

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

100 Cambridge Street, Suite 200

Boston, MA 02114

617-979-1900

PATRICK BURNS, SR.,

Appellant

v.

CITY OF WORCESTER,

Respondent

Docket number:

D1-23-186

Appearance for Appellant:

Robert A. Scott, Esq.
Hector E. Pineiro, Esq.
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Appearance for Respondent:

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Commissioner:

Shawn C. Dooley

Summary of Decision

The Civil Service Commission denied the appeal of a firefighter seeking to overturn his termination, concluding that the Worcester Fire Department had just cause to terminate him for insubordination related to his unwillingness to adhere to a rehabilitation agreement to return to work.

DECISION

On September 22, 2023, the Appellant, Patrick Burns, Sr. (Appellant), filed a timely appeal with the Civil Service Commission (Commission), pursuant to G.L. c. 31, §§ 41-43. The appeal challenged the decision of the City of Worcester (City) to terminate him from his position as a Firefighter for the Worcester Fire Department (WFD).

The Commission held a remote pre-hearing conference on October 31, 2023. I conducted an in-person hearing at Worcester City Hall on January 24, 2024.¹ The hearing was digitally recorded via the Webex videoconferencing platform and a link to the recording was provided to both parties.² Both parties filed proposed decisions. For the reasons set forth below, the Appellant's appeal is denied.

FINDINGS OF FACT

The Appellant submitted six exhibits into evidence (Exhibits A1, A3-A7).³ The City submitted 15 exhibits into evidence (Exhibits R1-R15). In addition, at my request, the City produced a relevant email from Deputy Chief Powers, dated 9/21/21, which was admitted as Exhibit R16. Based on the documents submitted and the testimony of the following witnesses:

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 Code Mass. Regs. §§ 1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

² If there is a judicial appeal of a Commission decision that issues in this matter, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of any evidentiary hearing relevant to the underlying decision of the Civil Service Commission to the extent that he/she wishes to challenge the decision as unsupported by substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, this recording should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript, unless a transcript was made at the time of the hearing.

³ Exhibit A2 was submitted by the Appellant and was objected to by the City. The objection was sustained.

Called by the City:

- Fire Chief Martin Dyer (Chief Dyer)
- Deputy Fire Chief John Powers⁴ (Deputy Chief Powers)
- Fire Lieutenant Sean Gaffney⁵ (Lt. Gaffney)

Called by the Appellant:

- Patrick Burns, Sr., Appellant
- District Chief Daniel O’Neil (District Chief O’Neil)
- Lieutenant Jackson Lowbridge (Lt. Lowbridge)
- Firefighter Adam LaPointe (FF LaPointe)

and taking administrative notice of all matters filed in the case, pertinent law, and reasonable inferences from other credible evidence, a preponderance of evidence establishes the following facts:

1. The Appellant is a 48-year-old male who has lived in Worcester his entire life. (*Appellant’s testimony*)
2. The Appellant has two children of which he has custody. (*Appellant’s testimony*)
3. The Appellant was hired as a firefighter by the City in December 2008. (*Appellant’s testimony*)
4. The Appellant was transferred to the Fire Department Rescue Unit (Rescue 1, Group 4) in 2015. (*Appellant’s testimony*)
5. WFD’s Rescue Unit is an elite and specialized unit comprised of highly trained firefighters who respond to highly technical and dangerous rescue scenarios. (*Appellant’s testimony, Exhibit A7*)

⁴ John Powers retired as an Assistant Chief in December 2023. For purposes of this decision, I will refer to Mr. Powers as “Deputy Chief Powers”, as that was his rank during the relevant time period.

⁵ During the relevant time period, Sean Gaffney (“Lt. Gaffney”) served in the rank of Firefighter as well as a Union representative. He has since been promoted to the rank of lieutenant.

