

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

MILES SCHLICHTTE,
Appellant

v.

D-15-179

CITY OF GLOUCESTER,
Respondent

Appearance for Appellant:

David I. Brody, Esq.¹
Office of Joseph L. Sulman
1001 Watertown Street, 3d Floor
Newton, MA 02465

Appearance for Respondent:

Thomas A. Mullen, Esq.
40 Salem Street, Building 2, Suite 12
Lynnfield, MA 01940

Commissioner:

Cynthia A. Ittleman

DECISION

Miles Schlichte (Mr. Schlichte or Appellant) filed the instant appeal at the Civil Service Commission (Commission) on September 25, 2015, under G.L. c. 31, §§ 42 and 43 challenging the decision of the City of Gloucester (Respondent) to suspend him for insubordination for one (1) shift (which was a twenty-two (22) hour suspension). The Respondent issued, and the Appellant served the discipline on August 20, 2015. The Respondent did not hold a hearing and, instead, the parties agreed to seek direct review at the Civil Service Commission (Commission). A prehearing conference was held in this regard on October 27, 2015 at the offices of the Commission. On November 2, 2015, the parties stipulated: 1) The Respondent shall not seek

¹ As Attorney Brody is no longer a member of the same firm, this decision is being sent to the Office of Joseph L. Sulman.

dismissal on the basis of any argument that the appellant failed to submit, in a timely manner or otherwise, any of the requests and/or notices contemplated (sic) G.L. c. 31, §§ 41-42. The appellant shall not argue or offer evidence to the effect that he was denied a right to a hearing or any other procedural right under G.L. c. 31, §§ 41-42 or otherwise.” (Ex. 2) As a result, the appeal was heard by the Commission in the first instance under G.L. c. 31, § 41A. A hearing² was held on this appeal on December 14 and 17, 2015 also at the Commission. At the written request of the Appellant, and without objection by the Respondent, the hearing was open to the public. The hearing was digitally recorded and the parties received a CD of the proceeding.³

At my request at the hearing, the parties produced additional documents after the hearing. On January 6, 2016, the Respondent submitted two (2) such documents. Later on January 6, 2016, the Appellant moved to strike the Respondent’s submittal. On January 8, 2016, the Respondent filed an Opposition to the Motion to Strike. Later on January 8, 2016, the Appellant filed a Reply to Respondent’s Opposition. On January 26, 2016, I issued a ruling indicating that the Appellant’s Motion to Strike was allowed; in addition, that ruling indicated that the Respondent’s post-hearing affidavit of Deputy Chief McRobb was entered into the record and that the Appellant’s affidavit and attachment (comprised of responses of another member of the Gloucester Fire Department to questions written by the Appellant) were entered into the record, assigning limited weight to the attachment since the parties were each permitted one post-hearing affidavit and the attachment was not signed under the pains and penalties of perjury. The parties

² The Standard Adjudicatory rules of Practice and Procedures, 810 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission, with G.L. Chapter 31, or any Commission rules, taking precedence.

³ If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this CD should be used to transcribe the hearing.

filed post-hearing briefs on February 16, 2016. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

Fifty-one (51) exhibits and one (1) document marked “P” for identification were entered into evidence at the hearing and following the hearing, according to my requests at the hearing.

Based on these exhibits, the testimony of the following witnesses:

Called by the Appointing Authority:

- Gloucester Fire Chief Eric Smith;

Called by Appellant:

- Miles Schlichte, Appellant;

and taking administrative notice of all matters filed in the case; pertinent statutes, regulations, policies, stipulations and reasonable inferences from the credible evidence; a preponderance of the evidence establishes the following.

FINDINGS OF FACT

Appellant’s Background

1. The Appellant was appointed to the position of firefighter/EMT at the Gloucester fire Department (GFD) in 1988. He was promoted to Captain in 1997 and made station commander at GFD headquarters. He was promoted to Deputy Fire Chief in 2005. As a Deputy Chief, the Appellant also assumed administrative duties at first in training and then in charge of operations. (Testimony of Appellant)
2. The Appellant has extensive training and education experience, having received two Associates degrees in Fire Technology, a Bachelor’s degree in Fire Administration, and a Master’s degree in Emergency Management. He has also become a Certified Fire Officer

and graduated from the National Fire Academy Deputy fire Program. In addition, the Appellant has received numerous commendations and certifications. (Testimony of Appellant)

