

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

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

**ROBERT J. LEARY,**  
*Appellant*

v.

**TOWN OF WEYMOUTH,**  
*Respondent*

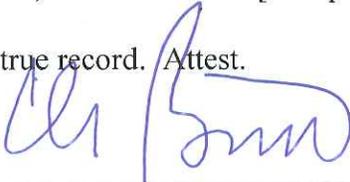
**Case No.:** D-11-272

**DECISION**

The Civil Service Commission voted at an executive session on June 14, 2012 to acknowledge receipt of the report of the Administrative Law Magistrate dated April 12, 2012. No written objections were received by either party. After careful review and consideration, the Commission voted to adopt the findings of fact and the recommended decision of the Magistrate therein. A copy of the Magistrate's report is enclosed herewith. The Appellant's appeal is hereby *dismissed*.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners [Marquis – Absent]) on June 14, 2012.

A true record. Attest.

  
\_\_\_\_\_  
Christopher C. Bowman  
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice to:

John M. Collins, Esq. (for Appellant)

George E. Lane, Jr., Esq. (for Respondent)

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



THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

98 NORTH WASHINGTON STREET, 4<sup>TH</sup> FLOOR

BOSTON, MA 02114

RICHARD C. HEIDLAGE  
CHIEF ADMINISTRATIVE MAGISTRATE

TEL: 617-727-7060  
FAX: 617-727-7248  
WEBSITE: www.mass.gov/dala

April 12, 2012

Christopher C. Bowman, Chairman  
Civil Service Commission  
One Ashburton Place, Room 503  
Boston, MA 02108

**Re: Robert Leary v. Town of Weymouth**  
**DALA Docket No. CS-12-5**  
**CSC Docket No. D-11-272**

RECEIVED  
2012 APR 12 P 3:54  
COMMONWEALTH OF MASS  
CIVIL SERVICE COMMISSION

Dear Chairman Bowman:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c)(1), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

Sincerely,

  
Richard C. Heidlage  
Chief Administrative Magistrate

RCH/mbf

Enclosure

cc: John M. Collins, Esq.  
George E. Lane, Jr., Esq.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

**Robert J. Leary,**  
Petitioner

v.

**Town of Weymouth-Mayor,**  
Respondent

Docket Nos. CS-12-5 (D-11-272, CSC)

Dated: **APR 12 2012**

**Appearance for Petitioner:**

**John M. Collins, Esq.**  
Collins & Weinberg  
47 Memorial Drive  
Shrewsbury, MA 01545-4028

**Appearance for Respondent:**

**George E. Lane, Jr., Esq.**  
P.O. Box 29  
87 Broad Street  
Weymouth, MA 02188

**Administrative Magistrate:**

**Sarah H. Luick, Esq.**

RECEIVED  
2012 APR 12 P 3:54  
COMMONWEALTH OF MASS  
CIVIL SERVICE COMMISSION

**Summary of Recommended Decision**

The Mayor had just cause for imposing a two day suspension without pay for the Fire Chief's poor exercise of managerial discretion, something for which he had been previously disciplined. The Fire Chief acted unilaterally to provide witness reports and a draft settlement agreement to the employee union concerning a violence in the workplace Town policy violation involving a Fire Fighter and the Chief's secretary. The Chief provided these documents without first discussing doing so with the Human Resources Director and the Mayor even though the Town policy required the Human Resources Director and the Mayor to be involved in the investigation and outcome of the complaint.

**RECOMMENDED DECISION**

Pursuant to G.L. c. 31, § 43, the Petitioner, Robert J. Leary, appealed the August 19,

2011 decision of the Respondent, the Mayor of the Town of Weymouth, suspending him for two days without pay for exercising poor managerial discretion in connection with a disciplinary matter involving a Fire Fighter's misconduct and in light of prior instances of such poor management decisions. (Ex. 1 & 6.)<sup>1</sup> The appeal to the Civil Service Commission for a hearing was timely filed. (Ex. 32.) A hearing was held for the Civil Service Commission on January 6 and February 8, 2012, at the offices of the Division of Administrative Law Appeals, 98 North Washington Street, 4th Floor, Boston, MA 02114. The hearing was declared public as the Petitioner filed a written request at the hearing for a public hearing. (Ex. D.)

Various documents are in evidence. (Exs. 1 – 34.) A copy of G.L. c. 48, § 42 was marked. (Chalk 1.) Four (4) tapes were used. The Appointing Authority presented the testimony of Susan Kay, the Mayor of Weymouth, and Cindy DePina, the Weymouth Human Resources Director. The Petitioner testified on his own behalf. The parties filed pre-hearing memoranda, and entered into stipulations of fact. (Exs. A, B & C.) Both parties made closing arguments on the record.

### FINDINGS OF FACT

Based on the stipulations of the parties, the testimony and documentary evidence presented, and the reasonable inferences drawn therefrom, I make the following findings of fact:

1. Robert J. Leary served in the Air National Guard and has a college degree. He became a Lexington Fire Fighter in 1982. He began service as a Weymouth Fire Fighter in May 1983. He became a Lieutenant in 1987, a Captain in 1993, a Deputy Chief in 2000, and was appointed Chief by an earlier Mayor in 2002.<sup>2</sup> He is tenured in his Civil Service Chief's

---

<sup>1</sup> The Petitioner withdrew his G.L. c. 31, § 42 claim at the hearing. (Ex. 1.)