6. On September 21, 2021, Deputy Chief John Powers attended a WFD training for firefighters (including the Rescue unit) at Green Hill Park. Deputy Chief Powers was Deputy Chief of Operations and his responsibilities included overseeing the Training Division. *(Testimony of Appellant and Deputy Chief Powers)*
7. During the training, the Appellant received permission from Lt. Jackson Lowbridge (his direct supervisor) to attend, via his personal cellular phone, a zoom video hearing being held at the Worcester Division of the Massachusetts Probate and Family Court regarding a personal matter (later identified as a child custody issue). *(Testimony of the Appellant)*
8. After observing the training for approximately half an hour, Deputy Chief Powers noticed that the Appellant was not participating in the training. *(Testimony of Deputy Chief Powers)*
9. Deputy Chief Powers located the Appellant who was on his phone participating in the aforementioned court hearing via Zoom in the rear of Rescue 1. He did not speak to the Appellant at that time. *(Testimony of the Appellant and Deputy Chief Powers)*
10. Later that day, Deputy Chief Powers ordered the Appellant, Lt. Lowbridge, and District Chief Daniel O'Neil to report to Worcester Fire Department Headquarters. *(Testimony of Deputy Chief Powers and Lt. Lowbridge)*
11. Deputy Chief Powers spoke with Lt. Lowbridge and District Chief O'Neil and discussed that the Appellant's ex-wife was, according to the Appellant, deliberately scheduling hearings in Probate Court on his duty days. *(Testimony of Deputy Chief Powers)*
12. Deputy Chief Powers then had Lt. Lowbridge bring the Appellant into his office to discuss attending court hearings while on duty. *(Testimony of Deputy Chief Powers)*
13. Deputy Chief Powers began to discuss with the Appellant why his conduct was unacceptable. *(Testimony of Deputy Chief Powers)*

14. Deputy Chief Powers testified before the Commission that the Appellant was in a “rambling diatribe” and “looked terrible and his pupils were pinpoint” and he wouldn’t stop talking even when asked. Deputy Chief Powers then asked the Appellant if he were on drugs which the Appellant denied. (*Testimony of Deputy Chief Powers*)
15. Deputy Powers told the Appellant at the meeting that his pupils appeared to be “pinpoint”. During testimony before the Commission, Deputy Chief Powers elaborated that he also observed that the Appellant was acting erratic, and that his skin tone appeared to be grey/pale, and all of those factors are what led to Deputy Chief Powers’ belief that the Appellant was on drugs. (*Testimony of the Appellant and Deputy Chief Powers*)
16. Deputy Powers then asked the Appellant if he would take a drug test. (*Testimony Deputy Chief Powers*)
17. At this point, Lt. Lowbridge suggested that a Union Representative should be present at the meeting. (*Testimony of the Appellant*)
18. Lt. Sean Gaffney, who was an Executive Board member of the Union, came to the conference room and joined the others at the table. (*Testimony of Appellant*)
19. Lt. Gaffney, upon being informed by the Appellant of the accusation of Deputy Chief Powers, called the Union President, Captain Mike Papagni, to speak with the Appellant. (*Testimony of Appellant*)
20. Captain Papagni spoke with the Appellant over the phone while the Appellant remained in the room and Deputy Chief Powers was outside in the hall. The Appellant testified that he

told Captain Papagni that he (the Appellant) would likely test positive for THC if he took the test.⁶ Captain Papagni advised him not to take the drug test. (*Testimony of Appellant*)

21. Lt. Gaffney, the Union Representative, did not object or express disagreement during the meeting to Deputy Chief Powers regarding Deputy Powers' assertion that there was reasonable suspicion that the Appellant was under the influence of drugs. (*Testimony of Lt. Gaffney*)
22. Lt. Gaffney testified before the Commission that he did not feel that the Appellant was under the influence of drugs at the time of the meeting. (*Testimony of Lt. Gaffney*)
23. Lt. Gaffney testified that prior to the Appellant choosing the rehabilitation option, the Appellant informed him that if he took the drug test he would not pass. He did not inform Lt. Gaffney why he would not pass. (*Testimony of Lt. Gaffney*)
24. Similar to Lt. Gaffney, neither Lt. Lowbridge nor District Chief O'Neil observed anything during the meeting to cause them to conclude that the Appellant was under the influence of drugs, but neither of them contradicted Deputy Chief Powers' assertion to the contrary while at the meeting. They did testify that the Appellant was highly emotional, weeping, and not acting calmly —however, they did not feel that was due to being under the influence but rather due to the accusation coupled with the Appellant's child custody issues. (*Testimony of Lt. Lowbridge and District Chief O'Neil*)
25. During the meeting on September 21, 2021, Deputy Chief Powers told the Appellant that he had three options available to him: (1) Immediately take a drug test with potential discipline,

