

THE COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION  
One Ashburton Place, Room 503  
Boston, MA 02108  
(617) 727 – 2293

JOSEPH D. COSBY,  
*Appellant*

v.

D1-08-187

CITY OF BOSTON,  
*Respondent*

Attorney for the Appellant:

Joseph J. McLean, Atty.  
20 Waterman Road  
Boston, MA 02131  
(617) 469-7290

Attorney for the Respondent:

Jordan N. Ablon, Atty.  
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Commissioner:

Daniel M. Henderson<sup>1</sup>

DECISION

Pursuant to the provisions of G.L. c. 31 § 2(b), the Appellant, Joseph D. Cosby (hereinafter “Appellant”) is appealing the decision of the City of Boston (hereinafter the “City” or “Appointing Authority”) to terminate his employment as a Boston Fire Department (“BFD”) Fire Fighter for failing a substance abuse screening test for the second time within a three (3) year period.

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<sup>1</sup> The Commission acknowledges the assistance of Maimoona L. Sahi, Esq. in the drafting of this decision.

The appeal was timely filed. A full hearing was held on October 9, 2008 at the offices of the Civil Service Commission (hereinafter "Commission"). Because no written notice was received from either party to make the proceeding public, the hearing was declared private. The witnesses were not sequestered. The hearing was recorded on one (1) audio tape. Both parties subsequently submitted proposed decisions.

#### FINDINGS OF FACT:

Fifteen (15) exhibits were entered into evidence at the hearing. The record was left open for the Respondent to submit two additional documents at the request of the Commissioner. Those documents were received by the Commission on October 10, 2008, and entered into the record as Exhibit 16(BFD Rules & Regulations) and Exhibit 17 (CBA between City and Union Local 718). Based on the documents submitted into evidence and the testimony of:

##### *For the Appellant:*

- None

##### *For the Respondent:*

- Michael J. Doherty, Deputy Fire Chief, Boston Fire Department
- Michael G. Hamrock, Medical Examiner, Boston Fire Department
- Joseph D. Cosby, Appellant<sup>2</sup>

I make the following findings of fact:

1. The Appellant, Joseph D. Cosby, a tenured civil service employee of the Department, has been employed as a Fire Fighter since November 24, 1986. (Testimony of Appellant).
2. The Appellant was previously disciplined for violating BFD Rule 18.44 (o) Substance Abuse in 2005. For that charged offense, he waived his right to a hearing and accepted a

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<sup>2</sup> The Appellant was called by the City as a witness but refused to testify, on advice of his Attorney.

thirty (30) day suspension. He agreed in writing by agreement dated September 19, 2005. (Exhibit 14).

3. On November 6, 2007, the Appellant was treated at Beth Israel Deaconess Hospital for Pancolonic diverticulosis with recurrent episodes of diverticulitis. He was discharged from the hospital on November 9, 2007 with a prescription for one hundred and fifty (150) tablets of hydromorphone and sixty (60) tablets of morphine. (Exhibit 8).
4. On April 14, 2008, the Appellant fell down the stairs at the Wood Island MBTA station in East Boston, while on duty. As a result, the Appellant was placed on administrative leave and began physical therapy. (Exhibit 4).
5. On May 29, 2008, the Appellant met with Dr. Michael Hamrock (hereinafter "Hamrock"), the Medical Examiner for the BFD. Dr. Hamrock reviewed his medical documentation to determine whether he was able to return to light duty. When Hamrock observed that the Appellant appeared anxious, was sweating and fidgety, he expressed concern to the Appellant about these behaviors. (Testimony of Hamrock).
6. Dr. Hamrock in his capacity as Medical Examiner reviews all medical bills and documentation sent to the City for payment of employees' medical treatment. He routinely reviews the documentation and bills for fraud and justified treatment. If his nurse finds some discrepancy or red flag, she calls his attention to it. (Testimony of Hamrock).
7. Hamrock also reviewed two notes sent by local hospitals indicating drug use/seeking behavior by the Appellant. The notes were attached to hospital bills for payment forwarded the Department. One note dated January 22, 2008 from Nurse Rosemary Prentice (hereinafter "Prentice"), from Massachusetts General Hospital Emergency, instructed a pharmacist to destroy a prescription after the Appellant sought to obtain a prescription refill

one week after he had filled the same for one hundred and twenty (120) tablets of Percocet. The Appellant had exhibited behavior that indicated “drug seeking”. Another note from New England Baptist Hospital dated May 6, 2008 described the Appellant as “nervous and fidgety.” (Testimony of Hamrock, Exhibit 7 and Exhibit 6).

