COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

One Ashburton Place - Room 503
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WILLIAM DUNN
Appellant
v.
CITY OF ATTLEBORO,
Respondent

CASE NO: D1-09-218

Appellant's Attorney:	Leah Marie Barrault, Esq. Pyle Rome Ehrenberg PC 18 Tremont Street, Suite 500 Boston, MA 02108
Appointing Authority Attorney:	Scott E. Bettencourt, Esq. Bettencourt Law Group, PC 455 Washington Street Duxbury, MA 02332
Commissioner:	Paul M. Stein

DECISION

The Appellant, William Dunn, acting pursuant to G.L.c.31, § 43, duly appealed to the Civil Service Commission (Commission) from a decision of the City of Attleboro (Attleboro), the Appointing Authority, to suspend and subsequently discharge him from his position of Firefighter/EMT in the Attleboro Fire Department (AFD). A full hearing was held by the Commission on September 29, 2009 (at the Commission's offices and at the offices of Dr. Timothy Foster), on September 30, 2009 (at the University of Massachusetts School of Law at Dartmouth) and on November 16, 2009 (at the offices of Dr. Michael Feldman and at the Attleboro City Hall). The hearing was declared private as no party requested a public hearing. Attleboro called four witnesses and the Appellant called three witnesses and testified on his own behalf. The hearings were digitally recorded, save for the Appellant's expert, whose testimony was stenographically recorded. Thirty-four (34) exhibits were marked. Post hearing submissions were received by the Commission from each of the parties on February 10, 2010.

FINDINGS OF FACT

Giving appropriate weight to the exhibits, to the testimony of the witnesses (the Appellant, Attleboro Fire Chief Ronald Churchill, Attleboro Firefighter Ken Blais, Attleboro Personnel Consultant Janice Silverman, Dr. Timothy Foster, MD, Dr. Michael Feldman, MD, Corey Atwood of Access Investigations, Inc., and Richard Young of Delta Projects) and inferences reasonably drawn from the evidence that I find credible, I make the findings of fact set forth below.

The Appellant

1. The Appellant, William Dunn, held the tenured civil service position of Firefighter/EMT with the AFD for approximately 16 years. At the time of his termination in April 2009 he was 50 years of age. He was a certified EMT Basic, one of 32 AFD personnel qualified to work the "rescue" (ambulance) and provide Emergency Medical Services (EMS). (*Exh. 2; Testimony of Appellant & Churchill*)

2. AFD Fire Chief Churchill considered Dunn to be a good and dependable employee. His prior disciplinary history consisted of one written reprimand. (*Testimony of Appellant & Churchill*)

The Essential Duties of an AFD Firefighter/EMT

3. AFD firefighters typically work one continuous 24-hour shift, followed by two days off, a second 24-hour shift, followed by 5 days off. (*Exhs. 1, 1A; Testimony of Blais*)

4. An AFD Firefighter's duties include responding to emergency medical calls, as well as to "room and contents" and structural fires. Most of the calls (about 90% of the 16 to 17 calls received each day) are for EMS services. Fire calls arise about once or twice a month and usually involve "room and contents" fires (mainly kitchen or bedroom),

although there have been major structural fires, including one major commercial building fire recently. (*Testimony of Churchill & Blais*)

5. According to Chief Churchill, an AFD Firefighter/EMT must be able to perform all of the essential functions of the job, including ability to respond to EMS calls as well as fires. A firefighter will not be sent to an EMS or fire scene to perform in a limited duty capacity, even as part of a team. (*Testimony of Churchill*)

6. EMS calls involve physical demands for lifting and moving patients weighing 100 pounds and more. In order to perform CPR most effectively, a Firefighter/EMT will kneel on both knees for an extended period of time. A large part of Attleboro's housing stock is three-decker residential property which requires climbing and descending stairs, and carrying victims, when responding to an EMS call. Dunn estimated he would do this an average of 5 to 6 times per week. EMS responders also are required to be able to crawl through automobile wreckage. (*Testimony of Appellant, Churchill & Blais*)

7. The physical demands at a fire scene include: moving and lifting of heavy items over 100 pounds (furniture, equipment and/or carrying a "hurt, lost or overcome" firefighter), crawling on both knees through attics, basements or entire buildings for minutes at a time with a 35-40 pound air pack on their backs, "venting" roofs (which requires kneeling on a roof for an extended period while wielding an axe), frequent climbing of stairs (elevators may not be operable when a fire is reported) and dragging a "charged" line (fire hose), which is so heavy it cannot be carried, and climbing on scaffolding (*Exh. 19; Testimony of Appellant, Churchill & Blais*)

8. Under Article X of the collective bargaining agreement between Attleboro and the Attleboro Firefighters, Local 848, I.A.F.F., effective from July 1, 2005 through June 30,

2008 Firefighter/EMT there was no provision for an injured firefighter to be returned to work in a "light duty" capacity. In the collective bargaining agreement effective July 1, 2008, Article X was revised to provide for "return to duty if capable of performing limited fire fighter duties on either a full time or less than full time basis" which are defined to include; "dispatch, inspections, general clerical work, schooling (non-physical) and such other tasks as may be agreed on by the Chief and the Union". The evidence does not establish that, at the relevant times involved in this appeal, there were "limited duty" positions Chief Churchill found suitable to be offered to and filled by Dunn, either on a part-time or full-time basis. (*Exhs. 1 & 1A; Testimony of Appellant & Churchill*)

Appellant's Outside Employment

9. As is typical for AFD personnel, Dunn works a second job. For approximately twenty years, he has owned a company, called "Consider It Dunn", which provides general maintenance services, including landscaping, plowing, sweeping and carpentry. Consider It Dunn has provided free maintenance services on occasion for AFD fire stations. (*Testimony of Appellant, Blais & Churchill*)

10. Consider It Dunn employs approximately 10 personnel. Ken Blais, another Attleboro Firefighter, works as an on-site supervisor for the company. As the company grew in size, Dunn assumed a management and administrative role. By 2007, he had substantially stopped performing any of the manual labor work associated with the business. His physical activities were limited mainly to driving to work sites, and procuring & delivering tools, equipment and materials. A significant part of his business-related work was conducted over the telephone. (*Testimony of Appellant, Blais & Young*)

Appellant's Line of Duty Injuries

11. On May 7, 2007, Dunn responded to an EMS call at a residence in Attleboro. After performing CPR, Dunn and his partner were in the process of transporting the injured party (an obese man weighing over 300 pounds), when Dunn tripped on an obstacle at the bottom of the stairwell. As a result, he suffered a disabling injury to his left knee. He was seen by Dr. Christopher Quinn of Occupational Health at Sturdy Memorial Hospital in Attleboro, who is also Attleboro's Commissioner of Public Health. Dr. Quinn ordered an MRI. Dunn was placed on Line of Duty (LOD) leave. (*Exhs. 2 & 7; Testimony of Appellant*)