<sup>2</sup> The current Mayor began her service in 2008. (Testimony.)

position. Chief Leary has taken numerous specialized training courses to help him do his work as Chief, including management courses. His authority as Fire Chief is through G.L. c. 48, § 42. He has the authority to hire, fire, and discipline the Fire Department staff, and is responsible for the direct operation and administration of the Fire Department, including covering all staffing needs and managing all Fire Department staff in carrying out their daily duties. The Weymouth Fire Department is an all Civil Service Fire Fighter Department. (Ex. C. Chalk 1. Testimony.)

2. In 2002, Chief Leary had about 105 members of the Fire Department. That was reduced to 89 members and is now at 92 members. There are 17 Lieutenants, 5 Captains, and 4 Deputy Chiefs. Currently, 3 of 4 Fire Houses have active apparatus. Headquarters only houses administrative staff. From 2009, [REDACTED] has been the Chief's one confidential civilian employee as his Secretary. (Testimony.)

3. The Code of Ordinances of the Town of Weymouth at Chapter 4, Section 4-210, *Fire Department, (a) Scope of Authority*, makes the Fire Department "responsible for providing fire protection services ... including safety program, fire suppression and extinguishing fires." The specific areas of work are set forth with brief descriptions at *(b) Scope of Department Activities*. (Ex. 7.)

4. The Town of Weymouth Charter at Article I, Section 5-6(1), Department of Human Resources, makes this department "responsible for all personnel and employee related functions and activities of the town government and its administration. The Department addresses "all of the duties and responsibilities related to human resources activities." Section 5-6(2), provides that the Director of Human Resources is appointed by and "responsible to the mayor." The Director is someone "especially fitted by education, experience and training to perform the duties of the office," and is "responsible for the supervision and coordination of all

activities” within this Department to ensure compliance “with state statutes, town ordinances, and rules and regulations.” (Ex. 34.)

5. The Town of Weymouth Charter at Section 3-2, Executive Powers, Enforcement of Ordinances, explains that the “executive powers of the town shall be vested solely in the mayor and be exercised by the mayor either personally or through the several town agencies under the general supervision and control of the office of the mayor.” In terms of individual Departments, this section explains that the “mayor shall exercise a general supervision and direction over all town agencies, unless otherwise provided by law, by charter or by ordinance.” These departments “shall furnish to the mayor, forthwith upon request, any information, materials or otherwise as the mayor may request and as needs of the office of mayor and the interest of the town may require.” The Mayor is “responsible for the efficient and effective coordination of the activities of all agencies of the town ... and shall have authority consistent with law, to call together for consultation, conference and discussion ... all persons serving the town.” (Ex. 33.)

6. The Mayor is the Appointing Authority for both the Fire Chief and Director of Human Resources, who under the current Mayor’s direction, meet routinely with her at regularly scheduled meetings along with other Department Heads. The Mayor has established herself and the Department Heads as a team with one voice when presenting town positions on various issues, including those specific to the Department Heads’ agencies. Especially when dealing with the press and to avoid pitting agencies against each other, the Mayor requires clearing releases of information through her office before being made public to ensure consistency and predictability in Town government. The Mayor has increasingly required the Fire Chief to report routinely to her on his decision-making that reaches legal, press, and employee management

matters. The Mayor has encouraged, and the Town has paid for, the Fire Chief to have various management skill trainings, as well as trainings in various Town management and employee conduct policies along with acknowledgements that he understands and can implement the policies. (Exs. 8a, 8b, 9, 10, 11, 12 & 13. Testimony.)

7. Chief Leary has had training about both the Town of Weymouth's Sexual Harassment Policy and its Violence in the Workplace Prevention Policy. He has received copies of both policies and has acknowledged to the Mayor that he has reviewed them and implemented them in the Fire Department. (Exs. 8, 8a, 8b, 10, 12 & 13. Testimony.)

8. The Town of Weymouth's Sexual Harassment Policy states that the Town does not tolerate any sexual harassment in the workplace and "takes allegations of sexual harassment seriously," including acting "promptly to eliminate the conduct and [to] impose such corrective action as necessary, including disciplinary action ... up to and including termination." The Policy defines sexual harassment to encompass "sexual advances [and] request for sexual favors." The Policy recognizes that sexual harassment can be verbal and can reach "advances, requests or conduct ... [that] have the effect of unreasonably interfering with an individual's work by creating an intimidating, hostile, humiliating or sexually offensive work environment." The Policy prohibits retaliation against the person complaining of sexual harassment or against someone cooperating in an investigation of a sexual harassment complaint. The Human Resources Director investigates these complaints "promptly," fairly and expeditiously. The Policy allows the Mayor to approve and implement "preventive changes." (Ex. 8.)

9. The Town of Weymouth's Violence in the Workplace Prevention Policy calls for "zero tolerance ... toward workplace violence, or the threat of violence," along with freedom "from intimidation, threats, or violent acts." The Policy contains a definitions section that

includes as prohibited conduct, “harassment, intimidation, threats, physical attacks, or property damage.” The Policy prohibits conduct that irritates or torments “persistently, with or without the intent to annoy.” Also prohibited is “stalking,” and verbal or physical acts that “are intended to frighten or coerce.” Threat is defined as,

the expression of an intent to cause physical or mental harm regardless of whether the person communicating the threat has the present ability to carry out the threat and regardless of whether the threat is contingent, conditional or future. Body language can be considered a threat.

