COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

LOUIS DeBENEDICTIS,
Appellant
v.

CASE NO: D-10-169

TOWN OF HANOVER,
Respondent

Appellant's Attorney:	Howard B. Lenow, Esq. Lenow & McCarthy 13 Pelham Road Wayland, MA 01778
Respondent's Attorney:	Daniel C. Brown, Esq. Feeley & Brown, P.C. 1600 Boston Providence Highway Suite 209A Walpole, MA 02081
Commissioner:	Paul M. Stein[1]

DECISION

The Appellant, Louis DeBenedictis (DeBenedictis), duly appealed to the Civil Service Commission (Commission), acting pursuant to G.L. c.31,§43, from a decision of the Town of Hanover (Hanover), the Appointing Authority, to suspend him for five days from his position of Firefighter in the Hanover Fire Department (HFD) for engaging in an altercation with another firefighter and for insubordination to a superior officer. A public hearing was held by the Commission at the Hanover Town Hall, on December 17, 2010. The hearing was digitally recorded. Seven exhibits were marked. Hanover called four witnesses and the Appellant testified on his own behalf. Witnesses were not sequestered. Hanover submitted a Proposed Decision on January 24, 2011. The Appellant made a closing argument in lieu of filing a proposed decision.

[1] The Commission acknowledges the assistance of Law Clerk Jihyun Choi in the drafting of this decision.

FINDINGS OF FACT

Giving appropriate weight to the exhibits and testimony of the witnesses (the Appellant, HFD Chief Kenneth Blanchard, HFD Captains Donald Harrington and James Gallagher, and Firefighter/EMT Gino DeAcetis) and to inferences reasonably drawn from the evidence as I find credible, I make the findings of fact set forth below.

1. The Appellant, Louis DeBenedictis, is a tenured civil service employee with the Hanover Fire Department (HFD) who has held the position of Firefighter/Paramedic for approximately four years. (*Testimony of Appellant*)

2. The Appellant is also employed at the Fire Academy as an instructor (level one) and "on-site" Academy as a peer support clinician. As a peer support clinician, the Appellant engages in one on one counseling sessions dealing with conflict resolution. His testimony regarding his counseling training and work was impressive and his demeanor at the hearing confirmed to me that he has an established history of being a conciliator by nature, not a provocateur. (*Testimony of Appellant*)

3. Before July 3, 2009, the Appellant claimed that an inappropriate amount of union dues had been deducted from his paycheck by the Town. After the Appellant expressed dissatisfaction with the responses he was getting from the Town, his Union—while under no obligation to do so—interceded and investigated the matter. (*Testimony of Appellant & FF DeAcetis*)

4. The Union determined that an extra $16.00 was deducted from the Appellant's pay, but he maintained that it was $32.00. (*Testimony of Appellant& FF DeAcetis*)

5. FF DeAcetis has been employed by the Fire Department for thirteen years. At the time of the incident, FF DeAcetis also served as the Union's treasurer. As such, it was his obligation to explain the Union's position to the Appellant. (*Testimony of FF DeAcetis*)

6. On July 2, 2009, after a vote by the leadership, the Union wrote a check for $16.00 and DeAcetis gave it to the Appellant. (*Testimony of FF DeAcetis; Exh. 4*)

7. The Appellant ripped up the check and threw it away in an empty wastebasket. FF DeAcetis did not see the Appellant do this. However, when FF DeAcetis discovered what happened, he went to the wastebasket, removed the pieces and taped the check back together, cleaned off the counter of all other material,, and put the check it on the counter so that everyone could see it. The next day, the Appellant saw what FF DeAcetis had done. (*Testimony of Appellant & FF DeAcetis; Exh.4*)

8. During the morning shift change (at around 8 a.m.) on July 3, 2009, FF DeAcetis, who was going off duty, ran into the Appellant. FF DeAcetis attempted to explain the Union's decision to Appellant in the "day room." Capt. Gallagher and the members of groups 1 and 4, including FF Tim Kirley, FF Eric Barron, and FF Richard Salvucci, were present, except for Capt. Harrington. The Appellant was upset and disagreed with FF DeAcetis' explanation, but did not want to discuss it any further, saying "Forget it." FF DeAcetis left the room and a few minutes later, the Appellant left the room too. (*Testimony of FF DeAcetis, Capt. Gallagher & Appellant; Exhibit 4*)

