

COMMONWEALTH OF MASSACHUSETTS

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

THOMAS F. SWARTZ,
Appellant

D1-18-155

v.

BOURNE FIRE DEPARTMENT,
Respondent

Appearance for Appellant:

Joseph L. Sulman, Esq.
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Waltham, MA 02451

Appearance for Respondent:

Robert S. Troy, Esq.
Bourne Town Counsel
Troy Wall Associates
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Sandwich, MA 02563

Commissioner:

Paul M. Stein

ORDER OF CLARIFICATION ON REMAND

Pursuant to a Decision issued on July 29, 2021, the Commission overturned the termination of Thomas Swartz, a Bourne firefighter, and ordered him reinstated after finding that he had not been untruthful and had not intentionally misrepresented his actions regarding a medical call, as charged, and that his interaction with the patient in question and his mother during that call had been consistent with the standard of care required on the call and did not constitute conduct unbecoming a firefighter. Although the Commission found that 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 a minor lapse of judgement did not provide just cause for termination.

On December 7, 2022, the Superior Court affirmed the Commission's decision but also

ordered a remand to the Commission for the purpose of clarifying whether it intended to direct the issuance of any form of modified disciplinary action. This order clarifies that the Commission, meeting in executive session in July of 2021, actually did consider whether to exercise its discretion to order a modification of the penalty and it declined to do so in this particular case.

In adjudicating an appeal brought pursuant to G.L. c. 31, §§ 41-43, taken after a municipal appointing authority has imposed a form of statutorily enumerated discipline, such as termination or suspension of employment, against a tenured civil service employee, and after the Commission has concluded that the municipal employer has not demonstrated just cause for the discipline imposed, the Commission routinely considers whether, based on its own *de novo* findings of fact that differ significantly from those determined by the local appointing authority, the Commission should allow the appeal with or without modification of the disciplinary penalty actually meted out. As section 43 of G.L. c. 31 states: “The Commission may also modify any penalty imposed by the appointing authority.” *See Town of Falmouth v. Civil Serv. Comm’n*, 447 Mass. 814, 823 (2006) (“the commission must pass judgment on the penalty imposed by the appointing authority”).

In this case, the Commission’s observation that “[it] would not look askance at *an appointing authority* who chooses to impose appropriate discipline, *such as a warning, counseling, and/or coaching*, for the sort of comments made by Appellant [Thomas Swartz] to [a private citizen] at the hospital on January 28, 2018” was dicta, intended to be advisory and prospective in nature. By its July 29, 2021 Decision, the Commission decided to allow the appeal and declined, quite consciously, to exercise its authority to modify downward the disciplinary penalty actually imposed; yet signaled that, in the future, any employer, including the

Respondent here, was not precluded from issuing a reprimand or lesser form of corrective measure on its own initiative, if it so chose.

The Commission reiterates the concluding sentence of its July 29, 2021 Decision: “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; McConney, Stein and Tivnan, Commissioners [Dooley, Commissioner -absent]) on April 20, 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.

Notice:

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