COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

BARRY THORNTON,
Appellant

v.

TOWN OF ANDOVER,
Respondent

D-08-135 (Section 42 Appeal)
D-08-195 (Section 43 Appeal)

Appellant's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION

The Appellant, Barry Thornton (hereinafter "Thornton" or "Appellant"), pursuant to G.L. c. 31, §§ 42 and 43, filed separate appeals with the Commission on June 6, 2008 and August 15, 2008, respectively, claiming that the Town of Andover (hereinafter "Town" or "Appointing Authority") did not have just cause (Section 43 appeal) to suspend him for four (4) days from the Fire Department, and that the Town failed to hold a timely hearing, provide him with a copy of Chapter 31, sections 41 through 45, provide proper

notice and that the Fire Chief lacked authority to suspend him (Section 42 appeal) regarding the disciplinary action.

The appeals were timely filed. It was agreed at an earlier pre-hearing conference that the two appeals would be joined for hearing. A hearing was held on January 27, 2009 at the offices of the Civil Service Commission (hereinafter "Commission"). As no written notice was received from either party, the hearing was declared private. The Appellant filed a motion to have the witnesses sequestered, which was allowed.

One (1) CD was made of the hearing and both parties subsequently submitted post-hearing briefs in the form of proposed decisions.

FINDINGS OF FACT:

Twenty (20) exhibits were entered into evidence. Based upon the documents entered into evidence and the testimony of:

For the Town of Andover:

- Reginald S. Stapczynski, Town Manager for Town of Andover;
- Thomas Agnew, Firefighter for the Town of Andover;
- Todd Richardson, Firefighter for the Town of Andover;
- Michael B. Mansfield, Fire Chief for the Town of Andover

For the Appellant:

- Joseph Maggliozzi, Police Officer for the Town of Andover;
- Barry Thornton, Fire Lieutenant for the Town of Andover, Appellant

I make the following findings of fact:

1. The Appellant, Barry Thornton, is a tenured civil service employee of the Town of Andover currently serving in the position of Fire Lieutenant within the Fire Department. He had been employed by the Town for approximately 20 years when he was suspended on May 29, 2008. (Testimony of Appellant and Exhibit 1)
2. The Fire Chief testified before the Commission that he is unaware of any prior disciplinary action that has been upheld against the Appellant. (Testimony of Chief Mansfield)
3. Reginald Stapczynski is the Town Manager for the Town of Andover and has held that position for the past nineteen (19) years. As Town Manager, Mr. Stapczynski is the Appointing Authority for the Town. (Testimony of Stapczynski)
4. Mr. Stapczynski testified that it was understood that the Fire Chief had the authority to suspend employees under him for up to five days, although this delegation of authority had never been put into written form. (Testimony of Stapczynski and Exhibit 9)
5. On May 3, 2008, the Appellant and his crew, which included firefighters Thomas Agnew and Todd Richardson, were dispatched at 10:07 A.M. on Engine One to respond to a report of an elderly gentleman who had fallen on the sidewalk. An ambulance from North Andover was already responding as the Andover ambulance was responding to another call. Firefighter Richardson was the driver and firefighter Agnew was the hydrant-man. (Testimony of Appellant and Exhibit 14)
6. Upon arrival, the crew was met by Andover police officer Joseph Maggliozzi, who had called dispatch over his radio to summons assistance after he observed that the

elderly gentleman who had fallen was bleeding from his nose and hand. He reported that the gentleman had gone into the building he fell in front of, as he was continuing on to his friend's office. Prior to the arrival of Engine One, Town Manager Stapczynski had been on the scene, and attempted to assist the man who fell. Officer Maggliozzi testified that Mr. Stapczynski appeared to know the man and that the man refused any treatment and insisted that he was fine. (Testimony of Maggliozzi)[1]

7. The Appellant and his crew went into the office building and up to the second floor carrying a medical jump bag, defibrillator and oxygen to try and locate the man who had fallen. After a search, the man was found in the office of his friend. (Testimony of Appellant, Agnew, Richardson and Exhibits 15, 16, and 17)
8. While firefighters Agnew and Richardson cleaned and bandaged the cut on the gentleman's hand, nose and knee, the Appellant was close by within the small office area. (Testimony of Appellant, Agnew and Richardson)
9. An ambulance had been dispatched to the scene from the North Andover Fire Department under mutual aid where the Andover ambulance was engaged. However, when the gentleman refused transport to the hospital for his cuts and bruises, Lieutenant Thornton canceled the ambulance. (Testimony of Appellant, Agnew and Richardson)
10. All medical calls are to be documented on a two-sided, multi-copy, ambulance report form which all members of the Department have been instructed to use when documenting medical responses. (Testimony of Mansfield, Agnew and Richardson

