

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

**CIVIL SERVICE COMMISSION**

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

DAVID HODGE,  
Appellant

v.

D-09-37

CITY OF SPRINGFIELD,  
Respondent

Appellant's Attorney:

*Pro Se*  
David A. Hodge

Respondent's Attorney:

Maurice Cahillane, Esq.  
Egan, Flannagan and Cohen P.C.  
67 Market Street  
Springfield, MA 01102

Commissioner:

Christopher C. Bowman

**DECISION**

The Appellant, David Hodge (hereinafter "Hodge" or "Appellant"), pursuant to G.L. c. 31, § 43, filed an appeal with the Civil Service Commission (hereinafter "Commission") on February 4, 2009, claiming that the City of Springfield (hereinafter "City" or "Appointing Authority") did not have just cause to suspend him for five (5) days from the Fire Department.

The appeal was timely filed. A pre-hearing conference was conducted on March 11, 2009 and a full hearing was held on June 10, 2009 at the Springfield State Building in

Springfield, MA. As no written notice was received from either party, the hearing was declared private. One (1) CD was made of the hearing.

**FINDINGS OF FACT:**

Fourteen (14) exhibits were entered into evidence. Exhibits 1-9 were submitted by the City and Exhibits 10-14 were submitted by the Appellant. At the close of the hearing, it was agreed that the City would submit a supplement to Exhibit 10 adding the days of the week that correspond to various dates listed on the documents that were part of that exhibit. The City submitted that document to the Commission and it has been marked as Exhibit 10A. Based upon the documents entered into evidence and the testimony of:

*For the City of Springfield:*

- Jerrold E. Prendergast, Deputy Fire Chief;

*For the Appellant:*

- David A. Hodge, Appellant

I make the following findings of fact:

1. The Appellant, David Hodge is a tenured civil service employee of the City of Springfield, currently serving in the position of firefighter within the Fire Department. He was appointed to this position on July 1, 2002 and was laid off on February 10, 2003. He was reinstated in November 2004. (Stipulated Facts)
2. Deputy Fire Chief Prendergast testified before the Commission regarding his decision to suspend the Appellant. Mr. Prendergast is a 23-year veteran of the Springfield Fire Department and has served as 1 of 2 Deputy Fire Chiefs since 1999. He serves as the Chief of Administration for the department and his responsibilities include personnel

3. On August 22, 2008, a District Fire Chief had a counseling session with the Appellant after the Appellant called out sick for the fourth time in calendar year 2008. (Exhibit 1)

4. On September 9, 2008, Deputy Chief Prendergast sent a letter to the Appellant which stated in relevant part:

“...Your record of absences reflects, in my opinion an above average use of absenteeism for 2 tours or less when compared to other personnel assigned to the shift. The 2008 average instance of lost time for 2 tours or less is less than 1 instance. Department records show that you have 5 instances in 2008 and have been visited 4 times by a District Chief with no improvement.”  
(Exhibit 2)

5. The Appellant was out sick again on November 2, 2008. (Exhibit 3)

6. On November 5, 2008, Deputy Chief Prendergast sent another letter to the Appellant which stated in relevant part:

“...Department records show that for 2008 you have 6 instances (146) hours or six times the average [sick time] for all firefighters. In addition, you have been visited 5 times by your supervisor and we have seen no correction about these absences.

Accordingly, I am taking this opportunity to notify you one final time that, you have to do whatever you deem necessary in order to, in the future, be dependably able and available as scheduled and needed.” (*emphasis in original*) (Exhibit 3)

7. The Appellant was out sick again on December 21, 2008. (Exhibit 4)

8. On January 9, 2009, Deputy Chief Prendergast sent another letter to the Appellant similar to the previous letters, but now stating that the Appellant had seven (7)

9. The Appellant's sick time record for calendar year 2008 was as follows:

Sick Type	Reason	Date	Hours (+/-)
Sick	Left Ankle	Thursday 1/3/08	-28
Sick	Diarrhea	Friday 3/7/08	-28
Sick	Stomach Virus	Friday 5/2/08	-28
Sick	Stomach	Monday 6/9/08	-20
Sick	Flu	Friday 8/22/08	-28
Sick	Stomach	Sunday 11/2/08	-28
Sick	Back	Sunday 12/21/08	-14

(Exhibit 8)

