COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

KELLY VINARD,
Appellant
v.
TOWN OF CANTON,
Respondent

D1-14-45

Appearance for Appellant:

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Appearance for Respondent:

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Commissioner:

Paul M. Stein

DECISION

The Appellant, Kelly Vinard, appealed to the Civil Service Commission (Commission), pursuant to G.L.c.31,§43, from her termination by the Town of Canton (Canton) as a Firefighter with the Canton Fire Department (CFD)[1]. A pre-hearing conference was held on March 11, 2014, and a full hearing on June 3, 2014 and August 26, 2014, at the Commission's offices in Boston. Thirty-two exhibits were marked in evidence (Exhs.1 through 31 & 35) and three documents marked for identification (Exhs. 32ID, 33ID, 34ID). The hearing was digitally recorded and copies provided to the parties.[2] The Commission received Proposed Decisions from the parties on February 15, 2015.

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

[2] 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 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.

INDINGS OF FACT

Based on the exhibits entered into evidence, the testimony of the following witnesses:

Called by the Appointing Authority:

- Charles E. Doody, CFD Fire Chief
- Andrew Geller, M.D.

Called by the Appellant:

- Kelly Vinard, Appellant

and inferences reasonably drawn from the evidence as I find credible, I make the findings of fact set forth below:

Background Information

1. The Appellant, Kelly Vinard, was employed as a Firefighter with the CFD from 2002 until her termination in February 2014 giving rise to this appeal. Ms. Vinard is also a registered nurse, and EMT/Paramedic. (*Exhs. 4 & 16; Testimony of Appellant*)

2. Charles E. Doody is a 20-year veteran of the CFD. He became Fire Chief in 2009 and serves as the civil service appointing authority for CFD personnel. (*Testimony of Chief Doody*)

3. Ms. Vinard, and all other CFD fire service personnel (excluding the Fire Chief and Deputy Chief), are members of a public bargaining unit known as the Canton Firefighters Association, Local 1580, International Association of Firefighters, AFL-CIO, which entered into a Collective Bargaining Agreement (CBA) with Canton effective from June 1, 2012 through June 30, 2015 (or until a new agreement is negotiated). The CBA includes, among other provisions, agreements covering Disability and Line of Duty Injuries (Article XV), Non-Occupational Sick Leave (Article XVI), Leaves of Absence (Article XVIII), Management Rights Clause (Article XXI), Grievance Procedure (Article XXIV), Sick Bank (Article XXVIII) and Limited Duty (Article XXXI). Article XXX of the CBA expressly provides that all members of the bargaining unit "shall retain his Civil

Service rights as determined in accordance with Chapter 31 of the General Laws of Massachusetts." (*Exh. 1*)

4. Ms. Vinard was CFD's only female firefighter out of approximately 50 members of the CFD. The one other female firefighter employed by the CFD resigned in 2005 after 16-months of service with CFD to work for the Ashburnham Fire Department, her home town. CFD had never had a female Lieutenant. (*Exh. 25; Testimony of Chief Doody*)

5. In 2010, Ms. Vinard applied for the position of the CFD's EMS Coordinator. In the August 5, 2010 letter notifying her that she had not been chosen, Chief Doody commended her for her "efforts in coordinating the ALS refresher training for our paramedics" and stated that "your contribution to our department has not gone unnoticed by me or your colleagues." (*Exh. 23; Testimony of Appellant & Chief Doody*)

6. In November 2010, Ms. Vinard took and passed the promotional examination for Fire Lieutenant. Her name appeared below one other CFD firefighter (Brian Marshall) on the CFD Lieutenant's Eligible List established in May 2011. (*Testimony of Chief Doody & Appellant*)

7. On April 12, 2013, Chief Doody submitted a letter of recommendation to Boston Medflight in support of Ms. Vinard's participation in the Ride-Along Program, which involved shadowing a medical helicopter crew on an emergency transport mission. Chief Doody called Ms. Vinard "one of our most skilled paramedics" who "has always sought to improve her skills and knowledge as evidenced by her most recent achievement of becoming a nurse." (*Exh. 24*)