[1] During his testimony before the Commission, Mr. Stapczynski never disclosed that he had been at the scene of the incident where the elderly man was injured. Although he should have disclosed this information, I conclude that his presence that day, and his failure to disclose that information, did not affect

and Exhibit 19) One side of the form documents patient information and insurance information, as well as observations from examining the patient, along with a narrative statement. The back-side of the form, among other things, provides a place for signature when the patient refuses medical transport. (Exhibit 19)

11. The Department assesses a charge to patients evaluated by Department personnel whether or not they are transported to a medical facility which charge is then submitted to the patient's insurance carrier. Chief Mansfield issued a memorandum on November 26, 2007 to all Andover Fire Rescue personnel which provided in part that in order to obtain reimbursement from insurance companies for all EMS non-transport of patients in order to generate additional revenue, "Effective Sunday December 2, 2007 all individuals who are evaluated by Andover Fire Rescue personnel and not transported to a medical facility shall continue to have a medical release signed by the patient." (Testimony of Mansfield and Exhibit 1)
12. The information required by insurance carriers is to be documented on the ambulance report form along with the place for the patient's signature. (Exhibit 19)
13. A "citizen assist" involves a situation where no medical treatment is required, such as assisting an individual who has fallen from bed or needs to be placed in a chair or helped from a car into a house. In these cases, the Department does not assess a charge against the citizen. (Testimony of Agnew, Richardson and Mansfield)
14. When the gentleman involved in this incident refused an ambulance transport, firefighter Agnew, consistent with Department policy, wanted the patient to fill out a

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the outcome of this case, particularly in light of the fact that the Appellant has been provided with a de novo hearing before the Commission.

patient refusal form, but the Appellant, Lt. Thornton, told him, "no paperwork." (Testimony of Agnew)

15. Mr. Agnew was a good witness. He is a veteran employee of the Andover Fire Department and, like all witnesses that testified before the Commission on this matter, he takes his job seriously. His answers were thoughtful and he was careful not to overreach or offer testimony on any matter for which he did not have a clear recollection. He did not appear to have any ulterior motive for testifying against the Appellant. (Testimony, demeanor of Agnew)
16. As they were headed back towards the engine, Firefighter Agnew again asked about the paperwork. The Appellant acknowledged during his testimony before the Commission that he responded to firefighter Agnew by saying, "Fuck the Chief and his $200.", referring to the charge by the Town to persons for each response and patient refusal. The charge was actually $75, however, Thornton believed it to be $200. (Testimony of Appellant and Agnew and Exhibits 16)
17. Chief Mansfield testified that prior to the issuance of the four-day suspension, the Appellant denied making the above-referenced comment. (Testimony of Chief Mansfield)
18. Chief Mansfield was also a good witness. He is the consummate professional who appears to have a "no-nonsense" style of managing his department. His answers were thoughtful, straightforward and had the ring of truth to them. I credit his testimony. (Testimony, demeanor of Chief Mansfield)
19. The Appellant subsequently filled out a Fire Incident report which stated that the incident was a "citizen assist." The Appellant testified that he did not think the elderly

gentleman should be charged a fee for "some sterile water and gauze pads." (Testimony of Appellant, Agnew and Richardson and Exhibit 14)

20. Chief Mansfield testified that shortly after the May 3, 2008 incident, his office received a telephone call from a relative of the elderly gentleman that fell to thank the responding crew for their kindnesses to him. Chief Mansfield testified that he then went looking for a report of the incident to put a letter of recognition in the employees' personnel file, but was unable to locate an EMS/Patient Refusal Form that matched with the address. (Testimony of Mansfield)
21. After not locating an EMS/Patient Refusal Form for the May 3, 2008 incident, Chief Mansfield requested that the Appellant and firefighters Agnew and Richardson provide him with a written report as to what occurred. (Testimony of Mansfield and Exhibits 1, 15 – 18)
22. Firefighters Agnew and Richardson submitted written reports that included references to the Appellant's decision to not have the gentleman sign a patient refusal form. (Exhibits 15 and 16)
23. The Appellant's written report, as requested by Chief Mansfield, consisted of the following four terse sentences: "In regards to incident #2544, I do not have a direct recollection of that EMS call. According to my fire report, [a]n elderly man had fallen and cut his nose and hand. At some point I canceled North Andover the (sic) mutual aid ambulance. It also states on my narrative that it was a citizen assist." (Exhibit 17)
24. The May 29, 2008 notice of suspension to the Appellant stated in part, "Specifically, your actions/inactions on May 3, 2008 while responding to incident 2008-2544

