

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108
(617) 979-1900

CRAIG ERICKSON,
Appellant,

v.

D1-17-218

ROCKLAND FIRE DEPARTMENT,
Respondent

Appearance for Appellant:

Michael Savage, Esq.
Attorney at Law
Village of Brant Rock
PO Box 92
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Appearance for Respondent:

John J. Clifford, Esq.
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Commissioner:

Cynthia A. Ittleman, Esq.

DECISION

On October 19, 2017, the Appellant, (Mr. Erickson or Appellant), pursuant to G.L. c. 31, s. 43, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Town of Rockland (Town or Respondent) to terminate his employment. A pre-hearing conference was held on November 14, 2017 at the Commission's offices in Boston. The hearing was held on January 16, 2018 at the same location.¹ Witnesses (not including the Appellant) were sequestered. As a discipline case, the hearing was closed as the Commission did not

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

receive a written request from either party to open the hearing to the public, pursuant to G.L. c. 31, s. 43. The hearing was digitally recorded and both parties were provided with a CD of the hearing, from which the Appellant obtained a written transcription of the full hearing, copies of which were provided to the Commission and the Respondent. This transcription constitutes the official record of the hearing.² The parties filed post-hearing briefs. Thereafter, the Commission informed the parties that it may take administrative notice in this appeal of the Commission's decision in an appeal previously filed by the Appellant regarding a thirty (30)-day suspension by the Respondent, which prior appeal the Commission allowed. *See Erickson v. Rockland*, D-17-092; *aff'd Rockland v. Civil Service Commission and Erickson*, Plymouth Superior Court C.A. No. 1883CV00466 (J. Pasquale)(April 3, 2019).³ The Appellant filed a memorandum in support of taking such administrative notice. The Respondent filed a memorandum in opposition thereto but argued that if the Commission takes administrative notice here of its decision in the thirty (30)-day suspension appeal, the Commission should also take administrative notice of the administrative record of the thirty (30)-day suspension case. As noted below, the Commission takes administrative notice of our decision, and the record therein, regarding the Appellant's prior appeal of the thirty (30)-day suspension issued by the RFD. For the reasons stated herein, the appeal is allowed in part.

FINDINGS OF FACT:

² If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

³ I note that on judicial review of the Appellant's prior appeal, the Superior Court solely addressed the Respondent's allegation that the appeal was untimely. The Respondent has appealed the Superior Court's decision to the Appeals Court but the Commission is unaware of the Appeals Court docket number or the current status of the further appeal.

The Appellant's exhibits (A.Exs.) 1 through 9 and the Respondent's exhibits (R.Exs.) 1 through 48 were entered into evidence. Based on these exhibits, the testimony of the following witnesses:

Called by the Respondent:

- Scott Duffey, Fire Chief, Rockland Fire Department (RFD)

Called by the Appellant:

- Craig Erickson, Appellant;
- Dr. Robert Downes, M.D.

and taking administrative notice of all matters filed in the case, as well as the Commission's decision in Erickson v Rockland, D-17-092 and the administrative record therein; and pertinent statutes, case law, regulations, rules, policies; testimony that I find credible; and reasonable inferences from the evidence; a preponderance of evidence establishes the following facts:

Background

1. The Appellant was hired as a full-time firefighter in the RFD in 1986. The Appellant is an African American male, the only African American member of the Department, and the longest serving member of the RFD. In 1994, the Appellant was promoted to temporary Lieutenant in 1994 and permanent Lieutenant in 1996. While the Appellant was working one day in 1996, he was attacked by a former Selectman who was ultimately convicted of assault and battery⁴. (Testimony of Appellant)
2. In addition to his position as Lieutenant at the RFD, the Appellant occasionally engaged in outside employment at a private company providing public safety-related services,

⁴ It is alleged that the assault and battery was motivated by racism but there is insufficient evidence in the record to make a determination in that regard.

such as high angle or confined space rescues, which can be intense work. (R.Ex. 14; R.Ex. 27 (June 6, 2017 investigative interview of Appellant); Testimony of Appellant)⁵

3. Since approximately 2004, the Appellant also occasionally engaged in outside employment for a federal government program that trains first responders and deploys them to disaster areas. (Testimony of Appellant; R.Ex. 14) At the pertinent time, the Appellant was a Chief of Logistics for Massachusetts Team 1 in the federal government program. (R.Ex. 14)
4. In June 2010, Chief Scott Duffey became the Fire Chief of the RFD. (Testimony of Chief Duffey) The Rockland Fire Chief is the Fire Department's appointing authority. (R.Ex. 1) Before Chief Duffey worked at the RFD, he was employed by the Norwell Fire Department, where he worked with Thomas Heaney, who also became employed by the RFD. (Testimony of Duffey)
5. Chief Duffey developed and implemented the Rules and Regulations for the RFD, which were implemented on January 1, 2011 and were in effect at all pertinent times. Every member of the Department received these Rules and Regulations and was required to return a signed acknowledgment sheet to Chief Duffey. (Testimony of Duffey; R.Ex. 3)
6. The RFD implemented a Standard Operating Guideline (SOG) for sick leave on September 14, 2015. It provides, in part,
 1. The policy "further defines the use of sick leave as established in the [CBA]. It is not the intent of this SOG to restrict sick leave use or deny members of the benefits received through the collective bargaining process.
 2. Sick leave is a benefit that is specifically intended to be used in the event of personal sickness or non-service connected injury of the employee. Sick leave shall not be utilized for any other reasons.

⁵ The record does not appear to indicate when the Appellant began outside employment with the private rescue company.

2.1.Exception: Sick leave used as defined in Article 11.9 of the [CBA].

3. Sick leave is not a benefit provided to be used as a substitute for vacation or personal leave, nor does it provide the opportunity to work at outside employment.

