

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108
617.727.2293

KEVIN HOWARD,
Appellant,

v.

D-11-60
D1-11-124

TOWN OF NAHANT,
Respondent

Appellant's Attorney:

Richard B. Reiling, Esq.
Two Center Plaza
Suite 510
Boston, MA 02108

Respondent's Attorney:

Stephen L. Smith, Esq.
85 Exchange Street: Suite 310
Lynn, MA 01901

Commissioner:

Christopher C. Bowman

DECISION

Pursuant to G.L. c. 31, §§ 42 and 43, the Appellant, Kevin Howard (Mr. Howard), filed timely appeals with the Civil Service Commission (Commission) on February 17, 2011 and April 13, 2011, contesting: 1) whether the Town of Nahant (Town) committed procedural errors related to the disciplinary proceedings at the Town level (Section 42 Appeal: D-11-60); and 2) whether there was just cause to terminate him as a firefighter in the Nahant Fire Department (Fire Department) (Section 43 Appeal: D1-11-124). Pre-hearing conferences were held on March 15, 2011 and May 10, 2011. A full hearing was conducted over the course of five (5) days at the offices of the Commission on September 8, 2011 and at the Nahant Town Hall on

September 12, 2011; October 27, 2011; November 10, 2011; and December 8, 2011. Neither party requested a public hearing, so the hearing was deemed private. The witnesses were sequestered. The hearing was digitally recorded and the parties were provided with five (5) CDs of the hearing, which both parties separately used to have written transcripts prepared. A copy of the transcript ordered by the Appellant was submitted to the Commission. The parties submitted post hearing briefs on March 16, 2012 (Town) and March 20, 2012 (Appellant).

On April 26, 2012 and May 8, 2012, the Town submitted a Motion to Reopen the Record to allow for the introduction of the transcript of Mr. Howard's April 20, 2012 sworn allocution to the Lynn District Court regarding charges of Larceny Over \$250, to which Mr. Howard admitted to sufficient facts. After hearing oral argument from both parties at a motion hearing held on June 25, 2012, I allowed the Town's motion and have marked the court documents attached to the Town's motions as Exhibit CC..

SUMMARY

By a preponderance of the evidence, the Town of Nahant has shown that it had just cause to terminate Mr. Howard from his position as firefighter for: 1) submitting claims for personal monetary reimbursement to the Town for expenses that had already been paid for by the union; and 2) committing acts of larceny while employed by the Town by misappropriating union funds. Further, Mr. Howard failed to show that the Town committed any procedural errors as part of the termination proceedings that prejudiced his rights.

FINDINGS OF FACT

Forty (40) exhibits were entered into evidence by Mr. Howard (Appellant Exhibits 1 – 40) and twenty-nine (29) exhibits were entered into evidence by the Town (Town Exhibits A – CC). Based upon the documents admitted into evidence, the stipulated facts and the testimony of:

Called by the Town:

- Kathleen Costin, Assistant Town Accountant;
- Kathy Famulari, Town Treasurer;
- Frank Pappalardo, Firefighter and past Treasurer of local firefighters union;¹
- David Doyle, Firefighter (Senior Private);
- Mark Cullinan, Town Administrator;²
- Edward Hyde, Fire Chief;³
- David Coleman, Former Vice President, Professional Firefighters of MA;
- Joshua Mahoney, Firefighter (Senior Private) and President of local firefighters union;
- Dean Palumbo, Fire Lieutenant;
- Robert Barreda, Firefighter and Treasurer of local firefighters union;
- Austin Antrium, Firefighter;

Called by Mr. Howard⁴:

- Elaine Titus, Selectman;
- Gene Howard, Mr. Howard's father;
- Mary Mansfield, self-employed EMT instructor;
- Christine Howard, Mr. Howard's mother;
- Robyn Howard, Mr. Howard's wife;
- Christian Howard, Mr. Howard's brother;
- Carl Jenkins, Certified Public Accountant

I make the following findings of fact:

1. In 1999, Mr. Howard was appointed to the civil service position of permanent full-time firefighter in the Town's Fire Department. (Stipulated Fact)
2. The Fire Department has an operating budget of approximately \$800,000 and employs eight (8) full-time employees, including a Fire Chief, a Fire Captain, two (2) senior privates and four (4) other full-time firefighters. In addition to these full-time employees, the Fire Department employs approximately seventeen call, paid firefighters. (Testimony of Hyde)

¹Mr. Pappalardo was recalled to testify by the Appellant on the fourth day of the hearing.

²Mr. Cullinan has subsequently retired.

