

**COMMONWEALTH OF MASSACHUSETTS**

**CIVIL SERVICE COMMISSION**

One Ashburton Place: Room 503  
Boston, MA 02108  
(617) 979-1900

**FIREFIGHTER A<sup>1</sup>,**

*Appellant*

[Redacted]

v.

**BOSTON FIRE DEPARTMENT,**

*Respondent*

Appearance for Appellant:

Scott A. Lathrop, Esq.<sup>2</sup>  
176 Fitchburg Road  
Townsend, MA 01469

Appearance for Respondent:

Robert J. Boyle, Jr., Esq.  
Labor Counsel  
City of Boston  
Boston City Hall, Room 624  
Boston, MA 02201

Commissioner:

Paul M. Stein

Summary of Decision

The Commission upheld a firefighter's thirty-day suspension for failing to comply with two orders to attend medical examinations and two orders to meet with the Deputy Chief to explain the absences.

**DECISION**

The Appellant, Firefighter A, acting pursuant to G.L. c. 31, § 43, brought this appeal to the Civil Service Commission (Commission), challenging the decision of the Respondent, Boston Fire Department (BFD), to suspend the firefighter for a total of thirty days from their position as a BFD

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<sup>1</sup> Separate Memorandum of Explanation for Pseudonymity on File

<sup>2</sup> Attorney Lathrop informed the Commission that he no longer represents the Appellant. As no successor counsel has appeared, this decision has been forwarded to him and to the Appellant via the email address provided to the Commission on the Appellant's Claim of Appeal.

Firefighter.<sup>3</sup> The Commission held a remote pre-hearing conference via Webex on December 14, 2021, and held a remote full hearing via Webex on August 2, 2022, which was audio and video recorded.<sup>4</sup> As neither party requested a public hearing, the full hearing was declared private, with witnesses sequestered. Seventy exhibits (*Resp. Exhs. 1 thru 40 & App. Exhs. 1 through 30*) were received in evidence. The Commission received Proposed Decisions from each party on September 30, 2022. For the reasons stated below, the Appellant's appeal is denied.

### **FINDINGS OF FACT**

Based on the exhibits entered into evidence and the testimony of the following witnesses:

*Called by the BFD:*

- Jonathan Holder, BFD Medical Examiner
- Gerard Viola, BFD Deputy Chief
- Lennie DeSouza, BFD Director of Human Resources
- Horacio Brienza, BFD District Chief

*Called by the Appellant:*

- Firefighter A, BFD Firefighter, Appellant

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

1. The Appellant, Firefighter A, is a BFD firefighter, was originally hired in 2008. Firefighter A is a member of Boston Fire Fighters' Local 718, the bargaining unit which has entered into a collective bargaining agreement (CBA) with the City of Boston covering all BFD firefighters, as

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<sup>3</sup> The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

<sup>4</sup> A link to the Webex recording was provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to use the recording to supply the court with a written transcript of the hearing to the extent that they wish to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

well as most uniformed BFD officers and other BFD personnel. (*Resp.Exh.1; App.Exh.2; Testimony of Appellant*)

2. Since 2018, Jonathan Holder, M.D., who also holds a master's degree in Public Health, has served as the BFD's Medical Examiner, responsible for oversight of BFD personnel on sick and injury leave. (*Resp Exhs.2 & 5; Testimony of Holder*)

3. On February 26, 2020, Dr. Holder met with the Appellant who had recently called out sick. He requested that the Appellant provide additional medical documentation so that he could ascertain the Appellant's ability to return to work. (*Resp.Exh.6; Testimony of Holder*)

4. On February 27, 2020, the Appellant reported becoming dizzy and had suffered head and wrist injuries while on-duty. Pursuant to the provisions of the CBA, upon receiving the injury report, the Appellant was immediately placed on paid injury leave status. The Appellant has not returned to full duty since that date. (*Resp.Exh.6; App.Exhs.3 & 4; Testimony of Appellant & Holder*).