⁶ During his testimony before the Commission, the Appellant stated that he had been prescribed THC gummies to help him sleep. This information was not relayed to Papagni or anyone at the meeting. A copy of the prescription was never provided to the City, nor was it submitted as evidence at the hearing.

up to and including termination, if the test came back positive for drugs; (2) Refuse to submit to a drug test and be found to be insubordinate, which would result in discipline up to and including termination; or (3) Forego a drug test and agree to enter into a rehabilitation agreement with the City with the ability to return to work after successful completion of said agreement with no discipline.⁷ (*Testimony of Deputy Chief Powers, Lt. Lowbridge, Lt. Gaffney, and District Chief O'Neil*)

26. Lt. Gaffney, after discussing with the Appellant about being admitted to a rehabilitation facility as part of the rehabilitation agreement, then went out in the hall in an attempt to negotiate with Deputy Chief Powers. Lt. Gaffney testified that he attempted to get the Deputy Chief to allow the Appellant to attend out-patient rehab as opposed to inpatient. This request was denied and Deputy Chief Powers stated that inpatient rehabilitation was the only option. (*Testimony of Lt. Gaffney*)

27. Lt. Gaffney testified that the Appellant also stated during the meeting that he also wanted to get mental health counselling but that was in addition to the rehabilitation treatment, not in lieu of getting substance abuse rehabilitation treatment. (*Testimony of Lt. Gaffney*)

28. While the “3 options” were the standard practice⁸ for firefighters under suspicion of being under the influence of drugs or alcohol at Worcester Fire Department at the time of this

⁷ The Appellant testified before the Commission that he recalls being presented with several options but he could only specifically recall taking the drug test and insubordination. He said he knew there was more but he was not in a good place emotionally and did not recall exactly what was said.

⁸ The three options presented had been standard practice for any firefighter suspected of being under the influence of drugs and alcohol for several years. Lt. Gaffney stated that one of the primary reasons he was there as the Union representative was to ensure that the three options were presented to the Appellant and that he understood he had these three options and the consequences of each.

instance, no formal agreement had been reached with the local union and/or distributed to members of the Department. *(Testimony of Appellant)*

29. On November 23, 2021, approximately one month after the September 21st meeting with the Appellant, the City approved a written policy for drug testing of firefighters based on reasonable suspicion after reaching agreement on the text with the Worcester firefighters' union. *(Respondent Exhibit 12)*

30. Chief Dyer testified that during the past five years, roughly "six or seven" firefighters have fallen under the reasonable suspicion policy and all of them chose option three and have entered into an in-patient substance abuse rehabilitation program. *(Testimony of Chief Dyer)*

31. At the conclusion of the meeting, it was the opinion of Deputy Chief Powers, Lt. Gaffney, and Lt. Lowbridge that the Appellant had chosen Option 3 – forego a drug test in exchange for agreeing to enter into a rehabilitation agreement and be admitted into a rehabilitation facility. Everyone, besides the Appellant, testified that when they left the meeting that they understood that the Appellant had chosen Option 3, to enter into a rehabilitation agreement, and enter into a drug rehabilitation program. *(Testimony of Chief Dyer, Deputy Chief Powers, Lt. Lowbridge, and Lt. Gaffney)*

32. The Appellant rode back from Worcester Fire Headquarters with District Chief O'Neil to Rescue 1's station house. *(Testimony of Appellant)*