12. Dunn previously had injured his right knee at work in 2003, for which he was treated surgically by Dr. Timothy Foster, a Board Certified orthopaedic surgeon who specializes in knee and shoulder surgery. Dr. Foster is an active member of the medical staff of four Boston area hospitals. His other professional credentials include appointment as assistant professor of surgery at Boston University School of Medicine, associate editor of the American Journal of Sports Medicine, the medical director of the Boston University Sargent School of Physical Therapy, the Varsity Team Physician for Boston University, and Oral Board Examiner for the American Board of Orthopaedic Surgery. He has been an author of 18 published journal articles and 74 professional presentations. I found him particularly deft at translating the complex medical information involved into terms that a non-expert could understand. (*Exh. 11; Testimony of Appellant & Dr. Foster*)

13. During Dunn's rehabilitation from right knee surgery, Dunn suffered a meniscus tear to his left knee which required additional surgery, also performed by Dr. Foster.

Dunn eventually recovered from both injuries and, after being cleared by Attleboro's physician, returned to full duty with the AFD. (*Testimony of Appellant & Dr. Foster*)

14. On June 14, 2007, Dunn went to see Dr. Foster for evaluation of his re-injured left knee. Dr. Foster's review of the MRI and physical examination of Dunn suggested a "microscopic fracture of the tibial plateau, which is going to heal." He also noted "a possible medial meniscal tear" and "if this is a new meniscal tear, he may not get relief of his discomfort." After consulting Dunn, Dr. Foster chose to "try conservative measures" of treatment. Largely at Dunn's insistence, Dr. Foster cleared Dunn to return to work, with a brace on his left knee, and to pursue a course of physical therapy. Dunn returned to full duty on June 16, 2007. (*Exhs 7 &. 11; Testimony of Appellant & Dr. Foster*)

15. At his next visit on September 9, 2007, Dunn "had not had substantial improvement" and "is . . . close to the point where he may require arthroscopic surgery". Dr. Foster decided "to try one more round of physical therapy for strengthening". At the next follow-up visit on November 15, 2007, Dr. Foster recommended surgery. "We have exhausted conservative measures and the patient continues to have significant discomfort". (*Exhs. 9 & 11; Testimony of Appellant and Dr. Foster*)

16. On December 21, 2007, Dr. Foster performed arthroscopic surgery on Dunn's left knee. During the operation, Dr. Foster confirmed the pre-operative diagnosis of a left knee "medial meniscus tear" and "osteochondral lesion of the femur and tibia". In lay terms, the meniscus is a piece of cartilage that sits between the two bones in a knee and acts as a cushion, while the articular cartilage is a coating over the bone. (*Exhs. 8, 9 & 16; Testimony of Dr. Foste*r)

17. During the surgical procedure, Dr. Foster discovered that the articular cartilage was "down to the bone" meaning that "there was no cartilage there at all. It had been shaved off." This condition, in Dr. Foster's opinion, was the critical problem and required him immediately to elect to perform a "subchondral fracture technique" in which he made small puncture holes to draw stem cells from Dunn's bone marrow to the site and, eventually, re-populate the area of bare bone with a newly grown cartilage coating. The procedure has only a 60% to 70% success rate, and (due to the time it takes the new cells to grow), generally requires a year of rehabilitation. The traditional alternative, however, was knee replacement, which, in Dr. Foster's opinion, could have permanently put Dunn out of work as a firefighter. (*Exhs. 8 & 9; Testimony of Dr. Foster*)

18. After this (his third) knee surgery, Dunn was followed by Dr. Foster and religiously pursued a course of physical therapy at Houghton Physical Therapy and Sports Conditioning, where he made substantial progress through October 2008. X-rays taken in June 2008 and January 2009 indicated that some cartilage had begun to grow back. (*Exhs. 10 thru 14 & 20; Testimony of Appellant, Dr. Foster & Dr. Feldman*)

The October 21, 2008 IME

19. In July 2008, Attleboro Personnel Consultant Janice Silverman took responsibility for managing Attleboro's LOD claims. Employed by Attleboro since 2005, she came with extensive experience in administering LOD and workers' compensation claims for over thirty years. She has no medical training. She has a general understanding of the duties of an AFD firefighter but did not know how frequently they are required to respond to various types of emergencies and was unable to describe in detail the physical requirements of the job. (*Testimony of Silverman*)

20. As part of a review of all pending LOD files, Ms. Silverman discussed Dunn's case with Chief Churchill. Based on their mutual concern that the time Dunn had been out on LOD was "excessive" and "too long" and "something seemed wrong", Ms. Silverman discussed the matter with Dr. Quinn and contacted Attleboro's outside claims administrator, Cook & Company. As a result, Cook & Company arranged for Dunn to undergo an "impartial independent medical examination" (IME) with Dr. Michael Feldman, a Board Certified orthopaedic surgeon who practices with Orthopedic Group, Inc., Pawtucket, RI. (*Exh. 20; Testimony of Appellant, Dr. Feldman, Silverman*)

21. Dr. Feldman holds an appointment as Clinical Assistant Professor of Orthopaedics and Clinical Instructor in Orthopaedic Surgery at Brown University. He also serves as Associate Team Physician at Bryant University and Rhode Island College, and as a member of the Editorial Board and a Reviewer for the Journal of Arthroscopic and Related Surgery. He has authored nine published journal articles and 12 professional presentations. (*Exh. 27; Testimony of Dr. Feldman*).

