

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

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

THOMAS F. SWARTZ,
Appellant

D1-18-155

v.

BOURNE FIRE DEPARTMENT,
Respondent

Appearance for Appellant:

Joseph L. Sulman, Esq.
Law Offices of Joseph L. Sulman
391 Totten Pond Road, Suite 402
Waltham, MA 02451

Appearance for Respondent:

Robert S. Troy, Esq.
Bourne Town Counsel
Troy Wall Associates
90 Route 6A
Sandwich, MA 02563

Commissioner:

Paul M. Stein

Summary

The Commission overturned the termination of a Bourne firefighter and ordered him reinstated after finding that he had not been untruthful or intentionally misrepresented his actions about a medical call as charged and that his interaction with the patient and his mother during the call was consistent with the standard of care required on the call and did not constitute conduct unbecoming a firefighter. Although the Appellant did, inappropriately, albeit with good intention, interject certain personal opinions during his interaction with the patient and his mother after completing his assigned duties, such minor lapse of judgement does not provide just cause for termination. The Commission also rejected the argument that it lacked jurisdiction to hear the appeal after the Appellant retired following his termination.

DECISION

The Appellant, Thomas F. Swartz, acting pursuant to G.L. c. 31, § 43, appealed to the Civil Service Commission (Commission), challenging the decision of the Fire Chief of the Town of Bourne (Bourne), the Appointing Authority, to discharge him from his position as a firefighter

with the Bourne Fire Department (BFD)¹. The Commission held a pre-hearing conference in Boston on October 16, 2018. On March 6, 2019, Bourne moved to dismiss the appeal for lack of jurisdiction, which the Appellant opposed. The motion was taken under advisement and a full hearing was held on September 13, 2019 and November 6, 2019 at the Bourne Community Building, which was digitally recorded.² The full hearing was declared private, with witnesses sequestered. Nineteen (19) exhibits were received in evidence at the hearing (Exhs. 1 through 19). Two additional documents were produced after the hearing at the Commission's request and marked as PH20 and PH21. The Commission received proposed decisions from each party on January 15, 2020. On January 16, 2020, Bourne filed a Renewed Motion to Dismiss to which the Appellant filed an Opposition. For the reasons stated below, Bourne's Motions to Dismiss are denied and Mr. Swartz's appeal is allowed. Nothing in this decision addresses the merits of the Appellant's retirement applications or the statutory requirements that govern a return to duty by a retired civil service employee.

FINDINGS OF FACT

Based on the Exhibits entered into evidence, the testimony of the following witnesses:

Called by Bourne:

- Paul Weeks, BFD Deputy Fire Chief
- David Cody, BFD Assistant Fire Chief
- Jared Shaughnessy, BFD Firefighter
- Ms. S, Bourne resident;

Called by the Appellant:

- Thomas F. Swartz, Appellant
- Ryan Haden, BFD Deputy Fire Chief;

¹ 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

² Audio recordings of the hearing were provided to the parties on compact disk. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CDs to supply the court with a written transcript of the hearing to the extent that he/she challenges the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

taking administrative notice of all other logged material in the case record, considering the pertinent law, and drawing reasonable inferences from the credible evidence, a preponderance of evidence establishes the following facts:

1. The Appellant, Thomas F. Swartz, was appointed to the civil service position of BFD Firefighter on July 24, 1997. He was licensed as an EMT in 1995, became a licensed Paramedic in January 2001, and served continuously without discipline until the incident that resulted in his termination on August 22, 2018. (*Stipulated Facts; Exh.5; Testimony of Appellant*)

The January 28, 2018 Medical Call

2. On January 28, 2018 at about 11:07 AM, the BFD received a call for service from a Bourne resident, Ms. S, a single parent, whose 18-year old son, A, had collapsed in his room. (*Exhs.9 & 11; Testimony of Ms. S*)

3. The first person to arrive on scene was BFD Acting Deputy Chief Ryan Haden, who was a few streets away at a fire investigation. Ms. S stated that A had a seizure. As he entered the house, Dep. Chief Haden detected the smell of marijuana. When he entered A's room, there was "smoke in the air from what I [Dep. Chief Haden] believe to be marijuana and drug paraphernalia including bong, vapor oils and bags of weed throughout scattered around." Ms. S stated that A smokes weed and that he has seizures sometimes.³ Dep. Chief Haden described A to be in a "post ictal state" which refers to someone coming out of a stroke or seizure. He took A's vital signs and determined he was stable. (*Exh.11; Testimony of Haden*)

³ At the Commission hearing, Ms. S identified two prior occasions on which A had a seizure, one in May 2017 and one in June 2017. The BFD responded to at least one of those incidents. The emergency room physician prescribed medication for A and recommended that A be seen by a neurologist. A did not see a neurologist until after his third seizure on January 28, 2018. (*Testimony of Ms. S*) Firefighter Swartz was told that there was no history of epilepsy; Firefighter Shaughnessy recalled discussion of A's seizures, but, in response to a direct question, he also could not recall any discussion of epilepsy while on the call. (*Exh.9; Testimony of Appellant & Shaughnessy*)

4. Dep. Chief Haden asked Ms. S if A uses other drugs and to show him “where are the pills.” He told Ms. S that A was not in trouble, the concern was for A’s health, knowing what medications A took was important to provide proper treatment. Ms.S appeared defensive but said she understood and said A did not take other drugs. (*Exh.11; Testimony of Haden*)