9. Capt. Gallagher has been employed by the Fire Department for 25 years and has been a captain since 2000. He was a Union secretary in July 2009. He was fully aware

about the Union dues issue with the Appellant and the check. (*Testimony of Capt. Gallagher; Exh. 6*)

10. Capt. Harrington has been employed by the Fire Department for 26 years and has been a captain for 16 years. (*Testimony of Capt. Harrington*)

11. Shortly after the conversation, the Appellant went over to the Fire Department's mop room to get a mop and a bucket. FF DeAcetis walked by the Appellant on his way to the watch room to check on something. FF DeAcetis then came out of the watch room and started another conversation with the Appellant who was now inside the mop room. The mop room is about 4 feet wide and 3 feet deep. The conversation quickly degenerated into a loud argument. There was no one present. (*Testimony of Appellant, FF DeAcetis & Chief Blanchard; Exh. 4*)

12. FF DeAcetis told the Appellant that ripping up the check was a 'slap in the face' to the Union and to him personally. The Appellant responded that his only intent was that his act be a slap in the face to FF DeAcetis. (*Testimony of FF DeAcetis & Appellant; Exhs 4 & 5*)

13. FF DeAcetis' position blocked the doorway of the mop room. He stood in the doorway, with his hands braced on either side of the entry way. The Appellant testified that he felt threatened. Due to the confined space, he testified that he was concerned that he could be charged with assault because he could not get out without touching FF DeAcetis. The Appellant credibly testified that he raised his voice in the hope that someone would hear him and come to his aid. (*Testimony of FF DeAcetis & Appellant; Exh. 5*)

14. The Appellant repeatedly told FF DeAcetis, "Get out of my way," "Let me out," and "You are blocking me." He testified that instead of moving, FF DeAcetis kicked over a bucket of water in front of the Appellant. (*Testimony of FF DeAcetis, Appellant & Capt. Gallagher; Exhs 4 & 5*)

15. FF DeAcetis raised his fist as if to throw a punch at the Appellant, and said, "I will hurt you, Junior." The Appellant replied, "Take your best shot," and called him a bully. When FF DeAcetis stepped closer, the Appellant took his glasses off, thinking that he would be slapped. The Appellant said, "Why don't you hit me." After FF DeAcetis refused to move, the Appellant told him that he had no choice but to file charges against him. The Appellant testified that FF DeAcetis told him he does not deserve to wear the fire shirt. The Appellant removed his shirt, stating, "You want my shirt, you take it." I find his testimony credible. (*Testimony of Appellant & FF DeAcetis; Exhs 4 & 5*)

16. The Appellant testified that he felt picked on because he was not from Hanover, and is not socially connected with people in the fire station. (*Testimony of Appellant*)

17. The Appellant and FF DeAcetis are roughly similar in height and build. If anything, FF DeAcetis would have the physical advantage. (*Testimony of Appellant, FF DeAcetis & Capt. Gallagher; Exhibit 5*)

18. The Appellant testified that FF DeAcetis only moved away from the mop room when he saw Capt. Harrington come around the corner. The Appellant then picked up his shirt and got out of the mop room. (*Testimony of Appellant*)

19.. In his testimony before the Commission, FF DeAcetis testified that he "moved" the bucket to the side because it was blocking the Appellant's exit. FF DeAcetis denied making a statement about the fire shirt, and testified that he does not recall it, although he

has no other plausible explanation for why the Appellant would have taken off his shirt. FF DeAcetis testified that he was not angry, that he never raised his voice, and that his hands were always by his side. I find his testimony overly self-serving and not credible. (*Testimony of Appellant & FF DeAcetis; Exhs 4 & 5*)

20. When asked about prior incidents of aggression during the hearing at the Commission, FF DeAcetis denied that he had previous incidents with his neighbors. (*Testimony of FF DeAcetis*)