3.1.If you are sick, it is expected you will stay home, except for a trip to the doctor's office, medical appointments or the pharmacy.

Exception: For some sick situations it may be permissible to resume non-fire department related activities even though you are unable to work. It is understood that **non-physical, non-fire department related activities and employment may be performed during convalescence. These situations shall be clearly communicated through the Fire Chief. These activities shall not be unreasonably denied by the Chief.**

4. Sick Leave abuse will be defined as follows:

4.1 Utilizing sick leave for purposes other than those outlined in Sections 2 and 3 of this SOG, or

4.2 Repeated pattern of taking sick leave in conjunction with weekends, holidays, and other paid leave, or

4.3 Use of more than 12 sick shifts in any 12 month period, unless the employee submits a medical certificate from a physician verifying the illness and inability to work, or

4.4 Submitting false or inaccurate information concerning the reason the employee needed to use sick leave.

5. Sick leave misuse and abuse will not be tolerated. Employees failing to follow this SOG will face disciplinary action as outlined in the Rules and Regulations of the [RFD] (dated January 1, 2011). ...”
(R.Ex. 4)(emphasis added)

7. Firefighters MD and MM were allowed to engage in outside employment while out on sick leave or injured on-duty leave under the 2015 sick leave policy. Firefighter MD engaged in outside employment as a Security Gate Attendant while out on injured on duty leave. Firefighter MM, while out on sick leave, also engaged in outside employment but as an account specialist for a trash company, which involved

clerical/administrative work. Firefighters MD and MM did not engage in outside employment on a day that they received sick pay from the RFD. (Testimony of Duffey)

8. Prior to the 2015 sick leave policy, members of the RFD were allowed to engage in outside employment while out on sick leave or injured on-duty leave. (Testimony of Duffey)
9. In 2012, when the Appellant was a provisional Fire Captain in the RFD, he filed a request for investigation at the Commission pursuant to G.L. c. 31, s. 2(a) asserting that Thomas Heaney, a member of the Department, did not qualify for promotion to Captain because he did not reside within ten (10) miles from the town limits of Rockland in violation of G.L. c. 31, s. 58. The Commission ordered the Town to investigate and ultimately concluded that Mr. Heaney, after the Appellant filed his request for investigation with the Commission, had moved to within ten (10) miles of the Town in satisfaction of the statute. The RFD then promoted Mr. Heaney.⁶ (Erickson v. Rockland Fire Department, CSC Tracking No. I-12-100 (2012; 2013))
10. The Appellant has filed grievances at the RFD alleging that he was subjected to race discrimination at the RFD, receiving disparate treatment by the Department regarding his outside employment, use of sick leave and in disciplinary matters. (R.Ex 36 - 39, 42 – 44 and 46) By letter dated June 21, 2016, Chief Duffey responded to then-pending grievances stating, in part,

You have presented to me numerous grievances since October 29, 2015. Each of these grievances conveyed allegations of racial discrimination ... Prior to answering these so called grievances, the Town of Rockland conducted an investigation into the multiple claims of racial discrimination. ... Now that the investigation is closed and no evidence of racial discrimination exist (sic), the matters being grieved can be dealt with

⁶ Thereafter, the Legislature amended G.L. c. 31, s. 58 allowing municipalities to collectively bargain this matter with the appropriate unions.

(R.Ex. 45)⁷

The letter went on to deny the Appellant's race discrimination grievances. (Id.)

Incidents Involving Appellant's Termination

11. In or about 2014, the Appellant was treating with Dr. Richard Goldbaum, psychiatrist, for Post-Traumatic Stress Disorder (PTSD). (Testimony of Appellant, R.Ex. 27)⁸
12. On February 21, 2017, Dr. Goldbaum faxed a letter to the RFD stating that the Appellant had suffered a relapse of PTSD and that the Appellant should not return to work until he was reevaluated and cleared by Dr. Goldbaum. The reevaluation of the Appellant would occur within two (2) weeks. (R.Ex. 5)⁹
13. On March 9, 2017, Dr. Goldbaum faxed a letter to Chief Duffey stating that he had reevaluated the Appellant and recommended that the Appellant be granted medical leave under the Family Medical Leave Act (FMLA). Included in the fax to Chief Duffey were the Appellant's deployment orders from the federal government program for training April 3 through 7, 2017. (Testimony of Duffey; R.Ex. 6)¹⁰

⁷ The June 21, 2016 letter states that the investigation report concerning the Appellant's race discrimination allegations is attached to the letter but it was not included with the letter produced by the Respondent in response to my request at the hearing. (Ex. 45)

⁸ There is no indication in the record if the Appellant was treated for PTSD prior to 2014.

⁹ There is no indication in the record of the events that lead to the Appellant's relapse.

¹⁰ The federal government program notice adds, in part, "Section 2812(d)(3) of the [Public Health Service] Act provides that service as an [federal government program] employee during activations and authorized training activities is considered 'service in the uniformed services.' As such, when the [federal government program] is activated to respond to a public health emergency or to be present at locations at risk of a public health emergency (which may include activation in response to a disaster, major emergency, or special event), or when [federal government program] employees are activated to participate in a Federal exercise or other official training, [federal government program] personnel are covered by the employment and reemployment rights provisions of chapter 43, title 38 of the U.S. Code (Uniformed Services Employment and Reemployment Rights Act)(USERRA). However, when [federal government program] employees are assigned to carry out ongoing activities necessary to prepare for the provision of health or other services when the [federal government program] is activated, employees are not considered to be providing 'service in the uniformed services' when engaged in such ongoing activities and will not be covered by USERRA for such activities." (R.Ex. 6)