³Mr. Hyde was appointed as Fire Chief after Mr. Howard was terminated. He previously served as a Fire Lieutenant.

⁴Mr. Howard did not testify on his own behalf and, for reasons discussed in more detail in the decision, I drew an adverse inference based on his failure to testify before the Commission.

3. The Fire Chief is appointed by and reports to the Town Administrator. Until his recent retirement, Mark Cullinan served as the Town Administrator for approximately fifteen (15) years. Mr. Cullinan has a bachelors degree from UMASS Amherst and a masters degree in city planning from MIT. He was born and raised in Nahant and has known Mr. Howard and his family his entire life. At one point, Mr. Howard's brother lived in Mr. Cullinan's house. (Testimony of Cullinan)
4. While employed as a firefighter, Mr. Howard also served as President of the Nahant Firefighters Association (the union) from 2006 to 2010. (Testimony of Doyle)
5. From 2007 to 2010, members of the union paid \$17.50 per week in union dues. (Testimony of Pappalardo and Hyde)
6. During the time period that Mr. Howard was union president, Firefighter Pappalardo held the position of Secretary / Treasurer and Firefighter Mahoney held the title of Vice President. Firefighters Pappalardo and Mahoney held these union positions in name only, however, as the business affairs of the union during this time period were handled exclusively by Mr. Howard. (Testimony of Pappalardo and Mahoney)
7. In late 2009, Mr. Cullinan began looking for a replacement for then-Fire Chief Robert Ward, who planned to retire as the Town's Fire Chief on March 1, 2010⁵. (Testimony of Cullinan)
8. Mr. Cullinan first approached then-Fire Lieutenant Edward Hyde about being appointed as the Town's Fire Chief. (Testimony of Cullinan and Hyde)
9. Mr. Hyde has been employed by the Town's Fire Department for twenty-six (26) years and served in the position of Fire Lieutenant for fifteen (15) of those years. (Testimony of Hyde)

⁵ The position of Fire Chief is not covered under the civil service law in Nahant.

10. Mr. Cullinan offered Mr. Hyde a salary of \$80,000 for the position of Acting Fire Chief. Mr. Hyde eventually declined the offer because of the low salary and “second job issues”.

(Testimony of Cullinan)

11. In late February 2010, after Mr. Hyde declined the offer to be appointed Acting Fire Chief, Mr. Cullinan offered the position to Mr. Howard - and Mr. Howard accepted. During their discussion about the Fire Chief appointment, Mr. Howard never raised any concerns or allegations that members of the Nahant Fire Department had fraudulently obtained EMT recertifications and/or used illegal drugs. Mr. Howard’s appointment as Acting Fire Chief was effective March 1, 2010. (Testimony of Cullinan)

12. Members of the Fire Department were angry that Mr. Howard was appointed as Acting Fire Chief. Lieutenant Dean Palumbo, the only other lieutenant (other than Mr. Hyde) at the time, believed that he should have been offered the position after Mr. Hyde declined. (Testimony of Palumbo) Firefighter Robert Barreda believed that Mr. Howard had “back-stabbed” the union by negotiating his own appointment as Chief when the union members supported Mr. Hyde. (Exhibit 25) Firefighter James Antrim believed that it was “ridiculous ... that a firefighter with only ten years of experience would be chosen as Chief over two senior officers.” (Exhibit 21) Firefighter Frank Pappalardo believed that Mr. Howard “weaseled his way into taking the job.” (Exhibit 22) Firefighter Josh Mahoney believed that Mr. Howard was “a little shady” for negotiating his own appointment with Mr. Cullinan when the union thought he should be advocating for Mr. Hyde. (Testimony of Mahoney) Firefighter David Doyle believed that Mr. Howard “seem[ed] to find great joy in with (sic) other people’s misery.” (Exhibit 23)

