

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

MARK WAUGAMAN,
Appellant

v.

TOWN OF FALMOUTH,
Respondent

CASE NO: D1-09-300

Appellant's Attorney:

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Commissioner:

Paul M. Stein

DECISION

The Appellant, Mark Waugaman, acting pursuant to G.L.c.31, § 43, duly appealed to the Civil Service Commission (Commission) from a decision of the Town of Falmouth (Falmouth), the Appointing Authority, to discharge him as Firefighter in the Falmouth Fire Department (FFD) for alleged inappropriate conduct and untruthfulness. Three days of evidentiary hearings were held at UMass School of Law at Dartmouth on January 14, 2010, January 21, 2010, and April 6, 2010. A fourth day of hearing was conducted on March 31, 2010 at the Gus Cauty Center in Falmouth. The hearing was declared private as no party requested a public hearing. By agreement of the parties, witnesses were sequestered. Falmouth called five witnesses and the Appellant testified on his own behalf. Twenty-four (24) exhibits were received in evidence and six (6) additional exhibits were marked for Identification. The hearing was stenographically recorded. Post-hearing submissions were received by the Commission from each of the parties on July 8, 2010.

On March 3, 2011, the Appellant moved to reopen the record, which motion Falmouth opposed. The Appellant's motion is addressed in the Findings of Fact.

FINDINGS OF FACT

Giving appropriate weight to the exhibits, the testimony (of the Appellant, FFD Chief Paul Brodeur, Firefighter/EMTs Russell Ferreira, Patrick Gonsalves and Lawrence DeMello, and Mrs. J¹) and inferences reasonably drawn from the evidence I find credible, I make the findings of fact set forth below.

Appellant

1. The Appellant, Mark Waugaman, was appointed to the FFD in April 1999 as a permanent full-time Firefighter Paramedic, after about four years with the FFD as a call-firefighter. In addition to his job with the FFD, Mr. Waugaman also owns a landscaping business. (*Tr.I:28-30[Ferreira]; Tr.II:63-66[Mrs. J]; Tr.IV:42-43 [Waugaman]*)

2. Mr. Waugaman lives in Falmouth and is married to Kristin Waugaman, who was employed in the Falmouth Town Treasurer's office. They have a son and a daughter. Mrs. Waugaman was present throughout the hearing but was not called to testify. (*Tr.I:4;Tr.I:30-35,70-75[Ferreira];Tr.II:34,50[Mrs. J];Tr.IV:5,165-166[Waugaman]*)

Appellant's Relationship with Firefighter Ferreira

3. Russell Ferreira is a Falmouth resident who has approximately 23 years of service as an FFD Firefighter EMT (a lower level of EMS skill than a Paramedic). He is president of Falmouth Firefighters Local 1397, the bargaining unit that represents all FFD fire officers, except the Chief. (*Tr.I:7-10 [Ferreira]*)

4. Waugaman and Ferreira were long-time acquaintances. Waugaman dated Ferreira's sister as a teenager. Ferreira has a side construction business and helped build

¹ Mrs. J is a civilian employee of Falmouth Hospital whose name is redacted for privacy reasons.

an addition to the Waugaman's home and used to socialize with them. He testified to "flirtatious" behavior and comments by Mrs. Waugaman during this time, including "skinny dipping" at the Waugaman's home. He testified that his flirtation with Mrs. Waugaman continued until 2007 and included e-mails and banter with her at work. He said the relationship was not meant to become physical and it never did. (*Tr.I:27-42,61-62,90-91[Ferreira];Tr.II:231-232,265-273[Ferreira];Tr.IV:49-51,65-66 [Waugaman]*)

5. Firefighters Ferreira and Waugaman became working partners in January 2004. Waugaman's paramedic license was suspended for improper patient care and he also had productivity and attendance issues. Ferreira proposed and Waugaman agreed that they both be reassigned to East Falmouth (aka Station 5) so that Ferreira could serve as Waugaman's shift partner and mentor, and Chief Brodeur approved. (*Tr.I:21-27,37-44 [Ferreira];Tr.III:113-117,171-172 [Brodeur];Tr.IV:48-49[Waugaman]*)

6. FFD firefighters work 24-hour split shifts, generally from 7:00 am to 7:00 am, i.e., 24 hours on, 24 hours off, 24 hours on, and five days off. At Station 5, two firefighters work each shift, along with a few maintenance personnel who work during the day, and the fire prevention staff who arrive at 7:00 pm to pick up their vehicles and return about 5:00 pm. Thus, during nighttime and early morning hours, Firefighters Ferreira and Waugaman were the only personnel on duty at Station 5. (*Tr.I:38-41[Ferreira];Tr.III:22-23[Gonsalves];Tr.IV:44-45[Waugaman]*)

Falmouth Fire Department Rules and Regulations

7. Since 1997, the FFD Fire Chief had been Chief Paul D. Brodeur, who joined the department as a firefighter in 1976. He is a past president of Falmouth Firefighter's Local 1397. He planned to retire in October 2010. (*Tr.III:101-102 [Brodeur];Tr.I:9[Ferreira]*)

8. One of Chief Brodeur's initial projects as Chief was to update the FFD's rules and regulations, which he repromulgated in May 1997 with a protocol that required all personnel to execute a form by which they acknowledged receipt of the rules and regulations and agreed to abide by them. Firefighter Waugaman executed this form when he joined the FFD in 1999. (*Tr.III:103-104[Brodeur];Exhs.3 & 15*)

9. The FFD Rules and Regulations include, in relevant part, the following:

STATION REQUIREMENTS.

Rule 11.

Sec. 1. The houses in charge of the department shall be for the exclusive use of the companies occupying them, and such other use as approved by the Chief.

Sec. 2. The hour for turning off the main lights in the different stations shall be not later than 22:00 hrs. All lights not being used shall be turned out. Any noise that may disturb those members who have retired shall not be allowed.

Sec. 3. Beds may be used for sleeping purposes only between . . . 21:00 hrs. and 07:00 hrs.

VIOLATION OF RULES.

Rule 21

Sec. 1. Any member of the department who shall violate any rule or regulation of the department, or who shall be guilty of any offenses named below, shall be subjected to reprimand, discharge from service, suspension, reduction of grade, or such punishment as the Chief may direct, or any two or more of such penalties, to wit:

(a) Conduct unbecoming a member, whether on or off duty, which tends to lower the service in the estimation of the public. . . .

(d) Violation of any criminal law. . . .

(g) Neglect of, evading or shirking duty. . . .

(j) Conduct prejudicial to good order. . . .

(m) Untruthfulness or willful misrepresentation in matters affecting the department or its employees. . . .

(*Exh. 3*)

10. It was understood within the FFD that family members and significant others can visit firefighters on duty for lunch, to drop off dinner or for other brief personal reasons. Although there are no set hours for visitations, except in emergencies, "common sense" implied that such visitation for any purpose during designated sleeping hours (9:00 pm to 7:00 am) was inappropriate and did not occur. Per policy, Station 5's exterior entry doors were locked and most lights turned off during sleeping hours or "lights out". Underwear

was the customary attire after lights out. (*Tr.I:18-19,69,107-108[Ferreira];Tr.II:209-210 [Mrs.J]; Tr.II:230-231,241,253-254,297-299,307-308 [Ferreira]; Tr.III:17-18,28-29 61-63,75-79[Gonsalves]; Tr.III:90-92,99-100 [DeMello]; Tr.III:106-110,171 [Brodeur]; Tr.IV:47-48,63,94-9 [Waugaman]*)

11. Save for simple, public displays of affection (kiss hello or goodbye, friendly hug), FFD firefighters clearly understood that any form of intimate physical activity on-duty, consensual or not, was prohibited. (*Tr.II:281-313[Ferreira];Tr.III:100 [DeMello]; Tr.III:105-106 [Brodeur];Tr.IV:94[Waugaman]*)

