COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

MICHAEL LOSI,
Appellant

v. D1-19-176

BOSTON FIRE DEPARTMENT,
Respondent

Appearance for Appellant:

Kevin R. Mullen, Esq.
15 Foster Street
Quincy, Massachusetts 02169

John J. Greene, Esq.
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Appearance for Respondent:

Connie Wong, Esq.
Boston Fire Department
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Robert J. Boyle, Jr., Esq.[1]
Boston City Hall, Room 624
Boston, MA 02201

Commissioner:

Christopher C. Bowman

DECISION

On August 20, 2019, the Appellant, Michael Losi (Appellant), pursuant to G.L. c. 31, § 43, filed an appeal with the Civil Service Commission (Commission), contesting the

[1] Attorney Devin Guimont and Attorney Connie Wong represented the Respondent at the Commission hearing. Attorney Guimont is no longer employed by the Respondent. Attorney Boyle subsequently submitted a notice of appearance and, after reviewing the record, submitted a post-hearing brief on behalf of the Respondent.

decision of the Boston Fire Department (Department) to terminate him from his position as a Boston Firefighter. On September 17, 2019, I held a pre-hearing conference at the offices of the Commission in Boston. I held a full hearing at the same location over two days on November 8 and December 16, 2019.[2] As no written notice was received from either party, the hearing was declared private. A CD of the digitally-recorded hearing was provided to both parties. Counsel for the Appellant submitted a stenographic transcription of the hearing which the Commission has taken as the official record of the proceeding. The parties submitted post-hearing briefs in the form of proposed decisions on May 1, 2020 (Respondent) and May 22, 2020 (Appellant).

FINDINGS OF FACT

At the outset of the hearing, I entered into evidence Exhibits 1 through 35, with the exception of Exhibit 5 (Appellant objection sustained). During the second day of hearing, I entered additional documents as Exhibits 36 through 40, with Exhibit 39 conditioned on the receipt of additional information from the Appellant, which was not received. Therefore, Exhibit 39 was not entered. The Department forwarded additional documents after the hearing, some at my request and others on their own initiative. After review, I entered those documents as Exhibits 41 through 48. Based on these exhibits, the testimony of the following witnesses:

Called by the Department:

- Gerard Viola, District Fire Chief;
- David Walsh, Deputy Chief of Personnel;
- Jonathan Holder, M.D., Department Medical Examiner;

- Gerard Cianciulli, Fire Captain, Ladder Company 21, East Boston.

Called by Mr. Losi:

- Michael Losi, Appellant;

and taking administrative notice of all matters filed in the case, pertinent statutes, regulations, policies, stipulations and reasonable inferences from the credible evidence, a preponderance of the evidence establishes the following:

1. The Appellant was employed as a firefighter with the Department from 2013 until his termination in 2019. Prior to becoming a firefighter, the Appellant served in the United States Marine Corps from 2007 to 2011, and was honorably discharged. As part of his military service, the Appellant served in Iraq and Afghanistan. (Testimony of Appellant)
2. Based on a reported on-the-job injury, the Appellant was placed on injured leave from November 11, 2018 to December 20, 2018. (Exhibits 43 & 44; Testimony of Appellant)
3. On December 7, 2018, the Department received a fax from the Boston Sports and Shoulder Center stating: "The following is a summary of Michael Losi's visit with Jason Rand, PA [Physician's Assistant], on 11/30/2018." On page 2 of the faxed communication, the PA wrote:

   "We discussed a more supportive sling because he does not feel the current sling is providing stability and educated the patient with regard to this. We discussed him working on posture, utilizing the sling and getting an MRI. The MRI will be used to evaluate the integrity of his rotator cuff, extent of AC joint separation and question of the fracture fragment." Also on Page 2, the PA wrote: "Return to Work Status: No Duty." (emphasis added) (Exhibit 43)

[2] 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.

