

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

**CIVIL SERVICE COMMISSION**

One Ashburton Place: Room 503

Boston, MA 02108

(617) 727-2293

DENIS SULLIVAN,  
Appellant

v.

D-11-302

BOSTON FIRE DEPARTMENT,  
Respondent

Appellant's Attorneys:

Stephen C. Pfaff, Esq.

Joseph A. Padolsky, Esq.

Louison, Costello, Condon & Pfaff, LLP

101 Summer Street

Boston, MA 02110

Respondent's Attorney:

Robert Boyle, Esq.

City of Boston Office of Labor Relations

1 City Hall Square

Boston, MA 02201-2020

Commissioner:

Christopher C. Bowman<sup>1</sup>

**DECISION**

Denis Sullivan (Appellant), pursuant to G.L. c. 31, § 43, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the City of Boston's Fire Department (City or Fire Department) to suspend him for two (2) weeks from the Boston Fire Department's Fire Alarm Operations Unit (Department or FAO) based on alleged instances of conduct prejudicial to good order and abusive or threatening language in violation of Rule 18.44 (j) and Rule 18.44(k) respectively. The appeal was timely filed. There were two days of hearing on

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<sup>1</sup> The Commission acknowledges the assistance of Law Clerk Meredith Havard in preparing this decision.

March 8, 2012 and April 5, 2012 at the offices of the Commission in Boston. All witnesses, with the exception of the Appellant, were sequestered. As no written notice was received from either party, the hearing was declared private. The hearing was digitally recorded and both parties were provided with a CD of the hearing. Post-hearing briefs were submitted by both parties in the form of proposed decisions.

### **FINDINGS OF FACT:**

Based on the thirty-three (33) documents entered into evidence and the testimony of the following witnesses:

#### *Called by the Appointing Authority:*

- Frank Sullivan, Fire Alarm Operator;
- Stephen Keeley, Principal Fire Alarm Operator;
- John Henderson, Fire Alarm Superintendent;<sup>2</sup>
- Robert Moran, Director of Human Resources for Boston Fire Department;
- William Kessler, Assistant Director, City of Boston Office of Human Resources;

#### *Called by the Appellant:*

- Denis Sullivan, Appellant;
- Christine Martin, Fire Alarm Operator;
- Dennis Corbett, Senior Fire Alarm Operator;
- John Geswell, Senior Fire Alarm Operator;
- Nancy Coleman, Fire Alarm Operator;

I make the following findings of fact:

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<sup>2</sup> John Henderson is the brother of Daniel Henderson, a former member of the Commission whose term recently expired. Former Commissioner Henderson was only present at an informal pre-hearing where he disclosed his relation to both parties. He had no role in this decision.

*Background Regarding the Relationship Between the Appellant and Frank Sullivan*

1. The Appellant is a tenured civil service employee and has been employed as a Fire Alarm Operator for the City since January 9, 1985. He was promoted to *Senior* Fire Alarm Operator on August 26, 2005. (Stipulated Fact; Testimony of Appellant)
2. The Appellant has no prior discipline in his personnel record during his twenty-seven (27) years of employment. He has various commendations and awards during this period. (Stipulated Fact; Testimony of Appellant; Exhibits 28, 29, 30 and 31)
3. Frank Sullivan (no relation to the Appellant) has been employed by the FAO for twelve (12) years as a Fire Alarm Operator. He was a victim of violence many years ago which left him legally blind. (Testimony of Frank Sullivan)
4. Prior to an incident in 2009, the Appellant and Frank Sullivan had a friendly relationship and the Appellant previously drove Frank Sullivan to work on a regular basis. Since that 2009 incident, the Appellant no longer drives Frank Sullivan to work and I infer that any friendship the two men may have developed ended at the same time. (Testimony of Appellant)
5. In 2009, the Appellant and Frank Sullivan had a verbal argument that happened to occur on “Marathon Monday”, a day in April that the Boston Marathon is held each year. The Appellant was the Principal Operator on a tour with Frank Sullivan and, thus, was serving as Frank Sullivan’s supervisor. That day, according to the Appellant, there was a camera crew filming operations in the Department. The camera crew asked for Frank Sullivan to move away from his console, which he did. The Appellant admonished Frank Sullivan for doing so and ultimately ordered him back to his console. A dispute between the two men ensued and, at some point, they went outside the building with operator Ralph Dowling to try and resolve

the matter. They were not successful. Frank Sullivan sought mediation with Robert Moran, Director of Human Resources of the Boston Fire Department, and a mediation session was held at that time. (Testimony of Appellant)

