

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

100 Cambridge Street, Suite 200
Boston, MA 02114
(617) 979-1900

STEVEN MULLEN,
Appellant

v.

CITY OF REVERE,
Respondent

Docket Number: D-23-178

Appearance for Appellant: Neil Rossman, Esq.
Rossman and Rossman
8 Essex Center Drive
Peabody, MA 01960

Appearance for Respondent: Matthew J. Buckley, Esq.
City of Revere
281 Broadway
Revere, MA 02151

Commissioner: Angela C. McConney¹

SUMMARY OF DECISION

The City of Revere had just cause to suspend the Appellant for five days where he twice refused the Fire Chief's order to file a report immediately. The refusal was not the first time that the Appellant had refused to immediately follow a superior officer's order and continued a pattern of poor decision-making.

DECISION

Pursuant to G.L. c. 31, § 43, the Appellant, Steven Mullen (Appellant), timely appealed to the Civil Service Commission (Commission) contesting the decision of the City of Revere (City or Respondent) to issue a five-day suspension based on a charge of insubordination that

¹ The Commission acknowledges the assistance of Law Clerk Noah S. Nelson in the drafting of this decision.

followed instances of poor decision-making and failure to abide orders.²

The Commission held a remote pre-hearing conference on September 19, 2023. On November 15, 2023, I held an in-person evidentiary hearing at the offices of the Commission, located at 100 Cambridge Street, Suite 200, Boston, MA. The hearing was recorded via Webex and a link to the recording was provided to the parties.³

The parties submitted post hearing briefs in January 2024. The Commission then received Respondent's Exhibit 18 – three videos stored on flash drives – whereupon the administrative record closed.

For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

I admitted into evidence twelve Appellant exhibits (A. Exhibits 1-12) and eighteen Respondent exhibits (R. Exhibits 1-18).⁴ I admitted the Appellant's Appendix of Terms as A. Exhibit 13.⁵ I admitted the Appellant's appeal form as A. Exhibit 14.

Based on these exhibits and the testimony of the following witnesses:

Called by the City:

- Chief Christopher P. Bright, Revere Fire Department
- Assistant Chief James Cullen, Revere Fire Department

² The Standard Adjudicatory Rules of Practice and Procedure, 801 C.M.R. § 1.01 (Formal Rules), apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

³ Should there be a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/it wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, the recording provided to the parties should be used to transcribe the hearing.

⁴ Respondent Exhibits are numbered Exhibits 14A, 14B, and 14C after Respondent Exhibit 13.

⁵ Based on the frequent use of terms of art employed throughout the witnesses' testimony, I asked the parties to submit an appendix of fire science terms. The Appellant submitted an Appendix of Terms with his post hearing brief.

- Firefighter Kris Sarcia, Revere Fire Department

Called by the Appellant:

- Firefighter George LaVasseur, Revere Fire Department
- Firefighter Hernando Ortega-Bueno, Revere Fire Department
- Firefighter Jordan Bohannon, Revere Fire Department
- Lieutenant Steven Mullen, Appellant

and taking administrative notice of all pleadings filed in the case, pertinent rules, statutes, regulations, case law and policies, and drawing reasonable inferences from the credible evidence, I make the following findings of fact:

1. The Appellant, Steven Mullen, was appointed to the position of permanent full-time firefighter with the Revere Fire Department (Department) on October 3, 2011. He was promoted to the rank of full-time lieutenant on July 21, 2019. (R. Exhibit 15; Testimony of Appellant.) He is a member of Local 926, the International Association of Firefighters (IAFF). (R. Exhibit 17)

2. In addition to his associate's degree in fire science, Lt. Mullen completed 12 weeks of training through the fire academy. He is also a registered nurse and emergency medical technician (EMT). (Testimony of Appellant)

3. Lt. Mullen's previous disciplinary history consisted of a written warning issued on November 26, 2021 for failure to wear a mask while responding to a medical aid call. (R. Exhibits 14A and 14B)

4. Lt. Mullen has also been counseled and transferred for more training for reasons related to poor performance, including his response to a serious brush fire on May 7, 2023. (R. Exhibit 15)

5. Acting Mayor Patrick M. Keefe is the appointing authority for the Department. (R. Exhibit 8)

Background to July 2023 Disciplinary Incident: Failure to Mask, November 2021 Medical Call

6. In October 2021, Fire Chief Bright issued General Order #2021-20, which provided that: **“Unvaccinated members are now required to wear masks at all times both inside the fire station and everywhere else while on duty. ... [All members shall] continue to protect themselves when out on calls using masks and personal protective equipment whenever in contact with members of the general public.”** (R. Exhibit 14C) (emphasis in original)

7. Lt. Mullen had not been vaccinated against COVID-19 on November 26, 2021, when the apparatus he helmed, Engine 4, was dispatched to a Cambridge Health Alliance (CHA) facility in Revere. At that time, the Department required that all fire apparatus be stocked with personal protective equipment (PPE) and face masks. Engine 4 was not in compliance on the morning of November 26; there were no face masks on the apparatus. (R. Exhibit 14B; Testimony of Chief Bright, Testimony of Appellant)

