Decision mailed: 1/28/11
Civil Service Commission

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, SS.

One Ashburton Place - Room 503
Boston, MA 02108
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JONATHAN BEAN,
Appellant

v.

CASE NO: D1-09-243

TOWN OF BOURNE,
Respondent

Appellant's Attorney:	John M. Becker, Esq. Sandulli Grace P.C. 1 State Street, Suite 200 Boston, MA 02108
Respondent's Attorney:	Robert S. Troy, Esq Bourne Town Counsel 90 Route 6A Sandwich, MA 02563
Commissioner:	Paul M. Stein

DECISION

The Appellant, Jonathan Bean, acting pursuant to G.L.c.31, §43, duly appealed to the Civil Service Commission (Commission) from a decision of the Town of Bourne (Bourne), the Appointing Authority, contesting the "just cause" for Bourne's termination of his employment as Bourne Firefighter/Paramedic.[1] Evidentiary hearings were held by the Commission, sitting at the UMass/Dartmouth School of Law, on September 21, 2009

[1] Originally, the Appellant also asserted an appeal pursuant to G.L.c.31,§42, that alleged due process flaws in the termination process, namely, that Bourne failed to conduct an appointing-authority level hearing prior to his termination as required by G.Lc.31,§41,¶1, which, if proved, would require an order to vacate his termination as invalid on procedural grounds and require Bourne to notice and conduct the required hearing. The parties subsequently reported to the Commission that they had reached a mutually agreeable settlement that resolved the procedural issue and the Appellant voluntarily withdrew his Section 42 appeal. The Commission has not considered and does not address the Appellant's Section 42 appeal in this Decision. During the summer of 2010, the Commission came to learn that the settlement between Bourne and the Appellant included an agreement to continue to pay the Appellant some or all of his salary pending the Commission's final determination of his Section 43 appeal as well. The agreement to continue paying the Appellant, while his Section 43 appeal was pending before the Commission, was solely Bourne's decision and is not required by any provision of civil service law and is not something that was mandated or should be taken as endorsed by the Commission in this (or any other) case.

and October 30, 2009. The hearing was declared private as no party requested a public hearing. Witnesses were sequestered. Bourne called four witnesses and the Appellant testified on his own behalf. Post-Hearing briefs and proposed decisions were filed by the Appellant on March 1, 2010 and Bourne on March 3, 2010, respectively. Twenty (20) exhibits were received in evidence at the hearing. The record remained open to receive additional exhibits requested by the Commission from Bourne, which were received on November 5, 2010 and December 14, 2010, and marked for identification (Exhs. 21-ID thru 23-ID). The hearing was digitally recorded.

FINDINGS OF FACT

Giving appropriate weight to the Exhibits, the testimony of the witnesses (the Appellant, Bourne Fire Chief Daniel Doucette, Bourne Fire Lt. Penny Fusco, Bourne Paramedic Thomas Simpson, and CIEMSS Director, Alden Cook) and inferences reasonably drawn from the evidence as I find credible, I make the findings of fact set forth below.

Appellant's Initial Training and Experience

1. The Appellant, Jonathan Bean, was appointed to the Bourne Fire Department (BFD) as a Firefighter/Paramedic in January 2007, after prior service as a call firefighter. He successfully completed the fire academy in early 2008 and had a "relatively smooth" probationary period "typical of any new EMT". He was a tenured civil service employee in the position of Firefighter/Paramedic at the time of his termination from employment. During his tenure he received recognition for his meritorious service as a firefighter and paramedic by Bourne town officials and citizens. (*Stipulated Facts; Testimony of Appellant & Paramedic Simpson; Exhs.13 thru 18*)

2. Mr. Bean received his paramedic training at Cape Cod Hospital, which included a year of coursework, 400 hours of emergency room internships, and 200 hours of ride along ambulance time (which he completed with BFD ambulance service). This training was incurred at his own expense, approximately $8,000. (*Testimony of Appellant*)

3. Mr. Bean took and passed the Massachusetts paramedic examination on the first try and received an EMT-Paramedic license. He has also been certified as an ACLS (Advanced Cardiovascular Life Support) Provider by the American Heart Association, as a PALS (Pediatric Advanced Life Support) Provider by the American Academy of Pediatrics, and has completed various other job related training. He is a certified SAFE instructor, which allows him to teach the public about fire safety. (*Exh. 2; Testimony of Appellant & Paramedic Simpson*)

4. Paramedic Bean also has been employed by American Medical Response, a private ambulance service. His duties with AMR include responding to medical emergencies, performing ALS for adult and pediatric patients and transferring patients. Paramedic Bean continued to hold his position with AMR even after his termination from the BFD through the dates of the hearing before the Commission. (*Testimony of Appellant*)

The Regulatory & Operational Framework

5. The BFD ambulance division operates pursuant to a license to provide EMS service issued pursuant to the Massachusetts Emergency Medical Services (EMS) System Law (Mass.G.L.c.111C) and regulations (codified as 105 CMR 170.00 et seq.) promulgated by the Massachusetts Department of Public Health (DPH) Office of Emergency Medical Services (OEMS).