6. Based on the testimony of the Appellant and Frank Sullivan and inferences I have made, it is clear that the mediation session was not successful and bad feelings have lingered between the Appellant and Frank Sullivan ever since the Marathon Monday incident in 2009.
7. Frank Sullivan alleges that the Appellant has treated him differently in comparison to other operators as a result of the dispute in April 2009. (Testimony of Frank Sullivan)

*Facts Related to Incidents that Resulted in Instant Appeal*

8. The instant appeal arises from events that occurred on April 27, 2011 and May 6, 2011.

*April 27, 2011 Incident*

9. On the night of April 27, 2011, there was a multiple alarm fire handled by FAO. Stephen Keeley was Principal Operator, the Appellant was Senior Operator, and Christine Martin, Ralph Dowling, Beverly Freeman, and Frank Sullivan were the operators. The Appellant was in a supervisory capacity to Frank Sullivan. (Testimony of Appellant and Frank Sullivan)
10. Frank Sullivan testified before the Commission that, on the night of April 27<sup>th</sup>, he made multiple requests of the Appellant that were not acknowledged by the Appellant. Frank Sullivan testified there was a lot of radio “chatter” on April 27, 2011, that he asked the Appellant for assistance and that the Appellant failed to acknowledgment his requests. (Testimony of Frank Sullivan)
11. For example, according to Frank Sullivan, a request to “check a still”<sup>3</sup> came in over the radio and he asked the Appellant to check the still on the incident of a multiple alarm fire. Frank

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<sup>3</sup> The phrase “check a still” is used to refer to an incident in which a responder arrives on scene with a report of a particular incident (i.e. – a car accident) but there is no evidence of the incident having ever occurred once the

Sullivan did not receive an acknowledgement from the Appellant and another operator checked the still. (Testimony of Frank Sullivan)

12. The Appellant testified that he did not hear Frank Sullivan make a request to check a still on April 27<sup>th</sup>. (Testimony of Appellant)

13. Also, Frank Sullivan testified that on the same night, he asked that there be a notification to Boston Water Sewer regarding a missing sewer cover and that he did not receive acknowledgment from the Appellant. Another operator made the notification. (Testimony of Frank Sullivan)

14. Similar to the request related to checking a still, the Appellant testified that he did not hear Frank Sullivan's request to contact Boston Water Sewer. (Testimony of Appellant)

15. Frank Sullivan testified that, while on break that night, he approached Principal Fire Alarm Operator Stephen Keeley and told Mr. Keeley that "I can't take it anymore. This has to come to an end ... We've got to address this." (Testimony of Frank Sullivan)

16. According to Frank Sullivan, Mr. Keeley suggested that the three (3) of them (Keeley, the Appellant and Frank Sullivan) meet in a nearby kitchen to discuss the matter, which they did. (Testimony of Frank Sullivan)

17. Mr. Keeley has been employed by the FAO for sixteen (16) years. He was promoted to Senior Fire Alarm Operator in 2001 and then promoted to Principal Fire Operator in 2010. As a Principal Fire Alarm Operator, he served in a supervisory capacity to both the Appellant and Frank Sullivan on April 27<sup>th</sup>. Mr. Keeley was a good witness and I credit the entirety of his testimony. He provided clear, forthright answers without regard for whether those

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responder arrives. The responder places a call over the radio to FAO reporting that there is no evidence of the incident reported and asking the members of the FAO to check the call log. The members of the FAO refer to this as "checking a still".

answers painted the Appellant or Frank Sullivan in a positive or negative light. (Testimony, demeanor of Keeley)

18. Mr. Keeley testified that when Frank Sullivan approached him about his concerns on April 27<sup>th</sup>, Frank Sullivan was agitated and Mr. Keeley had to tell him to lower his voice.