5. Next to arrive on scene was an officer from the Bourne Police Department. A was well-known to him. (*Exhs.9 & 11; Testimony of Haden*)⁴

6. Ms. S’s ex-husband (A’s father) arrived next. He told Dep. Haden that he thought A did sometimes mix marijuana with Xanax. (*Exh.11; Testimony of Haden*)

7. Dep. Chief Haden asked A if the weed he smoked was synthetic or if he had a new supplier to see if something was different. A did not respond. At this point, both parents stated that they suspected “they” [presumably meaning A’s source of marijuana] “sometimes put unknown substances in his weed.” (*Exh.11; Testimony of Haden*)

8. Firefighter Swartz arrived on scene at approximately 11:20 AM, accompanied by Firefighter Shaughnessy. They had both just completed a regular ten-hour shift at 8:00 AM and were called back on overtime duty. Firefighter Swartz took the lead as Firefighter Shaughnessy was a newly appointed EMT who had been on the job for less than three weeks and had only responded to about three prior calls. (*Exs.9 & 11; Testimony of Appellant & Shaughnessy*)

9. By the time they arrived, A was reviving and seated in a chair. As they entered the house, Firefighter Swartz noted the smell of marijuana. Firefighter Shaughnessy remembered seeing what appeared to be a standard prescription drug bottle in the room. (*Exhs.9 & 11; Testimony of Appellant & Shaughnessy*)

⁴ I requested a copy of the Bourne Police incident report or call log. For reasons that could not be explained, no such documents could be found. The BFD police officer was not called to testify.

10. Firefighter Swartz received a “brief rundown” from Dep. Chief Haden who relayed his observations and information received about A’s marijuana use and history of seizures (which did not specifically mention epilepsy) and what A’s father had reported to Dep. Chief Haden about A possibly mixing marijuana with Xanax. (*Exh.11; Testimony of Appellant & Haden*)

11. Firefighters Swartz and Shaughnessy applied a cervical collar to A’s neck and moved him by stretcher to the ambulance. (*Exhs.6 through 9; Testimony of Appellant & Shaughnessy*).

12. While Firefighters Swartz and Shaughnessy were administering medical aid, Dept. Chief Haden conferred with the BPD officer on scene and “we were in agreement that the patient most likely took something else due to his current medical status”. He “looked around a bit more with the [police officer] for any more things he might have taken . . . however, we were all unable to find anything else in his room that would help the hospital determine what was going on.” Dep. Chief Haden then cleared the scene. (*Exh.11; Testimony of Haden & Shaughnessy*)

13. Firefighter Swartz and Shaughnessy transported A to the nearest hospital. As the senior man and only paramedic (Shaughnessy was licensed only at the EMT level), Firefighter Swartz rode alone in the back of the ambulance with the patient and Firefighter Shaughnessy was the driver. (*Exh.9; Testimony of Swartz and Shaughnessy*)

14. While en route, as part of continuing care, Firefighter Swartz asked A some routine questions to identify any issues that would be important for the receiving hospital to know. This included asking him if he had any illegal substances in his possession, which A denied. Firefighter Swartz then told A something to the effect that his “actions had consequences for everybody involved” and he needed to “grow up” and stay off risky drugs. (*Exh.9; Testimony of Swartz & Shaughnessy*)

15. The ambulance arrived at the hospital at 11:52 am. After transferring the patient to an Emergency Department gurney, Firefighter Swartz completed his “run report” (also known as the ImageTrend Report or Standard Ambulance Report Form [SARF]). The two firefighters then headed to the hospital coffee shop. They passed A’s bed in the hallway and stopped to exchange pleasantries. (*Exh.8; Testimony of Appellant & Shaughnessy*)

16. The evidence is undisputed that, up to this point, only “standard patient care” was involved in the call and that the SARF was a complete and accurate account of that care.⁵ (*Exhs.6 through 9; Testimony of Appellant, Haden, Weeks & Shaughnessy*)

17. Ms. S was sitting on the gurney facing her son, caressing him. Firefighter Swartz stood in front of them alongside the bed. Firefighter Shaughnessy was about 10 feet away facing the foot of the bed. Ms. S said: “He’s a good kid” and Firefighter Swartz replied: “Yes, he’s a good kid.” He told Ms. S that A reminded him of his own stepson who had “similar” issues in the past and told her what he had said to A in the ambulance, adding “if that’s what he wants to do maybe he should be on his own” or words to that effect. (*Exh.8; Testimony of Appellant & Shaughnessy*)

18. Upon hearing what Firefighter Swartz said to Ms. S., Firefighter Shaughnessy distanced himself from any further conversation and could no longer see or hear what Firefighter Swartz, Ms. S or A did or said. (*Exh.8; Testimony of Shaughnessy*)

19. After leaving Ms. S and A, while at the coffee shop. Firefighter Swartz said he thought he was “uniquely” suited to have handled the call with A because of his [Firefighter Swartz’s] experience with his stepson and believed he had a good “rapport” with Ms. S and patient A. Firefighter Shaughnessy did not respond. (*Testimony of Appellant & Shaughnessy*)

⁵ The SARF contains an accurate report of the call, save for a scrivener’s error that A was 17 (not 18), attributable to what had been relayed to Firefighter Swartz from dispatch. (*Exhs.6, 7, 9 & 11; Testimony of Swartz & Haden*)

The Citizen's Complaint

20. Two days later, on January 30, 2018, Fire Chief Sylvester received an e-mail from Ms. S

which stated:

I am not sure if you are the correct person regarding a complaint about EMT/paramedic Hello [sic] Pomar. I'm not sure if that is the correct spelling of his name. ^{6[00]} I will start by saying my child (18 years old) had 4 seizures since May of 2017. His seizures have happened in town or at my home in [a section of Bourne]. This was the first time I was present for one [,] which was devastating (sic?) for me to watch as a mother. My son smokes weed for chronic stomach pain. your [sic] staff has developed an attitude that my son is some sort of drug addict. During the chaos at my house on this past Sunday one of the EMT's (not sure if it was Hello) asked my son, who was still UNCONSCIOUS mind you. "where the pills were!?" There were NO pills nor have there ever been in my sons [sic] possession or home.