33. In the meantime, Lt. Lowbridge contacted On Site Academy, a non-profit mental health facility for first responders, via telephone and requested that a counselor speak with the Appellant. Once the Appellant returned to the station, Lt. Lowbridge handed him the phone so he could speak briefly with a counselor. *(Testimony of Appellant)*

34. The Appellant then called his girlfriend to pick him up at the station and bring him home.

(Testimony of Appellant)

35. The Appellant had an additional two-hour conversation with the counselor on the night of September 21st and went to On Site Academy the following day to speak with someone. The Appellant then chose not to be admitted to the facility and there are no records or testimony as to what details or programs were discussed between the Appellant and On Site on that day.

(Testimony of Appellant)

36. Approximately one month later, in November 2021, the City's Human Resource Department drafted a "Rehabilitation Agreement" for the Appellant at the direction of Chief Dyer.⁹ Chief Dyer worked with Union President, Captain Papagni, to finalize the agreement prior to presenting it to the Appellant on November 29, 2021.¹⁰ *(Testimony of Chief Dyer)*

37. On or about November 29, 2021, the City emailed the Appellant with an unsigned copy of the Rehabilitation (Settlement) Agreement. The Appellant did not sign the agreement nor respond to the City regarding the agreement. *(Respondent Exhibit 3A)*

38. On January 21, 2022, Attorney Kimberly McMahon, Coordinator of Labor Relations for the City of Worcester, sent a letter to the Appellant advising him that the City would move for termination if the Rehabilitation Agreement were not signed by the Appellant and returned to the City on or before January 31, 2022. Attached to the letter was a copy of the

⁹ The official document outlining the requirements of the Appellant returning to work was titled, "Settlement Agreement" but was referred throughout the process as the Rehabilitation Agreement. This is also how this option is referenced in the agreement between the City and IAFF Local 1009 (Firefighters Union) in their agreement on Reasonable Suspicion Testing dated November 23, 2021. For the sake of clarity, I will use the term Rehabilitation Agreement throughout this document.

¹⁰ Previous Rehabilitation Agreements with other firefighters were similarly negotiated and structurally similar in scope and process.

Rehabilitation Agreement. It also stated that after the agreement was signed that the Appellant was expected to promptly and timely comply with the agreement. (*Respondent Exhibit 5 and 5A*)

39. The letter outlined that, on September 21, 2021, the City intended to subject the Appellant to a drug screen based upon reasonable suspicion of being under the influence of drugs, but the Appellant opted to enter into an agreement with the City to complete substance abuse rehabilitation treatment. (*Respondent Exhibit 5 and 5A*)
40. On January 31, 2022, the Appellant responded through his attorneys with a letter outlining alternative language that would be acceptable to the Appellant. The letter stated that he would relinquish any claims against the City relating to this matter, would submit to a drug screening prior to returning, and would attest that he does not use any non-prescribed drug. The letter further stated that the Appellant would abide by the rules of the Worcester Fire Department, including not being under the influence of drugs or alcohol while on duty, that he would not bring intoxicating beverages into the fire station, and would not use illegal drugs. (*Respondent Exhibit 6*)
41. The letter did not address attending any rehabilitation program, being subject to drug or alcohol testing after returning to work, or any of the other requirements set forth in the Rehabilitation Agreement. (*Respondent Exhibit 6*)
42. Over seven months later, on August 12, 2022, the City notified the Appellant that they were moving forward with termination of his employment for “job abandonment”. The City stated that:

[d]espite numerous requests from the City to sign the agreement that you agreed to enter, and to comply with the terms of the agreement, you have failed to take any action. Specifically, you have not returned the signed agreement to the City, nor is there any evidence that you have taken the steps necessary to enable you to return to duty. Instead,

the information available to the City demonstrates that you have taken no action and have instead opted to remain absent from the City without leave. Based on your conduct, the City has concluded that you no longer desire to remain employed as a firefighter with the City.