(Testimony of Keeley)

19. The Appellant testified that, prior to going into the kitchen, there was an intervening event that occurred in the locker room. The Appellant testified that he entered the men's locker room, observed Frank Sullivan at the sink and proceeded to one of the stalls. The Appellant testified that, while in the stall, he heard Frank Sullivan say "you had one lucky Saturday" a phrase the Appellant understands to mean receiving a high score on a civil service examination, traditionally administered on Saturdays. (Testimony of Appellant)

20. It is undisputed that a meeting eventually took place in the kitchen, attended by Mr. Keeley, the Appellant and Frank Sullivan. (Testimony of Appellant, Frank Sullivan and Keeley)

21. The Appellant and Frank Sullivan provided somewhat divergent testimony regarding the exact words spoken at this meeting in the kitchen, but both men (and Mr. Keeley) all testified that tensions were high and that the meeting did not go well. (Testimony of Appellant, Frank Sullivan and Keeley)

22. For the reasons cited above, I credit the testimony of Mr. Keeley regarding what occurred at this kitchen meeting, including the words spoken by the Appellant and Frank Sullivan.

(Testimony of Keeley)

23. Mr. Keeley was seated at one end of a bench in the kitchen and Frank Sullivan was sitting at the other end. The Appellant was standing about midway between the two of them. The Appellant stood facing Mr. Keeley with his arms folded over his chest in an uncooperative

manner. It was clear to Mr. Keeley that the Appellant did not want to participate in the meeting. (Testimony of Keeley)

24. Mr. Keeley explained to the Appellant that Frank Sullivan wanted to know why the Appellant had refused his request to check a still earlier in the night. Mr. Keeley told both men that he knew there was ongoing tension between the two of them and that he wanted to help them work it out. (Testimony of Keeley)
25. Since tensions were too high and since the Appellant didn't want to cooperate, Mr. Keeley informed both men that he was ending the meeting and sending it back to Human Resources. Mr. Keeley was referring to prior efforts by Human Resources, that he was aware of, to mediate the ongoing tensions between the Appellant and Frank Sullivan. (Testimony of Mr. Keeley)
26. After Mr. Keeley told the two men that the matter was being referred back to Human Resources, Frank Sullivan stated that Human Resources had not succeeded in resolving the matter in the past nor had the parties been successful resolving the matter informally when they had a conversation outside the building on Marathon Monday in 2009. (Testimony of Keeley)
27. After Frank Sullivan made the above-referenced statements, the Appellant leaned over the bench in the kitchen, with his arms crossed and said words to the effect, "I don't settle things that way, I take you out to the parking lot and punch your lights out." Frank Sullivan then stated, "He's threatening me" and asked that the District Fire Chief be called. (Testimony of Keeley)
28. A large contingent of individuals then arrived at the FAO as a result of this incident and Frank Sullivan's request to call the District Fire Chief, including the District Fire Chief, FAO

Superintendent John Henderson and the Union President. Various incident reports were prepared by individuals.

29. As part of his reporting on this matter, Mr. Keeley recommended that the Appellant receive a written reprimand for the incident in the kitchen. (Testimony of Moran)
30. On April 29, 2011, John Henderson emailed Director of Human Resources Robert Moran to inform him of the incident and placed his signature on a warning letter that he recommended be issued to the Appellant. Mr. Henderson was told to hold off. (Exhibit 4; Testimony of John Henderson)
31. John Henderson has been the Superintendent of the Boston Fire Department for six years. He has been employed with the Department for 37 years, starting in 1978. (Testimony of John Henderson)
32. Robert Moran has served as the Director of Human Resources for the Boston Fire Department for eleven (11) years. He has been in the Human Resources industry for thirty (30) years. (Testimony of Moran)
33. On May 5, 2011, Frank had a meeting with Director of Human Resources Robert Moran, Superintendent John Henderson, and Captain Creamer. Mr. Moran stated that there would be two steps taken to address the April 27, 2011 incident, one “administrative” and the second “disciplinary.” At that meeting, Frank Sullivan voiced skepticism that these steps would resolve the matter and stated that he feared retaliation. (Testimony of Frank Sullivan; Exhibit 18)
34. Based on the documentary evidence and the testimony of Mr. Moran and William Kessler, the Assistant Director of Human Resources for the City of Boston, it is clear that, at some time between May 6<sup>th</sup> and May 23<sup>rd</sup> 2011, Frank Sullivan met personally with Boston Fire



Commissioner Roderick Fraser to discuss this matter, including his concern that the matter was not being addressed properly.

