

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

One Ashburton Place, Room 503
Boston, MA 02108
(617) 979-1900

CASLEY BAILEY,

Appellant

v.

D-21-100

D-21-138

BOSTON FIRE DEPARTMENT,

Respondent

Appearance for Appellant:

Steven R. Yormak, Esq.
550 Cochituate Road, Suite 25
Framingham, MA 01701

Appearance for Respondent:

Robert J. Boyle, Jr., Esq.
Boston City Hall, Rm. 624
One City Hall Plaza
Boston, MA 02201

Commissioner:

Paul M. Stein¹

Summary of Decision

The Commission upheld two, eight-tour suspensions of a Boston firefighter for multiple instances of insubordinate and unbecoming behavior toward his peers and superiors, but overturned, due to mitigating circumstances, a third eight-tour suspension for two alleged instances of being AWOL.

¹ The Commission acknowledges the assistance of Law Clerk Sara Kniaz in drafting this decision.

DECISION

The Appellant, Casley Bailey (Appellant), filed these appeals with the Civil Service Commission (Commission), pursuant to G.L. c. 31, § 43, contesting the decision of the Boston Fire Department (BFD) to suspend him for sixteen tours (eight 24-hour work shifts) on May 5, 2021, and eight tours (four 24-hour work shifts) on June 15, 2021, for a total of twenty-four tours. Remote pre-hearings were held on June 29, 2021, and August 17, 2021.² I held remote full hearings via Webex on October 12, 2021, November 5, 2021, November 23, 2021, and December 9, 2021. The full hearing was audio/video recorded.³ As no written notice was received from either party, the hearing was declared private. Both parties submitted post-hearing Proposed Decisions on March 28, 2022.

FINDINGS OF FACT

Sixty-seven Respondent Exhibits (Exhibits R1 – R67) and fourteen Appellant Exhibits (Exhibits A1 – A14) were entered into evidence. Based on these exhibits, the testimony of:

Called by the BFD:

- Bettye Jarrett, Municipal Security Officer
- Jay Gormley, Fire Lieutenant, BFD
- Trenton Parsons, Fire Fighter, BFD
- Jonathan Holder, M.D., Medical Examiner, BFD
- Gerard Viola, Deputy Chief of Personnel, BFD

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

³ Both parties received a link to the recording via email. Should either party file a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she/it wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, the recording should be used to transcribe the hearing.

Called by Appellant:

- Casley Bailey, Appellant, Fire Fighter, BFD
- Katherine C. Wrenn, M.D., Beth Israel Deaconess Medical Center
- Christopher P. Miller, M.D., Beth Israel Deaconess Medical Center

and taking administrative notice of all matters filed in the case, pertinent statutes, regulations, policies, stipulations, and reasonable inferences from the credible evidence, a preponderance of the evidence establishes the following:

Background

1. The Appellant has been a Firefighter in the Boston Fire Department (BFD) since 2007. He reports to the Ladder 1 Firehouse, which is located in the North End of Boston. (Testimony of Appellant)
2. The Appellant is a member of the Local 718 International Association of Firefighters (IAFF) Union. (Testimony of Appellant)
3. The Appellant has a lengthy record of past discipline. He received a one-tour suspension in 2012 for reporting late for duty, a four-tour suspension in 2013 for disrespect or insolence to a superior, a four-tour suspension in 2015 for failing to properly swap a tour with another BFD member, and a four-tour suspension in 2017 for excessive absenteeism. (Exhibits R35, R37, R38, and R39)
4. The Appellant also received a thirty-day suspension for violating the BFD's drug and alcohol policies in 2017. (Exhibit R 46)

Injury Leave and Modified Duty Regulations in the BFD Relevant to this Appeal

5. All members of the BFD are required to be aware of the rules and regulations of the Department. (Testimony of Viola and Testimony of Gormley)
6. The Collective Bargaining Agreement (CBA) of the Boston Fire Department and Local 718 Union states, in relevant parts:

“A. Injury Leave

1. When an employee sustains a work-related injury, he/she shall submit a written report (Form 5D [also known as Form 5DX]) *notifying the Commissioner or his/her designee as soon as possible but in no event later than [seventy-two (72)] hours after the injury occurs unless the severity of the injury makes timely notification impossible.*⁴ The report shall specify the cause and nature of the injury...

* * *

3. The injured employee shall report to the Department Medical Examiner (or his/her physician designee) for an examination as soon as possible...

* * *

5. The employee shall obtain from his/her personal medical provider(s) (if any) a medical evaluation report... The employee shall submit this report to the Department Medical Examiner (or his/her physician designee). *The employee’s medical provider(s) shall be afforded the opportunity to consult with the Department Medical Examiner (or his/her physician designee).*

6. Should the Department Medical Examiner (or his/her physician designee) and the employee’s medical provider disagree as to the medical appropriateness of injury leave status, the employee shall be examined by an [independent medical examiner (IME)] selected pursuant to section C(3) of this PART C, in the relevant specialty area, who, at the City’s expense, shall examine the employee and render a written medical opinion as to the medical appropriateness of injury leave status...

B. Limited⁵ Duty

1. An employee on injury leave shall not be assigned to limited duty during the first six (6) consecutive calendar weeks ⁶after his/her duty [status changes]...

2. Where the Department Medical Examiner (or his/her physician designee) determines that the employee is capable of performing limited duty, the Department shall notify the involved employee and the Union. *The Department*

⁴ The CBA originally stated a member must report an injury within 48 hours. This conflicts with the BFD Rules and Regulations, which state that a member has 72 hours to report an injury. To be more lenient in the face of this conflict, the BFD has allowed members the 72 hours to make an injury report. (Testimony of Viola)

⁵ The BFD uses the terms “limited duty,” “light duty,” and “modified duty” interchangeably. (Testimony of Holder and Testimony of Viola)

⁶ The CBA (Exhibit R4) prescribes a 6-week period after an injury before limited duty can be ordered, but neither party disputed the position asserted at the hearing that a four (4) week waiting period applied in Appellant’s case, and a four week waiting period is referenced in more recent documents. (See Exhibit R5) I infer that, at some point, an MOA reduced the six-weeks interval to four.

shall provide the employee and Union with its limited duty plan including a detailed description of the duties and the specific work schedule...The work schedule may provide, at the Department's option, for a Monday through Friday, eight (8) hour work day, forty (40) hour work week...

* * *

3. Should the employee's medical provider disagree with the Department's Medical Examiner (or his/her physician designee) as to the medical propriety of the employee performing the Department's limited duty schedule and/or assignment plan and he/she notifies the Department's Medical Examiner (and his/her physician designee), the Department's Medical Examiner (or his/her physician designee) will contact the employee's medical provider to discuss potential resolution of the disagreement. Failing resolution, the Department Medical Examiner (or his/her physician designee) shall designate an IME from the panel provided pursuant to section C(3) of this PART C to examine the employee...

