

**COMMONWEALTH OF MASSACHUSETTS**

**CIVIL SERVICE COMMISSION**

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

THOMAS UNDERWOOD,  
*Appellant*

v.

D-17-082

CITY OF LOWELL,  
*Respondent*

Appearance for Appellant:

Thomas Underwood, *Pro Se*

Appearance for Respondent:

Hannah Pappenheim, Esq.  
Assistant City Solicitor  
City of Lowell  
375 Merrimack Street  
Lowell, MA 01852

Commissioner:

Cynthia A. Ittleman

**DECISION**

The Appellant, Thomas Underwood (hereinafter "Mr. Underwood" or "Appellant"), filed a timely appeal with the Civil Service Commission (hereinafter "Commission") on April 26, 2017, under G.L. c. 31, s. 43, appealing the decision of the City of Lowell ("City") to discipline him by suspending him for five (5) days. A prehearing conference was held in this case on May 8, 2017 at the Mercier Community Center in Lowell. A full hearing was held on the appeal on June 26, 2017 at the same location.<sup>1</sup> The hearing was digitally recorded and copies of the recording were sent to the parties.<sup>2</sup> All witnesses, with the exception of the Appellant, were

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<sup>1</sup>The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR ss. 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31 or any Commission rules taking precedence.

<sup>2</sup>If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the

sequestered. For the reasons stated herein, the appeal is denied.

**FINDINGS OF FACT:**

Eleven (11) Exhibits were entered into evidence at the hearing. At the hearing, I ordered the parties to produce other documents post-hearing, including certain disciplinary actions taken against other members of the Lowell Fire Department. I received the post-hearing documents and the parties submitted written comments thereon. The post-hearing documents were admitted and are given the weight they are due based on the parties' comments.<sup>3</sup> Based on the exhibits and the testimony of the following witnesses:

*Called by the Appointing Authority:*

- Rodney Panneton, Deputy Chief ("Dep. Chief"), Lowell Fire Department (LFD)
- Mark McGuane, Dep. Chief, LFD
- Robert Beane, Captain (Capt.), LFD
- Jeffrey Winward, Chief, LFD

*Called by the Appellant:*

- Thomas Underwood (Appellant)

and taking administrative notice of all matters filed in the case; stipulations; pertinent statutes, case law, regulations, rules, and policies; and reasonable inferences from the credible evidence; a preponderance of the evidence establishes the following facts:

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substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

<sup>3</sup>The exhibits entered into the record at the hearing include Respondent's Exhibits (R.Ex.) 1 through 8 and Appellant's Exhibits (A.Ex.) 1 through 3. In response to my order at the hearing, the parties also produced information regarding four (4) post-hearing disciplinary actions taken against other members of the Lowell Fire Department, a doctor's note explaining Dep. Panneton's limited speaking ability at the hearing, additional excerpts of the CBA, and daily manning reports for three (3) days in February 2017. The documents produced post-hearing are marked and entered into the record as Post-Hearing Documents and will be given the weight they are due based on other evidence in the record, the reliability of the post-hearing documents, and the parties' written comments on the post-hearing documents.

1. The Appellant is a Lieutenant in the LFD with approximately twenty (20) years of experience at the Department. He also served many years in the active military, where he was a First Sergeant. In 2016, the Appellant received a verbal warning from Capt. Beane that became a written warning; the warning stated that the Appellant was to wear a full uniform while responding to a call and not to release a member of the LFD under certain circumstances, referring the Appellant to an applicable standard operating procedure. (Testimony of Appellant)
2. On March 12, 2017, the Appellant was scheduled to work two (2) shifts, the day shift and the night shift, for a total of twenty-four (24) hours at Engine 7. (Testimony of Panneton)
3. Chief Winward has authorized Dep. Chief Panneton to use his discretion to assign members of the LFD in the interests of the City. (Testimony of Panneton) When Dep. Chief Panneton arrived for the day shift on March 12, he decided to close Engine 7 because it had a mechanical problem. (Testimony of Panneton; Respondent's Exhibit (R.Ex.) 3)
4. As a result of Dep. Chief Panneton's decision, the Appellant was reassigned to the back step of Ladder 2 for the day shift. (Testimony of Panneton; R.Exs. 2 and 3)
5. When the Appellant learned of his reassignment, he called Dep. Chief Panneton to object to it. (Testimony of Panneton; R.Ex. 3)
6. Dep. Chief Panneton told the Appellant that he could perform his reassignment or go home without pay. (Testimony of Panneton; R.Ex. 3) The Appellant went home without pay. (Id.)
7. The failure to perform an assignment constitutes abandoning the job without leave and disobeying an order. (Testimony of Winward)