3. As Deputy Chief in charge of operations, the Appellant was responsible for day-to-day matters but he was also responsible for updating and maintaining the GFD's policies and procedures – the Standard Operation Guidelines, or SOGs. At the time the Appellant was in charge of operations, the SOGs had fallen out of date for years. Under then-Fire Chief Philip Dench, the Appellant started to re-write a few SOGS by creating a small working group but the process was halted by a union grievance. Thereafter, the Appellant would circulate a couple of the SOGs to everyone in the GFD for their feedback; he would incorporate the feedback, as appropriate, and transmit the revised SOGs to the then-Chief for approval. This process took six or seven years to complete a full review of all of the SOGs. As a result, the Appellant set up an eighteen (18)-month review process.

(Testimony of Appellant)

4. The GFD is headed by a Chief, Assistant Chief and three (3) Deputy Chiefs. Each Deputy Chief is in charge of a Group, which consists of two (2) Captains, three (3) Lieutenants and eighteen (18) firefighters. Including Chief Smith and civilian employees, the GFD employs 79 people, who are located in four fire stations.

(Testimony of Smith)

5. Chief Smith, the current Chief at the GFD, began working there in July 2012, when he was brought in from out of state to be the new Chief. (Testimony of Smith and Appellant) The Appellant had applied for the position of Chief at the GFD. The

Appellant was one (1) of five (5) finalists, out of approximately forty-two (42) applicants but the Respondent selected Chief Smith. (Ex. 32)

6. The Appellant had surgery in February 2015 and returned to work early in July 2015. While the Appellant was out on leave, other officers were tasked with working on the SOG revisions. (Testimony of Appellant)
7. In mid-2015, Chief Smith wanted to accelerate the process by which the GFD's SOGs were reviewed and revised, anticipating a large number of vacancies because of retirements and wanting to have updated SOGs for the new personnel. Believing that update of the SOGs was too much for one person to handle, Chief Smith wanted the GFD officers to be involved in updating the SOGs to expedite the update process. (Testimony of Smith)
8. On July 8, 2015, shortly after the Appellant returned to work from injured on duty leave, Chief Smith sent an email message to an email group called "FDALLOFF", consisting of all officers at the Lieutenant level or higher for a total of eighteen (18) officers. (Testimony of Smith) The message requested volunteers for the SOG review and revision project. The email stated, in full,

Gentlemen,

I am looking to create an (sic) SOG work group to be tasked with expediting the SOG revision process. If you are interested in helping with this please reply and let me know. I envision several collaborative meetings at the beginning of this project to establish the formal process to be used in this effort and to divide up the SOG's (sic) to make the work more manageable. This initial process would then become a predominantly electronic communications (email) with the occasional work group meeting to keep everyone on track and collaborate (sic) on more difficult SOG's (sic) that overlap and need significant work. The group will also be tasked with creating a manageable system to ensure a 12 month review/revision process and assignment to the annual training schedule for all Emergency Operations SOG's (sic). The same system would be used on an 18 month review/revision process and assignments to the training schedule for all Organization and routing Operations SOG's (sic).

Best regards,
Eric
(Ex. 7)

9. Chief Smith did not discuss with the Appellant the contents of his July 8, 2015 email to the GFD officers before sending it. (Testimony of Appellant) Chief Smith did not know that the Appellant had proposed a group for the SOGs review previously. (Testimony of Smith) Earlier on in the SOGs review process, the Appellant created a committee to help him but the union grieved it. After that, the Appellant created a group to review the SOGs that involved everyone in the GFD; the GFD training officer would distribute the SOGs and report any responses back to the Appellant. (Testimony of Smith)
10. At least one officer, Capt. Barry Aptt, responded favorably to Chief Smith's July 8, 2015 email message by responding thereto on the same day. (Testimony of Smith) Capt. Aptt wrote, "I would like to participate. As I go through these, they need to be simplified."
(Ex. 7)
11. On July 9, 2015, the Appellant responded to Chief Smith's July 8, 2015 email message, replying to all on the FDALLOFF group email list, stating, in part,

"OK, so I created a method to have all SOG's (sic) put out for comment and updating over an 18 month period that all personnel have an opportunity to comment on. This method was a result of the union's view/grievance to Chief Dench of my working on SOG's as changing past practices. As part of the monthly training program 10 SOGs a month were time of year specific (ie (sic) Ice Rescue reviewed in NovJ (sic)) were sent out for department review and comment. At least 95% of the comments were valid and were implemented. On other occasions individuals brought forward suggestions that were also implemented, (no turnout gear required on beach calls).