5. On March 3, 2020, Dr. Holder noted that a CT scan on the Appellant was negative and the Appellant had full range of motion in the wrist. To Dr. Holder, the Appellant appeared fit for duty, but the Appellant's private nurse practitioner had referred the Appellant for a neurological examination and did not want the Appellant to return to work. (*Resp.Exh.6; App.Exhs.5 & 6*)

6. Over the next several months, Dr. Holder continued to follow up with the Appellant. On July 16, 2020, he learned that the neurologist, Dr. Pilgrim, had diagnosed the Appellant with a specific neurological condition. Dr. Pilgrim also reported that the Appellant was "anxious and uncomfortable coming into [BFD] Headquarters." Dr. Pilgrim did not provide a clear indication of the Appellant's fitness for duty.

7. On August 12, 2020, Dr. Holder noted that the Appellant’s private nurse practitioner had diagnosed the Appellant with Post Traumatic Stress Disorder (PTSD) and the Appellant “now claims [to be] totally disabled.” (*Resp.Exh.6; App.Exh.12; Testimony of Holder*)

8. On August 25, 2020, Dr. Holder informed the Appellant that he would send the Appellant to an Functional Capacity Examination (FCE) to determine whether the Appellant had any work capacity, such as limited duty that required sitting at a desk or answering the telephone.

9. Dr. Holder scheduled the Appellant to report on October 9, 2020 for an FCE. (*Resp.Exh.6; Testimony of Holder*)

10. On October 8, 2020, Dr. Holder contacted the Appellant regarding the FCE scheduled for the next day, October 9. The Appellant stated that, due to a power outage, computer access was interrupted and the notice of the FCE was never received. Notice of the October 9, 2020 FCE had been sent to the Appellant via certified mail as well as BFD email. (*Resp.Exhs.11 & 12; Testimony of DeSouza & Viola*).

11. The Appellant protested that being sent for an FCE was “not in the union contract and was illegal”. The BFD’s Director of Human Resources, Lennie DeSouza, and the BFD’s Deputy Chief of the Personnel Department, Gerard Viola, were called to intervene. After further discussion, the Appellant assented to attend the FCE. (*Resp.Exhs.6 through 12; Testimony of Holder, Viola & DeSouza*)<sup>5</sup>

12. When the Appellant reported for the October 9, 2020 FCE, the Appellant was examined by David Norwell, Ph.D., a licensed psychologist and clinical neuropsychologist. Dr. Norwell

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<sup>5</sup> Sending a BFD firefighter to an FCE is considered a “routine procedure.” The CBA expressly authorizes the Medical Director to refer an injured firefighter to see another physician, and the Deputy Chief of the Personnel Department, who has ultimate responsibility over uniformed personnel on sick and injured leave, also has authority to order a member to attend a medical evaluation. (*Resp.Exhs.1 & 2; Testimony of Holder, Viola & DeSouza*)

submitted an eighteen-page report which concluded that “due to the employee’s variable engagement” during the examination, “I am unable to offer a definitive response to the central question [of the Appellant’s] fitness for duty . . .”. Dr. Norwell also reported that “it is not clear from the records provided, or from the clinical interview, that the employee has been exposed to an event which meets the DSM-5 criterion A for PTSD. Symptom checklists at the current administration do not support severe distress.” (*Resp.Exhs.13 & 14*)

13. Dr. Holder found the diagnoses provided by the treating nurse practitioner and the neurologist who evaluated the Appellant to be inconsistent with Dr. Norwell’s report. Pursuant to the terms of the CBA, which provides that when “the BFD Medical Examiner and the employee’s medical provider disagree as to the medical appropriateness of injury leave status, the employee shall be examined by an IME [Independent Medical Examiner]. . . . [T]he IME’s determination shall be binding and [is] not grievable.” (*Resp.Exhs.1 & 14; App.Exh.2; Testimony of Holder*)

