she paid for it.

Appellant testified that she did not trust the generator vendors at the White Dotte on October 30, 2012; rather than allow Evanko to give her credit card information to what she considered untrustworthy salesmen, appellant gave Evanko $1,600 in cash to enable her to complete her purchase. But appellant later testified that she did trust the salesmen at the White Dotte, because the White Dotte name was imprinted on their invoice form.

This issue of trust arose again on October 31, 2012. Appellant may not have trusted the vendors on October 30, 2012, but she trusted these same vendors enough on October 31, 2012 to hand them $1,700 cash without getting a receipt or invoice. Appellant testified that they took her $1,700 cash on October 31, but then refused to give her that money back after the township shut down their operation. Although surrounded by law enforcement officials, appellant did not ask any of them for help getting back her $1,700; she testified that this would have been embarrassing to her, because this was a personal matter. But there should have been nothing embarrassing in asking a police officer for help with a personal matter if appellant was there in a personal, and not official, capacity. It was fortunate for appellant that the vendors

suddenly changed their minds and returned the $1,700 in cash to her, despite her not having a receipt or invoice for that dollar amount.

Appellant testified that when she arrived at White Dotte on October 31, 2012, one of the vendors recognized her, because she had been there the day before and because she paid with cash. But appellant did not purchase a generator on October 30; Evanko did. Appellant and Evanko's son Cody gave cash to Evanko to make the purchase. None of the vendors at White Dotte on October 31, 2012, should have recognized appellant as a cash purchaser.

There were also inconsistencies regarding the cash appellant had spent on generators. Appellant initially told Sandes she spent $2,000 on a generator. Later she said she really spent only $500 for a generator, and had a receipt to prove it. But appellant produced no receipt or invoice showing she spent either $2,000 or $500 for a generator purchase. Further, appellant testified that she had $1,600 in cash on October 30 (which she gave to Evanko for her generator purchase) and $1,700 cash on October 31, 2012 (which appellant initially gave to the vendors at White Dotte). Yet no bank statements or A.T.M. records were produced to verify that appellant had recently obtained $3,300 in cash.

Appellant explained her source of cash by stating that she had cash left over from a real estate transaction, that being her purchase of property in Hamilton, New Jersey, on October 22, 2012.[6] She had to do a cash closing because she was unable to secure mortgage financing for her purchase because she was on Worker's Compensation.[7] But a "cash closing" does not typically involve actual cash; a "cash closing" is a term of art to describe a transaction other than a mortgage loan-financed purchase. Purchasers bring a check to a closing table, not cash. If a purchaser did in fact show up at a real estate closing with hundreds of thousands of dollars in cash, the title company would be responsible for having the applicable Internal Revenue Service documents completed and submitted. Further, if there was money left over from a real

[6] Land records indicate that the date of appellant's deed was October 18, not October 22, 2012.

[7] Appellant provided no evidence that she applied for a mortgage or was rejected by lenders for mortgage financing.

estate settlement which had to be paid back to the purchaser, a title company would not pay that in the form of cash; they would pay the amount in the form of a check. In the unlikely situation where actual cash was paid, this would be reflected on a HUD-1 Settlement Statement; appellant, however, did not submit such documentary evidence, or a copy of any I.R.S. documents reflecting a cash closing, or bank statements showing the withdrawal of hundreds of thousands of dollars in cash in proximity to her settlement date. Additionally, Sandes testified that appellant told him she had taken money out of the bank to purchase her generator, and that she would produce receipts for said withdrawals, which is different than holding on to thousands of dollars in cash from a real estate closing for two weeks.

Appellant's statements regarding her clothing lacked credibility. She testified that she purchased a new home on October 22, 2012, and that because of repairs to the new home she had to live temporarily with her relatives, the Palmers. Because she was in-between homes, she was living out of boxes, which was why she was wearing the same outfit on both October 30 and October 31, 2012. It seems unlikely that the Palmers could not have lent appellant some clothes to wear. It also raises the question of why appellant would have packed away all her jackets; she was moving during October, a time of cool and wet autumnal weather, and it seems more likely that she would have needed to keep a couple of coats or jackets nearby to wear on an October day. Further, appellant testified that she wore the State Police/OEM windbreaker jacket on October 30 and 31, 2012, because it was in her truck. That means appellant walked out of the Palmer house, during a hurricane like Superstorm Sandy, to conduct business outdoors, with no jacket, coat or cold weather or wet weather gear, and that she then put on the cold State Police/OEM jacket that she happened to have in her truck. Even if that had happened on October 30, it seems unlikely she would have gone out the next day in the same clothes, with the same light jacket, instead of borrowing a coat or heavier jacket from her relatives, or going into her boxes to find a heavier coat, or to find the cold weather clothes that she had been issued at work, which she still had despite being out on Medical Leave.[8] Additionally, if appellant had been wearing the State