I did not ride in the ambulance with my son but met them at the same time at ER. While waiting to see the ER doctor, Hello comes over to me and informs me he decided to give my son a lecture in the ambulance mind you !!! about "being a man". I was too stressed and overwhelmed to question it at the time. Hello then tells me "if he wants to do what he wants he should get his own place and act like a man." I just looked puzzled at my son after Hello walked away. My son told me that this employee, Hello thought it was professional and ethical to accuse my son of doing heroin. I was and still am floored that Hello would even think it was in any way ok to make a judgment on my son. My son has never touched heroin in his life and his blood work from his most recent ER this Sunday showed ZERO drugs. you might want to let your judgmental staff [sic] about that. My son had epilepsy and his seizures have NOTHING to do with drugs. I am just beyond disgusted that an employee who is supposed to help and support the public during emergencies treated my family this way.

For the record, myself and my children have grown up in this town where my dad was a firefighter/Captain, my Uncle was on BFD, my cousin is on the BPPD(sic?), as well as many others I consider family and we were raised to help people and cast judgments aside. I really pray you speak to this specific employee regarding his behavior as this is only my first complaint regarding this but won't be my last.

Kindly, [Ms. S]
Sent from my iPhone

(Exh.10)

⁶ Ms. S said she identified the Firefighter as "Hello Pomar" because, after talking to her father, who had worked at the BFD, he told her "it sounds like him". (Testimony of Ms. S) At some point prior to the Commission hearing, Firefighter Pomar had left the BFD for reasons that were not explained. (*Testimony of Appellant*)

The Internal Investigation

21. On January 30, 2018, the day Chief Sylvester received the email from Ms. S, Firefighters Swartz and Shaughnessy were working another overtime shift together. They were at the Falmouth Hospital when they were contacted by someone in the BFD command staff (not Chief Sylvester or any of the BFD witnesses who testified at the Commission hearing). They were asked, through Dep. Chief Haden, to provide a written report about the incident on January 28, 2018. They did not learn about Ms. S's email until two days later. (*Testimony of Appellant, Shaughnessy, Haden & Weeks*)

22. The two firefighters discussed what to write in the report and discussed the matter with their union representative who had called them to ask what they were going to do about writing a report. They all agreed that, since all of the details about the call are accurately contained in the SARF, that is what their reports should state. (*Testimony of Appellant & Shaughnessy*)

23. When the two firefighters returned to the fire station, Firefighter Shaughnessy prepared a one paragraph report along the lines suggested by Firefighter Swartz. The report stated:

01/30/18

To: Chief Norman Sylvester
Bourne Fire Department

“On 01/28/2-18 firefighters Swartz and Shaughnessy called in for department recall at Station 1. While remaining on duty they responded to a reported seizure at [address redacted] at 11:09. Patient was found to be a 17 year old male requiring transport to the hospital. All details and instances relating to the matter there-of are located in the [SARF] written by FF Swartz. Upon conferring and re-reading the report, both FF Shaughnessy and FF Swartz agreed that the report was written both truthfully and accurately and contained all details pertinent to this call.

Respectfully, FF Shaughnessy

(*Exh.7; Testimony of Shaughnessy*)

24. Firefighter Shaughnessy showed his draft to Firefighter Swartz who said it looked good and told him to print out a duplicate and they would both sign and submit identical reports, which they did. (*Exhs.7 & 8; Testimony of Appellant & Shaughnessy*)

25. Later that evening, the union representative called Firefighter Swartz again and asked: “Did you or did you not say you were Julio?”. Firefighter Swartz laughed and said: “Is that what it is about?” but the union representative did not answer him. (*Testimony of Appellant*)

26. According to BFD Assistant Chief Cody (second in command at the BFD), of the 25 to 30 written complaints that he personally handled from 2004 to 2018, there had been no prior instances in which he did not provide a firefighter who had been named in a citizen complaint a copy of the complaint before requiring a written statement from the firefighter regarding the allegations of the complaint. (*Testimony of Cody*)

27. On February 1, 2018, Firefighter Swartz, then working his regular duty shift, was ordered to report for a meeting with Chief Sylvester. His regular shift group commander, Deputy Chief Paul C. Weeks, also was present. (*Testimony of Appellant & Weeks*)

28. Firefighter Swartz was asked to “expand and describe in more detail what had transpired during the transport of this patient [A].” He focused on “patient care in detail”, including the “questions regarding any substances being used to determine the patient’s condition.” Chief Sylvester had read selected excerpts from Ms. S’s email which mentioned BFD Firefighter Pomar, and, based on what his union representative had said, Firefighter Swartz also addressed what he thought was the main confusion that troubled Chief Sylvester, telling him: “I would never in all eternity introduce myself other than as who I am.” The Chief asked: “So you stick by your statement” and Firefighter Swartz said: “Yes”, believing that, based on what he knew, he had not done anything inappropriate or that needed any more explanation. At some point,