4. On December 20, 2018, the Appellant met with Dr. Britt Hatfield, the Department's Medical Examiner at Department Headquarters. At that time, Dr. Hatfield informed the Appellant that he (the Appellant) was being placed on light duty status (as opposed to injured leave), effective December 21, 2018. (Testimony of Appellant; Exhibit 32; Exhibit 43, pp. 52-53)

5. The Appellant questioned why Dr. Hatfield was assigning him to light duty when the physician's assistant at Furnace Brook Physical Therapy had told him that he (the Appellant) was not to return to work. (Testimony of Appellant)

6. The relevant collective bargaining agreement states in part:

   "Where the Department Medical Examination (or his/her physician designee) determines that the employee is capable of performing limited duty, the Department shall notify the involved employee and the Union. The Department shall provide the employee and Union with its limited duty plan including a detailed description of the duties and the specific work schedule. Limited duty tasks and assignments shall be determined by the Commissioner and may include any work or assignments performed by any bargaining unit personnel employed by the Department, except for fire suppression, consistent with the employee's medical restrictions.[3] The work schedule may provide, at the Department's option, for a Monday through Friday, eight (8) hour work day, forty hours per week, provided, however, that regardless of limited duty service, the involved employee shall receive on a weekly payroll basis all compensation provided by this Agreement to which he/she would be entitled if he/she were performing regular duty pursuant to his/her regular schedule." (emphasis added) (Exhibit 41)

7. That same day (December 20th), the Appellant called his firehouse and told Lt. [Timothy] Foley that he (the Appellant) had been told by a lieutenant in the personnel office (at headquarters) that he was to be coded as light duty as of December 21st,

[3] There is no evidence in the record showing that the Appellant and/or his union were provided with this information.

"but I was not to show up at the firehouse because of my medication." (Testimony of Appellant)[4]

8. The Appellant never appeared at the firehouse for light duty for the weeks that he was coded as light duty in December, January and February. (Testimony of Appellant)

9. On December 21, 2018, one day after Dr. Hatfield had assigned the Appellant to light duty, the BFD received another fax from Boston Sports & Shoulder Center, this time from orthopedist Brian P. McKeon, M.D. The fax, now signed by Dr. McKeon, confirmed that the Appellant had been seen in his office on November 30, 2018 and that the Appellant may not return to work until he is re-evaluated on December 28, 2018. (Exhibit 43)

10. The relevant collective bargaining agreement states in part:

> "Should the employee's medical provider disagree with the Department's Medical Examiner (or his/her physician designee) as to the medical propriety of the employee performing the Department's limited duty schedule and/or assignment plan and she/she so notifies the Department's Medical Examiner (or his/her physician designee), ***the Department's Medical Examiner*** (or his/her physician designee) ***will*** contact the employee's medical provider to discuss potential resolution of the disagreement.[5] Failing resolution, the Department Medical Examiner (or his/her physician designee) shall designate an IME from the panel provided pursuant to section C(3) of this PART C to examine the employee. The examination by the IME shall be at the City's expense and shall be limited to the subject area of the disability claimed. The IME shall forward a binding decision to the Department's Medical Examiner as to the medical propriety of the employee's performing the Department's desired limited duty schedule and/or assignment plan. The Department's Medical Examiner shall forward a copy of the IME's decision to be involved employee and the Union. In the event that the IME determines that the employee is unfit for any portion of the limited duty plan, then the employee shall remain on injury leave status pending future medical evaluations and determinations by the IME." (emphasis added) (Exhibit 41)

[4] Whether or not a lieutenant in the Personnel Office at Department headquarters ever told the Appellant this is a disputed fact that is discussed in further findings and the analysis section of this decision.

[5] There is no evidence in the record that the Department's Medical Examiner contacted Dr. McKeon upon receipt of this letter and, based on the testimony of Dr. Holder, I infer that no such contact was ever made.

11. On December 28, 2018, the Appellant had an appointment with the Physician's Assistant at Boston Sports & Shoulder Center. Excerpts from the PA's summary of the visit state:

"The patient is a 31-year-old male who presents today for evaluation of his left shoulder. He is a Boston firefighter. He is currently struggling with his work. He is out of work and evidently this has been a huge stress on him. He would like to go back to work. He has been at his current employer for 6-7 years. His date of injury was 11/11/18. He is being seen here for a second opinion. He presents today for a review of his MRI.

He continues to report rather significant shoulder pain. He comes in with his arm in a sling-type position secondary to the discomfort with guarding of the upper extremity. He continues to report discomfort within the whole shoulder girdle. He denies any significant numbness or tingling into his arm, but it is his whole shoulder girdle which is his source of discomfort."

….

" … we discussed a cortisone injection today in both the joint and subacromial space, as well as physical therapy. I do believe that the time bracing his shoulder has led to a significantly tight shoulder, a capsulitis as seouela of an acute injury."

