

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

**One Ashburton Place – Room 503
Boston, MA 02108
(617)727-2293**

KEVIN CARTER,
Appellant

v.

CASE NO: D-11-93

TOWN OF NORTH READING,
Respondent

Appellant (Pro Se):

Kevin Carter

Appointing Authority's Attorney:

Darren R. Klein, Esq.
Kopelman & Paige, PC
101 Arch Street
Boston, MA 02110

Commissioner:

Paul M. Stein¹

DECISION

The Appellant, Kevin Carter, acting pursuant to G.L.c.31, §§ 42 &43, duly appealed a decision of the Town of North Reading ("North Reading"), the Appointing Authority, to suspend him from February 25, 2011 until March 6, 2011, from his employment as a North Reading Firefighter due to his conduct at the scene of an emergency call and his conduct at the fire station after the call. A full hearing was held by the Civil Service Commission (the "Commission") on July 19, 2011. The hearing was declared private as no party requested a public hearing. Witnesses were sequestered at the request of the Appellant. North Reading called six witnesses and the Appellant testified on his own behalf. Fifteen (15) exhibits were received into evidence. The hearing was digitally recorded. North Reading submitted a post-hearing proposed decision.

¹ The Commission acknowledges the assistance of Law Clerk Michael Chin in the drafting of this decision.

FINDINGS OF FACT

Giving appropriate weight to the exhibits, the testimony of the witnesses [Richard Nash, Captain, North Reading Fire Department; David Lee, Firefighter, North Reading Fire Department; Bruce Herter, Officer, North Reading Police; Jonathan Burt, Firefighter, North Reading Fire Department; Barry Galvin, Captain, North Reading North Reading Fire Department; Richard Harris, retired Fire Chief, North Reading Fire Department; and the Appellant], and inferences reasonably drawn from the evidence as I find credible, I make the findings of fact set forth below.

1. The Appellant, Kevin Carter, was hired as a Firefighter and EMT in 1993. (*Undisputed Fact*)
2. On September 22, 2009, Firefighter Carter was verbally reprimanded for violating his red light permit. (*Exhibit 14*)
3. In October of 2009, Firefighter Carter received a four shift suspension for insubordination. (*Exhibit 15*)
4. Richard Harris was the Fire Chief when the incident that is the subject of the instant appeal took place. (*Testimony of Harris*)
5. On January 29, 2011, Firefighter Carter responded to a call in North Reading where a teenage female was suffering from a seizure. The call was initially responded to by Firefighter Carter, Captain Richard Nash, Firefighter David Lee, and Officer Bruce Herter. All four of these individuals were certified EMTs. Later on, two paramedics from the Town of Reading and Jonathan Burt, another North Reading Firefighter, also responded to the call. (*Testimony of Nash, Lee, Burt, and Herter*)
6. The officer in command of a call is typically the Captain, unless he is relieved by the Deputy Chief. (*Testimony of Nash and Lee*)

7. Captain Nash was the officer in charge and in command for the entirety of the call.

(Testimony of Nash and Lee)

8. After taking the patient's vital stats, it was determined that she suffered a seizure and the decision was made to transport her to a hospital. *(Testimony of Nash)*

9. In order to transport the patient, the emergency responders needed to restrain the patient to place her on the stretcher. When a seizure patient has to be restrained, it often looks harmful to the patient. *(Testimony of Nash)*

10. The patient's father initially asked the emergency responders not to touch his daughter. However, the patient's father eventually gave his full consent and the emergency responders attempted to load the patient onto the stretcher. *(Testimony of Nash)*

11. When the emergency responders attempted to place the patient on the stretcher, she became combative. The patient escaped from the emergency responders and ran towards the stairs. *(Testimony of Nash and Lee)*

12. After suffering a seizure, the patient presented a potential danger to herself and the emergency responders. The patient could have fallen down the stairs or fallen off the balcony at the top of the stairs. Furthermore, the emergency responders were aware there could be additional dangers to the patient, such as open windows or weapons, upstairs. *(Testimony of Nash, Lee, and Herter)*

13. Given the situation, Captain Nash ordered Firefighter Carter, the closest person to the stairs, to control the patient and prevent her from going upstairs. *(Testimony of Nash, Lee, and Herter)*