(Respondent Exhibit 7)

43. In the letter the City notified the Appellant of his right to request a hearing on his termination. *(Respondent Exhibit 7)*

44. On August 22, 2022, the Appellant submitted a letter to the Acting City Manager, Eric Batista, requesting a reasonable accommodation under the Americans with Disabilities Act (ADA) “for a mental health condition described in previously submitted medical and mental health records by withdrawing its demands for a last chance agreement, and in particular by withdrawing the requirements stated in Paragraphs 2 and 4-6 of the proposed agreement as conditions for my return to employment.” *(Respondent Exhibit 8)*

45. The Appellant attached urine drug screen results dated November 8, 2021, and August 17, 2022, as well as a hair follicle drug screen dated August 16, 2022—all showing a negative result for drugs. In addition, the Appellant included three letters from medical providers stating that he had been treated by them. These letters do not address any rehabilitation treatment or any specific treatment for any mental health condition.¹¹ *(Respondent Exhibits 8, 8A, 8B, 8C, 8D, 8E, and 8F)*

¹¹ The Appellant wrote in his letter to the City that he was asking for a reasonable accommodation for a mental health condition. He does not state what the mental health condition is, nor did he submit any supporting documents including diagnosis or evaluation of any mental health condition. Further, he did not put forth an accommodation request except for the City to withdraw four paragraphs of the agreement as he believes those paragraphs would exacerbate this undisclosed mental health condition. During testimony before the Commission, the Appellant stated that he is not currently seeing a therapist or receiving treatment for any mental health condition, and only goes to family therapy with his children.

46. The Appellant in this letter acknowledges he was “ordered to undergo and refused testing,” on September 21, 2021. *(Respondent Exhibit 8)*
47. Also in this letter, the Appellant stated that should his conditions not be acceptable to the City then this should serve as his formal request for a hearing on his termination. *(Respondent Exhibit 8)*
48. On January 3, 2023, the Appellant filed a civil complaint in Federal Court against the City to recover lost income due to unpaid suspension and termination from his job as a Worcester firefighter without cause and without due process.¹² *(Respondent Exhibit 9)*
49. On February 28, 2023, the City notified the Appellant that they were proceeding with a termination hearing scheduled for March 15, 2023. This letter stated that this notice revoked the August 12, 2022, notice to terminate. *(Respondent Exhibit 1)*
50. The letter stated: “[I]f any or all of the allegations contained herein are proven, your conduct is unbecoming of a firefighter and constitutes just cause for the termination of your employment. You have been absent without authorization and have in essence abandoned your job.” *(Respondent Exhibit 1)*
51. The letter further went on to state: “ Your conduct and actions also constitute violations of the Worcester Fire Department Rules and Regulations and Administrative Directives, including but not limited to: Chapter XII, Section 2.b. : Conduct unbecoming a member, whether on or off duty, which tends to lower the service in the estimation of the public; Chapter XII, Section 2.k. : Absence without Leave; and Chapter XII, Section 2.m. : Insubordination. ” *(Respondent Exhibit 1)*

¹² This case is currently pending before Judge Guzman at the United States District Court for the District of Massachusetts. Extensions have been granted to June 30, 2024 for respondents’ submissions.