12. The FFD did not restrict off-duty social and romantic fraternization by FFD personnel. The evidence indicated several examples of dating and marital relationships between FFD personnel, including such a relationship several years ago between Firefighter Ferreira and Chief Brodeur's secretary. (*Exh.19;Tr.I:12-14[Ferreira]; Tr.II:230-234,285-289,307-308 Ferreira]; Tr.III:97-100 [DeMello]; Tr.IV:13,20-21,29 [Brodeur]; Tr.IV:72[Waugaman]*)

13. FFD firefighters must respond to emergency medical calls and transport patients to Falmouth Hospital, which puts them in contact with the emergency room medical staff. FFD personnel and Falmouth Hospital medical staff also interact professionally during public events, such as the annual Barnstable County Fair. (*Exh.14; Tr.I:44-45[Ferreira]; Tr.II:31-33,205-207[Mrs.J];Tr.III:36-44,60-61[Gonsalves];Tr.III:152[Brodeur]*)

14. In particular, the working relationship between the FFD and Falmouth Hospital did not preclude off-duty social and dating relationships between FFD personnel and hospital staff, which did occur with some frequency. Virginia Brodeur, Chief Brodeur's spouse, was charge nurse and supervised staff of the hospital's Emergency Department.

(Exhs.14 & 19;Tr.II:16-18,183-184,214-216[Mrs.J];Tr.III:41-45[Gonsalves]; Tr.III:150-152 [Brodeur] ;Tr.IV:51-57,84-85 [Waugaman])

15. As to the standard of truthfulness by FFD personnel, Chief Brodeur testified that he placed a high degree of importance on this quality. He said with utmost sincerity:

“The main point with myself is prevarication does not sit well with me and it’s not going to be tolerated in the fire department as long as I’m responsible. I don’t go for that. . . . I have to make decision [sic] in the heat of battle. And if someone lies to me once, they will lie to me again. And it’s not going to happen. That’s the way I was raised. That’s why you don’t see too many people that have been disciplined three times for prevarication.”

(Tr. IV:39)

16. Firefighter Waugaman knew firefighters must be truthful and knew that untruthfulness could justify dismissal from service. (Tr.IV:106-109 [Waugaman])

Appellant’s Relationship with Mrs. J

17. Mrs. J is a registered nurse employed in the Emergency Department of the Falmouth Hospital since 2003. Initially, she worked midnight to 8am and moved to the 4pm to midnight shift in 2005. She became charge nurse on that shift in or about 2007. Although the shift formally ends at midnight, at times, her duties required her to stay as long as several hours after midnight. Her direct superior is Virginia Brodeur, Chief Brodeur’s wife. (Tr.II:7-12,16-18, 215[Mrs. J])

18. Mrs. J is married with two children, a teenage son and a younger daughter. In addition to her professional contacts with Firefighter Waugaman at Falmouth Hospital, Mrs. J occasionally saw him off duty at the Falmouth ice arena where her son played hockey on a team coached by Firefighter Waugaman and they each had daughters who also skated there. They saw each other during the summer when they took their daughters to cheerleading camp. In 2005, they went to the beach after working at the Barnstable

County Fair and drank beer with a group of other coworkers. (*Exhs.14 & 19;Tr.II:48-54, 183-191[Mrs. J];Tr.III:45-46,60-66,72-73[Gonsalves]; Tr.IV:51-57[Waugaman]*)

19. The tenor of the relationship took a turn toward the end of 2005, after Mrs. J gave Firefighter Waugaman her cell phone number. Thereafter, they began texting each other and, eventually, meeting privately at the beach and many other places. The meetings ultimately led to a consensual sexual affair carried on for more than a year at various locations, including public beach parking lots and nearby homes where Firefighter Waugaman did landscaping work. Mr. Waugaman admitted that, from his perspective: “Sex was the motivation [for the relationship], from the beginning, the middle and the end.” Mrs. J testified that she was uncomfortable and conflicted about the affair from the start, but felt an “attraction” to him. (*Tr.I:46-53,89-90 [Ferreira];Tr.II:54-83,130-133 [Mrs.J];Tr.II:242-243[Ferreira];Tr.IV:57-60,98-105[Waugaman]; See also Exh.6B,19*)

20. Firefighter Ferreira first learned about the relationship in January 2006 when Firefighter Waugaman showed him some of the text messages he exchanged with Mrs. J. Mrs. Waugaman first got wind of the text-messaging sometime shortly thereafter and asked Ferreira about it, who avoided giving her a straight answer. She confirmed on her own that Mrs. J was the party involved and confronted her husband, who claimed he was only exchanging text messages with Mrs. J. I infer that, if Mrs. Waugaman ever believed his explanations, at some point during the year, she came to conclude that her husband was lying, which he admitted at the Commission hearing. The Waugamans fought over the affair more than once thereafter. (*Exhs.6B&16;Tr.I:45-64,81-90,133,138,142-144, 149 [Ferreira]; Tr.II:242-246,274 [Ferreira]; Tr.IV:64,69,92-93,179[Waugaman]*)

Layout of the East Falmouth Fire Station

21. This Commissioner took a daytime view of Station 5 and diagrams (not to scale) were marked in evidence. Testimony was provided that the station appeared substantially as it did during the time Firefighter Waugaman worked there, save for minor cosmetic differences and repairs. (*Exhs. 8 through 10; Tr.III:4-7[View]; Tr.I:72,91-122 [Ferreira]; (Exhs.8, 9, 10; Tr.II:99-126,192-201,212-224[Mrs.J]; Tr.II:227-228,250-259[Ferreira]; Tr.III:11-12,27-32 [Gonsalves]; Tr.IV:22-28 [Brodeur]; Tr.IV:119-125 [Waugaman])*)

22. Station 5 lies approximately four miles east along the south side of Route 28 from the center of Falmouth, at the intersection of San Paulo Drive. It includes a three-bay apparatus floor with a separate operations/living wing on the San Paulo Drive side and an attached maintenance/repair wing on the other side. A main parking area is situated along the living quarters side of the building facing San Paulo Drive and an additional paved area is located behind the rear of the building where Firefighters Ferreira and Waugaman typically parked. Public access is available from the front (facing Route 28) via doors at the front and rear into the main hallway that accesses the operations and living areas. There is also another rear door directly into the apparatus floor. (*Exhs. 8 through 10; Tr.III:4-7[View]; Tr.I:38,93-102[Ferreira]; Tr.IV:60-6 [Waugaman])*)

23. The front and rear exterior doors into the operations/living area hallway are wired to give a signal whenever someone enters the building. All outside doors are physically lockable, although the apparatus floor door lock was broken and difficult to set. That lock was repaired after Firefighter Waugaman's termination. (*Exhs. 8, 9 10; 10; Tr.I:100-108 [Ferreira]; Tr.III:11-12 [Gonsalves]; Tr.IV:124 [Waugaman])*)

24. The operations room is situated in the front, off the main hallway (which runs from front to back), looking out toward Route 28. A short hall across from the operations room leads to the main living area, furnished with sofas, chairs, eating area and a TV. A galley-style kitchen and a men's room are also situated off the main hall, and can also be accessed through both the main hall and the living area. A ladies room is located at the rear of the main hall. (*Exhs. 8, 9 10; Tr.III:4-7[View];Tr.I:109-111[Ferreira] Tr.II: 99-126,212-224[Mrs. J];Tr.,III:23-27[Gonsalves];Tr.IV:120-124[Waugaman]*)

25. Station 5 has two bedrooms. One bedroom, with a single bed, is located at the front of the building, across the main hall from the operations room. The front bedroom was the one occupied by Firefighter Ferreira. The second bedroom is located at the rear, with its windows facing the back, and its door opening into the living area. It contains two beds and some lockers. Firefighter Waugaman used the back bedroom. Neither bedroom door was lockable.(*Exhs. 8, 9, 10; Tr.III:4-7[View];Tr.I:112-116[Ferreira];Tr.II:115-117, 217-218 [Mrs. J] Tr.IV:120-124[Waugaman]*)

