

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

**CIVIL SERVICE COMMISSION**

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

LAMONT DAVIS,  
Appellant

v.

D-13-64<sup>1</sup>

NEWTON FIRE DEPARTMENT,  
Respondent

Appearance for Appellant:

Charles A. Clifford, Esq.  
305 Main Street  
Charlestown, MA 02129

Appearance for Respondent:

Donnalyn Kahn, Esq.  
Newton Law Department  
1000 Commonwealth Avenue  
Newton, MA 02459

Commissioner:

Christopher C. Bowman

**DECISION**

Pursuant to G.L. c. 31, § 43, the Appellant, Lamont Davis (Mr. Davis), filed a timely appeal with the Civil Service Commission (Commission) on March 18, 2013, contesting the decision of the Newton Fire Department (Fire Department or City) to suspend him from his position as a firefighter for thirty (30) days. A pre-hearing conference was held at the offices of the Commission on June 4, 2013. A full hearing was held at the offices of the Commission on September 5, 2013. Neither party requested a public hearing, so the hearing was deemed private.

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<sup>1</sup> A separate decision regarding Mr. Davis, under CSC Docket No. D1-13-65, is also being issued today.

The hearing was digitally recorded and the parties were provided with a CD of the hearing. The parties submitted post-hearing briefs on November 4, 2013.

## **FINDINGS OF FACT**

Based on Exhibits 1 through 8, the stipulations of the parties, the testimony of:

*Called by the City:*

- Bruce Proia, Fire Chief, City of Newton;
- Michael Murphy, Fire Lieutenant, City of Newton;
- Dolores Hamilton, former Director of Human Resources, City of Newton;

*Called by Mr. Davis:*

- Lamont Davis, Appellant;

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

1. Mr. Davis is forty-two (42) years old. He is married, has two (2) children and lives in Brockton. (Testimony of Mr. Davis)

2. Mr. Davis was appointed as a firefighter by the City in 1995. He is also trained as a welder and is a member of Ironworkers Local 7. (Testimony of Mr. Davis)

*Prior Discipline*

3. Mr. Davis was suspended for six (6) months in 2004 and received a written warning in 2010. (Stipulated Facts)<sup>2</sup> Mr. Davis was also suspended for one (1) day in February 2013. (Testimony of Chief Proia and Exhibits 4 and 6)

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<sup>2</sup> In 2007, the Commission determined that the City did not have just cause to terminate Mr. Davis.

*Facts Related to Instant Appeal*

4. On February 1, 2013, a jury trial regarding litigation between Mr. Davis and the City concluded and a verdict entered in favor of the City. That litigation involved a 2008 discrimination complaint filed by Mr. Davis with the Massachusetts Commission Against Discrimination (MCAD) which was transferred to Superior Court.
5. On February 4, 2013, there was a fire at 25-27 Charlesbank Road in Newton (2013 Fire). Ladder 3 and Engine 10 from the Newton Fire Department were among those responding to the fire. Lt. Michael Murphy was on Ladder 3. The Appellant, Firefighter Lamont Davis, was on Engine 10. (Testimony of Lt. Murphy and Mr. Davis)
6. There is “bad blood” between Lt. Murphy and Mr. Davis. Fifteen (15) years ago, shortly after joining the Fire Department, Lt. Murphy was frustrated over Mr. Davis not hanging his safety equipment in its proper place at the end of the shift. Lt. Murphy balled up Mr. Davis’s gear and raised it up a hose tower. (Testimony of Lt. Murphy and Mr. Davis)
7. Lt. Murphy, then a firefighter, was disciplined for the above-referenced incident. He was suspended for three (3) tours of duty, was transferred by the Fire Chief; and was placed on probation for one (1) year. (Exhibit 8)
8. Mr. Davis, believing the 2002 incident was racially motivated, filed a complaint with the Massachusetts Commission Against Discrimination (MCAD). (Testimony of Mr. Davis and Exhibit 8) MCAD dismissed the complaint after finding that Mr. Davis could not articulate a prima facie complaint for discrimination based on race. (Exhibit 8)
9. At one point during the 2013 Fire, both Lt. Murphy and Mr. Davis were located in a second floor room with heavy smoke conditions and flaming debris from the ceiling. There were also other firefighters in the room. Mr. Davis was standing on a bed providing “water cover”

for fellow firefighters with a hose trained on the ceiling. (Testimony of Mr. Davis) Lt.

Murphy was the senior officer in the room. (Testimony of Lt. Murphy)

10. Lt. Murphy noticed that Mr. Davis was not wearing his helmet. He told Mr. Davis multiple times to find his helmet and put it on. (Testimony of Lt. Murphy)

11. Wearing a helmet is one of the primary pieces of gear used to ensure the safety of firefighters, particularly in situations involving falling debris. (Testimony of Lt. Murphy)

12. In response to Lt. Murphy's directive, Mr. Davis refused to find his helmet and did not put it on. Rather, Mr. Davis said words to the effect, "What the fuck; you want to do this now?" and "why don't you shut up?" (Testimony of Lt. Murphy)

13. At some point, Lt. Murphy's "low air alert" sounded and both Lt. Murphy and Mr. Davis exited the room. (Testimony of Lt. Murphy)

14. On February 6, 2013, Lt. Murphy wrote a "Dear Chief" memorandum regarding the incident. (Testimony of Lt. Murphy and Exhibit 3)