8. When Engine 4 arrived at CHA, Lt. Mullen was not wearing a face mask. When a nurse informed him that a face covering was a prerequisite for entering the medical facility, Lt. Mullen tried to “talk [his] way out of it.” (Testimony of Appellant)

9. After this November 2021 incident, Lt. Mullen authored an apology letter acknowledging his violation of General Order #2021-20. Lt. Mullen stated that his failure to wear a surgical mask occurred “due to [his] oversight of neglecting to ensure that the apparatus was adequately stocked with additional surgical masks throughout daily operation.” Lt. Mullen further noted that his misjudgment reflected poorly on himself and constituted a “disappointing failure.” (Exhibit 14B)

10. Immediately after a January 2022 disciplinary hearing, Chief Bright removed Lt.

Mullen from his front seat assignment on Engine 4 and precluded him from riding in any apparatus front seat or swapping (exchange of duty with another officer) until further notice. In a disciplinary memorandum, Chief Bright wrote that any future failure on Lt. Mullen's part to comply with fire department orders "would result in fac[ing] *further progressive disciplinary action.*" A written warning was also placed in Lt. Mullen's personnel file. (Exhibit 14A) (emphasis added)

11. Later testifying before me, Chief Bright opined that Lt. Mullen's "got off easy", given that he had interacted while unmasked with the public at the CHA medical facility in direct contravention of his directive issued a month earlier. (Testimony of Chief Bright)

Further Background: May 2023 Brush Fire Incident and Sequelae

12. On May 7, 2023, Lt. Mullen was assigned to Engine 5 as the front-seat officer, with firefighters George LaVasseur, Hernando Ortega-Bueno, and Jordan Bohannon under his command. (Testimony of LaVasseur, Testimony of Ortega-Bueno, Testimony of Appellant)

13. While at a fire house that afternoon, Lt. Mullen saw smoke coming from the Oak Island marshes in Revere and he advised other Engine 5 members that they all needed to respond. (Testimony of LaVasseur, Testimony of Ortega-Bueno, Testimony of Appellant)

14. By 2:11 p.m., Metro North Regional Emergency Communications Center had begun to receive numerous 911 calls for a brush fire in the Oak Island neighborhood. Over the course of the fire, companies from Revere, Chelsea, Winthrop, and Everett were dispatched to the scene. By the time Lt. Mullen's company arrived on scene around 2:15 p.m., the brush fire had already consumed approximately an acre of extensive marsh land and was threatening the residential homes along the marsh at the end of Woodland Road. (A. Exhibit 5)

15. Upon arrival, Lt. Mullen ordered Firefighter Bohannon to "make the hydrant" and

he ordered the rest of the company to use Engine 5's larger, two-and-one-half (2.5) inch diameter hose line to reach the fire.⁶ (Testimony of Bohannon, LaVasseur, Ortega-Bueno, and Appellant). The process of “flaking the line” took a very long time because – even when not “charged” with water – a hose line of that diameter is very heavy and difficult to maneuver.⁷ (Testimony of Appellant; Appendix of Terms)

16. Complicating matters were commuter rail train tracks and a series of three fences separating Engine 5 from the active fire, several hundred feet away. Despite the challenging conditions, Lt. Mullen’s initial report back to fire headquarters was very brief and he did not call dispatch to order the halting of commuter trains or the Blue Line.⁸ Notwithstanding considerable efforts, Lt. Mullen’s company only succeeded in getting about 15 feet of charged hose line over a tall MBTA fence. (Testimony of Appellant)

17. Although Lt. Mullen was able to partially douse the fire, the fire continued to advance across the marsh land in the opposite direction. When the charged hose line proved

⁶ When a firefighter “makes the hydrant,” he or she connects one end of a four-inch (4) supply line to the hydrant and the other end of the supply line into the engine feeding water. The purpose of “making the hydrant” is to allow multiple hose lines to be taken from the engine to the fire. (Appellant Appendix of Terms)

⁷ “Flaking the line” consists of “pull[ing] [the] hose off the engine and advanc[ing] it towards the fire in a manner so that when it is charged there are no kinks or tangles hampering the maneuverability or the flow of water.” (Appellant Appendix of Terms)

⁸ In his incident report, Deputy Chief DiCarlo noted that “C7 notified fire alarm to have the trains halted for safety.” (A. Exhibit 6). According to Firefighter Bohannon’s testimony, after Dep. Chief DiCarlo took command of the scene he spoke with other firemen on the radio. (Testimony of Bohannon). In light of the fact that: (i) the Appellant’s testimony indicates that he did not call in a “box alarm,” which is a dispatch transmission that includes multiple companies and manpower, including engines and ladder trucks (Appellant Appendix of Terms); (ii) no companies from other fire departments had yet arrived on scene; and (iii) only Revere companies were at the scene when dispatch confirmed shutdown of the tracks, the reasonable inference is that Dep. DiCarlo was the “C7” in the aforementioned incident report who called dispatch to cancel train service. As explained in the Analysis section, *infra*, Lt. Mullen exhibited poor judgment when he failed to immediately notify dispatch to halt train service upon arriving at the scene.

ineffective, Lt. Mullen ordered Firefighters Ortega-Bueno and Bohannon to attempt feeding more line from their position on the other side of the MBTA fence. Lt. Mullen testified that the hose line was so heavy that they found themselves “at a standstill.” Lt. Mullen decided to give up on extending the line and asked Firefighter Bohannon for a five-gallon bucket to douse little hot spots in the marsh. Nineteen times he filled the bucket. (Testimony of Bohannon, Ortega-Bueno, and Appellant.)