(Ex. 8.) The Policy establishes “a reporting hierarchy ... to report incidents of violence without fear of reprisal.” As with the Sexual Harassment Policy, the Human Resources Director investigates these complaints “to determine the appropriate action to be taken.” The Policy makes available to the employee who reports being victimized and traumatized by workplace prohibited conduct, “on-going counsel.” Any retaliation against an employee acting “in good faith by reporting real or implied violent behavior” is not tolerated. Protective measures for the complainant and those employees providing information on the complaint is included under the Policy. The Policy contemplates that discipline, up to and including termination, and even criminal sanctions, is possible for the perpetrator. Use of the Employee Assistance Program resources can be part of addressing the wrongful conduct. (Ex. 8.)

10. By letter of May 8, 2008, Mayor Kay issued a written reprimand to Chief Leary over his conduct in January and May 2008. He was criticized for talking to the public and the press in a manner that was inconsistent with the Mayor’s views on a topic. She noted that a “premature release of a statement, such as a public airing of a matter which has been or is being resolved within the legal, budgetary and operational requirements ... which expresses an individual opinion and potentially compromises the issuer’s performance of his duties, is an example of an unauthorized communication.” She used as an example some newspaper articles

on January 7 and 8, 2008 where the Chief was held responsible for quotes about the Department's staffing needs as "inadequate." A May 2008 newspaper article described the Chief's views on two of his employees who were indicted. He reported that he hoped they would be cleared of the charges and resume their careers as they are both well-regarded Fire Fighters. The Mayor found this compromised his ability to conduct an Appointing Authority discipline hearing about the matter. The Mayor explained how these are examples of the Chief's "poor judgment." She instructed him to "be fair and proper in operational and personnel matters and to choose appropriate venues to air your personal views." She instructed the Chief that as part of her "leadership team," he "must be able to effectively collect and assess facts and options so that we may accurately speak with a single voice after a decision to communicate has been made." The Mayor concluded the letter warning the Chief that more of such conduct "may result in further disciplinary action up to and including termination." Chief Leary was not able to contest any of the criticisms in the letter through the Civil Service Commission, and maintains that the written reprimand is an inaccurate assessment of his conduct. (Ex. 14. Testimony.)

11. Under the term of the prior Mayor, Chief Leary received a ten day suspension without pay on June 26, 2007. He was charged with threatening a Weymouth Fire Fighter with bodily harm, assaulting him and verbally berating him. After a hearing, these charges were upheld except that he was found not to have assaulted the Fire Fighter. The Chief was found to have violated the Department Rules and Regulations as well as the Violence in the Workplace Prevention Policy. In addition to the suspension, Chief Leary agreed to attend an anger management/stress program through the Town of Weymouth Employees' Assistance Program. (Exs. 15 & 16.)

12. Chief Leary's responsibilities include determinations of whether or not his Fire

Fighters merit G.L. c. 41, § 111F benefits in connection with in-line of duties injuries.

Weymouth Fire Fighter James Brady filed a Notice of Injury Report claiming that on May 11, 2011, he suffered abdominal swelling, pain, and a lump upon stepping off an Engine Truck. He was diagnosed as a right inguinal hernia needing surgery. He was scheduled for surgery. On June 2, 2011, Fire Fighter Brady completed a Weymouth Fire Department form called Injury Log about his health status following the May 11, 2011 injury for which he had begun receiving Section 111F benefits. He wrote that he last saw a physician three weeks prior, was having surgery on June 3, 2011, and would likely need 4 weeks of recovery time. (Exs. 17, 18 & 19. Testimony.)

13. Chief Leary had not seen Fire Fighter Brady after the June 2, 2011 visit with about 4 weeks having passed when he inquired about Fire Fighter Brady's condition in speaking with the Union President Kevin Connolly. He learned that Fire Fighter Brady never had the surgery [REDACTED] Chief Leary had no knowledge about this development, and no knowledge about any [REDACTED] Chief Leary determined that Fire Fighter Brady understood he had a duty to report on this status change. As a result of not viewing the [REDACTED] as an injury sustained in the line of duty during the May 11, 2011 incident, Chief Leary decided that Fire Fighter Brady should be switched from G.L. c. 41, § 111F benefits to sick leave for his time out from work back to the time he did not have the planned surgery. Chief Leary had Fire Fighter Brady see him in the office. When they met on or about Thursday, July 7, 2011, Chief Leary explained the change in status and felt Fire Fighter Brady understood what was happening. (Testimony.)

14. The morning time periods on Thursdays had been set aside by Chief Leary for those Fire Fighters on G.L. c. 41, § 111F benefits to visit his office to report on the status of their

medical conditions and to file their Injury Log forms. Chief Leary expected to see Fire Fighter Brady during the morning hours on Thursday, July 14, 2011. On or about Tuesday, July 12, 2011, Chief Leary emailed a letter to Mayor Kay for her approval that he wanted to give to Fire Fighter Brady about removing him from his Section 111F status and onto use of sick leave. The Mayor was aware that Chief Leary would see the Fire Fighters receiving Section 111F benefits each Thursday. She expected Chief Leary to wait for her approval before he sent letters such as the one he composed for Fire Fighter Brady. She did not provide her approval of the letter until an 11:45 AM email to Chief Leary on Thursday, July 14, 2011. She had not contacted him about the letter before then. Fire Fighter Brady did not come into the office that Thursday. (Ex. 21. Testimony.)

