

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

JOHN O’LEARY,
Appellant,

v.

D1-12-256

SALEM FIRE DEPARTMENT,
Respondent

Appearance for Appellant:

Joseph P. Dever, Esq.
Riley & Dever PC
210 Broadway, Suite 101
Lynnfield, MA 01940

Appearance for Respondent:

Daniel B. Kulak, Esq.
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Peabody, MA 01960

Commissioner:

Christopher C. Bowman¹

DECISION

Pursuant to G.L. c. 31, §§ 42 and 43, the Appellant, John O’Leary (Mr. O’Leary), filed a timely appeal with the Civil Service Commission (Commission) on September 12, 2012, contesting: 1) whether the Salem Fire Department (Department) committed procedural errors related to the disciplinary proceedings at the City level (Section 42 Appeal); and 2) whether there was just cause to terminate him as a firefighter in the Salem Fire Department (Department or Fire Department) (Section 43 Appeal). A pre-hearing conference was held on October 1, 2012. A full hearing was conducted over the course of four (4) days at the offices of the Commission on

¹ The Commission acknowledges the assistance of Law Clerk Hannah Filkins in the drafting of this decision.

January 17, 2013; May 29, 2013; June 7, 2013; and at 27 Congress Street in Salem on June 20, 2013².

Per the written request of the Department, the hearing was declared to be public.³ With the exception of Mr. O’Leary, the witnesses were sequestered. The hearing was digitally recorded and the parties were provided with four (4) CDs of the hearing, which Mr. O’Leary 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 September 30, 2013.

FINDINGS OF FACT

Forty-five (45) exhibits were entered into evidence. Based upon the documents admitted into evidence, the stipulated facts, the testimony of:

Called by the Salem Fire Department:

- Ray Krajewski, Firefighter; current Vice President and former President of Local 172;
- Paul Cranney, Fire Captain; volunteer tax preparer for Local 172;
- Elizabeth Rennard, City Solicitor;
- Richard O’Connor, Certified Public Accountant;
- David Cody, Fire Chief;
- Wayne Silva, Fire Lieutenant; member of Local 172’s “E-Board”;

Called by Mr. O’Leary:

- John O’Leary, Appellant, former firefighter and former Local 172 President;
- Richard Arno, Fire Lieutenant and former member of Local 172’s “E-Board”;
- Robert Jellison, Firefighter;
- Timothy Flynn, Firefighter; Secretary-Treasurer for Local 172;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations and policies, and reasonable inferences therefrom, I make the following findings of fact:

² Inclement weather was partly to blame for the delay in processing this case, with two full hearing dates canceled due to snow storms.

³ Salem News reporter Tom Dalton was present for each day of the hearings. Mike Murphy, a Trooper with the Essex County District Attorney’s office, was present for parts of the hearing.

1. Mr. O’Leary was born and raised in Salem, Massachusetts and currently resides there with his wife⁴ and three (3) children, ages 8, 11 and 13. He graduated from Salem High School in 1986 and attended one (1) year of college. He is also trained as a carpenter. (Testimony of Mr. O’Leary)
2. Mr. O’Leary was appointed as a Salem firefighter in 1996 and has been employed there for the past seventeen (17) years. He was promoted to lieutenant in 2006 and is certified as an arson investigator. (Testimony of Mr. O’Leary)
3. Prior to the incident related to the instant appeal, Mr. O’Leary had no record of discipline with the Fire Department. (Stipulated Fact and Testimony of Mr. O’Leary)
4. The leadership of the Salem Firefighters Local 172 (Local 172) consists of a President, Vice President, Secretary-Treasurer and an Executive Board, commonly referred to as the “E-Board”. The E-Board is comprised of these three (3) officers and six (6) other elected members. Elections are held annually. (Testimony of Mr. O’Leary)
5. In or around 2000, Mr. O’Leary was elected to serve on the E-Board. (Testimony of Mr. O’Leary)
6. In or around 2002, Local 172 and the City’s then-Mayor were involved in a contentious battle regarding contractual issues. When the Mayor, faced with severe cuts to local aid, sought to lay off firefighters, Local 172 obtained an injunction in Superior Court and forced the Mayor to submit any proposed layoff plans to the City Council, as opposed to acting unilaterally. (Testimony of Mr. O’Leary)

⁴ Mr. O’Leary’s wife was permitted to attend and observe each day of hearing as she was not called as a witness.

7. Sometime in 2002, the President of Local 172 resigned. After his resignation, and for a period of approximately six (6) months, the Local 172 officer positions were filled as follows:

President: Firefighter Ray Krajewski
Vice President: John O'Leary (Appellant)
Secretary-Treasurer: Firefighter Richard Thomas

(Testimony of Mr. O'Leary)

8. Around this same time, members of Local 172 were concerned about the "bad press" they were receiving and believed that the Mayor was gaining the upper hand in the public relations battle regarding the issue of budget cuts and Local 172's efforts to fight them.

(Testimony of Mr. O'Leary)

9. To burnish their public image, Local 172 decided to raise funds and make donations to local charities and others, above and beyond the traditional fundraising that Local 172 paid for such as scholarships for local students. (Testimony of Mr. O'Leary and Mr. Krajewski)

10. Between 2002 and 2011, Local 172 entered into a series of four contracts (2002, 2003, 2005 and 2010-2011) with All Pro Productions (All Pro), a company that specializes in fundraising. (Testimony of Mr. O'Leary and Exhibit 45)

11. All Pro is owned by Fred Smerlas and Steve DeOssie, two former professional football players, both of whom played for the New England Patriots. (Testimony of Mr. O'Leary)

12. A person by the name of Tiny Jerome from All Pro met with members of the E-Board in 2002 to discuss the terms of the first (2002) contract. (Testimony of Mr. O'Leary)

13. Under the 2002 contract, All Pro agreed to "provide the All-Pro Celebrity Team for a game of choice [Softball]" for Local 172. The "Celebrity Team" of current and former Patriots' players played a team of Salem firefighters. Admission tickets to the event were \$10 each.

Business owners and residents were contacted by ticket sales personnel (contracted by All Pro) and offered the opportunity to purchase tickets to the softball game and/or a sponsorship position within the event program guide. (Exhibit 45)

14. All Pro was responsible for furnishing and/or bearing the full expense of the celebrity talent; personal injury and liability insurance; a game announcer and scorekeeper; a sound system; national anthem presentation; a referee; ticket collectors and greeters; program guides; door prizes to be raffled off; posters; a press release; a complimentary guest speaker; and a \$300 allowance for a post-game reception. (Exhibit 45)
15. All Pro was responsible for hiring the ticket sales personnel as subcontractors that made the calls to local residents and business owners and all expenses associated with pre-sales including office rental, telephone costs, utilities, receipts, etc. (Exhibit 45)
16. Under the 2002 contract, Local 172 retained 35% of the first \$35,000, and 40% of everything above \$35,000 of the total gross revenue of the ticket and ad sponsorship reconcilable weekly. Local 172 was responsible for paying the telemarketing subcontractor room fee of 30% of the total gross revenue of ticket and ad sponsorship. (Exhibit 45) All Pro received the remaining 30 – 35% of gross revenue. (Testimony of Mr. O’Leary) Local 172 received 50% of ticket sales collected on the event date. (Exhibit 45)
17. The subcontractors making the phone solicitations set up shop in Salem and approximately five or six people made calls during normal business hours. Whenever a Salem resident or business owner agreed to make a contribution, a driver was sent to his or her home or business to collect the donation. (Testimony of Mr. O’Leary)
18. Additional donations were solicited by local merchants who put a canister near the register where patrons could make a contribution. (Testimony of Mr. O’Leary)

19. The 2002 contract stated, “All checks will be made payable to the Salem Firefighters Local 172 for deposit in their account. If you do not have an account, one must be opened immediately to facilitate this fundraising drive.” (Exhibit 45)
20. Mr. O’Leary signed the 2002 contract on behalf of Local 172. Lieutenant Richard Arno signed as a witness. (Exhibit 45)
21. The E-Board decided to open a separate account related solely to this fundraising activity. (Testimony of Mr. O’Leary and Mr. Krajieski)
22. On April 11, 2002, the separate fundraising account was established at the Greater Salem Employees Federal Credit Union by Richard Thomas (Secretary-Treasurer at the time). (Testimony of Mr. O’Leary) “The authorized signer on the account was Richard Thomas. On November 8, 2004, Richard Thomas was removed from the account and John O’Leary was added as the authorized signer on this account for [Local 172].” (Exhibit 44: November 8, 2013 letter from Judith Zolla, Manager of the Credit Union)⁵
23. The fundraising account that was opened by Mr. Thomas was a savings account, as opposed to a checking account. No debit card was ever issued for this account. (Testimony of Mr. O’Leary)
24. The fundraising account was not established as a 501(c)(3) tax exempt organization but instead was a 501(c)(6) organization. (Testimony of Mr. Cranney and Mr. O’Connor)⁶

⁵ This is contrary to the testimony of both the Appellant and Appointing Authority witness Ray Krajieski, who was the President of Local 172 when this separate account was opened. Both Mr. O’Leary and Mr. Krajieski testified that Mr. O’Leary was an authorized signatory on the account from the outset in April 2002. Regardless, it appears to be undisputed that Mr. O’Leary was permitted to withdraw funds from this account beginning in April 2002 and that the E-Board did not object to this. His ability to withdraw funds from the account is not the central issue here. Rather, the central issue is whether or not he misappropriated the funds that were withdrawn and/or used them for his personal use.