8. On the “manning” level report for March 12, 2017, the Appellant was marked “AWD” or absent without leave, day shift. (R.Ex. 2; Testimony of Winward)
9. If the Appellant performed his assignment on the back step of Ladder 2, he would have been paid his normal Lieutenant rate of pay, plus \$2.00 extra per hour for the shift. (Testimony of Winward; R.Ex. 4)
10. The Appellant was also scheduled to work the night shift on Engine 7 on March 12, 2017. (Testimony of Panneton) As in the morning shift, Dep. Chief Panneton closed Engine 7 and reassigned the Appellant to the back step of Ladder 2.
11. Again the Appellant called Dep. Chief Panneton, objecting to his reassignment. Dep. Chief Panneton again informed the Appellant that he was assigned to Ladder 2. In response, the Appellant told Dep. Chief Panneton that he was feeling sick. Dep. Chief Panneton informed the Appellant that a request for sick leave would be denied. (Testimony of Panneton; R.Ex. 3)
12. The Appellant also called Dep. Chief McGuane to ask if he would change Dep. Chief Panneton’s reassignment of the Appellant to Ladder 2. Dep. Chief McGuane declined the Appellant’s request and told him to perform the reassignment on the night shift or go home without pay. (Testimony of McGuane; R.Ex. 3) In an email message written later on March 12, 2017, Dep. Chief McGuane wrote that when the Appellant asked him to change Dep. Chief Panneton’s reassignment, he (Dep. Chief McGuane) “told him I would not and his options were to stay on the back step of Ladder Two or go home AWOL. He chose to go home AWOL.” (R.Ex. 3)

13. The Appellant went home and the manning level report for that night indicates that he was marked “AWN”, absent without leave, night shift. (Testimony of Winward; R.Ex. 1).
14. Because of the Appellant’s failure to perform his reassignment, Capt. Beane had to replace him with another member of the LFD on overtime. (Testimony of Beane)
15. Chief Winward, Dep. Chief McGuane and Dep. Chief Panneton have been assigned to ride the back step of a truck as a Lieutenant. (Testimony of Winward, McGuane and Panneton)
16. In deciding what discipline to issue to the Appellant for twice failing to perform an assignment on March 12, 2017, Chief Winward considered the Appellant’s conduct on the two (2) shifts, as well as discipline issued in other instances for disobeying orders. (Testimony of Winward)
17. By memo dated March 24, 2017 delivered to the Appellant in hand, Chief Winward informed the Appellant that he was suspended for five (5) days, attaching copies of G.L. c. 31, ss. 41-45. The memo states, in part,

... Refusing the orders of a Deputy Chief, going home on A.W.O.L. when you do not agree with those orders, and asking another Deputy Chief to change those orders because you do not agree with them are completely unacceptable behavior. This type of behavior is insubordinate, and constitutes conduct unbecoming a fire officer. You put the citizens of Lowell and the firefighters of the [LFD] at risk by abandoning your post while Captain Beane had to hire someone in your place and wait for him to come to work. ...