18. Both Firefighters Bohannon and Ortega-Bueno testified that the bucket Lt. Mullen used was not designed to hold water; that kind of bucket typically contained absorbent for oil spills. (Testimony of Bohannon, Testimony of Ortega-Bueno)

19. Capt. Kevin O’Hara encountered Lt. Mullen as he carried the five-gallon bucket in the marsh and asked him to put it down. Lt. Mullen did not comply until Cpt. O’Hara repeated himself and stated that it was order. (A. Exhibit 6, R. Exhibit 13; Testimony of Bohannon)

20. After he spoke with Dep. Chief DiCarlo about the brush fire incident, Chief Bright deemed it prudent to place Lt. Mullen in a double company with a captain for remediation and a determination about his decision-making. (Testimony of Bright)

21. Chief Bright first transferred Lt. Mullen to the “back step” of Ladder 1 and then, by the end of May, transferred him to the back step of Ladder 2 under the leadership of Cpt. O’Hara.⁹ (R. Exhibit 12; Testimony of Appellant)

22. Cpt. O’Hara soon “noticed that Lt. Mullen had issues following Orders” while under his command. Capt. O’Hara stated in an undated memorandum: “Lt. S. Mullen fail[ed] to

⁹ According to the Appellant’s Appendix of Terms, the “back step” is an “out of date term used in the Revere Fire Department to describe an extra officer grade personnel riding on an apparatus without command authority.”

follow orders and directives” by ignoring his order to clean the kitchen on June 6 and 8, 2023 (part of the daily routine of every Revere firehouse). (R. Exhibit 12)

23. On or about June 22, 2023, Lt. Mullen was instructed to report to headquarters for a meeting with Chief Bright. At the meeting, the Chief handed him Dep. Chief DiCarlo’s narrative of his performance at the brush fire. Lt. Mullen claimed that he was unable to discuss the narrative with Chief Bright at that time. (R. Exhibit 13; Testimony of Appellant)

24. Dep. Chief DiCarlo’s narrative sharply criticized Lt. Mullen’s behavior at the brush fire, noting that:

- The Appellant’s initial report upon arriving at Glendale Street was “brief” and provided “zero details about the severity of the situation.” Additionally, the Appellant “failed to recognize the need for a box response to an uncontained brush fire.”
- The Appellant had no confirmation that the train service was stopped and failed to instruct dispatch to have train service halted.
- The Appellant “exhausted himself unnecessarily with mishandling of the 2 ½ attack line rendering him a liability and distraction for the remainder [of] the incident.”
- The Appellant “had several safer and beneficial options”, including using a reducer to extend the overall hose length with a segment of smaller-diameter hose.

(R. Exhibit 13)

25. On July 17, 2023, Chief Bright transferred Lt. Mullen from Ladder 2 to the day staff.¹⁰ (Testimony of Appellant)

The July 25, 2023 Medical Aid Call

26. As part of the general day staff, Lt. Mullen was assigned to house duty on the Central fire station apparatus floor on Tuesday, July 25, 2023. The Central fire station is located at 400 Broadway Street. (Testimony of Bright)

¹⁰ On June 28, Lt. Mullen caused the filing of a union contract grievance over his transfer away from his regular lieutenant position to back step positions, allegedly “for an unspecified and unknown disciplinary reason”. (R. Exhibit 17)

27. Lt. Mullen's essential job duties (as a member of the general day staff) included house watch duty in the patrol room, including answering the phone, answering any messages that come into the station, and greeting members of the public visiting the station. (Testimony of Appellant)

28. Firefighter Kris Sarcia was also assigned to the general day staff on July 25, 2023, working in the patrol room at the Central firehouse alongside Lt. Mullen. They were the only personnel present on the apparatus floor, as the two apparatus companies, Engine 4 and Ladder 2, were out on call. (R. Exhibits 2, 9 and 10)

29. The Central fire station has three bay doors, with the patrol room to the left of the bay doors. There are windows on the patrol room door and on each bay door. (R. Exhibit 2)

30. At 12:27 p.m., dispatch reported a medical aid call over the loudspeaker in the station house. (R. Exhibit 2, A. Exhibit 11; Testimony of Sarcia).