⁶ The decision to not establish the account under 501(c)(3) is noteworthy and reinforces that the purpose of these fundraising efforts had more to do with burnishing the image of Local 172 and “coalition-building” than assisting local charities and organizations.

25. Firefighters also maintain a separate “kitty fund” which is funded through \$10 monthly contributions from firefighters and vending machine receipts. There are no written rules for this kitty fund which is used to purchase such items as a flat screen television for the firehouse. (Testimony of Mr. Silva)
26. The first quarterly bank statement of the fundraising account from 4/1/02 to 6/30/02 is addressed to Local 172, “c/o Richard Thomas”. (Exhibit 44)
27. The E-Board had designated all matters related to All Pro to Mr. O’Leary. (Testimony of Mr. O’Leary and Mr. Krajewski)
28. From 2002 to 2010, Mr. O’Leary primarily withdrew money from the savings account in one of two ways: 1) a direct cash withdrawal; or 2) requesting a bank check made payable to: the intended recipient (i.e. – a local charity) *or* Local 172. In the second scenario, it was common for Mr. O’Leary to immediately endorse the bank check and receive the cash from the credit union. (Testimony of Mr. O’Leary) [The crux of this case centers around whether, at any time from 2002 to 2010, after receiving a cash withdrawal or cashing a bank check, Mr. O’Leary gave the money to the intended recipient or not; and/or whether he used some or all of those funds for his personal benefit.]
29. There were some occasions where Mr. O’Leary did not endorse the bank check, but, rather, gave it directly to the intended recipient. (Testimony of Mr. O’Leary)
30. Paul Cranney is a Captain in the Salem Fire Department. He has been with the Fire Department for approximately thirty (30) years and has been a Captain for approximately fifteen (15) years. He is not an officer in Local 172 nor does he serve on the E-Board. (Testimony of Captain Cranney)

31. Mr. Cranney received a bachelors degree in Accounting from Salem State College. As a volunteer, he has been doing the “tax work” for Local 172 since he first joined the Fire Department in 1983. (Testimony of Captain Cranney)
32. Mr. Cranney files the annual tax return for Local 172 (the Form 990). Whenever a new Secretary-Treasurer is elected, he provides that person with a tutorial of the software program known as “QuickBooks” so that person can do monthly reconciliations. (Testimony of Captain Cranney)
33. As part of his accounting functions, Mr. Cranney also accounted for the money that came in and out of the new fundraising account “based on the information provided by [Mr. O’Leary]” and incorporated that information into the annual tax return that he filed on Local 172’s behalf. (Testimony of Captain Cranney)
34. Mr. Cranney was aware that the fundraising account at the credit union was a savings account as opposed to a checking account. (Testimony of Captain Cranney, Tr. Vol. 1, p.154, lines 17, 18)
35. For several years, however, Mr. Cranney (falsely) assumed that whenever a “withdrawal” was made from the fundraising savings account, a bank check was always made out *and* it was made out *solely* to the intended recipient (i.e. – a local charity). (Testimony of Mr. Cranney)
36. When the quarterly statements arrived from the credit union, Mr. Cranney would talk with Mr. O’Leary directly about the statements and get a list of exactly where the disbursements went. Mr. O’Leary would provide Mr. Cranney with hand-written notes to identify where each amount labeled “withdrawal” on the quarterly statement went. (Testimony of Captain Cranney)

37. A review of the quarterly bank statements from 2002 to 2010 shows that, starting in 2002, Mr. O’Leary hand-wrote an explanation next to each line-item marked as “withdrawal” directly on the quarterly bank statement. For example, on the 4/1/02 to 6/30/02 bank statement, Mr. O’Leary hand-wrote: “All-Pro” next to seven (7) withdrawals totaling \$23,273.62; “Sub” next to seven (7) other withdrawals totaling \$19,553.58; “Photo-Jeff” next to one (1) withdrawal of \$30.00; “expenses – ad” next to one (1) withdrawal of \$300; “Colonial Engravers” next to one (1) withdrawal of \$117.60; “bounced checks” next to two (2) withdrawals totaling \$210; and “Finz Rest.” next to one (1) withdrawal of \$600. (Exhibit 19)
38. Mr. O’Leary completed the same process of hand-writing notes directly on the bank statement for the next two (2) quarterly statement periods in 2002. (Exhibit 19)
39. Beginning in 2003, Mr. O’Leary, instead of writing directly on the front of the bank statements, began hand-writing a separate itemized list on the back of each bank statement indicating the purpose of each withdrawal. (Exhibit 19) Those statements (back and front) were given to Mr. Cranney each quarter. (Testimony of Mr. O’Leary and Mr. Cranney)
40. Local 172 officers and E-Board members were not aware of any written procedures or guidelines governing how funds were to be distributed from this fundraising account. (Testimony of Mr. O’Leary and Mr. Krajewski and Mr. Cranney and Mr. Flynn)
41. As referenced above, the first of four fundraising events / drives occurred in 2002 in which Local 172 retained approximately \$25,000 of a total of approximately \$69,000 raised by All Pro. (Exhibit 19)
42. After the softball game between Salem firefighters and current and former members of the Patriots, there was a reception at Finz Seafood and Grill (Finz) in Salem. (Testimony of Mr.

O’Leary and Mr. Krajewski). In addition to thanking the donors, the purpose of the event was to set up a “coalition”. With the exception of the Mayor, various elected officials were invited to the coalition-building event. (Testimony of Mr. O’Leary)

43. A \$500 deposit was provided to Finz and Mr. O’Leary estimates that “thousands” of dollars were spent on food and an open bar. (Testimony of Mr. O’Leary) Mr. O’Leary handed out drink tickets that allowed those in attendance, including members of Local 172, to receive free alcoholic drinks. (Testimony of Mr. Silva) The hand-written notes of Mr. O’Leary on the 4/1/02 – 6/30/02 quarterly bank statement state that a \$500 “withdrawal” was made on 6/28/02 for the purpose of paying a deposit to Finz. The hand-written notes of Mr. O’Leary on the 10/1/02 to 12/31/02 quarterly bank statement state that a \$4,482.50 “withdrawal” on 10/18/02 was made for the purpose of “Fall Ball Fund Raiser”. (Exhibit 19) While the evidence does not firmly establish that this amount was related to the coalition-building event at Finz, I infer that it was, at a minimum, a fundraising expense that did not go to any local charity or other non-profit organization. It was taken from the \$25,000 that was retained by Local 172, reducing the total amount of potential donations to approximately \$20,000 from the total funds raised of \$69,000 (29%).

44. In the Fall of 2002, Mr. O’Leary was elected as President of Local 172. Richard Thomas remained as Secretary-Treasurer. (Testimony of Mr. O’Leary)

45. Mr. O’Leary served as the President of Local 172 for approximately eight (8) years, until October 7, 2010. (Testimony of Mr. O’Leary and Exhibit 30)

46. During Mr. O’Leary’s tenure as President of Local 172, Local 172 and All Pro entered into three (3) additional contracts. While the terms and conditions were similar to the 2002 contract, the fundraising event was changed to a “comedy night” as opposed to a softball

game. All Pro was responsible for renting a facility and hiring four (4) comedians. (Exhibit 45)

47. From 2002-2010, approximately \$344,000 in funds were contributed by Salem residents and business owners. Approximately \$116,000 was paid to All Pro and approximately \$99,000 was paid to the subcontractors who solicited the funds. (Exhibit 6)

48. As part of the 2005 contract, a new “campaign info sheet” was required by All Pro. Under the contact information, John O’Leary was listed as President and Richard Thomas was listed as Secretary-Treasurer, with John O’Leary listed as the primary contact. Asked to list the beneficiaries of the fundraiser, Mr. O’Leary wrote: “Area Youth Sports, Plumber Home for Boys; Schools; Fire Education; Boys and Girls Club; and Fundraisers.” In response to the question, “Is there anyone that you do not want us to contact...?” [re: fundraising calls], Mr. O’Leary wrote: “members of Local 172.” (Exhibit 45)

49. From 2003 to 2010, Mr. O’Leary and Mr. Cranney continued to perform the same “reconciliation” that began in 2002 and 2003. Mr. Cranney would review the quarterly bank statements and ask Mr. O’Leary to provide an itemized explanation regarding the purpose of each item labeled “withdrawal” on the bank statement. (Testimony of Mr. O’Leary and Mr. Cranney and Exhibit 19)

