

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

100 Cambridge Street, Suite 200
Boston, MA 02108
(617) 979-1900

ROBERT BROWN, JR.,
Appellant

v.

CITY OF CHELSEA,
Respondent

D-21-223

Appearance for Appellant:

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Appearance for Respondent:

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Commissioner:

Paul M. Stein

Summary of Decision

The Commission upheld the six-month suspension and demotion of a Fire Captain to Firefighter, finding that the Appellant's persistent pattern of attendance issues, culminating in an unjustified refusal to return to work, even on limited duty, by claiming he was unable to perform clerical desk duties with accommodation for his condition while simultaneously pursuing his own private business and personal affairs that involved equally or more arduous physical activity, warranted the discipline imposed.

DECISION

On December 2, 2021, the Appellant appealed to the Civil Service Commission (Commission), pursuant to G.L. c. 31, §43, contesting the decision of the City of Chelsea (Chelsea) to impose a six-month suspension and demotion two ranks from his position of Captain to Firefighter with the Chelsea Fire Department (CFD).¹ The Commission held a remote pre-hearing videoconference via

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.01 (formal rules), apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

Webex on January 11, 2022. A full hearing was held at the Commission's offices in Boston over eight (8) days on March 29, 2022, April 12, 2022, May 12, 2022, June 21, 2022, July 12, 2022, October 3, 2022, October 4, 2022 and October 19, 2022 (with the testimony of one witness received via remote videoconference). The full hearings were audio/video recorded and also recorded and transcribed at the parties' expense by a Certified Shorthand and Registered Professional Reporter with a copy provided to the Commission. The parties stipulated that the written transcript shall serve as the official record of the hearing.² The hearing as declared private, and witnesses were sequestered. Each party submitted a proposed decision on March 17, 2023. For the reasons stated below, the Appellant's appeal is denied.

FINDINGS OF FACT

The Commission received into evidence 162 exhibits (*Resp.Exhs.1 through Resp.Exh.102 & App.Exh.1 through App.Exh.60*). Two exhibits were marked for identification (*Resp.Exh.103ID & Resp. Exh.104ID*). On March 17, 2023, the Appellant filed a Motion to Supplement the Record, to which he attached two sets of additional documents (Exhibits B & C), which motion Chelsea opposed. On May 30, 2023, the Appellant filed a Second Motion to Supplement the Record, to which he attached five sets of documents (Exhibits A through E), which Chelsea also opposed.³

²If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with the written transcripts to the extent that the plaintiff challenges the decision as unsupported by substantial evidence, arbitrary and capricious, or an abuse of discretion.

³ For reasons explained in the Respondent's Opposition and in this Decision, the Appellant's first Motion to Supplement the Record is denied. The proposed documents attached to the Appellant's first Motion as Exhibits B & C, are marked for identification as *App.PHExh.61ID* and *App.PHExh.62ID*, respectively. For similar reasons, the Second Motion to Supplement the Record is denied save for the proposed documents attached to the Appellant's Second Motion as Exhibits B, C & D are received in evidence for the limited purpose of establishing that they are accurate copies of documents filed by the Appellant in related civil actions and are marked collectively as *App.PHExh.63*. The documents attached to the Second Motion as Exhibit E is marked collectively as *App.Exh.64ID*. Exhibit A to the Second Motion is duplicative of other documents in evidence.

Based on the documents submitted and the testimony of the following witnesses:

For the City of Chelsea:

- Thomas Ambrosino, (then) Chelsea City Manager, Appointing Authority
- Edward Ells, Chelsea Director of Human Resources
- Leonard Albanese, Jr., CFD Fire Chief
- Brian Capistran, CFD Fire Lieutenant/President, Chelsea Firefighters, Local 937, Int'l Ass'n of Fire Fighters, AFL-CIO
- Robert Denning, CFD Fire Captain
- Kathleen Leone, R.N., Case Manager, USI/Future Comp
- Anthony Vigna, Adjuster, USI/Future Comp

For the Appellant:

- Robert Brown, Jr., Appellant
- Robert Houghton, CFD Deputy Chief
- Wayne Ulwick, CFD Deputy Chief
- Atul Bhat, M.D. (testified via remote videoconference)

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, and reasonable inferences therefrom, a preponderance of the evidence establishes the following findings of fact:

Background – Chelsea

1. Chelsea is a city in Suffolk County, Massachusetts, directly across the Mystic River from Boston with a population of approximately 40,000 and an area of 2.46 square miles, making it the smallest Massachusetts city in Massachusetts in total area and its second most densely populated city. (*Administrative Notice* [https://en.wikipedia.org/wiki/Chelsea,_Massachusetts])

2. The Chelsea city charter vests executive and administrative powers in an appointed city manager who handles the day-to-day administration of city affairs and serves as the Appointing Authority over personnel appointments, including all CFD employees. (*Tr.II:274-76 [Ambrosino]; Administrative Notice* [https://en.wikipedia.org/wiki/Government_of_Chelsea,_Massachusetts])

3. Thomas Ambrosino became the Chelsea City Manager (CCM) in July 2015. He served in that position at all times relevant to the disciplinary action that is the subject of this appeal.

Previously, he served as the Mayor of Revere and as the Executive Director of the Massachusetts Supreme Judicial Court. (*Tr.II:274-75 [Ambrosino]*)⁴

4. One of the “first and major tasks” that CCM Ambrosino needed to address was the search for a new Fire Chief for the CFD to tackle the “many” problems then facing that department, including, among other things, outdated policies and procedures as well as a long history of contentious labor/management issues. (*Tr.I:41-42[Albanese]*) *Tr.II:275-77[Ambrosino]*)

5. In April 2016, CCM Ambrosino appointed Leonard Albanese, Jr. as the CFD Fire Chief. Chief Albanese came to the CFD with over 30 years of experience in the North Providence, RI Fire Department, where he was promoted through the ranks and served six years as the Fire Chief of that department. (*Tr.I:41[Albanese]*) *Tr.II:275[Ambrosino]*)

6. Reporting to CCM Ambrosino, Chief Albanese was hired to bring “strong leadership” to the CFD. Coming into the department as an “outside” Chief, CCM Ambrosino tasked Chief Albanese to take a fresh look at the CFD’s practices, policies and procedures and “do whatever [he] needed to do” to “put the department in the right direction.” (*Tr.I:41-42;Tr.II:190-93,199[Albanese];Tr.II:276-77 [Ambrosino]*)

7. When Chief Albanese became Fire Chief, Chelsea and the Chelsea Firefighters, Local 937, Int’l Ass’n of Fire Fighters, AFL-CIO (the Union) were parties to a Collective Bargaining Agreement, effective July 1, 2014 to June 30, 2017, and extended and amended through June 30, 2024 by several subsequent Memoranda of Agreement (the CBA). (*Resp.Exh.1;App.Exh.1*)

⁴ City Manager Ambrosino left Chelsea in January 2023 to assume the position of Administrator of the Massachusetts Trial Court. (*Administrative Notice [<https://chelsearecord.com/2022/12/29/council-to-begin-search-process-for-new-city-manager-in-january/>]*)

8. The Union represents all CFD personnel, save for the Fire Chief and his executive secretary. CFD Lt. Brian Capistran, a twenty-year CFD veteran, serves as Union President.

(Tr.I:43,46;Tr.II:200[Albanese];Tr.II:275-276[Ambrosino];Tr.VII:1225-30 [Capistran])

9. Upon assuming command of the CFD, Chief Albanese began to introduce a number of changes to the CFD's standard operating policies and procedures. The changes were bargained with the Union, as necessary. All fire service personnel are required to comply with these new policies and procedures, which include, in relevant part:

- November 2016 - Updated the CFD Operations Manual, including (a) a new Code of Ethics and Discipline (ORG-11) and (b) detailed job descriptions setting forth the duties and responsibilities of the fire service ranks of Firefighter (ORG-05), Lieutenant (ORG-06), Captain (ORG-07) and Deputy Chief (ORG-08)
- October 2017 – (a) Abolished compensatory time; (b) replaced two days of sick leave which must be “caused by legitimate personal illness or injury” with two days of vacation time; (c) required sick leave verification after four (4) consecutive tours; and (d) limited overtime work after use of sick leave; and (e) changed the shift start time for all four work groups from 1800 hours (6:00 pm) to 0800 hours (8:00 am)
- August 2019 – Revised the “Service Connected Injuries [SCI] Policy” prescribing the requirements for initial and on-going reporting and documentation of SCI incidents, treatment and return to duty (Policy DP-15)
- July 2021 – Added a new Residency provision to the CBA which established a five-year Chelsea residency requirement as a condition of employment after which CFD firefighters must reside in Chelsea or within 15 miles of the perimeter of Chelsea.

(App.Exh.3;Resp.Exhs.1 thru 8; Tr.I:45-58;Tr.II:211-12[Albanese];Tr.VII:1234-39 [Capistran])

10. Chief Albanese made attendance – “Come to Work” and “Respect the Job” – his top priority. He introduced a new records management database system to replace the outdated Excel spreadsheets that had been used to document attendance. *(Resp.Exh.11; Tr.I:60-65 [Albanese])*

11. Chief Albanese believed that “attendance is everything . . . You have to be here to develop relationships with your crew members. . . . Just like any other team sport, you need to be present in order to be effective and efficient.” *(Tr.I:64 [Albanese])*

12. Chief Albanese reinforced these expectations in several general distribution memoranda which emphasize that “[m]aintaining the work schedule is the most basic and critical employee obligation” because “[p]roper attendance is required for the efficient and effective operation of the department” and “members [must] maintain the regular work schedule . . . and, accurately relay information about illness or injury” (*Resp.Exhs.9 through 11; Tr.I:58-61 [Albanese]*)

Background – The Appellant

13. The Appellant, Robert Brown, Jr., is a tenured civil service CFD employee. In 2008, after two years as a firefighter in Wakefield MA, he transferred to the CFD and rose through the ranks to become a CFD Fire Captain in 2013, a position he held until his demotion in November 2021 that is the subject of this appeal. (*Stipulated Facts; Tr.IV:582 [Appellant]*)

14. The Appellant served in the U.S. Navy from 2002 through 2005, attaining the rank of Petty Officer (E-4) when he was honorably discharged. During his military service, he suffered a crush injury to his dominant right-hand. After his discharge, he was approved by the Veterans Administration (VA) for disability benefits, which he continues to receive. (*App.Exhs.51 through 60; Resp.Exh.78; Tr.IV:582-86, 595-97, 642, Tr.VI:1026-29 [Appellant]*)⁵

15. The Appellant resides in Andover, MA and owns a federally certified, veteran-owned business based in Haverhill, MA with satellite facilities in North Reading, MA. Established in

⁵Chief Albanese knew that the Appellant was a Navy veteran from general conversations with him, but CCM Ambrosino did not. Deputy Chief Houghton recalled the Appellant telling him he was a disabled veteran but neither Chief Albanese nor CCM Ambrosino knew of the Appellant’s status as a disabled veteran until January 2021. (*App.Exh.60; Resp.Exh.78; Tr.II:287-88[Ambrosino]; Tr.I:113,115,Tr.II.340-43,Tr.III:459-75,481,533-37[Albanese];Tr.V:785-86[Houghton]*). No one in Chelsea knew the nature or extent of the Appellant’s military service-connected disability, or that it had more than a physical component, until he produced documents containing that information and testified about them at the Commission hearing. (*App.Exhs.30,40,51 through 59; Tr.IV:583-605,Tr.VI:1043-46[Appellant]; Tr.VII:1191-97[Ells]; Tr.VIII:1369[Leone]; Tr.VIII:1445-46 [Vigna]; Tr.VIII:1495 [Bhat]; Tr.III:360, Tr.VIII:1512 [Albanese]*)