And yes, I took pages and pages out of overly long SOGs and that process can continue if done in an orderly fashion.

Unfortunately, for whatever reason the 10 SOGs a month discussion has not been put out by the training officer for months.

So now we need to recreate the wheel and create a committee to use a shotgun approach to SOG renewal. Priceless.

My suggestion would be simply for me to take over the monthly issuing of 10 SOGs a month for review and incorporate any comments from all tlhe (sic) members instead of forming another committee that will get nothing accomplished. ...
(Ex. 7)

12. On July 9, 2015, Chief Smith responded to the Appellant and the email group stating, in pertinent part,

“I am well aware of the challenges to making change to policies, this challenge exists in every organization and Gloucester is not unique to this. The fact remains that this is part of our job as Officers and we are tasks (sic) with making changes that are needed to improve our system, stay current with changes in our profession and to ensure we train all personnel to those standards. ...

The 18 month review cycle for Emergency Operations SOGs is not frequent enough. An 18 month cycle also does not align with ‘time of the year specific’ review either.

I require the review/revision cycle for all emergency Operations SOGs to be done on a 12 month basis.

The 18 month review cycle is acceptable for the Organization and routine Operations SOGs.

For various reasons the current review program is woefully behind and many SOGs are far out of date. In addition the scope of the current review program fails to take in the big picture and look at the overall consistency and integration of individual SOGs or ensure the subject title actually matches the full content documented in said SOG e.g. SOG 3-1-2 Alarm Response Areas. Since you are very familiar with the SOG’s (sic) this problem may not be noticeable to you but to many others it is difficult to find the specific information in a timely manner. Actually you had a similar problem recently regarding OT eligibility after a member calls off of Sick Leave. In this case you stated you recall hearing about this but couldn’t find it documented in any SOG. This is because it was never added to the hiring SOG after the new contract language went into effect. I reviewed the various revisions that were issued and I am finding this language was in every one of them including the document that was presented to the membership for ratification. My point here is the ‘wheel’ is not rolling along nearly as smoothly as I require so it’s time for some changes. ...

Lastly throwing stones at the Training Officer or other employees is not at all helpful. Your suggestion of having the Operations Officer issue the SOGs for monthly review on the annual and 18 month cycles I require is a much better way of accomplishing the task of SOG review.

The sarcasm is far less than helpful. I caution you to not cross the line of disrespectful and discourteous behavior which is punishable under the Progressive Discipline policy and to some you may have already crossed but this is a separate issue.

Your 'wheel' ... has failed to keep our SOGs current. Since the Operations and Training Deputy could apparently not worked (sic) together to ensure the current review program maintained our SOGs I have no choice but to 'recreate' the wheel and ensure it moves fast enough to get us caught up. Once caught up the modified 'wheel' as you suggest below (with my timeline requirements) can keep us on track. The shotgun approach is actually the method you are using which puts this out before every member but is not getting a serious higher level big picture evaluation when needed.

A small committee that divides the work load can accomplish a lot is (sic) a short period of time and this approach will be used. ... Your suggestion of the Ops Deputy issuing the SOGs for review is dully (sic) noted and once all the SOGs are up to date this process of review/revision may be re-implemented. A committee of 3-4 personnel including the Operation deputy will be created as directed in order to get our revisions caught up and the SOGs back on track, I'm done waiting.

... I agree 100% regarding the additional/new version being saved [on the computer] in the WorkingSOPs folder by personnel other than the Ops Deputy. Consider the request to 'please stop' as an order to all personnel ...
(Ex. 8)

13. Chief Smith objected to the tone of the Appellant's email message and found it to be "in my face". Further, Chief Smith found that having made sarcastic comments to the entire email group of officers, the Appellant was aimed at undermining the Chief's authority. For several days after these email messages, Chief Smith considered the appropriate disciplinary response and he discussed it with Assistant Chief Thomas Aiello. The Chief was concerned that the Appellant's rude, disrespectful and inappropriate comments would have a negative effect on morale if he failed to discipline the Appellant. The

