

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2021-0314

TOWN OF BOURNE & another¹

vs.

CIVIL SERVICE COMMISSION & another²

**MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS
FOR JUDGMENT ON THE PLEADINGS**

Plaintiffs, the Town of Bourne (“Town”) and the Bourne Fire Department (“BFD”), filed this action seeking judicial review of the decision of Civil Service Commission (“Commission”) vacating BFD’s termination of civil service employee, former firefighter Thomas Swartz (“Swartz”). The parties have filed cross-motions for judgment on the pleadings. For the following reasons, the Town and BFD’s joint motion is **DENIED** and Swartz’s motion is **ALLOWED**. However, the matter is **REMANDED** to the Commission for clarification with regard to the appropriate disciplinary action, if any.

BACKGROUND

The following facts are taken from the administrative record, including certain findings of fact made by the Commission through its Commissioner.

Swartz was terminated from his employment with the BFD by the Fire Chief Noman Sylvester (“Chief Sylvester”) for the Town of Bourne, the Appointing Authority. He appealed his termination to the Commission. Ultimately, a full hearing was held on September 13, 2009 and November 6, 2019 at the Bourne Community Building.

¹ Bourne Fire Department

² Thomas F. Swartz

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 until the incident underlying the current litigation.

On January 28, 2018, at approximately 11:07 a.m. BFD received a call from a Bourne resident ("Ms. S"), whose eighteen year old son ("A") had suffered a seizure and collapsed in his room. The first person to arrive on scene was BFD Acting Deputy Chief Ryan Haden ("Deputy Chief Haden").

As Deputy Chief Haden entered the house, he detected an odor of marijuana, and when he entered A's bedroom, there was "smoke in the air from what [Deputy Chief Haden] believe[d] to be marijuana... ." There was "drug paraphernalia including bongs, vapor oils and bags of weed throughout scattered around." Ms. S stated that A smoked weed and "has seizures sometimes." Deputy Chief Haden described A as being in a "post ictal state," which refers to someone coming out of a stroke or seizure. He took A's vital signs and determined that A was stable. Deputy Chief Haden asked Ms. S if A used other drugs and to show him "where are the pills" or "where's the pills." He explained to Ms. S that A was not in trouble, and that knowing what medications A took was important to provide proper treatment. Ms. S was defensive and stated that A did not take other drugs.

An officer from the Bourne Police Department arrived on scene, followed by Ms. S's ex-husband, A's father. A's father told Deputy Chief Haden that A sometimes mixed marijuana with Xanax. When Deputy Chief Haden asked if there had been something different about the weed A smoked on this occasion, both parents responded that they suspected A's supplier "sometimes put unknown substances in his weed."

Swartz arrived on scene at approximately 11:20 a.m. with firefighter Jared Shaughnessy, (“Shaughnessy”). Swartz took the lead as Shaughnessy was a newly-appointed EMT. When they arrived, A was revived and sitting in a chair. As they entered the house, Swartz noted the odor of marijuana and Shaughnessy remembered seeing a standard prescription bottle in the room.

Deputy Chief Haden provided Swartz with a “brief rundown” of his observations and information about A’s marijuana use and history of seizures. Swartz and Shaughnessy transported A to the nearest hospital. Swartz rode with A in the back of the ambulance while Shaughnessy drove.

On the way to the hospital, Swartz asked A routine questions. During the conversation, Swartz told A that his “actions had consequences for everybody involved,” and he needed to “grow up” and stay off risky drugs.

The ambulance arrived at the hospital at 11:52 a.m. and, after transferring A to an Emergency Department gurney, Swartz completed his Standard Ambulance Report Form (“SARF”).

On their way out of the hospital, Swartz and Shaughnessy passed A’s bed in the hallway, where Ms. S was with her son. Ms. S stated to Swartz that A “was a good kid,” to which Swartz replied, “[y]es, he’s a good kid.” Swartz added that A reminded him of his own stepson who had “similar” issues, told her what Swartz had said to A in the ambulance, and added that “if that’s what he wants to do maybe he should be on his own.”

Two days later, Fire Chief Sylvester received an email from Ms. S to complain about Swartz’s comments, but the email mis-identified Swartz. In her letter, she stated that A smoked weed for chronic stomach pain; that “your staff has developed an attitude that my son is some

sort of drug addict;”³ that Swartz accused her son of doing heroin; and “this is only my first complaint regarding this but it won’t be my last.”