violated Andover Fire Rescue Rules and Regulations including but not limited to the following:……" The letter goes on to list 18 specific regulations, the memorandum dated November 11, 2007 (actually dated November 26, 2007), a MA CMR regulation and a MA Department of Public Health Advisory dated September 27, 2002 which were violated. (Exhibit 1)

25. The suspension letter did not include sections 42 through 45 of Chapter 31 of the General Laws, but that did not prevent the Appellant from filing an appeal with the Town Manager. (Exhibits 1 and 8 and Testimony of Appellant)
26. A hearing before the Town Manager was held on June 12, 2008. (Exhibits 2 and 3)
27. Town Manager Stapczynski issued his decision on procedural issues raised by the Appellant on June 20, 2008 and denied any relief sought. (Exhibit 9)
28. On August 6, 2008, the Town Manager upheld the Appellant's four-day suspension. The Appellant did not testify at the local Appointing Authority hearing. The Town Manager's decision stated in part, "In that you provided no evidence or testimony to dispute the Department's case, for all of the reasons presented herein, I find that the four-day suspension issued by Chief Mansfield should be upheld." (Exhibit 13)
29. The Town Manager testified before the Commission that his decision to uphold the four-day suspension was based in part on another incident, for which the Appellant also received a four-day suspension for insubordination. The Appellant has elected to appeal that suspension through binding arbitration and a hearing on that matter is scheduled for April 2009. (Testimony of Stapczynski)
30. The Appellant served the suspension from 8:00 A.M. on June 22nd to 8:00 A.M. on June 23, 2008, 8:00 A.M. on June 28th to 8:00 A.M. on June 29, 2008, 8:00 A.M. on

June 30th to 8:00 A.M. on July 1, 2008, and 8:00 A.M. on July 6th to 8:00 A.M. on July 7, 2008. (Testimony of Appellant and Exhibits 1 and 11)

CONCLUSION

Section 42 Appeal

In regard to suspensions of five days or less, G.L. c. 31, § 41 states in relevant part:

> "A civil service employee may be suspended for just cause for a period of five days or less without a hearing prior to such suspension. Such suspension may be imposed only by the appointing authority or by a subordinate to whom the appointing authority has delegated authority to impose such suspensions, or by a chief of police or officer performing similar duties regardless of title, or by a subordinate to whom such chief or officer has delegated such authority. Within twenty-four hours after imposing a suspension under this paragraph, the person authorized to impose the suspension shall provide the person suspended with a copy of sections forty-one through forty-five and with a written notice stating the specific reason or reasons for the suspension and informing him that he may, within forty-eight hours after the receipt of such notice, file a written request for a hearing before the appointing authority on the question of whether there was just cause for the suspension. If such request is filed, he shall be given a hearing before the appointing authority or a hearing officer designated by the appointing authority within five days after receipt by the appointing authority of such request. Whenever such hearing is given, the appointing authority shall give the person suspended a written notice of his decision within seven days after the hearing."

G.L. c. 31, § 42 states in relevant part:

> "Any person who alleges that an appointing authority has failed to follow the requirements of section forty-one in taking action which has affected his employment or compensation may file a complaint with the commission. Such complaint must be filed within ten days, exclusive of Saturdays, Sundays, and legal holidays, after said action has been taken, or after such person first knew or had reason to know of said action, and shall set forth specifically in what manner the appointing authority has failed to follow such requirements. If the commission finds that the appointing authority has failed to follow said requirements <u>and that the rights of said person have been prejudiced</u> thereby, the commission shall order the appointing authority to restore said person to his employment immediately without loss of compensation or other rights." (emphasis added)

The Appellant has raised a series of procedural issues under Section 42 including that the Town allegedly failed to hold a timely hearing, provide him with a copy of Chapter

31, sections 41 through 45, provide proper notice and that the Fire Chief lacked authority to suspend him. In regard to the alleged 7-day delay in scheduling a local hearing and failing to include all sections of the civil service law in the initial suspension letter, the Appellant has failed to show how these errors prejudiced his rights. Moreover, the record shows that the Appellant was afforded notice, a local hearing before the Appointing Authority, an opportunity to respond and a *de novo* review before the Commission, in full satisfaction of his due process rights. See O'Neill v. Baker, 210 F.3d 41, 47 (1st Cir. 2000) (tenured civil service employees are "entitled to the constitutional minimum of some kind of hearing and some pretermination opportunity to respond" [internal quotation marks and citation omitted]).

