

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
100 Cambridge Street, Suite 200
Boston, MA 02114

LARRY RICH,
Appellant

v.

D-22-167

BOSTON FIRE DEPARTMENT,
Respondent

Appearance for Appellant:

Peter T. Marano, Esq.
Law Offices of Peter T. Marano
100 State Street, 9th Floor
Boston, MA 02109

Appearance for Respondent:

Robert Boyle, Esq.
Boston City Hall, Room 624
Boston, MA 02201

Commissioner:

Shawn C. Dooley¹

SUMMARY OF DECISION

The Commission modified the decision of the Boston Fire Department, reducing a four-tour suspension to a two-tour suspension based on findings different than the Department and because of a lack of any prior discipline.

DECISION

On December 9, 2022, the Appellant, Larry R. Rich (Appellant) filed a timely appeal with the Civil Service Commission (Commission) pursuant to G.L. c. 31 § 43. The appeal challenged

¹ The Commission acknowledges the assistance of Law Clerk Alana Khan with the preparation of this decision.

the Boston Fire Department (Department)'s decision to suspend the Appellant for four tours of duty.² The Commission held a pre-hearing conference on January 10, 2023. I then conducted a full hearing on May 10, 2023 at the offices of the Commission located at 100 Cambridge Street in Boston, MA, which was recorded via the Webex videoconferencing platform.³ On June 16, 2023, the parties filed proposed decisions, whereupon the administrative record closed. For the reasons set forth below, the Appellant's appeal is allowed in part.

FINDINGS OF FACT

The Respondent entered 18 exhibits into evidence (Exhibits 1-18). The Appellant did not offer exhibits into evidence. Based on the documents submitted and the testimony of the following witnesses:

Called by the Respondent:

- Lieutenant Garry Cullinane, Boston Fire Department Personnel Office
- Captain Patrick Slattery, Boston Fire Department Personnel Office
- Deputy Chief Gerard Viola, Boston Fire Department Personnel Office

Called by the Appellant:

- Lieutenant John Sarro, Vice President of Local 718 - Union Representative

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 findings of fact:

Background:

1. The Appellant is a 55-year-old Boston Fire Department Lieutenant who was on injured leave

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.01, et seq., apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

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

at the time of this incident. (Stipulated Facts)

2. Prior to the subject of this appeal, the Appellant had nearly thirty years of service at the Department with no disciplinary incidents. (Stipulated Facts)
3. The Appellant had been on injured leave since November 26, 2021, due to a right shoulder injury. (Respondent Exhibits 14; 18)
4. While on injured leave, employees of the Department do not perform any job duties or come into the office, and they collect tax-free payments. (Testimony of Deputy Chief Viola)
5. The Department's Medical Examiner, Dr. Jonathan Holder, tracked the Appellant's injury progress, and on April 21, 2022, he cleared the Appellant for desk work. The Appellant's personal physician, Andrew Chapman, MD., however, wrote two notes on April 28, 2022 and May 5, 2022. stating that the Appellant was unable to perform desk duties and should remain on injured leave. (Respondent Exhibits 10; 11; 12)
6. Deputy Chief Gerard Viola, Director of the Department's Personnel Office, scheduled an independent medical exam (IME) for the Appellant, as was customary practice under the Collective Bargaining Agreement between the City of Boston and the Boston Firefighters Association, Local 718 IAFF, in the case of a disagreement about returning to desk duty. (Testimony of Deputy Chief Viola)
7. The Department incurs a \$1,000 fee for the IME appointment whether or not the Firefighter attends. (Respondent Exhibit 9)
8. On Wednesday, May 11, 2022, Deputy Chief Viola sent the Appellant an email informing him of his IME appointment on May 16, 2022. Attached to the email was the IME letter stating the date and time of the appointment. The email also reads, "A copy has also been sent to you via certified mail." (Respondent Exhibit 7)

9. The end of the email states, “***PLEASE ACKNOWLEDGE RECEIPT OF THIS EMAIL***.” The Appellant did not respond. (Respondent Exhibit 7; Testimony of Chief Viola).
10. Along with the email, Lieutenant Garry Cullinane contacted the Appellant via a phone call to inform him that his IME appointment was scheduled for May 16, 2022. He let the Appellant know to check his email to view the appointment information. (Respondent Exhibit 5; Testimony of Cullinane)
11. The Appellant responded to Lieutenant Cullinane saying that he was driving north to visit friends, and that he would check his email later. Lieutenant Cullinane noted this information down in writing once finding out about this appeal. (Respondent Exhibit 5; Testimony of Cullinane)
12. Although the email to the Appellant stated differently, the Department did not send the letter to the Appellant via certified mail, as is standard practice for IME appointment notifications. (Respondent Exhibit 1; Testimony of Viola)
13. The Appellant and the Department had no subsequent contact regarding the IME after that, and on May 16, 2022, the Appellant did not show up to his IME appointment. (Testimony of Slattery; Stipulated Facts)

Events After May 16, 2022

14. After missing his appointment, the Appellant called Captain Slattery early in the morning on May 17, 2022 and informed him that he had accidentally missed his IME appointment and wanted to reschedule it. (Testimony of Slattery)
15. The Appellant was apologetic and admitted to Captain Slattery that he made a mistake when reading the email and thought his appointment was another day. (Testimony of Slattery)