On January 30, 2018, the day Chief Sylvester received the email from Ms. S, Swartz and Shaughnessy were working together. They were contacted by someone in the BFD command staff regarding a complaint and were asked, through Deputy Chief Haden, to provide a written report about the incident on January 28, 2018. The two discussed what to write in the report and discussed the matter with their union representative, who had called to ask them about the report. They all agreed that, since all of the call details were accurately contained in the SARF, their reports should refer to the SARF. When the two firefighters returned to the station, Shaughnessy prepared a one paragraph report briefly describing the call and referring to Swartz’s SARF as, “both FF Shaughnessy and FF Swartz agree that the report was written both truthfully and accurately and contained all details pertinent to this call.” The two signed and submitted identical reports.

Later that evening, the union representative contacted Swartz again and asked if Swartz had mis-identified himself at the call. Swartz laughed and asked, “is that what his is about?” The union representative did not respond to the question.

On February 1, 2018, Swartz was ordered to report for a meeting with Chief Sylvester. Swartz was asked to “expand and describe in more detail what had transpired during the transport of [A].” Swartz focused on “patient care in detail,” including “questions regarding any substances being used to determine the patient’s condition.” Chief Sylvester read selected excerpts from Ms. S’s email that mentioned the other BFD firefighter’s name. Based on this, and the union representative’s question during the phone call, Swartz addressed what he thought

³ The record reflects that the BFD had responded to three prior incidents involving A. (AR Vol. I, pg. 352).

was the main issue, telling Chief Sylvester “I would never in all eternity introduce myself other than as who I am.” The Chief responded, “so you stick by your statement?” Swartz said “yes,” believing that he had not done anything wrong or that any other action needed further explanation. The meeting ended and Swartz returned to duty.

Shaughnessy was then called in for an interview with Chief Sylvester. He was asked the same question posed to Swartz regarding details of the call and initially gave essentially the same answer as Swartz. However, he was then asked whether there was anything said to A or the mother during the call. Shaughnessy began to explain the conversation in the hospital hallway between Ms. S and Schartz. Chief Sylvester stopped Shaughnessy and commanded him to reduce it to writing and amend his original report.

Swartz returned from a medical call and walked into the station. As he entered, he was met by off-duty BFD Lieutenant Shawn Silvia (“Silvia”) who told him that Chief Sylvester was going to fire him “for lying during a fire department investigation” and then escorted Swartz into the Chief’s office for a second interview. At this time, Silvia took a copy of Ms. S’s email from Chief Sylvester’s desk and gave it to Swartz. This was the first time Swartz was provided a copy of the complaint.⁴ After reading the email, Swartz asked for a copy of his SARF. Swartz asked Chief Sylvester if he had reviewed both, to which the Chief stated “yes.” Swartz asked “[w]hat is going on here?” The Chief responded, “[w]hat happened?” Swartz said, “I acknowledged the mother.” Chief Sylvester stated, “[t]hank you, we’re done here” and Swartz was informed by BFD that he was being relieved of duty and placed on leave. Swartz did not learn about Shaughnessy’s amended report until March 2018.

⁴ According to BFD Assistant Chief Cody, of the twenty-five to thirty complaints that he personally handled between 2004 and 2018, there had never been an instance where he did not provide a firefighter with a copy of a citizen complaint before requiring a written statement from the firefighter.

April 13, 2018, Chief Sylvester informed Swartz via letter that a hearing would be to address the Chief's request that he be terminated for his misconduct, "when you interacted with a patient and his mother in an ambulance and at a hospital in Plymouth, Massachusetts," in violation of 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"). The letter further alleges that Swartz was "untruthful when you were ordered to provide a report regarding this 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."⁵

The hearing was held May 14, 2018 and the hearing officer submitted his report on August 17, 2018. In the report, the hearing officer found that Swartz had engaged in the alleged conduct.

In a letter dated August 22, 2018, Chief Sylvester informed Swartz that he had reviewed the hearing officer's report and found that the charges against him were substantiated. As a result, Swartz's employment with BFD was terminated. Swartz filed an appeal to the Commission, signed and filed August 23, 2018.

⁵ The date appears to be a scrivener's error and should state January 28, 2018.