13. Mr. Hyde publicly criticized Mr. Cullinan for his decision to appoint Mr. Howard and told a local reporter that the decision was a “bag job” that marked a “sad day for the Town of Nahant and the Nahant Fire Department.” Mr. Hyde later complained to the same reporter that he had been threatened with disciplinary action by Mr. Cullinan for speaking to the media. (Exhibit 29)
14. On February 25, 2010, Mr. Howard officially informed members of the Fire Department that he had been appointed as the Town’s Acting Fire Chief, effective March 1, 2010. Those firefighters present at the time told Mr. Howard that they were convening a union meeting and that Mr. Howard could no longer serve as a member of the Union since he had been appointed as Acting Fire Chief. It was at this time that Mr. Howard first informed members of the Fire Department that he had obtained a business debit card for the union’s checking account. The members elected Firefighter Mahoney as union President; Firefighter Pappalardo as Vice President; and Firefighter Barreda as Secretary / Treasurer. (Testimony of Pappalardo, Doyle and Mahoney)
15. On March 20, 2010, then-Lieutenant Hyde reported for work and noticed that there was a new television set in the living quarters of the fire station. When he inquired about it, he was told that a majority of the union members had authorized its purchase, but that each member would need to contribute an additional \$100 to cover the cost of the purchase because there was not enough money in the union’s checking account. When Lieutenant Hyde told Firefighter Pappalardo that he wouldn’t pay the \$100, Pappalardo called him a “cheap bastard” and told him he would not be allowed to watch the new television until he paid the money. Mr. Hyde demanded to know why there wasn’t enough money in the union’s bank

account to cover the full cost of the television purchase and asked for an audit of the bank account. (Testimony of Hyde and Exhibit 25)

16. Firefighter Barreda obtained bank statements related to the union's checking account and noticed that numerous cash withdrawals had been made from the union's checking account using the debit card. At this point, he asked for the assistance of Firefighter Mahoney, the union's new President. (Testimony of Barreda)
17. After reviewing the bank statements together, Firefighters Barreda and Mahoney determined that approximately \$7500 in cash withdrawals had been made from the union's checking account using the debit card from October 2007 to February 2010, that many purchases had been made at Home Depot and Lowes where the user of the card had received cash back at the time of purchase; and that there may have been another \$10,000 to \$15,000 in "misappropriations". (Testimony of Barreda and Exhibit 28)
18. On or about April 15, 2010, members of the union met with Mr. Howard and presented him with the results of their review of the union's financial records available at that time. At this meeting, Mr. Howard admitted to making unauthorized withdrawals and purchases and offered to make restitution. (Testimony of Pappalardo, Doyle, Hyde, Barreda and Antrim)
19. After the April 15, 2010 meeting, Mr. Howard's mother, Christine Howard, met with Firefighter Pappalardo and Lieutenant Hyde and offered to make restitution to the union on her son's behalf. (Testimony of Pappalardo and Hyde) Mr. Howard's father, Eugene Howard, met separately with Lieutenant Hyde and then Firefighter Mahoney and offered to make restitution to the union on his son's behalf. (Testimony of Hyde and Pappalardo) Christian Howard, Mr. Howard's brother, also met with Lieutenant Hyde and offered to make restitution to the union on his brother's behalf. (Testimony of Hyde)

20. On April 20, 2010 at approximately 8:00 A.M., Mr. Howard met with Mr. Cullinan. During this meeting, Mr. Howard told Mr. Cullinan that: “I fucked up”. When Mr. Cullinan said “that’s not good; what happened?”, Mr. Howard said: “I stole money from the union.” Mr. Howard assured Mr. Cullinan that no Town funds were involved. Mr. Cullinan remembers then telling Mr. Howard: “I don’t know what this will do in your standing as a civil service firefighter, but we’re probably going to have some issues with this as Acting Chief seeing that you’re in a leadership position. Let me talk to the union. Let’s try to find out what’s going on and if something can be worked out, and we’ll talk later.” (Testimony of Cullinan)
21. Mr. Cullinan met with member of the union and was told that they weren’t interested in pursuing criminal charges or collecting any lost funds, but they did not want Mr. Howard returning to the Fire Department in any capacity. (Testimony of Cullinan)
22. Mr. Cullinan met with Mr. Howard two or three times over the next week to discuss the matter. At one point, Mr. Cullinan and Mr. Howard discussed the possibility of Mr. Howard transferring to a Fire Department in another city or town. Mr. Cullinan suggested to Mr. Howard that, if he decided to resign, he should first consult with an attorney to discuss issues related to future retirement benefits and other matters. Mr. Cullinan, after speaking with David Coleman, the District Vice President of the International Association of Firefighters (IAFF), provided Mr. Howard with the name of an attorney that he may wish to contact. (Testimony of Cullinan)
23. Mr. Howard also spoke directly to Mr. Coleman at which time Mr. Howard admitted to misappropriating union funds. Mr. Coleman was a member of the IAFF for thirty-two years and served as Regional Vice President until September 2011. (Testimony of Coleman)