52. On May 2, 2023, the City notified the Appellant that the hearing date was being rescheduled from March 15, 2023, to May 9, 2023, by agreement of the parties. (*Respondent Exhibit 2*)
53. On June 7, 2023, the termination hearing of the Appellant took place at the Worcester Fire Administrative Office. The Hearing Officer assigned by the City Manager to handle this case was Karen Meyer, Assistant City Solicitor for the City of Worcester. (*Appellant Exhibit 7*)
54. On September 11, 2023, Hearing Officer Meyer issued her report finding that “the Department’s 3 Option practice, now policy, recognizes the desire to assist those employees in need of rehabilitation services but also acknowledges that, as first responders, the Department has an obligation to protect the public and ensure that firefighters are fit for duty.” And that the Appellant’s “personal situation is not an excuse.” She further found that he could have either “immediately taken the drug/alcohol test or participate in a rehabilitation program under an approved settlement agreement, or would be subject to discipline.” She concluded that the Appellant’s “refusal to accept either option constituted good cause for the Department’s conclusion of insubordination and job abandonment, and just cause for discipline, including termination from his employment.” (*Appellant Exhibit 7*)
55. On September 12, 2023, Worcester City Manager Eric Batista notified the Appellant via certified mail that he adopted “the findings and conclusions contained” in the hearing officer’s report as his own and “that there is just cause to terminate your employment. Accordingly, your employment is terminated, effective immediately.” (*Appellant Exhibit 7*)
56. To date, the Worcester Firefighter’s Union has not filed an objection on how this process was handled or to any aspect of this case; nor have they filed a grievance on behalf of their member, the Appellant. (*Testimony of Lt. Gaffney*)

Applicable Civil Service Law

The Civil Service Commission is charged with ensuring that employment decisions are made consistent with basic merit principles. Basic merit principles require, among other things:

“ ... retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected”; and ... assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens” and; “assuring that all employees are protected ... from arbitrary and capricious actions.” (G.L. c. 31, § 1).

Section 41 of G.L. c. 31 states in relevant part:

“Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be discharged, removed, suspended for a period of more than five days ...”

An action is “justified” if it is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law.” *Commissioners of Civil Service v. Municipal Ct. of Boston*, 359 Mass. 211, 214 (1971); *Cambridge v. Civil Service Comm’n*, 43 Mass. App. Ct. 300, 304 (1997); *Selectmen of Wakefield v. Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928). The Commission determines justification for discipline by inquiring “whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service.” *School Comm. v. Civil Service Comm’n*, 43 Mass. App. Ct. 486, 488 (1997); *Murray v. Second Dist. Ct.*, 389 Mass. 508, 514 (1983).

The Appointing Authority’s burden of proof by a preponderance of the evidence is satisfied “if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there.” *Tucker v. Pearlstein*, 334 Mass. 33, 35-36 (1956).

Section 43 of G.L. c. 31 states in pertinent part:

“If a person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, appeal in writing to the commission, he shall be given a hearing before a member of the commission ...

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

Under section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew.” *Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823 (2006) and cases cited. However, “[t]he commission’s task . . . is not to be accomplished on a wholly blank slate. After making its de novo findings of fact, the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether ‘there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision’,” *Id.*, quoting internally from *Watertown v. Arria*, 16 Mass .App. Ct. 331, 334 (1983) and cases cited.

Analysis

The City of Worcester has shown by a preponderance of the evidence that it had just cause to terminate the Appellant based upon his insubordination. I credit the testimony of Deputy Chief Powers, District Chief O’Neil, and Lt. Gaffney that the Appellant, during a meeting on September 21, 2021, agreed to admit himself to a rehabilitation facility in exchange for not being required to be administered a drug test that day. I find that the Appellant was aware that refusing to either

take a drug test or enter into a rehabilitation agreement would be considered insubordination and he understood that insubordination could result in termination.

The Appellant admitted, in writing, that he was ordered to take a drug test and he refused. This, on its face, is insubordination. The fact that he chose the third option (to enter into a rehabilitation agreement) to avoid having to take a test on that date after receiving counsel from his Union representative was reasoned and deliberate. I do not find the Appellant's testimony that he was confused and thought that he could simply seek mental health counseling to avoid taking a drug test to be credible.

He subsequently reneged on that commitment and failed to admit himself into rehabilitation program. It was clear that he understood that this was required of him, hence his Union representative's attempt to negotiate the ability for him to participate in an outpatient program as opposed to being admitted to an in-patient treatment facility. Further, the Appellant did not make any effort to communicate with the City for over four months from the date of the incident, and only then after the City contacted him stating that if they did not hear from him they were moving to terminate his employment.

