

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

KEVIN PIERRE,
Appellant

v.

Case No. D1-12-45

CITY OF CAMBRIDGE,
Respondent

Appearance for Appellant:

Neil Rossman, Esq.
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Boston, MA 02109

Appearances for Respondent:

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Commissioner:

Paul M. Stein¹

DECISION

Procedural History

Pursuant to G.L. c. 31, § 43, the Appellant, Mr. Kevin Pierre (“Appellant” or “Mr. Pierre”), filed a timely appeal with the Civil Service Commission (“Commission”) on February 9, 2012, contesting the decision of the City of Cambridge (“City” or “Appointing Authority”) to terminate his employment as a fire fighter with the Cambridge Fire Department (“CFD”) on January 26, 2012, for violating the terms of his last chance agreement and the rules and policies of the CFD. A pre-hearing conference was held on March 20, 2012, at the offices of the

¹ The Commission acknowledges the assistance of Law Clerk Beverly J. Baker, Esq., in the drafting of this decision.

Commission. A full hearing was held at the same location on July 10, 2012. Following a request from the Appellant, the hearing was declared to be public. The hearing was digitally recorded and the parties were provided with copies of the recording. The parties submitted post-hearing briefs on or before October 22, 2012.

Summary

The City has demonstrated, by a preponderance of evidence, that it had just cause to terminate Mr. Pierre, based on his violation of his last chance agreement and the rules and policies of the CFD.

FINDINGS OF FACT

Based on the nineteen (19) exhibits entered into evidence, the stipulations of the parties, the testimony of:

Called by the City:

- Sergeant Stephen Lefebvre, Cambridge Police Department;
- Lieutenant Brian Albert, CFD;
- Deputy Chief James Burns, Assistant Chief of Administration, CFD;

Called by Mr. Pierre:

- Mr. Kevin Pierre, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, and policies, and reasonable inferences therefrom, a preponderance of the evidence establishes the following findings of fact:

1. Mr. Pierre was appointed to the position of fire fighter with the CFD on February 19, 2002 and was a tenured civil service employee. (Stipulated Fact)
2. For at least two years prior to his discharge, Mr. Pierre was assigned to the East Cambridge Fire Station, where he was a member of Engine 3. (Testimony of Mr. Pierre)

3. Section XVII of the Rules and Regulations of the CFD (“Rules and Regulations”), adopted in 1954 and in effect at all material times, provides, in pertinent part, that “no member shall act as a chauffeur [driver] unless he is licensed by the Registrar of Motor Vehicles.” (Ex. 3)
4. The City of Cambridge Employee Manual (“City Employee Manual”), in effect since July 30, 2001, provides, in pertinent part:

Driver’s License and Driving Record

Employees whose work requires operation of a motor vehicle must present and maintain a valid driver’s license and a driving record acceptable to the City. You will be asked to submit a copy of your driving record to the City from time to time.

Any changes in your driving license status must be reported to your supervisor immediately. Failure to do so may result in disciplinary action, including possible dismissal.

(Ex. 4)

5. The City Employee Manual also contains a section listing violations which may result in dismissal without prior disciplinary action due to the serious nature of such violations.

These violations include, among others:

Willful violation of any City of Cambridge rule; any deliberate action that is extreme in nature and is obviously detrimental to the City’s efforts to provide services effectively and efficiently.

Dishonesty; willful falsification or misrepresentation on your application for employment or other work records; lying about sick or personal leave; falsifying the reason for a leave of absence or other data requested by the City; failing to tell the truth at any time during the course of your employment with the City; intentionally and willfully misrepresenting information about the City or its employees to members of the media; failing to tell the truth during the course of a City investigation; alteration of City records or other City documents.

(Ex. 4)

6. Section XVII of the Rules and Regulations requires the member assigned to drive fire apparatus to see that all motor pumps and mechanical parts are kept clean and serviceable.