….

"In terms of his work status, certainly with his level of discomfort, I cannot imagine him working as a full duty firefighter at this time, and he was given a work restriction note.[6] We are going to see him back for further review with Dr. McKeon in 3-4 weeks to assess his response to the injection. He is in agreement with this treatment plan and consented accordingly." (emphasis added)
(Exhibit 43)

12. The above-referenced PA's summary was not faxed to the Department until January 4, 2019. (Exhibit 43)

13. Department records indicate that the Appellant was seen by Dr. Hatfield, the Department's physician, on January 2, 2019 and January 15, 2019. The January 2nd note indicates that the Appellant was awaiting results of an MRI and that the

[6] The Appellant was unable to produce any document which referenced work restrictions.

Appellant should follow-up with Dr. Hatfield on January 15th. The January 15th note makes reference to new doctor that the Appellant was now seeing. (Exhibit 43)

14. The Appellant stopped seeing Dr. McKeon after December 28, 2018. In January 2019, he began treating with Arun J. Ramappa, MD and John-Paul D. Hezel, MD at Beth Israel Deaconess Medical Center (BIDMC). (Exhibit 44)

15. Dr. Ramappa's January 8, 2019 notes state in part:

> " … He [Appellant] has significant discomfort in his shoulder. He is experiencing a fair amount of spasm. He is yet to move his shoulder. He would benefit from formal physical therapy to provide a prescription for this. I have also asked him to see 1 of my colleagues to address his trapezius spasm and myofascial pain. He may be a candidate for dry needling and potentially for an AC joint injection. We will arrange for this appointment for later this week."
> (Exhibit 44)

16. Dr. Hezel's January 11, 2019 notes state in part:

> "He [Appellant] has some AC joint arthropathy but has significant myofascial restriction throughout the left shoulder and neck. He should definitely continue with physical threrapy, we also discussed the role of targeted dry and trigger point injections to help unlock the shoulder and periscapular region. After risks benefits were discussed, he wished to proceed. Excellent twitch response in all muscles … I like to see him back in about 3 weeks for reevaluation."
> (Exhibit 44)

17. The Appellant had a follow-up visit with Dr. Hezel on February 1, 2019. Dr. Hezel's notes state in part:

> "Assessment and plan: 31-year-old gentleman status post work-related left shoulder injury now with persistent stiffness in the setting of a healed clavicle fracture. He has had an intra-articular and subacromial injection already, neither of which really gave him lasting benefit. I am okay if he pushes through some of the pain and physical therapy. No role for repeat MRI or other injections at this time. Also hold off on more dry needling trigger point were given that the benefit was minimal.
>
> <u>We will give it another month and then follow-up with me at that point</u>." (emphasis added) (Exhibit 44)

18. On February 5, 2019, the Appellant had a physical therapy appointment at Furnace Brook Physical Therapy. The notes from that visit state in part:

> "Pt. reports a subject 40-50% improvement in L shoulder P and function since beginning skilled PT. Pt. reports he follow-up with Dr. Hezel, who re-assured patient there was no injury within the shoulder joint, and encouraged patient to begin moving the arm normally and without guarding. Pt. reports that he has begun doing so, and has been able to improve his motion, though it remains painful and uncomfortable. Notes that he hasn't been experiencing pain past his elbow joint, and denies radicular paresthesias right now. Reports that MD cleared him to return to work, and he will be returning to department MD tomorrow for clearance there." (emphasis added)
>
> …
>
> Pt. has made fair-good progress through skilled physical therapy to date towards both short and long-term functional goals. Pt. demo improvements in A/PROM, myofascial integrity, and postural awareness. Continues to lack sufficient power, strength, and stability required in the LUE for a full return to PLOF, and will benefit from cont. skilled PT oversight to reach those goals while minimizing re-injury risk." (Exhibit 44)[7]

19. On Wednesday, February 6, 2019, the Appellant saw another Department Medical Examiner, Dr. Jonathan Holder, who covers for Dr. Hatfield when he is out. (Testimony of Dr. Holder)

20. During that February 6th examination, the Appellant told Dr. Holder that Dr. Hezel had cleared him for regular, full duty. (Testimony of Dr. Holder) Dr. Holder's notes from the February 6, 2019 visit state in part: "Had ortho apt yesterday – told no restrictions." (Exhibit 10)

21. Dr. Holder also did a limited physical examination which led him to conclude that the Appellant was ready to return to full duty. (Testimony of Dr. Holder)

22. The Appellant, however, told Dr. Holder that he (the Appellant) was still experiencing pain and stiffness in his shoulder. (Testimony of Dr. Holder)

[7] The Appellant claimed he received another letter from Furnace Brook Physical Therapy that said "I was good to go back to work." But the Appellant failed to produce the letter before or after the hearing.