24. On April 27, 2010, Mr. Howard came to Mr. Cullinan's office and gave him two letters. The first letter indicated that Mr. Howard was resigning as Acting Fire Chief, effective immediately. (Testimony of Cullinan and Exhibit S) The second letter requested a medical leave of absence as a firefighter. Mr. Cullinan approved thirty (30) days of unpaid medical leave, to expire on May 27, 2010. (Testimony of Cullinan and Exhibit T)
25. At some point shortly after Mr. Howard submitted his resignation as Acting Fire Chief, Mr. Cullinan appointed Mr. Hyde as the Town's Acting Fire Chief. (Testimony of Cullinan and Hyde)
26. On May 24, 2010, Mr. Howard submitted a letter to Mr. Cullinan requesting two (2) months of sick leave, which was approved. (Attachment B of Respondent's Post-Hearing Brief)
27. On June 3, 2010 and June 19, 2010, Mr. Howard's mother gave the union two checks in the amount of \$4,089.32 and \$3,424.50 respectively. (Exhibit U) With the assent of Mr. Howard's attorney, these checks were deposited into a trust account managed by counsel for the union. (Exhibit V)
28. On or about June 17, 2010, members of the union were provided with a copy of a letter prepared by Mr. Howard's attorney, addressed to union counsel, bearing a date of June 21, 2010, and labeled as "CLIENT COPY, (Draft 6/17/2010)". The letter, at Paragraph 6, gave notice of Mr. Howard's intention to file suit against union members and to raise issues related to the alleged "drug usage of certain firefighters", "drinking and other inappropriate activity on the job, and "the fact that all but one of the present firefighters have fraudulently obtained EMT certifications based on classes that they did not attend." The letter stated that Mr. Howard would file the complaint on or about June 25, 2010. (Exhibit V; Testimony of

Doyle, Hyde and Palumbo) This letter was found in the private vehicle of Lieutenant Palumbo. (Testimony of Doyle)

29. Members of the union brought the letter from Mr. Howard's counsel to the attention of Mr. Cullinan. Upon receiving the letter, Mr. Cullinan met with now-Acting Fire Chief Hyde, the Town's Police Chief, the Board of Selectmen and Town Counsel to discuss the allegations contained in the letter. (Testimony of Cullinan)
30. On June 23, 2010, Mr. Cullinan penned a letter to Mr. Howard inquiring about his sick leave status, which was due to expire on June 30, 2010. (Attachment B to Town's Post-Hearing Brief) That same day, Mr. Cullinan received a letter from Mr. Howard's physician indicating that Mr. Howard would be out of work for an additional month due to medical reasons. (Attachment C to Town's Post-Hearing Brief)
31. On July 6, 2010, Firefighter Mahoney filed an application for criminal complaint in Lynn District Court against Mr. Howard for Larceny over \$250. (Exhibit 28)
32. On July 10, 2010, Mr. Cullinan contacted the Director of the Massachusetts Department of Health's Office of Emergency Medical Services (OEMS), which is responsible for EMT certifications and told him that he wanted to make sure everything was "all set" with the EMT certifications of Nahant firefighters. Mr. Cullinan did not, at that time, request that OEMS investigate the allegations contained in the letter from Mr. Howard's counsel. (Testimony of Cullinan)
33. Sometime during the Summer of 2010, Mr. Cullinan was informed by Town Treasurer Kathy Famulari that she had been presented with records by a member of the union that documented that Mr. Howard had submitted and received personal reimbursements from the Town that were purchased with union funds. (Testimony of Mr. Cullinan)

34. Kathleen Costin, who has been the Assistant Town Accountant for eight (8) years, conducted a review of reimbursement requests submitted by Mr. Howard to the Town between April 26, 2007 and November 6, 2009. (Testimony of Costin)
35. During the thirty-one (31) month period between April 26, 2007 and November 6, 2009 Kathleen Costin processed eight (8) requests for reimbursement submitted by Mr. Howard. (Testimony of Costin and Exhibits E through L)
36. On at least one occasion, Mr. Howard submitted a request seeking reimbursement for the difference in the amount listed on a store receipt and the amount reimbursed to him as the result of a prior request. The second reimbursement included a payment to Kevin Howard for cash disbursed at the point of sale. (Testimony of Costin and Exhibits G and H)
37. All items for which Mr. Howard had submitted personal reimbursement were paid for with funds of the union or by members of the union who had previously been reimbursed union funds. (Testimony of Mahoney and Exhibits E through L and Exhibit R)
38. Each request for reimbursement resulted in a check being issued by the Town payable to Mr. Howard in the amount requested. (Testimony of Famulari and Exhibits E through L)
39. Each check issued to Mr. Howard was accompanied by a stub identifying that the check was for the reimbursement of personal expenses. (Testimony of Famulari and Exhibit X)
40. Each check issued by the Town to Mr. Howard was endorsed by Mr. Howard and deposited into a bank account in the name of Mr. Howard and his spouse. (Exhibit C, Exhibits E through L)
41. The total amount reimbursed to Mr. Howard for the eight (8) requests for reimbursements was \$1145.42 (Exhibits E through L)