[8] Appellant's boxes of clothes were easily accessible; they were stored at her new house in Hamilton, New Jersey, in the same township where she was staying with the Palmers. (Exhibit P-3, page 32.)

Police/OEM jacket on a regular basis, she could have produced photographs of her in the jacket from some time other than October 30 and 31, 2012.

Appellant-counsel stated in his Post-Hearing Brief (Exhibit P-3, page 32) that appellant purchased her new home (in Hamilton, New Jersey) on October 22, 2012, and that when Superstorm Sandy hit seven days later it forced appellant to move out of the house. Yet appellant testified that she was living with the Palmers because she was having repairs done to the new house before moving in.

There are also inconsistencies with regard to Mr. Jones and his presence at the Springfield Lot. Whittle and Grachus stated that Jones was not feeling well, and did not stay for the end of the conversation with appellant, and that Jones had pre-signed a pile of invoices before he left the Springfield Lot. But appellant stated that it was Jones who completed her purchase transaction, and stayed long enough to see the generator loaded into her truck, and that Jones signed her invoice in front of her. She also testified that Jones told her not to complete filling in her information on the invoice because all pertinent information would be in the warranty he was giving her. It is believable that Jones would pre-sign blank forms before leaving a site, but it seems unlikely that an experienced salesperson like Jones would have signed an invoice knowing that it was lacking in standard information, such as price and payment method. The only vital information that would be in a warranty book would be the model and serial number of the generator being purchased; the warranty would not have had the price or payment method. Further, no warranty should have been forthcoming to appellant because she purchased a used generator, not a new model. Jones could have testified as to appellant having paid for the generator she took home, but appellant did not call Jones as a witness. No warranty with appellant's name was offered into evidence by appellant.

Appellant's statements about wearing her black fanny pack at all times due to needing an epi-pen for potential food allergies went unsubstantiated; no evidence was provided that she wore the fanny pack at all times (such as old photographs showing her wearing the fanny pack), and no evidence was provided to confirm that she had any food allergies.

Accordingly, due to appellant's lack of credibility, I cannot accept her version of the events of October 31, 2012.

LEGAL ARGUMENT AND CONCLUSION

The issues are whether the appellant used her position as an employee of the New Jersey State Police to obtain a free power generator for personal use; whether such action constituted conduct unbecoming a public official, misuse of public property and violation of SOP F-7; and whether the Department acted properly in removing appellant from her position as a Communications Systems Technician 2 at the Department of Law and Public Safety, Division of State Police, for such violations.

Appellant's rights and duties are governed by the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.

In assessing the propriety of a penalty in a civil disciplinary action, the primary concern is the public good; factors to be considered are the nature of the offense, the concept of progressive discipline and the employee's prior record. George v. North Princeton Development Center, 96 N.J.A.R. 2d 465 (CSV) (1996). Progressive discipline is required in those cases where an employee is guilty of a series of offenses, none of which is sufficient to justify removal. Harris v. North Jersey Developmental Center, 94 N.J.A.R. 2d (CSV) (1994).

I. Conduct unbecoming a public employee

One of the grounds for discipline of public employees is "conduct unbecoming a public employee." N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental

services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). Suspension or removal may be justified even where the misconduct occurred while the employee was off duty. Emmons, 63 N.J. Super. at 140.

Appellant Friedman was a Communications Systems Technician 2 at the Department of Law and Public Safety, Division of State Police. While she was employed by the State Police, hers was a civilian position; she did not serve as a State Trooper. She worked in communications, and had no responsibilities for monitoring or regulating product sales, generators or roadside sales. She had no authority to review permits, shut down vendor sales, fine vendors, confiscate property, and had no arrest powers. Appellant was receiving Worker's Compensation and was on extended Medical Leave on the date of October 31, 2012, and had no duties on that date on behalf of the State Police.