31. An elderly woman had slipped, fallen, and hit her face at 411 Broadway, Revere, the address of a TD Bank branch. This location was across the street from the fire station. (A. Exhibits 8-10, 12)

32. After the 911 call came over dispatch, Firefighter Sarcia immediately called dispatch to confirm that there was a medical aid incident at 411 Broadway. He learned from the operator that the "patient was in front of the building [TD Bank] next to a tree." (A. Exhibits 8 and 11; Testimony of Sarcia).

33. According to the dispatch call log¹¹, the narrative for 12:29 p.m. reads:

70S Y/O FEMALE, INJURIES FROM A FALL, OUTSIDE BY THE TREE,
WEARING A PURPLE SHIRT, CALLER IS A PASSERBY[.]

¹¹ "Dispatch" refers to the Metro North Regional Emergency Communications Center.

(A. Exhibit 11) (capitalization in original)

34. Lt. Mullen “could not hear the address or nature of the call while in the patrol room.” (A. Exhibit 9).

35. Firefighter Sarcia looked out one of the bay windows, trying to observe the elderly woman. (A. Exhibit 9; Testimony of Sarcia)

36. When Firefighter Sarcia asked Lt. Mullen if they should try to help the elderly woman across the street, he replied that he was unsure and did not want to get into any trouble.¹² (A. Exhibit 8; Testimony of Sarcia, Testimony of Appellant)

37. After they deliberated about what to do, Firefighter Sarcia opened the middle bay door and they both saw a woman crossing the street and walking toward the station. Firefighter Sarcia helped the woman into a chair that Lt. Mullen provided. (R. Exhibit 2; Testimony of Sarcia)

38. Engine 5 was dispatched to the scene at 12:30:47 p.m. A Cataldo ambulance was also dispatched and arrived at the station house at 12:37:50 p.m. Ladder 2 also responded and arrived at the Central station house at 12:38:26 p.m. (A. Exhibit 11)

39. Lt. Mullen’s understanding was that, as a member of the day staff, “We don’t respond to medical aids ... not typically. Of course, if you see something, you respond.” Only apparatus respond to medical aid calls; thus, it was outside his purview as a member of the day staff to respond to such calls. Furthermore, the patrol room lacked personal protective equipment

¹² During his testimony, the Appellant stated the following with respect to his apprehension about investigating the medical aid call:

I’m very aware of the situation I’m in, too. I had just been transferred four times; I didn’t understand why, so I’m very careful with any move I do. [I’m] extremely cognizant of all my actions because I understand something is happening to me, I don’t understand it.

(PPE) or other medical equipment. (A. Exhibit 9; Testimony of Appellant)

40. The Massachusetts Firefighter Task Survey Analysis outlines the essential tasks that firefighters across the Commonwealth of Massachusetts are expected to follow. Subsection O entitled, “**FIRST AID,**” and located within “**I. EMERGENCY SCENE RESPONSE: HANDS ON,**” begins with the following task:

Provides direct medical assistance to persons requiring emergency attention or assists others in providing medical assistance.

(R. Exhibit 16) (emphasis in original)

41. Lt. Mullen testified, “We have a system in the fire department. You can’t just run out and respond to anything.” (Testimony of Appellant)

42. Lt. Mullen testified that he had never received any protocols for how to respond to medical aid calls, nor had he ever been told to respond to those types of calls.¹³ (Testimony of Appellant)

43. During cross examination, Lt. Mullen explained that he had to weigh the risk versus the reward of leaving the firehouse to assist the elderly woman across the street. He alleged that the intersection in front of the firehouse is notoriously dangerous; consequently, there was the possibility that he and Firefighter Sarcia could have been hit by a car. (Testimony

¹³ In his report written after the incident, Lt. Mullen submitted:

[A]s day staff, Firefighter Sarcia and I we were not given any SOPs [standard operating procedures] regarding responding to medical aid calls (other than rendering obvious medical care to those in need or station walk-ins).

(A. Exhibit 9)

Similarly, Firefighter Sarcia testified that there is no SOP for leaving the fire station that you’re assigned to as a member of the day staff – it is a judgment call based on the circumstances. In light of Firefighter Sarcia’s testimony, as well as Chief Bright’s testimony, discussed *infra*, that a firefighter can leave the station in this type of situation, the reasonable conclusion is that leaving the fire station for medical aid calls as a member of the day staff is indeed a judgment call made under the totality of the circumstances.

of Appellant)

44. Explaining what the appropriate response would have been to the situation, Chief Bright testified: “Everyone knows... you go help somebody. That’s what we do.” According to the Chief, the proper response would have been to take a radio and go on foot to check out the situation. The Chief noted that while a company had been dispatched to the scene, it was coming from another part of Revere. (Testimony of Bright)

45. As Firefighter Sarcia testified, when someone is in need, a firefighter acts in accordance with his or her training. Triage is the appropriate response – one first assesses for any major issues or complications with the patient, starting with any life-threatening injuries, and then continues assessing for injuries in descending order of severity. (Testimony of Sarcia)

46. Although there was no medical equipment at the station, Firefighter Sarcia and Lt. Mullen could have performed basic triage. In addition to Lt. Mullen’s EMT certification, he is a registered nurse. (Testimony of Sarcia)