6. As required by the applicable EMS law and regulations, BFD entered into a written "Affiliation Agreement" with Cape Cod Health Care, Inc. (which owns and operates Cape Cod Hospital and Falmouth Hospital) to provide the "Medical Control" required by law, which includes, among other things the "[d]esignation of an affiliate hospital medical director [AHMD], who shall have authority over the clinical and patient care aspects of the affiliated EMS service, including but not limited to the authorization to practice of its EMS personnel." (*Testimony of Mr. Cook; M.G.L.c.111C,§1; 105 CMR 170.020, 170.295, 170.300*)

7. The term "Authorization to Practice" means "approval granted to an EMT-Intermediate or EMT-Paramedic by his or her employing EMS service's affiliate hospital medical director, which enables that EMT to work as an EMT at the ALS level and receive medical control pursuant to the employing service's affiliation agreement and in conformance with the Statewide Treatment Protocols." (*105 C.M.R. 170.120*)

8. Cape & Islands Emergency Medical Services System, Inc. (CIEMSS) is a private, non-profit corporation that serves an intermediary role with EMS providers and health care facilities in the Cape Cod region, which includes providing administrative support, statistical reporting, quality control, continuing education, and certain governmental liaison services with OEMS regional and central offices. CIEMSS does not have responsibility for the delivery of EMS services by its clients. During the time period involved in this appeal, the Director of CIEMSS was Alden Cook, a retired Firefighter-Paramedic with 31 years prior experience with the Falmouth Fire Department. (*Testimony of Mr. Cook*)

9. EMTs are licensed by OEMS at three levels of proficiency. The status of EMT-Paramedic is the highest level certification that an EMT may receive. EMT-Basic licensees can perform only non-invasive procedures (such as splinting) and cannot give medications. Only individuals with EMT-Intermediate and EMT-Paramedic licenses can perform "Advance Life Support" (ALS) procedures, such as administering medications and performing invasive medical procedures such as IVs and intubation. (*Testimony of Mr. Cook; M.G.L.c.111C; CMR 170.800*)

10. This statutory and regulatory scheme means that, in effect, when performing ALS care at the Intermediate or Paramedic level, all BFD EMT personnel work under the license of the Medical Director, Dr. Jeffrey Herbst, of Cape Cod Health Care, Inc. All EMTs performing at the ALS level (Intermediate or Paramedic), must have both a duly issued license from OEMS and an "Authorization to Practice" approval from the Affiliate Hospital's Medical Director, Dr. Herbst. The statute and regulations contain no specific standards for issuance or revocation of an EMT's "Authorization to Practice", and the decisions of the AHMD is generally considered to be a matter within his or her own sound discretion, with which BFD must comply and has no authority to override. (*Exh.6; Testimony of Chief Doucette & Mr. Cook*)

11. There is also a requirement that EMS providers who provide ALS level care must be staffed with a minimum number of qualified ALS-certified EMT-Paramedics. In cases in which an EMS provider does not have sufficient ALS qualified staff, OEMS permits a staffing waiver, but the waiver calls for new hires by such a provider to be made at the required ALS qualified level. Thus, a provider subject to that waiver cannot hire an EMT-Basic to replace a departing EMT-Paramedic. The BFD was one such

provider which operated under such a staffing waiver (granted by OEMS Region V) at the time involved in this appeal. (*Testimony of Chief Doucette & Mr. Cook; 105 CMR 170.305; G.L.c.111C,§22*)

12. Other provisions of the EMS law and regulations that bear notice include the authority of OEMS to investigate any questions of compliance or deficiency by any EMS licensees (providers or individuals) concerning the EMS law, to order correction of any deficiency found, and after hearing, to suspend or revoke any certificate, license, designation or other approval issued by OEMS. (G.L.c.111C, *,§§15, 16 &, 23; 105 CMR 170.705-770; Exh.20; Post-Hearing Exh.23ID [e-mail re: OEMS remediation plan]*)

13. Paramedic Bean and the other EMTs employed by BFD are members of Local Union 1717, International Association of Firefighters, AFL-CIO (Local 1717). Lt. Penny Fusco was President of Local 1717 at the times involved in this appeal. Gil Taylor was a member of the Executive Board. Julio Pomar was Shop Steward. The applicable collective bargaining agreement between Local 1717 as bargaining agent and the BFD is contained in Exhibit 1. (*Exh. 1; Testimony of Appellant & Lt. Fusco*)

14. At the inception of the events that give rise to this appeal, David "Skip" Kingsbury served as BFD Fire Chief and Daniel Doucette was the Deputy Fire Chief and EMS Director. Deputy Fire Chief Doucette was named Acting Fire Chief to replace Chief Kingsbury in January 2009. Upon his appointment to Acting Chief, day-to-day oversight of the EMS division became the responsibility of EMT-Paramedic Penny Fusco, who had been promoted to Lieutenant in September 2008. (*Testimony of Chief Doucette & Lt. Fusco*)

Appellant's Tenure with the BFD

15. Lt. Fusco served as a Firefighter-Paramedic with BFD since 1998. She testified that she was partnered with Paramedic Bean when he first started at the BFD, prior to his attending the Fire Academy (which he entered in December 2007). They worked together for about a month out of Headquarters and later when they rotated to the same station together for about two months. This preceded her promotion to Lieutenant in September 2008, so they were peers during this time frame. (*Testimony of Appellant & Lt. Fusco*)

16. Lt. Fusco seemed to have formed an unfavorable opinion early on about Paramedic Bean. She provided two recollections of what she considered problem calls during this early period, but spoke mostly in generalities about how Paramedic Bean had "great difficulty" with "scene assessment" and "inappropriate questioning of patients". She concluded that he didn't seem to know "where he was going" and leaned heavily on notes that he had put on index cards to "prompt him". Paramedic Bean disputed Lt. Fusco's recollection of the deficiencies, claiming she greatly exaggerated the alleged problems with his performance and placed them in improper context with the overall facts of the situation. He denied having issues involving his assessment or treatment skills. I find this evidence of the early problems Lt. Fusco described too ambiguous to be substantively reliable and conclusive. I draw no inference, however, that Lt. Fusco carried away any personal animus toward Paramedic Bean formed during this period, as opposed to sincerely-held concern for his professional potential. No documented evidence was produced concerning this period and there is no record that her observations were communicated to others. (*Testimony of Appellant & Lt. Fusco*)

