

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

100 Cambridge Street: Suite 200
Boston, MA 02114
(617) 979-1900

CASLEY BAILEY,
Appellant

v.

BOSTON FIRE DEPARTMENT,
Respondent

Docket Number:

D-22-078, CS-22-0260

DECISION

Pursuant to 801 CMR 1.01 (11) (c), I assigned this appeal to the Division of Administrative Law Appeals (DALA) for a DALA Magistrate¹ to serve as presiding officer over an evidentiary hearing into whether the Boston Fire Department (BFD) had just cause to suspend the Appellant for four tours in his position as firefighter.

The Presiding Officer released to the Commission the attached Tentative Decision, modifying the suspension from four tours to two tours, and advised the parties that they had 30 days in which to provide any written objections to the Commission. Objections were received from the Appellant and the BFD, and the BFD submitted a timely reply to the Appellant's objections.

After careful review and consideration, the Commission voted to affirm and adopt the Tentative Decision of the Presiding Officer, thus making the attached the Final Decision of the Commission.

At issue in this appeal is whether the BFD proved, by a preponderance of the evidence, that the Appellant engaged in misconduct by: (1) abusing FMLA leave; (2) appearing for an interview with the Chief of Personnel in an improper uniform; and (3) showing disrespect to the Chief of Personnel during that same interview.

¹ At the time this hearing was held, the presiding officer was a Magistrate at the Division of Administrative Law Appeals (DALA). The Magistrate was subsequently appointed as a member of the Civil Service Commission while this matter was still pending. Since Commissioner Angela C. McConney was a DALA Magistrate at the time of the hearing, however, her decision was initially issued to the parties as a Tentative Decision.

In her well-reasoned Tentative Decision, the presiding officer provided a detailed explanation as to why the BFD failed to prove the first two of three charges: abuse of FMLA leave; and appearing for the interview in improper uniform. In reaching this conclusion, the presiding officer properly gave weight to the fact that the BFD was unable to produce the highly relevant local hearing officer's report. The presiding officer also credited the testimony of the BFD's own witness, Chief Viola, that after attending the Appellant's local hearing, and hearing the Appellant's explanation, he would *not* have recommended that the Appellant be disciplined for abuse of FMLA leave. Put another way, the person who initially recommended disciplining the Appellant for abuse of FMLA leave changed his mind after hearing the Appellant's full explanation at the local appointing authority hearing, yet the BFD failed to produce the local hearing officer's report to explain why he, as the hearing officer, was still upholding the charge.

While the BFD's only other witness, the Director of Human Resources, testified that she still believed that the Appellant abused his FMLA leave, she couched that conclusion by stating that the circumstances as narrated by the Appellant "probably contributed to the issues" or "exacerbated the medical issue" suffered by the Appellant's family member.

In short, the BFD's own witnesses provided testimony that undermined the local hearing officer's purported conclusion regarding abuse of FMLA leave. Not only did the BFD fail to produce the hearing officer's report, they did not call the hearing officer to testify before the Commission to mitigate that omission. Nothing in the BFD's objections change the reality that their case regarding this particular charge effectively evaporated during the hearing before the Commission.

The presiding officer also made short shrift of the second charge against the Appellant related to him failing to appear in proper uniform for an interview with the Chief of Personnel. First, the BFD was unable to refute the Appellant's assertion that the charge was dropped by the local hearing officer for the same reasons referenced above: the BFD failed to produce the local hearing officer's report, nor was the local hearing officer called to testify before the Commission. Quite apart from this, the charge seems somewhat frivolous, given that the Appellant, on short notice, did appear in an official BFD uniform shirt, albeit short sleeve, days before seasonal short sleeve shirts were permissible.

After carefully reviewing – and crediting – the testimony of both the Chief of Personnel and the BFD's Director of Human Resources, who were both present at the Chief's interview with the Appellant, the presiding officer found that the Appellant's conduct was unprofessional during that interview, providing specific examples of the Appellant's unprofessional conduct. The Appellant, as part of his objections, unsuccessfully attempted to dissect the testimony of the Human Resources Director to show that her testimony was not in sync with the Chief of Personnel. Any objective review of her testimony, in which Ms. DeSouza specifically identified the Appellant's responses as "petulant" and "dismissive", disproves the Appellant's unsupported argument in this regard.