47. The July 25, 2023, 12:35 p.m. associated narrative for the dispatch call log stated that the elderly woman was “relocated to fire hq [headquarters].” (A. Exhibit 11)

48. After the elderly woman crossed the street to the fire station of her own accord, Firefighter Sarcia seated her and let her know that an ambulance and fire apparatus were responding. Lt. Mullen fetched her paper towels from the rest room to clean up her facial lacerations and the blood from her nose. (A. Exhibits 8 and 9; Testimony of Sarcia, Testimony of Appellant)

49. Ladder 2 and the ambulance crew took over the medical aid response upon arrival at the fire station. The Ladder 2 captain wrote that the company “applied [an] ice pak and assisted in packaging [the] patient” in the subsequently filed medical incident report. (A.

Exhibits 8 – 10, R. Exhibit 18)

Chief Bright Issues a Five-Day Suspension

50. The next day, Wednesday, July 26, 2023, Chief Bright and Firefighter Sarcia met on an unrelated matter. However, the chief brought up the July 25 incident during their meeting and ordered the firefighter to submit a report about the incident. Firefighter Sarcia complied.

(R. Exhibit 2; Testimony of Bright, Testimony of Sarcia)

51. On Thursday, July 27, 2023, Chief Bright instructed Asst. Chief Cullen to have Lt. Mullen report to the Chief's office. After Lt. Mullen appeared, Chief Bright asked him if he recalled the July 25 incident. When Lt. Mullen stated he did, Chief Bright ordered him to submit a report about his actions during the incident. (R. Exhibit 11; Testimony of Mullen)

52. Lt. Mullen said that he could not submit the report right away because he had to have his lawyer review it first. Chief Bright responded that Lt. Mullen's lawyer did not run the Department and that he had issued an order. Lt. Mullen declined to submit a report and reiterated that his lawyer would have to review it first. (R. Exhibit 11)

53. Chief Bright suspended Lt. Mullen for insubordination¹⁴ and ordered him to leave the fire station immediately. (R. Exhibit 11; Testimony of Bright)

54. In a letter dated July 27, 2023, Chief Bright suspended Lt. Mullen "for five days without pay for failure to follow a direct lawful order." The letter described the July 25 incident when an elderly lady fell and injured herself "directly across the street from the fire house where you were working. ... Even after the injured woman came over to the fire house seeking help you failed to do anything to assist her." The letter charged that after the Chief called Lt. Mullen

¹⁴ Lt. Mullen argues that he never disobeyed the Chief's order but needed his lawyer to review his report before submission. According to Lt. Mullen, his compliance is evidenced by his submission of the report the following day. (Appellant's post-hearing brief)

into his office on July 27 and asked him to submit a report explaining the incident and his actions:

[Y]ou refused, stating that you had to consult with your attorney. I then informed you that it was direct order. You again refused. I then dismissed you, suspending you for five days, beginning tomorrow, July 28, 2023, for your refusal to obey a direct order.

(R. Exhibit 5)

55. Further, the chief wrote:

I am also ordering you to attend a fitness for duty evaluation based upon your seeming inability to make proper decisions when faced with stressful situations, a quality that every firefighter must have. You will receive the details of that appointment forthwith.

(R. Exhibit 5)

56. The next day, Friday, July 28, Lt. Mullen returned to the firehouse and submitted his report to Capt. Robert Mansfield. (Stipulation; Testimony of Bright)

57. Because the Chief was out of the office from Friday to Monday (July 28-31, 2023), Capt. Mansfield slid the report under the Chief's door. (Testimony of Bright)

58. On July 30, 2023, Lt. Mullen's counsel requested a Section 41 hearing on the five-day suspension and waived the right to hearing within five days.¹⁵ (R. Exhibit 6)

Chief Bright Issues an Amended Suspension Letter

59. On August 7, 2023, Chief Bright issued an amended suspension letter, again advising Lt. Mullen that he was suspended for five days without pay concurrent with the suspension the lieutenant had just completed, and including the following charges:

(1) Neglect of duty – failure to act to render aid, when he was most senior firefighter on duty on the apparatus floor due to the two-fire apparatus being out on call;

¹⁵ “[A tenured employee] ... shall be given a hearing before the appointing authority or a hearing officer designated by the appointing authority within five days after receipt by the appointing authority of such request.” G.L. c. 31, § 41.

- (2) Insubordination – failure to follow a direct lawful order from the Chief, when he twice refused to write a report after being summoned by the Chief to his office;
- (3) Incompetence – failure to act to render aid; and
- (4) Filing a false report, where he “apparently slid the report”¹⁶ “containing false information” under the Chief’s office door without consulting him further.