For over a period of a year and a half, the City gave the Appellant multiple opportunities to enter a rehabilitation facility. The Appellant did not get admitted to a rehabilitation program and did not abide by the parameters set forth in the Department's three option practice (albeit unwritten at the time of the incident) or the Rehabilitation Agreement presented to him after the fact which outlined the actions required for him to return to work as a Worcester Firefighter.

On January 31, 2022, the Appellant, through his attorney, sent a letter to the City stating that he would attest to the fact that he is not on drugs and would not use drugs or alcohol while on duty. All of which is already required of every firefighter in the City of Worcester. This letter is

not a good faith attempt to negotiate the settlement agreement, nor was there ever any suggestion by the City that the terms of returning to work were open for negotiation.

Further, on August 22, 2022, the Appellant made a request for “a reasonable accommodation under the Americans with Disabilities Act” due to a “mental health condition”. The Appellant did not state in this letter or at any time prior what said mental health condition he was referencing; nor did he provide any records to substantiate any mental health condition. His request for reasonable accommodation states that the City must withdraw “its demand for a last chance agreement, and in particular by withdrawing the requirements stated in Paragraphs 2 and 4-6 of the proposed agreement as conditions for my return to employment.” By striking out these sections the Appellant would not need to attend and subsequently be approved to return to work by a licensed substance abuse rehabilitation program, he would not have to submit to drug or alcohol screening at the Fire Chief’s discretion during the entirety of the 36 month agreement and, were he were to refuse to take or were he to fail a drug or alcohol test during the 36 months the agreement would be in effect, he would not be considered in violation of said agreement (actions that otherwise would result in termination). There is no rationale expressed as to why any of the City’s requirements would have required an accommodation under the ADA or would have exacerbated any mental health condition. Coupled with this letter, the Appellant submitted negative drug tests (a urine test from November 2021 and a hair follicle and urine test from August 2022) – all of which were meaningless in showing whether, on September 21, 2021, he was under the influence of illegal drugs while on duty.

I find that while there were conflicting opinions as to whether the Appellant appeared to be under the influence on September 21, 2021, there was agreement that he was acting irrationally, spoke in a very excited manner, and was exceptionally emotional, including weeping, during the

meeting. I credit Deputy Chief Power's analysis that these actions, in addition to the other symptoms he noted (pinpoint pupils, pale/ashen skin tone) were enough to have a reasonable suspicion that the Appellant had been under the influence of drugs. Further, other people present, including the Appellant's Union representative, did not formally object to the Deputy Chief's assertion that he suspected that the Appellant was under the influence.

I do not credit the Appellant's testimony that he never agreed to the "third option" of entering into a rehabilitation agreement. During the meeting on September 21, 2021, the Appellant was made aware of the three options available to him and that he understood the consequences of failing a drug test as well as insubordination. The Appellant told his Union representative, as well as the Union President, that if he took the drug test at that time, he would not pass. He was then advised by his Union President to not take the test, as a positive test would result in termination. The Appellant understood that the only option available to him that would allow him to keep his job was the third option, to enter into a rehabilitation agreement. After conferencing with the Appellant, Lt. Gaffney (the Union Rep) went to Deputy Chief Powers to negotiate out-patient treatment as opposed to in-patient treatment, which was denied by the Deputy Chief. This is further evidence that the Appellant understood that the third option required him entering a rehabilitation program.

The Appellant testified before the Commission that the reason he thought he might test positive for THC was that he was taking marijuana gummies prescribed by a doctor. This information was not shared by the Appellant on September 21, 2021. He also testified that he never informed anyone at the Department of his use of these gummies, he did not ask anyone in the Department if firefighters were allowed to use marijuana gummies, and he had no knowledge whether firefighters were allowed to use medical marijuana even with a medical marijuana card.

Further, the Appellant could not remember the name of the clinic he received the prescription from and was unable to produce a copy of his medical marijuana card or a prescription for the marijuana gummies. I do not credit his testimony that this was the reason he refused to take a drug test.