8. Prior to the events giving rise to the present appeal, Ms. Vinard's only discipline was a written warning issued by Deputy Chief Scott Johnson in November 2012, due to a "paperwork infraction" in handling a computer malfunction that caused delay in printing a "Patient Care Report" for a recent ambulance run. (*Exh. 17; Testimony of Chief Doody & Appellant*)

The May 2013 Discipline

9. On May 15, 2013, Ms. Vinard was assigned to the CFD "A1" ambulance with another EMT. Although protocol prescribes that an ambulance that is staffed by one Paramedic is authorized to operate at a BLS (Basic Life Support) Level, Ms. Vinard had been given ALS (Advanced Life Support) Equipment that day to carry with her on the ambulance.[3] On two occasions during her shift, Ms. Vinard used the ALS Equipment to do an EKG, insert an IV and administer medication. She did this without seeking to have a second Paramedic dispatched to the scene. (*Exh. 18; Testimony of Appellant & Chief Doody*)

10. On May 19, 2013, the CFD EMS Coordinator e-mailed Andrew Geller, MD, to inform him of these two incidents and seek advice as to whether "any mandated reporting" [to the State Office of Emergency Management Services [OEMS]) was necessary and sought his "recommendations on dealing with this." (*Exh. 33ID*)

11. Dr. Geller is a physician with over thirty years' experience who specializes in emergency medicine at Norwood Hospital. He has been deeply involved in paramedic services over his career. Municipal paramedics work through an "authorization" under Dr. Geller's medical license and he oversees the ALS operations for Canton and six other municipalities for which he serves as the Medical Director. (*Testimony of Chief Doody & Dr. Geller*)

12. Dr. Geller's reply came back: "This is as you know a clear cut violation . . . Talk with Kelly . . . and make it clear this is a violation." (*Exh. 33ID*)

13. On May 31, 2013, based on reports filed by Deputy Chief Johnson and EMS Coordinator Meier, Chief Doody imposed a 24-hour suspension for having "performed paramedic level skills

[3] The difference between BLS and ALS levels involve the degree of medical intervention associated with the treatment and only a Paramedic can perform at the ALS level, which permits IVs and medication. I infer that, in Canton, as is often the case, both an ambulance and a fire apparatus respond to emergency medical calls and, for whatever reason, the engine (which is often the first on scene) typically carries the ALS Equipment. (*Testimony of Chief Doody & Dr. Geller*)

while assigned to the BLS ambulance" in violation of state treatment protocols 150 CMR 170.305 without "reasonable explanation as to why you violated these standard treatment protocols." He believed he could have reported the incident to OEMS and initiate steps to "pull her license", but elected not to do it. Upon notice of the suspension, Ms. Vinard went home sick and also called in sick the following day. (*Exh. 18; Testimony of Chief Doody & Appellant*)

14. Ms. Vinard did not appeal the discipline. The investigation reports are marked for identification but the merits of the alleged misconduct are not now before the Commission and I make no findings as to them. I note, however, that there was no dispute that Ms. Vinard was a "good paramedic" who "treated the patient appropriately" and "[t]here was no bad outcome". I also take notice that the protocol cited by Chief Doody does allow for an exception to the "two paramedic" staffing rule under certain conditions and requires a second Paramedic to be dispatched "if the EMTs determine appropriate care of the patient's medical condition and needs require a second Paramedic", but Chief Doody believed this exception did not apply to the CFD. According to Dr. Geller, the "philosophy" in Region 4 (Greater Boston) prefers the "two Paramedic" rule as compared to less populated areas of the state. (*Exhs.26 [150 CMR 170.305(C)(2) & (C)(2)(c)]; Exhs. 32ID through 34ID; Testimony of Chief Doody & Dr. Geller*)[4]

The 2013/2014 Lieutenant's Promotion

15. No CFD firefighter took the November 2011 Fire Lieutenant's examination, and all three firefighters who took the November 2012 Fire Lieutenant's examination failed. Ms. Vinard did not take the 2011 or 2012 examinations. The May 2011 eligible list continued to remain active for the full two years that a list typically remains in effect. (*Testimony of Chief Doody & Appellant; Administrative Notice [Colloquy: Hearing Day II]*)