23. Asked to explain how he reconciled this conflicting information (i.e. – being told by the Appellant that Dr. Hezel had cleared him for regular duty and his own observation from the physical examination contrasted with the Appellant's reporting of pain and stiffness), Dr. Holder stated: "So, when the patient says that they're still in pain and they feel the need to do more physical therapy, it tells me they're in doubt about their physical ability to go back to regular work and I put a lot of weight on what the firefighter says. I'm not going to, you know, force him to go back to regular work when he's feeling that he's not ready. It doesn't pay to butt heads. And the outcomes aren't good." (Testimony of Dr. Holder)
24. Dr. Holder's notes from the February 6, 2019 visit also state: "has PT tomorrow." (Exhibit 10)
25. During this appointment on Wednesday, February 6th, Dr. Holder told the Appellant that he could return to full duty on Tuesday, February 12, 2019. (Testimony of Dr. Holder; Exhibit 10 and Exhibit 32)
26. Dr. Holder was aware that Thursday, February 7, 2019 was the next work day for Group 2 at Ladder Company 21 (where the Appellant is assigned) but he did not put the Appellant back on February 7, 2019 because of the above-referenced statement from the Appellant that he still had pain in his shoulder and wanted to do more physical therapy. (Testimony of Dr. Holder)
27. When I asked Dr. Holder why he did not schedule the Appellant for a follow-up visit prior to assigning him to return to work on February 12th, Dr. Holder stated: " … where I practiced before, you could often discharge a patient the following week without necessarily seeing them. Where I work now, they always like to actually see

them again before discharge .. So [I] expect I would have seen him again. Well, actually Dr. Hatfield would have seen him." (Testimony of Dr. Holder)[8]

28. Weeks later, when Dr. Holder reported to Department Headquarters to cover for Dr. Hatfield again, there was a folder on his desk that contained the February 1st notes from Dr. Hezel as they related to the Appellant, which stated in in relevant part: "We will give it another month and then follow-up with me at that point." Also in the folder were February 5th notes from Furnace Brook Physical Therapy which stated in part: "Continues to lack sufficient power, strength, and stability required in the LUE for a full return to PLOF[9], and will benefit from cont. skilled PT oversight to reach those goals while minimizing re-injury risk." (Testimony of Dr. Holder)
29. Dr. Holder concluded that the above-referenced notes directly contradicted what he had been told by the Appellant during his visit on February 6th, (that he had been cleared to return to work by Dr. Hezel) but he chose not to take any further action as the Appellant was not scheduled to attend any further medical examinations with the Department. (Testimony of Dr. Holder)
30. On the same day (Wednesday, February 6th) that the Appellant met with Dr. Holder and was told that he could return to full duty on Tuesday, February 12th, the Appellant left the Medical Office at headquarters, walked down the hall to the Personnel Office, and volunteered to work four paid details (on Thursday, February 7th; Friday, February 8th; Saturday, February 9th and Monday, February 11th). (Testimony of Appellant)

[8] Counsel for the Department confirmed that the Appellant was not seen by Dr. Holder or Dr. Hatfield before returning to regular duty on Tuesday, February 12th.
[9] Neither party was able to identify what PLOF stands for and Dr. Holder was not asked about this during his testimony.