14. On December 3, 2020, the Appellant was seen by an IME, Dr. Panis, a neurologist, who reported that a diagnosis of PTSD needed to be confirmed “after consultation with a psychiatrist or Ph.D. psychologist familiar with the diagnosis and treatment” but that “[b]ased on the history obtained, examination done and records reviewed, I find no neurologic evidence of any impairment . . . I do not think there is any neurologic reason why [the Appellant] should not be able to sit at a desk and answer the telephone.” (*Resp.Exh.14*)

15. On December 21, 2020, after receipt of the IME’s report, which the BFD deemed binding under the CBA, the Appellant was ordered to report to the BFD’s Engine 48 firehouse for light duty the following day, December 22, 2020. (*App.Exhs.9 & 10; Testimony of Viola & Holder*)

16. Light duty involves desk work, mostly answering the telephone. An employee on light duty can elevate their leg(s), ice body parts, or take breaks to lay down as needed. By returning a

firefighter to light duty, it enables the return to a work routine, which is a useful step to returning to full duty more quickly. (*Resp.Exh.1; App.Exh.2; Testimony of Holder*)

17. At 6:18 pm on December 21, 2020, a Boston Police Officer responded to the BFD's Engine 48 station on an "investigate person" call where he was met outside the station by the Appellant. The Appellant reported being ordered to return to work on December 22, 2020 but had filed complaints about retaliative racial slurs and threats did not feel safe entering the firehouse. (*Resp.Exh.15*)

18. The on-duty BPD District Chief and the Division Deputy Chief were called to the scene and met with the Appellant. As they were not privy to the prior history, an order was issued placing the Appellant on paid administrative leave pending a resolution of the Appellant's grievances. (*App.Exh.11*)<sup>6</sup>

19. The Appellant remained on paid administrative leave until June 2021, when the BFD reverted the Appellant's status from administrative leave back to injured leave (111F) retroactive to December 21, 2020. This change to the Appellant's status resulted in a retroactive payment to the Appellant on July 2, 2021 in the amount of \$11,999.56. (*App.Exhs.15 through 17; Testimony of Viola*)

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<sup>6</sup> According to the BFD, unbeknownst to the District Chief and Deputy Chief, the Appellant had previously reported the alleged retaliatory behavior in February 2020 and, following an investigation, was provided a report that concluded there were no ongoing concerns. The details of the Appellant's complaints and the investigative report were not offered in evidence by either party. (*Testimony of Viola & DeSouza*)

20. On May 4, 2021, in consultation with Local 718, the BFD scheduled the Appellant to see Dr. Andrew Brown, a psychiatrist, on June 7, 2021, to evaluate the status of the Appellant's PTSD claim. The Appellant did not appear for that appointment. (*Resp.Exh.16; Testimony of Viola*)<sup>7</sup>

21. On June 8, 2021, the BFD sent an internal email to the Appellant ordering the Appellant to report to Deputy Chief Viola at BFD Headquarters on June 11, 2021. Later that day, a second internal email was sent to the Appellant, changing the meeting to 10:00 am on June 9, 2021. The purpose of the meeting was to provide the Appellant with an opportunity to explain the failure to appear for the June 7, 2021 medical examination with Dr. Brown. (*Resp.Exhs.17 & 18: Testimony of Viola*)

22. At approximately 9:00 am on June 9, 2021, Dist. Chief Joseph Casper (assigned to BFD Headquarters) received a call from Fire Alarm, the BFD's emergency response line, informing him that there was a BFD firefighter outside BFD Headquarters who felt unsafe and may have been assaulted. District Chief Casper, accompanied by the Boston Municipal Protective Services Officer on duty at Headquarters, went outside, where they were directed to two persons standing near a Boston Police vehicle parked nearby. One of the individuals was the Appellant, whom the Boston Police identified as the person who called them, and the other individual was the Appellant's civilian friend. (*App.Exh.13;Resp.Exhs.19, 21 through 25*)