26. The parties provided different interpretations of the lighting after dark. This Commissioner did not view the station during nighttime conditions, but a reasonable inference suggests that, after retiring to sleep, except when an alarm sounded, there was only minimal lighting and it would be difficult, but not impossible, for a person unfamiliar with the layout of the station to make their way around. (*Tr.II:125,201-202, 218[Mrs. J];Tr.II:250[Ferreira];Tr.III:28-29[Gonsalves];Tr.IV:24-26 [Brodeur]*)

27. An alarm sounded throughout the station when a call for service was received by the FFD. This would happen whether the call required the personnel on duty at Station 5 to respond or not. At night, the lights would come on when the alarm sounded. Unless the

announcement ordered his or her station to respond, a firefighter who had retired was not required to get out of bed or to get dressed. (*Tr.II:210-211[Mrs. J];Tr.II:240-242 [Ferreira;Tr.III:29-30[Gonsalves];Tr.III:81[DeMello]*)

Evidence of Misconduct While On Duty

28. Prior to 2007, Mrs. J had been inside Station 5 when her (now teenage) children were very young and she accompanied them on field trips, and once when she went there briefly to check on a burning permit. (*Tr.II:80-82[Mrs. JJ]*)

29. On March 17, 2007, St. Patrick's Day, after having what she called "liquid courage", Mrs. J drove alone to Station 5. She walked in the front door and met Firefighter Ferreira (who was in the living quarters along with the firefighter filling in for Firefighter Waugaman, who had called in sick). This is the only time Ferreira actually saw her face inside the station. Ferreira said she looked tipsy. He took her to the entry hall where she told him she was there to check on Mark. Ferreira told her Mark was home sick, that "I don't want you in the station" and that she should stay away from Waugaman. He then escorted her out the apparatus floor door. He told Firefighter Waugaman the next day that "I can't have this kind of stuff going on at the station" to which Waugaman stated: "I have no control. I wasn't at work." (*Tr.I:83-89,120-122 [Ferreira]; Tr.II:83-92,147-151,168-170,191-192 [Mrs. J]; Tr.II:259-262[Ferreira]*)

30. At some point, Mrs. J began arranging to stop by Station 5 in the early morning hours to see Firefighter Waugaman at Station 5 after she finished her shift at Falmouth Hospital and while he was on duty. Coming straight from the hospital, she wore her blue nurse's "scrubs" to these visits. She was not sure exactly when the visits started, but, after considering the testimony of all percipient witnesses (Mrs. J and Firefighters Ferreira and

Waugaman), I infer that the visits most likely began in the warmer months around the middle of 2006 and continued until late 2007, when Firefighter Waugaman changed his shift partner. (*Tr.I:66-67,70-89,113-123 [Ferreira]; Tr.II:83-85,92,95-113,128-130,147, 165-167,177-178 [Mrs.J]; Tr.II:248-259[Ferreira]; Tr.IV:59-62[Waugaman]*)

31. Mrs. J described a progression from meeting Firefighter Waugaman outside, behind the station, to coming inside the apparatus room when the weather got colder and, eventually, going to his bedroom. She said they talked, kissed and hugged and, eventually, engaged in sexual relations. She said these visits stopped after Firefighter Waugaman changed shift partners and they didn't know the new partner's "sleep patterns". (*Exhs. 6B & 7B; Tr.I:66-89,113-115,120-123[Ferreira];Tr.II:83-130,147-151, 165-167,172-179,192-200,209-226 [Mrs. J]; Tr.II:248- 259[Ferreira]*)

32. Firefighter Ferreira testified that he heard the apparatus doors "squeaking" a few times late at night. He assumed it was Firefighter Waugaman and thought nothing of it at first. After the third or fourth time, he asked Waugaman about it, and Waugaman admitted to meeting with Mrs. J. He also said he had been intimate with her on the premises outside the station. While that later statement was plausible (given proof of such intimacy in other public places), Firefighter Ferreira chalked it up to exaggeration. (*Exhs. 6B & 7B;Tr.I:66-89,113-115, 120-123[Ferreira]; Tr.II:248-259[Ferreira]*)

33. Firefighter Ferreira also gave detailed testimony that, on one subsequent occasion in February or March 2007 (definitely prior to St. Patrick's Day), he spotted a woman in blue nurse's scrubs (with her back to him) walking with Firefighter Waugaman in the main hallway headed to the apparatus room. He then saw a minivan driving down San Paulo Drive. He said this episode occurred several minutes after Waugaman's son had

called the station about a concern for his mother. When Ferreira went to get Waugaman, he found Waugaman's bedroom door closed, which Ferreira said was atypical. He called out and Waugaman responded, without opening the door: "What do you want?" and Ferreira told him Waugaman's son was on the phone. Waugaman said to tell his son he was in the bathroom and would call him back. Ferreira said Waugaman told him the next day "if my wife can be out [fooling around] . . . I can have my fun as well." Waugaman promised never to bring Mrs. J into the station again. Except for the St. Patrick's Day visit, Ferreira never saw Mrs. J inside Station 5 after that. I find this testimony substantially credible and compelling. (*Exhs. 6B & 7B; Tr.I:70-83,115-120,122-123 [Ferreira]; Tr.II:247-259[Ferreira]; See also Tr.IV:163-168[Waugaman]*)²

34. Firefighter Waugaman emphatically denied he ever took Mrs. J inside Station 5 and said the only physical contact was a kiss goodbye. In the written statement to Chief Brodeur that admitted his extra-marital affair, Firefighter Waugaman wrote:

"[Mrs. J] has come to station 5 to see me. These visits occurred during the evening hours on her way home. We would meet outside station 5. During these visits we would converse and when she left on occasion we would kiss goodbye. That was the extent of the contact."

(*Exhs 18 & 19*) (*emphasis added*)

35. Mr. Waugaman stood by this statement in his testimony at the Commission hearing. He stated that Mrs. J visited him on duty "after midnight" about six times during their two year affair. He testified they talked only outside. In bad weather, he said they sat in her car. He testified that he never took Mrs. J "inside the fire station" or "into his room". He denied ever having sex inside the fire station. (*Tr.IV:59-63,104[Waugaman]*)

² The parties stipulated that neither of the other two firefighters who sporadically filled in as Firefighter Waugaman's shift partner during 2005 through 2007 ever saw Mrs. J in Station 5. (*Tr.IV:40-41*)

The Aftermath of the Affair

36. In or about October 2007, Firefighter Waugaman requested a new shift partner, complaining that Firefighter Ferreira was a source of some “personal issues” in the Waugaman household. Firefighter Ferreira got wind of this and asked Waugaman about it. Initially, Waugaman lied and said he had not asked for the transfer. After Ferreira pressed him, Waugaman said his wife Kristen made him do it because she “lost respect” for Ferreira. At the Commission hearing, Waugaman elaborated, accusing Firefighter Ferreira, in effect, of sexually harassing Mrs. Waugaman. (*Tr.I:131-139[Ferreira]; Tr.II:264-273 [Ferreira]; Tr.IV:64-67,91[Waugaman];Tr.III:118-123,171-174[Brodeur]*)

37. Firefighter Ferreira denied these allegations and claimed his flirtatious behavior with Mrs. Waugaman was always welcomed by her, known to Firefighter Waugaman, and he had never been called on it. Ferreira did indicate that, around April 2007, Mrs. Waugaman stopped returning his calls and e-mails and, in August 2007, stopped sending his paychecks to him from Town Hall which she had previously been doing as a favor. He believed Mrs. Waugaman probably was mad at him, but not for flirting. Rather, it was for failing to tell her sooner about her husband’s affair and, because, when “she threw him [Waugaman] out of the house, I lent him some money to have a place to stay.” (*Exh.6B;Tr.I:30-35,58,61-63,90-91,126-139[Ferreira];Tr.II:235-237,266-273[Ferreira]*)