The CFD maintains a Main Check List for each vehicle with nineteen (19) items to be checked by the operator on each shift. (Ex.3)

7. In May 2011, the CFD conducted an investigation when it learned that Mr. Pierre's driver's license had been suspended on multiple occasions. (Ex. 1B)
8. On or about June 15, 2011, the City notified Mr. Pierre via letter that the City was contemplating disciplinary action against him based upon allegations that he "engaged in a pattern of behavior which has demonstrated that [Mr. Pierre was] unfit to perform as a Cambridge Fire Department employee." (Ex. 5)
9. This letter alleges that Mr. Pierre's license was suspended on February 20, 2011, for sixty (60) days and that Mr. Pierre failed to report to his supervisors that his license was suspended. In addition, it is also alleged that during this time period, on February 24, 2011, and March 9, 2011, Mr. Pierre knowingly drove the CFD apparatus in the City while his license was suspended. (Ex. 5)
10. The letter further alleges that Mr. Pierre's license was also suspended from May 26, 2010 to September 27, 2010 and Mr. Pierre failed to report to his supervisors that his license was suspended. The letter alleges that during this period of time, Mr. Pierre knowingly drove CFD apparatus on six occasions, while his driver's license was suspended. (Ex. 5)
11. The letter also served to notify Mr. Pierre that a hearing would be held to consider the disciplinary charges on June 30, 2011. A copy of G.L. c. 31, §§ 41-45 was included with the letter. (Ex. 5)
12. Following the hearing, Mr. Pierre signed a settlement agreement on or about August 3, 2011. In the agreement, Mr. Pierre admitted that his violation of the Department's and the City's work rules and the laws of the Commonwealth were "so serious as to justify

discharge from employment with the City.” He accepted a suspension without pay of fifteen (15) tours of twenty-four (24) hours each; ten (10) tours to be served and five (5) tours to be held in abeyance by the City for three (3) years. (Ex. 2)

13. By entering into the settlement agreement, Mr. Pierre also agreed to maintain a valid Massachusetts driver’s license at all times during the course of his employment with the CFD, and to notify the CFD if his license was suspended or revoked. The Settlement Agreement had a Last Chance component in which Mr. Pierre agreed that any violation of City or CFD rules or state laws or regulations, including failure to maintain a valid Massachusetts driver’s license, would warrant the penalty of discharge. (Ex. 2)

14. Mr. Pierre understood the terms of the Settlement Agreement. (Testimony of Mr. Pierre)

15. The General Order dated September 6, 2011, sets forth the dates the suspension was to be served. (Ex. 6)

16. The Registry of Motor Vehicles (“RMV”) Historical License/ID and Demographic Information shows that on or about March 23, 2010, Mr. Pierre changed his address from Brockton to Roslindale. (Ex. 9A)

17. Mr. Pierre notified the CFD about the address change on or about June 30, 2011. (Ex. 9B)

18. On or about July 21, 2011, Mr. Pierre received a citation for not having an inspection sticker. (Ex. 8)

19. On or about September 20, 2011, the RMV sent written notice to Mr. Pierre’s residential address of record in Rosindale, notifying him that effective October 20, 2011, his license to operate a motor vehicle would be suspended because he did not pay the fines related to the July 21, 2011 inspection sticker violation. (Ex. 8)

20. Also on or about September 20, 2011, the RMV sent written notice to Mr. Pierre's residential address of record in Roslindale, notifying him that effective October 20, 2011, his license to operate a motor vehicle would be suspended for sixty (60) days for seven (7) surchargeable events, which included the most recent citation for the inspection sticker violation. (Ex. 8)
21. Mr. Pierre's license suspension based on the sticker violation could have been cured by paying the fines. However, the suspension based on seven (7) surchargeable events was a mandatory/automatic suspension. (Testimony of Sgt. Lefebvre)
22. The sixty (60) day license suspension went into effect on or about October 20, 2011, and ran its course, until Mr. Pierre got his license reinstated on or about December 19, 2011. (Exs. 10 & 11)
23. Mr. Pierre acted as the driver of Engine 3 on the day and night shifts (a total of twenty-four (24) hours) on or about October 22, 2011 and December 6, 2011, while his license was suspended. (Exs. 12A & 12B)
24. On or about October 22, 2011, Engine 3 had four (4) responses to emergency calls during the twenty-four (24) hour shift. On or about December 6, 2011, Engine 3 had three (3) such responses.
25. Mr. Pierre concedes that he has an "abysmal" driving record, with copious infractions between March 2003 and December 2011. The infractions range from speeding and failure to stop violations to more "technical" violations such as not having an inspection sticker. (Testimony of Mr. Pierre; Exs. 7 & 8)
26. Mr. Pierre's motor vehicle license was previously revoked on or about May 20, 2011, as a result of his liability insurance being cancelled. (Ex. 8)