Chief would accept disagreement but not in the manner the Appellant expressed it and not in front of all of the other officers. The Chief's reply to the Appellant's comments were intended to indicate to the other officers that such comments are inappropriate but without issuing a written reprimand in front of the other officers. (Testimony of Smith)

14. At the Commission hearing, the Appellant acknowledged that he wrote in the July 8, 2015 email message that the Chief's comments were "priceless" and that the Chief's comments involved "recreating the wheel" that would use a "shotgun approach to SOG renewal". The Appellant testified that those statements were a mistake, that he regretted making them and that he wished he had not made the statements. However, the Appellant has not apologized to Chief Smith. The Appellant acknowledged that the SOG review process had fallen behind, at least recently. (Testimony of Appellant)
15. The GFD does not have rules specifically regarding use of its email system. (Testimony of Appellant)
16. The GFD has a written progressive discipline policy in section 6-1-6 of the SOGs. (Ex. 6). One of the purposes of the policy is to "[e]stablish the goal of dignity, trust and respect to all members in the workplace." (Ex. 6, s. 1.01) The policy further provides that "[a]ll uniformed and non-uniformed employees of the [GFD] are expected to conduct themselves in a professional, courteous and helpful manner ... Progressively more severe penalties may be imposed on an employee each time any given offense is repeated." (Ex. 6, s. 1.02.A) A Verbal Warning is issued, for example, for "unintentional neglect of equipment, excessive or unusual use of sick leave, patterned tardiness, antagonizing another employee, or performance below acceptable standards." (Ex. 6, s. 103.C) A Verbal Warning "...is not considered official or formal discipline". (Id.) Written

warnings/reprimands are issued “if the employee fails to correct the problem identified in the verbal warning.” (Id.) The next form of discipline is “suspension without pay”, which provides, in part, “[i]t may be exercised immediately following the occurrence of a major offense”. (Id.) The provision regarding a major offense states, in part,

“Immediate dismissal may be warranted when an employee commits one of the following major offenses or another one of similar magnitude. The progressive discipline policy outlined above does not need to be followed and more severe disciplinary action may be instituted immediately for the following major infractions:

1. Verbally or physically harassing or discriminating against any employee or member of the public ...
2. Committing and being convicted of a felony, misdemeanor or other offense involving dishonesty or breach of public trust and confidence even if such offense is committed while off-duty ...
3. Stealing or maliciously destroying property of the City of Gloucester ...
4. Insubordination, which includes rude or discourteous conduct towards a supervisor as well as refusal to comply with a supervisor’s orders. Employees who feel that they have a good reason for not following directions should undertake the work as assigned (unless there is an obvious impropriety or extreme hazard involved) and later register their complaint with a higher supervisor, a Union Representative or the City Director of Personnel. ...”
(Ex. 6, s. 1.03G)(emphasis added)

17. At the Commission hearing, the Appellant admitted that, as a Deputy Chief, he should be held to a higher standard than others at the GFD. He also acknowledged that the SOGs review process had fallen behind, at least recently. (Testimony of Appellant)

18. After receiving the Appellant’s July 9, 2015 email message, Chief Smith read and reread it and discussed it with the Respondent’s human resources office and his Assistant Chief. Chief Smith perceived the Appellant’s comments as a purposeful shot against him and that a senior officer was getting into conflict with him (Chief Smith). Chief Smith saw that all eighteen (18) officers saw the Appellant’s July 9 response. He was concerned about leaving the Appellant’s email message unaddressed since we do not live in a

vacuum and he decided that he could not let it go. He did not want to address disciplining of the Appellant in the email exchange. There are other officers who have made questionable comments but without attacking him; those officers were given verbal reprimands face to face. Chief Smith had seen extremely bad email messages in the system and learned that the prior Chief did not address them. He discussed this with the mayor, who wanted to address the matter. Before issuing the discipline to the Appellant for his July 9 email message, Chief Smith considered the Written Warning that he issued to the Appellant in 2014 and the Appellant's file. Chief Smith did not check the Appellant's file before he disciplined him in 2014. (Testimony of Smith) Prior to 2014, the Appellant had no record of discipline. (Testimony of Appellant)

19. On August 20, 2015, Chief Smith issued the Appellant a "Notice of Suspension without pay", with the subject title "Rude, Discourteous and Unprofessional behavior", that was copied to the Appellant's personnel file, Asst. Chief Aiello, Gloucester Personnel Director Polzin, and union President Thomas Aiello. The notice states, in part,

"You are suspended without pay immediately following this discipline meeting. This action is being taken as a result of your rude, discourteous and unprofessional behavior in an email reply you sent to all FD Officers on Thursday July 9th at 5:28 PM, RE: SOG revision process[.]