* * *

5. An employee's participation in his/her limited duty plan shall terminate where the employee is cleared for full regular duty by the employee's medical provider or upon such clearance by the IME, whichever first occurs. If an employee sustains a work related injury while participating in his/her limited duty plan, the injury leave and light duty provisions in this Article shall apply, however, the employee may be immediately eligible for limited duty (the [4-week] limited duty assignment prohibition period described in provision B(1) shall not apply).

6. Limited duty shall not interfere with ongoing medical treatment ... An employee on limited duty will receive paid medical leave for medical treatment/therapy during assigned duty hours..."

(Exhibit R4) (*emphasis added*)

7. The BFD Rules & Regulations document states, in relevant parts:

“Chapter 17: Absence and Leaves

17.4 Absence from duty, other than what is allowed by the rules, shall be deemed absence without official leave, unless covered by leave of absence granted by the Fire Commissioner upon written application therefore.

17.6 *Absence from duty solely on the advice or recommendation of a physician other than the Medical Examiner of the department shall be considered and treated as absence without official leave, unless reason satisfactory to the Fire Commissioner be established in justification of such absence.*

17.21 All members of the department failing to report for duty because of injuries or sickness will go on leave without pay if not properly relieved by the Department Medical Examiner or chief officer. If, however, upon return to duty, the member can prove to the satisfaction of the Fire Commissioner that such absence from duty was because of sickness or injury sustained in the line of duty, his/her pay will be refunded.”

(Exhibit R8) (*emphasis added*)

8. On August 12, 2020, Deputy Chief of Personnel Gerard Viola distributed a memo articulating the requirements of a BFD member on modified duty. This memo was sent to all BFD members via email and was posted in public places throughout BFD firehouses and headquarters. This memo states:

“Officers and Senior Men are reminded that members assigned to Limited Duty/Modified Duty are to be coded on the tour report and *are required to work Monday- Friday 0800-1600 hours.*

The Officers and/or Senior Firefighter will be held strictly accountable for members assigned to their company, including those on modified duty status. *Members on Limited Duty/Modified Duty who are not at their work assignment are considered AWOL and will be disciplined as such...*

Members are permitted to leave their Limited Duty/Modified Duty to attend Medical appointments and Physical Therapy appointments, pertaining to their injury. The member is expected to return to their Limited Duty/Modified Duty assignment after the appointment...It is the member’s responsibility to keep all scheduled appointments with physicians, therapists, hospital/clinics, and the like.

Approved vacation and sick time can be used when on Limited Duty/Modified Duty in accordance with Boston Fire Department/IAFF Local 718 contract.”

(Exhibit R33) (*emphasis added*)

9. The BFD presents all members with the same modified duty plan, which consists of sitting at a desk and answering the phone at their assigned firehouse. Members on light duty work full time Monday through Friday, which is different than the 24-hour tour rotation of a firefighter on full duty. (Testimony of Viola)

September 2020 Injury and Leave

10. On September 1, 2020, the Appellant was injured while on duty responding to a fire in the North End of Boston. He felt something “pop” in his Achilles tendon. He went to the emergency room at Tufts Medical Center. BFD Medical Examiner Dr. Jonathan Holder also

examined the Appellant and found that the Appellant had sprained his right Achilles tendon.
(Testimony of Appellant and Testimony of Holder)

11. As a result of this right Achilles sprain, the Appellant was placed on injury leave for the majority of the month of September. Per the CBA, the Appellant was granted 4 weeks off duty on injury leave. The Appellant's personal doctor, orthopedic specialist Dr. Christopher Miller, also advised the Appellant to not return to work for a month and remain off his feet.
(Testimony of Holder, Testimony of Appellant, and Exhibit R4)

12. The Appellant had a normal exam which no longer showed signs of the injury on September 24, 2020. (Testimony of Appellant and Exhibit R63)

13. The BFD had communicated to the Appellant that he was to return to work the next week to begin his modified duty. (Testimony of Appellant)

14. The Appellant called out sick on the next workday, September 28th. He then did not report for duty on September 29th and was declared absent without official leave (AWOL).⁷
(Testimony of Appellant and Testimony of Gormley)

15. The Appellant then appeared for modified duty as expected through October and was eventually returned to full duty status and worked as normal. (Testimony of Appellant)

November 2020 Injury

16. On November 23, 2020, the Appellant was injured while working a fire detail at Beth Israel Hospital after catching his boot in construction steps.⁸ He continued to work on duty and did not seek medical treatment on this day. (Testimony of Appellant)

⁷ The Appellant's AWOL on September 29, 2020 is not an issue raised by either of the present appeals.

⁸ The exact source and setting of this injury are debated, which will be discussed later in these findings.

17. The next day, November 24th, the Appellant woke up with pain in his ankle and appeared for duty at a detail. After discussing with his officers, the Appellant went to St. Elizabeth's Medical Center for treatment. (Testimony of Appellant)
18. After receiving treatment at St. Elizabeth's, the Appellant submitted the required injury form, Form 5DX, to his officer on duty that day, Lieutenant Jay Gormley. This form stated "right ankle/achilles" as the body parts injured. The form states that the Appellant's injury occurred "at a paid detail while descending construction stairway, members boot became caught, inturn [sic] caused ankle to be sprained." (Exhibit R25)
19. On November 25th, the Appellant, adhering to BFD Rules and Regulations, presented himself to the BFD Medical Examiner, Dr. Holder. Dr. Holder found the Appellant had mild tenderness near his right Achilles tendon. Thus, determining this was a reinjury of the September Achilles sprain, Dr. Holder assigned the Appellant to a modified duty schedule of desk work beginning on November 30th.⁹ In Dr. Holder's notes from this visit, he wrote that the Appellant told him this injury was the "same as before." (Testimony of Holder)
20. In this meeting, the Appellant presented Dr. Holder with a note from Physician's Assistant Brianna Whitehouse (PA Whitehouse), stating that the Appellant had suffered "an acute acute [sic] Achilles injury" and was to remain out of work until she was able to examine him during his next appointment with her on December 1st. (Testimony of Holder, Exhibit A14)
21. The Appellant, figuring that this injury should be viewed as separate from the September 2020 injury and thus he should be entitled to four weeks of injury leave, refused to sign his modified duty plan and sought another opinion. As he was unable to book an appointment

⁹ The BFD permitted the Appellant to be out on injury leave from November 25th to November 29th. (Testimony of Viola)

with his orthopedic specialist until December 1st, he saw Dr. Katherine Wrenn at Beth Israel Hospital on the afternoon of November 25. (Testimony of Appellant)