22. Prior to seeing Dr. Feldman, Dunn met with a medical assistant who took some historical information. She reviewed a list of "Daily Activities Affected by Chief Complaint" and asked him to indicate which caused "any problems". Dunn answered negatively to some and affirmatively to others on the list. There was no evidence of follow-up questions to elicit any detail about his responses. The checklist and assistant's notes are not in the record and the assistant did not testify. There was no mention or inquiry about Dunn's outside employment activities with Consider It Dunn. (*Testimony of Appellant & Dr. Feldman*)

23. Dr. Feldman met with Dunn for approximately 10 minutes, as is typical of the three or four IMEs that he performs weekly (less than 5% of the 115 total number of patients he sees each week). When he testified, Dr. Feldman had no independent memory of any specific statements that Dunn made about the condition of his knee, and he could not recall whether he inquired about any of the historical background information given to his medical assistant. (*Exh. 20; Testimony of Appellant & Dr. Feldman*)

24. Dr. Feldman's report states that Dunn had "difficulty" (Feldman's words) climbing, standing, walking, driving, bending, climbing stairs, and getting in and out of a chair or car. He reports that Dunn continues to attend physical therapy three times a week, no longer wears a brace, "still notes significant pain on the medial side of his knee" and takes Tylenol and Ibuprofen as needed for pain. He performed a physical examination which included "palpitating" (pushing on) and bending the left knee. This examination disclosed that Dunn "walks with a minimal limp" and has "mild medial joint line tenderness", 0 to 130 degrees range of motion and "equivocal flexion pinch and McMurray's to the medial compartment", the latter being an objective test for irritation within the knee joint. (*Exh. 20; Testimony of Dr Feldman*)

25. Dr. Feldman found:

- "The patient's subjective complaints are consistent with the objective findings on exam. I see no gross inconsistencies . . . ."
- PROGNOSIS: "Guarded to poor as the patient remains significantly symptomatic ten months status post surgical procedure."
- IMPAIRMENT/DISABILITY: "The patient has a temporary partial impairment and temporary partial disability at this time. Additionally, given his significant grade 4 medial compartment changes, it is likely that he will have Permanent Partial Impairment and disability at Maximum Medical Improvement."

(*Exh. 20; Testimony of Dr. Feldman*)

26. Dr. Feldman recommended a Functional Capacity Evaluation (FCE) to determine whether Dunn was a suitable candidate to participate in a "work hardening" program (which is a more aggressive treatment than routine physical therapy, and is designed to bring the patient to the level of physical conditioning necessary to regularly perform the full duties of his specific occupation), or, if not, to make an evaluation to determine specific job restrictions that would permit him to return to duty in a modified duty capacity. He saw no further benefit to continuing the present routine physical therapy regimen. (*Exh. 20; Testimony of Dr. Feldman & Dr. Foster*)

27. On October 21, 2008, Dr. Foster ordered an FCE, performed by Braintree Rehabilitation Hospital on October 24, 2008. The FCE noted that Dunn reported a level of pain from 5 to 7 (0 [no pain] to 10 [severe]). He was put through activities designed to simulate his duties as a firefighter. The FCE summarized the results as follows:

> PAIN SCALE: Functional Limitations: Able to do light lifting at home, yardwork OK but careful not to move quickly, unable to play basketball, unable to run."
>
> "COMMENTS: Patient was able to complete the above activities in 20 minutes. He reported no change in pain at the end of the above course. . . He demonstrated increased antalgia (limp) with carrying. When simulating CPR, he was able to half kneel on his right knee, but stated he could not kneel on his left knee because of pain. He demonstrated hesitancy descending the ladder, stating he felt his knee was 'unstable'. Hesitancy noted again climbing the scaffolding. These findings are consistent with his history.
>
> CONCLUSION: Patient was cooperative and appears motivated to return to work. He was observed sitting and standing for approximately 2 hours without noted difficulty. He performed in the medium to heavy work category. The work category for a firefighter is heavy. The results of this evaluation indicate that he has not met the physical requirements of this job. He does not meet the lifting requirements of 100 lbs, he demonstrated difficulty with climbing and continued left knee weakness. . . . [H]e is an excellent candidate for participation in a work hardening program with focus on addressing the above areas. . . .[H]e should do well, and would expect him to reach his return to work goals. He is highly motivated to return to work full time, full duty.
>
> RECOMMENDATIONS: Work hardening as noted.
>
> PROGNOSIS: The prognosis for returning to work following compliance with recommendations is good.

(*Exhs. 11 - 13; Testimony of Appellant, Dr. Foster & Dr. Feldman*)

28. Dr. Foster described work-hardening, as a more intensive therapy focused on regaining endurance to perform a specific occupation, as distinguished from regular physical therapy which is meant to restore a patient to a more modest goal of good range of motion and strength in certain "situational activities." He used the following analogy:

> "The example would be a third baseman for the Red Sox could go out and play one game, but the idea is you want that person to stay for the whole season and continue to play. The idea was to try and get Mr. Dunn back and not come back out of work again. . . . If we just sent him after therapy with no work-hardening, chances are he would have been back out of work."

Dr. Foster predicted that, with successful work hardening, Dunn should have been expected to return to work in early 2009. (*Exhs. 11 - 16; Testimony of Dr. Foster*)

29. Dunn began the work hardening program at Braintree Rehabilitation Hospital on October 31, 2008, spending approximately 20 hours a week there. He continued to be followed by Dr. Foster. Chief Churchill testified that the firefighter's work hardening program used at Braintree Rehabilitation Hospital had been developed with specific input from fire departments. He also believed that the current fitness standards for firefighters were "diluted" down from what they had been in the past and, on the job, firefighters actually must perform at a level above the current standards. As described below, despite his willingness to continue and contrary to the opinions of Dr. Foster as well as the work hardening therapists that Dunn was making progress but not yet ready to return to full duty, his work hardening treatment was put on hold in December 2008, and terminated in January 2009, when Cook & Company (acting on information described below) denied authorization for further treatments. (*Exhs. 11, 14 & 28; Testimony of Appellant, Churchill & Dr. Foster*)

30. As a result, by July 2009, due to a "progressive degeneration" of his condition and the fact that enough new cartilage had not grown back, Dr. Foster began synthetic joint

fluid injections of artificial cartilage and told Dunn that the prognosis then indicated he would probably need another surgery and a knee replacement in the future. (*Exhs. 11, 16; Testimony of Appellant & Dr. Foster*)

Video Surveillance of Appellant

31. In October 2008, in addition to arranging for Dunn to undergo an IME, Cook & Company also retained Access Investigations, Inc. (ACI), a private investigative firm, to conduct video surveillance of Dunn. ACI assigned its employee, Cory Atwood, to conduct this investigation, which he performed on October 17th, 18th and 21st 2008 and summarized in a report dated October 23, 2008. Further surveillance was ordered on October 23, 2008, conducted by Mr. Atwood on October 24th and 28th 2008 and summarized in a second report dated October 30, 2008. A DVD of the surveillance video (without sound) is included with each report. (*Exhibits 21, 21A & 22; Testimony of Atwood & Silverman*)

32. Mr. Atwood is a 2004 college graduate with a degree in Criminal Justice. He had worked as a surveillance investigator for ACI for about three years. Approximately 95% of his assignments have been surveillance of an injured party for insurance company clients, and a small number of domestic surveillance cases. He has no medical training. He was provided some information regarding Dunn, including the fact that he was a firefighter/EMT who also owned a business, that he had injured his left knee, and that he had a medical appointment scheduled on October 21st. (*Testimony of Atwood*)