17. After he returned from the Fire Academy in March or April 2008, Paramedic Bean was partnered with another experienced, senior Paramedic, Thomas Simpson, who had prior EMT experience with the BFD as well as service as an EMT and Police Officer in Mattapoisett. (*Testimony of Paramedic Simpson*)

18. According to Paramedic Simpson, his experience with Paramedic Bean during the several months that they worked together was generally positive. Paramedic Simpson said he observed issues typical of what any new Firefighter-Paramedic would have but "nothing out of the ordinary". He said Paramedic Bean "knew his limits" and was "very much" receptive to his supervision, and didn't know of "anything more" he could have asked from him. This period of training lasted a few months after which Paramedic Bean was put on a different assignment rotation. (*Testimony of Paramedic Simpson*)

19. I could discern no personal animosity between the two men. If anything, I detected a slight degree of reticence on Paramedic Simpson's part in later having to confirm his honest and credible critique of Paramedic Bean's subsequent lack of progress on the job that is described below. I attribute the differences in the early perceptions of Paramedic Bean by Paramedic Simpson and Lt. Fusco to their respective interpersonal and management styles and comfort levels in the acceptable level of progress expected from a new employee, as confirmed by their testimony and demeanor. (*Testimony of Appellant, Lt. Fusco & Paramedic Simpson*)

20. Paramedic Bean's career with the BFD began to unravel in the summer of 2008. On July 18, 2008, Paramedic Bean was the lead Paramedic (referred to as the "tech") on a call to Bourne Manor Nursing home for a cardiac arrest patient who turned out to be the father of BFD Paramedic Dana Dupuis. Two ambulances responded (with Bean and

EMT-Basic Hodge in the first ambulance, and Paramedics Emberg and Ferro in the other), along with an Engine Company (including Paramedic Dupuis and Paramedic Gata). Lt. James Brown and Deputy Chief Doucette also were on scene. (*Exh. 12; Testimony of Appellant & Chief Doucette*)

21. According to the written report of this incident later sent by Lt. Brown to Chief Kingsbury and Deputy Chief Doucette, Lt. Brown observed several problems with Paramedic Bean's handling of the call, including "taking a lot of time to choose an airway tube", he "seemed to ignore" Lt. Brown's request to listen for lung sounds, and when the request was repeated by Paramedic Gata, Bean "snapped back it was fine." Lt. Brown made a third request, with which Paramedic Bean complied. (*Exh. 12*)

22. Once the patient was transported to Falmouth Hospital, Lt. Brown met privately with Paramedics Ferro, Emberg, Gata and Pomar (the latter not on the call). He reported they "all expressed a sincere concern for Paramedic Bean's ability to work alone as a paramedic. . . . I discussed these issues with D/C Doucette and we agreed that John needed to work with another paramedic for now. . . .D/C Doucette stated he would contact [CIEMSS] to see about possibly more training for Paramedic Bean." (*Exh. 12; Testimony of Chief Doucette*)

23. Deputy Chief Doucette followed up this matter in a series of e-mail exchanges with CIEMSS Director Cook and the AHMD Dr. Herbst, the latter requesting specific information about the nature of Paramedic Bean's deficiencies, to which Deputy Chief Doucette responded:

> "Paramedic Bean has difficulty with strip recognition and the ability to interpret what he sees to what [is] the proper treatment protocol. He has poor assessment skills. . . His skills need refining. It appears that when he has a high priority call he cannot develop a plan of action and then follow through with a plan. Other paramedics

> working with Bean have made suggestions to treatment and Bean takes the criticism personally and becomes defensive to what he is doing. . . . Upon arrival to the hospital . . . the MD was asking questions and it appeared that Bean did not know the answers and he just walked away."

Chief Doucette acknowledged that the above report was based on information he had been given by others, and not his own first hand observations. He also acknowledged that the problems did not rise to the level of violation of treatment protocols or having placed any patient's health in jeopardy. (*Exhs. 3a-3d; Testimony of Chief Doucette & Mr. Cook*)

24. Mr. Bean described the July 18, 2008 incident quite differently. He clamed that he was placed in an emotionally-charged, chaotic situation due to the patient's relationship with Paramedic Dupuis and the many paramedics present who were rushing him. He rejected the criticism of his behavior and called the post-mortem meeting with Lt. Brown (from which he says he was excluded) as a "scapegoat" exercise used to single him out, the youngest, most junior employee, to blame for a "bad situation". Mr. Bean claimed that it was he, in fact, who tried to calm down the other paramedics who were letting their high emotions color their actions. (*Testimony of Appellant*)

25. As a result of Chief Doucette's report to CIEMSS, Dr. Herbst ordered that Paramedic Bean remain on probationary status pending a meeting to be scheduled with him, and required that he work alone only at the EMT-Basic level and be supervised by another Paramedic at all times when performing ALS level care. After meeting with Paramedic Bean on September 17, 2008, Dr. Herbst extended the probationary status for six months, and recommended that Bean again be mentored by Paramedic Simpson ("with whom [Bean] states he is very compatible") and would be a "good mentor" who could "advance Mr. Bean to status of an independent, fully authorized paramedic." Mr.