22. Dr. Wrenn works in general internal medicine and sees patients for brief visits in a primary care setting. She is available for same day appointments in the hospital's urgent care section. (Testimony of Wrenn)

23. Dr. Wrenn diagnosed the Appellant with a medial right ankle sprain and provided him with a letter advising he stay out of work, which would include staying out of light duty, until his December 1 orthopedic appointment. (Testimony of Wrenn and Testimony of Appellant)

24. The Appellant then presented this note to Dr. Holder, who did not agree with Dr. Wrenn and continued to keep the Appellant on modified duty status. (Testimony of Holder and Testimony of Appellant)

25. The Appellant, not wanting to report to modified duty, called out sick on November 30th and December 1st. (Testimony of Appellant)

26. On December 1, PA Whitehouse, an orthopedic specialist who works with Dr. Miller, examined the Appellant. PA Whitehouse provided the Appellant with a new doctor's note after her examination, now diagnosing him with "an acute right ankle injury" and stating he "is to remain out of work until 12/21/2020." The Appellant sent this note to the BFD. (Testimony of Appellant and Exhibit A14)

Modified Duty Disputes

27. On December 2, 2020, the Appellant did not call out sick and therefore was expected to appear for modified duty at his firehouse at 8 AM. The Appellant's supervising officer for this day, Lt. Jay Gormley, did not know of his whereabouts. (Testimony of Gormley)

28. Instead of reporting to duty, the Appellant went to BFD Headquarters to meet with Dr. Holder and present him with the December 1 note from Dr. Whitehouse, stating he should not be put on modified duty. (Testimony of Holder and Testimony of Appellant)
29. The Appellant filled out a new Form 5DX concerning the November 23rd injury and gave it to Dr. Holder on this day. (Testimony of Appellant) This new form stated that the injury was an “ankle sprain” and that “this 5DX supersedes the previous 5DX submitted on 11-24-20.” (Exhibit R34)
30. Dr. Holder did not accept this amended form and continued keeping the Appellant on modified duty status. When the Appellant objected, Dr. Holder directed him to Deputy Chief Viola to discuss the matter further. (Testimony of Holder)
31. The Appellant then met with Deputy Chief Viola in his office to discuss why he could not amend his Form 5DX to only pertain to an ankle injury. Deputy Chief Viola explained the BFD’s policy of only accepting Form 5DXs within 72 hours of the injury, which had already passed. Deputy Chief Viola stated that they had a “respectful discussion” over this issue, and the Appellant left. (Testimony of Viola)
32. Around 1:37 PM that afternoon, Lt. Gormley called the Appellant to inquire of his whereabouts. The Appellant stated that he was not coming to the firehouse and was in talks with the Local 718 Union about a potential lawsuit. Lt. Gormley marked the Appellant as AWOL. (Testimony of Appellant and Exhibit R15)
33. The Appellant then had a conference call with Local 718 Union representatives and attorneys and sought a reassignment due to rising rates of COVID-19. The Appellant recalled that Local 718 President John Soares demanded the Appellant go to the firehouse and that he was about to be terminated from his position. Thus, the Appellant arrived at the firehouse around

4 PM “because [he] was threatened and coerced by the union.” (Testimony of Appellant)

34. When the Appellant was exiting his car at the firehouse, he leaned over to pick up a face mask and re-rolled his ankle in a pothole in the parking lot, exacerbating the existing injury.

(Testimony of Appellant)

35. The Appellant then walked up the steps of the fire station and met with Lt. Gormley, who explained the requirements of modified duty and that he is expected to be at the firehouse on Monday through Friday from 8 AM to 4 PM. The Appellant did not report the new ankle injury to Lt. Gormley at this time. (Testimony of Gormley)

36. The next day, December 3, the Appellant submitted a Form 5DX for the December 2 injury for his officer on duty, Patrick Loftus. This form states that the Appellant had a “re-sprain” on his “right ankle.” The Appellant wrote that “[t]he fear of adverse action is how this re-injury occurred. I was coerced into going to the firehouse because the union alleged I was AWOL. Upon arriving to the firehouse, I hastily exited my SUV and re-rolled my right ankle in a pot hole on the Charter Street parking lot side of the firehouse.” (Exhibit R23)

37. After a brief investigation, the Appellant’s Form 5DX for the December 2 injury was disapproved because the “injury occurred while exiting his personal vehicle” while in the BFD parking lot. (Exhibit R23) Deputy Chief Viola emphasized that the Appellant should have been at work earlier and would have avoided this injury, as “he hurt himself doing something he shouldn’t have been doing,” further explaining the denial of this injury form.

(Testimony of Viola)

38. Also on this day, the Appellant submitted a Form 5A addressed to Deputy Chief Viola stating that he should be entitled to the four weeks of injury leave because his November injury was a different injury on his ankle, compared to the September injury to his Achilles. (Testimony

of Appellant and Exhibit R27)

39. On December 4, the Appellant called out sick and visited Dr. Susan Maya for a primary care visit in the urgent care unit of Beth Israel Medical Center. (Testimony of Appellant and Exhibit R34)
40. Dr. Maya concluded that the December 2 injury was a re-injury of the Appellant's ankle from what happened on November 23. Dr. Maya advised the Appellant to remain off his foot and out of work. She provided the Appellant with a note that stated "[h]e is to remain out of work (including no modified duty)." (Testimony of Appellant and Exhibit R34)
41. The Appellant submitted this note to the BFD Medical Office but did not receive any response. The Appellant's modified duty status did not change. (Testimony of Appellant)
42. On December 7, the next day, the Appellant was on modified duty and he reported to the firehouse on time at 8 AM. The supervising officer on duty, Lt. Gormley, counseled the Appellant on "what is expected of a member on light duty per the Rules and Regulations of the Department" (Exhibit R17)
43. The Appellant notified Lt. Gormley that he had to leave modified duty for a 9 AM dentist appointment. The Appellant had not requested sick leave or vacation time for this appointment. (Testimony of Appellant). Lt. Gormley, expressing empathy at the difficulty of making medical appointments during the pandemic, allowed the Appellant to go to the dentist.¹⁰ (Testimony of Gormley and Exhibit R10)
44. The Appellant returned to modified duty after his dentist appointment. At approximately 12:30 PM, the Appellant notified Lt. Gormley that his child was sick and needed to be picked

¹⁰ Lt. Gormley was later made aware that allowing the Appellant to go to this appointment was against BFD policy. (Testimony of Viola)

up from school. Lt. Gormley allowed the Appellant to leave duty for the day to care for his sick child. (Testimony of Appellant and Testimony of Gormley)