33. On his first day of surveillance, October 17, 2008, Atwood observed "no claimant activity" from 6:30 am to 10:30 am, at which time surveillance was discontinued. No video was made of the surveillance of that day. (*Exh. 21 & 21A; Testimony of Atwood*)

34. On his second day of surveillance, Saturday, October 18, 2008, Atwood saw Dunn depart his home in an Acura MDX at 8:16 am to bring his daughter to school, after which he drove to a private residence, dropped a business card in the mailbox, re-entered his vehicle "in one fluid motion, balancing his full weight on his left leg briefly" and returned home about 8:43 am. No further claimant activity was noted, and surveillance was discontinued for the day at 11:00 am. (*Exh. 21 & 21A; Testimony of Atwood*)

35. Atwood resumed his surveillance on Tuesday October 21, 2008 at 6:30 am. At 10:24 am, having observed no claimant activity, he proceeded to Orthopedic Group, Inc's Attleboro office, where he had been told Dunn had an IME scheduled. He observed Dunn as he arrived in a pick-up truck for his appointment at 11:06 am wearing a black jacket bearing the logo of his company "Consider it Dunn". Atwood reported that he observed the contents of Dunn's truck to include "various work equipment such as power tools, a road cone, a sledgehammer, large sections of drywall, and a fuel tank." (*Exh. 21 & 21A; Testimony of Atwood*)

36. At 12:17 pm, Dunn departed the medical office and proceeded to a residence on Peck Street in Attleboro where he was reported to get in and out of the truck bed and converse with another male who accompanied him to several business locations. At the final location, Atwood reported that Dunn placed "a long piece of power equipment" into the bed of the truck. At 1:32 pm, the two men arrived at a residence at 100 Angelica Avenue in Mattapoisett. They met another male and the three men proceeded to unload some of the contents of truck. They then entered the residence at 1:44 pm. At 2:51 pm the men were observed walking about the front of the residence. Surveillance was discontinued at 3:30 pm. (*Exhs. 21 & 21A: Testimony of Atwood*)

37. The most controversial dispute at the hearing concerned the activities reported during this surveillance between 1:39 pm and approximately 1:44 pm. According to Atwood, Dunn was reported to be observed climbing into the truck, picking up the piece of power equipment and handing it to one of the other men, and throwing a bundle of wooden stakes out of the truck. After the vehicle was repositioned, Dunn again entered the truck bed and, for the next 5 minutes or so, according to Atwood, Dunn was observed to "lift large pieces of drywall up out of the truck and hand them up to two males standing on the roof of the residence." Dunn would (credibly) dispute this part of Atwood's narrative as erroneous. (*Exhs. 17,21 & 21A; Testimony of Appellant & Atwood*)

38. Atwood resumed surveillance on Friday October 24, 2008 at 4:30 am. Dunn was observed leaving in his Ford pick-up truck at 6:28 am and was followed until Atwood lost contact in traffic at 6:37 am. No other claimant activity was observed that day. Atwood then went to Mattapoisett Town Hall and obtained information that the Angelica Avenue property was owned by a Martin family (a conclusion that Dunn also showed was mistaken, as he had purchased the property himself from the Martin estate) and had no current building permits issued. Surveillance ended at 10:12 am. (*Exhs 18 & 22; Testimony of Appellant & Atwood*)

39. The final surveillance was October 28, 2008, from 5:30 am. At 6:50 am, Dunn left his residence in his Ford pick-up truck, met several employees at a work-site where they were cutting up a large tree and then drove to Norwood where he "drove aimlessly around", visiting several vacant lots and businesses. Atwood lost contact with Dunn at 9:44 am and discontinued surveillance at 11:30 am. (*Exh. 22; Testimony of Atwood*)

40. While in Norwood, at 7:28 am, Atwood reported that Dunn came upon a young male who appeared to have just been involved in an accident on his bicycle. Dunn stopped his truck and crossed the street where he stood over the boy, and bent down with his "legs spread wide as he bent down to tend to the boy. A short time later he crouched down next to the boy . . . kneeling next to the male with his left leg bent at a 90 degree angle." The Norwood Police and Norwood Fire Department arrived on scene with an ambulance and Dunn departed at 7:34 am. (*Exh. 22; Testimony of Atwood*)

Attleboro's Return To Duty Order

41. After Ms. Silverman saw the ACI surveillance report and videos in mid-November 2008, authorization for work hardening treatment was put on hold. By letter dated December 10, 2008, Dr. Feldman was asked to review the first three days' videos (October 17, 18 & 21). He was not shown the report or videos of the last two days of surveillance (October 24 & 28). (*Exhs. 14 & 28; Testimony of Silverman & Dr. Feldman*)

42. By letter dated January 7, 2009, Dr. Feldman responded as follows:

> "In response to your letter dated December 10, 2008, I have reviewed the surveillance tape on Mr. William Dunn . . . and will respond to your questions below. The tape consisted of three short videos. One occurred on the date of my Impartial Medical Examination of October 21, 2008. At that time Mr. Dunn appeared to be lifting drywall up and out of a truck bed to another person standing on a flat roof of a two-story home. He seemed to do this with ease. He also jumped in and out of the truck bed in doing so.
>
> "Based on my review of the entire surveillance video, and specifically this section in particular, it is my opinion, to a reasonable degree of medical certainty and probability that further work hardening is not indicated and that Mr. Dunn is capable of returning to work in a full-duty capacity."

(*Exh. 23*)

43. At the Commission hearing, Dr. Feldman explained on direct examination, that the activities he saw Dunn perform on the videos were inconsistent with Dunn's "complaints of what he could or couldn't do" and that "he was walking with ease" and

"complaints of pain and limp were not present". On cross-examination he acknowledged that Dunn did not, in fact, tell the assistant that he "couldn't do" any of the activities. His conclusions were made without benefit of the results of Dunn's October 24, 2008 FCE or other documentation of the course of the on-going work hardening program he had undergone at Braintree Rehabilitation Hospital He did not contact Dr. Foster or order further objective testing. (*Testimony of Dr. Feldman*)

44. On January 16, 2009, on Chief Churchill's orders, Dunn went to see Dr. Quinn, who met Dunn in the hallway and handed Dunn a one-page document stating that he was deemed fit to return to full unrestricted duty. Dunn's visit with Dr. Quinn lasted less than ten minutes. Dr. Quinn made no physical examination and performed no tests. Dunn took the document to Chief Churchill who, later that day, called Dunn and told him that he was ordered back to work effective January 19, 2009. It is a reasonable inference from the evidence that this action was triggered by the letter dated January 7, 2009 from Dr. Feldman, but that neither Dr. Quinn nor Chief Churchill had seen the video surveillance tapes or had the benefit of any information from Dr. Foster, Dunn's treating physician, or the records of his work-hardening treatment and evaluation by Braintree Rehabilitation Hospital on January 14, 2009. (*Exhibits 3, 14, 24 & 24A; Testimony of Appellant, Churchill & Dr. Foster*)