Yet on October 31, 2012, appellant dressed as a member of the New Jersey State Police Office of Emergency Management and carried a State-issued radio. She told roadside vendors at two separate locations that she had the authority to shut down their sales unless they gave her a free power generator. Rather than use her time and talents to assist those in need during the crisis that became known as Superstorm Sandy, she used her State-issued jacket and radio to impersonate an employee of the OEM. Not only did she not assist her fellow citizens in need, she used the fact that roadside vendors in an emergency did not have formal sales permits or approvals as the basis for taking a generator without paying for it. Appellant's actions constituted the extortion of property. In addition to this being a criminal act, appellant's behavior

undermined the efficiency of a governmental unit, that being the State Police, and was clearly the type of behavior that can undermine and destroy the public's respect in the delivery of governmental services, and its respect for police in general.[9]

The generator vendors were obviously hoping to make a profit from selling their wares, but were selling them at significant discounts in order to provide help during a crisis. Yet while they were offering help during a crisis situation, appellant was doing nothing but looking out for herself. This is the sort of behavior that offends publicly accepted standards of decency. Rather than wear the State Police/OEM jacket as a paragon of virtue, appellant wore it in a manner so as to violate the implicit standard of good behavior expected from someone who has a public position.

Accordingly, appellant's actions on October 31, 2012, constituted conduct unbecoming a public employee. N.J.A.C. 4A:2-2.3(a)(6).

II. Misuse of public property

As a Communications Systems Technician 2 at the Department, appellant had been issued State radios, cell phones and pagers. She received a radio maintenance shirt as part of a work uniform. She was issued cold weather gear such as boots, winter jackets, gloves and raingear. She received many State Police jackets over the years, and had an Office of Emergency Management (OEM) jacket. There was no State Police policy prohibiting civilian State Police employees from wearing jackets with a State Police logo.

But appellant was not simply wearing an OEM jacket to stay warm. She wore that jacket to give the impression that she was on-duty, working for the State Police/OEM. She wore that State-issued jacket while telling roadside vendors that she had the authority to fine them or shut down their business for lack of proper permits. Appellant did not purchase the jacket she wore on October 31, 2012; she wore a jacket that had been given to her as an employee of the State Police. Thus, because the

[9] By example, Christopher Green, the White Dotte manager, was so suspicious of appellant's behavior that he told vendors at his site to ignore her.

jacket she wore at the Springfield Lot on October 31, 2012, was a State-issued jacket, her improper actions on that date constituted a misuse of public property.

Similarly, appellant was carrying and speaking into a walkie-talkie, just like other law enforcement officers were doing. Appellant carried and talked into her State-issued walkie-talkie to bolster the image of her as an on-duty member of the OEM. Had appellant merely been wearing a walkie-talkie strapped to her waist, her defense--that what witnesses actually saw was the black fanny pack she always wore--might have had some validity. But appellant was carrying the walkie-talkie and speaking into it, hoping to give the impression that she was on-duty and acting in an official capacity when she was attempting to regulate roadside sales. Further, off-duty employees, like appellant, were not permitted to use their State-issued radios. Accordingly, appellant's use of a State-issued walkie-talkie as part of her extortion of a generator constituted a misuse of public property.

III. Violation of SOP F-7 radio procedures

There are guidelines for use of State-issued radios, that being Standard Operating Procedures F-7 ("SOP F-7"). (Exhibit R-7.) The Department cited SOP F-7, Section III, Radio Transmissions, subsection A, which states, "Personnel shall utilize proper radio procedures with brevity and professionalism at all times . . ." Neither party focused on this charge at the Hearing; it is presumed that appellant's denial that she carried a walkie-talkie or radio was a denial that she violated Standard Operating Procedures.

Appellant carried a State-issued radio, that being a Motorola XTS 5000 radio, and was speaking into it. Being on Medical Leave and not having any official work duties, any speaking into a walkie-talkie by appellant had to have been fake. Appellant's fake use of her radio to create the impression that she was on active duty indicated a lack of professionalism on her part. Accordingly, appellant was in violation of SOP F-7.

Therefore, the State met its burden of showing by the preponderance of the evidence that appellant Friedman did commit conduct unbecoming a public official, did misuse public property and did violate SOP F-7.

PENALTY

When considering removal of an employee, his or her entire prior work/disciplinary record must be considered. In re Stallworth, 208 N.J. 182 (2010). Appellant Friedman had one prior minor disciplinary action against her, a fifteen-day suspension in 2008. The within matter is the first major disciplinary action against her.