Cook's testimony that Paramedic Bean was in full agreement with this plan was not disputed. (*Exh. 3e-3g; Testimony of Appellant, Chief Doucette & Mr. Cook*)

26. Pursuant to this order, Chief Kingsbury spoke to Paramedic Simpson and tasked him to mentor Paramedic Bean and "point him in the right direction". Paramedic Bean was assigned to be the "tech" on every call, which meant that he was supposed to take the lead in assessment and treatment. There was occasionally a third paramedic (possibly Paramedic Dupuis) on the call to assist with the mentoring. There was no formal mentoring plan. Paramedic Simpson said he provided oral reports to Chief Kingsbury and CIEMSS, but Mr. Cook did not recall them. There were no written evaluations. Paramedic Bean described this mentoring period as having little structure or value. (*Testimony of Appellant, Chief Doucette & Paramedic Simpson*)

27. Paramedic Simpson detected something "different" about how Paramedic Bean handled his work as opposed to his perceptions about him from his earlier association when Bean first returned from the Fire Academy. He called Paramedic Bean a "good kid" who showed "some improvements" and was very "concerned about his future". He said "every call was a complete work up" which was "not wrong" because you "should always be a little bit scared", but it indicated a problem with "big picture issues". He described one specific incident in which Bean "couldn't get a blood pressure" and his anxiety in front of the patient's mother upset her. (*Testimony of Paramedic Simpson*)

28. Soon after Acting Chief Doucette assumed charge of the Department at the end of January 2009, he reviewed the Simpson mentoring process and concluded the "problems" with Paramedic Bean needed a more structured approach. Following a meeting with Dr. Herbst on February 11, 2009, Chief Doucette assigned Lt. Fusco, under his supervision,

to develop formal mentoring procedures based on Dr. Herbst's direction, which resulted in a written mentoring program, by which another Paramedic (designated as a "preceptor") on the call with Paramedic Bean would be required to complete an Evaluation Form regarding Bean's performance after each run, over a seven week period, to be maintained together with the Standard Ambulance Report Form (so-called AMBUPRO Report) documenting the call for OEMS reporting purposes. Periodic progress reviews would be scheduled with Paramedic Bean to review his performance. (*Exhs. 3h, 4, 5; Testimony of Chief Doucette, Lt. Fusco & Mr. Cook*)

29. On or about February 22, 2009, CIEMSS issued a Policy regarding "Denial, Suspension, or Revocation of Authorization to Practice" (CIEMSS Policy C-111) which it later revised on or about June 15, 2009. This policy listed eight categories of reasons that an Authorization to Practice may be suspended or revoked, including "failure by an employee to exercise reasonable care, judgment, knowledge or ability in the performance of medically related duties or the failure to perform those duties within the scope of the employee's training, standards of care, established protocols and/or certification, all as required under G.L.c.111C, the regulations promulgated there-under, and/or the rules, regulations and policies promulgated by the Affiliation Agreement." CIEMSS Policy C-111 also states:

> "The AHMD [Affiliate Hospital Medical Director] and only the AHMD shall have the authority over any actions for Denial or Suspension or Revocation of Authorization to Practice . . . Any denial, suspension or revocation of an employee's Authorization to Practice issued by the AHMD shall be implemented and enforced by the Ambulance Service Administrator of the Ambulance Service to which the employee belongs." (emphasis in original)

CEIMSS Policy C-111 also established an administrative process to request a review of the AHMD's decision to deny, suspend or revoke an Authorization to Practice, and stated

that all of those decisions be reported by the AHMD to the appropriate officials at OEMS.[2] (*Exh. 6; Testimony of Mr. Cook*)

30. Paramedic Bean was evaluated under the BFD's newly implemented mentoring program on a series of 39 calls to which he responded over a period from March 2, 2009 through April 3, 2009. Progress meetings were conducted with Paramedic Bean on March 20, 2009 and April 16, 2009. During these sessions, Paramedic Bean continued to declaim his proficiency despite the criticism, to which Dr. Herbst was reported to have replied "You just don't get it." (*Exhs.7A,7B & Post-Hearing Exhs.21-ID & 22-ID[AMBUPRO Reports]; Testimony of Appellant, Chief Doucette, Lt. Fusco & Cook*)

31. The Evaluation Reports are a mixed bag, with many positive comments along with many negative ones. Lt Fusco singled out three incidents, for which the radio transmissions by Paramedic Bean to the hospital were played at the hearing and the alleged deficiencies explained, most of which Paramedic Bean later disputed. The Evaluation Reports are replete with technical and medical matters, most of which were not explained in testimony. I reviewed these records carefully but cannot fairly draw inferences about many of the preceptors' technical conclusions of patient care, most of which are not matters that are accessible to a layperson. I have closely examined these reports, however, for any apparent pattern or evidence that the negative conclusions were predominately the product of preceptors, or others, whom the Appellant named as biased and predisposed against him for personal, as opposed to professional reasons, which include Lt. Fusco (Union President), Paramedics Ferro, Emberg, Gata, Pomar (the July

[2] The February 22, 2009 version of CIEMSS Policy C-111 also contained language regarding an employee's statutory, collective bargaining and civil service appellate rights to challenge a loss of the Authorization to Practice, which language was eliminated in the June 15, 2009 version. (*Exh. 6*)

18, 2008 critics) & Paramedic Goulart (who was allegedly always impatient and rushing him). I do not find the evidence presented to the Commission on this point sufficient to warrant reaching such a conclusion. (*Exh.7a; Post-Hearing Exhs.21-ID & 22-ID; Testimony of Appellant, Lt. Fusco & Mr. Cook*)