23. The Appellant had been ordered to report to Dep. Chief Viola at 10:00 a.m. but was feeling unsafe and refused to enter the building. The Appellant was not in uniform. BFD regulations require that members ordered to report to Headquarters must appear in uniform in order to be permitted to enter the building. (*Resp.Exhs.2 & 22*)

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<sup>7</sup> According to Dep. Chief Viola, the May 4, 2021 notice was sent by email and certified mail, but the letter was eventually returned as undelivered. A copy of the notice was sent to Local 718. (*Resp.Exh.16; Testimony Viola*)

24. District Chief Casper confirmed that there had been no assault; the Appellant was referring to an alleged prior incident during a training exercise. The Appellant was reluctant to interact with Dist. Chief Casper and asked for the support of another firefighter that the Appellant knew. (*App.Exh.13; Resp.Exhs.19, 21 through 25*)

25. The firefighter requested by the Appellant arrived, spoke to the Appellant, then proceeded into Headquarters and was taken to meet Dep. Chief Viola and HR Director DeSouza. The firefighter explained that, due to alleged prior harassment, discrimination, and retaliation, the Appellant did not feel safe entering the building and wanted to understand the reason for being asked to report.<sup>8</sup> Deputy Chief Viola explained that the meeting was to discuss the Appellant's missed medical appointment. The firefighter relayed this information to the Appellant, who then requested that the "C6", the Dist. Chief (Horatio Brienza) in charge of the district in which the Appellant's firehouse was located, report outside Headquarters. Dep. Chief Viola did not approve of calling Dist. Chief Brienza, but he reported to Headquarters after receiving a call from BFD Fire Alarm.<sup>9</sup> (*App.Exh.13; Resp.Exhs.21 & 25: Testimony of Viola & DeSouza*)

26. At 10:45 a.m., Dep. Chief Viola ordered the firefighter called by the Appellant to inform the Appellant that he considered the Appellant AWOL and would no longer wait to meet with the Appellant. (*Resp.Exh.25: Testimony of Viola & DeSouza*)

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<sup>8</sup> The Appellant told the Boston Police that the order to report violated an accommodation that had been requested that required all meetings with the Appellant to be conducted virtually. The only accommodation requests that appear in the record are (1) a reference to an accommodation letter the Appellant claimed was submitted in May 2020 (due to "severe respiratory conditions" associated with COVID-19), but no such letter was produced; (2) an accommodation request made after Dep. Chief Viola's June 2021 order to appear (in September of 2021) to be transferred to a "non-fire suppression" assignment; and (3) an accommodation to appear remotely at the Appellant's disciplinary appeal in September 2021. (*App.Exhs.19 & 30; Resp.Exh.19; Testimony of Viola & DeSouza*)

<sup>9</sup> I infer that the BFD Fire Alarm was contacted by the firefighter called to the scene by the Appellant.



27. Dist. Chief Brienza thereafter arrived on scene and spoke with the Appellant outside Headquarters who told him that the Appellant's physical safety had been compromised in the past and that those concerns were not addressed. The Appellant also mentioned a recent death in the family and that the Appellant's father was seriously ill. Dist. Chief Brienza said he would file a "5A" report to be submitted up the chain of command. He told the Appellant to go and take care of the ailing father. All personnel left the scene. (*App.Exh.13; Resp.Exh.19, 21 through 23; Testimony of Brienza*)

28. On June 9, 2022, Dist. Chief Brienza filed a "5A" report which stated:

I was ordered by Fire Alarm to respond to Headquarters to meet with the [ ] Liaison in front of Headquarters on June 9, 2021 approximately 1100 hours. On arrival I met with [the firefighter called to the scene by the Appellant, the Appellant], and Boston Police Officer De Los Santos, and another unidentified [person]. The Appellant reported to me, and asked me to report the following: Since making a MCAD complaint against the Department, [the Appellant] does not feel safe in any Firehouse or at Headquarters. [The Appellant] told me a story about feeling threatened and unsafe, then towards the end of the conversation, the Appellant informed me that I was being recorded. I never consented to being recorded.