2007 and grown to employ more than 45 employees, the company sells and distributes heating oil, biofuel and propane to homes and government agencies, and provides emergency response services. The Appellant is the company CEO and his wife serves as the company COO. He estimates that he typically works about 15 hours a week for the company. (*Resp.Exhs.84 through 93; Tr.I:582-83, Tr. V:957-970, Tr.VI:1020-22,1054-56 [Appellant]*)

16. Based on the testimony and documents in evidence, the Appellant resides at least 20 miles and a 30-minute drive from CFD Headquarters. His private business is at least 15 miles and a 25-minute drive from his residence. (*Resp.Exh.27;Tr.I:142, Tr.III:393-95 [Albanese]; Tr.IV:582 [Appellant]; Administrative Notice [Google Maps⁶]*)

The Appellant's Prior Warnings for Attendance Issues

17. By email from Chief Albanese dated October 10, 2017, the Appellant received an “oral warning (documented)” for “misuse of time off (i.e., mutual exchanges also known as “swaps”) by having another fire officer work eight (8) of his scheduled shifts in exchange for working a corresponding shift for the other officer, i.e., a swap, but had only “worked off” one of the exchanged shifts. Chief Albanese also ordered the Appellant to meet him on his next day shift “to discuss the overall attendance issue further.” (*Resp.Exhs.1, 8, 12, 13 & 14; Tr.I:80-81 [Albanese]*)

18. Chief Albanese emphasized to the Appellant that the “work for work” concept was well-known to be a key requirement of the mutual exchange policy and there was no “hire-out” practice

⁶<https://www.google.com/maps/dir/168+Hale+St,+Haverhill,+MA+01830/7+Regency+Ridge,+Andover,+MA+01810/@42.7114459,71.2245155,12z/data=!3m1!4b1!4m14!4m13!1m5!1m1!1s0x89e30225eab75e55:0x84a8d4701c5277b3!2m2!1d71.0899501!2d42.7847869!1m5!1m1!1s0x89e3090f78c5dec9:0x75c5201dff4a3584!2m2!1d-71.1360785!2d42.6212273!3e0;https://www.google.com/maps/dir/168+Hale+St,+Haverhill,+MA+01830/7+Regency+Ridge,+Andover,+MA+01810/@42.7114459,71.2035065,12z/data=!3m1!4b1!4m14!4m13!1m5!1m1!1s0x89e30225eab75e55:0x84a8d4701c5277b3!2m2!1d71.0899501!2d42.7847869!1m5!1m1!1s0x89e3090f78c5dec9:0x75c5201dff4a3584!2m2!1d-71.1360785!2d42.6212273!3e0>

allowed by the CBA, law or department policy, i.e., the Appellant could not just pay people to work for him or do anything other than repay a swapped shift by working another shift. Chief Albanese ordered the Appellant to work off his unpaid swaps within a “reasonable time frame”. (*Tr.I:81-84,222-26,Tr.III504-505: [Albanese]; Tr.V:806 [Houghton]; Tr.VII:1212-13 [Denning]*)

19. By April 2018, the Appellant had worked off five (5) of the eight (8) swaps he had been ordered to “swap on” when he received his October 2017 reprimand. By June 2018, he had not “swapped on” any of the three remaining old swaps and he began to “swap off” more shifts. As of October 2018, the Appellant had made an additional nine (9) new swaps and had accumulated twelve total swaps due to be worked off. (*Resp.Exhs.12, 15 & 16: Tr.I:65-66 [Albanese]*)

20. On October 16, 2018, Chief Albanese issued a further “Work Schedule/Written Warning and Sanction” reminding the Appellant that swaps were “work for work” and there is “no hire out” permitted by department or tax regulations. Chief Albanese also noted: (1) the Appellant utilized swaps without reporting them to the Deputy Chief as required (so that the switch would be properly logged and tracked on the “daily accountability sheet” or “roster”)⁷ and (2) he made “inappropriate and misleading use of swaps” by asking a Fire Captain to “stand-by” for most of the Appellant’s scheduled shift, when “stand-bys” were to be used only for “brief relief” of an hour or two. Based on the Appellant’s continued non-compliance with CFD’s mutual exchange rules, Chief Albanese barred the Appellant from further mutual exchanges (“swap offs”) until he worked off the balance of twelve (12) exchanged shifts and him advised that further infractions “will result in more stringent discipline.” (*Resp.Exh.1,App,Exh.1;Tr.I:84-86[Albanese];Tr.V:945 [Appellant]*)

⁷ Swaps must be properly and promptly reported (at least two hours in advance) and documented on the daily roster so that the CFD command staff knows who is working on any particular shift. Failure to follow these procedures can affect safety and administrative accountability, especially, if the CFD is called to respond to a fire. (*Tr.I:85-86, Tr.II:225-226, Tr.III:500-505 [Albanese]*)

21. The Union filed a grievance on the Appellant's behalf over the October 16, 2018 written warning. In November 2018, the grievance was settled by an agreement in which (1) the Appellant was "reminded of the regulations applied to the contractual/mutual exchange provision of the CBA that are outlined in the department's Leave Use policy"; (2) the Appellant was allowed one year to work off the twelve (12) outstanding swaps at a rate of at least one per month; (3) the Chief's prior restriction on new swaps was rescinded and (4) once the Appellant complied with the settlement and worked off the twelve (12) swaps, the Chief's prior written reprimand would be removed from the Appellant's file. (*Resp.Exhs.17 & 18; Tr.I:86-90, Tr.V:945-49,954-55 [Appellant]; Tr.VII:1242, 1330-31 [Capistran]*)

22. As of February 21, 2019, the Appellant still had twelve (12) swaps to work off. By email of that date, Chief Albanese reminded the Appellant that "it is the department expectation that [all] these shifts will be worked off within the one-year period", i.e. by December 2019. (*Resp.Exhs.12 &19; Tr.I:90-91 [Albanese]*)

The Appellant's 2019 Injury

23. On September 1, 2019, the Appellant filed a Service-Connected Injury (SCI) Report (Form 6A) stating that he was subjected to smoke inhalation and "pulled/strained" his lower back while positioning apparatus at a fire scene. He did not work his next scheduled 24-hour tour on September 3-4, 2019. (*App.Exh.4; Resp.Exhs.12 &21; Tr.I:96-97 [Albanese];Tr.IV:622-24 [Appellant]*)

24. The Appellant returned to duty on September 9-10, 2019. While extinguishing a trailer fire that morning, he lost his footing, twisted his knee and filed a Form 6A stating that he, again had "pulled/strained" his lower back but was able to complete his full 24-hour tour. CFD fire station video cameras showed the Appellant moving freely, bending, washing gear, changing into workout clothes, going to the in-house gym for workout and picking up two bags before leaving the station

at the end of his tour at 8:00 am on September 10. (*App.Exh.5; Resp.Exhs.12, 22 & 60 through 72; Tr.I:97-98,105-109 [Albanese]; Tr.IV:624-25 [Appellant]*)

25. An X-ray of the Appellant's spine on September 10, 2019 ordered by Kenneth Dovidio, PA-C, MHP, a Physician's Assistant (PA) at the Appellant's primary care provider, came back as "Normal", showing "no acute fracture or alignment abnormality" and that the "disk spaces are well preserved." (*Resp.Exh.23; Tr.I:98-99 [Albanese]*)

26. The Appellant took sick leave for his next tour on September 11-12, 2019. He saw PA Dovidio on September 12, 2019 and obtained a medical note allowing the Appellant to remain out of work for 30 days, and clearing him for a return to duty on October 13, 2019. As a result, Chief Albanese placed the Appellant on Injury Leave. (*Resp.Exhs.12, 23 & 24; Tr.I:99-102 [Albanese]*)

27. When CFD members suffer a service-connected injury (SCI), they are covered by the CBA (Article XVIII Injury Leave), the CFD SCI Policy (DP-15) and Leave Use Policy (DP-24), and G.L.c.41,§111F (also called 111F benefits). While out on Injury Leave and receiving 111F benefits, the member is entitled to full-pay, tax free, as well as 100% coverage for all medically necessary treatment due to the injury. Chief Albanese has primary fiduciary responsibility, with the support of FutureComp, a third-party administrator (Chelsea is self-insured), to manage a member's treatment on Injury Leave in order to rehabilitate the member and get him/her back to work in a timely and cost-effective manner. FutureComp facilitates medical treatments, but the member, not Future Comp or Chief Albanese chooses his/her own treating provider. (*App.Exhs.1&3; Resp.Exhs.1, 7&8;Tr.I:56,96-97,Tr.II:200-201,206-211,229,252,321,Tr.VIII:1529-39[Albanese]; Tr.VIII:1337, 1403,1421[Leone];Tr.VIII:1427-28,1440-41,1445,1447-48 [Vigna]*)

28. Pursuant to the terms of the CBA the Department Policies and the SCI/Form 6A Release signed by the Appellant, FutureComp made several requests for copies of PA Dovidio's treatment

records for his injured leave. None were provided until Chief Albanese contacted PA Dovidio's office himself and, then, only one office note was received sometime in October 2019. (*App.Exhs.4 through 6; Resp.Exhs.21 , 22, 24 & 25; Tr.I:100-104 [Albanese]*)

29. After returning to duty on October 13, 2019, the Appellant called in sick for his scheduled 10-hour day shifts on October 29, 2019 and on November 6, 2019, as well as for his scheduled full 24-hour tours on November 22-23, November 28-29, November 30-December 1, and December 14-15, 2019. (*Resp.Exh.12*)

The 2019 Surveillance

30. On or about September 20, 2019, at Chief Albanese's request, FutureComp engaged Access Investigations, Inc. to conduct surveillance of the Appellant, which was conducted on eight days in October and November 2019. (*Resp.Exh.26; Tr.I:109-110, 118-19, 188-120, Tr.II:321-26, Tr.IV:539-43 [Albanese]*)

31. Before requesting the surveillance, Chief Albanese had watched station videos showing the Appellant performing his normal duties throughout September 9-10, 2019 tour. In addition, the Appellant had produced no medical records other than the September 10, 2019 "Normal" X-ray to support the September 13, 2019 medical note excusing him from work for 30 days. (*Tr.I:98-109, Tr.II:323-25; Tr.III:540 [Albanese]*)

32. Chief Albanese was aware that the Appellant was nearing his one-year deadline to have worked off his swaps and had yet to show any progress toward meeting that deadline. It appeared that the Appellant was more focused on his outside employment than his duties to the CFD. (*Resp.Exh.12; Tr.I:98-109, Tr.II:321-29 [Albanese]*)

33. Access Investigations' reports for October 3, 4, 9 and 10, 2019 showed no sightings of the Appellant at his residence and business. The surveillance reports for October 7, 2019 establish that

the Appellant arrived at his oil company business at approximately 8:10 am, walked around the property in the company of others, then drove to Plaistow, NH for lunch and returned to the business where he remained until surveillance was discontinued at 3:00 pm. (*Resp.Exhs.26 & 73; Tr.I:110-12 [Albanese]; Tr.1092-97[Appellant]*)

34. The surveillance report for October 29, 2019 (a day the Appellant called out sick) establishes that the Appellant arrived at his business sometime prior to 9:00 am (when the investigator arrived at the location, having not seen the Appellant at his residence). The Appellant emerged from the building, was seen walking around the property at a normal pace, picking up a piece of wood, and reentering the building where he remained until surveillance was discontinued at 2:30 pm. (*Resp.Exhs.27 & 74; Tr.I:120-121 [Albanese]; Tr.VI:1097-98 [Appellant]*)