50. Mr. O’Leary’s hand-written notes from 2003 to 2010 include well over one hundred (100) entries. Examples include: Finz Restaurant; Salem Little League; Jimmy Fund; Salem Recreation Department; Stephen O’Grady Fund; Sheraton Ferncroft; Hawryluk Scholarship Fund; PFFM Fallen Firefighters Memorial; Crosby’s Market (Salvation Army Turkey Giveaway); Salem Firefighter Relief fund (X-Mas Party); St. John’s School; William Hudson Fund; Neil Sullivan Fund; Comedy Night Expenses (Sheraton); Lynn Firefighters; Dance

Class of Salem; Mike Ruane Fund; Hospitality Room Expenses; Holiday Fundraiser Expenses; Holiday Cruise Fundraiser; Salem Rotary; Danversport Yacht Club; Salem Heritage Days; Salem Beverly Firefighters; Salem Cartoon Basketball League; Salem Youth Football; Salem High Football Boosters; NECYFL Lights and Goalposts; Comedy Night and Holiday Cruise Expenses; Mizioch Catering; Salem Waterfront Hotel (Food, Room and Drinks); Local 172 X-Mas Party. (Exhibit 19)

51. In 2004, Tim Flynn was elected as Secretary-Treasurer of Local 172. (Testimony of Mr. Flynn) His name was added as a signatory to the fundraising account in 2007. (Exhibit 44)
52. On or around 2010, Mr. O’Leary and members of Local 172’s negotiating team negotiated a contract with the City’s current Mayor that angered many rank and file firefighters. Their angst apparently involved provisions for additional stipends to superior officers, but not rank and file firefighters. (Testimony of Mr. Arno)
53. Mr. O’Leary initially decided to not seek re-election as part of the annual election of officers in October 2010. He later changed his mind and mounted a last-minute write-in campaign. Richard Thomas was elected with 29 votes, defeating Charles Halloran (27 votes); and John O’Leary (12 votes). Ray Krajewski was elected as Vice President with 40 votes, defeating Richard Arno (29 votes). Timothy Flynn was re-elected as Secretary-Treasurer. Six (6) individuals, including Lt. Wayne Silva, were elected to the E-Board. (Exhibit 30)
54. As referenced in other findings, newly-elected President Richard Thomas previously served as Secretary-Treasurer of Local 172 and was the individual who opened the fundraising account in 2002.

55. When Mr. Thomas was elected as President in October 2010, he asked Mr. Silva, a newly-elected member of the E-Board, to take responsibility for the fundraising account effective January 1, 2011. (Testimony of Mr. Silva)
56. On around January 1, 2011, Mr. Silva had a brief, 5-minute meeting with Mr. O’Leary regarding the fundraising account. Mr. O’Leary handed Mr. Silva a folder that was less than an inch thick and said, “Good luck with that.” (Testimony of Mr. Silva)
57. When Mr. Silva and Ray Krajeski (Vice President) reviewed the bank statements, they were confused because all of the statements only listed deposits and withdrawals, as opposed to check numbers. The initial statements they reviewed did not include Mr. O’Leary’s handwritten itemized lists. (Testimony of Mr. Krajeski)
58. Several years earlier, Mr. Silva had similar concerns when he took over the separate “kitty fund”. Those concerns ended up being unfounded and there was no evidence of any wrongdoing. (Testimony of Mr. Roth)
59. When Mr. Krajeski expressed his concerns to Mr. Cranney, Mr. Cranney informed him about the itemized lists that Mr. O’Leary had prepared on a quarterly basis, explaining the intended purpose of the withdrawal. Mr. Cranney suggested that someone touch base with the recipients listed and verify that they received the money. (Testimony of Mr. Krajeski)
60. After reviewing Mr. O’Leary’s notes, Mr. Krajeski had questions about a contribution made to the Salem Cartoon Basketball League. (Testimony of Mr. Krajeski) Mr. O’Leary’s handwritten notes indicate that \$500 was paid to the Salem Cartoon Basketball League on 12/17/10. (Exhibit 19)

61. Mr. Krajieski reviewed the E-Board minutes for December 2010. Those minutes indicated that the E-Board approved a \$500 contribution to the Salem Cartoon Basketball League.
(Testimony of Mr. Krajieski)
62. Mr. Krajieski then called Jeff Morris, the director of the Salem Cartoon Basketball League and asked him if Local 172 had given the league any contributions over the past two (2) years. Mr. Morris indicated that no contributions had been received. Mr. Krajieski asked Mr. Morris to go back and check his records. A few days later, Mr. Morris called Mr. Krajieski and confirmed that his organization had not received any contributions from Local 172 in the past two years. (Testimony of Mr. Krajieski)
63. After reviewing Mr. O’Leary’s notes, Mr. Silva also had some questions about the recipients listed, including Salem High Golf. (Testimony of Mr. Silva) Mr. O’Leary’s hand-written notes indicate that \$200 was paid to “SHS Golf” on 7/21/10. (Exhibit 19)
64. At the time, a person by the name of Tommy Doyle, a friend of Mr. Silva and Mr. Thomas, was the golf coach at Salem High School. At some point, Mr. Silva was told by Mr. Thomas that Salem High Golf did not receive \$200 from Local 172. (Testimony of Mr. Silva)
65. Mr. Silva also had questions about an entry from Mr. O’Leary’s notes indicating that \$500 was paid to Danversport Yacht Club on 7/8/10. Mr. Silva contacted someone at the Yacht Club and received conflicting information regarding check numbers. (Testimony of Mr. Silva)
66. Mr. Silva and Mr. Krajieski also had questions about an entry on Mr. O’Leary’s notes stating that \$400 was donated to the “Stephen O’Grady Fund (Golf Tourney)” on 6/17/10.
(Testimony of Mr. Silva)

67. In an effort to gather additional information about the donation to the Stephen O’Grady Fund without causing any “waves”, Mr. Silva wrote an email to Beth O’Grady, copied to Ray

Krajeski, on January 31, 2011, stating:

“Beth, Greetings! My name is Wayne Silva. Ray Krajeski and myself recently took over the Salem Fire Department Fund Raising Account. We were trying to set up a program with the fundraising and our computer crashed. The information that we have is that we donated to the Stephen O’Grady Fund in late June 2010. Do you know the amount of our donation? Sorry for the inconvenience. It would really help us out as we are working on staying consistent with your charitable contributions. Thank you. Wayne Silva and Ray Krajeski. Salem Fire Department.” (Exhibit 43)

68. That same day, January 31, 2011, Beth O’Grady sent a reply email stating:

“Hi Wayne and Ray, That’s a bummer about your computer. I actually don’t have a record of you donating last year. You have sponsored our golf tournament over the years, and we do usually send those forms out in June, but we didn’t get anything for 2010. The last sponsorship I have a record of is in 2009. I can double check with my treasurer just in case if you think my notes may be wrong.” (Exhibit 43)

69. On February 1, 2011, Ms. O’Grady sent a follow-up email confirming that no contributions were received from Local 172 in 2010. (Exhibit 43)

70. Over the next week, Mr. Krajeski, Mr. Silva and Mr. Thomas, reviewed the notes provided by Mr. O’Leary and had questions about thirteen (13) donations totaling \$4100, including the three (3) referenced above.

71. On February 8, 2011, Mr. Silva sent an email to Mr. Cranney and Mr. Krajeski, copied to Mr. Thomas, asking Mr. Cranney about setting up a meeting with Mr. O’Leary to review these thirteen (13) donations. The email contained the following dates, donation amounts, organization names and comments from Mr. Silva:

Date of Contribution	Donation Amount	Organization	Mr. Silva’s notes
6/16	\$100	Beverly Firefighters	Cash (we haven’t contacted them yet to see if they received it)
6/17	\$400	Stephen O Grady Fund	Cash (Beth O Grady and the Fund Treasurer confirm that no money was received.