31. Department Rule 18.33(e) states that "Members shall not: Be employed in, or give personnel attention to, any other business while on injured leave, sick leave without loss or administrative leave without loss." (Exhibit 6)

32. Exhibit 21 is an email that appears to be from the Department's Personnel Office to "BFD-SWORN MEMBERS" dated April 7, 2016 which states:

> "The following is a notice that can be considered a visual aid to the Return to Work reminder in Revised Special Order 18 dated today. There seems to be some confusion as to what constitutes a return to work date and what duties a member can do before that date. Please print and post.
>
> **PLEASE READ**
>
> All uniformed members (all Members Local 718) are reminded that when returning to full duty from injured leave, no member is allowed to work any type of shift until they have worked on their regularly assigned group; this includes overtime, swaps and paid details. There are numerous disciplinary precedents within the department for violating this rule; the officer who allowed the violation and the member who worked the tour have been / will be considered for formal discipline."
> (Exhibit 11)

33. On Thursday, February 7th, the Appellant worked and was paid for a detail from 6:45 A.M. to 4:45 P.M. when he was also coded and paid for light duty for the same day. (Exhibit 11)[10]

34. After his return to full duty, the Appellant put in to work a paid detail on March 6, 2019. The Appellant telephoned the contractor that he was running late because he had worked the night before and was awaiting relief. The Appellant arrived an hour and thirty-five minutes late for the detail. He did not work the night before and, when he telephoned the contractor, he was not at the firehouse awaiting relief. (Testimony of Appellant and Viola)

[10] The Department also alleges that the Appellant was paid for both light duty and a paid detail on Friday, February 8th and Monday, February 11th. The Department did not, however, submit payroll records to

35. On March 11, 2019, the Appellant's superior officer, Captain Gerard Ciancuilli, spoke to him regarding his conduct on March 6, 2019. (Testimony of Ciancuilli)

36. After speaking with Captain Cianciulli, the Appellant left the firehouse, went to EAP, and then to the VA for stress. (Testimony of Appellant)

37. A memo from Captain Cianciulli dated March 13, 2019 states that, after the Appellant left the firehouse, "[t]he company was notified to code FF Losi FSK [sick leave] until further notice. (Exhibit 15)

38. Deputy Walsh spoke to EAP representative Pat Hayes and discussed options for providing the Appellant with medical assistance. (Exhibit 34A)

39. The following is Deputy Walsh's testimony from the local appointing authority hearing regarding whether the Appellant was ever told that he was being put on sick leave until he received clearance from a Department Medical Examiner:

"Q. In your discussion with Pat Hayes, you decided we'll put Firefighter Losi out sick for the time being?

A. Yeah, yeah, he had to be - - yeah, he had to be out sick. He was under – he was going to, Pat Hayes thought he [had] him [] lined up [for medical assistance] .. he got him under the care of the VA …

Q. By putting him out sick, was there any other discussion about how long he would be out sick?

A. No, I just do (sic) Pat, make sure he has to be cleared by the department Doctor, because he had this episode during work, so he has to be, you know, cleared by the department doctor before he gets back to work.

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support this allegation. The only payroll records submitted that show that the Appellant was coded for and paid for light duty was for Thursday, February 7th.

Q. How many conversations did you have with Pat Hayes?

A. I had a couple, I think. Probably two or three. But I called him around and Pat called me back and said I got him.

Q. Pat Hayes called you back?

A. Yeah.

Q. During one of those subsequent conversations, did Pat confirm that he relayed everything you instructed him to?

A. Yes." (Exhibit 34A)

40. The Appellant worked a paid detail on March 13, 2019. (Testimony of Appellant)

41. Shortly thereafter, Deputy Chief Walsh was notified that the Appellant had worked this detail on March 13th. At or around the same time, a Department employee at headquarters made Deputy Chief Walsh aware that the Appellant had allegedly worked prior details while on light duty. Based on this information, Deputy Chief Walsh initiated an investigation. (Testimony of Walsh)

42. During an interview with the Appellant, the Appellant confirmed that he told Lieutenant Timothy P. Foley that he did not have to report to Ladder 21 for his light duty assignment based on instructions from the Personnel Division because he was taking pain medication, Tramadol. (Testimony of Walsh)

43. Deputy Chief Walsh interviewed every member of the Personnel Division Assignment Office. According to Deputy Chief Walsh's May 9, 2019 report, "Each of these members stated that they did not tell FF Losi that he did not have to report to his light duty assignment, and each also stated that they had never told anyone else

that they didn't have to report to their light duty assignment." (Testimony of Walsh; Exhibit 8)