38. In a conversation with Chief Brodeur in October 2007, probably in connection with Firefighter Waugaman’s request for transfer, Firefighter Ferreira alluded to “inappropriate activity going on at the station”, but did not elaborate. Chief Brodeur asked Firefighter Ferreira to put it in writing and, when Ferreira did not do so, Chief Brodeur did not pursue it. (*Tr.I:134[Ferreira];Tr.III:172-178,182[Brodeur]*)

39. Mrs. J and Mr. Waugaman differ on how the affair finally dissolved. Mrs. J had a very specific recollection of what cinched the decision for her. She had been away without her cell phone in April 2008 and, upon her return had multiple messages from Firefighter Waugaman that “went from nice to really angry and vicious so I just let it go.” She testified that, thereafter, she did not return his calls and began avoiding contact with Firefighter Waugaman, even at work, except when required in the process of transferring patient care, which Waugaman did not deny. She and her husband reported receiving harassing voice mails and e-mails, and the fact the “People were starting to find out stuff” also had taken its toll on her. I find Mrs. J’s explanation rational and her recollection credible. (*Tr.II:128-145,163-164, 208-209[Mrs. J]*);*Tr.IV:84-86[Waugaman]*)

40. Mr. Waugaman testified that his last sexual encounter with Mrs. J was about October 2007 and he broke off the affair in January 2008, telling her “he was done”, because he suspected Mrs. J was harassing his wife. He said he didn’t speak to Mrs. J again thereafter. This explanation does not have the same ring of truth as Mrs. J’s less self-serving testimony, which included knowledge she would not be likely to have if the affair ended sooner and her visits to Station 5 did not stop until the January 2008 changes in shift assignments as well as credible recollection of a subsequent meeting with Firefighter Waugaman in the parking lot at Falmouth Hospital and a phone call she received from him prior to her scheduled testimony at the appointing authority level hearing. There was also circumstantial evidence that that Mrs. J visited Firefighter Waugaman on duty on November 9, 2007. (*Exh.6B; Tr.II:128-140,152-158 [Mrs.J]*); *Tr.IV: 67-71,148[Waugaman]*)

41. In March 2008, the Falmouth Police Department started to investigate allegations of a rash of harassing phone calls, letters and e-mails asserted by Mrs. Waugaman and Mr. & Mrs. J. The suspects included the couples themselves, Russell Ferreira and others. The investigation ended inconclusively. No charges were lodged. Chief Brodeur received a copy of the police report in September 2008. The report was not offered into evidence and, absent any proffer of the specifics of the allegations, the Commission can draw no conclusions about them. I do find relevant that, even during the police investigation, Firefighter Waugaman refused to confirm his affair with Mrs. J, stating: “if I admitted to having an affair, my marriage would be over.” He later conceded this statement to the police was false. (*Tr.I:143-144,149[Ferreira];Tr.II:139-145,162-164,177[Mrs.J];Tr.III:135,146-147[Brodeur];Tr.IV:3-6[Brodeur];Tr.IV: 68-70, 88-92 ,147-150[Waugaman]*)

42. In July 2008, Firefighter Ferreira sent Chief Brodeur a long, rambling e-mail, prompted by coming to learn that Firefighter Waugaman had complained he was being “bothered” by Ferreira. The focus of Ferreira’s e-mail concerned a dispute over Waugaman’s handling of the Station 5 “coffee fund” and a 24-hour shift swap that Waugaman owed to Ferreira. Station 5 personnel had voted to take responsibility for the fund away from Firefighter Waugaman. Allegations were made that money was taken from the fund and could not be accounted for, which the Falmouth Police Department also investigated but no charges were filed. At the end of the e-mail, Ferreira referred to expecting “some earth shattering report” (from the then on-going police investigations) and requested that “Mark’s conduct of sneaking unrelated women in to the station at all hours [of] the night . . . be addressed as well. I refuse to have Mark’s new partner be put into the same predicament that I am forced to be part of . . . I am guilty of nothing more

than being Mark's friend and partner for many years." (*Exh.16;Tr.144-149[Ferriera]; Tr.II:283-284[Ferriera];Tr.III:124-133,174,182-183[Brodeur]*)

43. In August 2008, with the "coffee fund" issue percolating, Mrs. J's husband came to Station 5 to confront Firefighter Waugaman. According to Waugaman, the man verbally threatened him outside the station. Waugaman admitted his affair to the husband and to his current shift partner, Lawrence DeMello, who had seen the altercation from inside the station. Chief Brodeur learned of this encounter from Firefighter Ferreira within a day or two and confronted Firefighter Waugaman ("I heard you had a visitor"), who responded that there was "nothing to it". Chief Brodeur asked Waugaman if the rumors were true that he had been having sex on FFD property, to which Waugaman replied "No, absolutely not." (*Tr.III:133-144,175-182[Brodeur];Tr.II:82-87[DeMello]; Tr.IV:68-70,77-84,168-175[Waugaman]*)

44. On February 23, 2009, Firefighters Waugaman and Patrick Gonsalves had a heated exchange outside Station 5 over Waugaman's parking his landscaping truck in a public space, rather than behind the station. After a departmental investigation, both men received verbal warnings and were ordered to submit to further periodic reviews over the ensuing 90 days. (*Tr.III:47-57,63-67[Gonsalves];Tr.III:169-170[Brodeur]*)

45. The acrimony between Gonsalves and Waugaman continued even after Waugaman's discharge. Gonsalves testified that, in 2010, Waugaman gave Gonsalves "the finger" as he drove past him. Gonsalves said Waugaman was "not a man of his word." (*Tr.III:47-48,57-59[Gonsalves]; Tr.IV:113-117[Waugaman]*)

46. Mrs. J also gave testimony, that was not impeached, that Mrs. Waugaman called her dirty names at the 2009 Barnstable County Fair with Mr. Waugaman and their young

children present. She described another sarcastic remark made by Mr. Waugaman to her husband about the same time. (*Tr.II:31-47[Mrs. J]*)

The Departmental Investigation

47. After Chief Brodeur received the police report on the harassment investigation, he forwarded it to town counsel for advice. Until then, he said, he did not have reason to pursue an internal investigation into what were only “rumors”. He said that, even after hearing about the confrontation between Todd Mrs. J and Firefighter Waugaman a month earlier, it still “didn’t register much to me.” (*Tr.III:139-147,180-182[Brodeur]*)

48. The Appellant questioned Chief Brodeur’s motives for delaying an FFD inquiry. I find it improbable that Chief Brodeur had not connected the dots, certainly by August 2008, at the latest, when he was apprised by Firefighter Ferreira of visit by Mrs. J’s husband and he knew that “the union was concerned about irate or estranged husbands coming to the station.” I find it more likely that Chief Brodeur actually had hoped, initially, that the police investigation would lead to a resolution. When that didn’t happen, he needed time and advice to weigh whether it would be best to let the matter die quietly and avoid subjecting his department (and his wife’s staff) to a prolonged and messy ordeal. Although his testimony, overall, was sincere and convincing, he did appear somewhat piqued and defensive about this particular issue. I infer that, in retrospect, he probably would have preferred to have addressed the matter sooner than he did. I do not find, however, that the delay was motivated by any personal animus or predisposition against Firefighter Waugaman or that the delay compromised in any way the integrity or substance of the investigation that he eventually conducted, as described below. (*Tr.III:101-183[Brodeur];Tr.IV:3-40,180-183[Brodeur]*)