10. On January 21, 2009, Deputy Chief Prendergast met with the Appellant to discuss his absenteeism and the Deputy Chief's concern that most of the sick time in question occurred on weekend nights. The Appellant told Deputy Chief Prendergast at that time that his work schedule is such that he is always working a weekend; that he was sick each time he called in, but that he would curtail his use of sick time. (Testimony of Prendergast; Exhibit 5)

11. The Appellant was suspended for five (5) days on January 28, 2009 by Deputy Fire Chief Prendergast for alleged abuse of sick time relating to seven (7) various dates cited by the City. (Stipulated Fact and Exhibit 6)

12. The Appellant appealed his suspension to the Springfield Fire Commissioner and a hearing was conducted on February 21, 2009 at which the Appellant testified. The Fire Commissioner upheld the five (5)-day suspension and the Appellant filed a timely appeal with the Commission. (Stipulated Facts; Exhibits 6 and 7)

13. As part of his decision upholding the suspension, the Springfield Fire Commissioner stated in relevant part:

“After a careful review of the available evidence, including your overall attendance record, it is my opinion that your record of absences is contrary to the good order and efficiency of our Department. Your record of absences, unlike any other sworn shift personnel, documents that when your absences occurred for 2 tours or less, 85% of the time a night tour was involved with 82% of those night tours occurring on a weekend. You were given a notice and an opportunity to correct this unacceptable record twice in writing and, you failed to correct this pattern. This kind of record is, in my opinion, not only contrary to the good order and efficiency of our Department but, it is also, in my opinion, disruptive and unfair to your fellow Firefighters.”

(Exhibit 7)

14. Deputy Chief Prendergast testified before the Commission that he was particularly concerned about a pattern which showed that the Appellant was calling in sick for duties of two tours or less primarily on weekend nights. (Testimony of Prendergast)
15. Deputy Chief Prendergast testified that while other firefighters may have taken as much or possibly more total sick time than the Appellant, those cases were primarily a result of a prolonged illness of more than two tours. (Testimony of Prendergast)
16. Deputy Chief Prendergast testified that while there are more weekend shifts, the Appellant does not work any more or less weekend shifts than other firefighters. After reviewing all firefighter personnel records, he determined that the Appellant and one (1) other firefighter had a continued pattern of taking sick time of two tours or less on weekend nights. This other firefighter received a similar warning notice a disciplinary hearing was scheduled, but the firefighter retired prior to the hearing or any discipline being imposed. (Testimony of Prendergast)
17. Deputy Chief Prendergast was a good witness. He is the consummate professional whose paramount concern appears to be the efficient operation of the Springfield Fire Department. I did not detect any personal animus that he may have for the Appellant

18. The Appellant testified that during 2008 he fully complied with the requirements of the collective bargaining agreement which only requires that a leave of absence form be completed when a firefighter is out sick for two tours or less and that he/she be subject to a home visit. (Testimony of Appellant)
19. The Appellant testified that he was indeed at home each time that he was subject to a home visit during a tour of duty in which he called in sick. (Testimony of Appellant)
20. The Appellant testified that most of his sick calls related to his “acid reflux disease” which causes stomach pain, heart burn and breathing problems that prevent him from working. He never sought medical attention for this condition during 2008, but took over-the-counter medication. (Testimony of Appellant)
21. The Appellant testified that other firefighters had a similar pattern of sick time in 2008, but that he was being targeted for discipline as a result of a verbal complaint he made to the Deputy Fire Chief and the attorney for the Springfield Finance Control Board in March or April 2008 regarding racial discrimination. The Appellant also testified that he was party to a complaint filed with the Massachusetts Commission Against Discrimination (MCAD) alleging racial discrimination, but he stated during cross examination that he wasn’t certain if such a complaint had been filed. (Testimony of Appellant)
22. The Appellant’s testimony before the Commission focused almost entirely on his allegation of being unfairly targeted for discipline. While he presented his case