[4] Ms. Vinard claimed that she was close to the hospital when she provided the ALS level care and calling for another paramedic would not have had any value to the patient.. (*Exh.32ID; Testimony of Appellant & Chief Doody*)

16. Pursuant to a generally distributed memorandum from the Massachusetts Human Resources Division (HRD), dated March 15, 2013 to Massachusetts Fire Chiefs, Chief Doody was advised that the May 2011 Eligible List for CFD Fire Lieutenant, typically due to expire in May 2013, would be further extended automatically and would continue in effect, at least through November 1, 2013. (*Exh. 31; Testimony of Chief Doody & Appellant*)

17. As a result, because the other firefighter who was first on the list had been promoted to Lieutenant, Ms. Vinard was the only firefighter whose name appeared on the May 2011 Eligible List for promotion to CFD Fire Lieutenant. At this time, there was at least one known vacancy anticipated to arise due to the mandatory retirement of a CFD Lieutenant on or before the end of June 2013. (*Exh. 16*; *Testimony of Appellant & Chief Doody*)

18. Chief Doody asked Ms. Vinard if she really wanted the job of Lieutenant and suggested she go home and think about it carefully. (Ms. Vinard was then in a romantic relationship with another CFD Lieutenant, since retired on disability, whom she married in January 2014.) She told Chief Doody that she definitely wanted to be promoted. Thereafter, Ms. Vinard was interviewed by a panel including Chief Doody, Deputy Chief Johnson and Lieutenant Marshall (the person who had been ahead of her on the May 2011 list and since been promoted). After the interview, Chief Doody said "Good job." (*Testimony of Appellant*)

19. For a period of a year or more prior to June 2013, Ms. Vinard had become uncomfortable with her work environment and also was having some "personal issues" (she was going through a divorce) and was "short of cash". Ms. Vinard told Chief Doody of her experiencing hostility from the Deputy Chief and had been taking medication for anxiety, but otherwise did not pursue a grievance or file a complaint with the CFD under the Canton workplace violence and sexual harassment policies. (*Exh. 27; Testimony of Appellant & Chief Doody*)

20. On June 19, 2013, Ms. Vinard asked Chief Doody about the status of the promotion and he met with her later in the day. She thought he was going to tell her that she was being promoted. Instead, he informed her that he had decided not to make a promotion because she was the only name on the existing "short" list and he wanted a larger pool of candidates to choose from so as to give other "good people" a chance to apply for the position. He said he was going to "keep his options open" and wait for the results of the November 2013 examination. Chief Doody cited, in his testimony before the Commission, further reasons that Ms. Vinard's recent disciplinary history was "as not good" and "not what you are looking for in a leader" and that he wasn't sure she wanted to be promoted. (*Exh. 16; Testimony of Appellant & Chief Doody*)

21. Upon learning of Chief Doody's decision, Ms. Vinard became upset. She had made it clear that she wanted the promotion and told Chief Doody that she was "pissed". She left work that day and did not speak with Chief Doody thereafter. She has not returned to duty since that date. She did not take the November 2013 Lieutenant's examination. (*Exhs 5 & 16; Testimony of Appellant & Chief Doody*)

22. In or about July 2013, with Ms. Vinard absent, Chief Doody made a "provisional" promotion of another CFD firefighter to fill the Lieutenant's vacancy created by the retirement pending an examination. (*Testimony of Chief Doody*)

23. In November 2013, nine CFD firefighters took the Fire Lieutenant's examination, four of whom passed the examination. Ms. Vinard did not take the examination. The names of the CFD firefighters who had passed the November 2013 examination appeared on an Eligible List issued in May 2014. (*Testimony of Chief Doody; Administrative Notice [Colloquy: Hearing Day II]*)

24. On May 28, 2014, Chief Doody announced two promotions to permanent Lieutenant -- Firefighter Gregory Woodbury, effective June 3, 2014, and Firefighter Stephen Driscoll, effective June 9, 2014. Mr. Driscoll was considerably junior in seniority to Ms. Vinard. What led to the

promotion of an additional firefighter to Lieutenant was not explained. (*Exh. 35; Testimony of Chief Doody*)[5]