(R.Ex. 5)
18. By letter dated March 28, 2017 from the Appellant to City Manager Kevin Murphy, the Appellant requested a hearing regarding his suspension. (R.Ex. 6)

19. On March 29, 2017, the Appellant was handed a letter from City Manager Kevin Murphy providing notice that a discipline hearing would be held on April 4, 2017 at 10:00a.m. regarding the five (5)-day suspension. (R.Ex. 7)
20. City Manager Murphy conducted the local discipline hearing on April 4, 2017, at which the Appellant testified. Mr. Murphy issued his findings and conclusions on April 10, 2017, stating that the Appellant had “disobeyed two orders of a superior and engaged in conduct unbecoming of a Fire Officer ...” and that Chief Winward had just cause to suspend the Appellant for five (5) days. (R.Ex. 8) The City Manager’s decision was hand delivered to the Appellant’s house on April 12, 2017. (Id.)
21. The Appellant timely filed the instant appeal on April 26, 2017. (Administrative Notice)

*Discipline of Other Members of the LFD*

22. In 2012, a prior LFD Chief issued a five (5)-day suspension for “disobeying a direct order from a superior officer”. (Post-Hearing Documents) The Respondent states that the employee had no prior discipline since 1998. (Email from Respondent to Commission and Appellant, July 10, 2017, 12:06 p.m.)
23. In 2014, a prior LFD Chief issued a twenty-four (24)-hour suspension for “disobeying a direct order from the Senior Fire Captain and for conduct unbecoming a Fire Officer” during a building fire. (Post-Hearing Documents) The Respondent states that the employee had no prior discipline. (Email from Respondent to Commission and Appellant, July 10, 2017, 12:06 p.m.)
24. In 2016, Chief Winward issued a twenty-four (24)-hour suspension for “disobeying an order of a Superior Officer; and conduct unbecoming a member of the [LFD]” after the employee argued with another member of the LFD and shoved him, and, when a superior

officer directed the employee to go to another part of the station, the employee did not comply until the superior officer repeated the order. (Post-Hearing Documents) The Respondent states that the employee previously had been issued warnings and a suspension for sick leave use. (Email from Respondent to Commission and Appellant, July 10, 2017, 12:06 p.m.)

25. In early 2017, Chief Winward issued a five (5)-day suspension to an employee for refusing a Superior Officer's order to shave, having been ordered to shave on another occasion. The suspension was reduced to a twenty-four (24)-hour suspension. (Post-Hearing Documents) The Respondent states that the employee previously had been issued written warnings about sick leave use. (Email from Respondent to Commission and Appellant, July 10, 2017, 12:06 p.m.)

#### *Applicable Law*

A tenured civil service employee may be disciplined for "just cause" after due notice and hearing upon written decision "which shall state fully and specifically the reasons therefore." G.L. c. 31, s. 41. A person aggrieved by a decision of an appointing authority made pursuant to G.L. c. 31, s. 41 may appeal to the Commission under G.L. c. 31, s. 43.

On appeal to the Commission, under G.L. c. 31, s. 43, the Commission makes a de novo review "for the purpose of finding the facts anew." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (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." City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, *rev.den.*, 426 Mass. 1102 (1997). *See also* City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, *rev.den.*, 440 Mass. 1108 (2003); Police

Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, *rev.den.*, 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass.App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, *rev.den.*, 390 Mass. 1102 (1983).

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., 359 Mass. 211, 214 (1971); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, *rev.den.*, 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (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, *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.

G.L. c. 31, section 43 also vests the Commission with some discretion to affirm, vacate or modify the discipline imposed by an appointing authority, although that discretion is "not without bounds" and requires sound and reasoned explanation for doing so. *See* Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 600 (1996) and cases cited. ("The power accorded to 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") "[T]he power to



modify is at its core the authority . . . to temper, balance, and amend. The power to modify penalties permits the furtherance of uniformity and equitable treatment of similarly situated individuals.” *Id.* (emphasis added). *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*

The Respondent has established, by a preponderance of the evidence, that it had just cause to discipline the Appellant. Twice in one day, on two (2) different shifts, the Appellant refused to perform as he was reassigned, and went home instead. The Appellant makes a number of arguments asserting that there was no just cause to discipline him and that, even if just cause was established, the discipline should be reduced because other members of the LFD who were alleged to have disobeyed orders received less discipline. Specifically, the Appellant avers that he was given a choice whether or not to work, that other members of the LFD had gone home without pay and were not alleged to have been AWOL, and no one specifically told him that going home without pay would constitute being AWOL, that the reassignments were a demotion, and that a different reassignment could have been arranged so that, as a superior officer, he did not have to be assigned to the back step of a truck during his reassignment.