45. On Dr. Foster's advice, Dunn did not return to work on January 19, 2009, using accumulated sick leave to cover his absence. He saw Dr. Foster on January 22, 2009 who took X-rays which showed "joint space narrowing over the medial component of the knee" which correlates to the area in which the recent surgery had been performed, indicating some new cartilage had formed. According to Dr. Foster, as well as a Braintree

Rehabilitation Hospital evaluation report dated January 14, 2009, Dunn was making progress and was close to meeting his rehabilitation goals, but he was not yet ready to return to full duty. Dr. Foster ordered Dunn to remain out of work. Further work hardening appointments were cancelled, however, when Attleboro declined to authorize payment for any more treatment. (*Exhs.11, 14, 16; Testimony of Dr. Foster* & *Silverman*)

46. Dunn's union grieved the January 16, 2009 return to duty order, alleging a violation of procedures for resolving disputes about the fitness of a firefighter to return to work, when his treating physician has not cleared him for duty. This grievance was resolved by settlement. These documents were marked for identification. They are given no evidentiary weight. (*Exh.29-ID & 30-ID; Testimony of Appellant*)

Termination of Dunn's Employment

47. By letter dated January 27, 2009, Attleboro Mayor Kevin Dumas, initiated disciplinary proceedings against Dunn, suspending him for five days and scheduling a hearing to consider possible further discipline, including termination of his employment. The hearing was held on February 6, 2009 before Ms. Silverman, as hearing officer. On April 3, 2009, Ms. Silverman submitted her report to Mayor Dumas, recommending that the five day suspension be upheld and that Dunn be terminated from employment. By letter dated April 9, 2009, Mayor Dumas concurred in the recommendation and terminated Dunn from his position as a firefighter in the AFD. (*Exhs. 4 through 6; Testimony of Appellant & Silverman*)

48. The reason for the decision to terminate Dunn from employment, expressed in Ms. Silverman's report is the conclusion that "Mr. Dunn falsely represented his medical status to extend his period of disability", which she based on the findings listed below.

- Dunn falsely told Dr. Feldman on October 21, 2008 that he had "difficulty climbing, standing, walking, driving, bending . . . and getting in and out of a chair or car", when he is shown on the video surveillance that same day "performing all of these activities . . . without impairment".
- Dunn falsely told the Braintree Rehabilitation Hospital evaluator on October 24, 2008 that he was "only" able to do light lifting at home, when he was observed three days earlier "lifting building materials and power equipment".
- Dunn falsely stated to the Braintree Rehabilitation Hospital evaluator that he was unable to kneel on his left side, although he is "clearly depicted doing just that" in another video taken four days later.
- "It is the City's position that the ease with which Mr. Dunn performed these duties was not only inconsistent with the level of pain he described to Dr. Foster, but also indicative that Mr. Dunn was capable of performing these duties for quite some time."
- He withheld information about his self-employment activities from Dr. Feldman and Dr. Foster.

(*Exh. 6*)

49. Ms. Silverman's report mentions, but does not explain why she fails to credit, the documentary evidence Dunn provided at the appointing authority hearing to the effect that the "building materials" he was seen lifting were lightweight wainscoting fiberboard, not "drywall" as the investigator and Dr. Feldman had assumed. She also did not explain why she did not credit the many findings in Dr. Foster's reports and in the Braintree Rehabilitation Hospital records provided to Attleboro that, while Dunn showed he had regained many functions of daily living, he still demonstrated hesitancy with a variety of exertions, still had a slight limp, and was not yet able to perform at the level required to return to duty as a firefighter. (*Exhs. 6, 10, 11, 14 & 16; Testimony of Silverman*)

The Commission Hearing

50. The ACI video surveillance tapes were received in evidence, along with Mr. Atwood's narrative reports, and viewed in their entirety. Most of the surveillance shows "no claimant activity" at all or shows unremarkable routine activity, such as shopping,

talking briefly with others, and driving or walking short distances which involved no apparent prolonged stressors or lifting and did not conflict with Dunn's objective medical and self-reported condition of his knee. The few remaining parts of the surveillance video that Attleboro's witnesses say purport to depict Dunn performing tasks required of a firefighter that he claims he could perform are ambiguous, at best. (*Exhs. 21, 21A & 22*)

51. Ms. Silverman is clearly mistaken in stating that Dunn's behavior on the October 28, 2008 video, when he stopped to help the injured young cyclist, is inconsistent with his claimed functional limitations of his left knee. He is shown "kneeling" for only a few minutes on his RIGHT KNEE, not his injured left knee. He was not engaged in treating the victim or performing any "first responder" activities. (*Exh. 22; Testimony of Blais*)

52. Similarly, the assumption made by Mr. Atwood and adopted by Dr. Feldman, that Dunn was observed lifting "drywall" on October 21, 2008, was also proved erroneous. Dunn, and another percipient witness, Ken Blais, credibly testified that Dunn was lifting 1/8" fiberboard wainscoting or "bead board", each panel weighing 15 lbs or less. This material is visually and structurally different from "drywall", which is 3/8" to 1/2" inch thick, made of crushed stone and is, indeed, very heavy. This testimony was corroborated by documentary evidence. As far as the other material or equipment Dunn is seen carrying or lifting, Attleboro proffered no direct evidence that contradicts the testimony proffered by the Appellant and Ken Blais, that the weight of the material or equipment depicted in the videos ranged from 6 to 18 lbs. None of this activity is inconsistent with the objective findings of Dr. Foster and Braintree Rehabilitation Hospital as to Dunn's functional limitations in October 2008. (*Exhs. 13, 14, 17, 21, 21A & 22; Testimony of Appellant, Atwood, Dr. Feldman, Dr. Foster, Churchill & Blais*)

53. The videos certainly do not establish that Dunn was capable of lifting up to 100 lbs, that he was ready to climb ladders and scaffolding, kneel on his left knee or engage in other forms of prolonged, heavy duty activity, with minimal pain, which was the goal he needed to meet to return to duty as a firefighter as established by Braintree Rehabilitation Hospital. (*Exh. 14; Testimony of Dr. Foster*)

54. More specifically, the weight-bearing activities on the surveillance video are neither obvious nor unequivocal illustrations of fitness for duty as a firefighter. These activities include:

- Atwood's description of Dunn climbing into a truck on October 18, 2008 "in one fluid motion, balancing his full weight on his left leg briefly". This single "brief" maneuver, during a trip Dunn made to drop off a business card, was the only physical activity specifically noted in Atwood's report for that day.
- Atwood's description of Dunn on October 21, 2008, who "stepped up" on the side of the truck and "threw his left leg up into the bed of the vehicle", "stood up in the bed", "moved around many of the objects" and "jumped down out of the truck, placing his left foot on the bumper of the vehicle." The video shows, as further informed by Dr. Foster's testimony, that these activities actually are consistent with the idea that Dunn actually favored his right leg most of time, and do not reasonably allow any inference about how his knee would handle daily, sustained stress.
- Atwood's description of Dunn, who, after moving "drywall", then "jumped out of the truck". My observation of the video indicated that, again, as informed by Dr. Foster's testimony, Dunn favored his right leg in this activity.