16. Captain Slattery told the Appellant to email Deputy Chief Viola. The Appellant emailed Chief Viola apologizing and acknowledging his error in reading the email. He also noted that he called the Personnel office as soon as he realized his mistake. (Respondent Exhibit 8; Testimony of Slattery)
17. Around noon on May 17, 2022, after sending the email to Deputy Chief Viola, the Appellant went to the Personnel Office in uniform. He told Captain Slattery that he missed his IME appointment because he read the email without his glasses on and mistakenly thought it was a different date. (Testimony of Slattery)
18. The Department rescheduled the Appellant's IME to May 31, 2022, when Dr. Suzanne Miller cleared the Appellant for desk duty. (Respondent Exhibit 13)

Disciplinary Procedure

19. Deputy Chief Viola charged the Appellant with violating Departmental Rules:

- 17.23(a): When ordered by a superior to do so, a member shall report to the Medical Examiner;
- 18.4: All orders of superiors which pertain to the service shall be obeyed promptly and without question and disciplinary action may be imposed; and
- 18.44(f): Absence without official leave. (AWOL)

(Respondent Exhibit 1).

20. Deputy Chief Viola was aware of a prior case before the Commission, in which a suspension was upheld for an Appellant who missed an IME appointment. When deciding the Appellant's discipline, Chief Viola, in part, based it on that prior decision, as he believed they were similar offenses. (Testimony of Chief Viola)

21. Deputy Chief Viola scheduled a meeting with the Appellant on May 19, 2022 and informed him of the Department's decision to suspend him for four tours as an official reprimand. (Testimony of Viola; Respondent Exhibit 1)
22. The Appellant and his union representative, Lieutenant John Sarro, appeared at the meeting. It is customary to have a union representative at these reprimand meetings. (Testimony of Viola; Testimony of Sarro)
23. Although Lieutenant Sarro was present, he kept no record of the meeting or his presence there and does not recall what he may have said at the hearing. He does, however, remember that there was little to no conversation, and that it was essentially only the charges being read aloud. (Testimony of Sarro)
24. Deputy Chief Viola informed the Appellant that he could request a full disciplinary hearing should he wish to appeal his suspension, and the Appellant subsequently filed an appeal with the Department. (Testimony of Viola; Respondent Exhibit 2)

The Departmental Hearing and Events Following the Missed Appointment:

25. The Appellant's disciplinary hearing was originally scheduled for May 27, 2022, but was rescheduled to November 14, 2022, by agreement of both parties. (Respondent Exhibits 3; 4 18).
26. Although the Appellant did not testify during his hearing at the Commission on May 10, 2023, he did testify at his departmental hearing. (Respondent Exhibit 18)
27. Lieutenant Cullinane, Captain Slattery, and Deputy Chief Viola all testified as witnesses at the Departmental hearing as well, and Chief of Operations Robert Calobrisi (Chief Calobrisi) presided over the hearing and provided his findings and recommendations to the Fire Commissioner. (Respondent Exhibits 16; 18)

28. Chief Calobrisi recommended that the charges against the Appellant be sustained due to the \$1000 no-show fee the Department incurred, as well as the Appellant's extended Injured Leave which cost the Department and the City of Boston taxpayers worker's compensation expenditure. (Respondent Exhibit 16)
29. On November 30, 2022, after the Departmental Hearing, the Boston Fire Commissioner upheld the four-tour suspension issued by Deputy Chief Viola to the Appellant. (Respondent Exhibit 17)
30. The Appellant subsequently appealed the decision to the Civil Service Commission on December 9, 2022

APPLICABLE CIVIL SERVICE LAW

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

"If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee, by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on

the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.”

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 Service Comm’n, 43 Mass. App. Ct. 486, 488, rev. den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983). The Commission is guided by “the principle of uniformity and the ‘equitable treatment of similarly situated individuals’ [both within and across different appointing authorities]” as well as the “underlying purpose of the civil service system ‘to guard against political considerations, favoritism and bias in governmental employment decisions.’” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. The Commission also enforces “basic merit principles,” which means “assuring fair treatment of all applicants and employees in all aspects of personnel administration,” “providing of training and development for employees, as needed, to assure the advancement and high-quality performance of such employees,” and ensuring that all employees “are protected from arbitrary and capricious actions.” G.L. c. 31, § 1. Basic merit principles require that discipline be remedial, not punitive, “correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected” Id.

ANALYSIS

After careful consideration of the record, I find that the Appointing Authority had just cause to discipline the Appellant, but, for the reasons discussed below, I believe a modification in the penalty is warranted.

The Appellant argues that the discipline imposed by the Department was unfair and disproportionate. The Appellant’s missed appointment was a simple mistake and he took steps

immediately to try to remedy the situation – including self-reporting the missed appointment to the Chief of Personnel and telephoning the Independent Medical Exam office to try to reschedule an exam as soon as possible.