7/8	\$500	Danversport Yacht Club	Cash (DYC received 2 checks Apr 23 ck # 7220 for \$500 and Jul 26 ck #7976 for \$2000. I don't know where these checks came from but I am assuming All Pro. Those are the only two payments they have on record related to our account and the \$2500 matches the rate for the room for the night. So, where is the \$500?)
7/21	\$200	Salem High Golf	Cash (Coach Tom Doyle did not receive a donation from the SFD)
8/6	\$200	Salem Heritage Days	Cash (I called Salem Main Streets and they referred me to Ellen Talklowski. She is a direct link to the Mayor and I don't think we should raise the flag in that direction.)
8/9	\$300	Lynn Firefighters	Cash (no info)
8/26	\$500	Robert Mullins Fund	Cash (we are hoping that this money went to where it was supposed to go.)
9/10	\$200	Salem High Soccer	Cash (no info)
9/20	\$200	Lynn Firefighters	Cash (no info)
10/13	\$200	Salem High Field Hockey	Cash (no info)
11/30	\$300	Salem Public Education	Cash (no info)
12/9	\$500	Salem Rec Dept	Cash (waiting to hear back from Doug Bollen. First person I talked to couldn't find it.)
12/17	\$500	Salem Cartoon Basketball League	Cash (Jeff Morris did not receive anything)

72. On or about February 10, 2011, Mr. Krajewski, Mr. Cranney and Mr. Silva met with Mr.

O'Leary to discuss the thirteen (13) donations in questions. Mr. O'Leary provided an explanation for each donation. (Testimony of Mr. Silva) As part of the February 10, 2011 meeting, Mr. O'Leary stated that the \$500 withdrawal for Danversport Yacht Club was for a room deposit; the \$400 withdrawal for the Stephen O'Grady Fund was for a two-some or foursome to play in their golf tournament; the \$200 withdrawal for the Salem High Field Hockey was for a donation in the name of a girl that died in a car accident in Lynn; the \$200 withdrawal for Salem High Golf was for a golf tournament they have in late July; the \$100 withdrawal for Beverly Firefighters may have been a "golf thing"; the \$500 withdrawal for

Robert Mullins was for a sick firefighter in Lynn. Mr. O’Leary also confirmed at this meeting that he made donations to the Salem Public Education foundation; the Salem Cartoon Basketball League and the Salem Recreation Department. (Testimony of Mr. Silva)

73. By the time the meeting ended, Mr. Silva described his reaction as “Good. Thank God. We didn’t want anything bad. We wanted the right thing.” (Testimony of Mr. Silva)

74. At the conclusion of the meeting, Mr. Silva gave Mr. O’Leary the list of thirteen (13) withdrawals in questions and asked Mr. O’Leary to do some research and provide documentation to support his answers. Mr. O’Leary told them that he’d get back to them. (Testimony of Mr. Silva)

75. At some point, Mr. O’Leary contacted Mr. Silva and told him that one of his children had spilled coffee on the list. Mr. Silva sent Mr. O’Leary another copy of the list. (Testimony of Mr. Silva)

76. Sometime in mid-April 2011, some members of the E-Board met with Mr. O’Leary again. Mr. Thomas, Mr. Krajenski, Mr. Silva, Mr. Cranney and Mr. Jellison (another E-Board Member) were present. Mr. Thomas went down the list of thirteen (13) donations and Mr. O’Leary gave the same answers that he provided at the earlier meeting in January. He did not have any receipts or additional documentation. Members of the E-Board who were present at the meeting were split as to whether Mr. O’Leary was telling the truth. Mr. Jellison was satisfied that Mr. O’Leary was telling the truth, but Mr. Silva and Mr. Krajenski were not. (Testimony of Mr. Silva) Mr. Cranney was satisfied that Mr. O’Leary was telling the truth. (Testimony of Mr. O’Leary)

77. After the meeting in mid-April 2011, Mr. Thomas, Mr. Krajenski, Mr. Silva and Mr. Thomas met with Local 172 attorney E. David Wanger. Attorney Wanger suggested that the matter

be referred to the Attorney General's Office. Attorney Wanger subsequently told them that it would be best to have a Certified Public Accountant (CPA) conduct an audit of the account.

(Testimony of Mr. Krajeski and Mr. Silva)

78. Sometime in 2011, Mr. Krajeski was on a cruise ship with his daughter and other parents in relation to a dance group that his daughter was part of. Another parent on that cruise was Richard O'Connor, a CPA who is a partner in the accounting firm of Johnson O'Connor Feron & Carucci LLP in Wakefield, MA. Mr. O'Connor and Mr. Krajeski are close friends. Mr. O'Connor's daughter is best friends with Mr. Krajeski's daughter. Mr. O'Connor and Mr. Krajeski socialize with each other; have been to each other's homes and their families have vacationed together. (Testimony of Mr. O'Connor)

79. During this cruise, Mr. Krajeski told Mr. O'Connor that there was a problem in the firehouse; that he (Krajeski) was part of a group doing charitable work and they couldn't trace some of the funds. Mr. Krajeski asked Mr. O'Connor if his firm had experience in such matters and Mr. O'Connor said yes. Mr. O'Connor was never told of any animus against Mr. O'Leary regarding the recent contract negotiations or that Mr. O'Leary had recently been ousted as President of Local 172. (Testimony of Mr. O'Connor)

80. At some point after the cruise, Mr. O'Connor attended a meeting with Mr. Krajeski, Mr. Flynn, Mr. Cranney, Mr. Thomas and Attorney Wanger. As part of this meeting, Mr. O'Connor was told that "funds were missing" for the period of time that Mr. O'Leary was in charge of the fundraising account and asked Mr. O'Connor how he would go about investigating the missing funds. (Testimony of Mr. O'Connor)

81. Mr. O'Connor told those present at the meeting that he could go in and do an audit and try to find evidence to support the donations; that he could take a sample of the donations; and that

he could try to get some independent confirmation that the donations were made. First, however, Mr. O'Connor said that the audit should include talking to Mr. O'Leary and having him provide any evidence that the donations were made to the intended recipients.

(Testimony of Mr. O'Connor)

82. Shortly thereafter, Mr. O'Connor attended a second meeting on or around June 2011 with the same individuals at which time it was agreed that Local 172 would retain his firm as part of a "consulting service agreement". Unlike an audit, a consulting service agreement does not involve looking at the total books and records. Rather, the firm looks at specific issues. Attorney Wanger instructed Mr. O'Connor what issues to look at. (Testimony of Mr. O'Connor) Mr. O'Connor's firm was paid \$135 / hour from the fundraising account. Two other individuals at the firm assisted Mr. O'Connor with his review. (Testimony of Mr. Silva)

83. When Mr. O'Connor completed the review, he erroneously believed that the account was established as a 501(c)(3) charitable organization. It was not until sometime after he completed his report, and after giving testimony at the local hearing in Salem, that he learned that the account was not a charitable account. (Testimony of Mr. O'Connor)

84. While completing his review, Mr. O'Connor erroneously believed that the summary of the meeting minutes that he was given to review were from a separate 501(c)(3) organization. He erroneously believed that there were separate bylaws for what he believed to be a non-profit organization, but he never reviewed any such bylaws. (Testimony of Mr. O'Connor)

85. Mr. O'Connor was unaware that Richard Thomas, and not John O'Leary, set up the separate fundraising account in 2002. (Testimony of Mr. O'Connor)

86. Mr. O'Connor was told by some member of the E-Board (but he couldn't remember who) that disbursements from the fundraising account required authorization from the E-Board. However, Mr. O'Connor never saw any written rules or bylaws regarding this requirement. (Testimony of Mr. O'Connor)
87. Mr. O'Connor never spoke with Mr. O'Leary. Rather, he was told by Mr. Cranney that Mr. O'Leary was not cooperating and was not providing any documentation regarding the donations. Mr. O'Connor was never informed by Mr. Cranney or any other member of the E-Board that Mr. O'Leary had met with them on at least two (2) occasions. (Testimony of Mr. O'Connor)
88. As part of the review, Mr. O'Connor and his staff asked Mr. Cranney to put together all of the records and organize them by payer. Mr. O'Connor intended on going through all of the documents provided (including meeting minutes, thank you letters, etc.) to verify that the contribution was made. Mr. O'Connor assumed that each donation should have a corresponding authorization referenced in the minutes. (Testimony of Mr. O'Connor)
89. Mr. O'Connor never actually reviewed any minutes, either from the E-Board or the general membership. Rather, he relied on a summary provided by members of the E-Board. (Testimony of Mr. O'Connor)
90. Mr. O'Connor decided to send out written requests to twenty (20) organizations that Mr. O'Leary listed as donation recipients and ask for verification that the contribution was received. Mr. O'Connor could not recall how he and his staff selected these specific donations to verify. (Testimony of Mr. O'Connor)

91. In order to obtain the mailing address of the donation recipient, Mr. O'Connor and his staff relied on information received from Mr. Thomas or Mr. Cranney or from addresses listed online. (Testimony of Mr. O'Connor)

92. Twenty (20) letters dated September 21, 2011 were sent under the signature of Local 172 President Richard Thomas asking the recipient to verify that they received a donation and send that information back to the accounting firm. The "verification" section to be completed was immediately after the signature of Mr. Thomas and stated:

"To: Johnson O'Connor Feron and Carucci

The above information regarding the donation dated [unique date] from Salem Firefighters Local 172 agrees with our records [] or does not agree with our records [] at September 21, 2011 with the following exceptions (if any):

Signature
Title:
Date:"

(Exhibit 17, starting at Page 2)

93. Of the twenty (20) letters that were mailed, there were twelve (12) replies. According to Mr. Johnson's report, two (2) of the twelve (12) replies confirmed that the donation agreed with their records and ten (10) organizations replied indicating that the donation did not agree with their records. Mr. O'Connor did not follow-up with these ten (10) organizations. (Testimony of Mr. O'Connor)

Organization #1

94. The letter sent to the Beverly Firefighters was returned with the box checked indicating that the \$100 donation on June 16, 2010 did not agree with their records. There is no signature, title or date included in the reply. There is also no indication as to why the donation did not

agree with their records. (Exhibit 17, Page 2) Further, nobody from Beverly Firefighters testified before the Commission. For these reasons, I have given no weight to this letter.