49. The FFD internal investigation into Firefighter Waugaman's alleged sexual misconduct began in February 2009 with Chief Brodeur's request for a written report from Firefighter Ferreira, which Ferreira delivered (five and a half single spaced pages) on February 12, 2009. Chief Brodeur notified Waugaman of the investigation on March 4, 2009 and ordered him to refrain from discussing the matter with anyone other than a legal representative. Chief Brodeur also wrote to Mrs. J that same day, asking her meet with him. On March 6, 2009, he requested a supplemental report from Firefighter Ferreira which he received later that day. (*Exhs.5,6A 6B,7A & 7B; Tr.III:147-152[Brodeur]*)

50. Firefighter Ferreira's reports are largely consistent internally and with the credible testimony before the Commission, as described and incorporated in the findings of fact above. Both in tone and substance, unlike his more rambling July 29, 2008 e-mail, Ferreira's reports to Chief Brodeur are respectful, candid and factual. He gave Firefighter Waugaman the benefit of the doubt on allegations about which he wasn't sure, such as whether any intimacy took place after March 2007 or whether there ever actually had been inappropriate behavior in vehicles behind the station. He did not conceal his own discomfort with what he considered Chief Brodeur's foot-dragging in dealing with the issue. (*Exhs. 5, 6A, 6B, 7A & 7B*)

51. Eventually, Mrs. J met with Chief Brodeur, Falmouth Assistant Town Administrator Heather Harper and Falmouth Labor Counsel. She went reluctantly, but voluntarily, and without pressure from anyone else. At or about the time of this meeting, however, got a text message on her cell phone that she turned over to Chief Brodeur and which read: "Do your kids and all thier [sic] friends know what u did? keep [sic] your mouth shut." The source of this e-mail was never identified. I draw no inferences about

who sent it to her. (Exh.4;Tr.II:14-31,157-161[Mrs. J];Tr.III:31-33,152-155[Brodeur])

52. After meeting Mrs. J, Chief Brodeur ordered Firefighter Waugaman to submit a report containing a detailed accounting of all visits with Mrs. J, whether he had engaged in specifically listed forms of intimate conduct while on duty, and the identity of anyone who knew of the affair. He was also asked to report any other FFD firefighters who engaged in such intimate conduct on duty. Waugaman was reminded that untruthfulness was another independent grounds for possible discharge. (Exh.18; Tr.III:155[Brodeur])

53. Firefighter Waugaman's response, dated March 28, 2009 states:

"I have acknowledged to you in the past that I did have an extramarital affair and that I haven't done anything to compromise my job. In response to your questions about this, yes, [Mrs. J] has come to station 5 to see me. These visits occurred during the evening hours on her way home. We would meet outside station 5. During these visits we would converse and when she left on occasion we would kiss goodbye. That was the extent of the contact. I never spoke to anyone about these visits and to my knowledge no one knew of them. The only time that I am aware of [Mrs. J] being in station 5 was after she and I had a falling out, she went there looking for me. Mr. Ferreira told me of this because they spoke and I was not there that day.

I have heard numerous rumors of fellow firefighters engaging in sexual activities in single man stations. I do know that [a woman] did come to visit Mr. Ferreira many times over the three years that they were having an affair . . Mr. Ferreira did make statements about other sexual activities with her, including an event that took place in your office. Mr. Patrick Gonsalves had an inappropriate relationship with a traveling nurse [first name] during the Barnstable County Fair detail in 2005, that he spoke to me about later that night . . . Pat had made arrangements with this nurse and Mrs. J to meet him back at station 5 to have beers . . .because he wanted to 'hookup' again with the same nurse.

As to the March 4, order, I have not spoken to anyone about it. . . I haven't attempted to make contact with either Russell or [Mrs. J] in over 15 months. However, I have received 3 text messages from a pre-paid cell [number] which I assume is [Mrs. J]. The only time I have seen [Mrs. J] was during the figure skating show at Falmouth Ice Arena. . . . [Mrs. J] has told myself and my wife that she has a friendship with Russell and that they do talk frequently and that the friendship started a couple of year ago.

/s/ Mark Waugaman

(Exh.19) (emphasis added)

54. On April 10, 2009, Chief Brodeur issued written Notice of Charges To Firefighter Mark Waugaman, citing his sexual relations on duty and untruthfulness in his report. Chief Brodeur relieved Waugaman of all authority and privileges as a FFD firefighter and

placed him on paid administrative leave. The notice stated: “If you believe that you have to come to Fire Department facilities, you must call me in advance and get permission.” (Exh.2;Tr.III:158-159[Brodeur])

55. On or about April 21, 2009, Firefighter Waugaman “came into the station and emptied his locker of his personal belongings, and left . . . he did not touch or go into any other lockers.” Waugaman said he did not ask permission because he “heard that Mr. Ferreira had been around my locker.” FFD personnel lockers are for personal use and firefighters have an expectation of privacy concerning their contents. (Exh.21; Tr.III:79-81,88-90[DeMello];Tr.IV:75-77,140-143[Waugaman];Tr.IV:33-34[Brodeur])

56. On May 4, 2009, Chief Brodeur asked Firefighter Gonsalves to report if he ever met the nurse named by Firefighter Waugaman in his report. Gonsalves responded

In July 2005, I did a paid detail at the Barnstable County Fair, after returning to the station and securing the vehicle and logged off duty. I had a beer or two with Mark Waugaman, [Mrs. J.] I don’t remember a girl named [first name]. I also did not arrange Any [sic] meeting. Mark Waugaman, Mel Trott, Sean Ellis were on duty with me at the BCF, and had to return there to retrieve there [sic] vehicles.

Respectfully submitted
/s/ **Patrick R Gonsalves**
F/F Patrick R. Gonsalves

Firefighter Gonsalves also stated: “No, I did not have sex with anyone at the BCF”, denied that he ever had sex on duty at the Barnstable County Fair or anywhere else and emphatically denied that he ever told Mark Waugaman that he did either of those things.

(Exhs.11 & 12) (*emphasis added*)³

³ At the hearing before the Commission, Firefighter Gonsalves recalled that he did know the nurse, who had once treated his father, and did recall meeting her and Mrs. J. for beers at Station 5 after the 2005 Barnstable County Fair, but still did not “recall” going to the beach with her. Both Waugaman and Mrs. J. contradicted Firefighter Gonsalves’ testimony on this point and I am inclined to believe that Mrs. J’s version of the beach party is closest to the truth. (Tr.II:183-191[Mrs.J];Tr.III:41-47,60,72-73[Gonsalves]; Tr.IV:51-56,112-117,145-146[Waugaman]) As this incident did not play any part in the charges against Firefighter Waugaman, the Commission need not address the incident further.

57. On May 6, 2009, Chief Brodeur issued an “Amended Notice of Charges to Firefighter Mark Waugaman” which added a charge of insubordination for coming onto FFD property without prior permission. No charges were added related to any of Firefighter Waugaman’s allegations of inappropriate conduct between Firefighter Gonsalves and the woman at the Barnstable County Fair. (*Exh.22*)

58. Chief Brodeur testified: “I didn’t want anything to be tampered with or misconstrued or any individual within the department affected by Mr. Waugaman while this investigation was going on”. He said: “When someone is issued an order . . .that should be adhered to” and it was “not what was in the locker, it was the order that was standing”. When asked for examples of discipline Chief Brodeur meted out for disobeying an order, he described a verbal warning given to personnel who had used an ambulance to take off-duty FFD personnel to the Woods Hole ferry, against his direct prior order. (*Exh.22;Tr.III:160-165[Brodeur];Tr.IV:14-17,33-38[Brodeur]*)

59. On May 11, 2009, an appointing authority hearing was convened before a hearing officer appointed by Falmouth Town Manager Robert L. Whritenour, Jr. The witnesses included Firefighters Ferreira and Waugaman and Mrs. J. On June 29, 2009, the hearing officer reported her findings and recommendations, concluding that all three charges asserted against Firefighter Waugaman had been sustained and recommended that he be discharged from employment. In particular, the hearing officer found:

- While on duty, in his bedroom at Falmouth Fire and Rescue Station 5, Waugaman had sex with [Mrs. J], with whom he was carrying on an extramarital affair;
- Waugaman orchestrated clandestine post-midnight meetings with [Mrs. J] at Station 5 while he was on duty;

- Waugaman disobeyed Chief Brodeur's order and lied to him, under the threat of dismissal, when he failed to give a complete and truthful report concerning his interactions with [Mrs. J] at Station 5. His lies included a denial that he ever let her into the Station and, of course, that they had sex in the Station. He also lied when he reported that FF Ferreira told him that Ferreira had engaged in a sexual act in the Chief's office with another employee while on duty.
- Waugaman defied Chief Brodeur's order not to come to Station 5 without advance notice or permission when he went into Station 5 on April 21st and proceeded to remove items from his locker.