8. On May 29, 2008, the Appellant submitted to a physical exam by Dr. Hamrock. The Appellant submitted to a Department substance abuse screening test at that exam and tested positive for morphine. (Testimony of Hamrock, Exhibit 5).
9. During this medical examination by Dr. Hamrock, the Appellant denied taking any opiates within the prior two (2) months. (Testimony of Hamrock).
10. On or about June 10, 2008, the Appellant provided Hamrock with a note written by Dr. James E. Ruano (hereinafter “Ruano”), indicating that he had been prescribed morphine during his November 2007 hospital stay for pain relief. (Exhibit 1).
11. The Appellant also provided a June 11, 2008 note written by Dr. Lisa A. Ferzoco (hereinafter “Ferzoco”) stating that he required surgical care for his diverticulitis. (Exhibit 2).
12. The Appellant had been treated during the relevant period from approximately three Medical Doctors: Dr. Ruano, Dr. Taylor and Dr. Herzig. The Appellant had sought and received prescriptions for medication: morphine, Percocet and oxycodone etc. from these Doctors. The Appellant received 11 prescriptions from 11/09/07 to 05/13/08. (Testimony of Dr. Hamrock, Exhibit 4, Exhibit 8)
13. Dr. Hamrock testified that the number of prescriptions sought and the volume of medication, 1,026 pills, over 180 days indicated a “pattern of use”, together with his own

observations and the other documentation he obtained, supported the conclusion of substance abuse. (Testimony of Dr. Hamrock, Exhibit 4, Exhibit 8)

14. Dr. Hamrock formed a medical opinion that the Appellant exhibited signs of substance abuse e.g. anxious, sweating, fidgety, small pupils, despite his claim that he had not taken any pain medication in two months. The Appellant was then sent for a urine test taken, for which a urine sample was collected that same day as the exam(5/29/08) was sent for a tox screen and came back positive for opiates, most consistent with morphine, levels greater than 3000, a level of 2000 is considered positive use. Dr. Hamrock testified that this is a positive test for morphine use. (Exhibit 4)
15. On June 11, 2008, Deputy Fire Chief Michael J. Doherty (hereinafter Doherty) sent a memorandum to Fire Commissioner, Roderick J. Fraser, Jr. (hereinafter "Fraser") stating that the medical documentation submitted by the Appellant in order to explain his positive substance abuse test was unacceptable. Doherty recommended a hearing to determine whether the Appellant should be removed, discharged or suspended from his position as a Fire Fighter for his second violation of Rule 18.44 (o) Substance Abuse. (Testimony of Doherty, Exhibit 9).
16. On June 24, 2008, the Department gave the Appellant notice of a hearing for July 10, 2008. (Exhibit 10).
17. On July 10, 2008, a hearing was held before the City's Disciplinary Hearing Board (hereinafter the "Board") of the Department. (Exhibit 12)
18. At this hearing, Hamrock testified that his research indicated the Appellant had filled prescriptions for over 1,022 opiate pills (over 5 pills per day) from November 9, 2007 to

May 13, 2008. He claimed that he took these pills as needed for pain. (Testimony of Hamrock, Exhibit 8).

19. However, the Appellant testified earlier at the City's Board Hearing that he was working and therefore on-duty approximately half of those days between November 9, 2007 and May 13, 2008. He also testified that he did not take any medication on the days he was on-duty. The Appellant thereby claimed to be taking at least twice the number of pills per day-off or 10 pills per day. The Board Hearing transcript shows the questioning by the City's Board indicated that the Board did not believe that the Appellant had such a great need for pain relief on his days-off only and no need for pain relief on his on-duty days. (Exhibit 4)
20. After hearing all the testimony and reviewing the evidence, the Board found that the Appellant had violated Rule 18.44 (o), substance abuse for the second time. (Exhibit 12).
21. On July 22, 2008, the Appellant was notified that he was being discharged effective July 25, 2008 for violating Rule 18.44 (o). (Exhibit 13).
22. The Appellant claims that he had prescriptions for the morphine for which he tested positive. He claims he took the morphine for pain, caused by diverticulitis, only as needed. However, the Appellant sought and received prescriptions from various Doctors and obtained a very large amount over a relatively short period of time. He obtained the medication from a variety of pharmacy locations. He was asked at the City Hearing about filling prescriptions at a variety of locations instead of just one, for example MGH; he responded that MGH was in his neighborhood. However, Dr. Hamrock pointed out that he filled the next prescription at Rite Aid in Weymouth. The Appellant then responded that he was visiting his sister in Weymouth then. He testified at the earlier City Board Hearing that he did not take any medication when he worked or immediately before. However, he