Organization #2

95. The letter sent to the Stephen O'Grady Fund (Attn: Beth O'Grady) was returned with the box checked indicating that the \$400 donation dated June 17, 2010 did not agree with their records. The signature section contains a signature and the name of Beth O'Grady printed next to it. Next to "title" is the word "President" and the document is dated 9/27/11. There is also a hand-written note stating, "We have no record of a donation calendar year 2010, but would be happy to research if a copy of front + back of check available." (Exhibit 17, Page 3) I found this document itself sufficiently reliable. Further, it was bolstered by the additional testimony of Mr. Silva who spoke to Ms. O'Grady and received the same information. Finally, Ms. O'Grady also signed and submitted a sworn affidavit confirming the information provided on the form that was sent to Mr. O'Connor. (Exhibit 18) For these reasons, I have given this document due weight as part of my decision-making process.

Organization #3

96. The letter sent to the Danversport Yacht Club, listed on Mr. O'Connor's spreadsheet as "does not agree with our records" was actually returned with the box checked indicating that the \$500 donation dated July 8, 2010 did agree with their records. Mr. O'Connor and his staff apparently concluded that the wrong box was checked because of a hand-written note on the bottom of the letter stating, "The event was paid by All Pro Production to DYC. We did not receive any pmts from Salem Firefighters. See attached receipt [illegible word]." The attachment is a receipt for \$500 to All Pro Production. (Exhibit 17, Pages 4, 5 and 6). The individual signing the letter, Angela Manzi, did not testify before the Commission. Further,

Mr. O’Leary submitted an invoice from the yacht club dated 8/6/10 for Local 172 in the amount of \$728. (Exhibit 36) Absent some type of follow-up to clarify the contradictory information, I did not find this document sufficiently reliable and have given it no weight as part of my decision-making process.

Organization #4

97. The letter sent to Salem High Golf was returned with the box checked and the words circled stating that the \$200 donation dated July 21, 2010 does not agree with their records. The response appears to be signed by Thomas R. Doyle, the Salem High Varsity Golf Coach, and is dated October 4, 2011. (Exhibit 17) I found this document to be sufficiently reliable and have given it due weight as part of my decision-making process. However, I also entered into evidence, a written statement from Thomas Doyle stating, “I do not have any records of people paying cash for raffle tickets and/or entry fees. People did pay cash for raffle tickets and entry fees and on course raffles.” (Exhibit 25) Based on Exhibit 25, Mr. O’Connor concluded that he would need more information before classifying the \$200 as a misappropriation. (Testimony of Mr. O’Connor)

Organization #5

98. The letter sent to the Robert Mullins Fund was returned with the box checked stating that the \$500 donation dated August 26, 2010 does not agree with their records. The reply is signed by Robert Mullins, Firefighter, City of Lynn and is dated Sept. 27, 2011 with the following hand-written note: “There is no fund of any kind for myself. I have never recieved (sic) anything from anyone not one cent.” Mr. Mullins put his phone number at the end of this note. (Exhibit 17, Page 8) I found this document to be sufficiently reliable and have given it due weight as part of my decision-making process.

Organization #6

99. The letter sent to Salem Recreation was returned with no box checked regarding the \$500 donation dated December 9, 2010. However, a hand-written note by Doug Bollen, dated 10/7/11 states: “We have no records of a donation made on December 9 to Salem Recreation or Council on Aging.” (Exhibit 17, Page 9) I found this document to be sufficiently reliable and have given it due weight as part of the decision-making process.

Organization #7

100. The letter sent to the Salem Cartoon Basketball League was returned with the box checked stating that the \$500 donation dated December 17, 2010 does not agree with their records. The reply is signed by Leo Higgins, Co-Ordinator, is dated 9-28-11 and contains the following hand-written note: “Dear Sir: I cannot confirm donation mentioned above. On 9-27-11 I contacted our bank which did a review of all deposits made from 12/17/10 to the present and no deposit contained a \$500 check from anyone.” (Exhibit 17, Page 10) I found this document to be sufficiently reliable and have given it due weight as part of the decision-making process. However, I also entered into evidence a February 5, 2013 written statement from Leo Higgins stating that he was unable to provide any records regarding cash donations. (Exhibit 26)

Organization #8

101. The letter sent to the Salem High Football Boosters was returned with the box checked stating that the \$200 donation dated August 26, 2010 did not agree with their records. Although the reply is signed by Scott Connolly, Athletic Director and dated 11/3/11, there is no indication as to why the amount does not agree with their records. (Exhibit 17, Page 13) I did not find this document sufficiently reliable and gave it no weight.

Organizations #9 & 10

102. No letters were attached to Exhibit 17 to support the summary sheet conclusion that a reply was received from “Salem Youth Football” or “NECYFL Lights and Goalposts” stating that their records do not agree with the contributions of \$250 and \$300 respectively. (Exhibit 17) For this reason, I gave that portion of the summary sheet no weight.

Straight Cash Withdrawal

103. Mr. O’Leary acknowledged that he withdrew funds from the fundraising account and used those funds for himself and his wife to fly to Colorado for a Fallen Firefighters Memorial. It appears that Mr. O’Leary was the only firefighter not to reimburse the account for these expenses. (Testimony of Mr. O’Leary)

104. On December 1, 2011, Mr. Johnson penned a letter to Mr. Thomas summarizing the findings and conclusions of his review.

The four (4) findings were as follows:

- 1) “For the period April 1, 2002 through December 31, 2010, cash withdrawals endorsed by John O’Leary totaling \$17,500 had no support in the document provided. (See Exhibit I)
- 2) For the period January 1, 2005 through December 31, 2010, checks endorsed and cashed by John O’Leary totaled \$8,200. None of the disbursements were approved in the Board of Directors’ minutes or had support in the other documents provided. (See Exhibit II)
- 3) For the period June 1, 2005 through December 31, 2010, a total of \$53,747.23 of checks were written to various subcontractors who were involved in various fundraising activities for the charity. All of the checks examined were cashed by the recipient subcontractor rather than deposited into a business bank account. (See Exhibit III) We were unable to obtain copies of all check images written to various subcontractors for the scope of our entire investigation due to bank restrictions. Therefore, Exhibit III does not represent or correspond with the total number of checks written to subcontractors in Exhibit I.
- 4) We received 14 out of the 20 confirmations sent to recipient organizations. We found that out of the 14 confirmations, 10 responses totaling \$3,450 do not agree with our records.(See Exhibit IV)”

The conclusion of the report stated:

“As indicated in the accompanying schedule of cash disbursements (Exhibit I), we identified transactions totaling \$344,514.49. Based on our findings mentioned above, cash disbursements totaling \$25,750 appear to be misappropriated for the personal benefit of John O’Leary. We have attached supporting schedules to illustrate how this amount was computed. Also mentioned above, \$53,747.23 of checks written to various subcontractors were verified as being cashed by the recipient rather than deposited into a business bank account. We found these recurring actions to be unusual in nature. Most businesses deposit checks into a business bank account rather than cash checks as a standard business practice. We were unable to obtain copies of check images from the bank for the period January 1, 2002 through December 31, 2004. Therefore, we are unable to vouch (sic) any additional information.” (Exhibit 6)

105. In March 2012, Mr. Thomas met with Salem Fire Chief David Cody. He informed Chief Cody that when he took over as President of Local 172 (in 2010), he and others had concerns about the fundraising account and had decided to have an audit of the account done. Mr. Thomas provided Chief Cody with a copy of the December 1, 2011 report from Mr. O’Connor. (Testimony of Chief Cody)

106. One day after meeting with Mr. Thomas, Chief Cody met with Salem City Solicitor Beth Rennard and gave her a copy of the report. (Testimony of Chief Cody)

107. Chief Cody and Ms. Rennard reviewed the report and reviewed the rules and regulations of the Fire Department. (Testimony of Ms. Rennard)

108. On March 16, 2012, Chief Cody sent a letter to Mr. O’Leary informing him that a hearing, pursuant to G.L. c. 31, § 41, would be held on March 22, 2012 to determine whether there was just cause to terminate his employment as a firefighter. The letter stated, in part:

“The reason for my seeking the termination of your employment is an independent Certified Public Accountant’s (CPA) report the City received recently from the Massachusetts Attorney General’s office. In this report, a copy of which is attached, the CPA found that as President of Local 172, you withdrew funds from the Local’s bank account for your personal benefit without authorization from the Executive Board, endorsed and cashed checks to the Local without approval of the Executive Board, and allowed other reported irregularities in the distribution of the Local’s funds.