Also in regard to procedural violations, the Appellant raises two issues in regard to the Fire Chief's authority to issue the suspension in question. First, the Appellant questions whether the Fire Chief has been delegated the authority by the Town Manager to issue suspensions of five days or less to members of the Fire Department. Based on the credible testimony of the Town Manager on this issue, I conclude that the Fire Chief has indeed been delegated such authority and may issue suspensions of five days or less to members of his Department. Second, the Appellant argues that given the actual number of work hours in the work day of a firefighter, the suspension is effectively greater than five days and thus could not be issued prior to a hearing before the Appointing Authority.

G.L. c.3 1, § 41 and related sections are silent as to the actual number of work hours in the work day of a civil service employee. Instead, the statute appears to speak to "calendar" work days, be it 8 hours or, in this case, more than 8 hours. See Baldasaro v. City of Cambridge, 10 MCSR 134, 137 (1997) Ouillette v. City of Cambridge, 19 MCSR

299, 303 (2006). In the instant appeal, the Appellant was suspended for four (4) work days and a hearing before the Appointing Authority was not required prior to the issuance of the suspension.

For all of the above reasons, the Appellant's Section 42 appeal under Docket No. D-08-135 is hereby ***dismissed***.

Section 43 Appeal

G.L. c. 31, § 43, provides:

> "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."

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214, 268 N.E.2d 346 (1971); Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427 (1928). The Commission determines justification 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, 684 N.E.2d 620, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514, 451 N.E.2d 408 (1983)

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36, 133 N.E.2d 489 (1956).

"The commission's task…is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether 'there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision'", which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006). See Watertown v. Arria, 16 Mass. App. Ct. 331, 334, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983) and cases cited.

Under Section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew." Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006) and cases cited. The role of the Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426

Mass. 1102, 687 N.E.2d 642 (1997). See also Leominster v. Stratton, 58 Mass. App. Ct. 726, 728, 792 N.E.2d 711, rev.den., 440 Mass. 1108, 799 N.E.2d 594 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, 721 N.E.2d 928, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass App.Ct. 473, 477, 648 N.E.2d 1312 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983).

There is little question that the Appellant's actions on May 3, 2008 violated the rules of the Andover Fire Department and the written directive of the Fire Chief. Clear guidelines required completion of the two-sided ambulance report form whenever medical treatment was provided by members of the Department, including the "patient refusal" section which is used to verify that the patient was offered, but refused transportation to a hospital. Based on the credible testimony of firefighter Agnew and partly on the testimony of the Appellant himself, I conclude that the Appellant violated this rule and the Fire Chief's written directive solely to ensure that the gentleman (or his insurance company) would not be assessed a fee for the services provided to him that day.

It is the function of the hearing officer to determine the credibility of the testimony presented before him. See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission, 401 Mass. 526, 529 (1988); Doherty v. Retirment Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Department of Social Services, 439 Mass. 766, 787 (2003); (In cases where live witnesses giving different versions do testify at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing); Connor v. Connor, 77 A. 2d. 697

(1951) (the opportunity to observe the demeanor and appearance of witnesses becomes the touchstone of credibility).

Further, the Appellant now acknowledges, despite his initial denial to the Fire Chief, that when a member of his crew sought to comply with this requirement, the Appellant stated "Fuck the Chief…and his fee".

It is understandable that the Appellant wanted to prevent the elderly gentleman in question from having to pay a fee for the services rendered and/or avoid the nuisance of ensuring payment from his insurance company. While the Appellant's actions may have been well-intended, they do not justify failure to comply with standard requirements, including the important task of completing the patient refusal section of the required form. This lack of documentation leaves the Town open to claims of mistreatment or lack of treatment. Similar liability may also arise by the lack of the signature of the patient indicating his refusing of medical transport. Further, it is highly inappropriate for a Fire Lieutenant to state, "Fuck the Chief…and his fee" when a member of his crew is trying to comply with the very requirements that the Appellant ignored in this case. For all of these reasons, I find that the Town has shown, by a preponderance of the evidence, that there was just cause to discipline the Appellant for his misconduct.