The hearing officer found: "Waugaman's conduct constitutes conduct unbecoming a firefighter and violates [FFD Rule 11, §§1&2 and Rule 21, § 1(a), (g), (j) & (m)]". (*Exh. 2*)

60. On June 30, 2009, Town Manager Whritnour adopted the hearing officer's conclusions and recommendations and dismissed Firefighter Waugaman, effective immediately. This appeal duly ensued. (*Exh. 1; Claim of Appeal*)

The Credibility of the "Eyewitnesses"

61. No eyewitnesses other than Mrs. J came forward to testify that they saw Firefighter Waugaman engaged in intimate relations with her at Station 5. The finding on this specific point would have turned on whether to believe Mrs. J or Mr. Waugaman, save for the circumstantial evidence that points conclusively to a finding that Firefighter Ferreira did once see Mrs. J leaving the living quarters of Station 5 with Firefighter Waugaman after midnight in or about March 2007 and other convincing evidence that warrants the conclusion that she visited many times over the course of their two year affair. (*See Findings of Fact, Nos. 23 through 37, 41 and 41*)

62. I have considered that Mrs. J might harbor animus against Mr. Waugaman. Her demeanor, however, suggested a person more nervous than calculating and more remorseful than revengeful. In addition, although her memory, especially for dates, was not perfect, she displayed remarkably clear and honest recollections of many details that

could not be contrived or all chalked up to lucky guesses. Among the specific facts that persuade me of the basic truthfulness of the account of her visits to Station 5:

- In a spontaneous response, she accurately described the routine when an alarm signal sounds in the station and the lights come on at night.
- She described once getting lost and coming through the men's room rather than the kitchen, her normal route, an understandable mistake that had the ring of truth and one that would not be easy to contrive.
- She recalled seeing a Christmas tree at holiday times.
- She accurately recalled two beds, lockers and a TV in Firefighter Waugaman's bedroom and other furnishings in the main living room.
- She credibly testified that the visits stopped because Firefighter Waugaman had a new shift partner whose "sleep patterns" weren't known.
- She said she always used the apparatus floor door which was left open for her. The front and rear doors, which would be the more obvious way to think to enter, were alarmed and locked and could not have been left open. Thus, she described the only way she could have entered the station undetected.
- She described Firefighter Waugaman's nighttime attire as "socks, shorts, sweatpants", consistent with what all firefighters described they wore to bed.

(Exhs 8 through 10; Tr.III:4-7[View]; Tr.II:93-94, 107-108, 123-125, 129-130, 209-214, 217-218 [Mrs. J]; See also Finding of Fact Nos. 12, 24-29, 32-34)

63. The Appellant makes the point that Mrs. J was not a "reluctant" witness, despite appearing by subpoena, noting that she voluntarily met with Chief Brodeur and other Falmouth officials, including Falmouth's legal counsel, prior to testifying at the appointing authority hearing and before the Commission. At these meetings she was "shown" a pre-prepared schematic diagram of the station to annotate the details of her visits. The evidence suggests that the preliminary meetings were merely customary due diligence and hearing preparation and I find no reason to believe these meeting unduly shaped her testimony. I am unable to infer whether or not Mrs. J would have refused to testify but for the subpoena, but I find that less important a factor in credibility than whether her demeanor in giving testimony appeared consistent with a person who wants

to tell the truth, as I find it did. (*Exh.5;Tr.II:12-30,157-161,172-174 [Mrs. J];Tr.III:150-155[Brodeur]; Tr.IV:8-11 [Brouder]*)⁴

64. The Appellant also moved to reopen the record “for the limited purpose of introducing correspondence received by the Appellant after the record closed which he believed reflected on Mrs. J’s credibility.” The document is a letter from the Director of Clinical and Research Compliance at Falmouth Hospital to Mr. Waugaman, dated December 17, 2010, in response to a claim that Mrs. J improperly accessed Mr. Waugaman’s family medical records in September 2009. The letter states, in part:

[I]t appears there may have been an isolated accessing of certain medical information in 2009 pertaining to your visit to Falmouth Hospital Emergency Department on September 28, 2009 for a wound check. It is hard for us to confirm for certain at this point whether there were circumstances at the time which may have justified the access, but we are certain that no sensitive information was accessed by [Mrs. J]. . . . Appropriate disciplinary action has been taken against [Mrs. J] by the Hospital.”

I deny the motion, and mark the document as Post-Hearing Exhibit 23 for Identification, noting Falmouth’s objection and saving Appellant’s rights.(*Post-Hearing Exh.23[ID]; Appellant’s Motion to Reopen the Record; Town’s Opposition to Appellant’s Motion*)

65. On the merits, I find the Falmouth Hospital letter, although hearsay, to be an accurate and reliable record made by the hospital in the ordinary course of business. However, although it arguably may be relevant, I would give little or no weight to evidence of disciplinary action taken against Mrs. J related to Mr. Waugaman’s medical records without an opportunity to develop the facts of the matter and, to the extent there is discretion here, I see no compelling reason to reopen the record to allow that collateral foray. The incident, as described in the letter, suggests a very minor, perhaps inadvertent,

⁴ It was previously noted that Mrs. J testified that Firefighter Waugaman had approached her after she had been subpoenaed to testify at the appointing authority hearing. (*Tr.II:152-154[Mrs.J]*)

breach of protocol. The letter, even if admitted, would make no difference to my findings about Mrs. J's credibility or motives. Indeed, were this letter admitted, there is an equal likelihood that it would lead me to infer that Mr. Waugaman harbored more animus and had sought to use a harmless act by Mrs. J as a means of retaliating for her testimony against him, as it would suggest any lingering animus on her part. (*Exh 23[ID]*)

66. I also considered Firefighter Ferreira's potential bias. He clearly was a once-loyal mentor reluctantly forced to live a lie himself and contain pent-up distain for someone whom he believed betrayed him and his union brothers in order to save his own skin. I am not persuaded that Ferreira was totally forthcoming about his own past behavior. I find particularly inappropriate that he would carry on a flirtatious relationship with Mrs. Waugaman that included inappropriate e-mails to her at work. Despite these flaws, however, when it came down to what he said, and wouldn't say, about Firefighter Waugaman's relevant on-duty misconduct, I detected no interest in embellishment. In particular, his testimony that places Mrs. J, on at least one occasion, in Waugaman's bedroom with the door closed, was fully credible. (*Exhs. 6B, 7B,16;Tr.I:6-91,113-123, 133-149[Ferreira];Tr.II:231-232,242-259,265-274,283-284[Ferreira]; Findings of Fact Nos. 6,22,31-35,39-40,44,50-51*)