Ms. Vinard's Medical Absence

25. On June 26, 2013, Ms. Vinard e-mailed Chief Doody to inform him that "I do not want to speak to you at this time" but that she had a doctor's note that would be delivered to him. She told him "I can't eat, sleep and I'm to tears at the thoughts of the FD. I can't walk through those doors. I can't do it." (*Exh. 2*)

26. The medical documentation provided by Ms. Vinard was a note from Jodi M. Macleod, P.C.-A, with the Brigham and Women's /Partners Community HealthCare, Inc. which stated:

> "Ms. Vinard was seen in the office today for a medical issue. She will need to remain out of work until she is medically cleared to return. Please excuse her absences beginning 6/25/2013 due to this issue."

(*Exh. 3*)

27. By letter dated July 1, 2014 to the Chairman of the Canton Board of Selectmen, an attorney retained by Ms. Vinard presented a claim against Canton alleging gender discrimination and demanded a settlement to avoid further action under G.L.c.151B. (*Exh. 4*)

28. On July 5, 2013, Chief Doody e-mailed Ms. Vinard seeking information about her absence since June 19, 2013 "on non-occupational sick leave . . . immediately after being informed that you would not be selected for a promotion." He stated that the "very short note from a physician's assistant . . . did not explain why you are incapacitated from working." (*Exh. 5*)

[5] Chief Doody's testimony at the Commission hearing presented a different recollection of the chronology concerning the Lieutenant's examination and promotional process that ultimately led to two 2014 appointments to Lieutenant. He seemed to conflate the 2012 examination which no candidate passed and the 2013 examination that occurred after his discussion with Ms. Vinard in June 2013, at which time he thought the list on which her name appeared had "expired" which is why he called for a new exam that "no one passed" and he was not required to promote off a short list. I requested clarification which was provided at the second day of hearing. Chief Doody also represented at the June 3, 2014 hearing that he had "just completed the interviews" and was "about to make" the appointments, although documentation later established that both promotions had already been announced and one had become effective that day. My findings as to the promotional chronology reflect, and are limited to, what I conclude was supported by the credible evidence presented. (*Exh. 35; Testimony of Chief Doody; Administrative Notice [Colloquy: Hearing Day II]*)

29. Chief Doody requested that Ms. Vinard contact him to explain why she was unable to report for duty. He also informed her that he would be scheduling an appointment at Milton Hospital for an examination by a Town-designated physician. He asked her to confirm if she was currently working elsewhere, including Norwood Hospital and/or Boston Medical Center so that he could "determine the validity of your sick leave and also to refer you to the correct physician for your examination at Milton Hospital." (*Exh. 5*)

30. On July 19, 2013, Canton's counsel responded to the demand letter from Ms. Vinard's counsel, denying the allegations and rejecting the settlement demand. (*Exh. 6*)

31. On or about July 22, 2013, Ms. Vinard, through counsel, filed a Complaint for gender discrimination against Canton with the Massachusetts Commission Against Discrimination (MCAD). (*Exh. 20*)

32. By letter dated August 12, 2013, Canton HR Administrator Jody Middleton provided Ms. Vinard with information explaining that her leave of absence may be eligible for approval under the Family and Medical Leave Act (FMLA) and provided her with the forms necessary to be completed. Also on August 12, 2013, Canton Town Counsel reiterated to Ms. Vinard's attorney that she needed to comply with Chief Doody's separate request for information regarding her medical condition and other employment status. (*Exhs. 7 & 8*)

33. On or about August 16, 2013, Jodi MacLeod PA-C, Ms. Vinard's primary care provider, prepared a letter which stated:

> "Ms. Vinard has been under my care for her anxiety since 6/26/2013. She has significant symptoms that are clearly worsened in the stressful environment that exist at her fire fighting job. I have advised her to avoid those situations and remain out of work but have not restricted her from working in other environments. She has continued to work at her nursing job as she finds it therapeutic and actually decreases her anxiety."