44. As a result of the investigation, the Department charged the Appellant with allegedly being untruthful on four occasions as follows: a) claiming that the Department's Personnel Division gave him permission not to report to the firehouse while on light duty between December 21, 2018 and February 12, 2019; b) telling Department Medical Examiner Dr. Holder during an examination on Wednesday, February 6, 2019 that he (the Appellant) had a physical therapy appointment the next day (Thursday, February 7th); c) repeating during an investigative interview with Deputy Chief Walsh that he did have a physical therapy appointment on February 7th and d) telling a private contractor on March 6th that he was going to be late for a paid detail because he worked the prior night and there was a delay in being relieved. (Exhibit 4)
45. The Department also charged the Appellant with violating Department rules by working paid details on February 7th; 8th; 9th; and 11th, 2019 while he was on light duty. Relatedly, the Department charged the Appellant with being absent without leave (for his light duty) on February 7th (Thursday); February 8th (Friday); and February 11th (Monday). (Exhibit 4)
46. The Department also charged the Appellant with violating Department rules by working a paid detail on March 13, 2019 while he was on sick leave. (Exhibit 4)
47. On August 7, 2019, the Department held a Trial Board hearing. The Trial Board consisted of a Deputy Chief and two District Chiefs. Deputy Chief David Walsh testified for the Department. The Appellant appeared with his personal attorney but

did not testify in his own defense during the Trial Board. The Trial Board sustained all of the charges against the Appellant. (Exhibit 22)

48. The Fire Commissioner upheld the findings of the Trial Board and the Appellant was terminated from his position as a firefighter on August 14, 2019. (Testimony of Walsh) This appeal followed.

49. The Appellant has previously received warnings and suspensions for being absent without leave; being disrespectful to a superior officer; and excessive absenteeism. (Exhibits 24-28)

Legal Standard

The Civil Service Commission is charged with ensuring that employment decisions are made consistent with basic merit principles. Basic merit principles requires, among other things:

> " … retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected"; and … assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens" and; "assuring that all employees are protected … from arbitrary and capricious actions." (G.L. c. 31, § 1)

G.L. c. 31, § 41 states in part:

> "Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be discharged, removed, suspended for a period of more than five days …"

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 (1971); Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304

(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 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (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 (1956).

G.L. c. 31, § 43 states in part:

> "If a person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, appeal in writing to the commission, he shall be given a hearing before a member of the commission …
>
> 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."

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 (2006) and cases cited. However, "[t]he 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'," Id., quoting internally from Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983) and cases cited.

Analysis

As a preliminary matter, the Appellant does not dispute that he was late for a paid detail on March 6, 2019, arriving at the New Sudbury Street construction project approximately ninety minutes after the scheduled start time of 7:00 A.M. Further, the Appellant acknowledges that, when speaking to the contractor on the phone shortly after 7:00 A.M., he (the Appellant) attributed his tardiness to having worked at the firehouse the night before. That wasn't true.

The District Fire Chief working the same detail sent the Appellant home and penned a note to the Fire Captain at Ladder Company 21 in East Boston, where the Appellant was assigned. The District Fire Chief's note summarized what occurred and deferred to the Fire Captain regarding what, if any, action should be taken against the Appellant. What happened next, in part, ultimately triggered an investigation into whether the Appellant had been violating the Department's rules regarding light duty, injured leave and when a firefighter is permitted to work paid details.

When the East Boston Fire Captain counseled the Appellant about what occurred at the New Sudbury Street construction project, the Appellant responded poorly, accusing the District Fire Chief of having a grudge against him. After that conversation, the

Appellant left the firehouse. A complete review of the record shows that BFD officials, at that point, were sincerely concerned about the Appellant's mental well-being, trying to quickly facilitate support through EAP and/or other medical attention for the Appellant.

Deputy Chief of Personnel David Walsh was notified and he (Walsh) spoke directly with the EAP representative about providing the Appellant with support. At or around the same time, it was brought to Deputy Walsh's attention that the Appellant had possibly violated Department rules by recently working paid details while he was on light duty. Having now received three pieces of information about the Appellant (his tardiness at the detail; his departure from the firehouse after being counseled about it; and potential rule violations related to working paid details while on light duty), Deputy Walsh initiated an investigation. The starting point of that investigation was effectively December 20, 2018, the date that the Appellant's status was converted from injured leave to light duty.

As outlined in the findings, the Appellant had been out on injured leave since November 2018 based on a work-related injury. While on injured leave, firefighters are required to regularly (i.e. – weekly) report to Fire Department headquarters to be examined by a Department Medical Examiner. On December 20, 2018, the Appellant appeared at headquarters and was examined by Department Medical Examiner Dr. Britt Hatfield at which time Dr. Hatfield told the Appellant that he was being converted from injured leave to light duty.