- Attwood's report that Dunn "appeared to do construction" at 100 Angelica Street. I note that, at the Commission hearing, Atwood testified that he did not, in fact, actually see Dunn do any construction work.
- Ms. Silverman's report and Dr. Feldman's testimony that Dunn performed "with ease" activity he said at the IME he "couldn't do" and that was "inconsistent with the level of pain" he reported. I note this testimony goes further than what Dunn claimed he said to Dr. Feldman's assistant (responding to a check list of daily activities that created "any problems") as well as how Dr. Feldman characterized those responses in his IME report (i.e. having "difficulty" with the activity).

(*Exhs.6, 20, 21, 21A, 22, 23; Testimony of Appellant, Atwood, Silverman, Dr. Feldman & Dr. Foster*)

55. Dr. Foster had a very different take on the ACI videos. He saw clear evidence of Dunn's "antalgic gait" (limp) and favoring his right side, not the "normal gait" as characterized by lay witnesses Mr. Atwood and Ms. Silverman. He testified that the videos were entirely consistent with his assessment of Dunn and he saw nothing that changed his medical opinion that Dunn was ready to perform the duties of a firefighter.

> "During the video I saw Mr. Dunn doing situational activities . . . that he was actually doing in work hardening. So there wasn't anything . . . that I didn't think he wouldn't be capable of and . . . actually hurting his knees."
>
> ". . . [I]n October, 2008, coming up on ten months after the procedure, I would hope that he would be able to do that in situations, and the goal was for him to be able to do that every day."
>
> "I didn't see a lot of jumping. I didn't see a lot of stair climbing, which would have been more of a concern to me."

(Exhs. 21, 21A 22; & *Testimony of Dr. Foster, Atwood and Silverman*)

56. Dunn presented as a sincere and trustworthy man and a fully compliant patient. He placed his faith in Dr. Foster, who is a respected and highly specialized expert in knee

injuries, to treat him in the most appropriate fashion that would enable him to return to his job as an AFD firefighter/EMT. I have no doubt that he declined to return to duty before his doctor had cleared him, because he was guided by his doctor's advice and honestly believed a premature return to duty could be a career-ending move. He avoided undergoing knee replacement, although that would have been a more conventional solution, for the same reasons. He had already experienced the futility of an unsuccessful return to duty in the immediate aftermath of his injury. He diligently pursued physical therapy and work hardening and was targeted to return to duty in January 2009, before Attleboro cut off funding for further treatments and his condition suffered a relapse. He later resumed physical therapy at his own expense. His therapists described him as "motivated and cooperative" and consistently rated his "Motivation to Learn" as "High". I found no substantial evidence or indicia in the medical records, or otherwise, that Dunn ever exaggerated his condition to any medical provider who treated him. (*Exhs. 10 through 14; Testimony of Appellant & Dr. Foster*)

CONCLUSION

Applicable Legal Standards

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 by such a decision, may appeal to the Commission pursuant to G.L.c.31,§43. Under Section 43, the appointing authority carries burden to prove to the Commission by a "preponderance of the evidence" that "there was just cause" for the action taken. G.L.c.31, §43. See, e.g., Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823 (2006); Police Dep't of Boston v.

Collins, 48 Mass.App.Ct. 411, rev.den., 726 N.E.2d 417(2000); McIsaac v. Civil Serv. Comm'n, 38 Mass.App.Ct. 473, 477 (1995); Watertown v. Arria, 16 Mass.App.Ct. 331,334, rev.den., 390 Mass. 1102 (1983).

In performing its appellate function, "the commission does not view a snapshot of what was before the appointing authority . . .[T]he commission hears evidence and finds facts anew. Examining an earlier but substantially similar version of the same statute, the [SJC], said: 'We interpret this as providing for a hearing de novo upon all material evidence and a decision by the commission upon that evidence and not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer.' For the commission, the question is 'not whether it would have acted as the appointing authority had acted, but whether*, on the facts found by the commission*, 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.' " [Citations omitted] Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003) (affirming Commission's decision to reject appointing authority's evidence of appellant's failed polygraph test and prior domestic abuse orders and crediting appellant's exculpatory testimony) (*emphasis added*). See generally Villare v. Town of North Reading, 8 MCSR 44, reconsid'd, 8 MCSR 53 (1995) (discussing de novo fact finding by "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." 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 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 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.

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 the authority to affirm, vacate or modify the penalty imposed by the 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; Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct. 796, 800 (2004); Faria v. Third Bristol Div., 14 Mass.App.Ct. 985, 987 (1982) (remanded for findings to support modification)

Applying these principles to the facts of this appeal, Attleboro has failed to establish by a preponderance of evidence that it had "just cause" to terminate Firefighter/EMT Dunn from his position with the AFD for the reasons they assert, i.e., "Mr. Dunn falsely represented his medical status to extend his period of disability". Attleboro has not proved that the proffered evidence of Dunn's ability to carry on certain outside employment activities, which he never concealed from them, was inconsistent with his medical condition at the time, as documented in the objective medical evidence as well as by the credible medical opinion of his treating physician, or that he was not justified to

follow his doctor's orders and decline return to duty as a firefighter before he had successfully completing the appropriately prescribed course of work hardening.

First, Attleboro did not prove that Dunn misrepresented his condition to Dr. Feldman or concealed any material information from him. Since Dr. Feldman had no personal recollection of anything Dunn told him, and the assistant's notes and checklist were not introduced, there is no documented evidence of the specific activities that Dunn claimed would cause pain. Dr. Feldman acknowledged that the use of the word "difficulty" to describe the limitations of "climbing, standing, walking, driving, bending, climbing stairs and getting in and out of a chair or car", was his own, not Mr. Dunn's. Dunn never described such limitations to any of his treating therapists or his doctor. I do not believe that Dunn ever said anything to suggest he claimed that his level of pain prevented him from standing, walking, driving, bending, or getting in or out of a chair or a car at all, as Dr. Feldman's initially testified what Dunn had told him, but retracted this characterization on cross-examination. Moreover, Dr. Feldman's wrote in his report that Dunn's "subjective complaints were consistent with [Dr. Feldman's own] objective findings on [his IME] exam" and saw no "gross inconsistencies on a physical basis", as a result of which he had opined in his IME report that Dunn could be expected to perform some kinds of modified duty work.