(*Resp.Exh.23; Testimony of Brienza*)

29. Following the June 9, 2021 incident, the Appellant's duty status was changed from Paid Administrative Leave to Sick Leave (not injured or 111F leave). (*App.Exh.14 & 16*)

30. On June 15, 2021, Dep. Chief Viola drafted a disciplinary notice "consistent with past discipline I have issued for similar infractions" that imposed a four-tour suspension on the Appellant for failure to attend the medical appointment on June 7, 2021 and failure to report to him on June 9, 2021. (*Resp.Exhs.25 & 26; Testimony of Viola*)<sup>10</sup>

31. The Appellant was ordered via email to report to Dep. Chief Viola on June 25, 2021 and July 8, 2021 with the intention of delivering the disciplinary notice but, when the Appellant

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<sup>10</sup> Dep. Viola's notes indicate that the missed medical appointment cost the BFD \$1,475. (*Resp.Exh.25*)

informed the BFD of being “away” due to a death in the family, the draft four-tour suspension was “tabled”. (*Testimony of Viola & DeSouza*).

32. By letter dated July 8, 2021 from Dep. Chief Viola to the Appellant, the Appellant was again ordered to report to Dr. Brown on August 12, 2021 for a Fitness for Duty Examination. (*Resp.Exh.29*)

33. By emails on July 9, 2021, the Appellant was ordered next to report to Dep. Chief Viola on July 16, 2021. (*Resp.Exhs.27, 28, 33 & 34*)

34. The Appellant did not appear for the July 16, 2021 meeting with Dep. Chief Viola.<sup>11</sup> (*Resp.Exh.34; Testimony of Viola*)

35. On August 5, 2021, Dep. Chief Viola sent the Appellant an email ordering the Appellant to report to him on August 11, 2021. (*Resp.Exh.35*)

36. On August 10, 2021, the Appellant contacted the BFD’s HR department stating that the Appellant and the Appellant’s child had been exposed to COVID-19 and were in quarantine. As a result, the Fitness for Duty Examination was rescheduled for September 2, 2021, with notice sent on August 18, 2021 by personal email, BFD email and certified mail. (*Resp.Exhs.3, 36 & 37; Testimony of Viola*)

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<sup>11</sup> The Appellant claimed that the May 4, 2021 notice of the June 7, 2021 medical examination or the order to report to Dep. Chief Viola on July 16, 2021 was never received because a computer had crashed in early June and it was not repaired for six to eight weeks, but the Appellant provided no records indicating taking the computer for repairs. (*Testimony of Appellant*) BFD disputed the explanation, pointing out, among other things, that the Appellant had forwarded emails from a department email to the Appellant’s personal email on at various times from December 2020 through July 2021, most recently on July 5, 2021 and July 14, 2021. The BFD also pointed out that it had rescheduled appointments when the Appellant had notified BFD of unavailability in advance and had reached out to the Appellant via personal email after becoming aware of that email address. (*App.Exhs.10; Resp.Exh.31; Testimony of Viola & DeSouza*).

37. By letter dated August 30, 2021, the Appellant's then-attorney<sup>12</sup> informed the BFD Legal Advisor and the Boston Deputy Commissioner for Human Relations of his opinion that the order requiring the Appellant to submit to a psychological examination was not appropriate because it violates the Appellant's rights under the Local 718 CBA. Further, this attorney stated that "exploring additional medical issues does not apply when the member in issue is not seeking to return to active duty in a fire suppression role and is stating that from neurological issues that render the Appellant unable to perform such a role. . . . [I]f the Department is insistent upon . . . further psychological examination, th[en] it must be an Independent Medical Examination ("IME") performed subject to all of the relevant contract provisions with respect to an IME. In addition, the Appellant seeks the right to be accompanied to any examination by a witness who is free to record the proceedings." (*App Exh.19; Resp.Exh.38*)