35. Sometime after Frank Sullivan met with Commissioner Fraser, the matter was referred to the City's Office of Human Resources for investigation, as opposed to being handled by the Boston Fire Department's Human Resources office. (Testimony of Moran)

*May 6, 2011 Incident*

36. On May 6, 2011, the Appellant was the Senior Fire Alarm Operator. Frank Sullivan was scheduled to serve as an "acting" Senior Fire Alarm Operator and was scheduled to relieve the Appellant. (Testimony of Appellant and Frank Sullivan)
37. Frank Sullivan approached the Appellant to relieve him and said "Hi Denis, how ya' doing? What's up." In response, the Appellant stated "I have nothing to report" and walked off the floor. At the time, there was a three alarm fire winding down with detail companies sent out. (Testimony of Frank Sullivan and John Henderson)
38. It is customary for an operator to notify the incoming relief of anything he needs to know coming into his shift such as overtime, further orders or new orders. The Appellant did not pass information regarding the multiple alarm fire onto Frank Sullivan. (Testimony of Frank Sullivan, the Appellant and John Henderson)
39. Superintendent Henderson told the Appellant that such behavior was not acceptable because there was a three (3) alarm fire with detail companies still going on. (Testimony of John Henderson)
40. On May 23, 2011, William Kessler and Jennifer Wexler began their investigation into the matter of April 27 and May 6, 2011. William Kessler is the Assistant Director of the Office of Human Resources of the City of Boston. He has been employed by the Office of Human

Resources since 1984. He was contacted by Deputy Commissioner Karen Glasgow to investigate the matter between the Appellant and Frank Sullivan, which resulted in a report to Fire Commissioner Fraser. (Testimony of Kessler; Exhibit 13)

41. On June 10, 2011, in a report to Commissioner Fraser, Mr. Kessler recommended that the Appellant be disciplined, placed in a separate group from Frank Sullivan, and that the Appellant be referred to the Employee Assistance Program (EAP). (Exhibit 13)

42. Mr. Kessler's report stated in relevant part:

“Regarding the April 27 incident, we find that a threat of physical violence was made by Sr. Operator Denis Sullivan toward Operator Frank Sullivan. The threat was reported by FAO Frank Sullivan and corroborated by Principal Operator Keeley. Sr. Operator Denis Sullivan's explanation of the statement made in the kitchen that night is not credible. Denis Sullivan did threaten to punch Frank Sullivan's lights out.

Regarding the event of May 6<sup>th</sup> during the relief of Sr. Operator Denis Sullivan by Acting Senior Operator Frank Sullivan, we find that Denis Sullivan's inappropriate and unacceptable behavior toward Frank was retaliatory toward Frank for pursuing a complaint related to April 27<sup>th</sup>. This behavior was not only disrespectful and unfair to Frank Sullivan, it had the potential to be harmful to the effective operation of the Fire Alarm Division, as the transfer of information from one shift to the next is critical to that operation. Further, we find that Sr. Operator Denis Sullivan's response to the Superintendent Henderson was antagonistic and insubordinate when he refused to correct the behavior that he was being called on.” (Exhibit 13)

43. After a hearing, Commissioner Fraser suspended the Appellant for two (2) weeks without pay, one week of which would be held in abeyance upon successful completion of anger management counseling. (Exhibit 16)

44. The report by Mr. Kesler and Ms. Wexler did not reference allegations, described below, made against Frank Sullivan by his co-workers. (Exhibit 13)

45. Senior Operator Dennis Corbett testified before the Commission regarding an incident in 2008 where Frank Sullivan allegedly said to Corbett, “I’ll take you out back and teach you [how] to talk to me.” (Testimony of Dennis Corbett, Exhibit 23)
46. Senior Operator John Geswell testified that he had a similar incident with Frank Sullivan on April 11, 2011. Mr. Geswell testified that he was the commanding officer and he noticed that Frank Sullivan was out of position and questioned him about it. According to Mr. Geswell, Frank Sullivan responded by saying, “who the f\*\*\* do you think you are talking to me that way. You f\*\*\*ing officers do not know who you are talking to. If you like, we can settle this outside.” In his report, Mr. Geswell wrote that Frank Sullivan stated, “if you do not want to settle this outside I will go above everyone’s head in the fire department. I will go outside the department.” (Testimony of Geswell; Exhibit 24)
47. Mr. Geswell testified that he wrote the report on May 5, 2011 and submitted it to Assistant Superintendent Peter Clifford. Mr. Geswell testified that he was interviewed by Mr. Kessler and Ms. Wexler about the incident. Mr. Geswell testified that Mr. Kessler and Ms. Wexler asked him his name, rank, his length of service and promotions and briefly asked him about his report. (Testimony of Geswell; Exhibit 24)

## **CONCLUSION**

A person aggrieved by a disciplinary action of an appointing authority made pursuant to G.L. 41 may appeal to the Commission under G.L. c. 31, 43, which states:

“If the commission by a preponderance of the evidence determines 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, 268 N.E.2d 346 (1971); Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427 (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, 684 N.E.2d 620, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514, 451 N.E.2d 408 (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, 133 N.E.2d 489 (1956).