As to Attleboro's claim that Dunn concealed his outside employment activity, the preponderance of evidence clearly demonstrated the contrary was true. No evidence suggested that Dunn was ever specifically asked by Attleboro or its claims administrator to disclose the status of any outside employment activities at any time. Chief Churchill, among others, knew about Dunn's business and, on occasion, had taken the benefit of

donated services for the AFD. Dunn arrived at his IME with Dr. Feldman wearing a "Consider It Dunn" jacket. Dr. Feldman, however, asked Dunn no questions about outside work, hobbies or extra-curricular activities, or even what his duties as a firefighter involved for that matter. Dr. Feldman evidently saw no material reason to inquire about these things and Attleboro has no cause to claim that Dunn's alleged "failure" to volunteer them was a conscious deception on his part. Had Dunn been asked, there is no reason to infer that his responses would have been untruthful or would have misrepresented the type of light and medium work he was then performing (which modified duty Dr. Feldman's IME opined he expected Dunn could perform at that point.)

Rather than credit Dr. Feldman's unreliable accounts of what transpired during the IME, I find it much more plausible to believe Dunn's version of that brief visit to Dr. Feldman's office. His recollection is consistent with the objective findings of the rehabilitation therapists and his own treating physician, each of whom have followed Dunn for an extended period of time and have performed multiple objective tests on him. The conclusion reasonably drawn from this evidence is that Dunn truthfully portrayed his condition to Dr. Feldman as he did to others at the time, as a man capable of performing the basic functions of daily living, albeit, in particular cases, with some pain, and with significant limitations in activities that put heavy and prolonged stress on his left knee, such as kneeling on it, climbing stairs, and picking up, carrying and lifting heavy weight.

Second, experts' conclusions are not binding on the trier of fact, who may decline to adopt them in whole or in part. See, e.g., Turners Falls Ltd. Partnership v. Board of Assessors, 54 Mass.App.Ct. 732, 737-38, 767 N.E.2d 629, 634, rev. den., 437 Mass 1109, 747 N.E.2d 1099 (2002). As a corollary, when the fact-finder is presented with

conflicting expert evidence, the fact-finder may accept or reject all or parts of the opinions offered. See, e.g., Ward v. Commonwealth, 407 Mass. 434, 438, 554 N.E.2d 25, 27 (1990); New Boston Garden Corp. v. Board of Assessors, 383 Mass. 456, 467-73, 420 n.E.2d 298, 305-308 (1891); Dewan v. Dewan, 30 Mass.App.Ct. 133, 135, 566 N.E.2d 1132, 1133, rev.den., 409 Mass. 1104, 569 N.E.2d 832 (1991).

In this case, the testimony from Dr. Foster was persuasive that he saw no inconsistency with what the October 2008 videos showed and his own diagnosis of Dunn's medical condition and prognosis for a return to duty in the near future. As Dunn's treating physician with the most in-depth contemporaneous and longitudinal percipient knowledge of Dunn's injuries and rehabilitation, and as an accomplished surgeon specializing in the field of knee injuries, Dr. Foster's opinions about Dunn's diagnosis and prognosis, supported by the objective evidence in the medical records, carried considerable weight, especially against the lay opinions of Mr. Atwood, Ms. Silverman and Chief Churchill.

The evidence showed that Dr Quinn had no relevant percipient knowledge of Dunn's condition in late 2008 and early 2009, having only one brief meeting with Dunn on January 16, 2009, at which time he handed him what appeared to be a pre-prepared Work Status Report that found him fit for unrestricted return to duty. Similarly, Dr. Feldman had one percipient encounter with Dunn. Each of these two physicians are well-qualified practitioners in the field of occupational health and arthroscopic surgery, respectively. I find, however, that their testimony was made without the benefit of a review of the most current x-rays, rehabilitation records and other relevant medical records, and is not insufficiently persuasive to outweigh the testimony from Dr. Foster, who as Dunn's

treating physician, had far more direct and complete information about the diagnosis and prognosis of Dunn's overall status, in general, and his knee condition, in particular.

Similarly, it appears that both Dr. Quinn and Dr. Feldman were unduly influenced (either directly or indirectly through what they were told by others) by the ACI report that, erroneously, claimed that Dunn was seen lifting heavy objects with ease, including "drywall", which was not substantiated at the hearing before the Commission. Dr. Feldman's testimony about the video was unpersuasive. He did not have a clear present memory of what he saw on the video and he did not expressly identify any specific actions as problematic or demonstrating a sound, rehabilitation of his knee. Rather, he testified generally that it was "everything" he saw that seemed inconsistent with what Dunn said "he could and couldn't do" when interviewed at the IME. In fact, I do not believe Dunn actually stated he "couldn't do" any of the activities. Moreover, Dr. Feldman's IME led him to opine, before seeing the ACI video, that (although he doubted Dunn could go out on a call "on a moment's notice" and climb ladders or carry victims) he could return to duty on a modified duty basis. This opinion is logically inconsistent with Dr. Feldman's later testimony that "everything" on the video was inconsistent with how Dunn presented himself at the IME. Nor do I believe Dr. Feldman's testimony that his opinion would not have been different, had he reviewed the Braintree Rehabilitation Hospital therapist's October 24, 2008 FCE (concluding Dunn was highly motivated to return to duty, was not ready to do so, and was an excellent candidate for work-hardening), or had he known Dunn had not lifted drywall, but a much lighter material.