The Department argues that the Appellant’s discipline was justified, as he was attempting to extend his injured leave. The Department states that because the Appellant failed to attend his IME appointment, he was able to remain out of work, and thus receive full pay tax-free for two additional weeks pursuant to G.L. c. 41, § 111F. They believe the Appellant was motivated by the tax-free pay with no duties and would have known that he would need to go into the office every day should he return to modified duty. The Department further argues that the Appellant’s missed appointment constitutes a refusal to obey an order. They state that Lieutenant Garry Cullinane gave the Appellant an order when he told him to check his email regarding the IME appointment, and that within that email, Deputy Chief Viola ordered him to attend, and the Appellant was required to obey these orders.

In reaching my conclusion, I considered that the Appellant was only given three business days’ notice of the appointment and that the Department would have rescheduled the IME if Lt. Rich stated that he had a conflict. Deputy Chief Viola stated that some IMEs are scheduled as far out as 4 weeks but Dr. Miller typically can accommodate a request more quickly. If Lt. Rich were trying to “game” the system and stay out injured for as long as possible, he could have asked for another date and would not have called the doctor’s office the day following the missed exam to see if he could come in immediately.

Deputy Chief Viola testified at the Commission hearing that he imposed the discipline on the Appellant based on a prior case before the Commission: Firefighter A v. Boston Fire Department, 35 MCSR 387 (2022). However, that case is significantly and factually different from

the one at hand. In that case, the Appellant not only missed two medical examinations, but also blatantly disobeyed two orders to meet with the Deputy Chief to explain the absences and constantly refused even to respond to calls and correspondence. Additionally, the Department and the Commission found that Firefighter A undoubtedly provided an untruthful excuse in missing her appointment. For these reasons, the Appellant in that case received a harsher, but warranted, thirty-day suspension. Id. In the present case, the Appellant informed the Department of his missed appointment prior to anyone realizing he missed it. He then made repeated efforts to correct his error. During his testimony before the Commission, Chief Viola agreed that these cases are substantially different and there were many more issues at play in the case of Firefighter A.

Further, Deputy Chief Viola explained that firefighters frequently miss doctor appointments with the Department's Medical Examiner and no disciplinary action is taken unless it becomes a repeated and deliberate issue. These firefighters are not considered AWOL and are not found in violation of disobeying a direct order. Deputy Chief Viola repeatedly stated that the main difference between the two was that missing the IME cost the Department money whereas missing an appointment with the Department's doctor did not create any additional costs. While I agree that the cost of a missed appointment is significant⁴ and that the City should be able to recover this expense, accidentally missing an appointment with a doctor should be treated the same whether it is an internal or external appointment.

In summary, while I agree with the Department that the Appellant missed his IME appointment by failing to take proper care to carefully read the notice that he received three

⁴ The fact that the Boston Fire Department has entered into a contract that allows for a missed initial appointment to be billed at the same rate as a full exam, analysis, and corresponding written report seems to be a contributing factor to the level of discipline and should be reviewed internally.

business days prior to the scheduled appointment, the facts do not support the Department's findings that the Appellant missed his appointment in a deliberate attempt to game the system and gain a financial advantage. Further, the Department did not prove just cause for the charge of "deemed absent without official leave" (AWOL). The Appellant was not AWOL – he was on injured leave and came into the office the very next day to inform the department of his error.

Modification of the Discipline

Section 43 of G.L. c. 31 vests the Commission with "considerable discretion" to affirm, vacate or modify discipline, but that discretion is "not without bounds" and requires sound explanation for doing so. See, e.g., Police Comm'r v. Civil Service Comm'n, 39 Mass. App. Ct. 594, 600 (1996) ("The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio ... accorded to the appointing authority"). See also Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass App. Ct. 331, 334 (1983).

I have carefully considered whether or not the discipline meted out to the Appellant was excessive and should be modified. I conclude that a modification of the discipline is appropriate. Here, the Appellant did not blatantly disobey an order, but, rather, made a scheduling error, which he immediately notified his superiors of, took steps to correct, and took full responsibility. He self-reported his missed IME to the personnel office before ever being contacted by the Department and he attempted to reschedule his appointment directly with the IME office. Lt. Rich's immediate and repeated efforts to correct his error set him apart from the Appellant in the Firefighter A v. BFD case.

Since my findings differ significantly from the Department and in light of the Appellant's discipline-free record over three decades of service, I have concluded that a modification of the discipline from four tours of duty to two tours of duty is warranted.⁵

CONCLUSION

For all the above reasons, the Appellant's appeal under Docket No. D-22-167 is *allowed in part*. The four-tour suspension is hereby modified to a two-tour suspension. The Respondent is to adjust the Appellant's payroll and personnel records accordingly.

For the CIVIL SERVICE COMMISSION:

/s/ Shawn C. Dooley
Shawn C. Dooley
Commissioner

By vote of the Civil Service Commission (Bowman, Chair; Dooley, Stein, & Tivnan, Commissioners [McConney – Absent]) on July 27, 2023.

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:
Peter T. Marano, Esq. (for Appellant)
Robert Boyle, Esq. (for Respondent)

⁵ A two-tour suspension translates to a reduction in pay roughly equivalent to the cost of the missed IME appointment.