Firefighter Swartz asked Dep. Chief Weeks (who said little during the meeting) what “was this about”, to which Dep. Chief Weeks replied: “It’s something we don’t want to get to the town and see it on Facebook”, or words to that effect. (*Testimony of Appellant & Weeks*)

29. At the end of the meeting, Chief Sylvester made a comment to Firefighter Swartz: “Am I here for you now?” (*Testimony of Appellant*)⁷

30. Firefighter Swartz went back on duty, responding to an emergency medical call shortly after leaving the meeting. (*Testimony Appellant*)

31. Firefighter Shaughnessy was then called in for an interview with Chief Sylvester and Dep. Chief Weeks. (*Testimony of Shaughnessy & Weeks*)

32. Firefighter Shaughnessy was asked the same question posed to Firefighter Swartz – what happened during the January 28, 2018 call and initially gave essentially the same answer that Firefighter Swartz had given. However, he was then asked a specific question that was not asked of Firefighter Swartz: whether there was anything said to A or the mother during the call. As Firefighter Shaughnessy began to explain the interaction in the hospital hallway, Chief Sylvester interrupted and said he wanted him to put it in writing. He ordered Firefighter Shaughnessy to submit an addendum to his report setting forth the details of the conversation in the hospital hallway. Deputy Chief Weeks escorted Firefighter Shaughnessy to his (the Deputy’s) office, where Firefighter Shaughnessy typed out an amendment to his original report and delivered it to Chief Sylvester. (*Exh.8; Testimony of Shaughnessy & Weeks*)⁸

⁷ Chief Sylvester’s comment refers back to a criticism Firefighter Shaughnessy made at a meeting of the department in September 2017 that Chief Sylvester had not done enough to prevent the tragic death of a firefighter with whom Firefighter Swartz was regularly partnered. (*Testimony of Appellant*)

⁸ Firefighter Shaughnessy’s amendment combines what was said to Ms. S and A, and what the two firefighters discussed privately. I also find that the words used by Firefighter Shaughnessy are, for the most part, paraphrasing or characterizing and do not represent what he heard verbatim. (*Exh.9; Testimony of Appellant & Shaughnessy*)

33. Meanwhile, Firefighter Swartz had returned from his medical call. As he walked into the station, he was met by off-duty BFD Lt. Shawn Silvia who told him that Chief Sylvester was going to fire him “for lying during a fire department investigation” and then escorted Firefighter Swartz into the Chief’s office for a second meeting of the day. (*Testimony of Appellant*)

34. Lt. Silvia took a copy of Ms. S’s email from Chief Sylvester’s desk and gave it to Firefighter Swartz. After reading the email, Firefighter Swartz asked for a copy of “his SARF” which Lt. Silvia provided. Firefighter Swartz held up the email and the SARF and asked Chief Sylvester if he had a chance to read them, to which the Chief said “Yes.” Firefighter Swartz then asked: “What is going on here?” The Chief repeated his question: “What happened?” and Firefighter Swartz said: “I acknowledged the mother.” Chief Sylvester said: “Thank you, we’re done here” and that ended the meeting. (*Testimony of Appellant*)

35. Moments after the second meeting with Chief Sylvester ended, Dep. Chief Weeks verbally informed Firefighter Swartz that he was being relieved of duty and placed on paid administrative leave. (*Testimony of Appellant, Weeks & Cody*)

36. Firefighter Swartz and Firefighter Shaughnessy did not cross paths on February 1, 2018, as they worked out of different stations that day, and they were not in contact again until the Commission hearing. Firefighter Swartz first learned about Firefighter Shaughnessy’s amended report after it was provided to his union representative sometime in March 2018 (*Testimony of Appellant & Shaughnessy*)

37. By letter dated April 13, 2018 from Fire Chief Sylvester, Firefighter Swartz was informed that a hearing would be held before a hearing officer designated by him to address the Chief’s request that he be terminated from employment with the BFD for his misconduct “when you interacted with a patient and his mother at a hospital”, for being “untruthful when you were

ordered to provide a report regarding the incident and that you made misrepresentations about what happened during the incident” and for being “discourteous and insolent to a member of the public at the incident on January 30, 2018 (sic).” (*Exh.3*)⁹

38. On May 14, 2018, a hearing was held before the Fire Chief’s designated hearing officer on the charges enumerated in the Chief’s April 13, 2018 letter. The parties stipulated to the introduction of nine (9) exhibits [Exhs.1, 3 & 6 through 12, entered in this appeal]. The BFD called four (4) witnesses [Ms. S, Assistant Fire Chief Cody, Deputy Fire Chief Weeks and Firefighter Shaughnessy]. Firefighter Swartz did not testify and called no witnesses. (*Exh.4*)

39. On August 17, 2018, the hearing officer submitted his report, which found that Firefighter Swartz had engaged in all of the alleged misconduct for which he was charged in the April 13, 2018 letter. The hearing officer concluded that the alleged misconduct violated the BFD’s Rules and Regulations, Professional Conduct, Rule Twelve, Section 7 (“No employee shall be untruthful or make an intentional misrepresentation in matters affecting the department or its employees”); Section 8 (“conduct of an employee, which is prejudicial to good order, is prohibited”); Section 18 (“No employee shall be discourteous, rude or insolent to any member of the public or department employees”); and Section 19 (“Any type of misconduct that reflects discredit upon an employee as a department member, or upon his fellow employees, or upon the fire department is prohibited.”) (*Exh.4*)

40. By letter dated August 22, 2018, Fire Chief Sylvester informed Firefighter Swartz that, after reviewing the hearing officer’s report, he found that the charges against him have been substantiated and, as a result, his employment with the BFD was terminated, effective immediately. (*Exh.5*)

⁹ The Fire Chief’s letter superseded a prior letter from the Bourne Town Administrator to the same effect. (*Exh.2*) There is no dispute the Fire Chief is the Appointing Authority over members of the BFD.