Having determined that it was appropriate to discipline the Appellant, the Commission must determine if the Town was justified in the level of discipline imposed, which, in this case, was a 4-day suspension.

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, 857 N.E.2d 1053, 1059 (2006) and cases cited. Even if there are past instances where other employees received more lenient sanctions for similar misconduct, however, the Commission is not charged with a duty to fine-tune employees' suspensions to ensure perfect uniformity. See Boston Police Dep't v. Collins, 48 Mass. App. Ct. 408, 412 (2000).

"The 'power accorded the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded the appointing authority.' " Town of Falmouth v. Civil Service Comm'n, 61 Mass. App. Ct. 796, 800 (2004) quoting Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 600 (1996). Unless the Commission's findings of fact differ significantly from those reported by the appointing authority or interpret the relevant law in a substantially different way, the commission is not free to "substitute its judgment" for that of the appointing authority, and "cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation" E.g., Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006).

I conclude that a modification of the penalty imposed here is warranted for the following reasons. First, the Town overreached and "piled on" by charging the Appellant with violating eighteen (18) separate rules of the Andover Fire Department for this isolated incident. Second, the Town Manager acknowledged that another matter, currently under review by an arbitrator, factored into his decision to uphold the four-day suspension of this 20-year employee who has no record on any other prior discipline. For

these reasons, the Appellant's appeal under Docket No. D-08-195 is hereby ***allowed in part.*** The four-day suspension is reduced to a 2-day suspension.

Civil Service Commission

_____
Christopher C. Bowman, Chairman

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman – Yes; Henderson, Commissioner – No; Marquis, Commissioner – Yes; Stein, Commissioner – Yes; and Taylor, Commissioner - No) on April 9, 2009.[2]
A true record. Attest:

_____
Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice:
William D. Cox, Jr. (for Appellant)
Michael Gilman, Esq. (for Appointing Authority)

[2] Dissent of minority attached.

Dissenting opinion of Commissioners Henderson and Taylor:

Conclusion:

The Appellant here, a Fire Lieutenant under the totality of the circumstances, handled the situation that he was dispatched to, on May 3, 2008, in a reasonable and appropriate manner. He was there to serve the public and in that role seemed to properly appraise and address the situation; that being the medical needs and personal wishes of the elderly man who had fallen. His behavior and spontaneous decision-making should not now, be second-guessed, absent sufficient reliable evidence that he acted improperly or without reasonable justification, under the circumstances which he personally observed and determined.

The Commission determines justification 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." Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Committee of Brockton v. Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997). That was clearly not the case here. Actually, the contrary was true. Fire Chief Mansfield had subsequently received a telephone call from a relative of the elderly man who had fallen, commending the Appellant and the other two firefighters for the kind and considerate service that they had provided to the elderly man. "Chief Mansfield testified that he then went looking for a report of the incident to put a *letter of recognition* in the employees' personnel file, but was unable to locate an EMS/Patient Refusal Form that matched with the address." (Finding of Fact 20).

After not locating an EMS/Patient Refusal Form for the May 3, 2008 incident, Chief Mansfield requested that the Appellant and the other two firefighters provide him with a written report as to what occurred. (Finding of Fact 21). However the Appellant did fill out a Fire Incident Report, (Exhibit 14) which stated that the call was a "citizen assist call". A "citizen assist" involves as a matter of practice in the Department, a non-medical call, in which an individual has fallen from a bed or chair or needs help from a car into a house. The Fire Department does not assess a monetary charge against the citizen for this type of call. (Finding of Fact 13) However, the Fire Department does attempt to extract a monetary charge from the citizen for what it may subjectively determine to be a medical call, even if the person is not transported to a "medical facility".

This attempted monetary charge is made pursuant to a memorandum by Chief Mansfield dated November 26, 2007. That Memorandum states "in part that in order to obtain reimbursement from insurance companies for all EMS non-transport of patients in order to generate additional revenue, "effective Sunday December 2, 2007 all individuals who are evaluated by Andover Fire Rescue personnel and not transported to a medical facility shall continue to have a medical release signed by the patient". (Finding of Fact 11) This memo clearly states the Chief's purpose of generating revenue yet it also employs *the subjective terms of*: *patient, medical facility and evaluates.* A patient is not such until he or she is transported to and treated by an M.D. at a medical facility. The elderly man did not meet these qualifications since he adamantly and repeatedly refused to be transported to a medical facility. It is therefore assumed that he subjectively determined that he was not a medical patient or a potential medical patient. The others present at the scene: the

Appellant, the two firefighters, the Andover police officer and the elderly man's friend apparently concurred with this self-assessment, since he was not transported to a medical facility.