35. The surveillance report for November 6, 2019 (another sick day), establishes that the Appellant arrived at his place of business before 9:30 am (when surveillance began), came outside about 1:20 p.m., conversed with several others and made a phone call, departed about 2:00 and went to Haverhill for lunch, returned to his place of business about 2:30 p.m., tossed items into a dumpster and entered the business where he remained until about 3:30 p.m. when he returned to his residence. (*Resp.Exhs.28 & 75; Tr.I:121-123 [Albanese]; Tr.VI:1098 [Appellant]*)

36. The Appellant called in sick for the day shift portion (8:00 a.m. – 6:00 p.m.) of the October 29-30, 2019, tour and the November 6-7, 2019 tour because he suffers from a chronic “acid reflux” condition and thought that he might not be able to sleep the night before those tours begin the next morning. He chose to take sick leave in advance rather than wait to see how he felt the next

morning, which he could have done. (*Resp.Exhs.8&12;Tr.IV:748-752, Tr.VI:1098, 1100-1102, 1171-72 [Appellant]*)⁸

37. Chief Albanese “covered the injury” and “didn’t doubt it”, but he was “suspicious that it was “not as severe as [the Appellant] made it out” and, along “with all of the unpaid swaps”, he was concerned that the Appellant “wasn’t getting the message.” (*Tr.I:109 [Albanese]*)

38. Chief Albanese took no action on his suspicions about the Appellant’s recent Injury Leave and sick time, deferring any decisions about discipline for attendance issues to be addressed after the imminent year-end deadline for the Appellant to work off his swaps. (*Tr.I:123-25 [Albanese]*)
Appellant’s 2020 Suspension for Attendance Issues

39. As of January 7, 2020, the Appellant still had not worked off any of the twelve swaps as required by the November 2018 settlement agreement. By letter of that date, CCM Ambrosino informed the Appellant that his failure to do so “is a violation of the [November 2018] settlement agreed to on your behalf by [the Union]” and “also a violation of [the CBA] and the Department’s policy . . .” He scheduled a hearing for January 17, 2020 to determine “whether to suspend the Appellant for twelve (12) tours. . . .” (*Resp.Exhs.12 & 20; Tr.I:91-92 [Albanese]*)

40. On January 9, 2020, Chelsea, the Appellant and the Union entered into a Pre-Suspension Hearing Settlement Agreement consisting of the following terms:

“Captain Brown will serve a twelve consecutive tour suspension commencing January 23; and, he shall forfeit 6 vacation days effective January 23, 2020 and 6 vacation days effective January 1, 2021. It is understood by all that this settlement is final, non-precedent setting and relieves Captain Brown and any member associated with Captain Brown's mutual exchange history from October 2017 through December 2018, of any further disciplinary action relating to this matter.”

(*Resp.Exh.20*)

⁸The CFD’s Leave Use policy makes an exception for the general requirement for advance reporting of sick leave in the case of a “sudden onset illness”, which the Appellant acknowledged was an option. (*Resp.Exh.8; Tr.VI:1100-1102 [Appellant]*)

41. At the Commission hearing, despite certain prior statements to the contrary, the Appellant acknowledged to me that “for purposes of this proceeding” the Appellant is not disputing that he had committed the infractions described in the Pre-Suspension Hearing Settlement Agreement and the discipline imposed (a suspension and loss of vacation time) was a legitimate exercise of Chief Albanese’s discretion to order him to comply with that agreement. (*Tr.V:954-56 [Appellant]*)

Appellant’s 2021 Injury

42. While responding to a structure fire during his June 2-3, 2021 tour, the Appellant was pulling a fire hose up a stairway and “twisted and strained” his back and suffered smoke inhalation. He completed the shift and filed an SCI Report (Form 6A) of the incident. (*App.Exhs.7, 8 & 12;Resp.Exhs.12 &29;Tr.I:125,Tr.II:327[Albanese];Tr.IV;622-29, 776 [Appellant]*)

43. The Appellant worked his next scheduled shift on June 4-5, 2021 and then had five regularly scheduled days off. While off-duty, the Appellant wore a compression brace and took non-prescription drugs (Advil, Tylenol, aspirin) as needed, which he had used periodically in the past for pain. (*Resp.Exh.12; Tr.I:125 [Albanese]Tr.IV: 776-77,Tr.VI:1046-47,1161[Appellant]*)

44. On June 7, 2021 the Appellant went to Access Sports Medicine and Orthopedics (ASM) in Exeter, NH⁹ (unrelated to Access Investigations), and saw Physician Assistant (PA) Masse and PA Wheeler, who both worked under the supervision of Dr. Siegel, an ASM physician. (*App.Exhs.10&11;Resp.Exhs.30,31&35; Tr.I:126[Albanese];Tr.II:253-56,;Tr.VIII:1439[Leone]*)

45. PA Masse’s medical notes from the June 7, 2021 examination report, in relevant part:

⁹ The Appellant asked Chief Albanese to recommend a medical provider, but the Chief told the Appellant he had to choose the provider himself. The Appellant “chose Access because . . . I thought I was dealing with a muscular injury, so I wanted to pick a place that was known for their physical therapy”. (*Tr.IV:632-33[Appellant]; Tr.I:104, Tr.II:255, Tr.VIII:1529-35[Albanese]*) ASM’s Exeter facility is a 40-minute drive from the Appellant’s Andover residence. (*Administrative Notice [<https://www.mapquest.com/directions/from/us/massachusetts/andover/01810-4882/7-regencyrdg-42.62124,71.13605/tous/new-hampshire/exeter/03833-4848/1-hampton-rd-42.9766,-70.91732>]*)

HPI: [Appellant] presents today with a chief complaint of low back pain He works as a firefighter and . . . about a year and half ago he had to jump from 6 feet high [and] felt a sudden sharp pain in his lower back. . . .[S]ince that injury . . . he has not been the same. . . [H]e reaggravated it this past weekend when he twisted to pull a hose [and] . . . had that sudden pain again. . . . [H]is pain right now is 5/10 and dull achiness on the right side of his back. . . . Patient is frustrated with this injury, as this has been going on for a year and a half now. He is hopeful to find relief soon.. . .

PHYSICAL EXAMINATION: On physical exam today, the patient is . . . well-appearing, in no acute distress. Alert and oriented x3 with normal mood and affect. Examination of the lumbar area reveals no deformities, no erythema, and no signs of infection. No significant vertebral point tenderness. Patient has tenderness over his right sacrum. Overall range of motion is functional. He has mild discomfort with side bending to the left as well as rotation to the left. Patient has relief of symptoms with forward bending. . . .[A]ble to heel walk and toe walk well . . . 2+ bilateral lower extremity reflexes . . . no gross motor weakness of the lower extremities. Negative straight leg test bilaterally . . . neurovascularly intact . . . in bilateral lower extremities.

RADIOGRAPHS: Lumbar spine, 3 views, shows no acute fracture or dislocation.

ASSESSMENT AND PLAN: Lumbar strain, question herniated disc. . . .[D]ue to the longevity of the symptoms . . . it would be appropriate to order an MRI to evaluate his lumbar spine. I will also have him start with physical therapy. He was also advised to take an NSAID, like Aleve, twice a day. Patient is in agreement with this plan. He will follow up after the MRI. . . .

(App.Exh.10; Resp.Exh.30; Tr.I:126 [Albanese];Tr.VI:1103 [Appellant])

46. PA Wheeler completed a New Hampshire Workers' Compensation Medical Form¹⁰

that contained the following information about the Appellant's "Work Capacity":

- Can return to work - YES – After MRI review
- Unable to bend, kneel, squat, climb, stand & reach
- No Restrictions: walk, sit, drive, do fine motor
- Employee can carry maximally – 15 lbs; frequently – 10 lbs
- Employee can work a maximum of # FT days/wk
- Maximum medical improvement – NO
- Permanent impairment - Undetermined
- Next Appointment: 6/25/21

(App.Exh.11; Resp.Exh.31); Tr.I:127-28 [Albanese])

¹⁰ The CFD supplies its own "Initial/Supplemental Medical Treatment Form" that is required to be completed by the medical provider after every visit. but also accepts other comparable forms such as the NH Workers' Compensation Form used by PA Wheeler. *(Resp.Exhs.33 & 34; Tr.II:206-208. 252-54 [Albanese])*

47. Based on the June 7, 2021, medical reports from ASM, a FutureComp claim file was opened on June 8, 2021 and Chief Albanese placed the Appellant on Injury Leave, effective June 10, 2021. (*Resp.Exhs.12 & 58*)

48. The MRI was performed at ASM's Dover, NH location on June 17, 2021 and read by Todd D. Greenberg, MD. Dr. Greenberg concluded that the MRI showed that the Appellant had a "chronic bilateral L5 pars fracture with 2 mm anterolisthesis. Mild bilateral foraminal stenosis." The MRI showed "moderate bilateral facet arthritis , worse on the right" at L4-5, and "No focal protrusion or stenosis" at L3-4, L2-3, or L1-2. He recommended consideration of "lateral flexion and extension standing views to assess dynamic instability." (*Resp.Exh.32*)

49. The Appellant next saw PA Wheeler on June 21, 2021 who concurred that the MRI showed "chronic bilateral L5 pars fracture with 2 mm anterolisthesis and mild bilateral foraminal stenosis." As recommended by Dr. Greenberg, "lateral flexion and extension films [X-rays] were done which showed "grade 1 anterolisthesis, but no instability" Physical examination showed "slight pain with side bending" and "[f]orward bending alleviates pain." Appellant could heel and toe walk, had 2+ bilateral lower extremity reflexes, no gross weakness and [n]egative straight leg raise. PA Wheeler's treatment plan stated:

Given no instability seen on the x-rays, I would like to get him to start in physical therapy for lumbar strengthening and core strengthening, but I would like to get a consultation with Coastal Neurosurgery just to discuss whether he would be a candidate for fusion L5-S1. We will see him back in three to four weeks.

(*Resp.Exh.95*)

50. PA Wheeler completed both a New Hampshire and a CFD medical treatment form noting diagnosis of "spondylolisthesis L5-S1" and a follow-up visit on July 14, 2021.

- The CFD form stated: "Employee can resume modified assignment immediately" with restrictions on standing, sitting, bending, and lifting more than 5 lbs.

- The New Hampshire form stated the Appellant “Can return to work – With modifications”, stating he was unable to bend, kneel, squat, climb, could lift 10 lbs frequently but 15 lbs marginally, could work “FT” hours/day, had not reached maximum medical improvement and whether his injury caused permanent impairment remained undetermined.