23. The Appellant testified that 12 other firefighters had a similar or worse sick time record, including some records that show firefighters taking sick time on nights and weekends. (Testimony of Appellant)
24. Exhibit 10A includes the sick time records of the 12 other firefighters referenced by the Appellant (hereinafter Firefighters 1 – 12).
25. All of the references below to the sick time of Firefighters 1-12 relate to sick time taken for two (2) tours or less in calendar year 2008.
26. Firefighter 1 had four (4) such sick calls including 3 on a Tuesday and 1 on a Wednesday. (Exhibit 10A, p.1)
27. Firefighter 2 had 2 such sick calls, including 1 on a Thursday and 1 on a Friday. (Exhibit 10A, p.2)
28. Firefighter 3 had 4 such sick calls, including 3 on a Saturday, 1 on a Monday and 1 on a Tuesday. The reasons for the 3 Saturday sick calls were: shoulder, shoulder and toothache. The reason for the Monday sick call was: flu. (Exhibit 10A, p. 2)
29. Firefighter 4 had 5 such sick calls, including 2 on a Friday, 2 on a Sunday and 1 on a Wednesday. The reasons for the 2 Friday sick calls were: flu, sore throat. The reason for the Sunday sick call was: sore throat. (Exhibit 10A, p. 3)

30. Firefighter 5, who is the firefighter referenced above that retired, had 5 such sick calls, including 1 on a Saturday and 2 on a Monday. The reason for the Saturday sick call was: cold. The reasons for the Monday sick calls were: stomach virus, cold. As referenced above, Firefighter 5 was sent a warning letter and a disciplinary hearing was scheduled, but he retired before it was held. (Exhibit 10A, p. 5)
31. Firefighter 6 had 5 such sick calls, including 2 on Friday, 1 on Sunday and 2 on Monday. The reasons for the Friday sick calls were: stomach virus, left heel. The reason for the Sunday sick call was: chest pains. The reasons for the Monday sick calls were: chest pains, allergy attack. (Exhibit 10A, p.4)
32. Firefighter 7 had 5 such sick calls, including 1 on Friday and 1 on Saturday. (Exhibit 10A, p. 5)
33. Firefighter 8 had 1 such sick call, which was on a Thursday. (Exhibit 10A, p. 7)
34. Firefighter 9 had 9 such sick calls, including 1 on a Friday, 2 on a Saturday, 1 on a Sunday and 1 on a Monday. The reason for the Friday sick call was: difficulty breathing. The reasons for the Saturday sick calls were: flu, migraine. The reason for the Sunday sick call was: ankle. The reason for the Monday sick call was: flu / pneumonia. (Exhibit 10A, p. 10)
35. Firefighter 10 had 8 such sick calls, including 1 on Friday, 1 on Saturday, 2 on Sunday and 5 on Mondays. The reason for the Friday sick call was: back. The reason for the Saturday sick call was: flu. The reason for the Sunday sick calls were: flu, neck. The reasons for the 5 Monday sick calls were: flu, flu, flu, left ankle strain, neck. (Exhibit 10A, p. 11)



36. Firefighter 11 had 5 such sick calls, including 2 on Friday, 1 on Sunday and 1 on Monday. The reasons for the Friday sick calls were: flu, stomach. The reason for the Sunday sick call was: flu. The reason for the Monday sick call was: flu. (Exhibit 10A, p. 14)
37. Firefighter 12 had 4 such sick calls, including 1 on Saturday, 1 on Sunday and 1 on Monday. The reason for the Saturday sick call was: hemorrhoids. The reason for the Sunday sick call was: stomach. The reason for the Monday sick call was: stomach. (Exhibit 10A, p. 15)
38. As referenced above, the Appellant had 7 such sick calls, including 3 on a Friday, 2 on a Sunday and 1 on a Monday. The reasons for the Friday sick calls were: diarrhea, stomach virus, flu. The reasons for the Sunday sick calls were: stomach, back. The reason for the Monday sick call was: stomach. (Exhibit 6)
39. As referenced above, only Firefighter 10 had the same or more sick calls regarding two tours or less in 2008 than the Appellant, with 8 sick calls as opposed to the Appellant's 7 sick calls. Of those firefighters that had at least 5 sick calls, 2 less than the Appellant, these firefighters did not have as high a percentage of weekend calls than the Appellant. (Exhibit 10A)
40. A closer examination of Firefighter 10's sick time record appears to indicate that 1 Saturday, 1 Sunday and 1 Monday sick time call, while listed separately, appear to be part of a longer period of time in which the firefighter had bouts with the flu. (Exhibit 10A, p.11)
41. Based on a careful review of the sick time records of the Appellant and Firefighters 1-12 and the testimony of the Appellant and Deputy Chief Prendergast, the Appellant

## CONCLUSION

G.L. c. 31, § 43, provides:

“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.”