Once a determination is made that an employee has violated a statute, regulation or rule concerning his or her employment, the concept of progressive discipline must be considered. W. New York v. Bock, 38 N.J. 500 (1962). However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. Henry v. Rahway State Prison, 81 N.J. 571 (1980). Progressive discipline is not a "fixed and immutable rule to be followed without question." Carter v. Bordentown, 191 N.J. 474, 484 (2007). Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished record. Id.

Appellant's use of a public position and public property to extort a generator from vendors during a weather emergency is egregious behavior, and therefore progressive discipline is not required. Although this is appellant's first major disciplinary matter, numerous cases have upheld the removal of an employee for a first violation. In re Hermann, 192 N.J. 19 (2007) (in upholding an employee's removal, the court held that while progressive discipline is a worthy principle, it is not subject to universal application); See also Henry v. Rahway State Prison (progressive discipline bypassed by the court where an employee was engaged in severe misconduct, especially where the employee's position involved public safety and the misconduct caused a risk of harm to persons or property); Bowden v. Bayside State Prison, 268 N.J. 469 (App. Div. 1993), *certif. denied* 135 N.J. 469 (1994) (upholding the removal of a corrections officer

for a first major discipline, having taken into consideration the important role that corrections officers play in dealing with inmates).

Appellant offered no mitigating factors for consideration, as she has maintained that she paid for the generator she procured at the Springfield Lot and therefore did not extort the generator obtained from Whittle and Grachus. She has alleged improper actions by others (for instance, that Grachus and Whittle were illegally selling generators, and that Nepi improperly bought generators for personal use while on duty.) These allegations will not be addressed here. Appellant is presumed to have raised these issues to show selective enforcement of rules by the State Police and law enforcement, to the detriment of appellant. Such allegations were taken into consideration in deciding what weight would be given to those witnesses' testimony. Similarly, appellant's accusations of bias against her by those co-workers who testified against her have been taken into consideration in determining how much weight to afford their testimony.

Accordingly, the Department acted properly in removing appellant from her position as a Communications Systems Technician 2 at the Department of Law and Public Safety, Division of State Police, for conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6), misuse of public property, in violation of N.J.A.C. 4A:2-2.3(a)(8), and violation of SOP F-7 Radio Procedures, in violation of N.J.A.C. 4A:2-2.3(a)(12).

ORDER

I **ORDER** that the disciplinary action of the Department of Law and Public Safety, Division of State Police, in removing appellant Friedman from her position as a Communications Systems Technician 2 is **AFFIRMED**, and that the appeal is hereby **DISMISSED**.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION** pursuant to N.J.A.C. 1:1-18.6., by which law it is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 19, 2018
DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency: March 19, 2018

Date Mailed to Parties: March 19, 2018

JNR/cb

APPENDIX

WITNESSES

For appellant:

Eric Trout, Springfield Township Chief of Police

Marcella Friedman, appellant

For respondent:

Nazzareno Nepi, New Jersey State Police

Thomas Whittle, vendor

Christopher Green, manager, White Dotte Communications

Anthony Grachus, vendor

David Brady, New Jersey State Police

Gary Sandes, investigator

EXHIBITS

For appellant:

P-1 Bill of Sale, World Wide Power

P-2 Black leather fanny pack

P-3 Letter-brief, dated February 1, 2018

For respondent:

R-1 Respondent binder, Exhibit B (Photograph, dated October 30, 2012)

R-2 Blue jacket with State Police and OEM markings

R-3 Respondent binder, Exhibit C (Receipt, dated November 1, 2012)

R-4 Respondent binder, Exhibit D (Nepi invoice, dated October 31, 2012)

R-5 Respondent binder, Exhibit E (Nepi report)

R-6 Respondent binder, Exhibit F (Performance Evaluation)

R-7 Respondent binder, Exhibit G (Radio Standard Operating Procedures)

R-8 Respondent binder, Exhibit H (Standard Operating Procedures)

R-9 Respondent binder, Exhibit I (Investigation Report, dated January 7, 2013)

R-10 Respondent binder, Exhibit J (Investigation Report, dated January 28, 2013)

R-11 Respondent binder, Exhibit A (Final Notice of Disciplinary Action)

R-12 Letter-brief, dated February 2, 2018