In the attached copy of the email ... you wrote;

'So now we need to create the wheel and create a committee to use a shotgun approach to SOG renewal. Priceless.'

This written comment coupled with numerous other written comments was clearly meant to be rude and discourteous. This unprofessional and insubordinate behavior violates SOG 1-6-1 sections 1.01C, 1.02A, 1.03A. 2&3, 1.03G3. Since this is the second documented instance of unacceptable conduct (the first resulted in a sustained Written Warning), the next step of discipline is Suspension without Pay. In accordance with the progressive discipline policy (SOG 1-6-1 General Conduct/Progressive Discipline) you are being suspended without pay for the remaining portion of today's (8/20/15 day and night shifts. Further more you are

reminded of the progressive discipline policy and that the next step for an infraction of a similar nature will result in a five (5) shift suspension without pay. Further violations could lead to longer suspension without pay, demotion and ultimately termination.

... You are reminded of your right to grieve this discipline or request a hearing before the Appointing Authority within 48 hours of today 8/20/15. Attached to this notice is a copy of M.G.L. ch. 31 section (sic) 41-45.”
(Ex. 3)

Chief Smith and the Appellant both signed this notice, acknowledging the Appellant’s receipt of the document. (Id.)

20. Chief Smith did not give the Appellant this notice of suspension earlier because the Appellant was on vacation on eleven (11) of the thirteen (13) dates he was scheduled to work after he sent his comments on July 9, 2015. In addition, during that thirteen (13)-day time period Chief Smith and the Appellant were both at work only on July 13, 2015, by which time Chief Smith had not yet determined the manner in which he would discipline the Appellant. (Testimony of Smith; Ex. 31)

21. The Appellant grieved his discipline, asserting that the suspension was “excessive” and asking for the suspension to be removed. (Ex. 29)

22. On August 20, 2015, Chief Smith sent a memorandum to union President Stephen Aiello and to the Appellant. The Appellant’s grievance was marked Grievance #15-4. Chief Smith wrote, in part,

“ ... After careful review of this grievance I find the discipline to be appropriate and the grievance to be without merit. Grievance 15-4 is denied at this step. In accordance with Article 21 of the CBA Deputy Schlichte may appeal this decision to the Mayor’s designee (Personnel Director Polzin) under Section c. within seven (7) days”
(Ex. 30)

23. On September 15, 2015, the Gloucester Director of Personnel, Ms. Polzin, wrote to union President Stephen Aiello regarding the Appellant's August 20, 2015 grievance, copying the Appellant, Chief Smith and two (2) others, stating,

“Thank you for extending my response time for step two of this grievance. I also appreciate the input given to me by you regarding your assessment of the situation. However, I agree with Chief Smith's resolution at step one and deny the grievance at step two.

Deputy Schlichte, ignoring previous warnings given to him regarding his behavior toward Chief Smith, made inappropriate remarks in an email that unfortunately also reached a large segment of the department. The remarks were sarcastic and given the discipline of the fire services, insubordinate. I concur with the denial and with the punishment imposed.”

(Ex. 4)

24. The Appellant's union did not pursue arbitration of his grievance. (Testimony of Smith)

Prior Discipline of Appellant

25. On June 26, 2014, the Appellant went into Chief Smith's office to address his concerns about the bid berth process for Deputy Chiefs. By a memorandum drafted the same day, Chief Smith issued a Written Warning to the Appellant stating, in part,

“On Wednesday 6/24/14 (while off duty) you entered my office visibly upset and engaged me in a conversation that was both confrontational and unprofessional in your conduct. You used an elevated volume level, condescending tone, were clearly upset and visibly angry. Your conduct was such (sic) we took our conversation into another room as it was inappropriate in front of the Financial Coordinator. Upon entering into the Deputies (sic) Dorm near my office you continued the same confrontational and unprofessional conduct during the rest of the conversation. Part way through you stepped into the hallway to make a copy of the Bid Berth document and [came in contact with⁴] the dorm door adding a physical act to your unprofessional conduct.