“The commission’s task...is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . 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’”, which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059

(2006). See Watertown v. Arria, 16 Mass. App. Ct. 331, 334, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983) and cases cited.

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, 857 N.E.2d 1053, 1059 (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, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997). See also Leominster v. Stratton, 58 Mass. App. Ct. 726, 728, 792 N.E.2d 711, rev.den., 440 Mass. 1108, 799 N.E.2d 594 (2003); Police Dep’t of Boston v. Collins, 48 Mass.App.Ct. 411, 721 N.E.2d 928, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm’n, 38 Mass App.Ct. 473, 477, 648 N.E.2d 1312 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983).

Although the facts regarding what occurred on April 27<sup>th</sup> and May 6<sup>th</sup>, 2011 are relatively straightforward, the parties present starkly contrasting contexts under which these events unfolded. According to the Fire Department, this an open and shut case in which a supervisor made threatening remarks to a subordinate and then retaliated against him for reporting it, thus justifying a two-week suspension.

According to the Appellant, Frank Sullivan has displayed a pattern of aggressive, insubordinate behavior that has gone unchecked by the Boston Fire Department. Frank Sullivan’s aggressive and insubordinate behavior, according to the Appellant, continued on April 27<sup>th</sup> when he made disrespectful comments to the Appellant in the locker room, attributing the Appellant’s supervisor status to having one lucky day and scoring well on a civil service

examination. The Appellant states that any remarks made in the kitchen on April 27<sup>th</sup> were not meant to be threatening. Finally, the Appellant argues that, since the multiple alarm fire on May 6<sup>th</sup> was winding down, and all information was available through the computer, there was no need to pass on information about that fire or any other matter when Frank Sullivan relieved him from his duties.

The reality is somewhere in between.

The Appellant, who appears to be in his early fifties, has worked for the Boston Fire Department for approximately twenty-seven (27) years. Prior to these incidents, he had no disciplinary history and appears to have served the City well in a critical position. Although he strikes me as a normally good-natured, decent individual, he also appears to have a mentality in which grudges don't die easily.

Frank Sullivan, who appears to be around the same age as the Appellant, has a compelling life story that includes overcoming obstacles related to an event in which he was the victim of a violent crime. He is legally blind and still has a bullet lodged in his head from that incident. Frank Sullivan has worked for the Boston Fire Department for twelve (12) years and pens columns for a local newspaper. While he too appears to have served the City well in a critical position, I credit the testimony of the Appellant and two of Frank Sullivan's other co-workers that he can be aggressive and confrontational at times. He appears to have heightened sensitivities to what others would dismiss as inadvertent slights that occur in most workplaces.

Sometime prior to 2009, the Appellant and Frank Sullivan established a cordial and friendly relationship at work, resulting in the Appellant giving Frank Sullivan a ride to work on a regular basis. That friendly relationship came to an abrupt end after an incident in 2009 that occurred on Marathon Monday in Boston. The Appellant's version of what happened on that day in 2009

rings true to me. Without the Appellant's permission, a television camera crew asked Frank Sullivan to get out of a camera shot and he obliged. The Appellant ultimately ordered Frank Sullivan back to his station. The shift that day should have ended with a handshake and mutual assurances of no hard feelings. The personalities of these two men, however, prevented that from happening. Instead, they have had a strained professional relationship ever since that, ultimately, led to a confrontational meeting in the FAO's kitchen on April 27, 2011.

Frank Sullivan, convinced that the Appellant was ignoring routine requests that he would normally respond to if made by other employees, brought his concerns to the supervisor on duty during that shift. He was loud and agitated and, at some point, had told the Appellant he obtained his promotion through luck. The Appellant, for his part, was in no mood to have a dialogue with Frank Sullivan that day. Nevertheless, they were brought into the kitchen, not only to address the incident that had just occurred, but to address the animosity that had developed between the two of them over a two (2)-year period. It was a recipe for disaster.