(App.Exh.13; Resp.Exhs.33 & 34)

51. Spondylolysis and spondylolisthesis are related spinal conditions. Spondylolysis is a chronic condition (as opposed to an acute injury) produced by a stress fracture or “defect” in the pars, a thin bone segment joining two vertebrae. It is a fairly common condition, especially in physically active individuals, that generally doesn’t interfere with everyday activities. In some cases, the stress fracture weakens the bone so much that it is unable to maintain its proper position in the spine and the vertebrae starts to shift or slip out of place. This condition is spondylolisthesis, which may be “low grade” (Grade I or II) or “high grade” (Grade III or IV) (*Resp. Exh.95; Tr.VIII: 1488-90,1494-95[Bhat];Tr.VIII:1415-16[Leone]; Administrative Notice [American Academy of Orthopaedic Surgeons, <https://orthoinfo.aaos.org/en/diseases-conditions/adult-spondylolisthesis-in-the-lower-back>;<https://orthoinfo.aaos.org/en/diseases-conditions/adult-spondylolysis-in-the-lower-back>;Cleveland Clinic,<https://my.clevelandclinic.org/health/diseases/10303-spondylolysis>;<https://my.clevelandclinic.org/health/diseases/10302-spondylolisthesis>]*)¹¹

52. Chief Albanese interpreted the June 7, 2021 and June 21, 2021 medical notes to mean that the Appellant was medically cleared to have the functional capacity to return to work immediately, at least on a limited duty basis. Chief Albanese did not order the Appellant to

¹¹ The Appellant assumed that having a pars “fracture” meant he had a “broken back” (*Tr.VI: 1108, 1180 [Appellant]*), but Dr. Bhat “would never [use a] term anything like that” to refer to the Appellant’s diagnosis of a stable, chronic Grade I spondylolisthesis. (*Tr.VIII:1488-90, 1494-95 [Bhat]*)

return to duty immediately because the CBA permitted limited duty only after thirty (30) days of Injury Leave, planning to order him back to duty after the 30-day waiting period. (*App.Exh.1;Resp.Exhs.1&58;Tr.I:127-131,141,Tr.II:249,344-46,Tr.VIII:1529 [Albanese]*)

53. After a visit with his PCP, on or about June 22, 2021, the Appellant informed FutureComp that he wanted to schedule the neurosurgical appointment with Dr. Robert J. Banco, Boston MA spine specialist. The Appellant also reported that “his biggest complaint is that he cannot sit for long periods of time. Standing bad too but not as bad as sitting. He is quite upset about [the 6/21/21] RTW [return to work] note.” (*Resp.Exh.58*)

54. FutureComp proceeded to reach out to set up the neurosurgical appointment as soon as possible. Meanwhile, FutureComp approved the Appellant’s request for physical therapy twice a week with an ASM physical therapist located at ASM’s Plaistow NH location. The Appellant also went to ASM’s Exeter NH location for physical therapy. (*Resp.Exhs.35 & 58*)¹²

55. On July 2, 2021, the Appellant took a two-hour flight for a pre-planned vacation to the Bahamas. He missed two scheduled physical therapy appointments on July 7, 2021 and July 12, 2021. He also failed to report for his weekly sign-in on July 7, 2021, as required by the CBA of personnel on Injury Leave. (*App.Exhs.1 & 22; Resp.Exhs.1, 35, 36, 58 & 59; Tr.I:134-35 [Albanese];Tr.VI:1116, 1140 [Appellant]*)¹³

¹²ASM’s Plaistow office is a 27-minute drive from the Appellant’s Andover residence. (*Administrative Notice [https://www.mapquest.com/directions/from/us/massachusetts/andover/01810-4882/7-regency-rdg-42.62124,-71.13605/to/us/new-hampshire/exeter/03833-4848/1-hampton-rd-42.9766,-70.91732]*)

¹³ Chief Albanese did not know of the Appellant’s vacation plans. On July 7, 2021, the Appellant emailed Chief Albanese: “. . . I was unable to sign the book today” and mentioned his July 28, 2021 appointment with Dr. Banco, but he did not mention his vacation. (*App.Exhs.14, 15 & 43; Resp.Exhs.36 & 10; Tr.I:135 [Albanese]*). The Appellant believed that Chief Albanese knew of the vacation because the Appellant had cleared his absence in advance with Deputy Chief Houghton. (*App.Exh.43;Tr.IV:758-60 [Appellant]*)

56. On July 12, 2021, after a series of communications with Dr. Banco's office, FutureComp scheduled the Appellant to see Dr. Banco on July 28, 2021. (*Resp.Exh.58*)

57. By letter dated July 14, 2021, Chief Albanese ordered the Appellant to return to work on Light Duty, beginning July 19, 2021. He was assigned to work from 8am to 4pm at the Fire Prevention Division until further notice. (*App.Exh.16;Resp.Exhs.38,58&101;Tr.I;141-142;Tr.II:249 [Albanese]*)¹⁴

58. When he issued the return-to-work letter, Chief Albanese had not received any further follow-up medical notes from ASM since June 21, 2021. It was not even clear whether or not the Appellant had been to his appointment at ASM scheduled for that day. (*App.Exh.16; Resp.Exhs.38, 58 & 101; Tr.I:141-142 [Albanese]*)

59. After the Appellant saw PA Wheeler on July 14, 2021, FutureComp and Chief Albanese received the medical notes from that visit. The notes stated:

HISTORY OF PRESENT ILLNESS: [Appellant] follows up today for a four week check to his L5-S1 spondylolisthesis and chronic back pain. He says it continues to hurt, but feeling like he is getting a little bit more stable and a little less painful but if he sits for more than 10-15 minutes, it is painful. . . . He is waiting on his visit on July 28, 2021 with Dr. Banco of Boston Spine.

PHYSICAL EXAMINATION: . . . Still some tenderness over the lumbar spine and painful forward flexion. Negative straight leg raise. Both lower extremities have no café-au-lait spots. No evidence of collagen disorder. Distal pulses intact at 2+. Capillary refill is less than 3 seconds.

PLAN: I did go through in detail with the patient today the etiology of low back pain and the spondylolisthesis. Although he is not having any instability, I do want him to continue to keep his appointment with Dr. Banco at Boston Spine to review chronic treatment of his

¹⁴Light Duty at the CFD involved answering the telephone and other clerical work, with the opportunity to accommodate the member in sitting, standing, and moving about as needed. During the five-year period from 2016 to 2021, Chief Albanese had issued over a dozen orders for CFD members to return to Light Duty after an SCI, including firefighters who had undergone surgery and one who suffered from the same condition as the Appellant, i.e. spondylolisthesis at L5-S1. (*Resp.Exh.102;Tr.I:75,129-31, Tr.II;347-49, Tr.III:449-51, Tr.VIII:1506-08[Albanese]; Tr.V:815 [Houghton]*)

spondylolisthesis. In the meantime, continue physical therapy and I outlined work restrictions. See him in four weeks

(Resp.Exh.40)

60. PA Wheeler completed a new New Hampshire Workers' Compensation Medical Form which tracked his prior 6/21/21 forms, save for changes to functional capacity. He again certified that the Appellant "Can return to work – With Modification" on a "FT" basis, that the Appellant had not reached maximum medical improvement and that it remained undetermined if he had a permanent impairment. The functional capacity findings included:

- Upgrading the Appellant's ability to bend, kneel, squat and stand from "Unable to" to "Occasionally"
- Downgrading the Appellant's ability to "sit" and "do fine motor" from "No Restrictions" to "Occasionally"
- Downgrading the Appellant's ability to "drive" from "No Restrictions" to "Unable to – more than 20 min"
- The Appellant's ability to "walk" remained "No Restrictions" and ability to "climb" remained "Unable to"

(App.Exhs.9 &18; Resp.Exh.40)

61. The Appellant seemed to take offense both to Chief Albanese's July 14, 2021 return to work note and to PA Wheeler's 7/14/2021 medical form clearing him for modified duty with the 20-minute driving restriction, telling Chief Albanese and FutureComp that "no one is taking his injury seriously" and he "would not be forced back to work" because "the severity of a vertebrae fracture and how sitting and standing would do me no good on getting back to full duty." He referred to PA Wheeler's notes that stated he "cannot drive for more than 20 minutes, can't stand, and many other limitations."¹⁵ He said he wanted Dr. Banco's advice as to what his work status was, not a PA He asked FutureComp to switch from ASM to another

¹⁵ Although the Appellant said he objected to PA Wheeler's note, the FutureComp case manager, Kathy Leone was "absolutely positive" that the Appellant told her that PA Wheeler included the driving restriction because "I [i.e., the Appellant] had him add it." (*Tr.VIII:1365-68 [Leone]*)

provider. (*App.Exhs.9, 18 & 19; Resp.Exhs.20, 41 & 58; Tr.I:144-45[Albanese]; Tr.IV:613-15, 656-663, Tr.VI:1113-15, 1178 [Appellant]; Tr.VIII:1373-79 [Leone]*)

62. By email to the Appellant dated July 15, 2021, after receiving PA Wheeler's 7/14/21 medical notes, Chief Albanese explained that his light duty assignment was based upon his treating provider's prior three work release notes and prior to receiving the new "20- minute driving restriction". Therefore, Chief Albanese postponed the light duty assignment until after the Appellant's scheduled July 28, 2021 appointment with Dr. Banco. Chief Albanese also excused the Appellant from his July 21, 2021 weekly in-person check in and reevaluate his status after the Appellant's July 28, 2021 medical appointment, expecting that Dr. Banco would be able to provide an updated opinion on the Appellant's ability to return to work. (*App.Exhs.17 through 20; Resp.Exhs.39, 41 & 42 & 58; Tr.I:144-48, Tr.II:247-49 [Albanese]*)

63. Also, on or about July 14, 2021, after learning that the Appellant reported he had been "feeling like he is getting a little bit more stable and a little less painful" but had been put on additional restrictions and recently had taken a trip to the Caribbean, Access Investigations, Inc. was contacted and commenced surveillance on July 16, 2021.¹⁶ (*App.Exh.24; Resp.Exhs.44, 57, 58 & 76; Tr.I:150 [Albanese];Tr.VIII:1462-64 [Vigna]*)

64. On July 28, 2021, the Appellant saw Dr. Banco who reported as follows:

[Appellant] tells me he had a work injury . . . He is a firefighter and is a captain . . . He jumped from a height with all his equipment on September 2019 when he fell and twisted. He went to his PCP and was given 30 days off. He returned to work. He still has pain in his back. He has been working ever [sic] the above-noted injury.

On June 2, 2021 while he was at a fire in Revere he hurt his back . . . Since that time he said 7 out of 10 back pain and no leg pain. Walking makes it feel better. Sitting or standing creates increasing pain in his back right greater than left.

¹⁶ Chief Albanese initially raised the issue of conducting surveillance on the Appellant on June 22, 2021, after receiving the June 21, 2021 medical notes clearing the Appellant to return to work, but did not take any action at that time. (*Resp.Exh.58*)

He tells me that [he] has not seen a medical doctor for this condition has been evaluated by a physician's assistant and has been involved in physical therapy. He takes no medications for his problem. Has had no injections. . . . [A]n MRI scan dated June 17, 2021 . . . shows a chronic bilateral pars fracture without edema at the fracture site.

He has a hard time sitting more than 20 minutes at a time. No substantial pain in his legs. He feels better walking and lying down feels worse sitting and standing. Raising from a chair is difficult.

EXAMINATION: [Appellant] is here today by himself. He is awake, alert, oriented x3. Mood, affect and language are normal. He is well-developed well-nourished. He is in no acute distress. He is very fit. He can walk about the room on his heels and on his toes.

PLAN: Treatment plan for this individual should be to diagnose the reasons for his low back pain. Questions I have are #1 is a chronic pars fracture of [sic] the source of the pain or #2 [are there] any other sources of the pain in . . . his lumbar spine.