42. There is no record – or testimony from Mr. Howard – showing that Mr. Howard ever reimbursed the Town or the union for the funds paid to him personally from the Town.
43. On August 6, 2010, Mr. Cullinan received a letter from Mr. Howard’s physician indicating that Mr. Howard was under his care and that Mr. Howard “was suffering from severe depression, PTSD, anxiety an (sic) depression as a result of his work-related experiences” and that Mr. Howard was “not presently able to perform the essential functions of his job as a firefighter ...”. (Attachment D of Town’s Post-Hearing Brief)
44. On August 14, 2010, an article appeared in the *Lynn Daily Item* under the headline: “Embattled Nahant firefighter alleges drug use at station.” The first six (6) paragraphs of the article read as follows:

“A Nahant firefighter accused of embezzling union funds said several members of the department have bought, sold and used cocaine while on duty.

Firefighter Kevin Howard, who went out on sick leave in April after the embezzlement allegations surfaced, admitted he purchased and used cocaine at the fire station.

Howard said one of the other firefighters sold him and another firefighter the drugs at the firehouse on more than one occasion.

‘He sold it to me and another guy.’ Howard said. ‘There is a drug, pot and alcohol problem at the station.’

Howard said he has not used drugs since April and his fellow Jakes are trying to force him out because he blew the whistle on numerous problems within the department.

‘I’ve been clean and sober since April,’ he said. ‘There are a lot of problems in the department that I tried to correct when I was chief so the guys tried to force me out. They wanted me to transfer and I refused.’” (Exhibit AA)

45. On August 16, 2010, a criminal complaint was issued by the Lynn District Court finding probable cause that Mr. Howard had committed criminal acts of larceny over \$250.
(Attachment L to Town's Post-Hearing Brief)
46. On August 17, 2010 and August 18, 2010, all members of the Fire Department volunteered to submit to a screening for cocaine at a certified testing facility. All test results for cocaine were negative. There was no screening for marijuana completed. (Exhibit 27)
47. On August 20, 2010, Mr. Cullinan sent a letter to Mr. Howard notifying him that he was being placed on "indefinite suspension without pay" from his position as a firefighter and that a hearing would be held on August 26, 2010 to determine whether Mr. Howard should be terminated. The reasons for discipline in the letter included: 1) Receiving \$1,094.50 in reimbursements from the Town that were not due to him; 2) Committing "acts of larceny against Town of Nahant employees ... includ[ing] the appropriation and/or theft of funds entrusted to you by Town employees as members of the Nahant Firefighters Association."
(Attachment E to Town's Post-Hearing Brief)
48. Also on August 20, 2010, counsel for Mr. Howard made a written request to continue the scheduled hearing for five (5) weeks allowing him sufficient time to prepare. (Attachment F to Town's Post-Hearing Brief)
49. In September 2010, Mr. Cullinan contacted OEMS to inquire about the status of his previous call to OEMS regarding the EMT training issue. (Testimony of Cullinan)
50. On October 18, 2010, a Clerk-Magistrate's hearing was held in Lynn District Court in connection with a criminal complaint that Mr. Howard had filed against Firefighter Mahoney. A Clerk Magistrate found probable cause to proceed with the charge. (Attachment to Mr. Howard's Section 42 Appeal to Commission)

51. By letter dated October 19, 2010, Mr. Cullinan informed Mr. Howard and his counsel that a disciplinary hearing would be held on October 26, 2010 and that Attorney Michael J. Marks would serve as the hearing officer. (Attachment G to Town's Post-Hearing Brief)
52. By letter dated October 22, 2010, counsel for Mr. Howard objected to Mr. Marks serving as hearing officer because he is a close friend of counsel for the Town. Further, counsel for Mr. Howard asked that any disciplinary hearing be continued until the criminal matter was resolved. (Attachment H to Town's Post Hearing Brief)
53. On October 26, 2010, Attorney Marks opened the Appointing Authority disciplinary hearing. After addressing some preliminary issues, counsel for Mr. Howard asked for additional time to review the documents proffered by the Town. At that time, Attorney Marks informed both parties that he would be out of state for an extended period of time beginning on October 28, 2010. Attorney Marks did not return to Massachusetts until February 26, 2011. (Attachment I to Town's Post-Hearing Brief)
54. By letter dated February 7, 2011, Mr. Cullinan informed Mr. Howard and his counsel that the Appointing Authority disciplinary hearing would be held on February 18, 2011 and that Attorney David Grunebaum would serve as the hearing officer. (Attachment J to Town's Post-Hearing Brief)
55. By email dated February 11, 2011, counsel for Mr. Howard objected to the appointment as Attorney Grunebaum as the hearing officer. (Attachment K to Town's Post-Hearing Brief)
56. On February 17, 2011, Mr. Howard filed his Section 42 appeal with the Commission.
57. On February 18, 2011, Attorney Grunebaum presided over the Appointing Authority disciplinary hearing. Mr. Howard and his counsel appeared for the sole purpose of contesting Attorney Grunebaum's authority to conduct the hearing. Mr. Howard did not