67. Finally, Firefighter Waugaman – aside from having his job and, possibly, his marriage on the line – faced a dilemma. By his own admission, he had lied to many people, including his wife, the police and his colleagues. He needed to stick to the “same story” he had been telling Chief Brodeur “for a year and a half”, lest he be caught into admitting his own untruthfulness to the Chief as well. He knew that untruthfulness, alone, could lead to his termination. He showed little remorse for his behavior, going only so far

to state: “I learned that having an affair is not a good thing”. At one point or another, nearly every other witness had “bothered”, “harassed”, “threatened” or “attacked” him or his wife or was out to get him fired. (*Exhs.6B,7B,16&19;Tr.I:58-64,81,137-138,147-148 [Ferreira]; Tr.II:136,154 [Mrs.J]; Tr.II:83 [Ferreira];Tr.III:47-48,54,59 [Gonsalves]; Tr.IV:65-66,77-81,87-93,96-97,100,107-109,148,159-160[Waugaman]*)

68. In sum, after fully considering all of the evidence, including, in particular, Firefighter Waugaman’s repeated untruthfulness under oath about never taking Mrs. J inside Station 5, as well as other admitted examples and circumstantial evidence of Waugaman’s untruthfulness on a myriad of other occasions, I infer that it is more probable than not that sexual relations did occur inside Station 5 as Mrs. J testified, and that Firefighter Waugaman’s denials about that were untruthful as well.

CONCLUSION

Summary

Falmouth has met its burden to establish reasonable justification to discharge Firefighter Waugaman for carrying on an extra-marital sexual affair while on duty and for his untruthfulness about it. While Falmouth did not meet its burden to show that Firefighter Waugaman lied by claiming that Firefighter Ferreira told him he had engaged in similar sexual misconduct in the past, and there may have been mitigating circumstances as to the insubordination charge, failure to establish fully those other charges does not warrant a modified penalty, given the serious on-duty misconduct and untruthfulness that was proved in this case.

Applicable Civil Service Law

A permanent civil service employee who claims to be aggrieved by a disciplinary decision made pursuant to G.L.c.31,§41, may appeal to the Commission under G.L. c.31, §43, which 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.

Under Section 43, the role of the Commission is to determine, under a “preponderance of the evidence” test, “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, rev.den., 426 Mass. 1102 (1997). See also 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 (2000); McIsaac v. Civil Service Comm’n, 38 Mass.App.Ct. 473, 477 (1995); Watertown v. Arria, 16 Mass.App.Ct. 331, rev.den., 390 Mass. 1102 (1983).

In performing its function, “the commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew. . . . [in] ‘a hearing de novo upon all material evidence and a decision by the commission upon that evidence and not merely. . .a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the

appointing officer' . . . For the commission, the question is . . . 'whether, on the facts found by the commission, 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.' ” Leominster v. Stratton, 58 Mass.App.Ct. 726,727-728(2003)(affirming Commission decision rejecting evidence of appellant’s failed polygraph test and domestic abuse orders and crediting appellant’s exculpatory testimony) (*emphasis added*). cf. Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (inconsequential differences in facts found insufficient to hold appointing authority’s justification unreasonable) See generally Villare v. Town of North Reading, 8 MCSR 44, reconsid’d, 8 MCSR 53 (1995) (discussing need for de novo fact finding by a “disinterested” Commissioner in context of procedural due process); Bielawski v. Personnel Admin’r, 422 Mass. 459, 466 (1996) (same)

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 (1971); 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 the “merit principle” which governs 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 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 (1956); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1982). The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract 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 entitled to due weight for its experience, technical competence, and specialized knowledge, as well as to the discretionary authority conferred upon it. . .This standard of review is highly deferential to the agency on questions of fact and reasonable inferences drawn therefrom.’ ” Brackett v. Civil Service Comm’n, 447 Mass. 233, 241-42 (2006) and cases cited.

It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great

reluctance.” E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) See 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). See also Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003) (where live witnesses gave conflicting testimony 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)

On-Duty Misconduct

Falmouth proved that Firefighter Waugaman used FFD property to carry on an inappropriate extra-marital affair while on-duty. He arranged trysts both outside and inside Station 5. By the preponderance of evidence, these meeting included, at times, intimate sexual relations while on duty. Until he was discovered, Firefighter Waugaman hid this activity from his wife, his shift partner at Station 5, and his FFD colleagues and command staff. Falmouth proved that this gross misuse of his office was conduct that, in general, is unbecoming an FFD firefighter, detrimental to the good order of the department, and, in particular, violated FFD Rules and Regulations implemented with those principles in mind. Falmouth was reasonably justified to terminate Firefighter Waugaman for this misconduct. See, e.g., Police Comm’r v. Civil Service Comm’n, 22 Mass.App.Ct. 364, rev.den., 398 Mass.1103 (1986) (termination was the proper discipline of police officer who had sexual intercourse at a private club while on duty); Belanger v. Barnstable Police Dep’t, 7 MCSR 1103 (1994) and cases cited (police officer terminated for bringing a woman to his home for sex while on duty); In re Town of Milford, 4 MCSR 96 (1991) (sex in police cruiser was “conduct unbecoming” and warranted termination); In re Town of Attleboro, 2 MCSR 88 (1989) (firefighter terminated for

“conduct unbecoming” by having consensual sex in a firehouse); In re Town of East Bridgewater, 2 MCSR 85 (1989) (termination for having sex in police cruiser); In re Town of Wareham, 1 MCSR 161 (1988) (on duty consensual sex by police officer). See also Coronella v. Town of Mashpee, 19 MCSR 262 (2006) (termination for having sex in cruiser, among many other acts of misconduct)

The Commission has characterized misconduct by a public officer who, while on duty, uses his office for personal sexual gratification (let alone to further an extra-marital sexual affair) as an “egregious breach of public trust”, an “utter lack of adult judgment” and “a form of stealing” from the employer. E.g., In Re Town of East Bridgewater, 2 MCSR 85 (1989). Although the “time stolen from work” may be “relatively short”, a public officer is dishonest “to abandon his duty and collect pay for the time spent on [such] personal business.” In Re Town of Wareham, 1 MCSR 161 (1988).

Falmouth also makes the point that FFD rules and regulations restrict the use of the station bedrooms to sleeping – i.e., resting – and that, except in emergencies, outside visitors, and certainly secret conjugal visitations at any time, were unacceptable. Firefighter Waugaman held appointment to the position of permanent FULL TIME Firefighter/Paramedic. This is no incidental title. As a firefighter and paramedic, his public responsibility required that he be prepared on a moment’s notice to respond to a call for service in which the lives of others depend on his preparedness and diligent attention to duty, at all hours of the day or night. The moral issues aside, there is no excuse for a public officer, especially a firefighter who is on duty two days a week and off duty for five, to use the office in any way for the furtherance of an illicit affair which

invites the unwanted complicity and the serious adverse effects upon his colleagues and other potential harm to members of the public he serves, as occurred here.⁵

Untruthfulness

Falmouth has also met its burden to prove that Firefighter Waugaman gave untruthful accounts of his on-duty sexual escapades when called to explain his conduct by Chief Brodeur. The point must be noted that, the relevant principle of civil service law espoused by Commission and judicial decisions, do not require an appointing authority to go so far as to prove prevarication about some form of “penetration” beyond a reasonable doubt, as if this were a rape prosecution. Chief Brodeur’s order asked for a full and unvarnished accounting of all intimate behavior at the station, including “hugging, kissing, fondling” as well as other specific intimate sexual acts. Chief Brodeur also asked whether any other firefighter knew about his behavior. Firefighter Waugaman denied doing anything more than occasionally “kissing goodbye” when he knew that his behavior involved far more intimate acts than that. He knew he had flouted the relationship (and may have exaggerated it) repeatedly with Firefighter Ferreira. He knew of at least two occasions (St. Patrick’s Day and the night Waugaman’s son called) that Firefighter Ferreira must have seen Mrs. J in the station. His untruthfulness, in addition to being insubordinate, forced a much prolonged and unnecessary, investigation in search of the truth. In addition, his untruthfulness confirms a serious character flaw that reinforces the conclusion that he did not fully acknowledge his wrongdoing and that Falmouth had