Untruthfulness Charge

The Commissioner found that the preponderance of the evidence failed to establish this charge. First, the report provided by Swartz on January 30, 2018 was truthful; he referred to the SARF report, which all parties agreed was accurate and complete. He was then ordered to prepare the further report, without any contextual information about the complaint by Ms. S. He was neither asked to address any off-handed statements that he made during the call, nor after the call was complete when the patient had been transferred to the hospital. Second, the only basis on which the charge of Swartz having made misrepresentations about what occurred during the incident is what Swartz said to the Chief on February 1, 2018. The Commissioner found that there was no testimony offered that 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.

The Commissioner found that the evidence did not support Bourne’s conclusion that Swartz was untruthful during either of the two meetings. In the first meeting, the hospital interaction never came up and Swartz was never asked to address directly any specific factual assertions in the email. In the second meeting, the Commission found it troubling that,

“even after [Chief Sylvester] 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.”

(Ex. A, pg. 22).

Conduct Unbecoming a Firefighter

The two instances cited by the Town are based on Ms. S’s versions of (1) the interaction between Firefighter Swartz and her son, A, during the ambulance ride to the hospital, when she

was not present, and (2), her interaction with Firefighter Swartz at the hospital. The Commissioner credited Swartz's testimony and found Ms. S's testimony to be the least credible, and specifically credited Swartz's account of the ambulance ride where Ms. S's testimony of the matter was based entirely on hearsay from her son. While Swartz's off-hand comment that A's "actions had consequences for everybody involved" and that he needed to "grow up" and recognize risks he was taking may not have been appropriate, standing alone, the comments did not constitute conduct unbecoming a firefighter. The Commissioner opined that a warning, counseling and/or coaching for these sorts of comments would be an appropriate discipline.

In sum, the Commissioner concluded that Swartz's appeal must be allowed, his termination vacated, and that he be reinstated with no loss of compensation or other benefits.

DISCUSSION

Pursuant to G. L. c. 31, § 43, a person aggrieved by a decision of an appointing authority may appeal the decision to the commission. If a commission determines, by a preponderance of the evidence, that there was just cause for an action taken, it shall affirm the action of the appointing authority. G. L. c. 31, § 43. Otherwise, it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights. G. L. c. 31, § 43. A commission also has the authority to modify any penalty imposed by the appointing authority. G. L. c. 31, § 43.

General Laws c. 31, § 44, provides that,

"[a]ny party aggrieved by a final order or decision of the commission following a hearing pursuant to any section of this chapter or chapter thirty-one A may institute proceedings for judicial review in the superior court within thirty days after receipt of such order or decision."

G. L. c. 31, § 44. The court reviews a commission's decision under the standards set forth in G. L. c. 30A, § 14, including whether there is substantial evidence in the record for the

commission's decision, G. L. c. 30A, § 14(7)(e), or whether the decision is arbitrary, capricious, or otherwise not in accordance with law, G. L. c. 30A, § 14(7)(g). The party appealing an administrative decision bears the burden of demonstrating the decision's invalidity. *Brackett v. Civil Serv. Comm'n*, 447 Mass. 233, 242 (2006). That is a "heavy burden," *Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 263-264 (2001), because the court gives "due weight to the experience, technical competence, and specialized knowledge" of the commission in deciding these matters, and is "highly deferential to the agency on questions of fact and reasonable inferences drawn therefrom." *Police Dep't of Boston v. Kavaleski*, 463 Mass. 680, 689 (2012), quoting *Flint v. Commissioner of Pub. Welfare*, 412 Mass. 416, 420 (1992). "The reviewing court is [] bound to accept the findings of fact of the commission's hearing officer, if supported by substantial evidence." *City of Leominster v. Stratton*, 58 Mass. App. Ct. 726, 728 (2003).

Although the plaintiffs' complaint is largely based on an argument that the Commission lacked authority to hear the appeal because Swartz has subsequently filed for disability,⁶ the plaintiffs' motion for judgment on the pleadings abandons this argument.⁷ Instead, the plaintiffs debate the factual findings of the Commission, and ask this court to overturn the Commission for three reasons: (1) the key premises of the Commission's factual conclusions are flawed and not

⁶ The plaintiffs' complaint summarizes their position as follows:

"[t]he Commission determined that Swartz should be reinstated and receive back pay despite the fact that Swartz has and continues to assert that he is unable to perform the duties of the position to which the Commission has reinstated him: Firefighter/EMT in the Town of Bourne Fire Department."