PA MacLeod's letter was forwarded to Canton Town Counsel by Ms. Vinard's counsel on or about August 19, 2013 and thence to Chief Doody. (*Exhs.9 & 10; Testimony of Chief Doody*)

34. On or about August 16, 2013, PA MacLeod also completed the FMLA paperwork which was forwarded to Canton HR Director Middleton. PA MacLeod stated that Ms. Vinard was "unable to work in the stressful environment" of her CFD job, although she was "able to work and finds it therapeutic to work at her other less stressful employer. She is seeking counseling and taking prescribed medications as directed". PA MacLeod estimated Ms. Vinard's period of incapacity to be "6/18/213 – 9/11/2013". HR Director Middleton received the FMLA forms on or about September 3, 2013. (*Exhs. 28 & 29*)

35. Meanwhile, by e-mail dated August 28, 2013, Chief Doody informed Ms. Vinard that he had "not been able to validate your use of paid sick leave; therefore, I am denying your use of paid sick leave, effective immediately." Although Chief Doody was "open to reconsidering my decision" he stated that he had made the decision for several reasons:

> "The circumstances of the beginning of your leave were suspect. You claimed to be incapacitated from working immediately after being informed that you did not receive a promotion. In addition, the medical documentation you have submitted was from a physician's assistant who issued a very brief opinion on your mental health – a subject area which does not appear to fall under the scope of her practice. Also, you have acknowledged that you continue to work in other jobs . . . Your lack of answers to my questions regarding your outside work hours and schedules also entered into my decision."
>
> . . .
>
> "This decision is . . . independent of any determination yet to be made on a potential leave under the FMLA . . . .For the time being, you will remain on unpaid leave status. Should you wish to challenge my decision please contact your Union representative(s) and inquire about filing a grievance pursuant to the collective bargaining agreement."

(*Exh. 11; Testimony of Chief Doody & Appellant*)

36. By letter dated September 3, 2013, HR Director Middleton approved Ms. Vinard for FMLA leave from June 19, 2013 through September 11, 2013 and informed her that she would be expected to return to work on September 13, 2013, subject to a fitness for duty examination. The FMLA approval "does not affect Chief Doody's concerns and determination regarding your entitlement to paid sick leave under the collective bargaining agreement." (*Exh. 28*)

37. Prior to September 11, 2013, Ms. Vinard did not further report her status and, when she did not return to duty on September 13, 2013, Chief Doody e-mailed her to inform her that she was considered to be "on an unauthorized leave of absence . . . I have decided to deduct days from your vacation leave accrual [29 days], beginning immediately. Should you remain out your accrual . . . will be exhausted effective December 8, 2013. At that time, a decision will be made regarding your future employment status." (*Exh. 12*)

38. On or about September 17, 2013, Ms. Vinard procured another letter from PA McLeod, co-signed by her assigned PCP, David W. Faling, M.D., noting her last visit was 8/16/2013 and stating that she has been "referred to psychiatry for further treatment." PA McLeod also prescribed medication to treat Ms. Vinard for anxiety. (*Exh. 21; Testimony of Appellant*)

39. On November 12, 2013, Chief Doody wrote to Ms. Vinard to inform her that, although his prior letter had stated that her vacation accrual expired on December 8, 2013, he had been mistaken and that her vacation time was actually exhausted on November 8, 2013. Accordingly, she would be continued on authorized leave until December 8, 2013 but reverted to unpaid status and Canton would continue to pay its share of her health care premiums through December 8, 2013, provided she forward her share of the premium which amounted to a total of $232.84. When her current leave ends on December 8, 2013, Canton would revisit her employment status and health and insurance coverage. (*Exh. 13*)

40. On or about December 22, 2013, Ms. Vinard's counsel filed a civil action in Norfolk Superior Court (CA No. 12-01889), against Canton alleging claims of gender discrimination and retaliation in violation of G.L.c.151B. (*Exh.19*)

41. By letter dated December 20, 2013, Chief Doody informed Ms. Vinard that a hearing would be held on January 9, 2014 to "consider whether just cause exists to discharge you from employment due to your inability/unwillingness to return to work." The hearing was rescheduled

and held on January 29, 2014 before a hearing officer designated by Chief Doody. Ms. Vinard was present and represented by counsel. She did not testify. (*Exhs. 14 through 16*)