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214, 268 N.E.2d 346 (1971); Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427 (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, 684 N.E.2d 620, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514, 451 N.E.2d 408 (1983)

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in

its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36, 133 N.E.2d 489 (1956).

"The commission's task...is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether 'there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision'", which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006). See Watertown v. Arria, 16 Mass. App. Ct. 331, 334, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983) and cases cited.

Under Section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew." Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (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." Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997). See also Leominster v. Stratton, 58 Mass. App. Ct. 726, 728, 792 N.E.2d 711, rev.den., 440 Mass. 1108, 799 N.E.2d 594 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, 721 N.E.2d 928, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass App.Ct. 473, 477, 648 N.E.2d

1312 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983).

For all of the reasons stated in the findings, the City has shown that the Appellant's sick time usage regarding two (2) tours or less was seven (7) times that of the average firefighter in the City of Springfield in 2008. Further, they have shown that the Appellant has a pattern of using this above-average sick time on or directly before and after a weekend. While the Appellant may have complied with the requirements of the respective collective bargaining agreement and submitted the proper forms noting his sick time, that does not prevent the City from taking corrective action to prevent an abusive pattern of sick time usage. In this case, the City gave the Appellant multiple warnings and opportunities to curtail his sick time usage and he did not. Although the Appellant argues that he was unable to work because of acid reflux disease, his testimony is undercut by the glaring pattern of these calls occurring during or directly before or after weekends. Further, the Appellant testified that he never sought any medical attention for a condition which he argues was causing him to incur sick time at a rate seven times higher than the average firefighter.

It is the function of the hearing officer to determine the credibility of the testimony presented before him. See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Department of Social Services, 439 Mass. 766, 787 (2003); (In cases where live witnesses giving different versions do testify at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing); Connor v. Connor, 77 A. 2d. 697

(1951) (the opportunity to observe the demeanor and appearance of witnesses becomes the touchstone of credibility).

Having determined that it was appropriate to discipline the Appellant, the Commission must determine if the Town was justified in the level of discipline imposed, which, in this case, was a 5-day suspension.

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, 857 N.E.2d 1053, 1059 (2006) and cases cited. Even if there are past instances where other employees received more lenient sanctions for similar misconduct, however, the Commission is not charged with a duty to fine-tune employees’ suspensions to ensure perfect uniformity. See Boston Police Dep’t v. Collins, 48 Mass. App. Ct. 408, 412 (2000).

“The ‘power accorded 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.’ ” Town of Falmouth v. Civil Service Comm’n, 61 Mass. App. Ct. 796, 800 (2004) quoting Police Comm’r v. Civil Service Comm’n, 39 Mass.App.Ct. 594, 600 (1996). Unless the Commission’s findings of fact differ significantly from those reported by the appointing authority or interpret the relevant law in a substantially different way, the commission is not free to “substitute its judgment” for that of the appointing authority, and “cannot modify a penalty on the basis of essentially similar fact

finding without an adequate explanation” E.g., Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006).

I carefully reviewed the Appellant’s allegation that 12 other firefighters with similar patterns of sick time were not disciplined. As referenced in the findings, I was able to identify only one (1) other firefighter who may possibly have an attendance record and pattern similar to the Appellant who was not disciplined. For the reasons cited in the findings, this other firefighter’s sick time record appears to be distinguishable from the Appellant’s. Based on a review of the records of these other firefighters and the credible testimony of Deputy Chief Prendergast, I conclude that the Appellant was not treated differently than similarly situated individuals. In fact, one (1) other firefighter with a somewhat similar, but not as egregious, attendance record, did indeed receive a warning letter and was scheduled for a disciplinary hearing which was canceled due to the firefighter’s retirement. Finally, also based on the credible testimony of Deputy Chief Prendergast, I do not believe that the City sought to discipline the Appellant as a result of allegations that he may have made regarding racial discrimination.

For all of the above reasons, the Appellant’s appeal under Docket No. D-09-37 is hereby *dismissed*.

Civil Service Commission

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Christopher C. Bowman, Chairman

By a of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on July 2, 2009.

A true record. Attest:

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Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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

Notice:

David A. Hodge (Appellant)

Maurice Cahillane, Esq. (for Appointing Authority)