testify at the hearing. Attorney Grunebaum stated in his report that “Although I am entitled to draw an adverse inference from the failure of Kevin Howard to testify, I find it unnecessary to draw such adverse inference inasmuch as I find the affirmative evidence and testimony of the various witnesses sufficient to make all of [my] findings of facts and ... recommendation.” Attorney Grunebaum recommended that Mr. Howard be terminated.
(Attachment L to Town’s Post-Hearing Brief)

58. By letter dated April 5, 2011, Mr. Cullinan notified Mr. Howard that he was terminated.
(Attachment M to Town’s Post-Hearing Brief)

59. On April 13, 2011, Mr. Howard filed the Section 43 appeal with the Commission. (Stipulated Fact)

60. Over the course of five (5) days between September 8, 2011 and December 8, 2011, the Commission conducted a full evidentiary hearing.

61. At the time of the Commission hearing, OEMS was in the process of contacting individual firefighters about their EMT training.

62. Based on the advice of his counsel, Mr. Howard opted not to testify while the criminal case against him was still pending in Lynn District Court. I drew an adverse inference against Mr. Howard based on his failure to testify before the Commission.

63. On April 20, 2012, Mr. Howard admitted to sufficient facts to the charge of Larceny over \$250 in Lynn District Court. As a result, the case was continued without a finding for a period of three years during which time Mr. Howard will be on probation. As part of a plea agreement, Mr. Howard agreed to reimburse the union \$12,854.42 and to reimburse the Town \$1145.42 forthwith. If Mr. Howard violates his probation, a guilty finding will enter

and Mr. Howard will be subject to a sentence of two years in the House of Correction.

(Exhibit CC)

64. In his statement to the Court, Mr. Howard stated in relevant part that: “As the complaint alleges, I acknowledge that I violated the Union’s trust funds. I misappropriated some of the funds (inaudible) my family, my friends and most of the firefighters from my former union. When this matter first came to light, I should have done what I’m doing now (inaudible) responsibility. Instead I chose (inaudible) support and understanding. I – instead of responding with contentiousness, I’m truly sorry for the hurt that I caused them and unnecessarily displays of anger (inaudible). I’m truly sorry for the pain I’ve cause to so many others.” (Exhibit CC)

65. In a statement to the Court, Mr. Howard’s counsel (who is not the same person that represented him before the Commission) stated in relevant part that: “[Mr. Howard] lost his employment, and that’s gonna resolve itself. The Town of Nahant well knows he is not coming back, we’re gonna have that resolution outside of this courtroom. He is going to finish that employment with the Town. That’s a given.” (Exhibit CC)

CONCLUSION

Section 42 Appeal

Prior to terminating a tenured civil service employee, G.L. c. 31, § 41 requires that the employee be given “a written notice by the appointing authority, which shall include the action contemplated, the specific reason or reasons for such action and a copy of sections forty-one through forty-five, and shall be given a full hearing concerning such reason or reasons before the appointing authority or a hearing officer designated by the appointing authority.”

Further, the appointing authority “shall provide such employee a written notice of the time and place of such hearing at least three days prior to the holding thereof, except that if the action contemplated is the separation of such employee from employment because of lack of work, lack of money, or abolition of position the appointing authority shall provide such employee with such notice at least seven days prior to the holding of the hearing and shall also include with such notice a copy of sections thirty-nine and forty. If such hearing is conducted by a hearing officer, his findings shall be reported forthwith to the appointing authority for action. Within seven days after the filing of the report of the hearing officer, or within two days after the completion of the hearing if the appointing authority presided, the appointing authority shall give to such employee a written notice of his decision, which shall state fully and specifically the reasons therefor.”