27. Mr. Pierre's motor vehicle license was previously suspended for sixty (60) days on or about February 20, 2011 for seven (7) Surchargeable Events. (Ex. 8)
28. On or about December 8 or 9, 2011, Sergeant Lefebvre of the Cambridge Police Department became aware that there was an outstanding default warrant with respect to Mr. Pierre and that his license was suspended after Officer McDavitt, also of the Cambridge Police Department, ran Mr. Pierre's driver's license. (Testimony of Sgt. Lefebvre)
29. Sergeant Lefebvre passed this information about Mr. Pierre up the chain of command. (Testimony of Sgt. Lefebvre)
30. Mr. Pierre was next scheduled to work on December 14, 2011. (Testimony of Sgt. Lefebvre)
31. On or about December 14, 2011, Sergeant Lefebvre was to go to the East Cambridge Fire House ("Fire House"), along with a police lieutenant, and escort Mr. Pierre to the Cambridge District Court, located in Medford, Massachusetts, to clear up Mr. Pierre's warrant. (Testimony of Sgt. LeFebvre; Ex. 13)
32. Prior to Sgt. Lefebvre's arrival at the Fire House on or about December 14, 2011, Lieutenant Brian Albert, of the CFD, received a phone call from the CFD's Deputy Chief James Burns, informing him that two police officers would be escorting Mr. Pierre to the court house and that he should keep this information confidential. (Testimony of Lt. Albert)
33. Upon arrival at the Fire House, Lieutenant Albert was notified and called Mr. Pierre to meet Sgt. Lefebvre and the police lieutenant. (Testimony of Sgt. Lefebvre; Ex. 13)
34. While at the court house, it was determined that the warrant had been issued in error. The warrant was cancelled by the Judge, who also issued an apology to Mr. Pierre. (Testimony of Sgt. Lefebvre, Mr. Pierre; Exs. 11, 13, 14).

35. On the way back from the court house that same day, Sergeant Lefebvre asked Mr. Pierre if he knew his license was suspended, to which Mr. Pierre answered that he could get his license back on December 20th. When Sergeant Lefebvre asked if Mr. Pierre had informed his supervisors at the CFD, Mr. Pierre responded by stating “I don’t think so, I just didn’t drive.” (Testimony of Sgt. Lefebvre; Ex. 13)
36. Also on or about December 14, 2011, Mr. Pierre completed a Form 2, directed to the Chief of the CFD, stating that the warrant issued in his name had been a mistake and was cancelled, and also that his license had been suspended and he would need to “follow up with the necessary steps for reinstatement.” (Ex. 14)
37. Mr. Pierre was placed on discretionary leave until things were sorted out at the RMV. (Testimony of Dep. Chief Burns)
38. On or about December 20, 2011, Mr. Pierre came to Deputy Chief Burns’ office with a document from the RMV showing that his driver’s license was active. When Deputy Chief Burns asked Mr. Pierre if that meant his license had never been revoked, Mr. Pierre stated only that his license was valid. (Testimony of Dep. Chief Burns)
39. On or about December 22, 2011, City Manager Robert Healy issued a notice of contemplated discipline to Mr. Pierre. In addition, the City decided to implement the five (5) remaining twenty-four (24) hour work tours of suspension that had been held in abeyance by agreement. The City’s contemplated disciplinary action against Mr. Pierre was based upon allegations that Mr. Pierre had a suspended license from October 20, 2011 through December 19, 2011 and that he failed in his obligation to notify the CFD on his suspended license and operated City-owned vehicles during the time his license was suspended. A copy of G.L. c. 31, §§ 41-45 was included with this letter. (Ex. 17)