15. Chief Leary started a Florida vacation the afternoon of July 14, 2011. He decided to have his secretary [REDACTED] mail the letter he had for Fire Fighter Brady by registered mail. Although he knew Fire Fighter Brady would not like having his G.L. c. 41, § 111F benefits ended, he assumed he would be expecting to receive this letter in light of the talk he had with him about one week prior. He knew Fire Fighter Brady from 1995 when he started as a Weymouth Fire Fighter. He never found him to be an angry person using explosive language, or being unable to control his anger. Nevertheless, he and [REDACTED] had a discussion about what she might expect in terms of Fire Fighter Brady reacting to the letter. [REDACTED] had an ongoing issue in coping with Fire Fighters who would come to Chief Leary's office to talk to him and learn he was not present. [REDACTED] found it emotionally hard to anticipate receiving and then to hear the Fire Fighters' expressions of anger about an action the Chief was taking. Chief Leary was aware of this kind of situation occurring, so he made sure that he shielded his secretary from having any responsibility for addressing the merits of such disputes. Regarding

this letter for Fire Fighter Brady, [REDACTED] told Chief Leary that she feared he was leaving her with another potential "bomb" that would go off in front of her because he would be on vacation. (Ex. 22. Testimony.)

16. Chief Leary left for vacation. Fire Fighter Brady received the letter and came to the Chief's office on July 15, 2011 to talk to him about it. He was angry about losing so much time out from work that had been covered by G.L. c. 41, § 111F benefits. He felt the Chief's action was very unfair because he wanted the surgery but just could not have it when it was first scheduled. He was upset when he arrived at the Chief's office. He asked [REDACTED] to let him see the Chief. She explained that he was on vacation until July 26, 2011. Fire Fighter Brady reacted with angry words in a loud tone that [REDACTED] felt were addressed to her just because she could not help him. [REDACTED] understood Fire Fighter Brady felt Chief Leary was targeting him, that he was intentionally never in his office, and that he had done a cowardly act in sending him a letter instead of talking to him in person. Fire Fighter Brady asked [REDACTED] if she knew about the letter but she did not respond. Fire Fighter Brady continued his rant against Chief Leary, including saying things like the Chief was taking food from his children, he was fed-up, and he would get an attorney to address this. [REDACTED] saw him holding the letter in his hand and gesturing with it as she saw him become "shaky and sweaty" when yelling at her. Fire Fighter Brady asked her if Chief Leary was aware of his [REDACTED] that he had tried to tell him about it at their last meeting without the Chief listening to him. He kept ranting how the Chief was a coward and intentionally targeting him. [REDACTED] became very upset, but tried to stay composed. (Exs. 22 & 23. Testimony.)

17. Fire Fighter Brady was so loud and persistent in voicing his outrage about Chief Leary, that his rants were heard by Deputy Chief Tose who came to the Chief's office. He talked

to Fire Fighter Brady and began to hear the same rants. Deputy Chief Tose instructed Fire Fighter Brady to stop his conduct, but Fire Fighter Brady dismissed Deputy Chief Tose's admonition. Fire Fighter Brady eventually left the office. A short time later, he returned to the office while Deputy Chief Tose was still there trying to calm [REDACTED]. Fire Fighter Brady apologized to [REDACTED] for raising his voice in front of her. He then left. (Exs. 22 & 23. Testimony.)

18. Deputy Chief Tose told [REDACTED] that he would let Acting Chief Davis know about this incident with Fire Fighter Brady. Deputy Chief Tose located Acting Chief Davis and Acting Chief Davis asked for reports from [REDACTED] Deputy Chief Tose, some others in the building who heard the commotion, and from Fire Fighter Brady. Once he had the reports, he summarized his course of action concerning the incident, and sent the reports with his summary to the Director of Human Resources. He also ordered Fire Fighter Brady to have no contact with [REDACTED]. [REDACTED] did not go to work on the Monday following the Friday incident with Fire Fighter Brady because she was still very upset over the incident. She was having trouble sleeping, and seemed to be always thinking about the incident. (Exs. 23. Testimony.)

19. Once Fire Fighter Brady left the Chief's office on July 15, 2011, [REDACTED] had difficulty continuing to do her work because she was so upset. She felt "angry and shaken." She began to cry. She was able to call the Director of Human Resources, Cindy DePina. She was able to discuss the incident somewhat with her. [REDACTED] explained that she had experienced "a verbal attack" and did not defend herself, because she "was at the Fire Department and ... learned from experience, ... [not] to defend the actions of this office, it makes matters worse." (Exs. 22 & 23.)

20. [REDACTED] wrote an email to Chief Leary after Fire Fighter Brady left on July

15, 2011. She told him that as she had “predicted the bomb just exploded,” when Fire Fighter Brady came to discuss the letter with the Chief and became “irritated to say the least that you were unavailable until 7/26/11.” [REDACTED] described how Fire Fighter Brady had ranted in front of her about how he felt the Chief was mistreating him. She described his conduct as “loud and threatening to me.” She explained that Deputy Chief Tose heard the commotion and came to the office. [REDACTED] noted that Fire Fighter Brady returned to the office to “apologize,” but that she remained upset. She felt Fire Fighter Brady should not have taken his anger out on her because she had nothing to do with this matter. She felt “he was too heated to hear me” explain that. She emphasized how this was “no joking matter ... very disturbing to me,” even though she and the Chief had joked the day before how a bomb might drop because he was going on vacation. [REDACTED] repeated her same sentiments in the report she wrote for Acting Chief Davis. (Exs. 22 & 23.)