14. Firefighter Carter stated to Captain Nash in response, "Let the father do it." *(Testimony of Nash)*

15. Firefighter Carter failed to comply with the order and made only a half-hearted attempt to control the patient. As a result, the patient got to the staircase and was able to go into her bedroom upstairs. *(Testimony of Nash and Lee)*

16. In response to the situation, Firefighter Lee attempted to comply with the order given to Firefighter Carter and moved towards the patient to control her. Firefighter Lee was unable to control the patient because Firefighter Carter got in his way when he moved towards the patient. *(Testimony of Nash, Lee, and Herter)*

17. Captain Nash made contact with Firefighter Carter and pushed him in the direction of the patient with one hand and ordered him to go upstairs and control the patient. *(Testimony of Nash, Lee, and Herter)*

18. Captain Nash's contact with Firefighter Carter was non-violent and reasonable given the gravity and urgency of the situation. *(Testimony of Nash, Lee, and Herter)*

19. Firefighter Carter refused to comply with the order to go upstairs and stated that he was going to go outside instead. *(Testimony of Nash, Lee, and Herter)*

20. Captain Nash ordered Firefighter Carter to stay inside the house and assist with the call. *(Testimony of Nash, Lee, and Herter)*

21. Firefighter Carter refused the order, went outside, and abandoned his fellow emergency responders in the middle of an emergency call. *(Testimony of Nash, Lee, and Herter)*

22. The remaining emergency responders had trouble controlling the patient. Officer Herter was bitten and a Reading responder was kicked by the patient. *(Testimony of Nash and Herter)*

23. After Firefighter Carter left the house, Captain Nash radioed him twice and ordered him to bring equipment to the scene. *(Testimony of Nash, Lee, and Herter)*

24. Firefighter Carter failed to respond to either of Captain Nash's radio calls because he failed to turn his radio back on after leaving the house. (*Testimony of Nash, Lee, and Herter*)

25. It is not uncommon for firefighters to turn their radios off while responding to a call to avoid radio interference. However, radios should be turned back on when a firefighter is not responding to a call. (*Testimony of Nash, Lee, and Burt*)

26. Two other North Reading Firefighters heard Captain Nash's radio calls and responded to the scene. (*Testimony of Nash and Burt*)

27. The safety of the emergency responders and the patient was compromised by Firefighter Carter's refusal to comply with any and all orders. (*Testimony of Carter Nash, Lee, and Herter*)

28. All EMTs are required to know all Office of Emergency Medical Services (OEMS) protocols. (*Testimony of Nash and Harris*)

29. OEMS protocol 5.7 governs the appropriate conduct for pediatric seizures. Preventing patient from accidental self-harm is the first step in treatment. (*Exhibit 13*)

30. All of Captain Nash's orders were consistent with OEMS protocol 5.7. (*Testimony of Nash and Lee*)

31. Firefighters must follow orders and doing so is critical to the successful handling of emergency calls. Refusing to comply with an order jeopardizes the health and safety of both citizens and emergency responders. (*Testimony of Nash, Lee, Herter, Burt, Galvin, and Harris*)

32. The only time a firefighter may refuse an order is if it unreasonably jeopardizes his health and safety beyond the normal risks associated with the job. (*Testimony of Nash, Lee, and Harris*)

33. If a firefighter disagrees with an order, the appropriate time to deal with it is at the fire station, after the call. (*Testimony of Nash, Lee, and Harris*)

34. None of the witnesses could recall another instance of a firefighter refusing to comply with an order during a call. (*Testimony of Nash, Lee, Herter, Burt, Galvin, and Harris*)

35. None of Captain Nash's orders unreasonably jeopardized Firefighter Carter's health or safety. (*Testimony of Carter*)

36. After the call, the firefighters returned to the fire station where Captain Nash ordered Firefighter Carter to wait in his office so the parties could discuss the events of the call. Captain Nash intended to discipline Firefighter Carter, thus he obtained union representation for both Firefighter Carter and himself. (*Testimony of Nash, Lee, Burt, and Galvin*)

37. In the interim, Firefighter Carter disobeyed Captain Nash's order and left Captain Nash's office. Firefighter Carter was ordered again to return to Captain Nash's office. This order was also disobeyed and Firefighter Carter was at the station desk area when Captain Nash returned to his office. (*Testimony of Burt and Galvin*)