Finally, the Presiding Officer provided adequate reasons for recommending a modification of the penalty, appropriately considering that the BFD had failed to prove two of three charges of misconduct; and balancing this against the seriousness of the third (proven) charge and the fact that the Appellant has prior discipline, which has been upheld by this Commission.

Accordingly, the Commission adopts the Tentative Decision of the Presiding Officer making this the final decision. The Appellant's appeal under Docket No. D-22-078 is hereby ***allowed in part***. The four-tour suspension is modified to a two-tour suspension and the Appellant shall be restored to his position for the two remaining tours without loss of pay or other benefits.

By a 4-0 vote of the Civil Service Commission (Bowman, Chair; Dooley, Markey and Stein, Commissioners [McConney – Abstain] on June 27, 2024.

Civil Service Commission

/s/ Christopher C. Bowman
Christopher C. Bowman
Chair

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

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

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

100 Cambridge Street, Suite 200
Boston, MA 02114

CASLEY BAILEY,
Appellant

v.

D-22-078, CS-22-0260

BOSTON FIRE DEPARTMENT,
Respondent

Appearance for Appellant:

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Appearance for Respondent:

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Presiding Officer:

Angela C. McConney²

SUMMARY OF TENTATIVE DECISION

The Presiding Officer recommends that the Civil Service Commission modify the four-tour suspension of the Appellant to a two-tour suspension because the Boston Fire Department failed to prove two of the three charges of misconduct, but showed that the Appellant engaged in a pattern of unbecoming conduct in interactions with his superior and co-workers.

²At the time this hearing was held, the presiding officer was a Magistrate at the Division of Administrative Law Appeals (DALA). The Magistrate was subsequently appointed as a member of the Civil Service Commission while this matter was still pending. Since Commissioner McConney was a DALA Magistrate at the time of the hearing, however, this decision is being issued as a Tentative Decision.

TENTATIVE DECISION

On June 1, 2022, the Appellant, Casley Bailey (Appellant), filed a timely appeal with the Civil Service Commission (Commission) pursuant to G.L. c. 31, § 43.³ The appeal challenged the decision of the Boston Fire Department (BFD) to suspend the Appellant for four tours of duty as a firefighter.

The Commission held a remote pre-hearing conference on June 28, 2022. On October 13, 2022, I conducted a full hearing at the Commission's former offices at One Ashburton Place in Boston, Massachusetts. I recorded the hearing via the Webex platform, and provided both parties with a link to the video recording of the hearing.⁴ On December 16, 2022, the parties filed proposed decisions, whereupon the administrative record closed.

FINDINGS OF FACT

The BFD submitted into evidence 24 exhibits (Exhibits R1 – R24) and the Appellant two exhibits (Exhibits A1 – A2). Based on the documents submitted and the testimony of the following witnesses:

Called by the BFD:

- Gerard Viola, Deputy Fire Chief, Chief of Personnel, BFD;
- Lennie DeSouza, Director of Human Resources, BFD;

Called by the Appellant:

³ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.01, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

⁴Should there be a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to use this recording to prepare a written transcript and supply the court with the hearing transcript to the extent that they wish to challenge the decision as unsupported by substantial evidence, arbitrary and capricious, or an abuse of discretion.

- Casley Bailey, Appellant;

and taking administrative notice of all pleadings filed in the case, pertinent rules, statutes, regulations, case law, and policies, and drawing reasonable inferences from the credible evidence, a preponderance of the evidence establishes the following facts:

1. The Appellant has been employed as a firefighter for the BFD since August 15, 2006. (Stipulated Fact)
2. The Appellant is a member of the International Association of Firefighters, Local 718 (Union). (Testimony of the Appellant)
3. In December 2021, the BFD approved the Appellant's request for intermittent leave under the Family Medical Leave Act (FMLA), related to the care of a direct family member, for the period of December 2021 to June 15, 2022. (Testimony of DeSouza)
4. In March 2022, the Appellant utilized intermittent FMLA on two occasions. (Testimony of DeSouza)
5. In a fact sheet dated February 2013, guidance from the United States Department of Labor (DOL) states in part:

Ongoing communication between the employee and the employer is critical throughout the Family Medical Leave Act (FMLA) process. It is important for the employee to let his or her employer know as soon as possible **each** time FMLA is needed and to respond to questions from the employer designed to determine if a particular leave request is FMLA-qualifying. If the employee fails to provide the employer with enough information to determine whether the leave is FMLA-qualifying, the leave may not be protected. The employee must also comply with the employer's policies for requesting leave unless unusual circumstances prevent him or her from doing so.