Your actions, as well documented in the CPA's report, are a clear violation of the Rules and Regulations of the Salem Fire Department, particularly the following sections of Chapter 21, Charges:

- i. Conduct prejudicial to good order;
- l. untruthfulness or willful misrepresentation in matters affecting the Department or its employees; and
- n. Conduct unbecoming a member, whether on or off duty, which tends to lower the fire service in the estimation of the public. (Exhibit 1)

109. Mr. O'Leary was placed on paid administrative leave pending the outcome of the hearing. (Exhibit 1)
110. The hearing scheduled for March 22, 2012 was postponed after Mr. O'Leary's attorney asked for all supporting documentation related to the CPA's report. Ms. Rennard subsequently obtained the supporting documentation from the Attorney General's office, kept a copy for herself and gave a copy to Mr. O'Leary's attorney. (Testimony of Ms. Rennard)
111. The documents received included bank statements, hand-written accountings of what the withdrawals were for and copies of canceled checks and withdrawal slips. (Testimony of Ms. Rennard)
112. Chief Cody and Ms. Rennard reviewed the documents and compared them against Mr. O'Connor's report. As part of her review, Ms. Rennard found numerous checks made out to organizations such as the Salem Children's Charity or Kevin Harvey *or* Local 172. Ms. Rennard observed that these checks were endorsed by John O'Leary. (Testimony of Ms. Rennard and Exhibit 7)
113. Ms. Rennard viewed one \$500 bank check made payable to "Salem Firefighters Local 172 or Michael Bencal" and another \$500 bank check made payable to "Salem Firefighters

Local 172 or Kevin Harvey Fund.”⁷ Both checks were endorsed by Mr. O’Leary.

Recognizing that Mr. Harvey and Mr. Bencal had run for office in Salem, Ms. Rennard obtained the campaign finance reports for each office holder and did not see a \$500 donation listed on those reports. She was also aware that applicable campaign finance laws prohibit cash contributions to political candidates or their committees of more than \$50. (Testimony of Ms. Rennard and Exhibits 9, 10, 11, 13, 14, 15 and 16)

114. Sometime after receiving additional documents from the Attorney General’s Office, counsel for Mr. O’Leary contacted Ms. Rennard and told her that he and his client had not been permitted to enter the fire house to obtain various documents related to the fundraising account. As a result, Ms. Rennard contacted Attorney Wanger to assist with the request. (Testimony of Ms. Rennard)

115. On April 4, 2012, Attorney Wanger sent a letter to Mr. O’Leary’s counsel stating in part, “The Local is prepared to provide John O’Leary with supervised access to relevant documents for his review and/or copying.” (Exhibit 20B)

116. As part of her review of the documents, Ms. Rennard noticed that, in addition to the withdrawals associated with bank checks, there were several other cash withdrawals with notes indicating that the funds went to the William Hudson Fund. After reviewing this information, Ms. Rennard met with Elizabeth Hudson, Mr. Hudson’s widow. As a result of that meeting, Ms. Rennard’s secretary typed up an affidavit that was signed by Ms. Hudson. The affidavit, dated May 23, 2012, stated:

“1. I was asked by the city of Salem to confirm that the I (sic) or the William Hudson Fund, a fund established for my family following the death of my husband, Fire Captain William

⁷ Both Mr. Bencal and Mr. Harvey served on the Salem City Council in 2005. Mr. Harvey ran for Mayor in 2005.

Hudson, received donations from the Salem Fire Fighters or John O'Leary in the amounts of \$1500 on or about 1/14/05, \$1,000 on or about 9/14/05 and \$400 on or about 9/11/06 for a total of \$2900.

2. I have reviewed the detailed account of the donations to the William Hudson Fund, a copy of which is attached hereto, and cannot confirm donations from John O'Leary or the Salem Fire Fighters, with the exception of a \$50.00 donation dated 3/29/05 that the Credit Union identified in a handwritten document was received by the Salem Firefighters."

Signed under the pains and penalty of perjury this 23rd day of May 2012." (Exhibit 18)

117. Shortly after Mr. O'Leary was terminated, Elizabeth Hudson penned a letter to the editor of the Salem News stating in part:

"... I would like to express the family's gratitude for granting Bill's last wish. Bill loved the beach and wanted to be able to enjoy the beach. It was the middle of winter and Bill was far too ill to travel.

Friends, family and brotherhood were feeling hopeless. I came up with the idea to build a beach. I purchased a beach mural, blue carpet, bamboo for a walkway, wallpaper, a day bed and a shelf, and friends brought over beach knickknacks and shells.

The fire department ... spent the whole day building, installing and fixing things around the house. It was the first time in a long time I felt surrounded and safe with the help of the fire department. John gave me several hundred dollars to help with expenses. I understood this to be donations made by Bill's coworkers. The missing money was from two years after Bill had passed away. It is our hope that this unfortunate event will not take away the memory of the building of the beach ...

... The fire department supported us in one last way. The department flew the children and me and Bill's mom to Colorado for the firefighter's memorial with escorts. This was a truly moving event that will remain with our family forever. My understanding, this was paid for by the firefighters from a separate fund. (Exhibit 35) (emphasis added)

118. Ms. Hudson did inform Ms. Rennard that the trip referenced above was paid for by Local

172. Since Ms. Rennard did not believe the dates in question matched up to the withdrawals, she did not think it should be included in the affidavit. (Testimony of Ms. Rennard)

119. Ms. Hudson did inform Ms. Rennard that firefighters had assisted her financially and otherwise with the construction of the basement beach. However, since Ms. Hudson believed that any funds that day came from individual firefighters, Ms. Rennard did not think it was relevant. (Testimony of Ms. Rennard)
120. On June 20, 2012, Chief Cody sent Mr. O’Leary another letter informing him that a re-scheduled Section 41 hearing would be held on June 20, 2012 at 10:00 A.M. (Exhibit 2) That hearing was postponed because counsel for Mr. O’Leary asked for additional time to prepare for the hearing. (Testimony of Ms. Rennard)
121. The Section 41 hearing was re-scheduled again – to July 24, 2012 at 10:00 A.M. (Exhibit 3)
122. On July 23, 2012, counsel for Mr. O’Leary sought another continuance of the Section 41 hearing. The hearing was rescheduled one final time – to August 2, 2012 at 9:30 A.M. (Exhibit 5 and Testimony of Ms. Rennard)
123. The Section 41 hearing took place on August 2, 2012. Chief Cody designated Ms. Rennard to serve as the hearing officer. (Testimony of Ms. Rennard and Chief Cody)
124. Mr. O’Connor testified before Ms. Rennard at the local Section 41 hearing and reviewed the findings and conclusions of his report. Mr. Arno testified on behalf of Mr. O’Leary. (Testimony of Ms. Rennard)
125. Mr. O’Leary did not testify at the local Section 41 hearing, but Ms. Rennard did not draw an adverse inference against him for his failure to testify. (Testimony of Ms. Rennard)
126. On August 29, 2012, Ms. Rennard sent a 6-page hearing officer report to Chief Cody. In her report, Ms. Rennard adopts all of the findings and conclusions of Mr. O’Connor’s report and concluded that he (O’Leary) had violated the three rules noted in the charge letter

relating to conduct prejudicial to good order; untruthfulness; and conducting unbecoming a member, on or off duty. (Exhibit 21)

127. In her report, Ms. Rennard concluded in relevant part that:

“O’Leary was the union President during the period of the CPA’s review and in this position O’Leary had complete control and access to the Union’s charitable account. As such, he was a fiduciary, the lead person to whom the Union’s charity account was entrusted for the benefit of local charities.

Based on the evidence presented through and the testimony of the CPA and the complete lack of evidence, not a note, affidavit or witness, presented by O’Leary to dispute even one of the questionable transactions, O’Leary breached his fiduciary duty to the Union and the intended recipients of the Union’s donations when he misappropriated funds intended for charitable purposes. He was untruthful and willfully misrepresented to Union officials that numerous donations were made on the Union’s behalf, when in fact the identified recipients did not receive said donations. Moreover, the these (sic) donations were to be given to those for whom the account was intended, specifically, a deceased firefighter’s family, a local basketball league, and an ill Lynn firefighter. In his capacity as not only an employee of the Salem Fire Department but also as the Union president in control of the charitable account, he had a fiduciary duty to the donors to exercise his powers in the role for the benefit of others. In not carrying out his fiduciary duty as required, he has created an environment of mistrust within the Fire Department. As such, O’Leary’s conduct is prejudicial to the good order of the Fire Department; he could not, in my opinion, successfully return in any capacity to the City of Salem Fire Department.” (Exhibit 21)

128. Chief Cody accepted Ms. Rennard’s report and recommendation and, via letter dated August 30, 2012, notified Mr. O’Leary that he was terminated, effective August 31, 2012. (Exhibit 21)

129. On September 12, 2012, Mr. O’Leary filed the instant two-part appeal with the Commission, arguing that there was no just cause for his termination (Section 43 appeal) and that the Fire Department committed procedural violations that were prejudicial to him. (Section 42 appeal). (Stipulated Facts)

Section 42 Appeal: Legal Standard

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.