The suspension letter did not cite any Department rule and regulations violations as the basis of the charges.¹⁷ (R. Exhibit 7)

60. The amended suspension letter further advised that the Chief would refer the matter to Acting Mayor Keefe and recommend a hearing to “determine if a greater penalty, up to and including demotion or termination is warranted.” The Chief delayed the fitness for duty evaluation until the disciplinary matters were sorted out. (R. Exhibit 7)

The Commission Denies the Appellant’s Procedural Appeal

61. On August 14, 2023, Lt. Mullen filed an appeal here pursuant to G.L. c. 31, § 42, alleging that Acting Mayor Keefe, as the Department appointing authority, had failed to follow the requirements of G.L. c. 31, § 41; and that the action taken by Chief Bright – in conjunction with Acting Mayor Keefe’s failure to hold a Section 41 hearing – affected his employment and compensation. The complaint requested a hearing concerning the appointing authority’s failure to provide a Section 41 hearing. (R. Exhibit 8)

62. Later that same day, Lt. Mullen supplemented the appeal, alleging that the City failed to follow procedural requirements. (Administrative Record)

63. The Commission found that Lt. Mullen could not show that he was prejudiced by the City’s short delay in scheduling the Section 41 hearing and dismissed the procedural appeal on October 5, 2023. (Administrative Record)

¹⁶ Capt. Mansfield slid the Lt. Mullen’s report under the Chief’s door. (See Finding of Fact 57)

¹⁷ It is unclear whether the Chief omitted the relevant Department Rules and Regulations or if the Department lacks such ordinances.

The Section 41 Appeal on August 29, 2023

64. Acting Mayor Keefe issued an August 21, 2023 letter, advising Lt. Mullen of a scheduled August 29, 2023 hearing on the four charges: (1) Neglect of duty – failure to render aid; (2) Insubordination – failure to follow a direct order from the Chief; (3) Incompetence; and (4) Filing a false report. (R. Exhibit 4)

65. Chief Bright, Asst Chief Cullen and Lt. Mullen testified at the August 29, 2023 Section 41 hearing, presided over by the Acting Mayor’s designee, Assistant City Solicitor Daniel E. Doherty, Esq. (R. Exhibit 2)

66. Assistant City Solicitor Doherty issued his report and findings on September 7, 2023, finding that there was insufficient evidence to sustain three of the four charges: Charge (1) Neglect of duty – failure to render aid; Charge (3) Incompetence – failure to render medical aid; and (4) filing a false report. (R. Exhibit 2)

67. In his third finding, Mr. Doherty concluded that “had Mullen been able to see the injured party when he was looking out the window, he would have responded to her location or permitted [Firefighter] Sarcia to do so.” He examined in his fourth finding the factors behind the Lt. Mullen’s reluctance to have Firefighter Sarcia leave the firehouse to look for the injured party:

... they could not see her [the elderly woman] and did not know where she was... they lacked medical supplies and Personal Protection Equipment... Ladder 2 and an ambulance were already dispatched and would be arriving within minutes...

(R. Exhibit 2)

68. Mr. Doherty concluded in his fifth finding that the Lt. Mullen and Firefighter Sarcia’s decision to remain in the firehouse was “... in these circumstances ... not unreasonable and did not amount to [Charge 1] Neglect of Duty or [Charge 3] Incompetence for failure to

render medical aid.” (R. Exhibit 2)

69. In his ninth finding, Mr. Doherty did not sustain Charge (4), filing a false report. The hearing officer found that while Chief Bright alleged that Lt. Mullen’s report contained false information, the Chief failed to identify exactly what information was untruthful. Although the Chief did not believe that Lt. Mullen rendered medical assistance, the fact that Lt. Mullen only brought the elderly woman a seat and provided paper towels to clean her face does not in and of itself make Lt. Mullen’s statement that he provided such help false. (R. Exhibit 2)

70. In his fifth finding, Mr. Doherty sustained only one of the four charges, Charge (2) Insubordination – failure to follow a direct order from the Chief. Mr. Doherty acknowledged that Lt. Mullen “felt that he had been treated unfairly by the department the previous three months and was under scrutiny, and that there had never been any formal discussion with him or explanation about why things were happening.” But he also found:

... it was clear from the Chief’s remark that Mullen’s lawyer does not run the fire department and his insistence that Mullen write the report that the Chief wanted him to write the report immediately. I find that, despite his concerns that he was being targeted within the department and treated unfairly, Lt. Mullen was not justified in refusing the Chief’s direct order so that he could consult with his lawyer before submitting his report.

(R. Exhibit 2)

The Appointing Authority’s Decision

71. Acting Mayor Keefe issued a September 13, 2023 decision incorporating the hearing officer’s report and adopting the findings as set forth therein. (R. Exhibit 1)

72. Mayor Keefe then wrote:

Failing to follow orders is a very serious matter. In the Fire service it can mean the difference between life and death. *While that was not the case here, it is clear that you have had problems, including one prior disciplinary action for failing to follow well-established Covid protocol*, as well as other incidents wherein you have demonstrated an inability or unwillingness to follow orders, or correct

procedure and protocol.

For the charge of Insubordination – failure to follow a direct order, the five-day suspension issued by Chief Bright will be imposed. ...