(emphasis in original) (Exhibit R19)

6. The DOL fact sheets further state that:

[T]he employee is required to provide enough information for the employer to know that the leave may be covered by the FMLA, and when and how much leave the employee anticipates needing to take. For example, the employee may need to provide information showing . . . that he is needed to care for a qualifying family member who is under the continuing care of a doctor, or that a qualifying family member has been hospitalized overnight. Once approved, for a particular FMLA leave reason, if additional leave is needed for that reason, the employee must reference that reason or the need for FMLA leave. In all cases, the employer may ask additional questions and/or for a certification to determine if the leave is FMLA-qualifying.

(Exhibit R19)

7. The BFD's attendance policy requires that upon a tenth sick leave absence in a rolling 12-month period, firefighters must submit medical documentation to substantiate additional sick time requests. FMLA-related days are not counted toward this policy. (Exhibit R21; Testimony of DeSouza)

8. As of April 15, 2022, the Appellant had nine undocumented sick absences for the relevant 12-month rolling period. (Exhibit R22; Testimony of Viola, Testimony of DeSouza)

9. The Appellant was scheduled to start working 24 hours on Saturday, April 16, 2022: a day tour from 8:00 a.m. to 6:00 p.m., then a night tour from 6:00 p.m. to 8:00 a.m. (Testimony of Appellant; Testimony of Viola)

10. The Appellant was also scheduled to take a civil service make-up promotional examination for Fire Lieutenant in Hudson at 8:00 a.m. on Saturday, April 16, 2022. (Exhibit R1)

11. On Friday, April 15, 2022, at 9:30 a.m., the Appellant sent an email to an unmonitored BFD Personnel Division email account used only for sending out external emails to BFD personnel. The Appellant wrote:

I respectfully request to be placed on Department Business for the day tour tomorrow 4-16-2022 (Day) so I may take the Fire LT exam.

(Exhibit R1; Testimony of Viola)

12. According to BFD practice, Department Business refers to events such as conducting training at the Fire Academy or appearing as a witness in a court or administrative proceeding required by the Department. Sitting for a civil service promotional examination does not qualify for the designation of Department Business.

(Testimony of Viola)

13. Sometime after 9:30 a.m. on Friday, April 15, 2022, the Appellant became aware of a “safety concern” related to the same family member who was the basis of the December 20, 2021 intermittent FMLA. (Testimony of Appellant)

14. On the morning of Saturday, April 16, 2022, the Appellant “called in sick ... because of the new issues with [his family member].” (Testimony of Appellant)

15. After making that call, the Appellant drove from his home in Mattapan, Massachusetts to the exam site in Hudson, Massachusetts, sat for the examination and then returned home after picking up take-out food for his family member. In his absence, the Appellant’s wife had remained at home with the family member. (Testimony of Appellant)

16. After other family members arrived at his home in Mattapan, the Appellant reported for duty at the North End fire station at 6:00 p.m. (Testimony of Appellant)

17. As the senior firefighter on that April 16, 2022 shift, the Appellant was authorized to access the Kronos payroll system. He accessed the system, and changed his absence from sick time to FMLA-sick. (Testimony of Appellant)

18. On April 20, 2022, Deputy Chief Gerard Viola, then Chief of Personnel for the BFD at the time, learned of the Appellant's April 15, 2022 email to the unmonitored email account. Chief Viola checked the Appellant's absence for the April 16, 2022 day tour and saw that he was coded "FMLA-sick." (Testimony of Viola)

19. Chief Viola initiated an investigation. As part of his investigation, Chief Viola interviewed the Appellant and asked the Fire Captain responsible for entering the Appellant's April 16, 2022 tour to write a report. (Testimony of Viola)

20. The Fire Captain at the North End fire station responsible for the Appellant's April 16, 2022 tour submitted an April 23, 2022 memorandum stating:

I worked my regularly scheduled 24 hour tour on 4/15, there were 2 sick calls for the next day on group 4, FLT [redacted] and FFMSM Casley Bailey. Before leaving the next morning I moved FF [redacted] up on the kronos and did the tour report for him. I could not recall which code used for FF bailey.

This morning on 4/23 I spoke to FF bailey and he stated that on 4/16 (N) he was working as the Senior man, he had only called in sick for the day tour, when doing the tour report he saw he was coded rgular (sic) in the day, He meant to use FMLA, And changed the code.