Since Dr. Banco focused his practice on surgical intervention, and the Appellant was not a surgical candidate at this point, Dr. Banco stated that he “cannot offer an opinion as to the source of his pain or treatment since a diagnosis has to be determined. He recommended referral to Dr. Atul Bhat “to locate the pain generator” and provide treatment. He offered no opinion on the Appellant’s work status. (*App.Exh.23; Resp.Exhs.43 & 58*)

65. Immediately after receiving Dr. Banco’s report, FutureComp reached out to Dr. Bhat’s office, Orthopedic Surgical Associates, PC in North Chelmsford, MA. On or about August 4, 2021, FutureComp arranged an appointment for the Appellant to see Dr. Bhat on August 16, 2021. (*App.Exhs.9 & 26; Resp.Exhs.48 & 58; Tr. VIII;1475 [Bhat]*)

August 2021 Surveillance Investigation Report

66. On or about August 3, 2021, after the Appellant’s visit with Dr. Banco, but before he saw Dr. Bhat, Access Investigations submitted its report of the surveillance it had conducted on the Appellant from July 16, 2021 through August 2, 2021, along with a video recording. Access Investigation’s report and video showed, in part, the following:

July 16, 2021 –Appellant arrived at his Haverhill place of business sometime before 10:20 am and was observed walking in and out of the building three times,

conversing with others for several minutes at a time, and departing the business in his truck at 12:40 pm, at which time surveillance lost him in traffic.

July 20, 2021 – Appellant arrived at his Haverhill place of business sometime before 9:30 am and departed in his truck at 12:25 pm, stopping at a coffee shop in Biddeford ME at 1:23 pm, where he was seen bending down to touch his shoe, and then continuing to a residential address in Biddeford abutting a beach, owned by a third-party, a distance of 72 miles from his place of business.

July 22-29, 2021 – Neither Appellant nor his truck were observed at his Andover residence or Haverhill place of business.

July 31, 2021 – At 8:00 am, both Appellant’s truck and his spouse’s vehicle, observed at the Biddeford address. Appellant left the residence sometime before 10:10 in his truck and returned at 10:23. Appellant seen walking in and out of residence onto a deck in the morning and, at 12:13 pm walked onto the beach with his family, sat on a beach chair and on a towel, bent down several times, walked the beach and into the ocean and, at 1:16 pm gathered some belongings and returned to the residence.

August 2, 2021 – At 10:00 am, surveillance arrived at the Haverhill place of business and observed both Appellant’s truck and his spouse’s vehicle present. At 12:41 pm, Appellant drove away in his truck, arriving at 1:07 pm at a medical facility in Londonderry NH, a distance of 28 miles. He drove away at 1:48 pm, stopped in a shopping mall parking lot, and then drove to a coffee shop where he remained until 2:00 pm. He then drove to Woburn MA, conversed on his cell phone and then entered a lunch establishment where he remained until 2:56 pm. He then drove to Reading MA, entered a pharmacy, and then drove to a residence in Wakefield MA.

(App.Exh.24; Resp.Exhs.44 & 76; Tr. VI:1140-42[Appellant])

67. Sometime during early part of August 2021, the Appellant went to North Conway, NH for a five or six-day camping trip with his family. Social media posts show the Appellant walking along a rocky beach, climbing on rocks and sitting and standing on rocks in a stream or lake. *(App.Exh.25; Resp.Exh.45; Tr.VI:1142-43, 1181[Appellant])*

Dr. Bhat Delays the Appellant’s Return to Duty Until September 2021

68. On August 16, 2021, the Appellant saw Dr. Bhat. Dr. Bhat’s report states, in part:

HSI: [Appellant] works as a fireman/fire captain . . . he initially injured himself at his workplace in 2019 . . . Since then . . . two separate work-related injuries . . . he has been unable to return to his pre-injury duties as a fireman . . . Pain in his low back on either side and wraps around his buttocks into his “hips”. . . . Pain itself does range from 7-8/10. . . . He does not take any prescription pain nor any anti-inflammatory

medications. Prolonged sitting for over 20 minutes and/or standing in one place for 15 to 20 minutes and/or activities that entail bending at his waist do seem to intensify his complaints even further.

Physical Exam: On exam, he stands and walks with good sagittal plane balance., There was a reproductive tenderness along the lower lumbar facet segment. Thoracolumbar range of motion did reproduce back as well as buttock pain both on flexion beyond 30 degrees and hyperextension beyond neutral. Both maneuvers were equally bothersome Straight leg raise did reproduce buttock as well as posterior thigh pain on either side. Gentle hip movement was quite painless. Reflexes were f+ and symmetric, except for absent ankle reflex Myothermal and sensory examination were normal.

RADIOGRAPHIC REVIEW: . . . x rays of his lumbar spine . . . do confirm subtle isthmic listesis at L5-S1 level. MRI of his lumbar spine . . . do confirm some minimal disc degeneration at L4-L5 and also at L5-S1. Facet changes noted on the right more than left at L4-L5. Spondylolysis bilaterally at L5 with mild foraminal narrowing. No evidence of increased uptake

(App.Exh.26; Resp.Exh.48)

69. After a lengthy discussion based on the Appellant's description of complaints, his physical examination and his review of the imaging workups, Dr. Bhat assessed "a combination of discogenic pathology as well as referred pain from a posterior element involvement, given the fact that he is symptomatic both on sitting and standing." Dr. Bhat recommended a treatment plan involving a single transforaminal injection at S1 with consideration for a further facet joint injection at a later date. He issued a medical note keeping the Appellant out of work pending completion of the injection(s). *(App.Exh.26; Resp.Exh.48; Tr.VIII:1474-76 [Bhat])*¹⁷

70. Dr. Bhat premised his assessment on the assumption that clearing the Appellant for full-time or modified duty meant he would return to "being a firefighter." Dr. Bhat was not apprised of the nature of, or accommodations available to a CFD firefighter assigned to limited

¹⁷ Dr. Bhat explained that the first transforaminal injection was expected to target the Appellant's pain on sitting; the second facet joint injection, if necessary, was expected to target the Appellant's pain on standing. *(Resp.Exh.49; TrTR.VIII:1481-82[Bhat])*

duty of a clerical nature, as opposed to the duties of “being a firefighter”, and the Appellant did not inform him that such an option was available to him. Had Dr. Bhat known those facts, “it certainly would” have made a difference in his opinion whether or not to keep the Appellant out of work entirely pending the completion of the injection(s). (*Tr.VII:1492-93, 1500-1501 [Dr. Bhat]*)

71. Immediately after seeing Dr. Bhat, the Appellant informed FutureComp that “Dr. Bhat just ordered a cortisone shot for approval and then will get me right in. Finally I have a piece of mind on this injury and a promising outlook on managing this.” (*App.Exh.9;Resp.Exh.58*)

72. On August 18, 2021, the Appellant appeared at CFD for his weekly sign-in. He met with Chief Albanese, stated he was still in pain and demonstrated what he could not do by sitting in a chair and saying: “This is what I can’t do. This is when I am in pain.” Chief Albanese asked the Appellant why he took a vacation out of the country in July while on Injury Leave and the Appellant replied that the vacation was scheduled before he was injured.¹⁸ Chief Albanese also told the Appellant that “you consistently have a problem with #1” [meaning the Chief’s well-publicized #1 priority “Come To Work”] and said “I am sure you don’t have the same attendance issue with your business”, to which the Appellant replied: “I haven’t been there, you can send someone there to check.” Finally, Chief Albanese brought up the swaps issue. The Appellant said: “You f---ed me with the suspension” and “you have to separate that from this”, to which Chief Albanese replied: “I can’t. It’s all about your attendance, or lack thereof” and ended the meeting. (*App.Exh.27; Resp.Exhs.11 & 36: Tr.III:447-449 [Albanese]*)

¹⁸ Deputy Chief Houghton verified that he received the Appellant’s request in March 2021 and told him it was in the system and there was no need to follow-up with a email. (*App.Exh.43*)

73. On August 27, 2021, Dr. Bhat administered a Bilateral S1 Transforaminal Epidural Injection to the Appellant. A follow-up visit was scheduled for September 16, 2021. No further information was requested by FutureComp or provided by Dr Bhat about the Appellant's ability to return to work. (*App.Exh.26; Resp.Exh.48 & 58; Tr.VIII:1477-78 [Bhat]*)

74. On September 1, 2021, Chief Albanese initiated a request for Access Investigations to conduct further surveillance, after the Appellant stated at the August 18, 2021 meeting that he had not been working at his Haverhill place of business while on Injured Leave. Chief Albanese had already received the August 2, 2021, Access Investigations report and believed the Appellant had just "lied to his face" at the August 18 meeting because he knew the Appellant's claim that he had not worked at his private business since he was injured was false. (*App.Exhs.24 & 35; Resp.Exhs.24; Resp.Exhs.44, 47 & 76; Tr.I:388, 418 [Albanese]*)¹⁹

75. In anticipation of the Appellant's follow-up visit with Dr. Bhat, FutureComp contacted the doctor's office and explained what a return to modified duty would mean; namely, that "any duty will be accommodated". (*Resp.Exhs.30 & 58*)

76. On September 16, 2021, the Appellant saw Dr. Bhat for his follow-up appointment. The Appellant said he had 50% or more improvement after the first injection with respect to low back as well as buttock pain on sitting, but reported still having "residual complaints in his low back, especially on upright activities such as standing in one place and/or walking and or specially [sic] when he arches his back backwards." The Appellant put his peak pain level at 6-7 out of 10. (*App.Exh.26; Resp.Exh.48*)

77. Dr. Bhat report concluded:

¹⁹ Art. XVIII, Section 7 of the CBA provides: "Any employee who is receiving injured on duty benefits pursuant to this article shall not be permitted to engage in outside employment inconsistent with the restrictions placed on him/her by his/her injury." (*App.Exh.1; Resp.Exh.1*)

His disc symptoms . . . seem to have improved quite a bit. He does have residual pain on upright activities such as standing in one place and walking. I do believe he will benefit from a fluoroscopic-guided bilateral L4-L5 and L5-S1 facet joint block. . . . one may need to consider an elective radio frequency degeneration at a later date. . . . I did indicate to him that he should be able to return to work in a modified sedentary capacity with amble ability to which [sic] position from sitting to standing.

I am going to have him 20 hours each week given the fact that he does have to attend physical therapy twice a week and hopefully we can get him back to full-time duty work after the facet joint injection.

(App.Exhs.26 &31; Resp.Exh.48)

78. On September 17, 2021, based on Dr. Bhat's report, Chief Albanese ordered the Appellant to return to Limited Duty, Monday through Friday from 8:00 am to 12:00 noon, commencing September 20, 2021. He was assigned to Fire Prevention, reporting to Acting District Chief Purcell. *(Resp.Exh.48; Tr.I:166-68 [Albanese])*

79. On September 21, 2021, Dr. Bhat performed the bilateral joint injection procedure. *(Resp.Exhs.49 & 58; Tr. I:168-69 [Albanese]; Tr.VIII:1482 [Bhat])*

80. On September 23, 2021, Access Investigations submitted a report covering the period from September 6 through 16, 2021. The report noted the Appellant was present at his Haverhill place of business on three of six days of surveillance during the period:

September 7, 2021 – Appellant's truck observed at the Haverhill place of business when surveillance began at 9:00 am. Appellant exited the building and conversed for about three minutes with several persons in military uniforms, standing up and gesturing his arms. He reentered the building and then departed the premises in his truck at 1:20 pm, stopping at a coffee shop in downtown Andover before returning to his Andover home at 1:51 pm.

September 9, 2021 – Appellant's truck observed at the Haverhill place of business when surveillance began at 9:00 am. At 11:13 am, the Appellant left the building and walked with another person to another building where they entered and remained until 11:28 am. Appellant remained in Haverhill until surveillance ended at 2:00 pm.

September 16, 2021 – Appellant arrived at the Haverhill place of business at 10:52 am and remained there until surveillance was discontinued at 2:00 pm.