admitted that he took the large amount of pain medication, as needed when he was off-duty. It is not plausible, given his alternating schedule of days on and off, that he would only need pain medication when he was off duty. The Appellant understood that he was prohibited from taking such medication while on duty, so he simply denied doing so. The Appellant's denial of on duty medication use to the City's Hearing Board is unconvincing. His earlier testimony in explanation for using a variety of locations to fill the prescriptions is also inadequate and unconvincing. (Exhibits 4, 8, testimony of Dr. Hamrock)

23. Dr. Hamrock testified in a straight forward manner. He did not appear to hold any bias against the Appellant. On the contrary, he appeared to be sincerely interested in helping the Appellant deal with his substance abuse problem or addiction. He is the Department's Medical Examiner and he is also a certified Medical Review Officer. His demeanor is that of an accomplished and experienced medical doctor. In this position of responsibility, he could not afford to ignore or down play the information and facts that he became aware of. I find his testimony to be very credible. (Exhibits, testimony, testimony and demeanor of Dr. Hamrock)

24. **The Appellant was called as a witness by the Respondent City of Boston but refused to testify on the advice of his Attorney.** The Appellant had testified at the City's earlier disciplinary hearing and was questioned then by the three members of the City's Hearing Board. The Appellant as the party of interest in forwarding this appeal before the Commission would presumably provide testimony favorable to his interest. The Appellant was present and available at this hearing and verbally refused to testify, when called upon by the City. His failure to testify conversely, without sufficient justification, excuse or explanation; allows for an **adverse inference** to be drawn from his failure to testify. The

Appellant offered no such justification or excuse and provided no explanation. The Appellant failed to sustain his burden of reasonably explaining **his failure to testify**. The Appellant's questioning by the three members of the City's Hearing Board at the earlier hearing was incisive and thorough on several issues, including: the large volume of prescription pain medication he had obtained over a relatively short period of time; the variety and location of the pharmacies and other dispensaries from which he obtained the medication; the length of time the physical effects and evidence remained in the blood or urine after consumption and the Appellant's work schedule and whether he had taken said medication while actually working or just before beginning work. The Appellant's answers when compared to his own testimony, that of Dr. Hamrock, and other evidence could have been determined to be implausible, inconsistent or contradictory by the Hearing Board. The transcript of that earlier City Hearing is in evidence at this hearing. (Exhibit 4) The City is represented by counsel at this Commission hearing where it had not been represented by counsel at the earlier City Hearing. It would be expected that the City's Attorney would effectively examine the Appellant based in part on his testimony at the earlier City Hearing. Given the posture of the evidence at this Commission hearing including the transcript, (Exhibit 4); I draw an adverse inference against the Appellant, that is, that if he had testified here and had been examined by the City's Attorney, his testimony on balance would have been unfavorable to the success of his appeal. (Testimony and exhibits, reasonable inferences)

## **CONCLUSION**

The role of the Civil Service Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action



taken by the appointing authority." Cambridge v. Civil Serv. Comm'n, 43 Mass. App. Ct. 300,304 (1997). See Watertown v. Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civil Serv. Comm'n, 38 Mass. App. Ct. 473, 477 (1995); Police Dep't of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is "justified" when 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." Id. at 304, quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civ. Serv. v. Mun. Ct. of the City of Boston, 359 Mass. 211, 214 (1971). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct by impairing the efficiency of public service." Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Comm. of Brockton v. Civ. Serv. Comm'n, 43 Mass. App. Ct. 486, 488 (1997).

The Appointing Authority's burden of proof is one of a preponderance of the evidence which 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). In reviewing an appeal under G.L. c. 31, §43, if the Commission finds by a preponderance of the evidence that there was just cause for an action taken against an Appellant, the Commission shall affirm the action of the Appointing Authority. Falmouth v. Civil Serv. Comm'n, 61 Mass. App. Ct. 796, 800 (2004).