41. On August 23, 2018, the Appellant made a timely appeal to the Commission from the BFD decision. (*Claim of Appeal*)

Appellant's Retirement

42. On or about March 1, 2018, Firefighter Swartz submitted a "Member's Application for Disability Retirement" to the Barnstable County Retirement Board (BCRB). (*Exh.18*)

43. On August 24, 2018, the Appellant filed an "Application for Voluntary Superannuation Retirement" with the Barnstable County Retirement Board (BCRB). (*Exh.13*)

44. On or about October 23, 2018, the BCRB received a Certificate of the Regional Medical Panel (Certificate) of the Public Employee Retirement Administration Commission (PERAC), which certified by unanimous agreement of the three-member physician panel that the Appellant was "mentally or physically incapable of performing the essential duties of his or her job" and that his incapacity is "likely to be permanent". (*PH20*)

45. As stated in the Certificate, the standard specified by PEREC for considering an applicant for disability retirement permanently disabled requires a finding that disability "will continue for an indefinite period of time which is likely never to end though recovery at some remote, unknown time is possible. If the medical panel is unable to determine when the applicant will no longer be disabled, they must consider the disability to be permanent. However, if the recovery is reasonably certain after a fairly definite time, the disability cannot be classified as permanent." (*Exh.PH20*)

46. At the regular meeting of the BCRB on November 27, 2018, the BCRB voted 5-0 to approve the Appellant's accidental disability retirement application, subject to further review by PERAC. (*Exh.14*)

47. On May 23, 2019, PERAC remanded the Appellant's application for disability retirement to the BCRB for further findings to establish, by substantial evidence, that the Appellant's disability was not the result of a "bona fides" personnel action or, if it was, that the BFD's treatment of the Appellant constituted "intentional infliction of emotional distress". Absent sufficient proof of those facts, PERAC advised that the Appellant's application for disability retirement would not be approved. (*Exh.16*)

48. As of the date of the Commission hearing, the Appellant's disability retirement application remained under review by the BCRB. According to counsel, the BCRB subsequently denied the application and the Appellant appealed that denial to the Contributory Retirement Appeals Board (CRAB), where it is pending a hearing. (*See email from Appellant's Counsel, dated 6/14/2021*)

49. At the Commission hearing, the Appellant was not completely certain when, or whether, he would be able to return to duty with the BFD. (*Testimony of Appellant*)¹⁰

50. The Appellant is receiving ordinary (superannuation) retirement benefits, effective as of August 24, 2018. (*PH21; Testimony of Appellant*)

APPLICABLE LEGAL STANDARD

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 therefor." 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

¹⁰ During a deposition on August 21, 2019 given by the Appellant in a federal civil action brought against Chief Sylvester and Bourne, the Appellant was asked if he were "offered to be reinstated to the BFD would he accept that?", he responded: "I haven't made up my mind yet" but he had a "fleeting thought" that it might interest him in returning to the BFD. (*Exh.17*)

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, ¶ 2, the Appointing Authority bears the burden of proving “just cause” for the discipline imposed by a preponderance of the evidence.

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

The Commission determines 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. See also Town of Brookline v. Alston, 487 Mass. 278 (2021) (analyzing broad scope of the Commission’s jurisdiction to enforce basic merit principles under civil service law); Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971) (appointing authority must provide “adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by

correct rules of law” for discharge of public employee), citing Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) (justification for discharge of public employee requires proof by a preponderance of evidence of “proper cause” for removal made in good faith). It is also a basic tenet of merit principles, which govern the civil service system, that discipline must be remedial, not punitive, designed to “correct inadequate performance” and “[only] separating employees whose inadequate performance cannot be corrected.” G.L. c. 31, §1.

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

ANALYSIS

Summary

The Commission is vested with jurisdiction to hear this appeal, notwithstanding the Appellant’s subsequent retirement and pending disability retirement applications. On the merits, Bourne failed to meet its burden to establish just cause by a preponderance of the evidence to terminate the employment of the Appellant as it did not prove the charge that he had been untruthful or engaged in conduct unbecoming a firefighter, nor that the Appellant’s interaction with the patient and his mother during the call, which was consistent with the standard of care required on the call, constituted conduct unbecoming a firefighter. Although the Appellant did,

inappropriately, albeit with good intention, interject certain personal opinions during his interaction with the patient and his mother after completing his assigned duties, such minor lapse of judgement does not provide just cause for termination.. Civil Service law, therefore, requires that he be reinstated to his position.

Jurisdiction

The Respondent filed two motions to dismiss this appeal on substantially identical grounds, arguing that nthe Appellant's superannuation retirement and pending disability retirement applications divest the Commission of jurisdiction because, even if the Appellant's appeal were allowed, the Commission can no longer grant the exclusive statutory relief – reinstatement – prescribed under civil service law. These motions are not well-founded and are denied.