32. To the contrary, for example:

- Evaluation Report on Run #661 on 3/13/09 (Priority 2) states: "Jon had somewhat of a difficult time determining what the pt's problem was. Jon was going to do a complete workup on a pt who didn't need it. I cannot fault him as this is what he has been advised to do. However, at this point, he should be able to determine what the pt's condition is & how to treat appropriately." He was rated a "2" ("1" being poorest and "4" being highest proficiency) on "Treatment Decision Structure" and "2.5" on General Medical Knowledge and Diagnosis - Accurately Identifies Condition. Based on the personnel with Mr. Bean on that call (as listed on the AMBUPRO Report), this Evaluation Report would appear to have been completed by Paramedic Simpson, Bean's former and trustworthy mentor.
- Ten days later, on Run #755 on 3/23/09 concerning a Motor Vehicle accident, another call on which Paramedic Simpson was on board, the Evaluation Report gave Bean a "2.5" on Knowledge and "2.5" on Diagnosis and states "Jon continues to have a hard time/difficulty with radio reports & verbal reports at the hospital."
- The Evaluation Report for Run # 718 on 3/18/09 for an allergic reaction call (Paramedics Santos and Haden) rated Bean deficient in nearly all categories and commented: "needs to work on his communication w/patients. He speaks to them on a very non-personal basis as if pt's were objects (non-living) . . . failed to take lung sounds until prompted to."
- The Evaluation Report on Run #849 on 4/3/09 (the final day of the evaluation period) for a public assist with a breast cancer patient (Paramedics Tura and Doherty) also rated Bean deficient in nearly all categories.
- Paramedic Bean actually received his highest ratings on calls accompanied by two of his alleged nemeses, Paramedic Goulart (Run #565 – all "4s") and Paramedic Gata (Run #591 –"3s" and "4s"; Run #831 – "3s" and "4s).

(*Exhs. 7a & Post-Hearing Exhs.21-ID & 22-ID[AMBUPRO Reports]*)

33. On April 21, 2009, having met with Paramedic Bean, CIEMSS Director Cook, Chief Doucette and other BFD command staff, and after having reviewed the Evaluation Reports, Dr. Herbst issued a memorandum to Paramedic Bean which communicated the

decision to revoke his Authorization to Practice within Dr. Herbst's Cape Cod Healthcare catchment area. Dr. Herbst's memorandum stated: "While you are obviously a very sincere and dedicated employee, you currently lack several very important skill sets in your practice, particularly patient assessment and treatment decision making. . . . If in the future, you believe that your assessment and treatment skills are considerable [sic] improved, by any means you chose, please feel free to ask for a reassessment." On April 30, 2009, as required, Dr. Herbst reported to OEMS his decision to revoke Paramedic Bean's Authorization to Practice, stating that "Mr. Bean is unable to successfully function as an independent ALS practitioner. His inability to properly perform routine patient assessment and to develop a treatment plan creates unacceptable conditions for his mandated occupational responsibilities as a Paramedic." (*Stipulated Facts; Exhs. 8 & 19*)

34. On May 5, 2009, based on Dr. Herbst's decision, Bourne's Town Manager, the Appointing Authority over the BFD, notified Paramedic Bean that his employment as a BFD Paramedic was terminated, effective immediately, "[s]ince the area Medical Director will no longer allow you to practice "under" his medical license you are not able to fulfill the requirements of the position . . ." (*Stipulated Facts; Exh. 9*)

35. Paramedic Bean said Dr. Herbst's decision took him by surprise, as he had thought his evaluation period had gone well. On May 8, 2009, he requested a hearing with Dr. Herbst, which was held on Friday June 5, 2009, with private legal counsel present. Following this hearing, on June 15, 2009, Dr. Herbst affirmed his decision to revoke Paramedic Bean's Authorization to Practice. Dr. Herbst stated:

> "I hope you recognize that Paramedics in our catchment area are practicing under my medical license and where I am not absolutely comfortable that those patients being served are receiving the highest standards of paramedic [c]are, I cannot continue to authorize the continued practice by you or anyone else who is found to be deficient in

certain skills and abilities . . . . [which] in my opinion, require your having additional training and hands on instruction. . . ."

(*Exhs. 9, 10 & 11; Testimony of Appellant & Mr. Cook*)

36. Paramedic Bean requested that Local 1717 intervene on his behalf to grieve or otherwise challenge his termination, but the union duly voted not to do so. This appeal to the Commission duly ensued. (*Testimony of Appellant & Lt. Fusco; Stipulated Fact on the Record; Claim of Appeal*)

37. Meanwhile, OEMS conducted its own independent investigation of Dr. Herbst's decision and concluded that the allegations that Paramedic Bean "repeatedly failed to perform appropriate patient assessments and make treatment decisions" were valid. OEMS issued its own Letter of Clinical Deficiency/Order to Correct, which required Paramedic Bean to complete an independent evaluation of his clinical performance in a simulation lab. The completion of this remediation plan was pending at the time of the hearing before the Commission. (*Exh.20 & Post-Hearing Exh.23-ID[E-mail re: OEMS remediation plan]*)

CONCLUSION

Summary

Bourne has met its burden of proving that it was justified to terminate the Appellant's employment as a BFD Paramedic after his Authorization to Practice as a Paramedic had been revoked by the supervising AHMD. Without such an Authorization to Practice, the Appellant was prohibited from providing ALS level patient care, which was an essential condition of his job duties. The Commission rejects the Appellant's arguments that would, in effect, require the Commission to determine whether the AHMD was justified in deciding to revoke the Authorization to Practice, either because his decision was

tainted by bias or other flaws in the evaluation process on which he presumably relied to make that decision. The Commission also rejects the Appellant's argument that his discipline be modified, in effect, to a demotion to an EMT-Basic position. Whatever merit those arguments may have, the remedy, if any, lies outside any applicable civil service law.