(Ex. A, pg. 2).

⁷ The plaintiffs take a somewhat convoluted position with regard to the jurisdictional issue: while they state that they do not challenge the Commission's decision as it relates to the motions to dismiss for lack of jurisdiction, the Town concludes that it "does not waive its ability to exercise its rights in these respects at the appropriate time." (P. Mot. JOP, pg. 19). In so much as this position is related to the merit of Swartz's retirement and disability applications, the Commission clearly stated, "[n]othing 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." (Ex. A, pg. 2).

supported by the substantial evidence; (2) the Commission's own subsidiary findings support the opposite of the Commission's conclusion; and (3) even if the Commission properly overruled the Town's termination decision, the Commission still erred by rejecting all discipline rather than modifying the decision.

The first and second arguments made by the plaintiffs are largely challenges to the factual findings of the Commission, and therefore the court addresses them together under the substantial evidence and arbitrary and capricious standard, along with their subsidiary arguments.

A. Substantial Evidence and Arbitrary and Capricious Standard

The Commission's decision is justified if it is supported by substantial evidence. "Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion." *Singer Sewing Machine Co. v. Assessors of Boston*, 341 Mass. 513, 517 (1960). The Commission's decision also must not be arbitrary and capricious. A decision is arbitrary and capricious when it lacks any rational explanation that reasonable persons might support. *Attorney Gen. v. Sheriff of Worcester Cnty.*, 382 Mass. 57, 62 (1980). A decision that is supported by substantial evidence cannot be arbitrary and capricious. See *Massachusetts Elec. Co. v. Department of Pub. Util.*, 376 Mass. 294, 312 (1978).

The plaintiffs argue that the Commission's decision is not supported by the substantial evidence because (1) Swartz concealed his commentary from the Fire Chief when asked about it; (2) Swartz's conduct was not limited to off-handed comments; and (3) Swartz's commentary was severe misconduct that caused harm to Ms. S and A and reflected badly on the BFD. The court discusses each argument in turn.

1. Swartz Concealed His Commentary

The plaintiffs argue that the Commission's finding that Swartz did not act untruthfully is flawed because it ignores the following undisputed testimony, which occurred at the first meeting:

Q. Did the Chief say anything about you saying man up or anything like that?

A. He did threaten me about if he found out that I told someone, patient, I don't know, if I told someone to man up. Those were the Chief's words.

The plaintiffs argue that, in light of this testimony, when Swartz was finally provided a copy of Ms. S's complaint in the second meeting and was asked, "what happened?" by the Chief, his response that "he acknowledged the mother," without elaboration, constituted "deliberate obfuscation and misrepresentation of the content and extent of the conversation." (P. Mot. JOP, pg. 15). The court disagrees.

The Commissioner concluded that Swartz initially believed he was coming under scrutiny for misidentifying himself during the call with Ms. S and A. This caused Swartz initially to focus his responses on this issue. During either meeting with the Chief, Swartz was never directly asked what was said during his interaction with A or Ms. S. Rather, once Swartz was provided the complaint, the only statement that the Commission had to evaluate the adequacy of Swartz's response was his comment, "I acknowledged the mother" while holding up his SARF report and the complaint. Just as the plaintiffs point out, this commentary is vague and the Commission clearly stated that it did not know what to make of the comment. Therefore, the Commission's conclusion that this evidence was insufficient to justify Swartz's termination for "untruthfulness" was rational. See *Attorney Gen v. Sheriff of Worcester Cnty.*, 382 Mass. at 62

(decision arbitrary and capricious when it lacks any rational explanation). The plaintiffs' position that the Chief should not be required to ask any clarifying questions after this interaction fails to acknowledge that it was the plaintiffs' burden to establish, by a preponderance of the evidence, that Swartz's termination was warranted. While an "obligation to cross-examine Swartz for every detail of that conversation" was certainly not required, it would have behooved the BFD to elicit some basis on which to base their termination for "untruthfulness."

It was within the Commission's discretion to find that the plaintiffs failed to meet their burden to justify Swartz's termination for untruthfulness. Because the Commission's findings were supported by the substantial evidence, they were not arbitrary and capricious.

Massachusetts Elec. Co. v. Department of Pub Util., 376 Mass. at 312.