14. When Chief Duffey received the Appellant's deployment orders, he was concerned that the Appellant would deploy for the federal government program training while out on sick leave. (Testimony of Duffey)
15. On March 10, 2017, the Appellant was out on sick leave for his entire twenty-four (24) hour shift. On that date, there were no other firefighters working overtime to cover the Appellant's shift. (Testimony of Duffey; R.Ex. 7) RFD members' work schedules remain the same so that they know when they worked in the past and when they will work in the future. Therefore, the Appellant was aware that on March 10, 2017 he was scheduled to work at RFD. (Testimony of Duffey)
16. On March 13, 2017, Chief Duffey wrote to the Appellant about Dr. Goldbaum's March 9 letter. Chief Duffey also notified the Appellant that in order to qualify for leave under the FMLA, he must fill out the required FMLA application. In the same letter to the Appellant, Chief Duffey specifically reminded the Appellant that he had no personal leave or vacation leave left, that he had three (3) shifts of holiday leave left ("if used as leave in lieu of pay"), and that he had twelve (12) 24-hour shifts, plus three (3) hours, of sick leave left. In the same letter, Chief Duffey also advised the Appellant that if he was still on medical leave from the RFD, he was not to deploy to the April 3 – 7, 2017 federal government program training and that doing so "will be viewed as an abuse of sick leave and you will face further discipline." (R.Ex. 8)
17. On March 16, 2017, the Appellant was out on sick leave for his entire twenty-four (24) hour shift. On that date, Lieutenant Daniel DelPrete and Captain Thomas Heaney covered both of the Appellant's shifts. (R.Ex. 9) The Appellant was aware that on March 16, 2017 he was scheduled to work at RFD. (Testimony of Duffy)

18. On March 23, 2017, Dr. Goldbaum faxed to Chief Duffey the Certification of Health Care Provider for Employee's Serious Health Condition pursuant to the FMLA. Included in Dr. Goldbaum's fax were his American with Disabilities Act (ADA) Recommendations for the Appellant: end "confrontational communications" with the Appellant, end co-workers' harassment of the Appellant, change the Appellant's night shift to a day shift, and implement sensitivity training. (R.Ex. 10)
19. On March 27, 2017, Chief Duffey sent a letter to Dr. Goldbaum addressing his request for ADA accommodations on behalf of the Appellant. Chief Duffey disputed Dr. Goldbaum's statements, writing, "[a]t various times in recent years, Lt. Erickson has made vague an (sic) unsubstantiated claims of harassment or improper treatment by other employees. Each time these claims were made, the Town attempted to investigate the claims. In each instance, the claims could not be substantiated because Lt. Erickson refused to provide details regarding names, dates or specific facts supporting the claims." (R.Ex. 11) Chief Duffey added that the Town had conducted sensitivity training with an outside consultant for four (4) days in 2014 in view of the Appellant's allegations, that he would consider possible assignment of the Appellant to the day shift under the appropriate circumstances and that the Town of Rockland would consider any accommodations which would not be unduly burdensome. (R.Ex. 11)
20. On April 3, 2017, Chief Duffey received a letter dated March 30 via fax from Dr. Goldbaum stating that the Appellant was "completely fit to return to his duties." (R.Ex. 12) The duties referenced were the Massachusetts Essential Tasks for fire department Lieutenants attached to the faxed letter. (Id.)

21. Sometime after March 30, 2017, but prior to the beginning of his April 3, 2017 shift with the Rockland Fire Department, Lt. Erickson became aware that he had been cleared for duty by Dr. Goldbaum. (Testimony of Appellant)
22. The Appellant deployed for his federal government program training late on the evening of April 2, 2017 or early in the morning on April 3, 2017, and returned April 7, 2017. He did not notify the Department that he had been medically cleared to return to duty prior to deploying for the federal government program training. (Testimony of the Appellant)
23. During his deployment, the Appellant did not communicate with the Department or Chief Duffey to tell them that he had been medically cleared to return to his duties, that he had deployed for his scheduled federal government program training on April 3, 2017 using sick leave, and that the sick leave designation for April 3, 2017 should be changed to some other paid leave since he was no longer medically unable to work. (R.Ex. 27; Testimony of Appellant). Also, *see* Fact 11.
24. On April 3, 2017, the Appellant was scheduled to work an entire twenty-four (24) hour shift but was carried on sick leave for which he was paid. On that date, Captain Heaney and Lieutenant DelPrete covered both of the Appellant's shifts. (R.Exs. 9 and 27)
25. On April 11, 2017, Chief Duffey initiated an investigation regarding the Appellant's use of sick leave. As part of that investigation, the Appellant was required to complete an investigatory questionnaire relating to his extended sick leave use and outside employment. (R.Ex. 14)
26. The Appellant submitted his written responses to the investigatory questionnaire on April 11, 2017. (Id.)

27. On May 15, 2017, Chief Duffey notified the Appellant in writing that many of the answers he provided on the investigative questionnaire were incomplete or relatively vague. Chief Duffey further ordered the Appellant to provide all payroll records for any outside employment he had engaged in while out on extended sick leave from February 20, 2017 through April 3, 2017, including all work performed for the federal government program and the private rescue company. (R.Ex. 15)
28. Citing a 2013 decision of the Department of Labor Relations (DLR) that found that the RFD could not require the union to provide outside employment payroll records, the union expressed concerns about Chief Duffey's request that the Appellant produce such records. (Testimony of Duffey; A.Ex. 6) The DLR's 2013 decision stated, in part,
- During the [DLR] investigation, the Town [of Rockland] did not dispute that the only way for the Union to retrieve the requested [outside employment payroll information, including recent W-2s and/or 1099s] information was through its bargaining unit members. An employee organization does not violate the Law by failing to provide information it does not possess and is under no obligation to retrieve. In this case, the Union did not possess or control the information requested by the Town. The requested information was in the possession of the bargaining unit members. The Union asked its members for the requested information; however, they were unwilling to provide it and the Union cannot compel its members to provide such information. Accordingly, [the DLR investigator does] not find probable cause to believe the Union has violated the Law in the manner alleged and [the DLR investigator dismissed] the Town's charge in its entirety." (A.Ex. 6)
29. The union and Chief Duffey subsequently agreed that Chief Duffey could ask the Appellant to produce a list of dates of when the Appellant engaged in outside employment. (Testimony of Duffey)
30. Chief Duffey scheduled a recorded investigative interview with the Appellant to take place on June 6, 2017. At the interview, the Appellant stated that he requested a union representative but, "based on the facts" (R.Ex. 27 (statement of Appellant)), which facts

the Appellant did not describe, he was “forced to decline”. (Id.) Asked if he wanted anyone else in the RFD to be with him during this interview, the Appellant also declined.

