COMMONWEALTH OF MASSACHUSETTS

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

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THOMAS SWARTZ,
Appellant.

v.

D1-18-155

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

DECISION ON MOTION FOR RECONSIDERATION

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) on the grounds that, after transporting a patient to the hospital for emergency care, he made an inappropriate comment about the patient to the patient's mother and then lied about what he had said at a meeting with the Fire Chief.

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 evidentiary hearing, which was digitally recorded, was held over two days on September 13, 2019 and November 6,

2019 at the Bourne Community Building. The Commission took testimony from six (6) witnesses and received twenty-one (21) exhibits in evidence. After the close of the evidence, the Commission received proposed decisions from each party and Bourne filed a Renewed Motion to Dismiss, to which the Appellant filed an Opposition.

By Decision dated July 29, 2021 (the Decision)[1], the Commission rejected Bourne's jurisdictional arguments and denied the Motions to Dismiss, finding that, under well-established law, neither the post-termination superannuation (ordinary) retirement applications filed by the Appellant, nor a possible successful appeal from the denial of a prior pending disability retirement application, precluded the Commission from taking jurisdiction over and deciding the Appellant's civil service appeal.

On the merits, the Commission held that Bourne failed to meet its burden to establish, by a preponderance of the credible evidence, that either of the two reasons stated as the grounds for discipline provided just cause to terminate Firefighter Swartz. In particular, although Firefighter Swartz did interject certain personal opinions during his interaction with a patient and his mother after completing his assigned duties, that temporary lapse of judgement was an isolated, minor incident that does not provide just cause to terminate a tenured employee under basic merit principles of civil service law, especially one with a previously unblemished record of over 20 years of service. The Commission also concluded that it was undisputed that Firefighter Swartz had delivered appropriate emergency care to the patient and had not been untruthful when asked to report what happened "during the call."

Having found that Firefighter Swartz was terminated without just cause, the Commission is mandated to order his reinstatement under civil service law, even if he had been, and may currently remain, unfit to return to full duty. See Town of Brookline v. Alston, 487 Mass. 278

[1] The Decision was reissued on August 4, 2021 to correct a minor scrivener's error.

(2021) (rejecting the argument that the Commission lacked authority to reinstate a wrongfully terminated firefighter who was unable to return to duty immediately for psychological reasons). The Decision expressly noted that the Appellant's reinstatement was subject to compliance with other statutory prerequisites to a return to duty by a retired civil servant prescribed by Massachusetts civil service law (G.L. c. 31, § 39) and Massachusetts retirement law (G.L. c. 32). Thus, reinstatement by the Commission of an employee terminated without just cause pursuant to civil service law is not necessarily the equivalent of an automatic, immediate return to full duty.[2]

On August 9, 2021, Bourne filed a Motion for Reconsideration, asking the Commission to vacate the Decision and reopen the record, alleging various reasons why the Decision was legally and/or factually unwarranted. The Appellant filed his Opposition on August 25, 2021. After careful review of Bourne's Motion and the Appellant's Opposition, the Commission finds that Bourne's Motion for Reconsideration has failed to identify a clerical or mechanical error in the Commission's Decision or a significant factor the Commission or the presiding officer may have overlooked in deciding the case, which are the prerequisites to allowing a Motion for Reconsideration set forth in 801 CMR 1.01(7)(l).

First, for the most part, the Motion for Reconsideration revisits the same jurisdictional arguments presented in Bourne's two prior Motions to Dismiss, both of which the Commission carefully considered and, for the reasons stated in the Decision, found to be without merit. Nearly everything presented in the pending motion was already included in the record and fully

[2] As the Appellant has pointed out, Massachusetts public policy recognizes the potential for rehabilitation and favors a former employee who retired due to a claim of permanent disability seeking reinstatement should the employee subsequently rehabilitate him/herself and become able to return to duty in the future. Ultimately, should Mr. Swartz receive permanent disability benefits, he will be obliged to demonstrate that he was rehabilitated before returning to duty. Moreover, Mr. Swartz will have to elect whether to accept retirement or reinstatement; he cannot receive retroactive or prospective compensation and simultaneously collect retirement benefits. See, e.g., G.L. c. 32, § 8; G.L. c. 31, § 39.