As to the Appellant's superannuation (ordinary) retirement, his application and effective retirement date came two days *after* he was terminated. Under the well-established Commission interpretation of its jurisdiction under those circumstances, the Appellant's subsequent retirement does not divest the Commission of jurisdiction. Compare In re Boston Police Dep't Drug Testing Appeals, 26 MCSR 73, aff'd on other issues, 90 Mass. App. Ct. 462 (2016), rev. den., 476 Mass. 1104, 1106 (2016) (disciplinary appeals by terminated police officers, including one who subsequently retired), Garvin v. Department of State Police, 21 MCSR 292 (2008) (jurisdiction over retired state trooper who appealed a suspension and termination imposed prior to retirement) and Silvia v. Department of Correction, 20 MCSR 409 (2007) (jurisdiction affirmed in disciplinary appeal of employee who subsequently retired) with Grover v. Department of State Police, 21 MCSR 153 (2008) (no jurisdiction over appeal from trooper who voluntarily retired before suspension imposed); Bishop v. Department of State Police, 23 MCSR 613 (2010)

(no jurisdiction over appeal when employee who chose a retroactive disability retirement date that preceded discipline) and Ford v. Town of Brookline, 20 MCSR 369 (2007) (same).

Similarly, as to the pending disability retirement application, the Motions to Dismiss also fail. That application was pending approval when the Appellant was terminated and remains pending to date. Thus, for the reasons stated above, that application does not bar the Commission from deciding this appeal.¹¹ Moreover, Section 39 of G.L. c. 31 provides a specific path for reinstatement of tenured civil service employees separated under a disability retirement:

“If a permanent employee who has become separated from his position because of disability shall be subsequently capable of employment as determined pursuant to section eight of chapter thirty-two . . . such employee shall be placed in a position in the same or similar title in the department from which he was separated . . . prior to the appointment from any civil service list; provided, however, that in the event that such placement of such employee occurs after a period of time greater than five years from the date of such separation . . . such placement right shall be subject to the completion by such employee of a retraining program established by the appointing authority and approved by [HRD].”

See also G.L. c. 32, §3(6), §8(2)(a) & §91 (provisions for full-time and part-time reinstatement and reemployment of retired public employees).¹²

Finally, the Commission follows the general rule that, if a condition for exercise of original jurisdiction later changes, a tribunal may elect, in the exercise of sound discretion, to retain jurisdiction to hear the matter or dismiss it. See Silva v. Department of Correction, 21 MCSR 474 (2008) and cases cited. This appeal presents an appropriate case to retain jurisdiction to

¹¹ I also note that the Appellant’s disability retirement appeal may be withdrawn at any time and, even were it ultimately approved, the effective date would not necessarily be retroactive.

¹² For discussion of the interpretation and application of these statutes, which is not necessary to address for purposes of deciding the Commission’s jurisdiction, but may bear on the specific form of relief that ultimately would be provided to the Appellant, see generally: Sullivan v. Town of Brookline, 435 Mass. 353 (2001); White v. City of Boston, 428 Mass. 250 (1998), appeal after remand, 57 Mass. App. Ct. 356, rev. den., 439 Mass. 1103 (2003); Cournoyer v. Department of State Police, 480 Mass. 1103 (2018); McLaughlin v. City of Lowell, 84 Mass. App. Ct. 43, rev. den., 466 Mass. 1112 (2013); Cummings v. Department of Correction, 67 Mass. App. Ct. 1113 (2006)(Rule 1:28); Pomoroy v. City of Pittsfield, 30 MCSR 234 (2017); Jordan v. City of Lynn, 25 MCSR 100 (2014); Sheehan v. Town of Hudson, 19 MCSR 15 (2006); Facella v. City of Newton, 18 MCSR 43 (2005), aff’d, 69 Mass. App. Ct. 459, rev. den., 449 Mass. 1111 (2007).

redress the Appellant's bona fide claim that his termination violated basic merit principles of civil service law.

In view of the foregoing, it is not necessary to address the Appellant's alternative argument, and the Commission need not decide, whether or not the Appellant has a constitutional right to appeal his termination for a "name clearing" hearing.

The Untruthfulness Charge

The duty imposed upon public safety personnel to be truthful is one of the most serious obligations he or she assumes. Thus, an appointing authority has just cause to discipline and/or terminate a firefighter who repeatedly demonstrates a "willingness to fudge the truth". Public safety officers are often called upon "to speak the truth when doing so might put into question a search or might embarrass a fellow officer." Falmouth v. Civil Service Comm'n, 61 Mass. App. Ct. 796, 801 (2004) citing City of Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. 300, 303-305, rev. den., 428 Mass. 1102 (1997) ("It requires no strength of character to speak the truth when it does not hurt."). See, e.g., Desmond v. Town of West Bridgewater, 27 MCSR 645 (2014); Ung v. Lowell Police Dep't, 24 MCRS 567 (2011); Gallo v. City of Lynn, 23 MCSR 348 (2010). See also Minoie v. Town of Braintree, 27 MCSR 216 (2014); Everton v. Town of Falmouth, 26 MCSR 488 (2013), aff'd, SUCV13-4382 (2014); Gonsalves v. Town of Falmouth and cases cited, 25 MCSR 231 (2012), aff'd, SUCV12-2655 (2014); Keating v. Town of Marblehead, 24 MCSR 334 (2011).