45. On December 8, the Appellant visited Dr. Holder again, who did not change his modified duty status and directed him to discuss his concerns with Deputy Chief Viola. The Appellant then met with Deputy Chief Viola to discuss why Dr. Holder had kept him on modified duty after the notes from Dr. Maya and PA Whitehouse had prohibited it. The Appellant continued to refuse to sign his modified duty plan. (Testimony of Appellant and Testimony of Viola)
46. Deputy Chief Viola explained to the Appellant that the doctor's note needed to explicitly state that the Appellant could not work from a desk for his duty status to change, as medical providers often do not know what "modified duty" may entail. (Testimony of Viola and Testimony of Appellant)
47. After this meeting, the Appellant called PA Whitehouse requesting a new note specifying that he was unable to do desk work. (Testimony of Appellant)
48. PA Whitehouse, without examining the Appellant again, quickly provided the Appellant with a new note that stated "[n]o modified or desk duties."¹¹ (Testimony of Appellant and Exhibit R34)
49. The Appellant emailed this updated note from PA Whitehouse to the BFD Headquarters, BFD Medical Office, and Local 718 Union representatives stating that now that he has a note stating he cannot be on desk duty, he should be out on injured leave. Deputy Chief Viola responded to this email stating that he must present this note in person to Dr. Holder, and it is up to Dr. Holder to decide to change his modified duty status. (Exhibit A3)

¹¹ PA Whitehouse did not testify at the Commission hearing.

50. On December 9, the Appellant went to the BFD Medical Office and presented Dr. Holder with this new note from PA Whitehouse. Around this time, the Appellant also provided Dr. Holder with a new note from Dr. Maya that stated, “no light or desk duties.” (Testimony of Appellant, Testimony of Holder, and Exhibit R34)
51. Dr. Holder asked the Appellant to bring him Dr. Maya and PA Whitehouse’s notes and memos about his visits but did not change his modified duty status. Dr. Holder did not understand why the Appellant, based on his injury, was unable to do desk work and thus requested further clarification concerning the doctors’ analyses. (Testimony of Holder)
52. Dr. Holder reached out to Dr. Maya to hear her opinion on the modified duty plan and the discrepancy between whether this was an ankle or Achilles injury. Dr. Holder is required to communicate with a BFD member’s personal doctor to resolve any differences in opinion before beginning the IME process. Dr. Holder “thought [the Appellant]’s walking fine, he has a normal exam. It doesn’t make sense to me, I better send [Dr. Maya] a note.” Dr. Holder did not understand why Dr. Maya would write that the Appellant was physically incapable of sitting at a desk. (Testimony of Holder)
53. Dr. Holder sent two faxes to Dr. Maya asking if the Appellant can sit at a desk and do work, and to send over the notes from her exam of the Appellant on December 4. Dr. Holder never received an answer from Dr. Maya’s Office.¹² (Testimony of Holder and Exhibit R34)
54. Also on December 9, Dr. Holder requested and received the emergency room record from the Appellant’s initial visit to St. Elizabeth’s Hospital on November 24. (Testimony of Holder)
- This document showed that while being treated at St. Elizabeth’s on November 24, the Appellant stated he “stretched his right Achilles tendon” from “working a security detail

¹² Dr. Maya did not testify at the Commission hearing.

yesterday[; while] running forward [he] stopped abruptly.” (Exhibit R34) The Appellant had outside employment as a security officer for hospitals in the Boston area. (Testimony of Appellant)

55. Deputy Chief Viola and Dr. Holder were concerned because the St. Elizabeth’s intake document stated a very different cause of the injury than the Appellant’s Form 5DX (which stated he was injured while descending a construction stairway on a paid detail), as well as the discrepancy between the injury being to the Appellant’s ankle or Achilles tendon. (Testimony of Viola)

56. Deputy Chief Viola, after speaking with his supervisor, decided to place the Appellant on administrative leave with pay “pending an investigation into his work-related injury.” (Testimony of Viola)

57. On the afternoon of December 9th, Lieutenant Edward Glasheen emailed the Appellant ordering him to report to BFD Headquarters for a meeting with Deputy Chief Viola scheduled for the next day, December 10, at 9 AM, to discuss the investigation and formally place him on administrative leave. (Testimony of Viola and Exhibit R31)

58. The Appellant replied via email, stating that he could not attend this meeting because he had an “oral surgery appointment...at nine at Tufts dental school.” In this email, the Appellant again requested to be taken off modified duty and inquired as to what the meeting was about. (Testimony of Appellant and Exhibit R31)

59. The Appellant then emailed Deputy Chief Viola directly stating that he had a “consultation tomorrow [December 10] at 0900” and “can be at Fire HQ after [his] consultation.” In this email, the Appellant also requested if his lawyer or someone else representing his interest could be present. (Testimony of Appellant and Exhibit R32)

60. Deputy Chief Viola and Lt. Glasheen did not respond to the Appellant's emails and expected the Appellant to report to this meeting on time as it was an order from a superior. Deputy Chief Viola also did not understand why the Appellant had an oral surgery appointment during his modified duty shift without taking any sick leave or vacation time. (Testimony of Viola)

December 10, 2020 Meeting

61. On December 10 at approximately 8 AM, the Appellant called the firehouse and spoke with Lt. Gormley, telling him that he had a doctor's appointment and meeting with Deputy Chief Viola at the same time that morning. Lt. Gormley "was led to believe that [the Appellant] had spoken to the Personnel Office and was given permission to report, as ordered, to the Deputy Chief of Personnel after his medical appointment." (Testimony of Gormley and Exhibit R19) However, the Appellant was never given permission to report late to his meeting with Deputy Chief Viola. (Testimony of Viola)

62. Lt. Gormley was under the impression that the Appellant's doctor's appointment was with the Medical Examiner, given his previous counseling about making non-injury related appointments while on modified duty. (Testimony of Gormley) Moreover, the Appellant wrote "Bailey Dept Doc" in the Ladder 1 House Journal for that morning. (Exhibit R29)

63. When the Appellant had not reported to Deputy Chief Viola by 9:30 AM, Deputy Chief Viola called the firehouse to inquire of the Appellant's whereabouts as he was declared AWOL. (Testimony of Viola)

64. Lt. Gormley, confused, responded that he had believed the Appellant had already communicated with Deputy Chief Viola about what Lt. Gormley thought was an appointment with Dr. Holder. (Testimony of Gormley)