40. A hearing was held by the City on or about January 5, 2012, to consider whether there was just cause for disciplinary action against Mr. Pierre. Mr. Pierre was represented by counsel and testified. (Exs. 1A, 18)
41. On or about January 26, 2012, the City manager issued a decision accepting and incorporating the findings and recommendations of the Hearing Officer. In light of the last chance agreement that Mr. Pierre entered into in or about August 2011, and Mr. Pierre's failure to comply with the terms of the agreement and the rules and policies of the CFD, the City determined that Mr. Pierre was not capable or qualified to carry out his duties as a firefighter and terminated his employment². (Ex. 1A)
42. Mr. Pierre was previously removed from the overtime callback list for three (3) consecutive tours of duty as a result of his failure to appear for work as scheduled, on or about March 3, 2008. He did not call to report the absence and was therefore considered absent without leave. (Exs. 16A & 19)
43. On or about July 6, 2008, Mr. Pierre failed to appear for duty as scheduled and failed to call. When reached by phone, Mr. Pierre reported he could not report to work because he was on his way to Providence and requested an emergency vacation day for the day shift portion of the twenty-four (24) hour tour and stated that he would report for the night shift portion. Twenty (20) minutes before the night shift began, Mr. Pierre left a voicemail that he would not be reporting to work and requested another emergency vacation day. As a result, Mr. Pierre was suspended from duty for a period of one (1) tour for a total of twelve (12) hours and was removed from the overtime callback list for three (3) consecutive cycles. (Exs. 16B & 19)

² In his appeal filed with the CSC, Mr. Pierre claims that the City failed to provide a copy of G.L. c. 31 §§ 41-45 with his termination letter. However, this issue was not raised at the hearing before the CSC and there is no evidence that Mr. Pierre was prejudiced in any way as a result.

44. On or about December 15, 2009, Fire Captain Jason Grimm reported to Deputy Chief Gelinas that based on his dealings with Mr. Pierre over a period of five (5) weeks and his performance, it is his request that Mr. Pierre not be given the added responsibility of being the acting lieutenant in his group. (Ex. 16C)
45. On or about December 28, 2010, Chief Reardon issued Mr. Pierre a suspension from duty of five (5) tours for a total of sixty (60) hours for being absent without leave. Mr. Pierre was also skipped over on the overtime callback list and on the paid detail list for a period of six (6) months. (Exs. 16D & 19)

CONCLUSION

Pursuant to G.L. c. 31, § 43, a “person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, appeal in writing to the commission” The statute provides, in pertinent 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 the 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 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.

G.L. c. 31, § 43.

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.” Cambridge v. Civil Serv. Comm’n, 43 Mass. App. Ct. 300, 304 (1997);

Comm'rs of Civil Serv. v. Mun. Ct. of Bos., 359 Mass. 211, 214 (1971); 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. of Brockton v. Civil Serv. Comm'n, 43 Mass. App. Ct. 486, 488 (citing Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983)).

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

While the Commission makes *de novo* findings of fact, “the Commission’s task, however, is not to be accomplished on a wholly blank slate.” Town of Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823 (2006). “Here, the Commission does not act without regard to the previous decision of the town, 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.’” Id. (citing Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983)).

Absent significant differences between the Commission’s findings of fact and those found by the appointing authority, or a substantially different interpretation of the relevant law, “the commission is not free to modify the penalty imposed by the town on the basis of essentially similar fact finding without an adequate explanation.” Town of Falmouth, 447 Mass. 814 at 824 (citing Police Comm'r of Bos. v. Civil Serv. Comm'n, 39 Mass. App. Ct. 594, 600 (1996)).

Applying these principles to this appeal, I conclude that the City has met its burden of proof and had just cause to terminate Mr. Pierre. The preponderance of the evidence establishes that, less than three months after signing the agreement, Mr. Pierre violated the terms of the last chance agreement with the City by failing to maintain a valid driver's license and failing to notify the CFD immediately that his license was suspended.