38. At the meeting, Firefighter Carter refused union representation and the parties discussed the call. At the conclusion of the meeting, Captain Nash ordered Firefighter Carter to submit a written statement on the Fire Chief's desk by 8:00AM Monday morning. Firefighter Carter responded, "I do not work on Monday, see you Tuesday." (*Exhibit 1*)

39. Captain Nash acted professionally at the fire station and Firefighter Carter introduced no evidence of unprofessional conduct by Captain Nash to corroborate his own self-serving testimony. (*Testimony of Lee, Burt, and Galvin*)

40. Fire Chief Richard Harris conducted an investigation into the incident. He requested and received a written statement from the Appellant and every North Reading Firefighter involved and also interviewed Officer Herter and the Reading Paramedics. Chief Harris met with both Captain Nash and Firefighter Carter, both of whom stood by their written statement. As a result

of the investigation, Chief Harris determined that Firefighter Carter disobeyed at least four direct orders and was insubordinate at the fire station. (*Testimony of Harris*)

41. Firefighter Carter was suspended for two and a half 24-hour shifts, or five shifts, as each 24-hour shift is broken down into two shifts. Firefighter Carter's suspension ran from February 25, 2011 to March 6, 2011, which equals six days for the purposes of G.L.c.31, § 41. (*Exhibit 1*)

42. Firefighter Carter received notice of his suspension on February 25, 2011 and filed his local appointing authority hearing request on March 2, 2011. (*Exhibit 1 and 2*)

43. A hearing was held on March 4, 2011 and on March 9, 2011 Firefighter Carter's suspension was upheld. (*Exhibit 4*)

44. On March 21, 2011 Firefighter Carter filed an appeal with the Commission pursuant to G.L.c.31, § 43 and on April 13, 2011 Firefighter Carter amended his appeal to include a G.L.c.31, § 42 appeal as well. (*Exhibit 5*)

CONCLUSION

Applicable Legal Standards

Under G.L.c.31, §43, a tenured civil service employee aggrieved by a disciplinary decision of an appointing authority made pursuant to G.L.c.31, § 41, may appeal to the Commission. Section 41 requires the appointing authority to give written notice and a discipline hearing before any tenured civil service employee is suspended for a period of more than five days excluding Saturdays, Sundays, and legal holidays. However, an employee may be suspended for just cause for a period of five days or less without a hearing prior to such suspension. G.L.c.31, § 41. For the purposes of § 41, Thornton v. Civil Service Commission defines "five days" as, "a single, continuous period covering five twenty-four hour days." Thornton, 80 Mass. App. Ct. 441, rev.den., 958 N.E.2d 529 (2011).

Pursuant to § 42, a tenured civil service employee must file an appeal “within ten days, exclusive of Saturdays, Sundays, and legal holidays, after said action has been taken.” G.L.c.31, § 42. Section 43 requires an aggrieved tenured civil service employee to file an appeal within ten days after receiving written notice of the employment decision.

The Commission must determine, under a “preponderance of the evidence” test, whether the appointing authority met its burden of proof that “there was just cause” for the action taken. G.L.c.31, §43. See, e.g., Falmouth v. Civil 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); McIsaac v. Civil Serv. Comm’n, 38 Mass. App. Ct. 473, 477 (1995); Watertown v. Arria, 16 Mass.App Ct. 331, 334, rev.den., 390 Mass. 1102 (1983). 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 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).

An action is "justified" if "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law." Commissioners of Civil Serv. v. Municipal Ct., 359 Mass. 211, 214 (1971); Cambridge v. Civil Serv. Comm’n, 43 Mass. App Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). An appointing authority's burden of proof is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) The

Commission must take account of all credible evidence in the record, including whatever may fairly detract from the weight of any particular evidence. See Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001). It is a basic tenet of the “merit principle” of civil service law that discipline must be remedial, not punitive, designed to “correct inadequate performance” and “separating employees whose inadequate performance cannot be corrected.” G.L.c.31, § 1.

It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance.” E.g., Leominster v. Stratton, 58 Mass. App. Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003) (where live witnesses gave conflicting testimony, decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing).

In performing its appellate function,

[T]he commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew. . . . [after] a hearing de novo upon all material evidence and . . . not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer. . . . For the commission, the question is . . . “whether, *on the facts found by the commission*, there was reasonable justification for the action taken by the appointing authority *in the circumstances found by the commission to have existed* when the appointing authority made its decision.”

Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003) (quoting Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983) (emphasis added)). See also Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823; Cambridge v. Civil Serv. Comm’n, 43 Mass. App. Ct. 300, 303-05,

rev.den., 428 Mass. 1102 (1997). See generally Villare v. North Reading, 8 MCSR 44, reconsidered, 8 MCSR 53 (1995) (discussing de novo fact finding by “disinterested” Commissioner in context of procedural due process).

Summary of Conclusion

Applying these principles to the facts of this appeal, North Reading met its burden – by a preponderance of the evidence – to establish just cause to discipline the Appellant. However, as he was not given a hearing prior to the discipline imposed, the suspension must be set aside.

Procedural Issues

Thornton, interpreting G.L.c.31 § 41, states that appointing authorities may not properly impose a suspension of more than “a single, continuous period covering five twenty-four hour days” excluding Saturdays, Sundays, and legal holidays, upon a tenured civil service employee without first holding a presuspension hearing.² 80 Mass. App. Ct. at 451. The evidence shows that Firefighter Carter was suspended from February 25, 2011 to March 6, 2011, or a period of six days excluding weekends and legal holidays. By law, Firefighter Carter was entitled to a pre-suspension hearing before his six day suspension began. However, North Reading failed to follow this procedure and waited until March 4, 2011 to hold a discipline hearing. For this reason, Firefighter Carter’s suspension must be set aside.

North Reading attempts to distinguish the instant case from Thornton in three ways. First, the appeal pursuant to § 42 is untimely; second, Firefighter Carter got full notice of his rights and a discipline hearing before serving the full suspension and; third, Firefighter Carter suffered no prejudice due to North Reading’s procedural error.

First, while § 42 requires appeals to be filed within ten days, exclusive of Saturdays, Sundays, and legal holidays, after said action has been taken, North Reading’s claim that

² The Commission has previously interpreted § 41 differently, but this interpretation was rejected in Thornton.

Firefighter Carter's § 42 appeal was untimely is without merit. Although Firefighter Carter did not file his § 42 appeal until April 13, 2011, his § 43 appeal was timely filed. On March 9, 2011 Firefighter Carter was notified that his suspension was upheld and on March 21, 2011 he timely filed his § 43 appeal. The § 42 appeal plainly arose out of the same transaction set forth in the original § 43 pleading and the Commission appropriately allowed Firefighter Carter to amend his appeal on April 13, 2011. See 801 C.M.R. 1.01(6)(f) (amendments to pleadings may be allowed upon conditions that the Presiding Officer deems just). Therefore, both the § 42 and § 43 appeals were timely filed. See generally, Mass.R.Civ.P.15(c)(general rule that amendments to civil pleadings related to original claim relate back to date of initial filing)

Second, although Firefighter Carter got full notice of his rights and a hearing earlier than Thornton, Firefighter Carter's discipline hearing was still untimely. It is undisputed that North Reading provided Firefighter Carter a copy of G.L.c.31, § 41-45. The suspension hearing in Thornton was not held until a month after the suspension was served. In the instant case, Firefighter Carter was suspended for six days, thus triggering the requirement of a suspension hearing prior to the beginning of the suspension. While it is commendable that North Reading did not wait a month to hold a hearing, a suspension hearing was not held until March 4, 2011, five days after the suspension began. Furthermore, the suspension was not affirmed by North Reading until the suspension was served in its entirety. The relevant inquiry is whether, not to what degree, North Reading violated § 41. In accordance with Thornton, North Reading clearly violated § 41 and there is no merit to the distinction that the discipline hearing was held before Firefighter Carter served his suspension in full.

Third, the claim that Firefighter Carter was not prejudiced by the procedural error is also without merit. It is seemingly clear pursuant to § 42 that if the appointing authority fails to

comply with § 41, the civil service employee must demonstrate prejudice for the Commission to grant relief. We have previously held true to this position. See, e.g., Dinicola v. City of Methuen, 22 MCSR 504 (2009) (no prejudice shown due to procedural deficiencies); Waiyaki v. Department of Mental Retardation, 21 MCSR 196 (2008) (same); Rizzo v. Lexington, 21 MCSR 70 (2008) (same); Gariepy v. Department of Correction, 19 MCSR 211 (2006) (same). The evidence presented by Firefighter Carter does not constitute a showing of prejudice. However, the Thornton court granted relief without requiring any showing of actual prejudice. The Commission is bound to follow the Appeals Court decision. Under the rule established by Thornton, prejudice is presumed.