(*App.Exh.35; Resp.Exhs.47 & 77*)²⁰

81. On September 27, 2021, Dr. Bhat reported that the Appellant “has . . . complete resolution” of his pre-injection condition and cleared the Appellant to “return to full-time pre-injury duties” without limitations, effective immediately, and a follow-up appointment in 5 to 6 weeks. (*App.Exhs.36, 44 & 40; Resp.Exhs.47 & 58; Tr.I:169-170 [Albanese];Tr.VIII:1482-83 [Bhat]*)²¹

The Appellant’s Weekly Sign-In Compliance

82. The CFD Standard Operating Guidelines governing SCIs, as most recently revised in August 2019, require: “All members out on Service-Connected Injury are required to report to the Administrative Officer every Wednesday no later than 12:00 [noon] to sign in and report on their progress and status. . . .The Chief of Department may exempt members from the weekly sign in requirement for long term injuries, members obtaining surgery, or other relevant special circumstances.” (*App.Exh.3, Resp.Exh.7*)

83. During the fourteen weeks that the Appellant was on Injury Leave Status (June 10, 2021 through September 17, 2021), he personally reported to the CFD Administrative Offices and signed-in on nine occasions (June 16, 23, 30, July 14, 28, August 4, 18 & 31, and September 15). He was excused twice from signing in on July 21 and August 11. He “reported” by calling in or email on three occasions (July 7, August 25 and September 8). (*App.Exhs.21, 28 & 52: Resp.Exhs.37, 42 & 79; Tr.I:133-35,159-63 [Albanese]*)

²⁰ Surveillance was discontinued after Chief Albanese received Dr. Bhat’s report of September 16, 2021 that cleared the Appellant for Light Duty (*Tr.I:183, Tr.III:544-46[Albanese]*)

²¹ At his follow-up appointment on November 9, 2021, Dr. Bhat reported that the Appellant had achieved 95% to 98% improvement from his pre-injection complaints. The Appellant informed Dr. Bhat that he had been placed on administrative leave and “he is fearful that he may be terminated.” (*App.Exh.44*)

84. The Appellant was excused from the personal sign-in requirement on August 11, 2021, based on his representation that he was attending his cousin's funeral in Wakefield, MA, attaching a copy of the funeral home posting. At the Commission hearing, Chelsea produced a complete copy of the funeral home posting, which showed that the document the Appellant provided to Chief Albanese did not include the page containing the date of the funeral, i.e., August 12, 2021 at 11 am. The Appellant was actually in New Hampshire for the "Brown family annual camping trip" and, while most of the family went to the services, he stayed behind at the campsite to chaperone several dozen youngsters and did not attend the funeral. (*App.Exh.52; Resp.Exh. 79; Tr.I:163-64 [Albanese]; Tr.VI:1144-48, 1181-83 [Appellant]*)

The 2021 Disciplinary Proceedings

85. The Appellant returned to Limited Duty as ordered on September 21, 2021 and worked his assigned shift at Fire Prevention through the following Monday, September 27, 2021. (*Resp.Exh.12; Tr.I:169, Tr.III:546 [Albanese]; Tr.II:306-307 [Ambrosino]*)

86. By letter dated September 29, 2021, Chief Albanese informed the Appellant of the investigation into his possible misconduct and that, effective immediately and until further notice, the Appellant was placed on Administrative Leave with Pay while the investigation was ongoing. The Appellant was prohibited from entering or occupying any CFD property. (*App.Exh.39; Resp.Exh.51; Tr.I:170 [Albanese] Tr.II:306-307 [Ambrosino]*)

87. By letter dated October 26, 2021, CCM Ambrosino notified the Appellant that he would convene an appointing authority hearing for the purpose of determining whether to terminate the Appellant's employment for the following reasons:

[Y]our failure to truthfully report your ability to report for duty; a pattern of actions to avoid fulfilling your work responsibilities; failure to maintain regular and continued attendance; failure to maintain the work schedule; failure to fulfil your responsibilities as a Captain to ensure compliance with Departmental policies and

procedures, abuse of sick and disability leave, failure to comply with Department policies and procedures and requirements of the collective bargaining agreement; and conduct unbecoming a Captain in the Chelsea Fire Department.

The letter provided a link to a drop box containing CFD policies and procedures, the CBA, the Appellant's attendance records from 2018 through 2021, including prior discipline, and documentation and videos regarding the Appellant's ability to work. (*App.Exh.41: Resp.Exh.52*)

88. On November 18, 2021, CCM Ambrosino, who did not know the Appellant personally, conducted the appointing authority hearing to consider whether the Appellant's conduct warranted discipline. (*App.Exh.45; Resp.Exh.53; Tr.I:277[Ambrosino]*)

89. Both Chelsea and the Appellant were represented by counsel. Chief Albanese was the only witness to testify. On advice of counsel, the Appellant did not testify or present evidence on his behalf. (*App.Exh.45; Resp.Exh.53Tr.II:280[Ambrosino]; Tr.IV:760-61 [Appellant]*)

90. By Decision dated November 29, 2021, CCM concluded:

"There is no dispute in this case about [the Appellant's] injury. Rather the crux of the disciplinary issues in this case are twofold: did [the Appellant] misrepresent the extent of his injury to avoid a return to light duty; and did [the Appellant] disobey direct orders of Chief Albanese. I find that the evidence is overwhelming that he did. Therefore, there is just cause for discipline."

". . . I conclude that [the Appellant] engaged in a deliberate and concerted effort to conceal from the Fire Department that he no longer was limited to twenty minutes of driving at least as of July 18, when he drove for over an hour to Biddeford Maine. In my opinion, [the Appellant's] conduct was intentional and fraudulent. During the ensuing two months, he repeatedly drove distances requiring him to sit for more than 20 minutes, and he actively conducted his [private] oil business during this timeframe. Yet, he never made any attempt to notify the Fire Department that he no longer was limited by this driving/sitting restriction. Further, he repeatedly violated direct orders of Chief Albanese for in-person reporting, despite warnings to refrain from doing so. As a Fire Captain for the Chelsea Fire Department, [the Appellant] has an affirmative duty to be honest and truthful at all times, to not withhold pertinent information, to show up to work when capable and to obey all lawful orders of the Fire Chief. He violated each of these duties. There is no excuse for his behavior over the course of this past Summer."

"The Fire Chief has recommended that [the Appellant] be terminated for his fraudulent conduct and is blatant insubordination. I concur that the conduct of [the

Appellant] is reprehensible, contrary to the responsibilities of a Fire Captain or a person in any position of authority in the Chelsea Fire Department and deserving of discipline.”

“[The Appellant] has previously been disciplined, the most recent being a three-week suspension in January of 2020. In keeping with a policy of progressive discipline, I determine that [the Appellant] shall be suspended for six (6) months, effective immediately. Further, given that this deplorable conduct establishes that [the Appellant] is not deserving of a supervisory position in the Chelsea Fire Department, he is forthwith demoted from the supervisory ranks of the Chelsea Fire Department. When the suspension is over, [the Appellant] shall return to the rank of Firefighter.”

(App.Exh.45; Resp.Exh.53)

91. By letter dated November 30, 2021, Chief Albanese informed the Appellant, through his counsel, of CCM’s decision. *(App.Exh.46; Resp.Exh.54)*

92. On December 1, 2021, Chief Albanese issued General Order 2021-42 which stated:

“As a result of disciplinary action by the Appointing Authority, [the Appellant], Badge # [redacted] has been suspended for 6 months and demoted to the rank of firefighter, effective November 30, 2021. Accordingly, these changes are so ordered within the department records.”

(App.Exh.47)

93. This appeal duly ensued. *(Resp.Exh.56)*

The Appellant’s Related Civil Actions

94. The Appellant also pursued other independent claims against Chelsea for its alleged violation of his civil rights.

- On September 19, 2021, the Appellant filed an internal complaint alleging that he was “coerced and bullied into signing an agreement that gave me a double punishment of 12 shifts suspension with no pay as well as 12 vacation days taken away” and that he has been “harassed” by Chief Albanese after his injury in June 2021 which “has healed but did not heal correctly” and “I had told him I cannot physically sit for more than five minutes right after the initial date of injury.” After investigation by Chelsea’s Law

Department, by letter dated October 26, 2021, the Appellant was informed that his claim was determined to be unfounded. (*App.Exhs. 33, 34, 37, 38 & 42: Resp.Exh.50*)

- On September 19, 2021, the Appellant filed a Wage Complaint with the Massachusetts Attorney General's Office alleging Employment Discrimination in which the Appellant stated that he had exposed an October 2019 "overtime scandal that involved a Chelsea deputy chief stealing \$35,000 in overtime and the fire chief covered it up", that he had "become a target" of retaliation "all due to me calling out the fraud of my department", that he was "coerced and bullied into signing an agreement" for discipline, and that he has been "physically and emotionally" injured. The evidence in the record does not disclose what, if any, action was taken by the Attorney General's Office on this complaint. (*App.Exh.32*)
- On December 7, 2021, the Appellant, through counsel, filed a Massachusetts Public Records Law Request with the Chelsea City Clerk, seeking production of documents concerning the Appellant as well as other CFD firefighters' disciplinary and medical leave records and information about the alleged "overtime fraud scandal" involving a CFD Deputy Fire Chief. On December 16, 2021, the City Clerk responded to the document request, providing certain documents related to the Appellant and withholding others on various grounds, including the assertion that there was no "overtime fraud scandal" and most of the information concerned pending investigations and/or personnel and medical documentation of municipal employees protected from disclosure under the Massachusetts Records Law. (*App.Exhs.48, 49*)
- On January 7, 2022 the Appellant filed a Charge of Discrimination against the CFD with the Massachusetts Commission Against Discrimination (MCAD) and the Equal

Employment Opportunity Commission (EEOC), which he later amended on January 10, 2022. The Appellant charged, under the penalty of perjury, that the CFD hired him “knowing I am a disabled veteran of the United States Navy” as well as a “disability acquired while working for the fire department” which “impaired major life functions vital to my job such sitting and lifting items”. He charged that the CFD discriminated against him because of his disability by “rushing my return to duty”, by hiring a private investigator “to determine if my injury and sick time was legitimate and found zero evidence that it was not,” and ultimately suspending and “double demoting” him. (*App.Exh.53; Resp.Exhs.81B & 81C: Tr.V:933-34[Appellant]*)

- On March 22, 2022, the Appellant, through counsel, filed a civil action to compel compliance with his Public Records Request. Chelsea counterclaimed asserting an abuse of process. On November 22, 2022, the Superior Court (Pappas, J.) dismissed Chelsea’s counterclaim on a special motion to dismiss pursuant to G.L.c.231, §59H (the “anti-SLAPP statute) and denied Chelsea’s motion for judgment on the pleadings, finding that “[w]hile Chelsea may ultimately be correct about a lack of duty to disclose certain exempt records and/or that sought records do not exist”, the complaint raises a number of unresolved questions of fact that preclude summary disposition. (*App.PHExh.63; Resp.Exh.83*)
- On April 1, 2022, the Appellant, through counsel, filed a civil complaint against Chelsea²² in Suffolk Superior Court, later removed to the United States District Court for the District of Massachusetts, alleging violation of the federal American with

²² The complaint also named Chief Albanese and CCM Ambrosino, who were later dismissed from the lawsuit. (*Resp.Exhs.81A & 81D*)

Disabilities Act of 1990 (ADA) and the Rehabilitation Act of 1973 by discriminating against him based on his physical disability. This action remains pending. (*App.PHExh.63; Resp.Exhs.81A & 81D:Tr.V:935-36 [Appellant]*)

- On May 9, 2022, the Appellant, through counsel, filed another civil complaint against Chelsea in Suffolk Superior Court, alleging that Chelsea violated G.L.c.149, §185 by unlawfully retaliating against the Appellant because of his whistleblowing activities, namely, that Chelsea “tried to intimidate and coerce [the Appellant] into silence to make an example of him” after he “vocally criticized and challenged” the “misappropriation of overtime funds” by a CFD Deputy Fire Chief sometime in or around May or June of 2018 so that “dissenters who challenged Chief Albanese and the City’s handling of the overtime fraud scandal would face negative consequences.”