21. Capt. Harrington was downstairs underneath the ladder truck, making repairs to the brakes, which put him in the apparatus room but not within sight or earshot of the mop room, as he was blocked by two pieces of apparatus. Capt. Gallagher was in the "day room" upstairs. When Capt. Harrington called Capt. Gallagher to update him on the status of the truck, Capt. Gallagher heard loud voices (plural) in the background. Capt. Gallagher asked Capt. Harrington what the noise was, and Capt. Harrington said there was an argument going on in the bays. Capt. Gallagher asked if it was the Appellant and FF DeAcetis because he had seen the check on the table. Capt. Harrington immediately went to investigate. (*Testimony of Capt. Harrington; & Capt. Gallagher; Exhs 4 & 6*)

22. FF Christopher Azizian was upstairs and also heard loud voices (plural) coming from the bay below and reported this to Capt. Gallagher. FF Eric Barron, who was in the "day room" stated in his report that another firefighter entered the "day room" and said that "they are really yelling at each other down there." (*emphasis added*) (*Exh. 4*)

23. Capt. Harrington testified that he saw the Appellant rip off his shirt outside the mop room but I find his recollection mistaken. The Appellant credibly testified that he was still in the mop room when he took off the shirt. What Capt. Harrington probably

saw was the Appellant pick up his shirt as he left the mop room. (*Testimony of Capt. Harrington & Appellant; Exhs 4 & 5*)

24. Capt. Harrington stated in his report and also testified that:

> "I heard some talking by A-3 and the talking escalated into a confrontation between FF DeBenedictics and FF DeAcetis. FF DeAcetis was calming trying to explain a union matter to FF DeBenedictis. FF DeBenedictis was shouting at FF DeAcetis to move out of his way and to step outside to take him on." (*emphasis added*)

(*Testimony of Appellant & Capt. Harrington; Exhs. 4 & 5*)

25. While Capt. Harrington was present, the Appellant headed for the gear room which was at the end of the hall. Capt. Gallagher entered the apparatus bay via the watch room door, and said he heard the Appellant yelling at FF DeAcetis, "Go outside and settle this." He then said he saw the Appellant walking away from FF DeAcetis and Capt. Harrington. Capt. Gallagher, however, walked past FF DeAcetis, moving toward the Appellant and told him, "You are relieved of duty. I want you out of the building now." (*Testimony of Capt. Gallagher & Appellant; Exhs 4 through 6*)

26. Capt. Gallagher testified that as he approached, the Appellant turned back toward FF DeAcetis, angrily calling him outside and inviting him to fight. However, the Appellant testified that he was at the end of the hall, having already walked away from FF DeAcetis, and he turned when he heard Capt. Gallagher's voice. The Appellant testified that he wanted to explain the situation to Capt. Gallagher. I find the Appellant's testimony makes common sense, given where he, FF DeAcetis, Capt. Harrington and Capt. Gallagher would have been positioned at that point in time and is more persuasive than what Capt. Gallagher said he recalled. (*Testimony of Capt. Harrington, Capt. Gallagher & Appellant; Exh. 5*)

27. Capt. Gallagher again ordered the Appellant to leave the building, telling the Appellant, "You are a disruption to the station." The Appellant kept trying to explain the incident to Capt. Gallagher, but Capt. Gallagher said that he would call the police if the order was not followed. The Appellant asked Capt. Harrington to support him, but Capt. Harrington reminded him that Capt. Gallaher was the Duty officer. (*Testimony of Appellant & Capt. Gallagher; Exhs 4 & 5*)

28. Capt. Harrington stated that when Capt. Gallagher arrived, he "without hesitation ordered both parties to leave the station." Other evidence, however, showed that Capt. Gallagher turned to FF DeAcetis and told him to go home and, "Enjoy your five days off." FF DeAcetis was already scheduled for the next five days off. Captain Gallagher did not give any other directions to FF DeAcetis. (*Testimony of FF DeAcetis, Capt. Harrington & Capt. Gallagher; Exhs 4 & 5*)