2. Swartz's Comments as "Off-handed"

The plaintiffs claim that the Commission erred in categorizing Swartz's comments as "off-handed." The plaintiffs argue that this characterization was "wrong" because Swartz twice made these comments and the definition of an "off-hand" comment is one made "without premeditation or preparation." The court concludes that the Commission's characterization was warranted, and in any event, the significance of this characterization to the Commission's overall, well-founded decision is minute.

On page twenty-four of the Commission's decision, the Commissioner states,

"... 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 were 'risky', the comments, standing alone, do not constitute conduct unbecoming of a firefighter."

The record reflects that Swartz had been made aware that A had a history of seizures, that he had been smoking marijuana at the time and A's parents suspected the person who A purchased the

marijuana from may have mixed it with other substances. In addition, A's father knew A to mix marijuana with Xanax. Additionally, Swartz believed he had established a rapport with Ms. S and A through his common experience with this stepson.

This record of evidence substantially supports the Commission's conclusion that the commentary was not "discourteous" or "insolent," but rather was "an honest effort to provide what [Swartz] perceived to be constructive feedback to the patient ...". *Attorney Gen. v. Sheriff of Worcester Cnty.*, 382 Mass. at 62. The court is bound to accept the Commission's findings. *City of Leominster v. Stratton*, 58 Mass. App. Ct. at 728 (reviewing court is bound to accept the commissioner's findings of fact if supported by the substantial evidence).

3. Swartz's Comments as Misconduct that Caused Harm

Similarly, the plaintiffs again dispute the Commission's factual findings, asking this court to find that Swartz's comments constituted "severe misconduct" that caused harm to Ms. S, A, and reflected badly on the BFD, warranting termination. This position largely boils down to a credibility determination, which the Town acknowledged in its Post Hearing Brief. (A.R. Vol. I, pg. 182).

While Ms. S stated in her letter that she was offended by the actions of the paramedic who assisted her son, and the BFD as a whole, the Commissioner found her testimony to the least credible of the relevant witnesses. Her allegations regarding the ambulance ride were solely based on hearsay from her son, and she misstated significant factual details about the call. For example, she accused Swartz of asking her "unconscious son" to "tell him where the pills were," however, Swartz was not the first to respond to the scene and it was in fact Deputy Chief Haden who asked a similar question. In addition, she provided conflicting factual accounts; in her email she claimed her son had "no pills," but the record indicates that he was taking anti-

seizure medication and a pill bottle was located in his room. In addition, she misidentified the paramedic who rendered aid and named, by first and last name, a paramedic who was not on scene. On the other hand, the Commission found Swartz's testimony to be competent and credible. In light of Ms. S's conflicting and inaccurate account of the facts, it was within the discretion of the Commission to credit Swartz's testimony. See *Police Dep't of Boston v. Kavaleski*, 463 Mass. at 689 (court is highly deferential to agency on questions of fact and reasonable inferences drawn therefrom). Therefore, the Commission's conclusion that Swartz's conduct was not sufficient to constitute conduct unbecoming a firefighter was supported by the substantial evidence. See *Attorney Gen. v. Sheriff of Worcester Cnty.*, 382 Mass. at 62.

B. Powers of the Commission Under G. L. c. 31, § 43 to Remand

The plaintiffs argue that the Commission erred by "rejecting all discipline rather than modifying the decision to some lesser discipline." (P. Mot. JOP, pg. 18). In its decision, the Commissioner stated,


"[t]he Commission 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 the Appellant to Ms. S at the hospital on January 28, 2018. Those comments did not, however, justify the termination of this long-time Bourne firefighter.

(Ex. A, pg. 25). In its conclusion, however, the Commission allowed the appeal without qualification, vacating the termination and reinstating Swartz 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 the decision.

Given the somewhat conflicting findings of the Commission with regard to appropriate discipline, the court concludes that the matter should be remanded to the Commission to determine appropriate disciplinary action, if any.

ORDER

For the foregoing reasons, the Town and BFD's motion for judgment on the pleadings is **DENIED**, and Swartz's motion for judgment on the pleadings is **ALLOWED**. The matter is **REMANDED** to the Commission for clarification regarding appropriate disciplinary action, if any.



Gregg J. Pasquale
Justice of the Superior Court

Dated: December 7, 2022