The Appellant’s arguments are unpersuasive. First, Dep. Chief Panneton is authorized by Chief Winward to make staffing reassignments in the interest of the City as appropriate. That he may have been able to make alternate reassignments to avoid assigning the Appellant to the back step of Ladder 2 does not free the Appellant from his obligation to work where assigned. Dep. Chief Panneton testified that Engine 7, to which the Appellant and others had been assigned initially, had mechanical problems. As a result, he reassigned the members of the LFD, including the Appellant, elsewhere. If members of the LFD, or of any other fire department,

were to choose to go home rather than work as they are assigned, the effectiveness of the Department would be jeopardized.

The Appellant avers that as a long-term member of the LFD with many years in active military duty, he knows what an order is and asserts that Dep. Panneton's repeated instruction to work where he was reassigned did not constitute an order. I find that the reassignment was an order, not a choice or a request, that the Appellant refused to obey the order, and that the Appellant's refusal to obey the order constituted insubordination. Dep. Panneton had to repeatedly tell the Appellant to work where he was reassigned or go home without pay. Having refused to work when he was reassigned, the Appellant cannot complain of the results. There is no evidence in the record that the Respondent is barred from interpreting an employee's refusal to work as being AWOL. That the Appellant may not have been expressly informed that going home could be interpreted as being AWOL does not preclude the City from making such a determination. The Appellant was afforded notice of the allegations against him and an opportunity to be heard at which he presented evidence, the hearing was held, the hearing officer issued his findings and conclusions, and the Appellant was able to appeal the local decision to the Commission.

The effect of the Appellant's disobeying of an order is not the sole reason for the Respondent's decision to discipline the Appellant. In addition to arguing with Dep. Chief Panneton about his reassignment, the Appellant called another superior officer in an attempt to work around Dep. Chief Panneton and his reassignment order. Moreover, the Appellant did so on two (2) different shifts, requiring the LFD to engage another member of the Department to work overtime. The Appellant's actions undermine the authority of the chain of command and constitute conduct unbecoming of an officer. The Appellant's insubordination and conduct

unbecoming an officer constitutes substantial misconduct which adversely affects the public interest by impairing the efficiency of public service.

The Appellant's reassignments did not constitute a demotion. The Appellant's title was not altered when he was reassigned to the back step of Ladder 2. The superior officers who testified at the Commission hearing indicated that when they had been Lieutenants like the Appellant, they too had been assigned, on occasion, to the back step of a fire truck. Further, the Appellant's reassignment did not involve reduced pay. In fact, had the Appellant worked as reassigned, he would have been paid his usual salary and earned an additional amount pursuant to the applicable provisions of the collective bargaining agreement.

The Appellant avers that his five (5)-day suspension constitutes disparate treatment. Having reviewed the four (4) examples of similar discipline issued to members of the LFD, I find that the Appellant's suspension is not disproportionate. A member of the Department with no prior discipline received a five (5)-day suspension for disobeying a direct order. The Appellant's conduct here is worse. Specifically, the Appellant repeatedly refused to obey the order of his reassignment on two (2) different shifts and, further, he asked Dep. Chief McGuane to un-do the reassignment by Dep. Chief Panneton. The Appellant's misconduct does not compare to an employee suspended for twenty-four (24) hours for refusing an order to shave. The other disciplinary examples provided by the Respondent appear to involve a single incident, while there were two (2) separate instances in this case and, while the other disciplines involve disobeying an order, as the Appellant did here, they do not appear to involve allegations of conduct unbecoming an officer. Further, having reached substantially the same findings as the City, modification of the five (5)-day suspension is unwarranted.

*Conclusion*

Accordingly, for the above stated reasons, the discipline appeal of Mr. Underwood, Docket No. D-17-082, is hereby *denied*.

Civil Service Commission

*/s/Cynthia A. Ittleman*

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Cynthia A. Ittleman, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 6, 2019.

Either party may file a motion for reconsideration within ten days of the receipt of the Commission's decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), 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. 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 to:  
Thomas Underwood (Appellant)  
Hannah Pappenheim, Esq. (for Respondent)