(Id.)

31. The purpose of the June 6 interview was to ask the Appellant about the answers he provided on the investigative form inquire on April 11, 2017. The Chief also wanted to ask the Appellant why he failed to timely advise the RFD that Dr. Goldbaum had cleared him to return to duty. (Testimony of Duffey) The Appellant asserted that he did not tell the RFD he was cleared for duty because he was under doctor’s orders not to communicate with the Department. (R.Ex. 27) However, neither Dr. Downes nor Dr. Goldbaum told the Appellant not to communicate with the RFD. (Testimony of Downes)
32. During the June 6, 2017 investigative interview, the Appellant gave Chief Duffey a list of dates that he had engaged in outside employment while out on extended sick leave, as the Chief had ordered. Chief Duffey determined that the Appellant had engaged in outside employment in violation of SOG 15-03 (R.Ex. 3), he ordered the Appellant, by a date certain, to provide payroll records for the dates that the Appellant had engaged in outside employment to confirm the dates that the Appellant had written. (Testimony of Duffey; R.Ex. 19)
33. The list of dates provided by the Appellant indicated that the Appellant had engaged in outside employment at the private rescue company on March 10, 2017 and March 16, 2017 and at the federal government program on April 3, 2017. On those dates, the Appellant was scheduled to work for the RFD and received paid sick leave. (R.Exs. 7, 9, and 13)

34. Chief Duffey scheduled a second investigative interview with the Appellant to be held on June 12, 2017. As with the June 6, 2017 interview, the Appellant did not bring a union representative or other member of the RFD with him. Also at the June 12 interview, the Appellant stated that the reason he did not contact the RFD himself to report that he had been cleared for work and to ask the RFD to change his reported time for the period April 3 through 7, 2017 from sick leave to another form of leave was that he was under doctors' orders not to communicate with the RFD. That statement is untrue. (R.Ex. 27; Testimony of Dr. Downes) Further, at the June 12 meeting the Appellant accused Chief Duffey of ordering the Appellant to return from his deployment although there is no evidence in the record to support this allegation. (R.Ex. 27)
35. At the June 12 interview, the Chief again ordered the Appellant, by a date certain, to produce payroll records to confirm the dates that the Appellant engaged in outside employment. He also ordered the Appellant to produce the dates and times he had met with Dr. Goldbaum in the pertinent time period. (R.Ex. 27) At the interview, the Appellant repeatedly referred to the need to change his use of paid sick leave time for the deployment to another form of leave as "bookkeeping" rather than as adherence to the RFD sick leave policy. (R.Ex. 27)
36. At or around the time of these events, Dr. Goldbaum retired. On June 18, 2017, Dr. Downes, the Appellant's new treating physician, told the RFD that the Appellant had suffered a recurrence of PTSD and that he would be out of work on extended sick leave. (R.Ex. 18) Dr. Downes is not a psychiatrist. He was trained as a pediatrician then worked in insurance for years. He has been in private practice since then, he has worked with patients in psychiatric hospitals and with patients with addiction. He has

approximately five (5) patients with PTSD and has “lived it” himself. (Testimony of Downes)¹¹

37. In a letter from Chief Duffey to the Appellant dated June 19, 2017, the Chief wrote:

On June 12, 2017 you were ordered to provide payroll records for your [federal government program] deployment and other employment, as well as information from Dr. Goldbaum to me within 48 hours. You have knowingly violated that order and may be subject to discipline for insubordination as you have not provided me the records. I ordered you to provide those records as part of the investigation into your use of sick leave while getting paid by other employers. I am restating my original order to provide those records to me immediately, and your continued refusal to comply with this order will be considered in any disciplinary process that takes place as part of this investigation.” (R.Ex. 19)

38. The Appellant did not respond to Chief Duffey’s June 19, 2017 letter. (Testimony of Duffey)

39. On June 28, 2017, the Appellant was scheduled to work an entire twenty-four (24) hour shift but he did not work that shift. (Testimony of Duffey)

40. When RFD members are going to be out on sick leave, they must call the Officer on duty to notify him that they will be out. A member of the RFD may also complete a slip when they are going to be out for an extended period of time. (Testimony of Duffey)

41. The Appellant did not follow the procedure for informing the RFD when he did not appear for his scheduled shift on June 28, 2017. (Testimony of Duffey and Appellant)

42. On June 29, 2017, Chief Duffey sent the Appellant a letter regarding his absence on June 28, 2017 stating, in part,

You were also reminded that on June 12, 2017 you were ordered to provide payroll records for your [federal government program outside employment] and other [outside] employment as well as information from Dr. Goldbaum within 48 hours. In a letter dated June 19, 2017, you were given further orders to immediately provide the documentation requested during the June 12, 2017 meeting. You continue to knowingly violate

¹¹ No curriculum vitae was provided for Dr. Downes.