(Exhibit R1)

21. On April 26, 2022, Chief Viola interviewed the Appellant in the presence of the BFD's Human Resources Director, Lennie DeSouza and the Union Vice President John Sarro. (Testimony of Viola, Testimony of DeSouza, Testimony of Appellant)

22. Chief Viola prepared the following questions before the interview:

- Why did you call in sick on 4/16?
- Why did you use FMLA?
- Where were you on 4/16?
- Did you take the promotional exam on 4/16? Where? What time? What time dismissed?
- Did you report to work 4/16 (N)? What time? What time did you log onto CAD?

- Where were you between exam and night shift?
- Were you or your family member seen by a medical provider on 4/16?

(Exhibit R3)

23. At his April 26, 2022 interview, the Appellant appeared in a short-sleeved BFD uniform shirt without a necktie in violation of the seasonal uniform of a long-sleeved shirt and necktie.⁵ (Testimony of Viola)

24. The Appellant remarked that Chief Viola's questions were "silly" more than once during the interview. He asked Chief Viola to sign an overtime slip for his appearance at the interview when it was common knowledge that the Department did not pay overtime for investigative interviews conducted for off-duty firefighters. The Appellant answered multiple questions with "I don't recall" or "No clue." (Testimony of Viola)

25. Although BFD Human Resources Director Lennie DeSouza found the Appellant to be "dismissive" and "petulant" during his interview with Chief Viola, she did not believe that the Appellant was required to provide confidential medical information related to the family member during the April 26, 2022 interview. (Testimony of DeSouza)

26. Ms. DeSouza spoke with the Appellant immediately after the April 26, 2022 investigative interview in her office. Based on the information that the Appellant shared with her, Director DeSouza found that the April 15 and 16, 2022 events related to the Appellant's direct family member were not directly related to FMLA leave, the

⁵ BFD uniform guidelines allow for a short sleeve shirt and no tie for such meetings effective on May 1st.

family member did not experience a “medical issue that day”. Further, the matter was not “medically-related”, but the circumstances as narrated by the Appellant “probably contributed to the issues” or “exacerbated the medical issue” already suffered by the Appellant’s family member. Ms. DeSouza concluded that no part of the Appellant’s time 8:00 a.m. to 6:00 p.m. period on April 16, 2022 constituted “bona fide” FMLA time. (Testimony of DeSouza)

27. At the conclusion of the investigation, Chief Viola issued the Appellant the four-tour suspension on April 29, 2022. Chief Viola cited the Appellant’s violation of the Department attendance policy, his insolence to a superior, conduct unbecoming, and violation of the Department’s uniform requirements. (Exhibit R5)

28. The Appellant requested a hearing pursuant to G.L. c. 31, Section 41. The Department designated Acting Chief of Operations Steven E. Shaffer (Chief Shaffer) as hearing officer, and he conducted a hearing on Friday, May 13, 2022.⁶ Chief Viola attended the hearing. The Appellant was twenty minutes late for his hearing. (Exhibit R6; Testimony of Viola)

29. Chief Viola observed that the Appellant was “polite, forthcoming and apologetic” to the hearing officer, and offered a “reasonable explanation” regarding a “sensitive issue” related to his family member for his April 16, 2022 absence. (Testimony of Viola)

⁶The BFD was unable to locate a written report of the findings and recommendations from Chief Shaffer to the Fire Commissioner. (Testimony of Viola)

30. The Chief testified before the Commission that had the Appellant offered the same explanation during the investigative interview, for “compassionate” reasons he would not have disciplined the Appellant. (Testimony of Viola)

31. In an undated letter to the Appellant, the BFD Fire Commissioner wrote in part that, “I have accepted the recommendation of the hearing officer that there exists cause for the discipline for failure to follow basic procedures established in the Rules and Regulations.” “Accordingly, I hereby uphold the Written Reprimand and four (4) tour suspension.”⁷ (Exhibit R6)

32. The Appellant has an extensive record of prior discipline that includes discipline for attendance issues, insolence, and untruthfulness. (Exhibits R7 – R16)

APPLICABLE CIVIL SERVICE LAW

A tenured civil service employee may be disciplined for “just cause” after due notice and hearing upon written decision “which shall state fully and specifically the reasons therefor.” G.L. c. 31, § 41. An employee aggrieved by the decision may appeal to the Commission. G.L. c. 31, § 43. Under section 43, the appointing authority carries the burden to prove “just cause” for the action taken by a “preponderance of the evidence.” *Id.* See, e.g., *Falmouth v. Civ. Serv. Comm’n*, 447 Mass. 814, 823 (2006); *Police Dep’t of Boston v. Collins*, 48 Mass. App. Ct. 411, *rev. den.*, 726 N.E.2d 417 (2000).