This also raises the unanswered question of whether the elderly man could have forced against his will to be transported to a medical facility and if so could he be forced to pay for the transport and medical facility fees? The memo clearly states the desired goal of having all individuals who are evaluated by Andover Fire Rescue personnel and not transported to a medical facility "shall continue to have a medical release signed by the patient". However, it does not explain, as a practical matter, how that goal is to be achieved, especially as here, the person is adamantly and repeatedly refusing to be transported.

The Appellant is being disciplined here for his alleged failure to procure a completed and signed EMS/Patient Refusal Form, (Exhibit 19), contrary to the Chief's memo. However, the EMS/Patient Refusal Form is only part of that document. This document, in its entirety is not a benign or inconsequential document. It requires detailed personal information on the targeted person, (elderly man) to be completed. It also appears to be a binding legal contract with severe financial and other consequence, (18% interest attorney fees , court and collection costs) Some subsections of this form are titled as follows: Medicare Authorizes Signature, Patient Release/Fiduciary Responsibility, HIPPA Notification and Notice To Medicare Beneficiary. No person would be reasonably expected to read and understand this document, without sound reflection and

the advice of an attorney. The mere sight of it would likely frighten or confuse an elderly person, especially under these circumstances. The relevant and material consequence of signing the EMS/Patient Refusal Form is completely omitted from the form; that is the $75.00 fee for signing it. Therefore the elderly man would not have received written notice that he would later be sent a bill for $75.00 from the Fire Department. This omission of notice could reasonably be determined to be deceptive or fraudulent. This omission or lack of notice is due directly to Chief Mansfield's negligence. Chief Mansfield issued the memorandum-directive on the EMS/Patient Refusal Form and the $75.00 fee for signing it yet failed to modify the form to include the written notice of the $75.00 fee.

This was not the only omission or error on the part of Chief Mansfield. He also failed to schedule and hold a timely disciplinary hearing pursuant to G.L. c. 31 sec 41 and failed to provide the Appellant, as statutorily required with copies of G.L. c. 31 sec 42-45 in a timely fashion. It is noted for contrast, that Chief Mansfield committed his statutory violations after weeks of consideration and preparation; yet the Appellant was charged with numerous rules violations for a single judgment call at the scene of a dispatch.

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, 857 N.E.2d 1053, 1059 (2006) and cases cited. The Appellant Thornton is a twenty (20) year veteran of the Department without any record of prior discipline. Chief Mansfield had

been with the Department a brief fifteen months prior to this disciplinary incident. The other two firemen who accompanied the Appellant to the call also did not file an EMS/Patient Refusal Form for this call. One of those responding firefighters also inquired of two other Department Lieutenants as to whether he should file an EMS/Patient Refusal Form and was told not to bother filing one. Those two firefighters and the two Lieutenants were not disciplined by Chief Mansfield for their similar acts or omissions. The failure to charge those others for similar violations is disparate treatment Chief Mansfield exhibited some bias toward the Appellant by overcharging him with 18 separate rules violations for this single act of omission. The imposed discipline of suspension for four (4) days of shifts without pay, or the equivalent of ninety-six (96) hours and is clearly excessive under the circumstances of this case. This seems especially severe since the Appellant had no other prior discipline. It is clearly contrary to the principles of progressive discipline.

The Appellant under the circumstances here seems to have exercised good judgment and discretion in keeping the Department practice of filing a “Fire Incident Report” and designating the call as a “citizen assist” so that the elderly man would not be charged a $75.00 fee for refusing transportation to a medical facility. This is essentially a $75.00 fee case. The Appellant filed a form report which did not call for the elderly man to be charged a $75.00 fee for his refusal signature.

The Appellant should at the most have received only a verbal warning or reprimand but he should also have received the letter or recognition in his personnel file, which Chief

Mansfield originally intended to do. Instead, he was charged and disciplined for multiple rule violations, which under these circumstances seem inappropriate and certainly unjust.

For all of the above stated reasons we would allow the Appellant's appeal and order him to be returned to his position, without any loss of pay or other benefits.

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Daniel M. Henderson,
Commissioner

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John E. Taylor,
Commissioner

April 9, 2009