21. Once Human Resources Director DePina reviewed the reports from Acting Chief Davis, she opened the matter up as a formal complaint of under the Sexual Harassment Policy and/or under the Violence in the Workplace Prevention Policy. Union President Kevin Connolly asked her about the matter on behalf of Fire Fighter Brady. She did not reveal to him any specific information about the incident, but explained the investigation process that would be followed. Union President Connolly explained that the Chief had acted improperly in ending Fire Fighter Brady’s G.L. c. 41, §111F benefits and had not followed collective bargaining agreement provisions. Director DePina reported this matter to Mayor Kay. She conducted interviews, including with [REDACTED] and Fire Fighter Brady. Director DePina did not turn over to Union President Connolly any of the underlying reports that Acting Chief Davis had asked for. She needed to talk to Chief Leary who was still on vacation, and to do follow-up with

██████████ as part of her investigation. Once Chief Leary was back at work, Director DePina met with him and reviewed what she knew from her investigation. She did not provide the same level of detail about the matter to the Mayor. (Testimony.)

22. Chief O'Leary decided that Fire Fighter Brady needed an immediate suspension for his conduct. He wanted to give him a four day suspension without pay represented by four unpaid shifts on July 30 and August 1, 2011. He met with Mayor Kay about his proposed discipline. Mayor Kay felt as much as a 30 day suspension would be appropriate, but Chief Leary argued the worth of imposing an immediate suspension which would need to entail a shorter suspension due to the Civil Service Laws. Mayor Kay agreed to the Chief's plan. He then imposed the suspension without pay on Fire Fighter Brady by letter of July 27, 2011, the day after he had returned from Florida. (Ex. 24. Testimony.)

23. The suspension was sent by registered mail to Fire Fighter Brady. Union President Connolly and Human Resources Director DePina were copied on the letter. Chief Leary cited Fire Fighter Brady's conduct on July 15, 2011 in his office with his secretary as the basis for the suspension for causing "a hostile and threatening environment." His actions were found to involve "an inappropriate response to a notice that you had received regarding a change in your employment status from 'injury leave' to 'sick leave'." His conduct was described as raising his voice while he was directly in front of ██████████ with his arms waiving as he stated his "disgust with the letter." Chief Leary also noted how he had referred to the Chief as a "coward" for not being in the office. Chief Leary noted that Fire Fighter Brady had been "approached" by Deputy Chief Tose who tried to "mitigate this hostile and harassing situation, by redirecting your anger away from ██████████" but Fire Fighter Brady had "dismissed him, a superior officer, by stating that ... [he] 'wanted nothing to do with him'." Chief Leary added

that the matter had nothing to do with [REDACTED] a civilian, so that she should never have been a “target ... of your anger.” To support the suspension Chief Leary found Fire Fighter Brady’s actions had violated the Fire Department Rules and Regulations at Paragraph 5.12(f) and (l), for being disrespectful or insolent conduct toward another Department member, and for being conduct unbecoming a Fire Fighter whether on or off duty that lowers the public’s image or respect for the Fire Department. Chief Leary also found the conduct to have violated the Weymouth Violence in the Workplace Prevention Policy found in the collective bargaining agreement that calls for “a workplace ... free of violence ... intimidation, threats, or violent acts.” Chief Leary noted that Fire Fighter Brady had received training in March 2010 about this Policy and about prohibitions on all harassing conduct in the workplace. (Ex. 24.)

24. Fire Fighter Brady served the suspension, but filed for an Appointing Authority hearing to challenge the discipline. (Testimony.)

25. At some point following the July 15, 2011 incident and before Chief Leary had returned to work, Mayor Kay gave [REDACTED] administrative leave time and took her to dinner at a local restaurant. She offered [REDACTED] a transfer to another Department if she wanted it. Mayor Kay found [REDACTED] to be genuinely upset about the incident. Chief Leary also spoke to [REDACTED] and offered his understanding and sympathy for what she had experienced. [REDACTED] decided to stay in her job. (Testimony.)

26. Prior to a hearing for Fire Fighter Brady on the merits of his suspension, Union President Connolly approached Human Resources Director DePina and not Chief Leary, about an alternative outcome of the matter for Fire Fighter Brady. Soon after she heard the settlement proposal, she met with Chief Leary and explained the proposal to him. She also asked him to write up the proposal as a potential settlement. He did this. The Mayor at this point had no

knowledge of the terms of the proposed settlement. Chief Leary was concerned the Union had bypassed him and gone directly to Director DePina with the proposed settlement. This kind of conduct had been done by the Union for some time. (Testimony.)

27. Chief Leary wrote up the proposal as a letter dated August 3, 2011 on the letterhead of the Fire Department and addressed it to Union President Connolly. The letter stated that “the following stipulations have been agreed to by the Town of Weymouth and nullify the need for a disciplinary hearing.” These stipulations were:

- In FF Brady’s file, his suspension would be replaced with a written reprimand;
- His 24-hour shifts on July 30 & August 1, 2011 would be changed with vacation;
- FF Brady shall attend formal counseling for anger management;
- The Town and the Weymouth Fire Department will assist FF Brady in any way that will help him to deal with stress-related issues, such as access to the Employee Assistance Program.