29. The third time Capt. Gallagher ordered the Appellant to leave the building, he added that he would be charged with insubordination if he does not leave. This time, the Appellant obeyed the order. The Appellant asked if he could put his gear away and Capt. Gallagher said yes. The Appellant later asked if he could get his other gear from upstairs and Capt. Gallagher said yes, but ordered him not to talk to anyone about the incident. (*Testimony of Appellant & Capt. Gallagher; Exhs 4 & 5*)

30. Chief Blanchard investigated the incident, obtained written reports from witnesses and interviewed them. (*Testimony of Chief Blanchard*)

31. Chief Blanchard found that the Appellant violated the Government of the Town of Hanover Fire Department, Section 12.5, Offenses Subject to Disciplinary Action:

1) Abusive/Threatening language: Use of any language which is obviously meant to frighten, coerce, or imply a threat of physical or mental harm

2) Disorderly/Boisterous/Provocative Conduct
3) Insubordination: Failure or deliberate refusal to obey a lawful order issued by a superior

(*Exhs 2, 3 & 6*)

32. On August 4, 2009, Chief Blanchard sent a suspension letter to the Appellant. He suspended Appellant for five days commencing on Monday August 10, 2009, for engaging in an altercation with a co-worker and being insubordinate toward a superior officer. He informed the Appellant that he could request a hearing before the Board of Selectmen within 48 hours of receipt of the letter. (*Exh. 3*)

33. On appeal, the Appointing Authority (Hanover Board of Selectmen) made findings of fact, and concluded that Appellant's conduct was unprofessional and insubordinate. The Board upheld the discipline decision. (*Exh. 7*)

34. The Appellant duly filed this appeal with the Commission on July 14, 2010. (*Claim of Appeal*)

CONCLUSION

A tenured civil service employee may be discharged only for "just cause" after due notice and hearing, followed by a written decision "which shall state fully and specifically the reasons therefore." G.L. c.31,§41. An employee aggrieved such a decision may appeal to the Commission under G.L. c.31, §43, which provides:

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

compensation or other rights. The commission may also modify any penalty imposed by the appointing authority."

Under Section 43, the role of the Commission is to determine, under a de novo "preponderance of the evidence" test, "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). Compare Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev.den., 440 Mass. 1108 (2003) (affirming de novo decision to reject appointing authority's evidence of appellant's failed polygraph test and prior domestic abuse orders and crediting appellant's exculpatory testimony) with Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814,823 (2006) (inconsequential differences in facts found did not make appointing authority's justification unreasonable). See also Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411 (2000); McIsaac v. Civil Service Comm'n, 38 Mass. App.Ct. 473, 477 (1995); Watertown v. Arria, 16 Mass.App Ct. 331, rev.den., 390 Mass. 1102 (1983). See generally Villare v. Town of North Reading, 8 MCSR 44, reconsid'd, 8 MCSR 53 (1995) (discussing need for de novo fact finding by a "disinterested" Commissioner in context of procedural due process); Bielawksi v. Personnel Admin'r, 422 Mass. 459, 466, 663 N.E.2d 821, 827 (1996) (same)

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." E.g., Commissioners of Civil Service v. Municipal Ct. 359 Mass. 211,214 (1971); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477,482 (1928); Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). The Commission determines justification for discipline

by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass. App. Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983). The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in governmental employment decisions.'" Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of the "merit principle" which governs Civil Service Law that discipline must be remedial, not punitive, designed to "correct inadequate performance" and "separating employees whose inadequate performance cannot be corrected." G.L. c.31,§1.

The 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); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1982). The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001). The Commission is guided by, but is not obliged to follow strictly, the rules of evidence applied in a judicial proceeding, and may credit, in its sound discretion, reliable hearsay evidence that would

be inadmissible in a court of law. See, e.g., Doe v. Sex Offender Registry Board, 459 Mass. 603 (2011); Costa v. Fall River Housing Auth., 453 Mass. 614, 627 (2009).