Section 42 Appeal: Analysis

Here, the Town met all of the procedural requirements contained in Section 41. They provided Mr. O’Leary with proper notice of the hearing with specific charges; notified Mr.

O'Leary of his appeal rights under civil service law; appointed a hearing officer; and notified Mr. O'Leary of the final decision to terminate him in a timely manner.

Mr. O'Leary's objection to Ms. Rennard serving as a hearing officer is misplaced. There is no requirement in the civil service law and rules that the Appointing Authority choose an impartial hearing officer. (See McIsaac v. Civ. Serv. Comm'n et al, 38 Mass. App. Ct. 473 (1995). 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, 12 MCSR 169 (1999), citing Cleveland v. Board of Education v. Loudermill, 470 U.S. at 546, 547).

For this reason, Mr. O'Leary's Section 42 appeal is hereby *denied*.

Section 43 Appeal: Legal Standard

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).

Section 43 Appeal: Analysis

Salem Fire Chief David Cody, who serves as the Appointing Authority for the Salem Fire Department, appointed City Solicitor Beth Rennard to serve as a hearing officer to determine whether there was just cause to terminate John O'Leary as a firefighter. In his letter to Mr.

O’Leary, Chief Cody specifically stated that the reason for possible termination related to the findings and conclusions contained in a report prepared by CPA Richard O’Connor. For this reason, I have limited my review to the findings and conclusions contained in that report.

While Ms. Rennard, and ultimately Chief Cody, accepted all of the findings and conclusions of that report, I do not. Based on my de novo review of the testimony and all of the documents submitted, I have serious questions and reservations about the report, both generally, and in regard to specific findings and conclusions.

First, Mr. O’Connor was asked to complete the report by firefighter Ray Krajeski. Mr. Krajeski is a personal friend of Mr. O’Connor. They socialize together, visit each other’s homes; go on vacation together; and their daughters are close friends. Prior to approaching Mr. O’Connor, Mr. Krajeski had already concluded that Mr. O’Leary was being untruthful. A far better course of action here would have been for Mr. O’Connor to have the review conducted by another CPA in his firm or suggest to Mr. Krajeski that Local 172 find another CPA to complete the review.

Second, Mr. O’Connor was unaware of the backdrop under which this review was being requested. He did not know that several firefighters were angry about a recent contract negotiated by Mr. O’Leary or that Mr. O’Leary had recently lost a recent write-in campaign to be reelected President of Local 172. Had he known this, he may have relied less on second-hand information given to him by other firefighters and insisted on talking with Mr. O’Leary directly.

Third, the actual review done here was not an audit, which the Attorney General’s office had apparently suggested take place. Rather, the report was the product of a “consulting service agreement” in which the CPA takes direction from the client in regard to what issues should be reviewed or not reviewed. That is particularly troubling here where it appears that there was a

concerted effort to direct the review entirely toward the actions of Mr. O’Leary, as opposed to other individuals who, at various times, also had a fiduciary responsibility here. Those individuals include, but are not limited to: Mr. Thomas, who *opened* the account and was an authorized signatory for at least two (2) years; Mr. Cranney, who, albeit on a voluntary basis, submitted *tax returns* on behalf of Local 172 that included information about the account; Tim Flynn, the Secretary-Treasurer and authorized signatory on the account for several years; and, more generally, all officers and members of the E-Board. An independent “audit” could have – and should have – examined the actions or inactions of all of these individuals. An independent audit could have examined, among other things, the appropriateness of this entire enterprise, in which two-thirds of all money raised went to the fundraisers and a good portion of the remaining funds were spent on “coalition-building” functions and holiday parties where free food and alcohol was apparently in plentiful supply. Since that would have implicated almost all members of Local 172, it is not surprising that the E-Board directed Mr. O’Connor to focus solely on Mr. O’Leary’s actions.

Fourth, Mr. O’Connor, even after completing the report, was apparently unaware of important information related to the fundraising account. For example, he falsely assumed that the account was established as a non-profit under 501(c)(3) when it was not. He also did not know who actually set up the account (Mr. Thomas) and he never asked for or received, as part of his review, the written procedures regarding how funds could be authorized from, what he mistakenly believed was a non-profit account.

Fifth, as alluded to above, Mr. O’Connor never spoke directly with Mr. O’Leary or with any of the individuals representing the recipient organizations. Rather, he relied on hearsay statements from members of the E-Board regarding their conversations with Mr. O’Leary and

representatives of the recipient organizations. It is akin to an IRS agent concluding an audit of a taxpayer's tax returns without ever speaking to the taxpayer.

Finally, Mr. O'Connor had difficulty during his testimony explaining certain aspects of his own report. For example, his definition of what was considered a "misappropriation" was at times vague and evolving. Also, he could not adequately explain why he seemed to continuously change the look-back time periods that he and his staff chose to examine. Further, he could not produce documentation to support specific conclusions on his own summary sheets. For example, while one of his summary sheets indicated that two recipient organizations replied to a letter indicating that they had not received a donation, he could not produce the actual letters in question.

For all of the above reasons, I do not credit many of the sweeping, broad-based, and unsubstantiated portions of his conclusion. For example, I do not credit Mr. O'Connor's conclusion that "... cash disbursements totaling \$25,750 appear to be misappropriated for the personal benefit of John O'Leary." That conclusion is based on Mr. O'Connor's findings that none of the \$17,550 in straight cash withdrawals, dating back to 2002, were authorized *and* that they were misappropriated and spent by John O'Leary for his personal use. This jaw-dropping conclusion was reached by Mr. O'Connor without ever speaking to Mr. O'Leary directly and, more importantly, without ever contacting, personally, or via letter, the *vast majority* of recipient organizations identified in Mr. O'Leary's hand-written notes that he provided to Mr. Cranney on a quarterly basis. Just as importantly, the conclusion relies on the assumption that all expenditures must be approved by a vote of the E-Board, or as Mr. O'Connor falsely assumed, the Board of Directors of the non-profit organization that never actually existed. Similar assumptions and undocumented, hearsay statements were behind his finding that \$8,200 in

checks endorsed by Mr. O’Leary were misappropriated and used for Mr. O’Leary’s personal benefit.

While I do not credit all of the broad, sweeping conclusions of Mr. O’Connor’s report, I was willing to examine any instances, whether it was through a straight cash withdrawal or a withdrawal via bank statement where Mr. O’Connor or the Department was able to show some corroborating evidence regarding a specific misappropriation. In these instances, I also considered and weighed the credibility of Mr. O’Leary.

In regard to the bank statement withdrawals, Finding #4 of Mr. O’Connor’s report states that: “We received 14 out of the 20 confirmations sent to recipient organizations. We found that out of the 14 confirmations, 10 responses totaling \$3,450 do not agree with our records.” Since this appears to be the only portion of the report that relied on an acceptable level of due diligence, I carefully examined the information produced by Mr. O’Connor in regarding to this particular finding.

As referenced in the above analysis and in the findings, Mr. O’Connor was unable to produce documentation regarding two (2) of the ten (10) responses in question. Thus, I did not credit that portion of his finding. Of the remaining eight (8) responses, I found that the documentation provided was not sufficiently reliable for me to credit, including one instance where the recipient organization actually checked the box on the reply form stating that the organization *did* receive a donation from Local 172.

That leaves five (5) remaining bank statement withdrawals classified by Mr. O’Connor as misappropriations:

1. Stephen O’Grady Fund: \$400
2. Salem High Golf: \$200

3. Robert Mullins Fund: \$500
4. Salem Recreation: \$500
5. Salem Cartoon Basketball League: \$500

Mr. O'Leary's hand-written notes indicate that a \$400 contribution was made to the Stephen O'Grady Fund on June 17, 2010. It is undisputed that Mr. O'Leary actually cashed the bank check. Mr. Silva, whose testimony I found credible, was told by Beth O'Grady, President of the O'Grady Fund, that no such donation was received. Further, Ms. O'Grady replied to the form sent to her confirming this information. Finally, Ms. O'Grady signed a sworn affidavit to this effect. In his testimony before the Commission, Mr. O'Leary stated that the \$400 was used by now-deceased firefighter Jack Rubin to participate in a foursome at the annual O'Grady golf tournament in 2010. Even standing alone, his testimony did not ring true to me. Further, as part of her sworn affidavit, Beth O'Grady stated that Jack Rubin did not participate in the 2010 golf tournament. She also attached photographs of each of the foursomes to show that Jack Rubin was not among them. Thus, I have concluded that Mr. O'Leary, via a bank check, withdrew \$400 from the fundraising account on June 17, 2010. It is more likely than not that he falsely stated that its purpose was the Stephen O'Grady Fund, and that he never donated that money, directly, or indirectly, to the O'Grady Fund.