Just Cause for Disciplining Firefighter Carter

Although this appeal must be allowed on procedural grounds, the Commission notes that but for Thornton, the Commission would have dismissed the appeal on the merits.

The Commission uses a “preponderance of the evidence” test to determine whether the appointing authority met its burden of proof that “there was just cause” for the action taken. G.L.c.31, § 43. See Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823 (2006). An action is "justified" if "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law." Commissioners of Civil Serv. v. Municipal Ct., 359 Mass. 211, 214 (1971).

North Reading cites two separate reasons that warrant justification of Firefighter Carter’s discipline. First, based on the evidence presented, Firefighter Carter’s behavior at the scene of the emergency and failure to follow a superior’s orders created a dangerous environment for the patient and the emergency responders. At some point during the emergency call, Captain Nash ordered Firefighter Carter and Firefighter Lee to control the patient after she broke loose and ran

towards the stairs. Captain Nash issued this order to protect the safety of the patient and the emergency responders. Firefighter Carter stated to Captain Nash in response, “Let the father do it,” and failed to comply with the order and made only a half-hearted attempt to control the patient. In response to the situation, Firefighter Lee attempted to comply with the order given to Firefighter Carter, however was unable to control the patient because Firefighter Carter got in his way when Firefighter Lee moved towards the patient. Captain Nash put his hand on Mr. Carter and directed him towards the patient and repeated his order, which again was ignored by Firefighter Carter. As a result, the patient got to the staircase and was able to go into her bedroom upstairs. Despite Captain Nash ordering Firefighter Carter to stay inside the house and assist with the call, the situation was further exacerbated when Firefighter Carter ignored the order, turned off his radio, and left the house. After hearing Captain Nash’s emergency radio calls go unanswered by Firefighter Carter, two other North Reading Firefighters responded to the call.

Second, Firefighter Carter was insubordinate at the firehouse after the emergency call concluded. Captain Nash twice ordered Firefighter Carter to wait in his office so the parties could discuss the events of the call. Captain Nash intended to discipline Firefighter Carter, thus he attempted to obtain union representation to represent all interested parties. At the conclusion of the meeting, Captain Nash ordered Firefighter Carter to submit a written statement on the Fire Chief’s desk by 8:00AM Monday morning to which Firefighter Carter responded, “I do not work on Monday, see you Tuesday.”

The overwhelming weight of the evidence indicates that Firefighter Carter’s conduct was unprecedented and compromised the success of the call. A dangerous environment was created for both the patient and the emergency responders. This dangerous environment played a role in

Officer Herter being bitten and a Reading Paramedic being kicked. No witness could point to an example of another firefighter ignoring a superior's order at the scene of an emergency. Each witness testified that the appropriate venue to disagree with an order is at the firehouse, after the emergency. It was established that the only time an order can be refused at a scene by a firefighter is if it endangers his or her life beyond the normal call of duty. There was no evidence presented by Firefighter Carter that illustrates that his life or safety was endangered in any way by the orders. The insubordinate conduct of Firefighter Carter at the fire station demonstrated a lack of professional judgment, a lack of respect for authority, and a failure to accept criticism for his actions at the scene. Furthermore, Firefighter Carter has two prior instances of misconduct, including a four shift suspension in 2009 for insubordination.

After carefully considering all of the circumstances, I conclude that the five-shift suspension of Firefighter Carter was reasonable given his conduct both at the scene and at the firehouse and given his prior discipline history. However, North Reading failed to hold a discipline hearing prior to suspending Firefighter Carter for more than five days. For the aforementioned reason, it is necessary to set aside Firefighter Carter's suspension.

For the reasons stated above, the appeal of the Appellant, Kevin Carter, is hereby *allowed*.

Civil Service Commission

Paul M. Stein
Commissioner

By a 3-1 vote of the Civil Service Commission (Bowman, Chairman [AYE]; Ittleman [NOT PARTICIPATING], Marquis [NO], McDowell [AYE], and Stein [AYE], Commissioners) on August 23, 2012.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in 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.

Notice:

Kevin Carter (Appellant)

Darren R. Klein, Esq. (for North Reading)