65. Lt. Gormley called the Appellant to notify him of the AWOL charge and demand he report to Deputy Chief Viola as soon as possible. (Testimony of Gormley) The Appellant did not understand why he was marked AWOL as he believed he had permission from Lt. Gormley to attend this oral surgery appointment. (Testimony of Appellant)
66. The Appellant arrived at approximately 12 PM to meet with Deputy Chief Viola and “appeared to be in an agitated state.” The Human Resources Director of the BFD and two representatives from the Local 718 Union were also present at this meeting. Deputy Chief Viola notified the Appellant that he was placed on administrative leave with pay and now had two AWOLs on his record. Deputy Chief Viola also informed the Appellant “non-work-related appointments are not a reason to leave [a modified duty] assignment” and thus his email was not a valid excuse to have arrived late to this meeting. (Testimony of Viola and Exhibit R14)
67. After his meeting with Deputy Chief Viola, the Appellant was upset and called Lt. Gormley. (Testimony of Appellant)
68. The Appellant asked Lt. Gormley about department policy for attending medical appointments while on light duty in “an agitated tone.” Lt. Gormley had to tell the Appellant to correct his tone while speaking to him, a superior. (Exhibit R20)

Incident Following the December 10, 2020 Meeting

69. At approximately 1 PM, Ladder 1 was headed to a training at the BFD Headquarters. Firefighter Trenton Parsons was driving the firetruck, with Lt. Gormley in the passenger’s seat and two other firefighters sitting behind them. (Testimony of Gormley)
70. As Ladder 1 was waiting at the traffic light in the left lane of the Massachusetts Ave. Connector (also known as Melnea Cass Blvd.) to turn on to Massachusetts Ave to get to the

BFD Headquarters, the Appellant was driving on the other side of the street in his personal vehicle having turned right on to the Massachusetts Ave. Connector from Southampton St., as he was leaving the BFD Headquarters. (Testimony of Parsons)

71. When Ladder 1 and the Appellant in his personal vehicle were “almost parallel” (Testimony of Gormley) and two lanes apart (approximately 50 ft away) at this intersection, Lt. Gormley and FF Parsons witnessed the Appellant gesture his middle finger to the firetruck and mouth “f**k you brothers.” FF Parsons was able to hear the Appellant say “f**k you brothers” due to his proximity, while Lt. Gormley only saw the Appellant mouth this phrase. (Testimony of Gormley and Testimony of Parsons)

72. Lt. Gormley and FF Parsons briefly spoke of this encounter right after it happened, noting that it was odd. Neither were offended by the incident and did not report it. (Testimony of Parsons and Testimony of Gormley) FF Parsons stated that this “was not personal and was not towards me” and thus he was not offended. (Testimony of Parsons)

73. Lt. Gormley recorded the incident in his personal notes. The BFD was not made aware of this incident until Lt. Gormley was interviewed as a part of the investigation into the Appellant’s injury status on January 15, 2021. (Testimony of Gormley, Exhibit R10, and Exhibit R20) After the interview, Lt. Gormley asked FF Parsons to submit a Form 5A on this incident as well. (Testimony of Gormley and Exhibit R22)

Investigation of Injury and Alleged Misconduct

74. On December 12, 2020, the Appellant emailed Deputy Chief Viola apologizing for his misconception about when it might be permissible to attend medical appointments. The Appellant wrote that he “truly did not know that medical appointments other than injury appointments could not be made on modified duty time” and that he would not openly defy

the Rules and Regulations of the BFD. Deputy Chief Viola did not respond to this email.

(Testimony of Appellant and Exhibit A3)

75. The Appellant's doctor cleared him to return to full duty on December 21, 2020, although he remained on administrative leave for a few weeks after that. (Exhibit R11) The Appellant was working fully duty at the time of his department disciplinary hearing and Commission hearing. (Testimony of Appellant)

76. Deputy Chief Viola began investigating the Appellant's injury status. Eventually, Chief of Operations Joseph McMahan became the head of this investigation. (Testimony of Viola)

77. Chief McMahan and HR Director Lennie De Souza interviewed the Appellant and Lt. Gormley in January 2021. At his interview, the Appellant denied making any gesture to Ladder 1 on December 10. (Testimony of Appellant and Exhibit R10-12)

78. On January 19, 2021, after the investigative interviews, the Appellant texted Lt. Gormley's personal cell phone number asking him to submit his cell phone records for December 2 and December 10 and stated: "I wanted to ask you before I took any other action to obtain them." Lt. Gormley did not respond to the Appellant but submitted a Form 5A describing the text he received. (Testimony of Gormley and Exhibit R21)

79. Once the investigation concluded, on April 20, 2021, the BFD notified the Appellant that he was charged with:

- a. Charge #1 Count 1 for being AWOL in violation of Rule 18.44(f) on December 2;
- b. Charge #1 Count 2 for being AWOL in violation of Rule 18.44(f) on December 10;
- c. Charge #2 Count 1 for disrespect or insolence to a superior in violation of Rule 18.44(e) for his speech and conduct towards Lt. Gormley on December 2 and 10 and January 19;
- d. Charge #2 Count 2 for disrespect or insolence to a superior in violation of Rule 18.44(e) for gesturing his middle finger and yelling "f**k you brothers at Ladder 1 on December 10;

- e. Charge #3 for conduct unbecoming a member, whether on or off duty, which tends to lower the service in the estimation of the public in violation of Rule 18.44(a) for gesturing his middle finger and yelling “f**k you brothers at Ladder 1 on December 10;
- f. Charge #4 for failing to promptly and without question obey all orders of superiors in violation of Rule 18.4 for failing to report to Deputy Chief Viola on time on December 10; and
- g. Charge #5 for conduct prejudicial to good order in violation of Rule 18.44(j) for being AWOL on December 2, failing to report to his meeting with Deputy Chief Viola, and gesturing his middle finger and yelling “f**k you brothers at Ladder 1 on December 10. (Exhibit R2)

Disciplinary Hearing and Parking Violations

80. On April 7, 2021, the Appellant arrived at BFD Headquarters in preparation for his disciplinary hearing. The Appellant parked in a designated handicapped parking space outside of the building. (Testimony of Appellant)
81. Municipal Special Police Officer Bettye Jarrett, who oversees security and parking at BFD Headquarters, recognized the Appellant as he was parking and left the building to speak with him. Officer Jarrett asked the Appellant why he was parked in the handicap spot and stated he needed a disability placard to be there. The Appellant told Officer Jarrett he was parked there due to his “leg and foot” injuries and began to pull out what appeared to Officer Jarrett to be a disability placard from his glove compartment. Officer Jarrett, satisfied from what she saw, ended the conversation, and let the Appellant remain parked there. (Testimony of Jarrett)
82. The April 7, 2021 hearing was rescheduled to April 27, 2021.
83. On April 27, 2021, the Appellant arrived for his rescheduled disciplinary hearing and again parked in the handicapped parking space. Officer Jarrett, recalling her prior conversation with the Appellant showing her a disability placard, did not question him this time. (Testimony of Jarrett)