The corollary to the serious consequences that flow from a finding that a firefighter violated the duty of truthfulness requires that any such charges must be carefully scrutinized so that the employee is not unreasonably disparaged for honest mistakes or good faith mutual misunderstandings. See, e.g., Boyd v. City of New Bedford, 29 MCSR 471 (2016) (honest

mistakes in answering ambiguous questions on NBPD Personal History Questionnaire); Morley v. Boston Police Dep't, CSC No. G1-16-096, 29 MCSR 456 (2016) (candidate unlawfully bypassed on misunderstanding appellant's responses about his "combat" experience); Lucas v. Boston Police Dep't, 25 MCSR 420 (2012) (mistake about appellant's characterization of past medical history).

Here, the Appellant was charged with being "untruthful when you were ordered to provide a report regarding the [January 28, 2018] incident and that you made misrepresentations about what happened during the incident." After a careful review of the evidence, including the testimony of percipient witnesses, I conclude that the preponderance of the evidence fails to establish those charges.

First, the written report prepared and signed by Firefighter Swartz on January 30, 2018 was truthful. It addressed the patient care provided to patient A by referring to the SARF, which all witnesses agreed contained an accurate and complete report of the care rendered to patient A. Firefighter Swartz was ordered to prepare that report without any information about the complaint that had been made by Ms. S. He cannot be faulted for focusing that report on the standard of care that had been administered. The SARF was indeed an accurate and complete record of the care provided. When he was ordered to submit that report, Firefighter Swartz was never asked to address any off-handed statements that he or any other firefighter might have made while administering care to the patient during the call, let alone, after the patient was transferred to the custody of the hospital and their duties had ended.

Second, the Respondent's claim that Firefighter Swartz "made misrepresentations about what happened during the incident" is equally without merit. The only basis on which such a charge could have been supported is what Firefighter Swartz said during the colloquy with Chief

Sylvester on February 1, 2018. There was no recording made of the February 1, 2018 meetings and no further investigation or interviews were conducted. Chief Sylvester did not appear and testify at the appointing authority hearing or at the Commission hearing. The only witnesses to testify at the Commission hearing as to what was said at that those meetings are Deputy Chief Weeks and the Appellant. Neither one of them testified that Firefighter Swartz was ever asked specifically about the interaction with patient A or his mother at the hospital or that he “misrepresented” what he said to Ms. S.¹³

At the first meeting, the subject of the hospital interaction never came up. The question Firefighter Swartz was asked was what happened “during the call” and focused on “patient care”, along with the confusion about whether Firefighter Swartz had represented himself to be Firefighter Pomar. Although some (unidentified) excerpts from Ms. S’s email were read to Firefighter Swartz by Chief Sylvester, Firefighter Swartz was never asked to directly address any of the specific factual assertions in that memo. In the version of the meeting offered by Dep. Chief Weeks, the closest it came to that subject was a question along the lines of whether Firefighter Swartz could think of any reason that someone (not even clear if the complainant was specifically identified to him in the first meeting) could think that he did anything that could be perceived as “detrimental” or “judgmental”. Even if such a broadly framed question had been asked, and even if Firefighter Swartz said “No”, neither of which I find actually happened, that evidence still falls short of proof of untruthfulness required to establish just cause to terminate Firefighter Swartz for untruthfulness.

¹³ Dep. Chief Weeks prepared what he called a “rough” one-page memo purporting to describe the February 1, 2018 meetings. (*Exh.12; Testimony of Weeks*) The memo does not purport to be a verbatim or complete record; it contains nothing substantive about the meeting with Firefighter Shaughnessy; does not even mention the second meeting with Firefighter Swartz. I have given this memorandum no weight. My findings about the substance of these meetings are based on what I found to be the credible testimony provided by Dep. Chief Weeks and the Appellant.

I also find that the evidence does not support Bourne’s conclusion that Firefighter Swartz was untruthful during the second meeting with Chief Sylvester on February 1, 2018. I credit the Appellant’s testimony that, again, he was never directly asked what he said in his interaction with patient A or Ms. S, and that his only comment about Ms. S’s email was to hold up both his SARF and her email and say: “I acknowledged the mother.” I am not sure what to make of this statement, although I infer it may likely have been his way of acknowledging that he did, in fact, interact with Ms. S. I find it significant, and especially troubling, that, even after he finally allowed Firefighter Swartz to read the e-mail for the first time, Chief Sylvester did not take the opportunity to follow-up and ask any specific questions, or show or tell Firefighter Swartz about the amended statement he just received from Firefighter Shaughnessy and ask for his response. This approach falls short of a fair and impartial “fact-finding” process and confirms Firefighter Swartz’s credible testimony that he had just been told by a Lieutenant before he walked into the second meeting that Chief Sylvester had already decided to “fire him for lying during a department investigation” solely based on whatever happened at the first meeting.

In sum, the preponderance of the evidence fails to establish that Firefighter Swartz “misrepresented” his actions during the January 28, 2018 medical call. The Respondent did not establish just cause to terminate him for untruthfulness.

Conduct Unbecoming a Firefighter

The second ground asserted by the Respondent for terminating Firefighter Swartz was for being “discourteous and insolent to a member of the public” or, essentially, conduct unbecoming a firefighter. The two occasions cited by the Respondent are based on Ms. S’s versions of (1) the interaction between Firefighter Swartz and her son, patient A, during the ambulance ride to the hospital and (2) her interaction with Firefighter Swartz at the hospital.