It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. "[T]he assessing of the credibility of witnesses is a preserve of the [Commission] upon which a court conducting judicial review treads with great reluctance." E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003) (where live witnesses gave conflicting testimony at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing)

G.L. c.31, Section 43 also vests the Commission with authority to affirm, vacate or modify the penalty imposed by an appointing authority. The Commission has been delegated with "considerable discretion," albeit "not without bounds," to modify a penalty imposed by the appointing authority, so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. E.g., Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594,600 (1996) and cases cited. See Faria v. Third Bristol Div., 14 Mass.App.Ct. 985,987 (1982) (no findings to support modification)

In deciding to exercise discretion to modify a penalty, the commission's task "is not to be accomplished on a wholly blank slate." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983).

> "After making its de novo findings of fact, the commission must pass judgment on the penalty imposed, a role to which the statute speaks directly. G.L. c.31,§43.

> . . . Here, the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether "there was reasonable justification for the action taken by the appointing authority in the circumstances found by the Commission to have existed when the appointing authority made its decision.' "

Id. See also Town of Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct. 796, 800 (2004) quoting Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 600 (1996). ("The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded to the appointing authority.") Thus, when it comes to the review of the penalty, unless the Commission's findings of fact differ materially and significantly from those of the appointing authority or interpret the relevant law in a substantially different way, the commission is not free to "substitute its judgment" for that of the appointing authority, and "cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. cf. School Committee v. Civil Service Comm'n, 43 Mass.App.Ct. 486, rev.den., 426 Mass. 1104 (1997) (modification of discharge to one-year suspension upheld); Dedham v. Civil Service Comm'n 21 Mass.App.Ct. 904 (1985) (modification of discharge to 18-months suspension upheld); Trustees of the State Library v. Civil Service Comm'n, 3 Mass.App.Ct. 724 (1975) (modification of discharge to 4-month suspension upheld)

Applying these principles to the facts of this appeal, the Commission finds that the Appointing Authority has not met its burden to establish just cause for discipline imposed on the Appellant. The evidence shows that the Appellant was the victim in a loud altercation with FF DeAcetis; and that the Appellant was not being insubordinate.

First, the Appellant was not guilty of verbal or physically abusive or threating conduct. Based on a review of the evidence and the testimony, I find the Appellant credible. His testimony was direct and consistent. I further find that the Appellant was the victim in the incident with FF DeAcetis. I do not assign weight to FF DeAcetis' overly self-serving testimony that he was not angry, and never even raised his voice and that he kept his hands at his side at all times. Capt. Harrington was initially positioned in such a manner as to be unable to actually see or hear what he later claimed to have witnessed FF DeAcetis "calmly trying to explain a union matter" to the Appellant, and the Appellant "charging at" DeAcetis "in a threatening manner."

The Appellant was upset about the Union decision, tore up the check, and threw it away. Had FF DeAcetis not subsequently fished the pieces out of the wastebasket, the Appellant's disposal of the check probably would have been the end of the entire matter. The subsequent conversation surrounding this action indicated that, by this action, the Appellant intended to "forget about it." I believe that FF DeAcetis originally wanted to to explain the Union's decision, but took umbrage when he discovered what happened to the check. FF DeAcetis' affirmative acts of taping the check and putting it on the counter were far more provocative, especially given the trivial amounts involved. His cornering of the Appellant in the tiny mop room, which amounted to little more than a closet, was a continuance in this provocative vein. During the conversation, FF DeAcetis stated that he was personally offended and insulted the Appellant to his face, stating that the Appellant did not deserve to wear the fire shirt. Capt. Gallagher and other firefighters upstairs heard their loud voices (plural) although, obviously, they were not able to hear what was said or done or by whom.

Second, the preponderance of the evidence established that, while the Appellant was in the tiny mop room, FF DeAcetis did block the doorway and tried to intimidate the Appellant by kicking the bucket and raising his fist. When the Appellant asked FF DeAcetis to move several times, he refused to do so. I am particularly persuaded by the Appellant's testimony that he raised his voice and yelled at FF DeAcetis, "Get out of my way," "Let me out," and "You are blocking me" because he wanted someone to hear him and come to his aid. His fear that he would be risking a physical fight or assault if he tried to get out was reasonable. Although the Appellant removed his shirt out of frustration and did say to FF DeAcetis they could "go outside" if he still wanted to hurt him. Once he got out of the mop room, however, he walked away from FF DeAcetis, and exhibited no intention of pursuing any further confrontation.