In performing its review ... the commission hears evidence and finds facts anew ... [after] a hearing de novo upon all material evidence and ... not merely for a review of the previous hearing held before the appointing

⁷ The Appellant testified before the Commission that Chief Shaffer “threw out” the uniform charge at the local appointing authority hearing. Chief Viola did not recall that happening.

officer. There is no limitation of the evidence to that which was before the appointing officer... .

Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003). *See also Falmouth v. Civil Serv. Comm'n*, 447 Mass. at 823; *Cambridge v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 300, 303-05, *rev. den.*, 428 Mass. 1102 (1997).

The Commission determines justification 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, 488 (1997). *See also Murray v. Second Dist. Ct.*, 389 Mass. 508, 514 (1983).

A Commission hearing officer must take into account all credible evidence in the administrative record, including anything that would fairly detract from the weight of any particular evidence supporting the decision reached below. *See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 264-65 (2001). It becomes the purview of the hearing officer, however, to determine the credibility of testimony presented to the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [Commission] upon which a court conducting judicial review treads with great reluctance.” *Leominster v. Stratton*, 58 Mass. App. Ct. at 729. *See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n*, 401 Mass. 526, 529 (1988); *Doherty v. Retirement Bd. of Medford*, 425 Mass. 130, 141 (1997).

ANALYSIS

I am concerned that the Department was unable to submit a copy of the local hearing officer’s findings and recommendations of the May 13, 2022 Section 41 hearing is problematic. Although the Commission is required “to conduct a de novo hearing for

the purpose of finding the facts anew.” *Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823 (2006) and cases cited, “[t]he commission’s task ... is not to be accomplished on a wholly blank slate. After making its de novo findings of fact, the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether ‘there was [] justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision’,” *Id.*, quoting internally from *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983) and cases cited.

The inability to review the local hearing officer’s report that presumably formed the basis for the Commissioner’s decision to uphold the discipline against the Appellant, makes it difficult to reconcile Chief Viola’s testimony that he would not have disciplined the Appellant upon hearing his testimony. The Commission would like to know why the hearing officer apparently concluded otherwise. The BFD’s failure to produce the hearing officer’s findings and recommendations – or have the hearing officer testify before the Commission – was a fault line in the BFD’s burden to show that there was just cause for the discipline issued against the Appellant.

This fault line is further undermined by the Appellant’s assertion that Chief Shaffer in his capacity as hearing officer “threw out” the charge for wearing an improper uniform (short sleeve and no tie as opposed to long sleeve and a tie required prior to May 1st). While Chief Viola does not recall the local hearing officer making those comments, it does seem plausible and ring true to me, that those comments were made at the hearing. Further, the Fire Commissioner’s letter does not specifically state that the uniform charge was upheld by the hearing officer.

Based on my de novo review, including a review of all testimony and documentary evidence submitted by the parties, the BFD has not proven by a preponderance of the evidence that the Appellant violated the Department's attendance policy on April 16, 2022. In reaching this conclusion, I gave considerable weight to Chief Viola's testimony that based on the Appellant's "reasonable explanation" regarding a "sensitive issue" at the local hearing, he would not have disciplined the Appellant for an attendance violation. Further, while Director DeSouza testified before the Commission that the Appellant's time used that day, in her opinion, did not qualify as FMLA sick time, she also testified that the circumstances as described to DeSouza by the Appellant "probably contributed to the issues" or "exacerbated the medical issue" of the Appellant's family member.

I now turn to the question of whether the Appellant coding FMLA-sick leave for taking a promotional civil service examination on the morning of April 16, 2022 constituted misconduct justifying discipline. Taking a civil service examination cannot be used to justify use of FMLA-sick time. However, the BFD has not argued, nor did the evidence show, that the Appellant could not use FMLA-sick time for *part* of the day tour shift on April 16, 2022 and use some other type of time (i.e. – vacation or personal time) for that part of the day tour shift that the Appellant was taking the civil service examination.