84. The Appellant did not testify at this disciplinary hearing. (Exhibit R1)
85. On May 5, the Appellant was notified that the trial board had made a decision after his April 27 hearing, and he was suspended for a total of sixteen (16) tours for the events of early December 2020. The trial board ordered an 8-tour suspension for the AWOL, disrespect/insolence charges; and an 8-tour suspension for his profane conduct toward Ladder 1. His charge of disrespect or insolence to a superior for his conduct directed toward Ladder 1 (Charge #2 Count 2) was dismissed per the trial board's recommendation, while all other charges were upheld. (Exhibit R1)

Investigation of Parking Violations

86. During the April 27th disciplinary hearing, at Chief McMahon's request, Officer Jarrett provided Chief McMahon with security footage from April 7th showing her approach the Appellant's car, demonstrating that she was under the impression that he had a disability placard and thus was not at fault for the potential parking violation. (Testimony of Jarrett and Exhibit R60)
87. Chief McMahon approached the Appellant's car and recorded the identification number of the disability placard. After communicating with the Boston Police Department, Chief McMahon found that the disability placard was registered to Claudette Bailey, who is the Appellant's deceased mother. (Exhibits R56 and R57)
88. Chief McMahon also took pictures of the Appellant's car in the handicap space, showing that the Appellant had displayed the disability placard in the car's windshield. (Exhibits R66 and R67)
89. Immediately after the disciplinary hearing, Chief McMahon questioned the Appellant about his parking. The Appellant stated that the disability placard he had shown to Officer Jarrett

and put on his windshield belonged to his deceased mother and therefore was not issued to him. (Exhibit R57)

90. On May 4, Chief McMahon communicated with the Massachusetts State Police his concerns that the disability placard may have been fraudulently obtained. On May 10, he spoke with Lieutenant Christopher Boyle, who informed him that the Social Security Administration did not report Claudette Bailey's death to the Registry of Motor Vehicles, and therefore a new disability placard was automatically issued to the Appellant's home. Thus, while the Appellant was using a disability placard that did not belong to him, he never fraudulently applied for a renewal. (Exhibit R57)

91. At the Commission hearing, the Appellant stated he parked in the handicapped space because his thought his wife was going to pick up the car from him while he was at BFD Headquarters, and it would be easier for her to access the car from the handicap spot compared to the BFD parking area. The Appellant also asserted that he has seen many BFD members park in the handicap space, so he assumed this would not be an issue.¹³ (Testimony of Appellant)

92. At the conclusion of his investigation of the parking violations, Chief McMahon charged the Appellant with:

- a. Charge #1 Count 1 for conduct unbecoming a member, whether on or off duty, which tends to lower the service in estimation of the public in violation of Rule 18.44(a) for parking in the handicap spot on April 7;
- b. Charge #1 Count 2 for conduct unbecoming a member, whether on or off duty, which tends to lower the service in estimation of the public in violation of Rule 18.44(a) for parking in the handicap spot on April 27;

¹³ The only evidence the Appellant provided of this practice was one photo of a BFD Deputy Chief vehicle parked in the handicap spot. It is unclear how long this car was parked at BFD Headquarters. (Exhibit A6) Officer Jarrett testified that she would question anyone she thought was illegally parked in the handicap spot and request they move their vehicle. (Testimony of Jarrett)

- c. Charge #2 Count 1 for untruthfulness or willful misrepresentation in matters affecting the department or its employees in violation of Rule 18.44(m) for falsely telling Officer Jarrett the disability placard was for the Appellant's leg/foot injuries on April 7;
- d. Charge #2 Count 2 for untruthfulness or willful misrepresentation in matters affecting the department or its employees in violation of Rule 18.44(m) for fraudulently using the disability placard registered to his deceased mother to park at BFD Headquarters on April 27. (Exhibit R50)

93. The BFD conducted a disciplinary hearing for these charges on June 9, 2021. The Appellant did not testify at this hearing. (Exhibit R51)

94. On June 15, the BFD issued an eight (8) tour suspension for this misconduct. Charge #1 Counts 1 and 2 for conduct unbecoming in violation of Rule 18.44(a) were dismissed, and the charges of untruthfulness or willful misrepresentation in violation of Rule 18.44(m) were upheld. (Exhibit R49)

95. The Trial Board recommended counseling and an oral warning for this misconduct, but upon review of the Appellant's past disciplinary history, the Fire Commissioner elevated this discipline to the eight (8) tour suspension. (Exhibit R49)

APPLICABLE CIVIL SERVICE LAW

Sections 41 to 45 of G.L. c. 31 allow discipline of a tenured civil servant for "just cause" after due notice, a hearing (which must occur prior to discipline other than a suspension from the payroll for five days or less), and a written notice of the decision that states, "fully and specifically the reasons therefor." G.L. c. 31, § 41. An employee aggrieved by such disciplinary action may appeal to the Commission, pursuant to G.L. c. 31, § 42 and/or § 43, for de novo review by the Commission "for the purpose of finding the facts anew." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006). As prescribed by G.L. c. 31, § 43, the Appointing Authority bears the burden of proving "just cause" for the discipline imposed by a

preponderance of the evidence:

“If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee, by a preponderance of the evidence, establishes that said action was based upon harmful error in the application of the appointing authority’s procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.”

The Commission determines just cause for discipline by inquiring “whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service.” School Comm v. Civil Service Comm’n, 43 Mass. App. Ct. 486, 288, rev. den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983).

The Commission is guided by “the principle of uniformity and the ‘equitable treatment of similarly situated individuals” as well as the “underlying purpose of the civil service system[:] to ‘guard against political considerations, favoritism and bias in governmental employment decisions.”” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. See also Town of Brookline v. Alston, 487 Mass. 278 (2021) (analyzing broad scope of Commission’s jurisdiction to enforce basic merit principles under civil service law).

ANALYSIS

The Appellant contests all eight charges that the BFD has issued against him in this combined appeal (resulting in a total suspension of twenty-four tours). The charges that the Commission must analyze regarding appeal D-21-100 are:

1. Charge #1 Count 1 in relation to the Appellant’s alleged AWOL on December 2;
2. Charge #1 Count 1 in relation to the Appellant’s alleged AWOL on December 10;
3. Charge #2 Count 1 for the Appellant’s alleged disrespect or insolence to a superior for his speech and conduct toward Lt. Gormley on December 2, 10, and January 19;

4. Charge #3 for conduct unbecoming a member, whether on or off duty, which tends to lower the service in the estimation of the public for his conduct toward Ladder 1 on December 10;
5. Charge #4 for failing to promptly and without question obey all orders of superiors, regarding the Appellant's interactions with Deputy Chief Viola on December 10; and
6. Charge #5 for conduct prejudicial to good order for the Appellant's AWOLs, failure to meet with Deputy Chief Viola on time on December 10, and ensuing conduct toward Ladder 1 on December 10.