I credit the Appellant's testimony that he had somewhat of a verbal dispute with Dr. Hatfield on December 20th regarding the decision to take him off injured leave. As referenced in the findings, a Physician's Assistant recommended that the Appellant <u>not</u> be returned to duty. The Appellant was understandably perplexed as to why Dr. Hatfield

was effectively overruling the findings of the Physician's Assistant. Based on reasonable inferences drawn from the Appellant's testimony, I conclude that Dr. Hatfield did not feel obliged to defer to the PA's recommendation nor did he believe that a PA's recommendation triggered the requirement in the CBA to discuss the divergent recommendation related to whether the Appellant should be removed from injured leave. Even if this interpretation is correct, the Department, upon receiving Dr. McKeon's correspondence the next day (December 21st) was clearly obligated to reach out to Dr. McKeon to discuss his divergent conclusion regarding whether the Appellant should be removed from injured leave. That didn't happen.

Dr. Hatfield, on December 20th, removed the Appellant from injured leave and placed him on light duty, effective the next day. What occurred immediately after the Appellant's visit with Dr. Hatfield is in dispute. According to the Appellant, he (the Appellant) spoke with a lieutenant in the personnel office at headquarters; and, after telling the lieutenant he was taking Tramadol, was told by the lieutenant that he would not need to report for work at the firehouse while he was out on light duty. The BFD argues that the Appellant is lying. Deputy Chief Walsh testified that, upon being told this by the Appellant, he questioned every member of the personnel department and that each of them vehemently denied ever making this statement to the Appellant. In fact, according to Deputy Chief Walsh, each of the employees insisted that they would never tell any employee that he/she did not need to report for work while out on light duty.

I don't credit the Appellant's testimony that he was told by a lieutenant in the personnel office that he didn't need to report for work at the firehouse while out on light duty. First, the Appellant was unable to specifically identify who in the personnel office

purportedly told him this (i.e. – the name of the person). Second, I kept the record open for the Appellant to provide a record of refilled prescriptions showing that he was indeed taking Tramadol during the time period which he was assigned to light duty. I drew an adverse inference from the Appellant's failure to provide this information. Third, the Appellant's testimony, even standing alone, just didn't ring true to me. It differed from other parts of his testimony which were more specific and logical. Thus, I conclude that the Appellant was untruthful when he told Deputy Chief Walsh that a lieutenant in the personnel office told him that he didn't need to report for work while out on light duty.

The Appellant acknowledges that he called the East Boston firehouse and told a lieutenant that, according to the personnel office, he was being put on light duty, but did not need to report for work. Remarkably, over the next several weeks, 6-8 Fire Captains and lieutenants at this East Boston firehouse recorded the Appellant as being on light duty when they knew he was not reporting for light duty at the firehouse. The Appellant testified that this has been a longstanding common practice in firehouses in the Boston Fire Department. Deputy Chief Walsh and East Boston Fire Captain Gerald Cianciulli dispute this. While there is not sufficient evidence to show that such a practice exists, it was disappointing that the Department failed to conduct any retrospective review and/or audit to determine whether other firefighters, assigned to light duty, had failed to report to duty at their respective firehouses. Rather, the Department appeared to solely take a prospective look, ensuring that, going forward, firefighters are not paid for light duty if they are not reporting to work. Having found that the Appellant was not excused from reporting to duty by someone in the personnel office, I conclude that the Appellant engaged in misconduct by not reporting for duty during the multiple weeks in December,

January and February 2018 that he was assigned to light duty. The language in the CBA does not change my conclusion. If the Appellant believed that the Department's decision to place him on light duty was not permitted under the CBA, he had a right to grieve that order. He did not. Rather, he falsely reported to a fire lieutenant in the East Boston firehouse that he had been excused from reporting to duty. That untruthfulness, along with his actual failure to report to duty, constitutes misconduct.

The next critical juncture relevant to this appeal is when the Appellant met with Dr. Holder on Wednesday, February 6th. Dr. Holder was serving as the Department's Medical Examiner that day, filling in for Dr. Hatfield. I credit Dr. Holder's testimony that, during that examination, the Appellant verbally told him that his new orthopedic doctor, Dr. Hezel, had cleared him to return to duty. That wasn't true. In fact, when Dr. Hezel last met with the Appellant on February 1, 2019, he had not cleared the Appellant to return to full duty. Rather, he instructed the Appellant to appear for a follow-up visit weeks later before any such determination would be made. I also credit Dr. Holder's testimony that the Appellant told him that he had a physical therapy appointment the next day, Thursday, February 7th, the day in which the Appellant, based on his assignment, would have otherwise been assigned to work if he was returned to full duty effectively immediately.