these orders and may be subject to discipline for insubordination as you have not provided me the records. I ordered you to provide those records as part of the investigation into your use of sick leave while getting paid by other employers. I am restating my original ORDERS to provide those records to me no later than 14:00 Hours on July 6, 2017, and your continued refusal to comply with this order will be considered in any disciplinary process that takes place as part of this investigation. (R.Ex. 22)(emphasis in original)

43. Thereafter (but on an unknown date), the Appellant provided the RFD with contact information for his supervisors at his two (2) outside employers. The supervisors reported the dates that the Appellant worked for his outside employers between February 24, 2017 and March 29, 2017, which information RFD had not been previously provided. Based on this information, the RFD learned that the Appellant was paid by the private rescue company for work he performed for it on thirteen (13) shifts while he was out on sick leave from the RFD. The RFD records show that on two (2) of those dates (March 10 and March 16, 2017) the Appellant was scheduled to work at the RFD but was still on paid sick leave. (Testimony of Chief Duffey, R.Ex. 1) The Appellant did not provide the information ordered pertaining to Dr. Goldman. (Testimony of Duffey)
44. On June 30, 2017, Dr. Downes, via fax, informed Chief Duffey that the Appellant had suffered a recurrence of PTSD and that the Appellant should be placed on an extended medical leave of absence. Dr. Downes also inquired about the status of the ADA accommodations that Dr. Goldbaum had requested prior to clearing the Appellant to work. (R.Ex. 23)
45. On July 6, 2017, Chief Duffey responded to Dr. Downes' June 30, 2017 letter, asking whether Dr. Downes had instructed the Appellant not to communicate with the Chief or any other representative of the Department. (R.Ex. 24)

46. On July 8, 2017, Dr. Downes notified Chief Duffey that he had not restricted the Appellant's communication with anyone in the Rockland Fire Department. (R.Ex. 25)
47. On July 20, 2017, Chief Duffey issued a Notice of Contemplated Termination to the Appellant, scheduling a hearing for August 8, 2017. The reasons for the Notice and hearing were that the Appellant:

engaged in outside employment on March 10 and 16, 2017 while he was on paid sick leave without obtaining permission from the Fire Chief, in violation of the RFD sick leave SOG;

was cleared to work on or about April 2, 2017 by his physician but failed to notify the RFD and received sick pay for his scheduled shift on April 3, 2017;

was issued an order on March 13, 2017 to not deploy for [the federal government program] training while on sick leave and was advised that it would constitute abuse of sick leave and yet he deployed on April 2 while on sick leave;

after the June 12, 2017 investigative interview, was ordered to provide documents indicating when he was cleared for duty by his physician and payroll records from outside employment to verify the dates of his outside employment. Having failed to produce these documents at that time, he was ordered to do so again on June 19 and June 26, 2017 and yet he failed to produce the documents; and

failed to report for duty or call in sick on June 28, 2017.

This written Notice (attaching copies of G.L. c. 31, ss. 41-45) stated that these actions violated RFD Rules and Regulations:

- 1.1 Disobeying general orders
 - 1.2 Insubordination
 - 1.4 Conduct unbecoming an officer
 - 1.5 Making false statements regarding illness
 - 1.12 Absent without leave
 - 3.1 Failure to report for duty
 - 3.10 Falsifying information and/or misrepresenting himself on RFD reports and/or paperwork
 - SOG 15.03 Sick leave policy
- (R.Ex. 2)

48. The hearing was held on August 21, 2017 and was conducted by Attorney James Lampke, who was appointed by Chief Duffey to be the hearing officer. Chief Duffey and Dr. Downes testified at the hearing. The RFD was represented by Attorney Clifford, who represented the Respondent at the Commission hearing. The Appellant was represented by counsel at the local hearing (not the attorney who represented the Appellant at the Commission). The Appellant did not testify at the local hearing and was advised that an adverse inference may be drawn from his refusal to testify. (R.Ex. 1)
49. In a forty-two (42)-page decision dated October 9, 2017, the hearing officer concluded that the Appellant had taken the actions stated in the Notice of Contemplated Termination, in violation of the rules, regulations and policies cited therein. (R.Ex. 1)
50. The hearing officer's report considered the Appellant's discipline record, all of which arose *after* the Appellant asked the Commission to conduct an investigation into the residency of a member of the RFD in 2012:

March 5, 2013: Verbal reprimand for failing to complete 39 departmental incident reports;

March 29, 2013: Written reprimand for failing to provide the Town of Abington with a mutual aid ambulance;

February 11, 2014: Written reprimand for excessive absenteeism thus jeopardizing the Department's ability to maintain appropriate levels of staffing.

February 28, 2014: Written reprimand for safety violations that placed others on scene at risk including freelancing on the fire ground without orders from the Incident Command and failing to wear the appropriate safety apparatus.

February 25, 2015: Written reprimand for conduct unbecoming a superior officer for failing to properly direct his group on the fire ground at a mutual aid call. Specifically, Lieutenant Erickson was unable to execute a clear order from Chief John Nuttall of the Abington Fire Department with regard to venting a roof resulting in an order from Chief Nuttall that Lieutenant Erickson not respond to any emergencies in Abington until completing basic safety training.

March 15, 2016: Written reprimand for failing to obey orders with regard to the completion and proper documentation of a written investigation form for Chief Duffey.