Mr. O'Leary's hand-written notes indicate that a \$200 contribution was made to Salem High Golf on July 21, 2010. It is undisputed that Mr. O'Leary cashed the \$200 bank check. In his written response, Thomas Doyle, the golf coach, unequivocally stated that no such donation was received. In his testimony before the Commission, Mr. O'Leary stated that the \$200 was used to pay for raffle tickets sold by members of the team. I did not believe his self-serving testimony, which lacked the type of specificity or detail needed in order to deem it credible. Thus, I have

concluded that Mr. O’Leary, via a bank check, withdrew \$200 from the fundraising account on July 21, 2010. It is more likely than not that he falsely stated that its purpose was for Salem High Golf and that he never donated that money, directly, or indirectly, to Salem High Golf.

Mr. O’Leary’s hand-written notes indicate that a \$500 contribution was made to the Robert Mullins Fund on August 26, 2010. Mr. Mullins, in his written response, bluntly rebutted this assertion, stating, “There is no fund of any kind for myself. I have never recieved (sic) anything from anyone not one cent.” Mr. O’Leary’s testimony regarding this withdrawal was wildly unbelievable. According to Mr. O’Leary, he left \$500 with an unnamed Lynn firefighter and told him it was for Mr. Mullins. I don’t credit this testimony. Thus, I have concluded that Mr. O’Leary, via a bank check, withdrew \$500 from the fundraising account on August 26, 2010. It is more likely than not that he falsely stated that its purpose was for Robert Mullins and he never donated that money, directly, or indirectly, to Robert Mullins.

Mr. O’Leary’s hand-written notes indicate that a \$500 donation was made to Salem Recreation on December 9, 2010. However, the written response from the Salem Recreation’s representative, Doug Bollen, states that no such donation was received. I did not credit Mr. O’Leary’s testimony that the funds were used to sponsor individuals participating in recreation-related events such as the annual “turkey trot.” Similar to his testimony regarding the Salem High Golf donation, his testimony lacked specificity and simply did not ring true to me. Thus, I have concluded that Mr. O’Leary, via a bank check, withdrew \$500 from the fundraising account on December 9, 2010. It is more likely than not that he falsely stated that its purpose was for Salem Recreation and he never donated that money, directly, or indirectly, to Salem Recreation.

Mr. O’Leary’s hand-written notes indicate that a \$500 donation was made to the Salem Cartoon Basketball League on December 17, 2010. However, the written response from the

President of the League stated that no such contribution was received. Mr. O’Leary did not offer any credible testimony to rebut this. Thus, I have concluded that Mr. O’Leary, via a bank check, withdrew \$500 from the fundraising account on December 17, 2010. It is more likely than not that he falsely stated that its intended purpose was for the Salem Cartoon Basketball League and that he never donated that money, directly, or indirectly to the Salem Cartoon Basketball League.

In addition to the five (5) donations above, each of which I have deemed to be a misappropriation by Mr. O’Leary, Mr. O’Leary also acknowledged that he withdrew funds from the fundraising account and used those funds for himself and his wife to fly to Colorado for a Fallen Firefighters Memorial. It appears that Mr. O’Leary was the only firefighter not to reimburse the account for these expenses.

Applying the preponderance of the evidence test, and limiting my review to the evidence before me, I was unable to conclude that dozens of other contributions identified by Mr. O’Connor or the Department were misappropriated. I already addressed above why I rejected the sweeping, broad-based conclusions in Mr. O’Connor’s report. I also carefully reviewed all of the specific examples proffered by the Fire Department and was unable to conclude that all of the funds were misappropriated. For example, the Fire Department concluded that thousands of dollars intended for William Hudson, a deceased Salem firefighter, were misappropriated by Mr. O’Leary. Based on the evidence before me, I was unable to reach this conclusion. First, Ms. Hudson, after signing an affidavit prepared by the City Solicitor’s office, penned a letter to the editor of the local newspaper which referenced funds she and her family received from Mr. O’Leary related to her late husband. Ms. Hudson did inform the City Solicitor about these donations at the time the sworn affidavit was prepared by her office. Yet, the City Solicitor, who also served as the local hearing officer, unilaterally determined that this information should not

be included in the affidavit. That decision was regrettable and, for me, tainted any evidence put forth by the Department regarding alleged misappropriations related to contributions made to the family of William Hudson.

I also reviewed the evidence in regard to whether a contribution was made to then-Salem City Councilor Michael Bencal and then-Salem City councilor and mayoral candidate Kevin Harvey in 2005. Exhibit 8 is a bank check made payable to Local 172 or the Kevin Harvey Fund. It was cashed by Mr. O'Leary. Exhibit 12 is a bank check made payable to Local 172 or Micheal Bencal. Mr. O'Leary testified that he withdrew the funds relative to Mr. Harvery and used them to pay for tickets on a cruise sponsored by Mr. Harvey. The campaign finance reports for Mr. Harvey, entered into evidence, do not show any corresponding contribution from Local 172 or Mr. O'Leary. Mr. O'Leary's testimony regarding this expense was, at best, equivocal, at first suggesting the cruise was a political fundraiser and then suggesting it may have been a charitable fundraising cruise. Mr. O'Leary's testimony regarding the Michael Bencal-related funds was also equivocal, suggesting at one point it was used for charities supported by Mr. Bencal. The evidence does not establish, one way or another, whether \$1,000 from this fundraising account was used to make \$500 cash contributions to Mr. Harvey's or Mr. Bencal's political accounts. If such contributions were received, it would apparently be a violation of campaign finance laws regarding cash donations. Since the evidence here is inconclusive, I have not reached a conclusion regarding this. However, it would behoove those with a vested interest in this matter, including Local 172, Mr. Bencal and Mr. Harvey, to investigate this matter further and determine whether any such contributions were made.⁸

⁸ I take administrative notice of a State Ethics Commission disposition agreement dated January 25, 2006 under Docket No. 06-0005 related to Mr. Harvey's mayoral campaign and former Salem City Council Michel Bencal.

Through his actions referenced above, Mr. O’Leary: engaged in conduct prejudicial to the good order of the Fire Department; was untruthful and willfully misrepresented matters affecting the Department or its employees; and engaged in conduct unbecoming a member of the Fire Department, whether on or off duty, which tends to lower the fire service in the estimation of the public; all of which constitute a violation of the rules of the Salem Fire Department. More broadly, Mr. O’Leary’s actions constitute substantial misconduct which adversely affects the public interest by impairing the efficiency of public service. For this reason, the Salem Fire Department had just cause to discipline Mr. O’Leary.

Having determined that it was appropriate to discipline Mr. O’Leary, the Commission must determine if the Fire Chief 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 carefully considered whether Mr. O’Leary was the subject of disparate treatment here. That analysis included considering whether the entire enterprise here, of which all members of Local 172 were aware, adversely effected the public interest. As referenced in the findings, it appears that the primary impetus for this entire enterprise had more to do with “coalition-building” and burnishing the image of Local 172 than making donations to local charities. The account, opened by now-Local 172 President Michael Thomas, was not part of a non-profit organization and the contributions made by Salem residents and business owners were not tax deductible. Close to two-thirds of the funds raised went to the professional fundraisers. Of those funds actually retained by Local 172, thousands of dollars were spent on such items as hospitality rooms, food, alcohol, holiday parties and retirement functions. I do not credit the testimony of any witness from the Salem Fire Department that they were unaware that hospitality rooms and/or other social events were funded through this account. Even if I did, it is undisputed that Mr. Cranney, who reviewed the quarterly bank statements and filed Local 172’s tax returns, was aware that funds were being used for this purpose. He reviewed the notes of Mr. O’Leary on a quarterly basis and those notes explicitly state that the funds were being used for said purpose.

Ultimately, however, I have concluded that there is a stark distinction between the overall unappealing nature of this enterprise and the misconduct engaged in by Mr. O’Leary. On at least five (5) occasions, he was untruthful, by stating that funds were withdrawn from the fundraising

account and given to local charities. Those funds were not received by the local charities referenced by Mr. O’Leary. Further, Mr. O’Leary used funds from this account to pay his personal travel expenses to attend an out-of-state tribute to fallen firefighters. For this reason, I have concluded that Mr. O’Leary was not subject to disparate treatment.

Further, I considered that my findings, based on the evidence before me, significantly differed from the Fire Department’s in regard to the extent of misappropriations. However, my findings and conclusions are consistent with the Department’s overall conclusion that Mr. O’Leary misappropriated funds meant for local charities. That misconduct, even when limited to the misappropriations identified in this decision, is egregious and warrants termination, even after considering that Mr. O’Leary had no prior disciplinary record. This is particularly true given the trust that citizens put in public safety officers. By his own actions, Mr. O’Leary irrevocably violated that trust and there is no place for him in the Salem Fire Department.

For all of the above reasons, the decision of the Salem Fire Department to terminate Mr. O’Leary is affirmed and Mr. O’Leary’s Section 43 appeal under Docket No. D1-12-156 is hereby *denied*.

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on December 19, 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 to:

Joseph P. Dever, Esq. (for Appellant)

Daniel Kulak, Esq. (for Respondent)