For the reasons cited in the findings, I conclude that the Appellant, while in the kitchen and in response to a statement from Frank Sullivan, said, "I don't settle things that way, I take you out to the parking lot and punch your lights out." Frank Sullivan then stated, "He's threatening me" and asked that the District Fire Chief be called.

Notwithstanding his testimony, it is overwhelmingly clear to me that Frank Sullivan did not believe then, nor does he believe now, that the Appellant had any intention of physically harming him that night. Rather, he quickly realized that the Appellant, by making these inappropriate comments, had given him an opening to resolve a simmering two-year grudge in his favor. He did not express any fear of that at the time and, in fact, he continued to work with the Appellant for the remainder of the shift.

It is the function of the hearing officer to determine the credibility of the testimony presented before him. 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); (In cases where live witnesses giving different versions do testify 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); Connor v. Connor, 77 A. 2d. 697 (1951) (the opportunity to observe the demeanor and appearance of witnesses becomes the touchstone of credibility).

Notwithstanding my conclusion that Frank Sullivan was not in fear of the Appellant at the time, the Appellant's comments were inappropriate, abusive and represented conduct prejudicial to good order in the Fire Department, all of which constitute a violation of the Department's rules and regulations.

Similarly, the Appellant's conduct on May 6, 2011 was also prejudicial to the good order of the Fire Department. Based solely on his ongoing grudge with Frank Sullivan and the recent incident on April 27<sup>th</sup>, the Appellant failed to properly brief Frank Sullivan about an ongoing call regarding a multiple alarm fire when Frank Sullivan relieved him from duty. There is no excuse for such conduct, particularly when it comes to ensuring that critical events, such as a multiple alarm fire, are handled properly. The Appellant acknowledged that it is normal practice to brief the individual replacing you on such matters. He violated this protocol and let a personal grudge get in the way of taking all steps necessary to ensure that critical events were handled seamlessly.

For all of the above reasons, I have concluded that the Boston Fire Department, by a preponderance of the evidence, had just cause to discipline the Appellant.



Having determined that it was appropriate to discipline the Appellant, the Commission must determine if the Fire Department was justified in the level of discipline imposed, which was a two week suspension, with one week held in abeyance upon completion of anger management counseling.

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. Civ. Serv. 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 employees’ suspensions 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., Town of Falmouth v. Civ. Serv. Comm’n, 447 Mass. 814, 823 (2006).

For the reasons cited below, I have concluded that a modification of the penalty is warranted.

First, it is clear to me that the Boston Fire Department, for whatever reason, chose to ignore complaints of a somewhat similar nature against Frank Sullivan. Investigators heard from at least one individual who alleged that, during the same time period in question, Frank Sullivan made vulgarity-laced threatening remarks toward him. It appears that this allegation was not investigated and the Boston Fire Department did not offer any valid reason for failing to conduct such an investigation.

Second, the end-result here, a two-week suspension, has all the appearances of a pre-determined result. Two seasoned managers of the Boston Fire Department, one of whom was a percipient witness to the kitchen meeting, recommended the issuance of a written warning. Sometime later, and after Frank Sullivan met personally with the Fire Commissioner, the matter was transferred to the City's Human Resources office and the two-week suspension resulted. This timeline, the inferences I draw from it, coupled with the City's failure to investigate similar complaints against Frank Sullivan at the time, adequately show to me that the outcome here was predetermined.

Finally, although certain misconduct can warrant a harsh disciplinary action, up to and including termination, I do not believe the City considered the Appellant's 27-year spotless employment record when it issued the penalty here.

For all of these reasons, the Appellant's appeal is *allowed in part*. The two-week suspension is modified to a one-week suspension. The requirement to attend anger management training stands.

Civil Service Commission

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Christopher C. Bowman, Chairman

By vote of the Civil Service Commission (Bowman, Chairman; McDowell, Marquis and Stein, Commissioners [Ittleman – absent]) on July 19, 2012.

A true record. Attest:

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Commissioner

Notice:

Stephen C. Pfaff, Esq. (for Appellant)

Joseph A. Padolsky, Esq. (for Appellant)

Robert Boyle, Esq. (for Appointing Authority)

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.