Applicable Legal Standards

Under G.L.c.31,§43, a tenured civil service employee aggrieved by a disciplinary decision of an appointing authority made pursuant to G.L.c.31,§41, may appeal to the Commission. The Commission has the duty to determine, under a "preponderance of the evidence" test, whether the appointing authority met its burden of proof that "there was just cause" for the action taken. G.L.c.31,§43. See, e.g., Town of Falmouth v. Civil Service 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); McIsaac v. Civil Service Comm'n, 38 Mass App.Ct.473,477 (1995); Town of Watertown v. Arria, 16 Mass.App Ct. 331,334, rev.den.,390 Mass. 1102, (1983).

An action is "justified" if "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). 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, 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' [both within and across different appointing authorities]" 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. It is also a basic tenet of the "merit principle" which governs Civil Service Law that discipline must be remedial, not punitive, designed to "correct inadequate performance" and "separating employees whose inadequate performance cannot be corrected." G.L.c.31,§1.

The Appointing Authority's burden of proof is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) The Commission must take account of all credible evidence in the record, including whatever may fairly detract from the weight of any particular evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65 (2001)

It is the purview of the hearing officer to determine 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." E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) 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). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003) (where live witnesses gave conflicting testimony at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing)

In performing its appellate function, "the commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew. . . . [after] 'a hearing de novo upon all material evidence and a decision by the commission upon that evidence and not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer' . . .For the commission, the question is . . .'whether, *on the facts found by the commission*, there was reasonable 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.' " Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003) (affirming Commission's decision to reject appointing authority's evidence of appellant's failed polygraph test and prior domestic abuse orders and crediting appellant's exculpatory testimony) (*emphasis added*). cf. Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (inconsequential differences in facts found were insufficient to hold appointing authority's justification unreasonable); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (commission arbitrarily discounted undisputed evidence of appellant's perjury and willingness to fudge the truth); Town of Watertown v. Arria, 16 Mass. App. Ct. 331, 334, rev.den., 390 Mass. 1102, (1983) (commission improperly overturned discharge without substantial evidence or factual findings to

address risk of relapse of impaired police officer) See generally Villare v. Town of North Reading, 8 MCSR 44, reconsid'd, 8 MCSR 53 (1995) (discussing need for de novo fact finding by a "disinterested" Commissioner in context of procedural due process); Bielawksi v. Personnel Admin'r, 422 Mass. 459, 466, 663 N.E.2d 821, 827 (1996) (same)

In reviewing the commission's action, a court cannot "substitute [its] judgment for that of the commission" but is "limited to determining whether the commission's decision was supported by substantial evidence" and is required to 'give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it. . .This standard of review is highly deferential to the agency on questions of fact and reasonable inferences drawn therefrom.' " Brackett v. Civil Service Comm'n, 447 Mass. 233, 241-42 (2006) and cases cited.

G.L.c.31, Section 43 also vests the Commission with the authority to affirm, vacate or modify the penalty imposed by the appointing authority. The Commission has been delegated with "considerable discretion", albeit "not without bounds", to modify a penalty imposed by the appointing authority, so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. E.g., Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594,600 (1996) and cases cited.

> "It is well to remember that the *power to modify is at its core the authority to* review and, when appropriate, *to temper, balance, and amend*. The power to modify penalties permits the furtherance of uniformity and equitable treatment of similarly situated individuals. *It must be used to further, and not to frustrate, the purpose of civil service legislation, i.e., 'to protect efficient public employees from partisan political control' . . and 'the removal of those who have proved to be incompetent or unworthy to continue in the public service*'."

Id., 39 Mass.App.Ct. at 600. (*emphasis added*). See Faria v. Third Bristol Div., 14 Mass.App.Ct. 985, 987 (1982) (remanded for findings to support modification)

In deciding whether to exercise discretion to modify a penalty, however, the commission's task "is not to be accomplished on a wholly blank slate. After making its de novo findings of fact, the commission must pass judgment on the penalty imposed, a role to which the statute speaks directly. G.L.c.31,§43. Here, the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether "there was reasonable 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.' " Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983). "The 'power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded to the appointing authority." Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct. 796, 800 (2004) quoting Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 600 (1996).

Thus, when it comes to its review of the penalty, unless the Commission's findings of fact differ materially and significantly from those of the appointing authority or interpret the relevant law in a substantially different way, the commission is not free to "substitute its judgment" for that of the appointing authority, and "cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation."). Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited (minor, immaterial difference in factual findings by Commission and appointing authority did not

justify modification of 180 day-suspension to 60 days). See, e.g., Town of Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct. 796 (2004) (modification of 10-day suspension to 5 days unsupported); Commissioner of MDC v. Civil Service Comm'n, 13 Mass.App.Ct. 20 (1982) (discharge improperly modified to 20-month suspension); cf. School Committee v. Civil Service Comm'n, 43 Mass.App.Ct. 486, rev.den., 426 Mass. 1104 (1997) (modification of discharge to one-year suspension upheld); Dedham v. Civil Service Comm'n 21 Mass.App.Ct. 904 (1985) (modification of discharge to 18-months suspension upheld); Trustees of the State Library v. Civil Service Comm'n, 3 Mass.App.Ct. 724 (1975) (modification of discharge to 4-month suspension upheld)