March 15, 2016: Written reprimand for conduct unbecoming an officer for failing to properly file incident reports; and

December 28, 2016 – Forty-eight (48)-hour unpaid suspension for failure to properly supervise firefighters under his command.
(R.Ex. 2)

51. The Appellant grieved five (5) of these eight (8) disciplines he received; specifically, he appealed the disciplines dated Feb. 11, 2014, Feb. 28, 2014, Feb. 25, 2015, March 15, 2016 and Dec. 28, 2016. Chief Duffey denied the grievances. (R.Exs. 35 – 47)
52. The hearing officer's report did not rely on a thirty (30)-day suspension issued to the Appellant by the Respondent on or about April 27, 2017 because the Respondent indicated that it did not consider the thirty (30)-day suspension in its decision to terminate the Appellant's employment since the Appellant had appealed the suspension to the Commission and the Commission had not yet issued a decision on that appeal (Erickson v Rockland, D-17-092). (R.Ex. 2)
53. By letter dated October 13, 2017, the RFD terminated the Appellant's employment at the RFD effective October 14, 2017. (R.Ex. 1)
54. The Appellant timely filed the instant appeal at the Commission. (Administrative Notice)
55. After the Respondent terminated the Appellant's employment, the Commission issued a decision in the Appellant's appeal of the (30)-day suspension, allowing that appeal. Specifically, the Commission found, in part, that RFD's allegation that the Appellant had lied when he stated that he had ordered members of the Department to timely respond to a mutual aid call was untrue. The Commission further found that although the RFD suspended the Appellant for thirty (30) days for allegedly lying in this regard, other

members of the Department who are connected to current or previous Department leadership or Town officials were not disciplined at all, indicating that the Appellant had been the subject of disparate treatment. Moreover, the decision in that appeal further found that the Fire Chief's actions exhibited a clear bias against the Appellant. Erickson v Rockland, D-17-092; *aff'd* Rockland v. Civil Service Commission and Erickson, Plymouth Superior Court C.A. No. 1883CV00466 (J. Pasquale)(April 3, 2019).

Applicable Law

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and **bias** in governmental hiring and promotion. The commission is charged with ensuring that the system operates on "[b]asic merit principles." Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. 256 (2001), citing Cambridge v. Civil Serv. Comm'n., 43 Mass.App.Ct. 300 (1997). "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees from "arbitrary and capricious actions." G.L. c. 31, section 1. Personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. Cambridge at 304.

A tenured civil service employee may be discharged for "just cause" after due notice and hearing upon written decision "which shall state fully and specifically the reasons therefore." G.L. c. 31, s. 41. A person aggrieved by a decision of an appointing authority may appeal to the Commission under G.L. c.31, s. 43.

Under section 43, the Commission makes a de novo review "for the purpose of finding the facts anew." Town of Falmouth v. Civil Service Comm'n., 447 Mass. 814, 823 (2006) and

cases cited. The role of the 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." City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, *rev.den.*, 426 Mass. 1102 (1997). *See also* City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, *rev.den.*, 440 Mass. 1108 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, *rev.den.*, 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass.App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, *rev.den.*, 390 Mass. 1102 (1983).

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., 359 Mass. 211, 214 (1971); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, *rev.den.*, 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass.App.Ct. 486, 488, *rev.den.*, 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983). The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in governmental employment decisions.'" Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of "merit principles" which govern 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.

G.L. c. 31, section 43 also vests the Commission with some discretion to affirm, vacate or modify the discipline imposed by an appointing authority, although that discretion is “not without bounds” and requires sound and reasoned explanation for doing so. *See* Police Comm’r v. Civil Service Comm’n, 39 Mass.App.Ct. 594, 600 (1996) and cases cited. (“The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded the appointing authority”). “[T]he power to modify is at its core the authority . . . to temper, balance, and amend. The power to modify penalties permits the furtherance of uniformity and equitable treatment of similarly situated individuals. It must be used to further, and not to frustrate, the purpose of civil service legislation, i.e., ‘to protect efficient public employees from partisan political control’ . . . and ‘the removal of those who have proved to be incompetent or unworthy to continue in the public service’ [citations omitted]” *Id.* *See also* Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983).

The Commission may draw an adverse inference against an appellant who fails to testify at an appointing authority hearing. Town of Falmouth v Civil Service Comm’n, 447 Mass. 814 (2006).

The Commission may also take administrative notice of certain matters. In Boston Police Department v Kavaleski, 463 Mass. 680 (2012), a case involving the bypass of a police officer candidate based on her reported failure of a psychological evaluation, the Commission relied, in part, on findings concerning expert testimony in Roberts v. Boston Police Department, G1-06-321 (2008), another case involving the bypass of a police officer candidate based on his reported

failure of a psychological evaluation. The Boston Police Department sought judicial review of the Commission's decision in Kavaleski arguing, in part, that it was improper for the Commission to rely on findings made in the Roberts case. The Kavaleski Court held, in part,

... G. L. c. 30A, § 11 (5), authorizes agencies to 'take notice of any fact which may be judicially noticed by the courts,' as well as any 'general, technical or scientific facts within their specialized knowledge.' However, '[p]arties shall be notified of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed.' Id. See Assessors of Boston v. Ogden Suffolk Downs, Inc., [398 Mass. 604](#), 605-606 (1986).

The critical component of these statutory provisions is that parties be afforded notice of and an opportunity to respond to the evidence on which an agency relies in rendering a decision. (citations omitted) ... Thus, our concern with the commission's decision is not that the commission considered testimony from a different commission proceeding, which it permissibly may do. See Doherty v. Retirement Bd. of Medford, [425 Mass. 130](#), 140 (1997)(upholding State agency's reliance on transcripts from Federal criminal proceedings where transcripts bore "reasonable indicia of reliability")(fn 20 omitted). Contrast Assessors of Boston v. Ogden Suffolk Downs, Inc., *supra* at 606 (agency could not permissibly rely on determination of property values made in prior proceeding involving same party where prior decision was not supported by contemporaneous findings). Rather, the commission erred in failing to alert the department that it would be looking to [expert testimony] in Roberts, and considering it as evidence in the present case, thus depriving the department (and Kavaleski) of an opportunity to contest and respond to that evidence. Contrast Doherty v. Retirement Bd. of Medford, *supra* (agency introduced portions of transcript of prior criminal trial during hearing; defense counsel permitted to respond and to introduce other portions of transcript to question witness's credibility).