The fact that the Appellant did have representation provided by his Union is significant. I found the testimony of Lt. Gaffney, Union Representative, to be credible. Lt. Gaffney stated that the Appellant was given three options, understood these options, and took the “third option” to enter into a rehabilitation agreement. He stated this was standard practice at that time within the Worcester Fire Department for anyone said to be under reasonable suspicion of being under the influence of drugs and/or alcohol.

The Appellant repeatedly refused to sign this agreement, and he did not unilaterally enter any (in-patient or out-patient) rehabilitation facility for substance abuse treatment. The City informed him that if he continued to refuse to abide by the agreement, he would be terminated. While the word “order” was not directly used in the written communication, there is no ambiguity that the Appellant understood that he was being directed by his employer to complete all of the requirements set out in the rehabilitation agreement. By the Appellant’s repeated refusal to enter an in-patient substance abuse rehabilitation program, and by continually ignoring the direction of his superior officers, I find the Appellant to have been insubordinate on multiple occasions.

On September 21, 2021, Deputy Chief Powers directed the Appellant to take a drug test and notified him that if he refused he would be found to be insubordinate and receive discipline accordingly. He was told that there was a third option available to him: he could enter into an in-patient rehabilitation facility and enter into a rehabilitation agreement with the City. The Deputy Chief told the Appellant’s Union representative that in-patient rehab was not negotiable, and the Appellant could not do an out-patient to satisfy the agreement. The Appellant’s Union President

subsequently worked with the Chief Dyer to draft the terms of the Rehabilitation Agreement which includes successful completion of a licensed Substance Abuse Rehabilitation Program.

The Appellant twice submitted alternative proposals to the City that would not require him to enter any substance abuse rehabilitation program, either in-patient or out-patient. Both of these proposals were rejected by the City. In the second letter, the Appellant asked for accommodation due to his “mental health problems” but the Appellant did not identify what these problems were nor provide any supporting documentation surrounding any mental health issues. The mental health accommodation he requested was that the City remove a majority of the requirements in the agreement, including that he would need to go to licensed substance abuse rehabilitation program, submit to hair or urine testing at the Chief’s discretion during the 36 month period, and if found to be under the influence due to a positive test result would be immediately terminated. He did not give any reason as to why any of these elements would affect his mental health and at the hearing did not offer any exhibits or documentation to further these claims whatsoever.

Conclusion

For all of the above stated reasons, the appeal of Patrick Burns under Docket No. D1-23-186 is ***denied***.

Civil Service Commission

/s/ Shawn C. Dooley

Shawn C. Dooley
Commissioner

By a 4-1 vote of the Civil Service Commission (Bowman, Chair - Yes; Dooley, Commissioner - Yes; Markey, Commissioner – No; McConney, Commissioner – Yes; & Stein, Commissioner - Yes) on June 27, 2024.

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

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

Robin Scott, Esq. (for Appellant)

Ian Keefe, Esq. (for Respondent)

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

100 Cambridge Street, Suite 200

Boston, MA 02114

617-979-1900

PATRICK BURNS, SR.,

Appellant

v.

CITY OF WORCESTER,

Respondent

OPINION OF COMMISSIONER JOSEPH MARKEY

I voted no as I do not believe the City had just cause to terminate the Appellant based on the facts of this particular appeal for the following reasons. First, at the time of the incident, the Fire Department had no written policy regarding drug testing, including what constituted reasonable suspicion for a firefighter to be ordered to undergo drug testing. Second, the record provides scant support to justify the order at the time. Aside from the Deputy Fire Chief, none of the other percipient witnesses who testified before the Commission found the Appellant's behavior at the time to justify the ordering of a drug test. Rather, it appears that the Appellant, at most, showed an outward appearance of any parent who had just participated in an adversarial proceeding in probate court. While public safety agencies have a duty to ensure that its members are not under the influence of illegal drugs, I don't believe the facts related to this particular appeal support the charge of insubordination or provide just cause for termination.

CIVIL SERVICE COMMISSION

/s/ Joseph A. Markey

Joseph A. Markey

Commissioner

June 27, 2024