15. At the local appointing authority hearing on March 7, 2013, Mr. Davis failed to testify and Chief Proia drew an adverse inference against Mr. Davis for his failure to testify. (Testimony of Chief Proia)

16. Chief Proia found that Mr. Davis violated various rules of the Newton Fire Department including failure to follow a reasonable order or directive from a superior officer and failure to comply with a Department rule requiring firefighters to don helmets and other gear upon arrival at a fire. (Testimony of Chief Proia and Exhibits 5 and 7)

17. Chief Proia suspended Mr. Davis for thirty (30) days. This appeal ensued. (Stipulated Facts)

## LEGAL STANDARD

G.L. c. 31, § 43, provides:

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

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102, (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm’n, 43 Mass. App.Ct.486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983)

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956).

## ANALYSIS

Mr. Davis does not dispute that he was not wearing his helmet when Lt. Murphy entered the room at 25-27 Charlesbank Road. Both he and Lt. Murphy agree that there was heavy smoke in the room; there was debris falling from the ceiling; and that Lt. Murphy directed Mr. Davis to find his helmet and put it on.

Mr. Davis argues that he was not obligated to comply with Lt. Murphy's directive because he was providing "water cover" for fellow firefighters at the time. In the alternative, he argues that Lt. Murphy should have found the helmet and put it on his head for him.

Mr. Davis is mistaken. He disobeyed the clear and unambiguous directive of a superior officer to put on his helmet during a dangerous fire. Rather than obey the order in the midst of this dangerous fire, Mr. Davis began arguing with Lt. Murphy, at one point stating, "what the fuck; you want to do this now?" Mr. Davis has not shown that complying with Lt. Murphy's order would have put him or his fellow firefighters in harms' way. Rather, Lt. Murphy's order was meant to *ensure* the safety of Mr. Davis and protect him from falling debris. The suggestion that Lt. Murphy was obligated to find the helmet and put it on his head is simply absurd. The failure to comply with this order constitutes substantial misconduct which adversely affected the public interest by impairing the efficiency of public service. Thus, the Fire Chief had just cause to discipline Mr. Davis.

Having determined that it was appropriate to discipline Mr. Davis for this incident, I must determine if the Fire Chief was justified in the level of discipline imposed, which, in this case, was a thirty (30)-day suspension.

The Commission is guided by "the principle of uniformity and the equitable treatment of similarly situated individuals" [both within and across different appointing authorities]" as well as the

“underlying purpose of the civil service system ... to guard against political considerations, favoritism and bias in governmental employment decisions.” Falmouth v. Civil Service Commission, 447 Mass. 814, 823 (2006) and cases cited. Even if there are past instances where other employees received more lenient sanctions for similar misconduct, however, the Commission is not charged with a duty to fine-tune an employee’s discipline to ensure perfect uniformity. See Boston Police Dep’t v. Collins, 48 Mass. App. Ct. 408, 412 (2000).

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

Here, after a de novo hearing at which I reviewed all of the documentary evidence and listened to the testimony of percipient witnesses, I have concluded, similar to the Fire Chief, that Mr. Davis failed to comply with a lawful order of a superior officer by failing to find his helmet and put it on during a dangerous fire. That represents serious misconduct warranting serious discipline. Further, the thirty (30)-day suspension is consistent with the principles of progressive discipline in light of Mr. Davis’s prior disciplinary record. I also considered whether the relatively harsh discipline was influenced by any “bad blood” between Lt. Murphy and Mr. Davis and/or any frustration by the Fire Department related to his previous termination which was overturned by the Commission. There is no evidence that either event resulted in a harsher penalty than warranted here.

Finally, there is the timing of this suspension. Starting in January 2013, a jury trial commenced involving Mr. Davis's charges of racial discrimination against the City, stemming from a 2008 complaint he filed with MCAD. The parties agree that the trial lasted weeks and a verdict in favor of City entered on February 1, 2013, three days before the fire in which the misconduct occurred. Shortly after the jury found in the City's favor, the City commenced the local civil service hearing and suspended Mr. Davis.

While, taken together, these events could potentially paint the picture of a Fire Chief who was pre-determined to discipline Mr. Davis for reasons other than the offenses for which he was charged, I do not believe a modification of the penalty is warranted here.

First, Mr. Davis did engage in the serious misconduct, by failing to obey a lawful order of a superior officer in the midst of a dangerous fire. Second, even as of the date of the Commission hearing, Mr. Davis has failed to recognize that he engaged in misconduct. Third, Mr. Davis has a history of prior discipline ranging from warnings to short-term suspensions to a six (6)-month suspension.

Finally, the timing of Mr. Davis's suspension appears to be more a function of when the actual misconduct occurred, as opposed to the jury trial which ended just prior to the City's decision to move forward with his suspension.

### *Conclusion*

For all of the above reasons, Mr. Davis's appeal under Docket No. D-13-64 is hereby ***denied*** and the decision by the Newton Fire Department to suspend Mr. Davis for thirty (30) days is upheld.

Civil Service Commission

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Christopher C. Bowman  
Chairman



By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein) on January 9, 2014.

A True Record. Attest:

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Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

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

Notice to:

Charles A. Clifford, Esq. (for Appellant)

Donnalyn Kahn, Esq. (for Respondent)