Although we conclude that the commission erred by considering testimony from Roberts without notice to the parties and an opportunity to respond, that does not end our inquiry. Pursuant to G.L. c. 30A, s. 14(7), we also determine whether, as a result of that error, 'the substantial rights of any party may have been prejudiced.'

We are satisfied that the department was not prejudiced by the commission's reliance on expert testimony from Roberts... [T]he commission did not decide Kavaleski's appeal on that basis alone, and there was other substantial and reliable evidence in the record, independent of the testimony from Roberts, to support the commission's decision. (Id. at 690-92)(fn omitted).

As a result, the Commission may take administrative notice of findings made in another decision as long as the parties have been afforded notice and an opportunity to comment thereon.

Analysis

The RFD has proved by a preponderance of the evidence that it had just cause to discipline the Appellant. Specifically, a preponderance of the evidence establishes that the Appellant engaged in outside employment on days he was scheduled to work for the Department while on paid sick leave on March 10, 2017 and March 16, 2017 in that he performed work for an outside employer (the private rescue company) whose work was physical and fire department-related employment in violation of the 2015 sick leave policy, he repeatedly failed to produce the dates on which he met with Dr. Goldbaum as ordered, he failed to timely inform the RFD (directly or through his doctor) that he was fit to work April 3 – 7, 2017 until he left for training for an outside employer (the federal government employer), and he failed to report for work on June 28, 2017 and report any illness as reason therefor, as required. The Appellant's actions and/or inactions in these regards constitute violations of RFD Rules and Regulations section 1.1 (disobeying general orders), 1.2 (insubordination), 1.4 (conduct unbecoming an officer), 1.5 (making false statements regarding illness, 3.1 (failure to report for duty), 3.10 (misrepresenting himself on department paperwork) and the RFD sick leave policy. The RFD did not have information about the Appellant's outside employment for the private rescue company for the two dates in March, 2017. The Appellant's misconduct clearly constitutes substantial misconduct which adversely affects the public interest by impairing the efficiency of public service, thereby warranting discipline.

The Department has not established that it had just cause to discipline the Appellant for other reasons it cited. Specifically, I do not find that the Appellant's deployment to the federal government program violated the RFD sick leave policy because it was for training and not physical work similar to the work performed by the RFD. Further, the Department sick leave policy does not explicitly require prior notice and approval of the Chief of such outside

employment during sick leave, although, as a practical matter, it certainly would be important information for the RFD to know in a timely manner so that it can address any necessary staffing issues. In addition, the Respondent has not established that the Appellant lacked sufficient unpaid holiday leave time for the period April 3 through April 7, 2017 when the Appellant deployed to the federal government program. Lastly, the Respondent has not established that the Appellant did not produce the payroll information for the work he performed for the private rescue company on March 10 and 16, 2017 since he produced it after multiple orders, albeit after the deadlines established in the orders he was given.

I draw an adverse inference against the Appellant for failing to testify at the Respondent's hearing. In addition, I found the Appellant's credibility limited because his testimony at the Commission hearing was, at times, vague and/or evasive, such that I had to ask him to directly respond to questions posed to him. The Appellant was also vague and/or evasive in responding to Chief Duffey's questions during the investigative interviews of the Appellant. R.Ex. 27. Further, the Appellant's credibility was undermined by his untruthful assertion in his testimony and in his recorded investigative interview that the reason he did not contact the RFD himself to report that he had been cleared for work in April 2017 and to ask the RFD to change his reported time for the period April 3 through 7, 2017 from sick leave to another form of leave until he was notified of the investigative interview was that he was under doctors' orders not to communicate with the RFD.

The Appellant's arguments that he did not violate the cited RFD rules and sick leave policy are unavailing. For example, as noted above, the Appellant did not timely notify the RFD that he was cleared to work, permitting him to be deployed to the federal government program on April 3, 2017, because he said that he was under doctor's orders not to communicate with the

RFD. Dr. Downes testified that there were no such orders from him or Dr. Goldbaum. The RFD only found out that Dr. Goldbaum had cleared the Appellant to work when Dr. Goldbaum faxed a letter to Chief Duffey in that regard on April 3, although the letter was dated March 30. Incredibly, the Appellant stated that he did not know he would be cleared to work until Dr. Goldbaum told him the night before by phone. The Appellant is proud of the outside employment that he performs and indicated that he enjoys it, so much that he apparently told Dr. Goldbaum that he was ready to return to work (although, only a couple of weeks earlier, Dr. Goldbaum had written to Chief Duffey to ask him for specific reasonable accommodations to enable the Appellant to return to work at the RFD) just in time to deploy for the federal government program April 3 to 7, 2017 and for Dr. Goldbaum to send written notice to Chief Duffey Sunday night when the Chief was not in, only hours before the Appellant boarded a flight to California for the deployment.

The Appellant also argued that for years the RFD had approved his outside employment. While that may have been the practice years ago, the RFD had changed its practice in 2015 because of historical abuse by some members of the Department. Specifically, the 2015 sick leave policy provides that employees may engage in outside employment while out sick but the work must be “non-physical, non-fire department related” and such outside employment must be clearly communicated through the Fire Chief, while such activities “shall not be unreasonably denied by the Chief.” R.Ex. 4. The wording of the sick leave policy does not explicitly require the Chief’s prior notice and approval of outside employment. Therefore, it has not been established that the Appellant violated that aspect of the sick leave policy. However, at his June 12, 2017 investigative interview with Chief Duffey, the Appellant attempted to undermine the sick leave policy by referring to the assignation of the type of leave time to be used in connection

with outside employment while on sick leave as “bookkeeping”. A personnel policy established to avoid sick leave abuse and double-dipping is not merely bookkeeping.