(Ex. 25.) The letter further stated that if the Union and Fire Fighter Brady agree to these stipulations, then both Union President Connolly and Fire Fighter Brady had to sign the letter. The letter also had space for Human Resources Director DePina and Chief Leary to sign the letter. The letter was not labeled as a draft document in any way. (Ex. 25. Testimony.)

28. Union President Connolly was anxious to receive the letter Chief Leary had written-up containing the proposed settlement. Human Resources Director DePina emailed Chief Leary on August 3, 2001 at 9:37 AM and asked him if he could write up the proposed settlement “asap” for the union. She wrote: “They would like that piece prior to ‘the deal’.” At 10:31 AM Chief Leary informed Director DePina that he had just seen Union President Connolly and had given him “copies of ‘the deal’ plus the letters that were written by all parties. He should be good to go.” Director DePina responded: “I don’t know that I would have given him the letters written by everyone. Oh well, too late.” (Ex. 26. Testimony.)

29. After this event, Chief Leary talked to [REDACTED] about the proposed

settlement. She was upset and angry, and felt she was being shortchanged and betrayed. She began to cry. Chief Leary felt badly. He called Mayor Kay and explained the course of events. She had not known about the proposed settlement and had wanted Fire Fighter Brady to have a suspension without pay. Even though the deal involved using up 4 days of vacation time, Mayor Kay refused to agree to the settlement. The following day was to be Fire Fighter Brady's Appointing Authority hearing to challenge the suspension. Chief Leary and Weymouth Town Counsel appeared but no one appeared for the other side. When they contacted Human Resources Director DePina, they were told to come to her office. The other side was there. The Mayor was not. The Union felt there was a deal that they received in writing from Chief Leary on August 3, 2011. Chief Leary explained that the Mayor would not agree to the terms of it. The Appointing Authority hearing for Fire Fighter Brady did not occur. A settlement was eventually reached. Fire Fighter Brady, Union President Connolly, Union Counsel, Town Counsel, Chief Leary and Human Resources Director DePina all signed the agreement dated August 4, 2011. The key difference was that there were 4 unpaid shifts and the suspension was replaced with a written reprimand. The rest of the agreement was unchanged from the August 3, 2011 proposed settlement. The Mayor agreed to this settlement. (Ex. 30. Testimony.)

30. On August 4, 2011, after the matter was settled, Chief Leary wrote up General Order #11-988, Injury Leave Reporting. Its terms called for, "any [Fire Department] member who has been assigned to Injury Leave under MGL, C 41, s. 111F shall now report in person to the Chief ... each Thursday between 1000 and 1200 hours in order to keep the Chief apprised of his or her injury status." The Order no longer allowed telephone reporting "unless a written request to do so has been submitted and approved by the Chief." The Order further called for an "Injury Log form ... [to] be filed and time stamped upon each visit." Chief Leary emailed this

proposed Order to Mayor Kay for her approval. In the email he noted that the Order “nails down a specific time period in which injured members have to report in ... help to stop the excuses as to why people didn’t see me.” Mayor Kay emailed back her approval of the Order soon thereafter on August 4, 2011. Chief Leary issued the Order on August 5, 2011. (Exs. 27 & 28. Testimony.)

31. On August 12, 2011, Mayor Kay wrote to Chief Leary, a “written directive,” to be in her office each Thursday from 10:00 AM to Noon “for 111F check in.” He was instructed to “meet all 111F injured fire fighters, in order to observe, take report and any other actions required.” The written directive also called for the Chief to have “all time away from the office ... first ... approved in writing ... by me personally ... not limited to meetings, appointments, conferences, etc.” Chief Leary signed-off on this written directive on August 12, 2011. (Ex. 29. Testimony.)

32. On August 19, 2011, Mayor Kay amended the August 12<sup>th</sup> written directive and added the following: “General orders can be sent out without my prior approval,” and [y]our daily calendar can be emailed to me by 3PM the day prior.” Mayor Kay explained that she is trying to enable the Chief “to spend more time managing the Weymouth Fire Department’s day to day operations.” (Ex. 31.)

33. By another letter of August 19, 2011, Mayor Kay imposed a two day suspension on Chief Leary. The stated bases for her action were what she considered bad management decisions with respect to the matter involving Fire Fighter Brady and the issues with [REDACTED] as well as relying upon prior discipline he had received. Specifically, she found fault with Chief Leary turning over to Union President Connolly the proposed settlement document and at the same time the reports generated in connection with Fire Fighter Brady’s conduct with

██████████ Mayor Kay explained that handing over information that contained ██████████ “workplace harassment complaint to anyone other than Human Resources,” without the “written consent from Human Resources,” had the effect of putting ██████████ in an even more difficult and uncomfortable position with the potential of facing “further workplace harassment, hostility, and retaliation.” Mayor Kay explained that handing over the settlement agreement meant the Union had an unauthorized and not finalized agreement which was handed over without “express written consent from my office.” She emphasized that this document could have been used by the Union “in an attempt to file an unfair labor practice ... [placing] the Town of Weymouth in a difficult and potentially costly legal situation.” Both actions were viewed by Mayor Kay as showing that Chief Leary lacked “the discretion necessary in the role as Fire Chief.” Mayor Kay went on to add that this action was “a FINAL written warning and any further infractions may lead to further disciplinary actions up to and including termination.” She noted that Chief Leary had “been written up previously for similar issues, which tie into your lack of ability to act as the Chief of the Department should.” In addition to imposing the two day suspension, Mayor Kay ordered Chief Leary to have training courses approved by the Human Resources Director involving but not limited to a supervisor’s role in addressing a harassment complaint. Mayor Kay explained that “we have made numerous attempts to assist you in correcting this insufficiency, which included college level management courses paid for by the Town of Weymouth, one on one meetings with the Director of Human Resources and web based management training.” Mayor Kay concluded the suspension letter by noting that Chief Leary’s failures were severe and carried potential liability for the Town of Weymouth. (Ex. 1.)