The record does not reflect the current status of this civil action. (*Resp.Exh.82*)

The Putative “Overtime Fraud Scandal”

95. The CBA requires that overtime shall be “posted and distributed to all employees on an equitable and fair basis, commensurate with their rank.” A claim by the Union that overtime is “not being distributed fairly and equitably” shall constitute a grievance under the CBA. Similarly, a claim that an employee “has not received his/her full share of overtime shall similarly constitute a grievance under the CBA.” (*App.Exh.1; Resp.Exh.1; Tr.III:521-25 [Albanese]; Tr.V:807 [Houghton]; Tr.VIII:1260-61, 1291 [Capistran]*)

96. All overtime is supposed to be automatically recorded on “tally sheets” for each rank which are maintained by the CFD Deputy Chiefs and are published weekly to all CFD members. (*Resp.Exh.80; Tr.III:364-69, 511-22 [Albanese]; Tr.V:807-808 [Houghton]; Tr.VII:1291-93 [Capistran]*)

97. As the Union President, CFD Fire Lieutenant Brian Capistran has the authority and discretion to file and settle grievances, including issues involving the equitable distribution of overtime. (*Tr.V:811-12 [Houghton]; Tr.VII:1265-66 [Capistran]*)

98. On or about June 1, 2018, the Chelsea Record published a story entitled “Top 100 City Salary Earners Dominated by Public Safety Employees” in which the paper reported that the list of earnings for Chelsea city employees for 2017 “showed that, as has become routine” the top 100 earners’ list was dominated by police and fire personnel. The highest paid CFD employee, fifth overall on the list, was a Deputy Fire Chief with gross pay of \$194, 200. The next highest paid CFD Deputy Chief, in 10th position on the list, earned \$171, 818. Four other CFD Deputy Chiefs on the list earned between \$155,518 and \$157,387. (*Resp.Exh.97*)

99. The newspaper article prompted several CFD Deputy Chiefs to approach Union President Capistran and question how one of their peers was able to earn more than \$22,000 than any other Deputy Chief, when all members received a comparable salary and, under the CBA, were supposed to share equally in overtime opportunities. (*Resp.Exh.80;Tr.V:791-96 [Houghton];Tr.VII:1262,1295 [Capistran]*)

100. The Union immediately requested that Chief Albanese provide copies of all records pertaining to salaries, overtime, and overtime tally sheets maintained by the CFD for calendar years 2017 and 2018. After review of those documents, Union President Capistran determined that the total amount reported for the top-earning Deputy Chief for 2017 and 2018 to date could not be reconciled with the amounts of overtime worked and entered on the overtime tally sheets for those years. He immediately filed a Union grievance on behalf of all Deputy Chiefs/Acting Deputy Chiefs for breach of the CBA requirement that all

overtime be equitably distributed for each rank. (*Resp.Exh.80;Tr.III:369-71,381,509 [Albanese]; Tr.VII:1261-66, 1291-94 [Capistran]*)

101. After an investigation by Chief Albanese and Union President Capistran, they came to learn that the discrepancy between the tally sheets and the payroll records was due to a glitch in the manner in which the overtime was recorded by the Deputy Chief in question. In converting the overtime reporting system from a handwritten record to a data-based record, the code for reporting “administrative” overtime by that particular Deputy Chief in question had not been assigned an overtime code. Thus, the Deputy Chief had duly worked and recorded all overtime for which he was paid. No public money was misspent. It was an administrative data entry glitch that the time was not logged as overtime on the “tally sheet” used by the Union to monitor that overtime was being equitably distributed for each rank. (*Resp.Exh.80; Tr.III:372-380 [Albanese]; Tr.VII:1294-95 [Capistran]*)

102. On June 8, 2018, the Deputy Chief in question agreed to a settlement of the grievance proposed by the Union by which he would not work any further overtime for a period of three months to allow other Deputy Chiefs to catch upon their proper allotment of overtime. Chief Albanese accepted the Union’s proposal, as he saw the overtime distribution to be a Union matter which had not impacted CFD operations or its budget. Chief Albanese contacted the database vendor who fixed the glitch so that all codes used to record overtime in the future were linked to the tally sheets. The grievance and resolution were explained at a Union meeting that the Appellant attended. (*Resp.Exh.80; Tr.III:380-81, 525 [Albanese]; Tr.V:897-900, 908 [Ulwick];Tr.VII:1267-71 [Capistran]*)

103. Neither Union President Capistran nor Chief Albanese had any recollection that the Appellant had any problem with the overtime issue. As a Fire Captain, the misallocation of

Deputy Chief overtime did not have a direct impact on him. The first time they recalled the Appellant raising the matter was after he, himself, was facing discipline. (*Tr.III:381-83[Albanese];Tr.V:807-10[Houghton];Tr.VII:1261, 271-73 [Capistran]*)²³

Alleged Disparate Treatment

104. At the Commission hearing, the Appellant proffered evidence that Chief Albanese called the Appellant a “frequent flyer” in his communications with FutureComp and, in connection with the 2019 injury, directly contacted one of the Appellant’s medical providers. (*App.Exh.10; Resp.Exh.58; Tr.IV:615-618,635[Appellant]; Tr.VIII:1456-61[Vigna]; Tr.VIII:1516 [Albanese]*)²⁴

105. The Appellant also points to the 2019 discipline of an CFD Deputy Fire Chief after the Deputy’s command vehicle had been seen parked at the Deputy’s private business (a gym) during a training exercise they were both expected to attend at CFD headquarters. Chief Albanese had previously counselled the Deputy that he should not be using his CFD command vehicle to travel to his business and, when Chief Albanese confronted the Deputy with the latest infraction, the Deputy was less than forthcoming about his actions, misrepresenting that he had been out on “department business” and had stopped at the gym to get his wallet. Chief Albanese imposed a three-tour suspension for the Deputy’s

²³ The Appellant’s testimony was not inconsistent with the recollections of Chief Albanese and Lt. Capistran. The Appellant recalled that he mentioned the overtime issue to Chief Albanese in August 2018, after the union grievance had been settled and was told that it was a “Union issue” that he should raise with Lt. Capistran. He said he raised the issue again in the summer of 2019, prior to his September 2019 injury. There is also evidence that the Appellant’s wife was in e-mail contact with the media in June 2018 about the overtime issue. (*App.Exh.2; Tr.845-62 [Appellant]*)

²⁴The Appellant also proffered other evidence of alleged animosity that was largely based on his personal opinions and uncorroborated hearsay that I do not find sufficiently reliable or credible to be entitled to any weight..

misconduct, the first suspension he had ever imposed on a Deputy Fire Chief. The Union grieved the suspension which, ultimately, was upheld by an arbitrator as consistent with the principles of just cause and progressive discipline. (*Resp.Exh.96; Tr. V;900-905 [Ulwick]*)

106. The Appellant's First Motion to Supplement the Record, filed after the record had closed, also referenced seven allegedly comparable, but lesser disciplines Chief Albanese imposed during the period from 2016 to 2021, including three written reprimands for suspected sick leave abuse, one written reprimand for repeated violation of the "sign in" policy while on Injury Leave, one written reprimand for failing to complete an assignment as ordered, a one week-suspension for claiming a work-related injury that surveillance indicated had not occurred on duty (a negotiated settlement with the Union) and the three-tour suspension for using CFD command vehicle on-duty to travel to private business (the last discipline being the same incident that was upheld after arbitration described above). (*Appellant's First Motion to Supplement the Record, Exh.B, App.PHExh.611D; Resp.Exh.23*)

107. The Appellant's Second Motion to Supplement the Record proffered five new sets of documents, included email exchanges between Chief Albanese and Access Investigations, the surveillance company, and other email exchanges between Chief Albanese and FutureComp containing what the Appellant thought would supplement his claim of bias against him. These documents include: remarks by Chief Albanese in the 2019 timeframe in which he refers to the Appellant as "full of shit but we don't have much time to catch him;" a communication with FutureComp on August 25, 2021, in which Chief Albanese states, in reference to the Appellant: "He is a real beauty. Can't sit for 20 minutes but he can sit around and lie on the freaking beach"; and a communication on September 9, 2021 in which Chief Albanese, after learning that the Appellant was spotted at his private business that week,

refers to the Appellant as “our prime suspect”. (*Appellant’s Second Motion to Supplement the Record, Exh.E*)²⁵

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 therefore.” 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. Examining an earlier but substantially similar version of the same statute, the [Supreme Judicial Court]court said: “We interpret this as providing for 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. ”

Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003).

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. Civ. Serv. Comm’n, 43 Mass. App. Ct. 486, 488, *rev. den.*, 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983). It is also a basic tenet of merit principles, which govern civil service law, that discipline must be

²⁵ As noted in the Analysis, *infra*, my review of the Appellant’s proffer of the additional evidence contained in Exhibit E to the Appellant’s Second Motion, standing alone or in combination with the hearsay and opinion evidence he proffered at the Commission hearing, does not change my conclusion that the Appellant’s claim of alleged unlawful bias or animosity toward the Appellant is without merit.

remedial, not punitive, designed to “correct inadequate performance” and “[only] separating employees whose inadequate performance cannot be corrected.” G.L. c. 31, § 1.

The Commission must take account of all credible evidence in the entire administrative record, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law, including whatever would fairly detract from the weight of any particular supporting evidence. See Comm’rs of Civ. Serv. v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971), citing Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928); 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.” 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).

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. Civ. Serv. Comm’n, 39 Mass. App. Ct. 594, 600 (1996) and cases cited; Falmouth v. Civ. Serv. 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, 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, 447 Mass. at 824.

ANALYSIS

The preponderance of the evidence established that, for most of the time that the Appellant was out on Injury Leave during the summer of 2021, he knowingly exaggerated and overstated the extent of his injury during all or a significant part of that period for the purpose of avoiding a return to limited duty which he was capable of performing. Chelsea also established by a preponderance of the evidence that the Appellant's conduct during his Injury Leave in 2021 was part of a pattern of flouting the CFD's attendance rules about which he had been repeatedly counseled and previously disciplined. That behavior constitutes insubordinate conduct unbecoming a fire service officer and rises to the level of gross misconduct that cannot be tolerated, especially in the position of a senior level fire service officer. Chelsea was fully warranted to suspend the Appellant for a period of six months and to demote him from his supervisory position as a Fire Captain to a rank-and-file firefighter for that misconduct.

The Just Cause for the Discipline

There is no doubt that the Appellant suffers from chronic spondylolisthesis, nor is there any doubt that he suffered two SCIs, i.e., on-duty accidents, in June 2021. The Appellant claimed that his injuries, combined with his chronic condition, required him to remain out of duty throughout the summer of 2021, whereas Chelsea concluded that he was fully capable of performing limited duty as early as July 2021 and the Appellant knew it. The preponderance of the evidence supports Chelsea's conclusion.