Further concerning the RFD sick leave policy, the Appellant argues that he was treated differently because other members of the RFD were allowed to work their outside jobs while they were on sick leave on days they would be scheduled to work. However, Chief Duffey testified that two (2) members of the RFD had been permitted to perform outside work on while out on sick leave because the outside work that one of them performed was office work and the work the other member performed involved monitoring a security gate, not the work of the RFD. By comparison, the rescue work that the Appellant performed for the private company providing public safety-related services in March 2017 is similar to the work of the RFD and, therefore, is not permitted by the RFD sick leave policy.

Having established just cause to discipline the Appellant, the RFD avers that termination of the Appellant’s employment is appropriate based on his actions in 2017 but also based on his pertinent discipline record.¹² As noted above, until the Appellant’s termination he was the most senior member of the RFD and the only African American member of the RFD. I note also that from 1983 to 2013 (twenty-seven (27) years) the Appellant had no discipline record at all. Beginning in 2013, the Appellant suddenly incurred a number of disciplines; in 2013, he received two (2) reprimands (one verbal, one written); in 2014, he incurred two more reprimands (written); in 2015, he incurred a written reprimand; and in 2016 he incurred three disciplines (two (2) written reprimands and a forty-eight (48) hour unpaid suspension. Chief Duffey acknowledged that some of the disciplines were for minor matters. For example, certain reprimands were for the Appellant’s failure to file certain reports but, on one occasion, the

¹² As noted above, the RFD did not include in its consideration here the 30-day suspension previously issued to the Appellant for other alleged misconduct. The Appellant appealed the 30-day suspension and the Commission allowed the appeal.

Appellant was disciplined for having thirty-nine incident reports outstanding. On another occasion involving the Appellant, the Abington Fire Department called for mutual aid, needing the RFD's ambulance. The RFD ambulance was reportedly hidden by renovations being performed on the fire station and the Appellant reported to Abington that the ambulance was either not there or unavailable. When he discovered shortly thereafter, that the ambulance was available, the Appellant attempted, but failed to reach Abington to report that it was available.

One of the logical questions here is why, after twenty-seven (27) years free of discipline at the RFD, did the Appellant incur eight (8) disciplines in three (3) years? In addition, why did the RFD discipline the Appellant all but one (1) of the eight (8) times with a written or verbal reprimand, then one (1) forty-eight (48) hour suspension and then termination? Unfortunately, and although Chief Duffey denied it at the Commission hearing, the sudden number of disciplinary actions did not occur until the Appellant requested that the Commission investigate the residency status of certain members of the RFD, including now-Capt. Thomas Heaney, whom Chief Duffey has known since they worked together in the Norwell Fire Department. As noted above, in 2012 the Appellant was a provisional Fire Captain in the RFD and Thomas Heaney was a candidate for promotion to Captain. The Appellant alleged that Mr. Heaney did not qualify for the promotion because he did not reside within in ten (10) miles of the town limits of Rockland in violation of G.L. c. 31, s. 58. Mr. Heaney intervened in the investigation and, ultimately, moved his residence to be in compliance with the statute and was promoted. There can be little question that this left at least some members of the relatively small Department with hard feelings.

In the present appeal, the recorded investigative interview of the Appellant by Chief Duffey relating to the instant appeal, Chief Duffey, responding to a statement by the Appellant,

stated words to the effect ‘let’s not start throwing bombs you’re not ready to throw’. R.Ex. 27. Intended or otherwise, the statement indicates that the disciplinary process here was inappropriately affected by animus toward the Appellant that resulted in his termination. Having taken administrative notice of the Commission’s decision and hearing record in the prior thirty (30)-day suspension appeal, after the parties were given notice and an opportunity to be heard in that regard, it is clear that the Department’s animus in that case continued in this appeal.

The prior Commission decision laid bare the bias that the Fire Chief has developed against the Appellant. Specifically, that decision concluded that:

“ ... the Fire Chief initiated a second investigation of Lt. Erickson which resulted in the thirty (30)-day suspension that is the subject of this appeal. In his testimony before the Commission, the Town’s Fire Chief stated that the second investigation was initiated after two individual firefighters approached him and accused Lt. Erickson of lying during his testimony at the local hearing related to the forty-eight (48)-hour suspension. Both of those firefighters, who were sequestered, testified before the Commission and offered testimony *which directly contradicts the Fire Chief.*”

The Commissioner in that prior Commission decision also concluded that:

“To me, this case is a stark and troubling example of disparate treatment. A firefighter whose son sits on the Board of Selectmen and served with the Fire Chief on the Fire Station Building Committee faced no formal discipline for: a) engaging in insubordination; and b) providing what appear to be less than credible responses during an internal investigation.”

Finally, the Commission in that prior decision stated that:

“To ensure uniformity, the Town must also now decide how to respond to the starkly conflicting testimony before the Commission between the Fire Chief and two (2) firefighters regarding whether, as stated by the Fire Chief, they accused Lt. Erickson of being untruthful during the local hearing.”

Under the circumstances, but in view of the findings here that some, but not all of the Appellant’s conduct involved in the instant appeal violated the cited RFD rules and sick leave policy, modification of the discipline issued to the Appellant is warranted, while ensuring that

the message is clear – that proven violations of RFD rules and its sick leave policy are unacceptable, especially when committed by a superior officer.

Conclusion

For all of the above reasons, the Appellant’s appeal under Docket No. D1-17-218 is hereby ***allowed in part*** such that the Appellant shall be demoted to firefighter and be suspended for ninety (90) days.

Civil Service Commission

/s/

Cynthia A. Ittleman
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on May 21, 2020.

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 to:
Michael Savage, Esq. (for Appellant)
John J. Clifford, Esq. (for Respondent)