(R. Exhibit 1) (emphasis added)

73. Lt. Mullen timely filed a disciplinary appeal with the Commission on September 18, 2023. (A. Exhibit 14)

APPLICABLE LEGAL STANDARD

A tenured civil service employee may be disciplined for “just cause” after due notice and hearing upon written decision “which shall state fully and specifically the reasons therefor.” G.L. c. 31, § 41. An employee aggrieved by the decision may appeal to the Commission. G.L. c. 31, § 43. Under section 43, the appointing authority carries the burden to prove to the Commission by a “preponderance of the evidence” that there was “just cause” for the action taken. *Id. See, e.g., Falmouth v. Civil Serv. Comm’n*, 447 Mass. 814, 823 (2006); *Police Dep’t of Boston v. Collins*, 48 Mass. App. Ct. 411, *rev. den.*, 726 N.E.2d 417 (2000).

[Upon appeal,] the commission does not view a snapshot of what was before the appointing authority. In performing its § 43 review... the commission hears evidence and finds facts anew. Examining an earlier but substantially similar version of the same statute, the court in *Sullivan v. Municipal Ct. of the Roxbury Dist.*, 322 Mass. 566, 572 (1948), said: “We interpret this as providing for a hearing de novo upon all material evidence and a decision by the commission upon that evidence and not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer.”

Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003).

The Commission determines just cause 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 Serv. 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 must take account of all credible evidence in the entire administrative record, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law, including whatever would fairly detract from the weight of any particular supporting evidence. *See Commissioners of Civil Service v. Municipal Ct. of Boston*, 359 Mass. 211, 214 (1971), citing *Selectmen of Wakefield v. Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928); *Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 264-65 (2001). It is the purview of the hearing officer to determine the credibility of testimony presented to the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance.” *Leominster v. Stratton*, 58 Mass. App. Ct. at 729. *See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n*, 401 Mass. 526, 529 (1988); *Doherty v. Retirement Bd. of Medford*, 425 Mass. 130, 141 (1997).

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 v. Civil Service Comm’n*, 447 Mass. at 823, and cases cited.

Section 43 of G.L. c. 31 also vests the Commission with the authority to affirm, vacate or modify a penalty imposed by the appointing authority. The Commission is delegated “considerable discretion” in this regard, albeit “not without bounds” so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. *See, e.g., Police Comm’r v. Civil Service Comm’n*, 39 Mass. App. Ct. 594, 600 (1996) and cases cited; *Falmouth v. Civil Service Comm’n*, 61 Mass. App. Ct. 796, 800 (2004); *Faria v. Third Bristol Div.*, 14

Mass. App. Ct. 985, 987 (1982) (remanded for findings to support modification). However, the Supreme Judicial Court has added that, in the absence of “political considerations, favoritism, or bias,” the same penalty is warranted “unless the commission’s findings of fact differ significantly from those reported by the town or interpret the relevant law in a substantially different way.”

Falmouth v. Civil Service Comm’n, 447 Mass. at 824.

ANALYSIS

The City has proven by a preponderance of the evidence that it had just cause to suspend Lt. Mullen for five days based on the charge of insubordination. Regardless of the precise language employed in his two responses to the Chief’s order, it is evident that Lt. Mullen did not immediately submit the report despite the Chief’s clearly-expressed desire for compliance forthwith. *See* Findings of Fact 51-53. Even if Lt. Mullen were not refusing to eventually write a report, it is indisputable that he failed to immediately submit a report. The adjective “insubordinate” is defined as “disobedient to authority.”¹⁸

Lt. Mullen could have submitted an immediate report with basic facts and then submitted a supplemental report after a review by his attorney.¹⁹ I concur with the local hearing officer’s

¹⁸ Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/insubordination>.

¹⁹ Lt. Mullen could also have employed the policy, Obey now, grieve later.

In his post-hearing brief, Lt. Mullen analogizes his desire to obtain his attorney’s review of any written report with the refusal of an employee to participate in an interview or file a report without union representation – with no citation to Commission decisions or caselaw. Nevertheless, it appears that he is drawing an analogy to the *Weingarten* doctrine, articulated in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). In *Weingarten*, the United States Supreme Court upheld the National Labor Relations Board’s (NLRB’s) construal of section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. § 157, as creating the right of an employee to “request representation as a condition of participation in an *interview* ... where the employee reasonably believe[s] the *investigation* will result in disciplinary action.” 420 U.S. at 257 (emphasis added). The Court’s majority highlighted the restrictions that the NLRB placed on this statutory right, including the rule articulated in *Quality Mfg. Co.*, 195 N.L.R.B. 197 (1972), that interviews are not encompassed by “such run-of-the-mill shop-floor conversations as, for

observation in his report:

Although Mullen testified that there was no clarity from the Chief as to how much time he had to submit the report, it was clear from the Chief's remark that Mullen's lawyer does not run the fire department and his insistence that Mullen write the report that the Chief wanted him to write the report immediately.

See Finding of Fact 52.

In his post-hearing brief, Lt. Mullen implicitly urges the Commission to place great weight on the fact that he submitted a report on July 28, 2023, the day following the meeting with the Chief. However, Chief Bright would have had no way of knowing that would occur when he and Lt. Mullen spoke on July 27, 2023.