Firefighter Swartz presented himself at the Commission hearing as a sincere, articulate, and responsive witness with an excellent memory for events. His strong background of training and experience as a firefighter/paramedic was unquestioned. His confident, measured demeanor, which stood up during tough cross-examination, reinforced my conclusion that he sought to be truthful in his testimony even when it did not put him in the best possible light. Of all the witnesses to the events of January 28, 2018, I found his testimony the most accurate and credible.

For the most part, Firefighter Shaughnessy's testimony about the treatment provided to patient A also carried the ring of truth. I did give diminished weight to his recollection of the interaction with patient A and Ms. S after they had transferred custody of patient A to the hospital emergency room staff. His amended report, and his testimony, was ambiguous and, to some extent, inconsistent, and leave it uncertain how much of what he said he remembered took place in the presence of Ms. A as opposed to what Firefighter Swartz and he discussed amongst themselves after the encounter with Ms. A in the hospital hallway. In addition, I credit the Appellant's recollection that Firefighter Shaughnessy was positioned too far away and out of view of Ms. S's face to have seen her "roll her eyes" as he recalled.

I found Ms. S to be the least credible witness to the events of January 28, 2018. First, by her own admission, she was "devastated" (as could be expected) as a result of living through her son's medical emergency, which she described as "chaos". This certainly affected her perception and recollection and led her to get numerous critical facts demonstrably wrong. For example, contrary to her testimony, Firefighter Swartz was not the first on scene and he did not find her son A "on the floor". Despite her testimony that she was "100% certain" Firefighter Swartz was the person who asked her "unconscious son" to tell him "where the pills were," that question in

fact was posed to her by *Dep. Chief Haden*; and she claimed in her e-mail that her son had “no pills” but he was taking medicine since his first seizure and several witnesses noticed the prescription bottle in A’s room. Other examples of discrepancies between her testimony and the record evidence include that she testified that her son had two prior seizures but the e-mail said he had a total of four; and there was no “Hello Pomar” on the call.¹⁴ Finally, there is a troubling tone to Ms. S’s email, in which she accuses the entire BFD “staff” of “developing the attitude that my son is some sort of drug addict” and states that “this is only my first complaint regarding this but won’t be my last.”¹⁵

As to what occurred in the ambulance on the ride to the hospital, I credit Firefighter Swartz’s account over anything Ms. S claimed to have been said in her testimony or e-mail, all of which was based entirely on hearsay from her son. The Appellant’s focus was on providing routine patient care to A, who was regaining consciousness after being found in a “post ictal state” induced by the, as yet unexplained, seizure he had suffered. This care included the protocol to determine whether patient A might have had any drugs in his possession.

A was never accused of being a “heroin” addict, but, after experiencing a odor in the room he knew to be from marijuana in which A was found unconscious, Firefighter Swartz did tell patient A that his “actions had consequences for everybody involved” and he needed to “grow up” and recognize the risks he was taking. While this off-handed comment may not have been appropriate and was made without any documented factual support that the patient’s actions

¹⁴ At my request for information about the prior emergency calls for service, Bourne declined to provide copies of the SARF reports but did confirm that there had been three such calls prior to January 2018 – May 22, 2017 to A’s home; June 22, 2018 to a restaurant parking lot in Sagamore and on October 29, 2017 to a street location in Buzzards Bay. Neither Firefighter Swartz nor Firefighter Pomar were one of the BFD responders on any of those calls. Firefighter Shaughnessy is listed as present at the first call on My 22, 2017, which would be prior to his appointment to the BFD. (*See email from Counsel to Commission dated July 23, 2021*)

¹⁵ The Appellant testified that he did not “recognize” the Ms.S who testified at first day of the Commission hearing as the person with whom he had developed a rapport on January 28, 2018. (*Testimony of Appellant*)

were “risky”, the comments, standing alone, do not constitute conducting unbecoming a firefighter. This comment was an honest effort to provide what he perceived to be constructive feedback to the patient, after coming to learn of his history of using marijuana, purportedly for medical reasons, but for which he had no prescription (i.e., whose dosage and purity was not regulated), as well as reports that he knowingly mixed his marijuana with other substances, including Xanax, according to A’s father, and the “rapport” he believed he had established with Ms. S and her son. I find nothing “discourteous” or “insolent” about Appellant’s remarks. The statements made by the Appellant to Ms. S. at the hospital on January 28, 2018, at best, warrant counseling or coaching. They do not, however, justify the termination of a long-time Bourne firefighter.

Even after taking into account the fact that the Appellant did not testify before the appointing authority hearing officer, and weighing that fact with all of the specific, credible evidence presented at the de novo hearing before the Commission, I still conclude that the Appellant’s appeal must be allowed.

CONCLUSION

For these reasons, the Respondent’s Motions to Dismiss are ***denied***. The Appellant’s appeal in Case Nos. D-18-155 is hereby ***allowed***. The Appellant’s termination is vacated and, per the terms of G.L. c. 31, section 43, he shall be reinstated to his position without loss of compensation or other benefits, subject to compliance with such other requirements of law governing his reinstatement as are consistent with this Decision.

Civil Service Commission

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

By vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Stein and Tivnan, Commissioners) on July 29, 2021.

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:

Joseph L. Sulman, Esq. (for Appellant)

Robert S. Troy, Esq. (for Respondent)