38. As described earlier (Finding Nos. 8 through 11), the BFD construes the Local 718 CBA regarding an IME differently. The BFD asserts that the IME process, binding on both parties, applies only when there is a medical dispute between the BFD Medical Examiner and the employee's medical provider, as distinct from a functional capacity or fitness for duty exam, so that the Medical Examiner can form an initial opinion about a diagnosis or opinion provided by the employee's own doctors; and it was the latter (i.e., the diagnosis of PTSD) that triggered seeking an expert psychological examination by an outside expert psychiatrist. According to the BFD, the authority to send the Appellant for such an outside expert evaluation stems from a separate provision of the CBA which provides that, when a reported injury calls for an expert opinion beyond the scope of the BFD Medical Examiner's own expertise, the Medical Examiner

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<sup>12</sup> This attorney was not the attorney that represented the Appellant at the Commission hearing.

may “designate another physician [to assume responsibility for] a particular case, [and then] the designated physician shall serve as the Department's physician . . . for all purposes regarding that case.” (*Resp.Exhs.1 &.2; Testimony of Holder & Viola*)

39. On September 1, 2021, HR Director DeSouza responded to the Appellant, and acknowledged the receipt of the August 30, 2021 attorney’s letter. Insofar as that letter represented a request that the Appellant be granted an accommodation and transferred to a non-fire suppression assignment, Ms. DeSouza informed the Appellant that, in order to do so, the Appellant would need to provide appropriate medical documentation supporting the need for such an accommodation. (*App.Exh.19*)

40. Shortly after 6:00 a.m. on September 2, 2021, the Appellant emailed HR Director DeSouza stating that “I will not be attending the fitness for duty” examination by Dr. Brown scheduled for that day on advice of counsel. The Appellant attached the August 30, 2021 attorney’s letter. (*Resp.Exh.38*)

41. By letter dated September 2, 2021, the BFD again placed the Appellant on administrative leave with pay effective immediately for unspecified misconduct (violation of BFD rules and policy). (*App.Exh.20; Resp.Exh.39*)

42. By letter dated September 14, 2021, the BFD notified the Appellant of a Hearing Board on September 22, 2021 to consider the following four specific charges of misconduct:

“Count #1: in that [the Appellant]failed to appear . . . to see Department Medical Examiner’s physician designee, Dr. Andrew Brown, on June 7, 2021 as directed by the Personnel Division. [The Appellant] did not have permission to miss this appointment.”

“Count #2: in that [the Appellant] failed to appear as ordered by the Personnel Division to meet with the Personnel Deputy Chief on June 9, 2021. [The Appellant] did not have permission to miss this appointment.”

“Count #3: in that [the Appellant] failed to appear as ordered by the Personnel Division to meet with the Personnel Deputy Chief on July 16, 2021. [The Appellant] did not have permission to miss this appointment.”

“Count #4: in that the Appellant failed to appear for [their] appointment to see the Department Medical Examiner’s physician designee, Dr. Andrew Brown, on September 2, 2021 as directed by the Personnel Division. [The Appellant] did not have permission to miss this appointment.”

*(Resp.Exhs2 &.4; App.Exh.21)*

43. After a continuance, the Hearing Board was convened on September 28, 2021. Deputy Chief Viola was the only witness called to testify. The Appellant called in and requested another continuance, which was not allowed. The Appellant then was permitted to participate remotely, did not testify personally, and was represented by Local 718. *(App.Exh.19; Resp.Exh.40)*

44. By certified letter dated October 7, 2021, the BFD notified the Appellant that they had found the Appellant guilty on all four counts and ordered the Appellant suspended for a period of thirty days, without pay, from Monday, October 11, 2021, continuing until Thursday, November 11, 2021. *(App.Exh.21; Resp.Exh.4)*