First, as the Appellant himself acknowledges, and as he reported to his medical providers who treated him in 2021, he has suffered from chronic back pain since at least 2019, when he was first out on Injury Leave, and "has not been the same" since then, yet he returned to duty after a month. Although he did take several days of sick leave during the remainder of 2019, and he eschewed

taking pain medication, his chronic back pain did not prevent him from attending to his private business or performing full duty as a CFD Fire Captain for the next eighteen months. Even while he was out on Injury Leave in 2019, CFD station videos and surveillance raised legitimate questions about how severely injured the Appellant really was, but Chief Albanese gave the Appellant the benefit of the doubt and did not initiate any formal disciplinary action at that time.

Second, the Appellant had been under scrutiny since 2017 for his cavalier use of “swaps” privileges – inducing others to take his scheduled shifts without duly reciprocating by “working off” the swap. Despite formal discipline for this infraction, when the Appellant went out on Injury Leave in June 2021, he had not made any progress on his obligation to “work off” the twelve swaps he had accumulated over the years. Although this problem was not specifically included by CCM Ambrosino as a basis for the discipline involved in this appeal, I do take note of this prior misconduct as a context for the CFD’s reasonable conclusion that the Appellant knew of, and had disdain for, the fact that Chief Albanese was a “stickler” on attendance issues.²⁶

Third, an assignment to light duty does not involve fire suppression or physical training exercises, but is limited to office work – answering telephones, taking messages, typing, filing and other clerical tasks – on a Monday through Friday daytime schedule, with time off for medical appointments. If accommodations are needed to perform even light duty, they are available on request. While the opportunity to be assigned light duty might seem to be an incentive to return to work, I note that is not necessarily the case for someone, such as the Appellant, who runs an

²⁶ I note from the testimony, especially from CCM Ambrosino and Chief Albanese, that Chief Albanese was hired as Chief from outside the CFD because of the “many problems” with outdated policies and contentious labor/management issues and was given the mission to reform and modernize the CFD. I infer that having to adjust to Chief Albanese’s new policy of strict enforcement of attendance and other CFD rules and regulations likely was discomforting to many CFD employees and to the Appellant, specifically.

outside business. A return to limited duty means that the employee is paid his regular, taxable base pay (with limited ability to earn overtime) and is no longer entitled to tax free 111F benefits that the employee receives when out on Injury Leave. Also, a CFD Company Fire Captain on regular full duty works a one-day 24-hour shift, one day off, another 24-hour shift, followed by 5 days off. Thus, that such a schedule is likely to afford the Appellant considerably more flexibility to attend to that business than if he were working a “9 to 5” type job. It may also explain why the Appellant would have reason to want to postpone a return to limited duty for as long as possible.

Fourth, the Appellant undermined his credibility by demonstrating a lack of candor in concocting a thoroughly exaggerated and unsubstantiated picture of Chief Albanese as someone who disliked the Appellant and was “out to get him”. The Appellant’s accusations against Chief Albanese, many under oath, include, for example: (1) repeated charges that he was “coerced and bullied” into agreeing to accept discipline in 2020 for his violation of the swaps policy, a statement he retracted in his testimony at the Commission hearing; (2) alleging that he had exposed an October 2019 “overtime scandal that involved a Chelsea deputy chief stealing \$35,000 in overtime and the fire chief covered it up”, or that he had “become a target” of retaliation “all due to me calling out the fraud of my department”, when the evidence showed that the problem was a glitch in how overtime was reported, which was promptly rectified once discovered, there was no “theft” or “cover-up” and the Appellant (who had been under scrutiny for violating CFD policy since 2017) had nothing to do with bringing the matter to light; and (3) charging that the CFD hired him “knowing I am a disabled veteran of the United States Navy” as well as someone with a “disability acquired while working for the fire department” which “impaired major life functions vital to my job”, when the evidence proved no such thing, but rather showed that Chief Albanese had no knowledge that the Appellant was a “disabled” veteran prior to January 2021, and knew nothing

until the Commission hearing in this appeal about the Appellant's history with the Veteran's Administration of having been found to have significant physical and emotional disabilities during his tenure at the CFD.²⁷

Fifth, the Appellant's lack of candor extended to his interaction with his medical providers, and his medically dubious characterization of his condition as a "broken back". I am not sure whether the provider who added the 20-minute driving restriction to the July 14, 2021, return to duty form did so at the Appellant's direction, or merely misunderstood the Appellant when he told the provider that it was difficult for him to sit for more than 20 minutes. Nevertheless, once that condition was included, the Appellant did nothing to rectify the issue although, as noted below, he clearly continued to drive (or at least sit in a vehicle) for well more than 20 minutes on a regular basis, both to and from CFD and elsewhere for personal and private business. Similarly, he failed to give Dr. Bhat any information about what limited duty actually entailed. At the Commission hearing, after Dr Bhat learned what CFD limited duty involved, Dr. Bhat indicated that information would definitely have affected his decision to keep the Appellant out of work.

Sixth, the Appellant's claim to be unable to work even on a limited duty basis (performing clerical duties with accommodations for mitigating issues of sitting and standing), is inconsistent with the documented evidence of his true work capacity. The Appellant took at least three extended summer vacations during his Injury Leave—a trip to the Bahamas, a vacation at a lakeside residence in Maine, and a week-long camping trip to New Hampshire – which, for the most part, he actively concealed from the CFD. He was seen at his place of business (a 25-minute drive from his

²⁷ I have carefully reviewed the additional evidence of proffered by the Appellant in his Second Motion to Supplement the Record. In addition to the fact that the proffer came after the record had closed and was not subject to cross-examination or rebuttal, I find nothing in that proffer, either standing alone or in combination of any evidence already in the record that would lead me to give that proffered evidence any weight or change my conclusion stated above.

Andover residence) on at least six (6) occasions during the several weeks of surveillance conducted on him, where he typically spent several hours at a time, both inside the office and walking around outside. On one occasion (August 2, 2021), after spending more than 2½ hours at his place of business, he then drove approximately twenty-seven (27) minutes to a medical appointment in New Hampshire and then drove to Woburn MA and later proceeded, first, to Reading MA and, then, to Wakefield MA. He managed to make it to CFD for most of his weekly check-ins (a 30-minute drive from Andover). I agree with Chief Albanese and CCM Ambrosino that this pattern of behavior is incompatible with any honest belief that the Appellant was incapable of performing limited duty for the CFD.

In sum, I conclude that the preponderance of the evidence established just cause to impose significant discipline for the Appellant's unreasonable refusal to return to limited duty on and after July 14, 2021.

The Failure to Make In-Person Weekly Reports

The second reason Chelsea provided for imposing discipline upon the Appellant concerns his failure to conform to CFD rules and regulations, as well as specific written directives from Chief Albanese, that required him to personally report to the CFD administrative offices prior to noon every Wednesday to update his "progress and status" while on Injury Leave. In particular, although the Appellant complied with this requirement most of the time he was on Injury Leave, Chelsea presented evidence that the Appellant reported late on July 15, 2021 and reported three times by email rather than in person (July 8, August 25, and September 8, 2021). Also, on one of the two occasions that Chief Albanese excused the Appellant from reporting (August 11, 2021), Chief Albanese came to learn that Appellant was in New Hampshire on a camping trip and did not attend

the funeral in Wakefield MA that he gave as the reason he would not be able to report in person on August 11, 2021.

Save for the deceptive concealment of the Appellant's actual activities that enabled him to be excused from reporting on August 11, 2021, and his "email" report for July 8, 2021 that omitted the fact that he was on a trip to the Bahamas, I am persuaded that the Appellant's neglect in reporting late on one occasion and by e-mail two other times does not rise to the same level of "substantial misconduct which adversely affects the public interest by impairing the efficiency of public service" as did the Appellant's persistent exaggeration and concealment of the actual extent of his ability to return to duty.

The CFD had received detailed medical reports from the Appellant's 2021 visits with his medical providers on June 21st, July 14th, July 28th, August 16th and August 27th and knew he was not going to be cleared to return to duty. The Appellant had been under active surveillance from July 16th through August 2nd, and again beginning on September 6th. The CFD clearly knew throughout July and August 2021 the position the Appellant and his medical providers had taken regarding his "progress and status".

Some modified discipline, short of a six-month suspension and demotion would be warranted for this additional misconduct. Given that I conclude below, however, that the Appellant's exaggeration and concealment of the actual extent of his impairment, alone, justifies the suspension and demotion imposed, the Commission need not consider whether a modification of the discipline related to the failure to report should be ordered.

Appellant's Claims of Disparate Treatment and Bias

The Appellant's claim of disparate treatment because of Chief Albanese's personal animosity against him are without merit and need be addressed only briefly.

Most importantly, CCM Ambrosino, not Chief Albanese, was the Appointing Authority who made the decision to demote the Appellant and impose a six-month suspension. The Appellant provided no evidence that CCM Ambrosino had any pre-conceived adverse opinion about the Appellant or harbored any animus against him. CCM Ambrosino persuaded me that his choice of discipline was based solely on his assessment of the severity of the Appellant's misconduct as proved by the evidence presented.²⁸

Moreover, the Appellant's contentions that he had been singled out due to a personal animus against him was thoroughly discredited. None of the alleged similarly situated comparators he presented, either at the Commission hearing or through the proffers in Second Motions to Supplement the Record, bears sufficient similarity to the serious pattern of deceptive behavior by the Appellant found to have been committed by the Appellant to support a claim of disparate treatment or bias. The alleged anecdotal evidence of discrimination (e.g., calling the Appellant a "frequent flyer") comes solely from the credible observations by Chief Albanese and others about the Appellant's professional performance while on-duty or on Injury Leave. Nothing that he presented persuaded me that the Appellant was viewed differently because of any personal traits or characteristics. In particular, the contention that Chelsea discriminated or retaliated against the Appellant because of his status as a disabled veteran was thoroughly discredited by the evidence that (1) neither CCM Ambrosino nor Chief Albanese knew of this status and (2) the Appellant never made any request for accommodation for that alleged disability. Finally, as to any alleged

²⁸ I note that the Appellant failed to testify at the Appointing Authority hearing, which entitled CCM Ambrosino to draw an adverse inference against him. The Appellant claimed that his failure to testify was due to poor advice of counsel. I have considered, as I must, the adverse inference against the Appellant as a factor in deciding this appeal but my conclusion that the Appointing Authority's decision was supported by the preponderance of the evidence and was not tainted by unlawful bias is based on my own de novo review of the evidence and does not depend on that adverse inference.

animus stemming from the Appellant's claim to have exposed Chief Albanese's cover-up of a 2018 overtime fraud scheme, I find no credible evidence to support the allegation that any such fraud occurred and, in addition, found no nexus between the 2018 incident and the disciplinary decisions taken by Chief Albanese and CCM in 2021.

Modification of the Discipline

I have carefully considered whether or not the discipline imposed on the Appellant was excessive and should be modified. I conclude that a modification is not appropriate here. As noted above, CCM Ambrosino carefully weighed Chief Albanese's recommendation for more severe discipline before reaching his own conclusion that the Appellant's deceptive and dishonest evasion of his obligation to return to duty when able warranted a significant suspension and disqualified him to continue to serve as an CFD supervisor who is expected to enforce the rules and stand as a role model for others. I also note that Chief Albanese placed attendance as his number one priority. In the absence of unlawful bias or other violation of basic merit principles, the Commission is not warranted to exercise its discretion to modify the discipline imposed for the Appellant's proven misconduct.

CONCLUSION

For all of the above reasons, the appeal of Robert Brown, Jr., Docket No. D1-21-223 is hereby

denied.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chair; Dooley, McConney, Stein and Tivnan, Commissioners) on July 13, 2023.

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 the 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:

Paul A. Magliocchetti, Esq. (for Appellant)

Kay H. Hodge, Esq. (for Respondent)

John Simon, Esq. (for Respondent)