If the Commission finds that the Appointing Authority failed to follow the above-referenced Section 41 procedural requirements and that the rights of said person have been prejudiced thereby, the Commission “shall order the Appointing Authority to restore said person to his employment immediately without loss of compensation or other rights.” G.L. c. 31, §42.

Here, the Town met all of the procedural requirements contained in Section 41. They provided Mr. Howard with proper notice of the hearing with specific charges; notified Mr. Howard of his appeal rights under civil service law; appointed a hearing officer; and notified Mr. Howard of the final decision to terminate him in a timely manner.

Mr. Howard’s objection to the change in hearing officers is not persuasive. The first hearing, to be conducted by Attorney Marks, did not go forward based on a request by counsel for Mr. Howard for additional time to review the Town’s proposed exhibits. When the hearing finally commenced, Attorney Marks was out of state and not available to serve as a hearing officer. Thus, the Town designated Attorney Grunebaum to serve as a hearing officer.

Mr. Howard's argument that Attorney Grunebaum was not impartial is misplaced. First, there is no requirement in the civil service law and rules that the Appointing Authority choose an impartial hearing officer. If an Appellant disputes the hearing before the Appointing Authority, that Appellant is entitled to a hearing before an impartial representative of the Civil Service Commission. The Appellant is afforded a de novo hearing before the Commission protecting the Appellant's rights against a local hearing where there may have been a pre-determined result. (See G.L. c. 31, § 43 and Puopolo v. Department of Correction, citing Cleveland v. Board of Education v. Loudermill, 470 U.S. at 546, 547). Even if there were such a requirement, there is no reliable evidence that Attorney Grunebaum was not an impartial hearing officer.

For these reasons, Mr. Howard's Section 42 appeal under Docket No. D-11-60 is hereby *dismissed*.

Section 43 Appeal

G.L. c. 31, § 43, provides:

"If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority."

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (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 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).

Under Section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew." Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. The role of the Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102, (1997). See also Leominster v. Stratton, 58 Mass. App. Ct. 726, 728, rev.den., 440 Mass. 1108, 799 N.E.2d 594 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den. (2000); McIsaac v. Civil Service Comm'n, 38 Mass App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 390 Mass. 1102 (1983).

Here, Mr. Howard was terminated from his position as a firefighter for the following reasons:

- Submitting claims for personal monetary reimbursement to the Town for expenses that had already been paid for by the union;
- Committing acts of larceny while employed by the Town by misappropriating union funds.

The Town has shown, by a preponderance of the evidence, that Mr. Howard engaged in this misconduct which provided them with just cause to impose discipline. The evidence supporting the charges against Mr. Howard is overwhelming.

First, Mr. Howard admitted to sufficient facts of Larceny over \$250 for misappropriating union funds. As part of a plea agreement, he agreed to reimburse the union \$12,854.42 and to reimburse the Town \$1145.42. His allocution in Lynn District Court was unequivocal.

Second, Mr. Howard admitted to the Town Administrator, Mr. Cullinan, that he stole funds from the union. Specifically, Mr. Howard told Mr. Cullinan that: "I fucked up ... I stole money from the union." Mr. Cullinan was a good witness and I credit his testimony. He is a consummate professional who was sincerely disheartened to learn that Mr. Howard, whose family he had known all his life, had engaged in this misconduct. In fact, Mr. Cullinan's first instinct was effectively to serve as an advocate for Mr. Howard by testing the waters with the union to determine if Mr. Howard could continue to serve as a firefighter. After being rebuffed by the union, Mr. Cullinan then counseled Mr. Howard, going so far as to recommend an experienced attorney to help Mr. Howard protect his rights to such benefits as retirement. It is not plausible that Mr. Cullinan is being untruthful about Mr. Howard making this incriminating statement to him.

Third, Mr. Howard admitted to the then-Regional Vice President of the union, Mr. Coleman, that he misappropriated funds from the union. Mr. Coleman was also a good witness and I credit his testimony as well. Having spent decades as either a member or officer of the firefighters union, it is inconceivable to me that he would fabricate testimony to incriminate Mr. Howard. Moreover, Mr. Coleman struck me as an individual who took his sworn testimony before the

Commission seriously and was careful only to testify about events for which he had a clear memory.

Fourth, the Town Treasurer and Assistant Town Accountant presented credible evidence to show that Mr. Howard submitted and received personal reimbursements for expenses that had been paid for by the union. Ms. Costin and Ms. Famulari were good witnesses. They explained with clarity the various documents that were entered into evidence which show that Mr. Howard was inappropriately seeking personal reimbursement for items that had been paid for by the union.