I find Dr. Foster's testimony about the significance of what he saw on the ACI videos far more persuasive and more consistent with the objective medical evidence. Dr. Foster

was very specific about what he saw and didn't see that would have been problematic for him. Based on Dr. Foster's informed testimony, I was persuaded that the activities shown on the ACI video confirmed, more than disputed, Dr. Foster's opinion that Dunn had been rehabilitated to the point of being able to resume many functions of daily living, but was still short (although close) to the goal of returning to work in the heavy duty job of a firefighter/EMT. I agree that Dr. Foster accurately describes the video activities as failing to show that Dunn's knee was capable of sustaining the level of stress required to perform the essential duties of a firefighter/EMT

I also was impressed by the testimony from Dunn's colleague, Ken Blais, who worked with Dunn both as a firefighter/EMT and as a part-time supervisor for him at Consider It Dunn. They clearly have had a close personal, business and professional relationship for many years and his testimony has been considered with that potential personal and financial interest in mind. I do credit his testimony about the details of "bead board" and "drywall" as it was un-impeached and is consistent with other evidence and the pictures of the material on the video (and the still frame on front page of ACI's first report) which clearly showed that the material was some sort of very thin material with a patterned face, not smooth as one would expect drywall to appear. I also believe the testimony he gave when asked for his assessment of Dunn's work with Consider It Dunn as compared to the duties he would be required to perform as a firefighter. Blais said he wouldn't want to have to count on Dunn to have to be the one to pull him out of a burning building. As someone with personal knowledge of Dunn's work as a firefighter and at Consider It Duun, as well as considerable experience with the strenuous physical demands of the day-to-day work of a firefighter/EMT, Blais's spontaneous and candid

remark put a brutally honest perspective on the evidence presented in this appeal from the point of view of a man who potentially could have been required to put his life into Dunn's hands at a fire scene.

Fourth, I considered Attleboro's argument that the Appellant cannot rely on expert testimony that was not presented at the appointing authority level hearing, citing Falmouth v. Civil Service Comm'n, 447 Mass. 814 (2006) and Houhoulis v. Town of Avon, D-07-418. I do not read those decisions to preclude the Commission from considering Dr. Foster's testimony (together with all of the other evidence, including the testimony of Attleboro's expert witness), and giving it the appropriate weight that I believe it deserves. Attleboro's proposition would, in effect, neutralize the value of holding an evidentiary hearing before the Commission, and convert the Commission's role into a record review of the evidence marshaled before the appointing authority. This does not square with the statutory scheme or general practice under Chapter 31 for Commission oversight of disciplinary decisions through a hearing before a disinterested hearing officer with the authority to authorize (and compel) discovery, to take (and compel) evidence, to determine the credibility of witnesses and to make a "de novo" determination of the just cause for a disciplinary decision. See, e.g., G.L.c.31, §41-§44, §72; Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-28 (2003) (Commission not limited to evidence at appointing authority hearing); McIsaac v. Civil Service Comm'n, 38 Mass.App.Ct. 463, 476 (1995) (appointing authority hearing need not be held before a "disinterested" hearing officer); 801 CMR 1.00(8) (Commission discovery rules)

The SJC's Falmouth decision held that, when a civil service employee elects not to testify at an appointing authority level disciplinary hearing, the appointing authority may

draw an adverse inference from that election, and, on appeal of an adverse decision, the Commission is permitted, but not required, to draw the same adverse inference against an appellant. Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) Falmouth, however, does not go so far as to eviscerate the general rule that an appellant (or an appointing authority for that matter) may still testify and offer any relevant evidence to the Commission, through experts or percipient non-experts, whether or not it was first proffered at the appointing authority level.

Nor does the Commission's decision in Houhoulis stand for that proposition. Houhoulis was a two-day suspension imposed on a police officer who damaged his cruiser in an accident and misrepresented to the Police Chief his excessive speed, which a State Police reconstruction expert report confirmed. On appeal to the Commission, Houhoulis introduced an expert reconstruction expert of his own, who had not testified at the appointing authority level hearing. The DALA magistrate assigned to conduct the hearing of the appeal found Houhoulis's expert testimony "although well reasoned" did not overcome the testimony of the State Police reconstruction expert presented by the appointing authority. The reference in the DALA magistrate's Recommended Decision to the Falmouth decision was ancillary to this core evidentiary finding. At the most, Houhoulis indicates that the Commission took into account that Houhoulis did not present certain evidence at the appointing authority hearing, but such fact, standing alone, was not determinative of the Commission's independent de novo decision, which was based on all of the evidence presented to the Commission. See McDowell v. City of Springfield, 23 MCSR 243 (2010) (adverse inference from appellant's failure to testify

taken into account, but appeal allowed, in part; appointing authority's decision modified by the Commission); Heady v. Town of Great Barrington, 20 MCSR 209 (2007) (same)

Finally, I note that, at the appointing authority level hearing, Ms. Silverman had before her most, if not all, of the relevant medical records from Dr. Foster and Braintree Rehabilitation Hospital. Dr. Foster's testimony was essentially explanatory and interpretative of the medical records that were before the appointing authority at the time of its decision. Falmouth does not place any barriers on the Commission's fair and full consideration of this testimony and there is no reason to do so here.

Fifth, Attleboro makes a misplaced analogy to the Commission's Decision in Myers v. Town of Duxbury, 18 MCSR 305 (2005). In Myers, the Commission upheld the discharge of a police officer who claimed he was unable to return to "light" duty although he was observed working at his family restaurant. The Commission found his denial that the activities amounted to "working" (and his testimony as a witness generally) evasive and not credible. Here, I found Dunn a very forthcoming and credible witness who was motivated to return to work and religiously devoted to his rehabilitation, even to the point of returning to physical therapy at his own expense after Attleboro cut off his employer-paid insurance coverage. I also note that Dunn was never asked to return to duty other than a full-time basis. Unlike Meyers, he never denied that he could not return on a modified duty basis or suggested that he would refuse such an opportunity, if offered, which it was not.

In sum, this case does not present an example of an employee who is milking the disability system at taxpayer expense. To the contrary, Dunn was dutifully complying with all reasonable advice he had received from his treating physicians and therapists

who honestly believed, as did he, that their course of treatment was medically necessary to bring him to the point at which he safely could return to the job he loved. He was devoting twenty or more hours per week in work-hardening treatments and well on the road to full recovery before Attleboro pulled the plug. Attleboro correctly points out that it is not within the Commission's purview to make a determination whether Dunn was, or now is, fit to return to full duty, but only whether Attleboro proved by a preponderance of substantial evidence that, from October 2008 through April 2009, Dunn misrepresented his condition as worse than he knew, or reasonably should have known, it to be. Attleboro did not meet that burden.

Accordingly, for the reasons stated above, the appeal of the Appellant, William Dunn, from his suspension and termination of employment must be ***allowed***. He shall be reinstated to his position as an AFD firefighter/EMT without loss of any benefits to which he is entitled on or after April 9, 2009. Nothing in this Decision, however, is intended to establish the specific employment status to which the Appellant should be reinstated (e.g., LOD leave, limited duty, full duty).

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis [ABSENT], McDowell & Stein, Commissioners) on June 2, 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 shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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:
Leah Marie Barrault, Esq. (for Appellant)
Scott E. Bettencourt, Esq. (for Appointing Authority)