The charges that the Commission must analyze regarding appeal D-21-128 are:

1. Charge #2 Count 1 for untruthfulness or willful misrepresentation regarding the Appellant falsely telling Officer Jarrett his disability placard was for his leg/foot on April 7; and
2. Charge #2 Count 2 for untruthfulness or willful misrepresentation regarding the Appellant fraudulently using his deceased mother's disability placard to park at BFD headquarters on April 27.

After careful consideration of the record, the preponderance of the evidence demonstrates that the BFD had just cause to discipline the Appellant for (1) disrespect exhibited toward Lt. Gormley, (2) conduct unbecoming for his actions toward Ladder 1 on December 10, and (3) for both counts of untruthfulness or willful misrepresentation associated with the Appellant's parking in a handicapped spot. However, I have found that the Department did not have just cause to discipline the Appellant for either alleged absence without leave on December 2 or 10, nor for his failure to follow orders from a superior as they were inextricably tied into the AWOL charges. The charge for conduct prejudicial to good order is duplicative of the other charges and does not justify additional discipline beyond what was warranted by the other charges.

December 2 AWOL

The BFD did not have just cause to discipline the Appellant for being AWOL on December 2. The Appellant genuinely believed that he was not required to report for modified duty because he had visited PA Whitehouse the day before, December 1, and she provided him with a new doctor's letter stating that the injury he sustained on November 24 was different than his

September injury and that he should remain out of work until December 21. The Appellant promptly forwarded this letter on December 1st to the BFD and officials received it that day.

While the Appellant was unable to amend his Form 5DX due to the 72-hour injury report rule, this would not have prevented the Medical Examiner from reviewing his injury after receiving a new doctor's note from an orthopedic specialist. The Appellant, frustrated after speaking with Dr. Holder, met with the Local 718 Union for advice. Thereafter, he immediately reported to the firehouse for duty and met with Lt. Gormley. Thus, under the particular circumstances and ambiguities presented in this instance, the BFD did not have just cause to mark the Appellant as AWOL on December 2.

December 10 AWOL

The BFD also did not have just cause to discipline the Appellant for being AWOL on December 10. The Appellant gave notice that he could not be present at the requested meeting time on December 10. When Lt. Glasheen emailed the Appellant on December 9, ordering him to report to BFD Headquarters to meet with Deputy Chief Viola, the Appellant promptly responded stating he had a conflict at that time. He also directly notified Deputy Chief Viola of this conflicting appointment. Deputy Chief Viola did see the Appellant's email. On the morning of December 10, the Appellant called his supervisor, Lt. Gormley, to give notice that he would not be able to report for duty due to a doctor's appointment and would meet later with Deputy Chief Viola. Lt. Gormley assumed that the Appellant was meeting with Dr. Holder (which would have been allowed as an on-duty visit) and that Deputy Chief Viola was somehow aware of this. In fact, the Appellant had not received confirmation from Dep. Chief Viola approving a change to the meeting time he had set. When he eventually reported to Dep. Chief Viola, the Appellant acknowledged that he should have obtained advance approval from Dep. Chief Viola and

apologized to him for not doing so.

I note that the BFD Policy concerning attending non-injury-related appointments while on modified duty does clearly exclude the Appellant's dental visit as a medical appointment that could be undertaken during on-duty time and the Appellant knew or should have known that. The BFD was fully entitled to dock him for the time he took to attend to that appointment. However, the Appellant was not disciplined for sick time abuse or violation of BPD protocols. The BFD was aware of his whereabouts.

Moreover, the BFD separately disciplined the Appellant for his actions on December 10, as discussed below. Thus, under the unique and particular facts of this case, the BFD did not have just cause to discipline the Appellant for being AWOL on December 10.

The Commission's decision on this point should not be construed to preclude future discipline of the Appellant or any other BFD member for skirting the rules in the future in similar fashion—*i.e.*, by interpreting or creating ambiguities in their favor. Rather, the Commission intends to give fair warning to the Appellant and all BFD members that they take the risk of appropriate discipline for unilateral violation of established rules—and, in the future, similar actions will not be excused through interpretation or creation of ambiguities in their favor rather than using sound judgement to resolve potential misunderstandings or ambiguities prior to absenting themselves from work.

Disrespect toward a Superior Officer

The preponderance of the evidence does show that the Appellant was disrespectful toward Lt. Gormley on separate occasions in December of 2020 and January of 2021. Lt. Gormley had to counsel the Appellant at least three times about the requirements of light duty and attending to non-injury related medical appointments. However, the Appellant willfully and consistently did

not heed the policies that Gormley articulated, as he attended the dentist appointment on December 7 and the oral surgery consultation on December 10 without taking sick leave. Also, on December 10, after the meeting with Deputy Chief Viola, the Appellant called Lt. Gormley in “an agitated tone.” The Appellant had exhibited such disrespect toward his superior that Lt. Gormley had to order him to correct his tone. During this call, the Appellant was demanding information about the BFD policy for attending non-injury- related medical appointments on modified duty, which Lt. Gormley had already explained to him. Thus, the preponderance of the evidence supports the appointing authority’s finding that the Appellant was disrespectful toward Lt. Gormley, and thus there was just cause for discipline.¹⁴

December 10 Conduct Unbecoming

The Appellant’s actions toward Ladder 1 on the afternoon of December 10 reflected substantial misconduct which adversely affects the public interest and therefore there was just cause to discipline him. I credit the testimony of Lt. Gormley and Firefighter Parsons that the Appellant did yell “f**k you brothers!” and gestured his middle finger toward Ladder 1 near BFD Headquarters as he was turning onto the Massachusetts Avenue Connector. I do not credit the Appellant’s inconsistent testimony. The Appellant first stated he did not even drive toward that intersection on December 10, but then defended this accusation by alleging it is common for firefighters to yell “f**k yeah, go get ‘em brothers!” when they pass a firetruck. This latter claim is not substantiated by any evidence or testimony from other firefighters. The Appellant was in public, wearing his BFD uniform, while exhibiting such deplorable language and conduct. These

¹⁴ The BFD also included the Appellant’s January 19th texts to Lt. Gormley on demanding his phone records in this charge for disrespect and insolence. This topic was not discussed in the Commission hearing, and therefore I am unable to find that this particular incident of poor behavior was established by a preponderance of the evidence.

actions do warrant just cause for discipline.