45. This appeal duly ensued *(Claim of Appeal)*.

### **APPLICABLE LEGAL STANDARD**

Sections 41 through 45 of G.L. c. 31 allow discipline of a tenured civil servant for “just cause” after due notice, hearing (which must occur prior to discipline other than a suspension from the payroll for five days or less), and a written notice of decision that states “fully and specifically the reasons therefore.” G.L. c. 31, § 41. An employee aggrieved by such disciplinary action may appeal to the Commission, pursuant to G.L. c. 31, § 42 and/or § 43, for de novo review by the Commission “for the purpose of finding the facts anew.” Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. As prescribed by G.L. c. 31, § 43, ¶ 2, the Appointing Authority bears the burden of proving “just cause” for the discipline imposed by a preponderance of the evidence:

*“If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person*

*concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee, by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.”*  
*(Emphasis added)*

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.’” Falmouth, *supra*, 447 Mass. at 823, and cases cited. It is also a basic tenet of the “merit principles” that 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.

Section 43 of G.L. c. 31, vests the Commission with “considerable discretion” to affirm, vacate or modify discipline but that discretion is “not without bounds” and requires sound explanation for doing so. See, e.g., Police Comm’r v. Civil Service Comm’n, 39 Mass. App. Ct. 594, 600 (1996) (“The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio . . . accorded the appointing authority”). See also Falmouth, *supra*, 447 Mass. at 823, quoting Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983).

## ANALYSIS

The BFD has proved, by a preponderance of the evidence, that the Appellant engaged in substantial misconduct in violation of BFD rules that warranted discipline for failure to appear for medical appointments ordered by the BFD to be held on June 7, 2021 and September 2, 2021, as well as for unexcused absences from meetings with Dep. Chief Viola on June 9, 2021 and July 16, 2021. The Appellant's claim of not receiving notice to attend certain of these meetings is not credible.<sup>13</sup> The preponderance of the evidence also rebuts the Appellant's claims that (1) the Appellant was granted an accommodation to attend meetings virtually and (2) that the order to attend the medical examinations was not authorized under the terms of the Local 718 CBA.

The Appellant initially was placed on injured leave in February 2020 and, since that time, the BFD has made repeated efforts to ascertain the Appellant's medical condition and ability to return to duty, either on a full-duty or limited-duty basis. In August 2020, after receiving reports from the Appellant's treating medical providers that the Appellant had suffered from a neurological condition and PTSD, the BFD medical director ordered the Appellant to be examined by Dr. Norwell, a licensed psychologist and clinical neuropsychologist in October 2020. The day before the scheduled examination, the BFD contacted the Appellant with a reminder about the examination. The Appellant claimed never to have received notice of the exam, blaming an "outage" that knocked out the Appellant's personal computer. The Appellant also claimed the exam was "illegal" and not authorized by the Local 718 CBA. After the BFD's medical director

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<sup>13</sup> Assessing the credibility of live testimony is a function that lies exclusively with the hearing officer. E.g., Leominster v. Stratton, 58 Mass. App. Ct. 726, 729 (2003). See Embers of Salisbury, Inc. v. 37 Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Ret. Bd. of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003) (assessment of conflicting testimony cannot be made by someone not present at the hearing).

and HR director explained that the BFD did, in fact, have authority to order the exam, the Appellant attended. Due in part to the Appellant's "variable engagement" during the exam, the psychologist was unable to provide a definitive opinion as to the Appellant's functional capacity but found no evidence to support a diagnosis of PTSD.

Based on the disputed opinions by the Appellant's medical provider and Dr. Norwell, as well as the BFD medical director's doubt about the neurological diagnosis, the BFD arranged for an IME, pursuant to the terms of the Local 718 CBA, to make a binding determination of the Appellant's medical condition. The IME was conducted in December 2020 by Dr. Panis, a licensed neurologist, who found "no neurologic evidence of any impairment . . . I do not think there is any neurologic reason why [the Appellant] should not be able to sit at a desk and answer the telephone." He offered no opinion on the diagnosis of PTSD, recommending that the existence of such a condition be confirmed "after consultation with a psychiatrist or Ph.D. psychologist familiar with the diagnosis and treatment".