Mr. Pierre testified that he did not have knowledge that his license was suspended until he was informed by Sergeant Lefebvre on or about December 14, 2011. However, I do not find Mr. Pierre's testimony to be credible. When Sergeant Lefebvre asked Mr. Pierre if he was aware that his license was suspended, Mr. Pierre responded by saying that he could get his license back on December 20. When asked if he had notified the CFD, he stated "I don't think so, I just didn't drive." Mr. Pierre's answer to the first question was unresponsive and evasive, especially given that the date he mentioned was approximately the date that his license could be reinstated. Furthermore, Mr. Pierre's statements are not in line with the type of responses a person would provide if he or she truly did not have knowledge of the suspension. When asked if he received the notices from the RMV, Mr. Pierre claimed that never received them. The RMV notices were sent to his address of record in Roslindale. Though Mr. Pierre claims that he was living with his girlfriend in Cambridge continuously from September 20, 2011 – December 14, 2011, he failed to provide a reason that he had not received mail addressed to his Roslindale address and could not explain why he had not notified the RMV of a change of his address, as he had done previously. In addition, Mr. Pierre had to be aware of his failure to obtain a valid inspection sticker, his other surchargeable violations, and his outstanding parking tickets and excise tax. His driving record shows that this was not the first time his license had been suspended for having numerous surchargeable events and defaulting on payments. Given his

extensive driving record, Mr. Pierre knew or should have known that his license was either suspended or in danger of becoming suspended, yet he made no inquiry into the status of his license during this time period. It was Mr. Pierre's responsibility to ensure that he maintained a valid license and no reasonable explanation for his failure to do so.³

Rather than terminate Mr. Pierre in May 2011, when it was discovered that his license was suspended, the City entered into the last chance agreement with Mr. Pierre in August 2011. The last chance agreement is valid and I give it significant credit. Mr. Pierre testified that he understood the terms of the agreement. This is now the second time that Mr. Pierre has been charged with having a suspended license, failing to notify the CFD of his suspended license, and operating the City's fire apparatus without a valid license. Maintaining a driver's license is an essential requirement of a firefighter's job, which also requires driving fire apparatus safely while en route to an emergency. The City cannot trust Mr. Pierre to do so and Mr. Pierre's operation of the City's fire apparatus without an active license presents a potential public safety hazard and places the City at risk for liability. Because Mr. Pierre violated the terms of the last chance agreement, along with the rules and policies of the CFD, the City had just cause to terminate his employment as a firefighter.

Having determined that it was appropriate to discipline Mr. Pierre, the Commission must determine if the City was justified in the level of discipline imposed, which, in this case, was termination from his employment as a firefighter with the CFD.

³ I do not credit Mr. Pierre's testimony that he didn't know or have reason to know about his October 2011 suspensions based on the evidence in the record, including his evasive and inconsistent statements to Sergeant Levebvre and in his dubious explanation for why he failed to keep the RMV informed of his whereabouts. Thus, the CFD's post-hearing offer of proof and motion to reconsider the exclusion of other evidence concerning Mr. Pierre's earlier alleged incriminating statements related to a prior license suspension are moot. The rulings excluding that evidence stand.

Given Mr. Pierre's failure to comply with the terms of his very recent last chance agreement, in which he acknowledged that the appropriate penalty for any such violation is discharge, and his prior discipline history, the Commission declines to modify the discipline imposed on Mr. Pierre by the City. The Commission's findings of fact do not differ significantly from those reported by the City, nor does the Commission interpret the law differently than the City has in this case. In addition, there is no evidence of disparate treatment in regard to the penalty imposed nor has there been evidence of any ulterior motives that would warrant the Commission's intervention in regard to the penalty imposed.

For the foregoing reasons, Mr. Pierre's appeal under Docket Number D1-12-45 is hereby *dismissed*.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell, and Stein, Commissioners) on June 27, 2013.

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

Notice:
Neil Rossman, Esq. (for the Appellant)
Philip Collins, Esq. (for the Respondent)