34. Chief Leary received the suspension letter, received copies of the Civil Service Laws, and sought and received a hearing on the suspension. (Exs. 1, 2, 3 & 4.)

35. At his August 26, 2011 Appointing Authority hearing, Chief Leary entered into the record a defense to the misconduct claimed against him. He did not offer testimony on the facts. His defense was not claiming a wrongly understood course of events. In presenting his defense, he explained that he had "sought the advice of Atty. Jack Collins, Labor Relations Counsel for the Fire Chiefs Association of Massachusetts." He asserted he has an "obligation to provide the union with whatever information they request that involves one of their members," in the context of Fire Fighter Brady having sought a hearing to contest his suspension without pay. (See, Ex. 5. Testimony.)

36. Mayor Kay issued a decision letter following Chief Leary's hearing, dated September 1, 2011. She addressed the legal arguments Chief Leary made regarding an obligation to turn over investigation materials to the Union so that Fire Fighter Brady was able to prepare a defense to present at his hearing challenging his suspension. She explained:

While the basic premise of this documentation may be somewhat relevant, you clearly did, or should have known, that the human resources express consent is required before you submit such documentation. Since neglecting to secure such permission and/or written consent prior to submission of the complaint to the Union President, the unauthorized and incomplete agreement indicates to me a lack of personnel management discretion. As a result, certain assumptions were made by the Union of a complete and authorized agreement. Further documentation submitted by you does not sustain your argument that the documents cited above were submitted to the Union without the necessary authority.

(Ex. 6.) Mayor Kay affirmed the two day suspension. (Ex. 6. Testimony.)

37. At the time he turned over the documents to Union President Connolly on August 3, 2001, Chief Leary did not feel that the Fire Fighter Brady- [REDACTED] matter was in any open investigation of either a Sexual Harassment or a Violence in the Workplace Prevention Policy complaint. He felt the Human Resources Director had completed her work on the matter or else she would not have sought the proposed

settlement be put in writing and provided to the Union President. Chief Leary felt he could turn over the reports about the incident to the Union so Fire Fighter Brady could decide whether or not to fight the suspension or agree to a settlement. (Testimony.)

38. Chief Leary filed a timely appeal to the Civil Service Commission received September 9, 2011. (Ex. 32.)

### Conclusion and Recommendation

The Appointing Authority must satisfy a preponderance of the evidence standard to show just cause for suspending a civil service employee. *Gloucester v. Civil Service Commission*, 408 Mass. 292 (1990). Just cause is found when an employee has engaged in “substantial misconduct which adversely affects the public interest by impairing the efficiency of public service.” *Murray v. 2<sup>nd</sup> District Court of Eastern Middlesex*, 389 Mass. 508, 514 (1983); *School Committee of Brockton v. Civil Service Commission*, 43 Mass. App. Ct. 486, 488 (1997). On appeal, the Civil Service Commission determines whether or not the Appointing Authority had a reasonable justification for the action it took. *Watertown v. Aria*, 16 Mass. App. Ct. 331, 334 (1983). This means the Appointing Authority’s action had to be “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.” *Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300, 304 (1997), quoting *Wakefield v. 1<sup>st</sup> District Court of Eastern Middlesex*, 262 Mass. 477, 482 (1928); *Civil Service Commission v. Municipal Court of Boston*, 359 Mass. 211, 214 (1971). In making this determination, the Civil Service Commission cannot simply substitute its decision for that of the Appointing Authority. *Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. at 304; *School Committee of Salem v. Civil Service Commission*, 348 Mass. 696, 699 (1965).

I conclude Mayor Kay had just cause to impose discipline on Chief Leary based on his handling of the matter involving [REDACTED] and Fire Fighter Brady. There is sufficient proof to support a two day suspension without pay in light of his prior discipline that involved poor exercises of judgment and management decisions. The standard the Mayor used to determine how Chief Leary addressed the incident is grounded in her Chief Executive Officer powers and responsibilities. She assessed his conduct properly in light of the Town Charter powers she has over her Department Heads, particularly on matters that have the potential to and/or do cause the Town of Weymouth to be viewed unnecessarily in a bad light to the public, or to Town employees, or to the Unions. *Gloucester*, 408 Mass. at 297.