42. At the appointing authority hearing, Ms. Vinard's counsel produced a medical note from Daniel Hoobersman, M.D., dated January 28, 2014, which stated: "Kelly Vinard is under my psychiatric care." She described her treatment as related to anxiety, panic attacks, insomnia and nightmares, causing her to avoid all contact with the CFD. (*Exh. 22;Testimony of Appellant*)

43. Ms. Vinard asserted that, as of the date of the appointing authority hearing on January 28, 2014, she was willing to return to work but was unable to do so because she had not been cleared to return by her doctor. (*Testimony of Appellant*)

44. On February 7, 2014, the hearing officer reported to Chief Doody, in part:

> "I find that the charges detailed in Chief Doody's December 20, 2013 Notice are substantiated. Ms. Vinard was charged with an inability or unwillingness to return to work. She has not indicated that she intends to return to work at any time in the future. She has not even indicated that she desires to return. . . . Ms. Vinard's long-term and ongoing absence has had a significant economic and operational cost to the Town since most of her shifts must be covered by other firefighters on an overtime basis."
>
> . . .
>
> "With regard to the allegations of discrimination . . . Ms. Vinard did not testify at the hearing, I was actually not provided with any evidence in support of her claims."
>
> "Regular and consistent attendance is an essential function of any job. . . . It is important to reiterate that Ms. Vinard has been absent for over seven months and that no evidence was presented that she has any intention – or for that matter, desire – to return to work now or in the future."

(*Exh. 16*)

45. Chief Doody accepted the hearing officer's findings and, by letter dated February 12, 2014, discharged Ms. Vinard from employment with the CFD effective immediately on the grounds of "inability or unwillingness to return to work has rendered you incapable of continuing as a [CFD] employee." (*Exh. 16*)

46. This appeal duly ensued. (*Claim of Appeal*)

APPLICABLE CIVIL SERVICE LAW

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

> "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."

Under Section 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. It is also a basic tenet of "merit principles" of civil service law that discipline must be remedial, not punitive, designed to "correct inadequate performance" and "separating employees whose inadequate performance cannot be corrected." G.L. c.31,§1.

The Appointing Authority meets its burden of proof "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 (1956). See also Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) The Commission must take account of all credible evidence in the record, including whatever fairly detracts from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001). The Commission is not obliged to follow strictly the rules of evidence applied in a judicial proceeding, and may credit, in its sound discretion, reliable hearsay that would be inadmissible in a court of law. See, e.g., Doe v. Sex Offender Registry Board, 459 Mass. 603 (2011); Costa v. Fall River Housing Auth., 453 Mass. 614, 627 (2009). The hearing officer determines the credibility of

witnesses. Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003); Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 141 (1997).

G.L.c.31, Section 43 also vests the Commission with "considerable 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"). 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 principle is well-established that an appointing authority has just cause to terminate the employment of a tenured civil service employee if the employee has been absent from duty for an extended period of time with no reasonable expectation that the employee will be able or willing to return to work in the foreseeable future. See, e.g., MacEachern v Boston Housing Auth., 29 MCSR 99 (2016); Bistany v. City of Lawrence, 26 MCSR 136 (2013), aff'd, 2014 WL 6708807 (Mass. Super. 2014), aff'd, 88 Mass.App.Ct. 1105 (2015 (unpublished); Valente v. City of Newton, 23 MCSR 660 (2010); Alves v. Fall River School Committee, 22 MCSR 4 (2009). See also, Russell v. Cooley Dickenson Hosp., 437 Mass. 443 (2002) (employer under no obligation to provide disabled employees with indefinite leave of absence); Scott v. Encore Images, Inc., 80 Mass.App.Ct. 661 (2011) (employee with disabling shoulder injury with no foreseeable ability to return to work discharged after eight months on workers' compensation); Rios-Jimenez v. Principi,

520 F.3d 31 (1st Cir. 2008) (employee with emotional disability that prevented coming to work properly terminated because attendance is an essential function of the job)

Ms. Vinard had been absent from work for seven months at the time Canton held thelocal appointing authority hearing to consider her termination from employment. She did not testify at that hearing. The evidence that was presented demonstrated that her own doctors contended that she was unable to report to work. The evidence presented to the Commission demonstrated that, even at the time of the Commission hearing, she remained unable to return to duty as a firefighter for the CFD. The facts clearly establish that Canton had just cause to terminate Ms. Vinard due to her inability to perform the essential duties of her job.