Loss of Authorization to Practice

The Commission has repeatedly upheld the indefinite suspension and/or termination of an employee who lost a license that was essential to perform the duties of his public position. See Cannella v. North Andover Fire Dep't, 21 MCSR 266 (2008) (discharge for failure to obtain EMT certification); Britt v. Department of Public Health, 20 MCSR 364 (2007) (termination of electrician who failed to maintain his professional electrician's license); McGravey v. Town of Bedford, 10 MCSR 5 (1996) (indefinite suspension of police officer whose driver's license was revoked despite alleged option of desk duty or bicycle patrol); Furtado v. Town of Plymouth, 6 MCSR 195 (1993) (same): but see Kelly v. Town of Winchester, 7 MCSR 201 (1994) (allowing appeal by EMT whose license was suspended for lapse of OEMS certification, due entirely to a postal error in losing updated CPR license mailed to OEMS)

This principle is fully applicable to the revocation of a Paramedic's Authorization to Practice. Without such Authorization to Practice, a Paramedic is precluded from

providing ALS level patient care, which is required on many, if not most, of the calls to which the BFD is required to respond. It is reasonable to infer that, in some cases, whether ALS level service is necessary will not always be known until the BFD arrives on scene. Bourne is fully justified to require that, its ALS service be staffed, as fully as it resources permit, with Paramedics who have an Authorization to Practice at the ALS level, as required by G.L.c.111C, and to impose, as a condition of employment as a Paramedic with the BFD, that the employee hold such an Authorization to Practice.

Bourne contends that this conclusion puts an end to the Appellant's claim of appeal. The Appellant, however, contends that there are extenuating circumstances that warrant further scrutiny by the Commission into the decision to revoke the Appellant's Authorization to Practice. These additional arguments are not without virtue, but they do not impel the Commission to allow the Appellant's appeal for the reasons explained below.

Alleged Bias and Flaws in the Evaluation Process

The Appellant presses the idea that Dr. Herbst's decision here, albeit made without apparent bias by Dr. Herbst, himself, may be unlawfully tainted by bias of certain BFD personnel who provided the information upon which he reached his conclusion. The idea does have some legal foundation. See Natal v. City of New Bedford, 22 MCSR 568, 573 (2009) citing Llampallas v Mini Circuits Lab, Inc., 163 F.3d 1236, 1249 (11th Cir. 1998), cert.den., 120 S.Ct. 327, 145 L.Ed.2d 255 (1998); Willis v. Marion County Auditor's Office, 118 F.3d 547 (7th Cir. 1997) and cases cited; Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990) Application of this principle must fail here, however, for two reasons.

First, the evidence available in this record falls short of establishing that unlawful bias was a material and contributing factor in Dr. Herbt's ultimate decision. Rather, Paramedic Bean was subject to criticism from a variety of sources, ranging from his former mentor, Paramedic Simpson, to the OEMS which independently investigated the matter and validated Dr. Herbst's conclusions. In addition, it appears that Dr. Herbst conclusions were based, in part, on his own personal observations of Paramedic Bean during the several meetings held with him.

Similarly, a number of legitimate factors, not the least is cost, can enter into the decision of a labor union local to press a member's claim to a grievance. Thus, the fact that Local 1717 declined to grieve Paramedic Bean's termination, standing alone, is not sufficiently credible evidence upon which to infer that the union leadership was personally biased against the Appellant in this case. Moreover, should the Appellant believe that there is sufficient evidence of such bias on this latter ground, there are other more appropriate remedies available to him. See G.L.c.150E, §10(b).

Second, the Commission is loathe to intrude into the province of another specialized agency such as OEMS on matters involving non-civil service laws, especially when application of statutory and regulatory standards affecting public health and safety to the disputed facts of a particular case are involved. Although the Appellant's testimony may fairly be viewed to raise legitimate questions about some of the conclusions of Dr. Herbst and OEMS as to the Appellant's competence to operate independently as an ALS EMT-Paramedic, the Commission is obliged to defer to the expertise of the AHMD and other authorities designated by statute and cannot make de novo determinations on those questions. Resolution of conflicting evidence on such purely technical matters is a fact-

finding responsibility that lies beyond the Commission's jurisdiction and is best left to another forum with expertise and resources to adjudicate the dispute properly. See Erickson v. Town of Oxford, 22 MCSR 14 (2009) (violation of ethics laws for determination of State Ethics Comm'n); Norton v. City of Melrose, 21 MCSR 530 (2008) (Section 111F disability leave benefits dispute for civil action or collective bargaining)

The same analysis must lead the Commission to reject the Appellant's related argument that procedural flaws in the mentoring process skewed it against the Appellant and, in effect, "set him up to fail". The evidence presented in this record does not warrant such a conclusion. Indeed, there is considerable credible evidence that Mr. Bean was given plenty of opportunity to prove himself.

Although the Appellant has credibly established that some of his "mentoring" was less than perfect, and that the formal evaluation process put in place in March 2009 could have been better designed and implemented in certain respects, that does not necessarily infer that these alleged flaws in the process, although not optimal, pre-disposed Mr. Bean to fail or made a material difference in the outcome.[3] By the same token, the Commission is not in a position to assess whether the substance of the Evaluation Reports, in any given case, are factually accurate and represent a good faith, fair assessment of the circumstances. This, too, would require the Commission to make

[3] The Appellant has a point that there was a lack of transparency and little "mentoring" in his training and evaluation process. In particular, he questioned whether his "peers", who lacked training in mentoring or evaluating performance, should have been used as sources for reports on him, which he was not permitted to see until after his termination. Bourne contends this process was needed to preserve the integrity of the evaluations and insulate co-workers from Mr. Bean's potential retaliatory behavior. The Commission is not in a position to micro-manage Bourne's mentoring plan (which appears on its face to be sufficient under basic merit principles), but it may behoove Bourne to revisit its procedures to ensure that the "lessons learned" in this case are incorporated into future situations to avoid the criticism expressed here, and to ensure that, prospectively, the process is not only facially objective, but also acknowledged as truly objective in application, to the satisfaction of all parties who may be affected.

address the conflicting evidence and make de novo determinations on the merits of the medical care issues which it declines to do in this case for reasons previously expressed.