I have not overlooked the troubling chain of events in which the Appellant submitted an improper request to an unmonitored Department email address for "Department business" time to take a civil service examination the following day, then called in sick for the day shift the next morning, and then later changed that time to

FMLA-sick. Understandably, the BFD is skeptical of this sequence of events – as am I. However, to discredit the Appellant’s testimony that circumstances changed later on the day of Friday, April 15, 2022 that justified the FMLA-sick time the next morning, I would need to conclude that the Appellant was fabricating events surrounding a family member. Notwithstanding the questionable timing, I credit the Appellant’s testimony that a safety concern developed later on April 15, 2022, justifying the proper use of FMLA-sick time on April 16, 2022.

Finally, I turn to the alleged misconduct for failing to wear the proper seasonal uniform and for disrespect to a superior officer during a Departmental interview. I do not believe that wearing a short sleeved BPD-issued uniform shirt without a tie as opposed to a long sleeved BFD-issued uniform shirt rises to the level of justifying discipline. Further, in the absence of the hearing officer’s report and/or testimony, I credit the Appellant’s testimony that there was a reference to that charge not going forward or being “thrown out” at the Section 41 hearing.

The Appellant’s conduct at the interview with Chief Viola, however, is far more problematic and a cause for dismay. This behavior continues the Appellant’s pattern of unbecoming behavior toward peers and superiors, adversely affects the public interest and justifies disciplinary action.

I find that Chief Viola was a credible witness. Based on my observations, he appeared to harbor no personal animus against the Appellant. When presented with information that the Appellant participated in a civil service promotional examination on the same day that he claimed FMLA-sick, he initiated an investigation and called the Appellant in for an interview. While the Appellant was justified in not divulging any

medical-related details related to his FMLA claim, I credit the testimony of both Chief Viola and Ms. DeSouza that the Appellant was uncooperative and, in the words of Ms. DeSouza, “petulant” and “dismissive”. Telling the Chief of Personnel that his reasonable questions are “silly”, repeatedly responding “no clue” to reasonable questions such as how long the examination from only days ago lasted, and flippantly asking the Chief to sign an overtime slip for his attendance at the hearing are inappropriate and constitute conduct unbecoming by the Appellant. This is not the first time that the Appellant engaged in such behavior. In *Bailey v. Boston Fire Dep’t*, 35MCSR 376 (2022), the Commission upheld that part of a suspension based on the Appellant’s “multiple instances of insubordinate and unbecoming behavior toward his peers and superiors” including gesturing his middle finger to on-duty firefighters and mouthing “f**k you brothers”.

For the reasons cited above, the BFD had just cause to discipline the Appellant for his unbecoming conduct during his interview with Chief Viola, but the BFD has not shown, by a preponderance of the evidence that just cause existed to discipline the Appellant for violation of the BFD’s attendance or uniform policy.

Section 43 of G.L. c. 31 also vests the Commission with the authority to affirm, vacate or modify a penalty imposed by the appointing authority. The Commission is delegated “considerable discretion” in this regard, albeit “not without bounds” so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. *See, e.g., Police Comm’r v. Civil Service Comm’n* at 600 (1996) and cases cited; *Falmouth v. Civil Service Comm’n*, 61 Mass. App. Ct. 796, 800 (2004); *Faria v. Third Bristol Div.*, 14 Mass. App. Ct. 985, 987 (1982) (remanded for findings to support

modification). However, the Supreme Judicial Court has added that, in the absence of “political considerations, favoritism, or bias,” the same penalty is warranted “unless the commission’s findings of fact differ significantly from those reported by the town or interpret the relevant law in a substantially different way.” *Falmouth v. Civil Service Comm’n*, 447 Mass. at 824.

My findings differ significantly from those reported by the BFD. Most substantively, I do not find that the Appellant violated the BFD’s attendance policy by taking FMLA-sick leave on April 16, 2022, nor do I find that the Appellant violated the Department’s uniform policy. I find, however, that the Appellant engaged in conduct unbecoming during his interview with Chief Viola, representing a pattern of misconduct which prior discipline has not corrected.

CONCLUSION

For these reasons, I recommend that the Commission modify the Appellant’s four-tour suspension to a two-tour suspension.

Civil Service Commission

/s/ Angela McConney
Angela C. McConney
Commissioner and assigned Presiding Officer

Date: May 6, 2024