The Appellant alleges that the charge of “conduct unbecoming a member, whether on or off duty, which tends to lower the service in the estimation of the public” is impermissibly vague. However, a “conduct unbecoming” charge has often been found to be properly implemented by a public safety department. See, e.g., McIsaac v. Civil Service Comm’n, 38 Mass. App. Ct. 473, 475. “An officer of the law [as well as a firefighter] carries the burden of being expected to comport himself or herself in an exemplary fashion. In that context, the adjectives ‘immoral,’ ‘improper,’ ‘disorderly,’ and ‘intemperate’ have meaning.” Id. The Appellant acted in an improper, disorderly, and intemperate fashion when he acted profanely toward Ladder 1 while in uniform on December 10. His actions qualify as conduct unbecoming and thus this charge was appropriately the basis for discipline.

Failing to Respond to Orders of a Superior Officer

The charge of failing to obey the order of a superior officer is a close call. The BFD’s rules and regulations require members to obey the lawful orders of a superior officer. The Appellant’s failure to report to Deputy Chief Viola on December 10 was due, in part, to his misunderstanding of the rules, as well as his belief that Lt. Gormley had the authority to excuse him from reporting to BFD Headquarters so he could attend his medical appointment. The Appellant eventually acknowledged his mistake and apologized via email to Deputy Chief Viola. I am persuaded that, on the preponderance of the evidence, the Appellant’s behavior does not rise to the level of warranting a suspension. The Appellant should take heed, however, that in the future he must pay strict attention to the BFD’s rules and regulations and seek clarification from the superior who issued the order *before*, and not after, taking an action that could be construed as AWOL or insubordinate.

Conduct Prejudicial to Good Order

The BFD did not have just cause to impose further discipline upon the Appellant for conduct prejudicial to good order, as he had already been disciplined for the conduct covered in this charge via the other charges issued to him. The Appellant's notice of department hearing details the explanation and conduct covered in each charge the BFD had imposed upon him. For this conduct prejudicial to good order charge, the BFD cited the Appellant's communications with Lt. Gormley, the alleged absences without official leave, profane conduct toward Ladder 1 from his personal vehicle on December 10, and failure to report as ordered to his meeting with Deputy Chief Viola. As described in the analyses above, the BFD had already disciplined the Appellant for all these infractions. I have found just cause to impose discipline for the Appellant's poor behavior toward Lt. Gormley and his profane outburst on December 10, but I do not find just cause for the other alleged misconduct. Imposing additional discipline for the superfluous 'conduct prejudicial to good order' charge is not warranted. While the Appellant's outburst on December 10 was "conduct unbecoming, it was viewed by the BFD members on Ladder 1 as humorous, not offensive, leading me to believe that it cannot be fairly considered "prejudicial to good order." The BFD has not persuasively explained why this separate charge is necessary along with all the other charges.

Untruthfulness or Willful Misrepresentation related to Handicap Parking Space

Both charges of untruthfulness and willful misrepresentation regarding the Appellant parking in the BFD Headquarters handicap parking space in April 2021 amount to substantial misconduct which adversely affects the public interest. The Appellant had represented to Officer Jarrett that his disability placard was for his leg/foot, when in fact it was not issued to him, but to his deceased mother. By the time of this incident in April 2021, months had passed since his

ankles/Achilles injury and he had returned to full duty, and thus it is unclear why the Appellant would have needed to utilize a handicap parking space at all. Moreover, the Appellant's testimony about why he parked in this space, in that he planned to swap cars with his wife during the day and she was easily able to access this space, does not justify his actions as this purported explanation does not even relate to a disability. The Appellant also stated that he was in the process of applying for a disability placard for his child; however, his child was not present with him (or his wife) on this day so this explanation cannot be valid. Since the Appellant had gone through the disability placard application process, he should have known it was wrong to use a disability placard that was not in his name to park in a more convenient space. The Appellant willfully misrepresented matters to Officer Jarrett by implying that he legitimately possessed a disability placard; moreover, he fraudulently used the placard issued to his deceased mother, when he knew he did not have justification to park in this space.

Firefighters, like police officers, are expected to “comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel.” Police Comm’r of Boston v. Civil Service Comm’n, 24 Mass. App. Ct. 364, 371 (1986). The Appellant openly and in uniform displayed a disability placard that did not belong to him, parked in a handicap spot for his own benefit, and potentially prevented members of the public with disabilities from parking in that space. The BFD, as a public safety organization with a reputation to uphold, cannot condone these actions and thus discipline was warranted.

Modification of Penalty

Section 43 of G.L. c. 31 vests the Commission with “considerable discretion” to affirm, vacate or modify discipline, but that discretion is “not without bounds” and requires sound

explanation for doing so. See, e.g., Police Comm'r v. Civil Service Comm'n, 39 Mass. App. Ct. 594, 600 (1996) (“The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio ... accorded to the appointing authority”). See also Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass App. Ct. 331, 334 (1983).

Since the facts I find regarding appeal D-21-100 differ from those determined by the BFD, it is appropriate that the Commission consider whether to exercise its discretion to modify the penalty imposed. I conclude that the exercise of the Commission’s discretion to modify the penalty is warranted here. The Appellant had received conflicting information from his superior officers about how to attend non-injury-related medical appointments and was constantly asked to provide more medical documentation before his concerns would be entertained. The Appellant was justifiably confused about whether he had proper leave on the days of his alleged AWOLs. Thus, I find the sixteen-tour suspension to be excessive for the limited misconduct that has been supported by just cause, i.e., the Appellant’s disrespect of his superiors and peers. The Appellant has been disciplined once before for similar misconduct in 2013, resulting in a four-tour suspension, and therefore I conclude that, consistent with the determination of the BFD Trial board, an eight-tour suspension is warranted for the misconduct for which just cause was established.

Given that the facts found by the Commission regarding appeal D-21-138 do not differ significantly from the findings of the BFD, a modification of that eight-tour suspension is not warranted.

CONCLUSION

For all the above reasons, the Appellant’s appeal under Docket No. D-21-100 is *allowed in*

part. The two eight-tour suspensions, amounting to a total of sixteen tours, are hereby modified to one eight-tour suspension, in accordance with the Appellant's prior discipline and the misconduct established through the foregoing factual findings. The Respondent is to adjust the Appellant's payroll and personnel records accordingly. The Appellant's appeal under Docket No. D-21-138 is *denied* and, hence, a second eight-tour suspension was properly served.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chair; Stein & Tivnan, Commissioners) on December 15, 2022.

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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

Steven R. Yormak, Esq. (for Appellant)
Robert J. Boyle Jr., Esq. (for Respondent)