After receiving the IME report, which is binding on the BFD and the Appellant under the terms of the Local 718 CBA, the BFD ordered the Appellant to report for limited duty in late December 2020. The Appellant resisted this order and appeared at the firehouse but did not report for duty, instead remaining outside, and then called the Boston Police and complained of racial harassment that made the Appellant feel unsafe. As a result, the Appellant was placed on paid administrative leave, later converted to injured leave (entitling the Appellant to so-called 111F benefits).

On May 4, 2021, the BFD ordered the Appellant to attend an examination by a psychiatrist, Dr. Brown, to address the unresolved issue of the Appellant's medical provider's diagnosis of PTSD. The examination was scheduled for June 7, 2021, but the Appellant did not appear. The



Appellant was then ordered to report to BFD Deputy Chief Viola, who sought an explanation for the Appellant's failure to see Dr. Brown. The Appellant later claimed that a computer, again, had crashed sometime in early June 2021. The Appellant reported receiving no notice to report for the June 7 examination and was told to report to Dep. Chief Viola by the Appellant's attorney but was not told why they had been ordered to see him. I find the Appellant's claim to have not received notice of the June 7, 2021 examination (sent on May 4, 2021) is not credible. In fact, as noted in the findings of fact (footnote 11), the evidence showed that the Appellant was sending and receiving emails during this timeframe.

On June 9, 2021, the Appellant, appeared in civilian attire outside BFD Headquarters. The Appellant had called the Boston Police who were on-scene and requested the attendance of another firefighter for support. That firefighter met with Dep. Chief Viola and subsequently informed the Appellant that the Deputy Chief wanted to see the Appellant to get an explanation for the missed June 7, 2021 medical examination. The Appellant would not enter Headquarters, even accompanied by the other firefighter. I do not credit the Appellant's claim of not initially knowing the reason for being ordered to Headquarters. Even assuming the truth of that claim, however, the Appellant's refusal to meet with Dep. Chief Viola is inexcusable after being informed of the reason, and the potential to be accompanied by a trusted party. The Appellant's behavior also reinforces my conclusion that there was no legitimate excuse for failing to see Dr. Brown on June 7, 2021.

I also do not credit the Appellant's claim that, due to another computer malfunction that purportedly caused it to be out for repair for most of June and July, notice of the order to report to Dep. Chief Viola on July 16, 2020 was never received. As noted above, the preponderance of the

evidence showed that the Appellant was sending and receiving emails, both work email and personal, throughout this period.

Finally, I find the Appellant's explanation for the refusal to attend the September 2, 2021 examination by Dr. Brown to be without merit. The order to have Dr. Brown examine the Appellant (to evaluate the claim of PTSD) had originally been issued in May 2021, in consultation with Local 718. I am not persuaded that the BFD's order to attend that examination was unlawful or unreasonable as a matter of civil service law. The Appellant did not seek to grieve the matter, perhaps because of the well-established principle that, except in rare cases, a union employee is generally obliged to "obey and grieve" an alleged violation of rights under the CBA. Indeed, it would have been to the Appellant's advantage to have seen Dr. Brown who could have potentially confirmed the PTSD diagnosis made by the Appellant's medical provider and, thus, obviated the need to undergo another IME.

In sum, the preponderance of the evidence proves that the Appellant engaged in substantial misconduct that warranted a suspension of 30 days.

## **CONCLUSION**

For these reasons, the Appellant's appeal in Case No. D-21-195 is **denied**.

Civil Service Commission

/s/ Paul M. Stein  
Paul M. Stein, Commissioner

By a vote of the Civil Service Commission (Bowman, Chair; Stein and Tivnan, Commissioners) on December 15, 2022.

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

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

Notice:

Firefighter A (the Appellant)

Scott A. Lathrop, Esq. (for Appellant)

Robert J. Boyle, Jr., Esq. (for Respondent)