Demotion to EMT-Basic

The Appellant also contends that Bourne need not have terminated Mr. Bean, but could have reassigned him to a position of EMT-Basic, which does not require him to possess an Authorization to Practice.

The Appellant points out that BFD employs some EMT-Basic personnel, and argues that Paramedic Bean should have been re-assigned to such duties rather than be terminated.[4] The Appellant cites language in the applicable collective bargaining agreement between Bourne and Local 1717, that a transfer of a Firefighter-Paramedic to a Firefighter-EMT position is a plausible scenario, and, perhaps, would be mandated in some cases. See Exh. 1, Art. XVIII, Sec. 17.[5] Bourne argues that these points are not matters within the purview of the Commission, but rest within the discretion of the Appointing Authority's hiring decision-making prerogatives and/or obligations assumed in collective bargaining as to which the Commission has no authority to interfere.

Bourne's argument comes close to the mark, but, as noted above, the Commission is vested with "considerable discretion" to order a modification of the Appellant's discipline to place him in a position of EMT-Basic if the circumstances warranted it.

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[4] The only evidence of the breakdown BFD's personnel by EMT level is found in the AMBUPRO reports complied during the March-April 2009 evaluation of Paramedic Bean, which contain the names of 19 Paramedics and 5 EMT-Basics. (*Post-Hearing Exh. 21-ID & 22-ID*) The Commission is warranted to infer that these data are accurate and reasonably representative of the breakdown of the BFD's EMS staff.

[5] The relevant language of the CBA states in part: "The Fire Chief shall control the number of EMT and Paramedic certificate holders for which it will make payment in any fiscal year . . . If the Chief decides to hire a firefighter/EMT, an incumbent Firefighter/Paramedic with at least seven years of service may elect to fill such position, and in that event the Chief may hire a firefighter/paramedic to replace the individual filing the firefighter/EMT position."

After careful consideration, however, a demotion to EMT-Basic does not seem warranted in the circumstances of this case. Bourne is correct that, as a general rule, the decision as to the performance standards, minimum qualifications and experience required of its EMS staff to service the public health and safety needs of the community they serve is a matter that rests within the sound discretion of the Appointing Authority. See, e.g., Town of Watertown v. Arria 16 Mass.App.Ct. 331 (1997), See also Goldblatt v. Corporate Counsel of Boston, 360 Mass. 660, 666 (1971); City of Somerville v. Somerville Municipal Employees Ass'n, 20 Mass.App.Ct. 594, 597, rev.den., 396 Mass. 1102 (1985); City of Worcester v. International Bh'd of Police Officers, Local 504, 1998 WL 1183944 (Mass. Sup.Ct.1998).

Bourne also correctly asserts that state law establishes a preference – if not the obligation – to staff EMS services at the Paramedic level. According to Chief Doucette and Mr. Cook, the waiver under which BFD operates, require that, in the absence of a approval by OEMS, when an EMT-Basic employee leaves the BFD, he or she must be replaced by another equally qualified employee certified at the same Paramedic level. To be sure, it would be possible to envision that Paramedic Bean could be assigned EMT-Basic duty, which would require Bourne to add one additional employee to the staff or run the BFD with one less qualified Paramedic. While there may be no legal impediment for Bourne to choose that path, nothing in the evidence established that it was required to elect to do so, and the Commission is not inclined to exercise its discretion under Section 43 to order such a result in the circumstances of this case. See generally McGravey v. Town of Bedford, 10 MCSR 5 (1996) (indefinite suspension of police officer whose driver's license was revoked despite alleged option of desk duty or bicycle patrol)

The Appellant's final argument is that the applicable collective bargaining agreement invites or compels demoting Paramedic Bean to EMT-Basic status. The Commission does not address that issue, however, because it involves construing contract rights under a collective bargaining agreement which – unless they conflict with civil service law (not allegedly the case here) – it is generally inappropriate for the Commission to attempt to interpret or enforce. See, e.g., Almeida v. New Bedford School Comm., 22 MCSR 739, 742n.1 (2009); Choiniere v. City of Worcester, 21 MCSR 129 (2008); Tocci v. City of New Bedford, 18 MCSR 36 (2005) See generally, G.L.c.150E, §7; City of Fall River v. AFSCME Council 93, 61 Mass.App.Ct. 404, 411 (2004); Mayor of Lawrence v. Kennedy, 57 Mass.App.Ct. 904 (2003); City of Leominster v. Int. Brotherhood of Police Officers Local 338, 33 Mass. App. Ct. 121, 124-27 (1992). There is no apparent reason to deviate here from this well-established rule.

Accordingly, for the reasons stated above, the appeal of the Appellant, Jonathan Bean is hereby ***dismissed***

Civil Service Commission

Paul M. Stein
Commissioner

By 3-1 vote of the Civil Service Commission (Bowman, Chairman [AYE]; Henderson [NO], Marquis [ABSENT], McDowell [AYE] & Stein {AYE], Commissioners) on January 27, 2011.

A True Record. Attest:

Commissioner

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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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

Notice to:
John M. Becker, Esq. (for Appellant)
Robert S. Troy, Esq. (for Appointing Authority)