The issue for the Commission is "not whether it would have acted as the Appointing Authority had acted, but 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." Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). See Commissioners of Civ. Serv. v. Mun. Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

The Respondent has shown by a preponderance of the credible evidence in the record that it appropriately discharged the Appellant from the Boston Fire Department. The Appellant previously received a thirty (30) day suspension, which he did not contest, for substance abuse of morphine in 2005. In June of 2008, after exhibiting symptoms of substance abuse, he again tested positive for morphine. Department rules clearly indicate that violations of Rule 18.44 (o) Substance Abuse can lead to discharge. The Appellant claims that he had prescriptions for the morphine for which he tested positive. He claims he took the morphine for pain, caused by diverticulitis, only as needed. However, the Appellant sought and received prescriptions from various Doctors and obtained a very large amount over a relatively short period of time. He obtained the medication from a variety of pharmacy locations. He was asked at the City Hearing about filling prescriptions at a variety of locations instead of just one, for example MGH; he responded that MGH was in his neighborhood. However, Dr. Hamrock pointed out that he filled the next prescription at Rite Aid in Weymouth. The Appellant then responded that he was visiting his sister in Weymouth then. He testified at the earlier City Board Hearing that he did not take any medication when he worked or immediately before. However, he admitted that he took the large amount of pain medication, as needed only when he was off-duty. It is not plausible, given his alternating schedule of days on and off, that he would only need pain medication when he was off duty. The Appellant understood that he was prohibited from taking such medication while on duty, so he simply denied doing so. The Appellant's denial of on duty medication use to

the City's Hearing Board is unconvincing. When Dr. Hamrock, the Department's medical examiner, conducted a medical exam to determine if the Appellant could return to light duty after an injury, he observed that the Appellant showed signs of substance abuse; he appeared anxious, was sweating and fidgety and he became concerned by this behavior. Dr. Hamrock reviewed two notes sent by local hospitals that also indicated drug abuse by the Appellant. One note instructed a pharmacist to destroy a prescription after the Appellant sought to obtain a prescription refill one week after he had filled the same for one hundred and twenty tablets of percocet. Another note described the Appellant as nervous and fidgety. Based on the totality of the evidence the City had at the time of its Board Hearing, including the Appellant's testimony, the City had sound and sufficient reasons for the action it took, the discharge of the Appellant from employment after a second substance abuse violation.

It is understood that Firefighting is a dangerous profession, on which public safety is dependant. Good judgment, clear thinking and safe action are the foundation of effective firefighting. The machinery, equipment and circumstances involved in firefighting demand that mental and physical performance is unaffected or influenced by medication or other substances. The Appellant knew this and had been previously disciplined for this same serious offense. The potential for catastrophic results from any critical firefighting performance while under the influence of a strong substance is great. Not only would the Appellant's addiction prove dangerous to himself, but he would jeopardize the safety and wellbeing of his fellow firefighters, and the public.

It is the function of the agency hearing the matter to determine what degree of credibility should be attached to a witness's testimony. School Comm. of Wellesley v. Labor Relations Comm'n, 376 Mass. 112, 120 (1978). Doherty v. Retirement Board of Medicine, 425 Mass. 130,

141 (1997). The hearing officer must provide an analysis as to how credibility is proportioned amongst witnesses. Herridge v. Board of Registration in Medicine, 420 Mass. 154, 165 (1995). The key witness for the City, Dr. Hamrock testified in a forthright and credible manner. No bias or political motive on the part of City was indicated.

Based on the Appellant's positive substance abuse test, the credible testimony of the Department's doctor who testified that the Appellant had filled prescriptions for over one thousand morphine pills in a six month period, equaling more than ten pills per day-off, and the Appellant's insufficient medical documentation, I find that the evidence supports the action taken by the City.

The Department has met its burden and proven by a preponderance of the credible evidence in the record that there was just cause to discharge the Appellant. Moreover, I find that there is no evidence of inappropriate motivations or objectives that would warrant the Commission modifying the discipline imposed upon him.

For all of the above reasons, the Appellant's appeal, Docket No. G-07-201 is hereby *dismissed*.

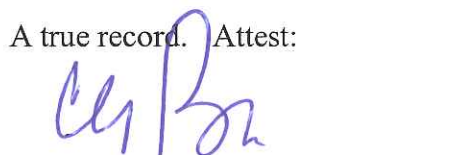
Civil Service Commission,



Daniel M. Henderson  
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell and Stein Commissioners) on October 7, 2010.

A true record. Attest:

  
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Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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

Notice to:

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