Second, the Appellant was not guilty of insubordination. According to Capt. Gallagher, when he came down to investigate, he saw the Appellant walking away from FF DeAcetis, he called out to the Appellant that he was a disruption to the station, relieved of duty and ordered him to leave the building. The Appellant was then at the opposite end of the apparatus bay from Capt. Gallagher with his back to both men. I find the Appellant's testimony credible that he turned around and walked towards Capt. Gallagher because the Appellant wanted to approach Capt. Gallagher so that he could speak to him in a normal conversational tone. I find that the Appellant approached Capt. Gallagher without rancor and with the good faith intent to inform him about what had happened, rather than disobeying any orders.

Third, the disparate treatment of the Appellant and FF DeAcetis (who was held harmless) is quite apparent. The evidence of the confrontation and shouting match

between the two firefighters (all credible witnesses confirmed that both men raised their voices) cannot support the conclusion that the Appellant is guilty of "substantial misconduct" that warrants a five-day suspension, but the conduct of FF DeAcetis deserved no equivalent or greater discipline. In fact, the preponderance of the evidence established that it was FF DeAcetis, not the Appellant, who was primarily responsible for cornering the Appellant and then provoking a physical confrontation and causing it to escalate. However, whether because the Appellant was an "outsider" as he claimed, or for other unexplained reasons, Capt. Gallagher clearly was pre-disposed, had already taken sides in the dispute and targeted the Appellant even before he arrived and before he had the facts. Even under these adverse conditions, the Appellant was not disrespectful to Capt. Gallagher. He attended to his gear and obeyed Capt. Gallagher's orders completely. Indeed, had Capt. Gallagher chosen a more rational, unbiased approach, this conflict probably could have been simply and equitably resolved on the spot.

In sum, Hanover has not demonstrated by a preponderance of the evidence that there was just cause to discipline the Appellant for verbal or physical misconduct or insubordination.

Accordingly, for the reasons stated above, the appeal of the Appellant, Louis DeBenedictis, is ***allowed.***

Civil Service Commission

Paul M. Stein
Commissioner

By a 4- 1 vote of the Civil Service Commission (Bowman, Chairman - Yes; Henderson, Commissioner – Yes; Marquis, Commissioner – No; McDowell – Commissioner – Yes; and Stein, Commissioner -Yes) on July 14, 2011.

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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of a Civil Service Commission's final decision.

Under the provisions of G.L. c.31, §44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c.30A, §14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to: Howard B. Lenow, Esq. (for Appellant)
Daniel C. Brown, Esq. (for Appointing Authority)

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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LOUIS DeBENEDICTIS,
Appellant
vi.

CASE NO: D-10-169

TOWN OF HANOVER,
Respondent

CONCURRING OPINION OF CHRISTOPHER BOWMAN

Deferring to the credibility assessments of the hearing officer, I concur with the conclusion that there was evidence of disparate treatment that warrants the intervention of the Commission.

I do not, however, adopt those findings and conclusions that paint the Appellant as a passive, unwitting victim whose calm demeanor was the result of training he received in de-escalation techniques. Based on a review of the record, the Appellant should seek a refund from the training provider.

First, he went on a mission to have the local union refund him a grand total of $32.00 in what he believed were overpaid union dues. When the union gave him a check of $16.00, the amount they believed he was owed, the Appellant tore up the check and left it in an empty wastebasket where it could be easily found. He also admitted to yelling and screaming and ripping his shirt off as part of an altercation with another firefighter. These are hardly appropriate de-escalation techniques.

Although I believe the Appellant's claims of victimization and no wrongdoing are not plausible, I am sufficiently convinced that at least one other firefighter engaged in similar conduct for which he should have been disciplined.