If one examines the matter in the best light for Lt. Mullen — and accepts that his concerns about disciplinary transfers (allegedly “for offenses unknown”) were reasonable and constituted a reasonable excuse — he still cannot prevail on such a defense. Lt. Mullen had both actual and constructive notice of the fact that the Department senior officers were concerned by his poor decision-making at the May 7, 2023 brush fire, which resulted in a series of disciplinary transfers beginning just a few days thereafter.

Moreover, although Lt. Mullen claimed that he was unable to discuss Dep. Chief

example, *the giving of instructions.*” *Id.* at 257-58, quoting *Quality Mfg. Co.*, 195 N.L.R.B. at 199 (emphasis added).

While section 2 of the NLRA, 29 U.S.C. § 152, specifies that the statute does not apply where the employer is an agent of the state or political subdivision thereof, appearing at first blush to nullify any reliance on the *Weingarten* doctrine, the Massachusetts legislature enacted a statute comparable to section 7 of the NLRA that applies where the employer acts as an agent of state or local government. *See* Mass. Gen. Laws c. 150E, §§ 1 and 2. *See also Massachusetts Correction Officers Federated Union v. Labor Rels. Comm’n*, 424 Mass. 191, 193 (1997). Consequently, the Massachusetts state courts have discussed the *Weingarten* doctrine in conjunction with cases involving issues of union representation within the context of investigatory interviews. *See Massachusetts Correction Officers Federated Union*, 424 Mass. at 193-94; *Town of Hudson v. Labor Rels. Comm’n*, 69 Mass. App. Ct. 549, 551-52 (2007). At any rate, though, the *Weingarten* doctrine does not extend to orders to submit a written report.

DiCarlo's narrative with the chief during their meeting, the narrative was quite blunt in its critique of Lt. Mullen's actions at the scene of the fire. This narrative, supported by evidence before me, faulted Lt. Mullen for: (1) failing to recognize the need for a box alarm upon arriving at the brush fire; (2) failing to instruct dispatch to have train service halted; (3) mishandling of the 2.5" attack line; (4) refusing to comply with a superior's command to get another attack line and to stop using a bucket; and (5) failing to recognize the safer options for combatting the brush fire. The concluding paragraph of the DiCarlo narrative noted that Lt. Mullen has a "history of extremely poor decision-making ability." Part of this history was noted in the September 13, 2023 disciplinary letter wherein Acting Mayor Keefe referenced Lt. Mullen's failure to comply with the Department masking directive during the coronavirus pandemic.

Commission's Authority to Modify a Penalty

The "power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded to the appointing authority." *Falmouth v. Civil Service Comm'n*, 61 Mass. App. Ct. at 800, quoting *Police Comm'r v. Civil Service Comm'n*, 39 Mass. App. Ct. 594, 600 (1996).

Even if the Commission were inclined to reduce Lt. Mullen's suspension, it must be noted that the same disciplinary penalty is warranted "unless the commission's findings of fact differ significantly from those reported by the town or interpret the relevant law in a substantially different way." *Falmouth v. Civil Service Comm'n*, 447 Mass. at 824. Additionally, the "power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded to the appointing authority." *Falmouth v. Civil Service Comm'n*, 61 Mass. App. Ct. at 800, quoting *Police Comm'r v. Civil Service Comm'n*, 39 Mass. App. Ct. at 600. When the Commission passes judgment on an appointing authority's

selected disciplinary measure, it does not “act without regard to the previous decision of the [appointing authority].” *Falmouth v. Civil Service Comm’n*, 447 Mass. at 823, quoting *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983).

I have carefully reviewed and considered the arguments of both parties. Even when viewing the facts in a light most favorable to Lt. Mullen, intervention by the Commission in the form of a modified penalty is not warranted here. First, there are no allegations here of political considerations, favoritism, or bias. Second, the underlying material facts found by the City’s hearing officer are backed by the testimony and documentary evidence I have reviewed. Third, I believe that Acting Mayor Keefe acted reasonably when he factored in Lt. Mullen’s troubling violation of the Department mask protocol (and more recent, but pre-July 2023, instances of lack of obedience or poor judgment also appropriately could have been weighed). Thus, even if the Commission were inclined to modify Lt. Mullen’s suspension, it would lack a rational justification for doing so.

CONCLUSION

For all of the above reasons, the discipline appeal of Lt. Mullen filed under Docket No. D-23-178 is hereby *denied*. In light of a documented past pattern of failure to follow directives and poor decision-making, I find that the City of Revere has proven by a preponderance of the evidence that it had just cause to suspend Lt. Steven Mullen for five days for the following:

Insubordination – failure to follow a direct order from the Chief.

/s/ *Angela C. McConney*
Angela C. McConney
Commissioner

By vote of the Civil Service Commission (Bowman, Chair; Dooley, Markey, McConney and Stein) on October 3, 2024.

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 C.M.R. § 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 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:

Neil Rossman, Esq. (for Appellant)

Matthew J. Buckley, Esq. (for Respondent)