⁵ In some cases, acts of public lewdness, even while off-duty, are sufficient to establish “conduct unbecoming” a public officer to justify termination. See, e.g., Lynch v. Department of Correction, 23 MCSR 696 (2011) (road rage and public lewdness at rest stop); Cullen v. Department of Correction, 21 MCSR 220 (2008) (off-duty exposure in vehicle parked on public street); Marino v. Jackson, C.A., 85-680 (Essex Sup.Ct. 1985) and cases cited (off-duty acts of sexual foreplay in cruiser on public street and in tavern within view of patrons) Although Falmouth did not discharge Firefighter Waugaman for off-duty conduct unbecoming, the undisputed admissions that he carried on his sexual affair in public places on multiple occasions was certainly of that character.

good reason to believe that discipline, short of discharge, was not going to solve the problem. See, e.g., City of Cambridge v. Civil Service Comm'n, 43 Mass. 300, 303 (1997) (“The city was hardly espousing a position devoid of reason when it held that a demonstrated willingness to fudge the truth in exigent circumstances was a doubtful characteristic . . . It requires no strength of character to speak the truth when it does not hurt.”); cf. Polin v. Town of Randolph, 23 MCSR 229 (2011) (upholding bypass of candidate for firefighter due to his dishonesty in application concerning prior driving record)

There is less certainty that Firefighter Waugaman was untruthful in claiming that Firefighter Ferreira once claimed to have had sex in Chief Brodeur’s office with a civilian employee. The episode, if it occurred, took place some time ago. Although Firefighter Waugaman had no basis for the assertion other than his word that Firefighter Ferreira had bragged to him about it, Falmouth had no proof to the contrary other than Firefighter Ferreira’s denial. Firefighter Waugaman was always clear that his only source of information about this was what Firefighter Ferreira had told him. There is insufficient evidence to infer that the alleged sexual act actually occurred, but that is not the issue. Based on the other evidence of the sexually provocative workplace behavior between Firefighter Ferreira and other women, the preponderance of evidence permits an inference that Firefighter Ferreira, indeed, may have once bragged that he had sex in Chief Brodeur’s office and Firefighter Waugaman was not untruthful about reporting that is what he heard Firefighter Waugaman say. Had Firefighter Waugaman volunteered this salacious information unsolicited or in another context, it might well be cause for discipline, but he came forward only because he was ordered to report any and all such

information of that nature in the letter he received from Chief Brodeur.⁶

Insubordination

The final act of misconduct is Firefighter Waugaman's action in coming to Station 5 to remove his personal effects from his locker one evening after he was placed on administrative leave, without prior notice or permission from Chief Brodeur, who had ordered him to stay away from the station and all personnel, pending the investigation. Firefighter Waugaman clearly violated the letter of this order. His excuse for coming to Station 5 without asking permission, i.e., he heard Firefighter Ferreira had been nosing around his locker, does not wash. Some discipline for this misconduct was warranted.

Chief Brodeur could articulate no specific mischief that occurred as a result of Firefighter Waugaman's appearance at the station and removing his personal effects – with only one other disinterested firefighter on duty – other than the harm to the integrity of the organization that comes from violation of any lawful order delivered by an FFD superior officer to a subordinate. Chief Brodeur's discipline of other firefighters who flouted his direct order never rose above a verbal reprimand for the first offense. Had Firefighter Waugaman not been responsible for the serious acts of on-duty misconduct and untruthfulness described above, the Commission would not uphold a termination of his employment for this single incident of insubordination. Falmouth's decision to

⁶ Firefighter Waugaman's allegation that Firefighter Gonsalves had a sexual encounter with a Falmouth Hospital nurse at the Barnstable County Fair was not found to be an act of untruthfulness at the appointing authority level hearing. Falmouth now argues that this allegation is another example of Firefighter Waugaman's "despicable" effort to "besmirch the careers and personal lives of two fellow firefighters". Assuming, without deciding, that this allegation can be considered properly before the Commission as a separate basis for justifying the charge of untruthfulness, the same analysis applies as to whether Firefighter Waugaman was untruthful about what Firefighter Gonsalves said he did, not whether he actually did it. In fact, in his case, there is credible, independent circumstantial evidence that impeaches Firefighter Gonsalves testimony about the full extent of his contacts with the nurse involved which, in turn, makes any proof of untruthfulness about the facts and statements made about this second distant episode even more problematic.

terminate Firefighter Waugaman is justified on those other grounds, however, and consideration of further discipline for coming to the station without permission is moot.

Modification of Penalty

Finally, since the facts established before the Commission do vary from those upon which Falmouth relied, the Commission must consider whether to exercise discretion to modify the penalty imposed.

G.L.c.31, Section 43 vests the Commission with the authority to affirm, vacate or modify the penalty imposed by the appointing authority. The Commission has been delegated with “considerable discretion”, albeit “not without bounds”, to modify a penalty imposed by the appointing authority, so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. E.g., Police Comm’r v. Civil Service Comm’n, 39 Mass.App.Ct. 594,600 (1996) and cases cited.

“It is well to remember that the power to modify is at its core the authority to review and, when appropriate, to temper, balance, and amend. The power to modify penalties permits the furtherance of uniformity and equitable treatment of similarly situated individuals. It must be used to further, and not to frustrate, the purpose of civil service legislation, i.e., ‘to protect efficient public employees from partisan political control’ . . . and ‘the removal of those who have proved to be incompetent or unworthy to continue in the public service’.”

Id., 39 Mass.App.Ct. at 600. (*emphasis added*). See Faria v. Third Bristol Div., 14 Mass.App.Ct. 985, 987 (1982) (remanded for findings to support modification)

In deciding to exercise discretion to modify a penalty, the commission’s task “is not to be accomplished on a wholly blank slate. After making its de novo findings of fact, the commission must pass judgment on the penalty imposed, a role to which the statute speaks directly. G.L.c.31,§43. Here, 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.’ ” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983). “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 to the appointing authority.” 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).

Thus, when it comes to its review of the penalty, unless the Commission’s findings of fact differ materially and significantly from those of 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.”). Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited (minor, immaterial differences in facts found by Commission and appointing authority did not justify modification of 180 day-suspension). See, e.g., Town of Falmouth v. Civil Service Comm’n, 61 Mass.App.Ct. 796 (2004) (modification of 10-day suspension unsupported by material difference in facts or finding of political influence); Commissioner of MDC v. Civil Service Comm’n, 13 Mass.App.Ct. 20 (1982) (discharge improperly modified to 20-month suspension); cf. School Committee v. Civil Service Comm’n, 43 Mass.App.Ct. 486, rev.den., 426 Mass. 1104 (1997) (discharge modified to one-year suspension upheld); Dedham v. Civil Service Comm’n 21 Mass.App.Ct. 904 (1985) (discharge modified to 18-months upheld); Trustees of the State Library v. Civil Service Comm’n, 3 Mass.App.Ct. 724 (1975) (discharge modified to 4-month suspension upheld)

After careful consideration, for the reasons expressed above, the differences in the facts found by the Commission in this case do not present an occasion for the Commission's exercise of discretion to modify a termination that is rationally supported by substantial evidence of the serious misconduct that was proved.

Accordingly, the appeal of the Appellant, Mark Waugaman, is hereby *dismissed*.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowall, Marquis & Stein, Commissioners) on May 31, 2012.

A True Record. Attest:

Commissioner

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)(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 does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of a Civil Service Commission's final 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.

Notice to:

James W. Simpson, Jr., Esq. (for Appellant)

Leo J. Peloquin, Esq. (for Appointing Authority)