Fifth, the documents submitted show that thousands of dollars in cash withdrawals were made from the union's checking account using a debit card for which only Mr. Howard was aware of. The documents also showed numerous occasions where Mr. Howard, using the same debit card, received cash back when making various purchases at local establishments. There was no documentation to show that Mr. Howard reimbursed the union for these funds or that he used this cash for union-related purchases. I did not credit the testimony of Robyn Howard, Mr. Howard's wife, that some of these funds may have been used to make purchases for the fire station. Her answers were geared entirely toward exonerating her husband and simply did not ring true to me.

Sixth, I drew an adverse inference from Mr. Howard's failure to testify before the Commission while criminal charges were pending against him in Lynn District Court.

Finally, Mr. Howard admitted to several of his fellow firefighters that he misappropriated union funds. Of all the evidence put forward by the Town, I gave this testimony the least weight. Had the Town's case been based solely on the testimony of these firefighters, it would not have met the preponderance of the evidence test. While their testimony appeared plausible, there was

a glaring disconnect between the testimony of some firefighters before the Commission and their written statements to the district attorney's office. In their testimony before the Commission, they uniformly testified that their actions were driven in large part by their concern for Mr. Howard's family, including his wife and children. Even standing alone, that part of their testimony did not ring true to me. It was even more unbelievable considering their written statements to the district attorney describing Mr. Howard as a shady, whimpering, back-stabbing weasel who took joy in other people's misery. This jarring disconnect called into question their overall credibility.

There is a more troubling reason that I gave little weight to the testimony of some of the Nahant Firefighters called by the Town. Those firefighters who had reported receiving EMT training from a trainer by the name of Mary Mansfield were subject to pointed cross examination regarding whether they actually completed the required training. Their answers appeared to be rehearsed and deliberately vague. The testimony of Ms. Mansfield was even more unbelievable. In order to credit her testimony, I would need to put all common sense aside and, in some cases, accept that she conducted marathon training sessions in one day over a 12-14 hour period. This simply did not happen. There is ample evidence in the record to justify the initiation of a more rigorous investigation by OEMS, the Town Manager and the Board of Selectmen regarding whether those firefighters who reported receiving EMT training from Ms. Mansfield actually completed the training sessions.

While I have serious doubts about whether some firefighters actually received EMT training from Ms. Mansfield, there is no credible evidence to show that this issue was somehow tied to the termination of Mr. Howard. Mr. Cullinan credibly testified that Mr. Howard never raised this concern to him prior to his appointment as Acting Fire Chief. Further, there is no evidence

to support the testimony of Mr. Howard's wife that Mr. Howard raised this issue during his very brief tenure as Acting Fire Chief.

Rather, the evidence shows that Mr. Howard, *after* learning that members of the Fire Department insisted that he end his employment with the Town, threatened to go public with allegations of wrongdoing related to the EMT training and alleged use of illegal drugs.

Finally, Mr. Howard makes the unpersuasive argument that, even if he misappropriated union funds, there is no nexus to his duties as a firefighter. He is mistaken. Mr. Howard took the union dues of his fellow firefighters and used those funds for his own personal use. His actions were criminal in nature, violated the trust of his fellow firefighters and constituted substantial misconduct which adversely affected the public interest by impairing the efficiency of public service.

For all of the above reasons, the Town has shown, by a preponderance of the evidence, that there was just cause to discipline Mr. Howard.

Having determined that it was appropriate to discipline Mr. Howard, the Commission must determine if the Town was justified in the level of discipline imposed, which, in this case, was termination.

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.'" Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. Even if there are past instances where other employees received more lenient sanctions for similar misconduct, however, the

Commission is not charged with a duty to fine-tune an employee's discipline to ensure perfect uniformity. See Boston Police Dep't v. Collins, 48 Mass. App. Ct. 408, 412 (2000).

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

I have, based on the testimony of credible witnesses and the documentary evidence submitted, reached the same conclusion as the Town. Specifically, I have found that Mr. Howard submitted claims for personal monetary reimbursement to the Town for expenses that had already been paid for by the union; and that he committed acts of larceny while employed by the Town by misappropriating union funds. These actions, which occurred over multiple years, warrant Mr. Howard's termination, even after considering that he had no prior discipline.

For all of the above reasons, Mr. Howard's Section 43 appeal under Docket No. D1-11-124 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on August 23, 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)(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 to:

Richard B. Reiling, Esq. (for Appellant)

Stephen L. Smith, Esq. (for Respondent)