Chief Leary's defense reaches a situation that the Mayor's issues with his conduct did not reach. She examined the totality of circumstances that resulted in the Union receiving when it did, the underlying reports containing details about what [REDACTED] asserted Fire Fighter Brady did to her as well as how that made her feel, and the Union receiving when it did, an unapproved by the Mayor settlement document to overturn the suspension Chief Leary had already imposed. Chief Leary was not disciplined because he had no right at any time to turn over these documents to Fire Fighter Brady and his Union Representative to help them prepare for a hearing, or to receive them to determine if Fire Fighter Brady should decide to contest the suspension at an Appointing Authority hearing. Rather, she was disciplining Chief Leary, because this particular situation involved a Human Resources Department investigation and a set of circumstances that would also involve the Mayor in determining the final outcome of the matter. Chief Leary was aware that Human Resources was involved and had opened an investigation because the matter was potentially, a sexual harassment and/or violence in the workplace matter under the jurisdiction of the Human Resources Department. The policies

covering such complaints set forth clear terms showing these matters cannot be addressed solely by a Department Head. Moreover, Chief Leary knew how these policies are used to address such conduct. He acknowledged reading and understanding these policies. He had received training about these policies and had himself been found to have violated the Violence in the Workplace Prevention Policy in connection with prior discipline he had received. He had included a violation of the Violence in the Workplace Prevention Policy as a basis for imposing the suspension on Fire Fighter Brady.

Chief Leary was aware that the Mayor had wanted to discipline Fire Fighter Brady with as much as a 30 day suspension without pay. He knew she agreed to a lesser suspension without pay after hearing Chief Leary's reasoning about the benefits of imposing an immediate suspension without pay to get the message across soon to Fire Fighter Brady without waiting for a full hearing process. He knew the Mayor agreed to this action because at least the shorter suspension was going to be without pay. That August 3, 2011 unsigned settlement agreement lacked that feature of an unpaid suspension. No evidence shows Chief Leary was told by the Human Resources Director that Mayor Kay was now okay with the discipline not involving any unpaid time.

The undisputed facts reveal that Chief Leary did not first inform either the Human Resources Director or the Mayor that he was turning over the underlying reports produced about the incident. He might have persuaded both of them of the worth or need to do that, but he never provided them with that opportunity. He took control over this particular matter involving Fire Fighter Brady at a time when there was still a need to work with both Human Resources Director DePina and Mayor Kay on a final outcome. His assessment that the investigation was over by the time he turned over these documents to Union President Connolly is not credible because at

best, he would only have assumed the Human Resources Director was all right with a settlement that did not involve any unpaid time. He had no knowledge the Mayor would be all right with that outcome. It is Chief Leary's timing in turning over the documents when he had an obligation to first discuss his plan to do so with the Human Resources Director and the Mayor that is the fault in his conduct. He is being disciplined for not fulfilling his known obligations of involving both the Mayor and the Human Resources Director directly in his actions concerning how he was handling this matter.

Even though Chief Leary is the Department Head for the Fire Department with statutory, Town Charter and Ordinance powers over the operations of the Fire Department, Mayor Kay is his Department Head or Appointing Authority, and he is able to be disciplined for how he handles his work. The Town of Weymouth Charter at Section 3-2, Executive Powers, Enforcement of Ordinances, explains that the "executive powers of the town shall be vested solely in the mayor and be exercised by the mayor," who "shall exercise a general supervision and direction over" even the Department Heads. This Charter requires that all Department Heads "furnish to the mayor, forthwith upon request, any information, materials or otherwise as the mayor may request and as needs of the office of mayor and the interest of the town may require." The mayor is "responsible for the efficient and effective coordination of the activities of all agencies of the town ... and shall have authority consistent with law, to call together for consultation, conference and discussion ... all persons serving the town." (Ex. 33.) Because Fire Fighter Brady's conduct involved the Violence in the Workplace Prevention Policy, even if his misconduct also involved violations of the Fire Department Rules and Regulations, Chief Leary could not escape the need to work together on addressing this misconduct with both the Mayor and the Director of Human Resources. No evidence shows that there would likely have

been illegal actions he would have had to engage in if he had first given notice and discussed his plan to turn over the underlying reports to the Union President, or if he had ensured that the Mayor was aware of the proposed settlement agreement that contained no unpaid time as discipline. Mayor Kay's finding of fault in how Chief Leary handled this situation is within her authority as the Town's Chief Executive Officer and as Chief Leary's Appointing Authority.

To have sought the counsel of the Mayor and the Director of Human Resources before turning over the documents to the Union President under the circumstances he faced, would not have come as a surprise, or have been reasonably viewed by him as some new job requirement imposed upon him with no notice. He had already been regularly meeting with Mayor Kay over numerous matters. He had already faced prior discipline for not having first discussed with Mayor Kay public statements coming out of his Department that were contrary to what Mayor Kay felt as the Town's Chief Executive Officer were fair to make and which in her view were potentially harmful to make. She expected him to be a part of her team of top executives and Chief Leary knew this. He knew this meant he was to be sharing actions he was taking with the Director of Human Resources and the Mayor on his handling of a personnel matter that went beyond just violations of Fire Department Rules and Regulations and orders, by reaching Town Policy violations. He was aware that by their terms, these Town policies require a Department Head to work with the Director of Human Resources and the Mayor, particularly when any final outcome of the matter is involved. He had received pertinent management training to appreciate his need to engage as a team member with the Mayor.

I recommend that the Civil Service Commission find just cause for the Mayor to have disciplined Chief Leary with a two day suspension without pay, particularly in light of his record of prior discipline.

**DIVISION OF ADMINISTRATIVE  
LAW APPEALS**

*Sarah H. Luick*

**Sarah H. Luick, Esq.**  
Administrative Magistrate

DATED: **APR 12 2012**