I have not overlooked Ms. Vinard's claim that her inability to work was the result of what she characterized as a pattern of harassment and hostility by Chief Doody and others who had targeted her because of her gender over a period of years, culminating in the decision not to promote her to Lieutenant which humiliated her to such a degree that she could no longer "walk through the doors" of the CFD or interact with its personnel. Certainly some aspects of Canton's treatment of Ms. Vinard are questionable, including the timing of, and reliance on, her discipline for what seems a minor infraction, the inconsistent statements about her qualifications, Chief Doody's apparent brushing off her complaints about the Deputy Chief, and the curious explanation provided by Chief Doody for why he chose repeatedly to defer promoting her in favor of other members of the otherwise all-male CFD. For at least two reasons, however, these claims are not sufficient to rebut the undisputed evidence that supported Canton's decision to discharge Ms. Vinard.

First, prior to her termination, Ms. Vinard asserted a formal claim of gender discrimination under G.L.c.151B, by filing a complaint with the MCAD which she later removed for adjudication in a civil action before the Norfolk Superior Court. Canton erroneously argues that Ms. Vinard's assertion of a Chapter 151B claim of gender discrimination provides her the exclusive remedy for

such violations and divests the Commission of jurisdiction to adjudicate such claims, as the Commission has concurrent authority to address such matters as violations of "basic merit principles" of civil service law. See, G.L.c.31, §1. As a general rule, however, the Commission is inclined to defer to the MCAD, which is the agency with the specific expertise in these matters, and to the judiciary as a matter of comity, especially when, as here, the claims were first asserted in that forum. See Phillips v. City of Cambridge, CSC No. G2-16-068, 29 MCSR --- (2016) ("what has been set forth here is a fairly classic employment discrimination complaint and the Civil Service Commission should not act in place of the agency [MCAD] charged with addressing such complaints"); Holden v. Department of Correction, 19 MCSR 245 (2016) ("The MCAD is clearly the agency primarily entrusted to investigate and enforce acts committed in violation of the anti-discrimination law")

Indeed, if Ms. Vinard's claims had merit, so too would the contention that her subsequent termination was a "retaliation" for her asserting her Chapter 151B rights, all of which are better suited to be fully litigated before the Norfolk Superior Court where the relief that can be granted is, in some respects greater than the relief available from the Commission.[6] Although the Commission always retains the authority to grant relief for discrimination against public employees as a violation of "basic merit principles", the decision to weigh in on any particular alleged violation will continue to be made on a case-by-case basis. This appeal is not one of those circumstances that warrant the Commission's intervention.

Second, the evidence presented to the Commission, while it certainly raised an eyebrow, did not rise to the level of proving that Ms. Vinard's inability to return to work was excused due to the alleged hostile work environment that she sought to portray. Canton vigorously disputed those

[6] The discrimination claims now have been settled. See Vinard v. Town of Canton, Norfolk Sup.Ct. CA 1382CV01889. https://www.masscourts.org/eservices/?x=t8UA-QNMY0d5NlmyC8TYP2iIG9bKb-O2m8LH-JkD2RV4o8rHAy6noptf7axsOCq0QbYYmb*bUEBYsGIA6bJZZQ

claims, which Ms. Vinard supported solely by her own testimony. Although the evidence clearly showed that Ms. Vinard had suffered from, and was continuing to suffer from some form of severe emotional distress, no expert or other credible evidence established the actual cause of this distress. The evidence actually showed that Ms. Vinard was subject to stressors both on and off the job. In sum, the evidence presented to the Commission is simply too inconclusive to prove that Canton's decision to discharge Ms. Vinard was inconsistent with basic merit principles.

CONCLUSION

Accordingly, for the reasons stated, the Appeal of the Appellant, Kelly Vinard, under Docket No. D1-14-45 is ***dismissed.***

Civil Service Commission

/s/ *Paul M. Stein*
Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein & Tivnan, Commissioners) on August 4, 2016.

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.

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:
Robert S. Messinger, Esq. (for Appellant)
Daniel C. Brown, Esq. (for Respondent)