Instead, based on the Appellant's representation that he had a physical therapy appointment the next day, and based on the Appellant's statement to him that he (the Appellant) was still feeling minor pain and discomfort, Dr. Holder made the return to duty effective Tuesday, February 12th. At a minimum, this would mean that the Appellant was still required to report to the firehouse in East Boston for light duty on

Thursday, February 7th. The undisputed evidence shows that, instead of reporting for light duty, the Appellant performed a detail during almost the same hours that he should have been reporting to the firehouse for light duty. In short, the Appellant, on Thursday, February 7th, received light duty pay and detail pay for the same hours. By doing so, the Appellant engaged in misconduct.[11]

In summary, the Appellant engaged in misconduct by: being untruthful on multiple occasions; failing to report to work at the firehouse when assigned to light duty; getting paid for a detail for the same hours that he was supposed to be performing light duty; and appearing 90 minutes late for a paid detail. These actions violate multiple rules of the Department and constitute substantial misconduct which adversely affected the public interest.

Having determined that the Appellant did engage in the alleged misconduct, I must determine whether the level of discipline (termination) was warranted. As stated by the SJC in Falmouth v. Civ. Serv. Comm'n, 447 Mass. 814, 823-825 (2006):

> "After making its de novo findings of fact, the commission must pass judgment on the penalty imposed by the appointing authority, a role to which the statute speaks directly. G.L. c. [31], s. § 43 ('The commission may also modify any penalty imposed by the appointing authority.') Here 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." Id. citing Watertown v. Arria,16 Mass.App.Ct. 331, 334 (1983).
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> "Such authority to review and amend the penalties of the many disparate appointing authorities subject to its jurisdiction inherently promotes the principle of uniformity and the 'equitable treatment of similarly situated individuals.' citing Police Comm'r of Boston v. Civ. Serv. Comm'n, 39 Mass.App.Ct. 594, 600 (1996). However, in promoting these principles,

[11] It is an understatement to say that there appears to be a systemic problem at the Department in which there is no automated system to automatically block the assignment of details to employees who are coded as being on light duty.

> the commission cannot detach itself from the underlying purpose of the civil service system— 'to guard against political considerations, favoritism and bias in governmental employment decisions." Id. (citations omitted).
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> "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 absence of political considerations, favoritism or bias would warrant essentially the same penalty. The commission is not free to modify the penalty imposed by the town on the basis of essentially similar fact finding without an adequate explanation." Id. at 572. (citations omitted)

First, while my findings are not identical to the Department's (i.e. – the evidence only supports one day of "double-dipping" as opposed to multiple days), they do not differ significantly from the Department as, like the Department, I found that the Appellant engaged in misconduct by being untruthful, failing to report to work at the firehouse when assigned to light duty; getting paid for a detail on one day for the same hours that he was supposed to be performing light duty; and appearing late for a paid detail.

Second, the evidence did not show that the Department's decision here was based on political considerations, favoritism or bias. Rather, the Department's initial efforts to provide the Appellant with assistance from EAP and other medical assistance appears to show the opposite. In short, the Appellant was not targeted by the Department; his own actions resulted in a well-founded decision to conduct an investigation. The findings of that investigation show that the Appellant engaged in repeated misconduct.

Third, the Appellant's personnel file shows that he engaged in similar misconduct in the past, receiving warnings and suspensions for being absent without leave; being disrespectful to a superior officer; and excessive absenteeism. This shows that corrective

action through a lesser penalty (i.e. – a long-term suspension) is unlikely to correct the Appellant's performance.

For these reasons, a modification of the penalty (termination) is not warranted.

Conclusion

The Appellant's appeal under Docket No. D1-19-076 is ***denied***.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Camuso, Stein and Tivnan, Commissioners) on July 16, 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. 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 to:
Kevin R. Mullen, Esq. (for Appellant)
John J. Greene, Esq. (for Appellant)
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Connie Wong, Esq. (for Respondent)