considered by the Commission. None of the "new" information provided in the Motion for Reconsideration was unknown or "newly discovered" matter. In sum, whether the "facts" or arguments presented in the Motion for Reconsideration are "new" or reconstituted, none of them change the Commission's conclusion. Even though an Appellant may claim to be permanently disabled within the meaning of Massachusetts retirement law (especially when he alleges that the disability stems from his employer's own wrongful conduct), the Decision to reinstate the Appellant falls well within the purview of the Commission's authority and jurisdiction under civil service law, as most recently construed by the SJC in Town of Brookline v. Alston, *supra*. Cf. Cleveland v. Pol'y Mgmt. Sys. Corp., 526 U.S. 795, 802-806 (1999) (plaintiff in employment discrimination action is not judicially estopped from establishing that she can perform the essential functions of her job with reasonable accommodations solely because she has previously applied for and received Social Security Disability Income benefits); Russell v. Cooley Dickinson Hosp., Inc., 437 Mass. 443, 450-453 (2002) (plaintiff's prior pursuit, and receipt, of benefits based on an assertion of "total disability" does not automatically estop her from pursuing a claim of employment discrimination on the basis of disability [under G.L. c. 151B, § 4, subd. 16] so long as a disputed issue of fact remains whether the plaintiff is able to perform the essential functions of the position). As the Supreme Judicial Court concluded in Russell, *supra*: A claim for disability benefits on the basis of total disability is evidence of a discrimination plaintiff's inability to perform the essential functions of a job, but it is not dispositive if the plaintiff is able to raise a question of fact, through other evidence of her ability or through an explanation of how her disability claims and employment discrimination claims are consistent, sufficient to warrant a reasonable factfinder's conclusion that the plaintiff could perform the essential functions of the job. Ibid.

Second, the Motion for Reconsideration takes issue with the factual findings and credibility determinations of the presiding hearing commissioner. The motion, however, identifies no specific fact that was overlooked. In fact, some of the "facts" presented by the motion actually ignore the evidence Bourne, itself, proffered at the hearing. The most incongruous (indeed, as the Appellant suggests, "bizarre") example is Bourne's attempt to equate what happened in this case to a 1991 brutal domestic beating and the recent mortal, racially-motivated attack on George Floyd last year. Nothing in the evidence Bourne presented during this appeal comes close to justifying any inference that the two firefighters conspired to conceal anything, harbored any bias, or that the conduct involved here even remotely presented any issue of, or risk to, public safety. The undisputed evidence proved that Firefighter Shaughnessy, not Firefighter Swartz, penned the report they were requested to prepare about what happened "during the call". The partner (a new EMT in his probationary period) was later allowed to supplement his report to include his version of the after-care colloquy at the hospital and he did so fully and freely. Firefighter Swartz was terminated without ever giving him the same opportunity.

Third, Bourne now claims that Firefighter Swartz's interaction with the patient's mother violated some unspecified federal privacy law (by telling her some of what Swartz and the patient discussed while in the ambulance on the way to the hospital). This issue was not previously presented to the Commission. Assuming Bourne's reference to "HIPPA" is a misnomer meant to refer to the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), on this record, it is unlikely that any bona fide violation of that statute, see 42 U.S.C.§1320d-6, could be established as a matter of fact or law. Moreover, any inadvertent violation, even if proved, definitely would not change the Commission's ultimate "just cause"

conclusion on the merits to allow the appeal and reinstate the Appellant to his civil service position.

Fourth, Bourne's privacy argument is ironic, in that Bourne, itself, also attached to the Motion for Reconsideration certain very private and specific medical information about the Appellant, which, inter alia, has no relevance to any issue before the Commission. This medical evidence was known to Bourne at the time it terminated Firefighter Swartz, but his alleged unfitness for duty was NOT included as a reason stated by Bourne in its notice of charges or termination decision as just cause for terminating him. The Commission notes that it will treat this personal medical information in the Motion for Reconsideration as confidential, pursuant to the requirements of Massachusetts law and SJC rules promulgated for the protection of such personal information. The Commission directs the parties to do the same.

Fifth, Bourne requests that the Commission take "judicial notice" (sic) of a 1991 MCAD decision (referred to in a newspaper article attached to the Motion for Reconsideration), as well as a decision (date unspecified) in a federal civil action brought by Firefighter Swartz against the Town of Bourne and (former) Fire Chief Sylvester. Neither of these Decisions appear to involve civil service law. This request is denied for several reasons, including, *inter alia,* failure to provide a definitive identification of the facts to be noticed and their relevance to any issue in this civil service appeal.

For these reasons, the Appellant's Motion for Reconsideration in Docket D1-18-115 is hereby ***DENIED***.

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 August 26, 2021

Notice to:

Joseph Sulman, Esq. (for Appellant)
Robert S. Troy, Esq. (for Respondent)