As our conversation continued in the hallway and you continued to conduct yourself in the same unprofessional and confrontational manner Acting Deputy Tom LoGrande came over and asked you to ‘tone it down’ and ‘use some decorum’ as we were being heard by other personnel on duty personnel (sic) and

⁴ The parties disagree on the nature of the Appellant's contact with the door, with the Respondent arguing that the Appellant “kicked” the door and the Appellant arguing that he “bumped into” the door when he “stormed past it”. (Exs. 11 and 12)

it was unprofessional. You sternly dismissed Acting Deputy T. LoGrande in the same confrontational manner you used while addressing me.

Due to your unacceptable behavior and conduct you are receiving a Written Warning in accordance with department policy SOG-1-6-1 General Conduct/Progressive Discipline. ... [The Written Warning] will be placed in your Department file and forwarded to Personnel to be place (sic) in your Personnel file “
(Ex. 11)

The Written Warning was initialed by the Appellant on July 4, 2014, ten (10) days after this incident, indicating his receipt thereof. (Id.)

26. On July 4, 2014, the Appellant wrote to union President Stephen Aiello stating, in part,

“... I will state right up front that the Chief’s description of my actions that day is fairly accurate. As the Chief noted:

- I was extremely upset at having been informed through the grapevine that I had been arbitrarily assigned to a group without being allowed to select my berth as every other department member had. I had called the chief the night before to confirm that it was only a rumor but the chief did not return my call. As you are aware, that arbitrary assignment was the basis for a separate grievance.
- I admit the next morning my behavior was unprofessional with an elevated volume due to my extreme level of disbelief. It was not intended to be confrontational or condescending. If it was viewed that way, I apologize.
- I recall that I was the one that indicated to the chief that we should take the conversation out of his office so as to not be in front of the Financial Coordinator.
- I do recall the dorm door crashing but I recall it more as my hip bouncing off of it as I stormed past it.
- Captain LoGrande did insert himself into the conversation where his comment was to tone it down because ‘they can all hear you’ as if I should have something to hide. I did respond that I had nothing to hide and informed the Captain that I was talking to the Chief and did not need him there.

However, despite agreeing with the chief regarding the overall incident, I am grieving the Chief’s Written Warning. I wrote the department’s first ever Progressive Discipline Policy based on other Fire Department’s (sic) policies to provide guidance to the officers, standardize the issuing of discipline, and take the subjectivity out of the process as much as possible. I have paraphrased the pertinent parts of ... SOG 1-6-1 General Conduct/Progressive Discipline.

C. Verbal Warning

A verbal warning is issued in a conference format, in which the problem is identified, and the options for correcting the problem are given. In addition, the Department Head or supervisor may offer assistance in helping the employee resolve the cause of the problem ... Instances where a verbal warning may be appropriate may include unintentional neglect of equipment, excessive or unusual use of sick leave, patterned tardiness, antagonizing another employee, or performance below acceptable standards.

D. Written Warning/Written Reprimand

A written warning/reprimand ... is the next step in the progressive disciplinary process if the employee fails to correct the problem identified in the verbal warning. ...

Therefore, by using the examples in our own SOG on Progressive Discipline I believe that I have illustrated that a Written Warning is not warranted for my actions on June 26, 2014.

- I have never been spoken to by the Chief in the past regarding any of my conduct. In fact, there is no (sic) a single warning or reprimand of any sort in my entire personnel folder.
 - On the day in question, I was never asked by the Chief to lower my voice or control myself in any manner. If I had been, I probably would have caught my poor behavior and lessened my tone.
 - The Chief and I discussed the June 26th event on July 4th ... I agreed that my behavior that morning was a problem and that it shouldn't happen again.
 - I agreed that the Fire Chief was entirely appropriate in his need to take appropriate action.
- ... as a Deputy Chief, I should be held to a higher standard than the lesser ranks.

Therefore, my suggested resolution to this grievance would be greater than the informal warning 'pass' that might be appropriate for a firefighter yet less than the Written Warning the Chief has issued.

I believe that an appropriate level of discipline for a Deputy Chief for this offense would be a Verbal Warning ...
(Ex. 12)(**emphasis** in original)(emphasis added)

The sample Verbal Warnings that the Appellant attached to this memo were for two (2) different firefighters in 2008 for not wearing turnout gear. (Id.)

27. By memorandum dated July 10, 2014 from Chief Smith to union President Stephen Aiello and the Appellant, Chief Smith wrote, in part,

“I have received a grievance dated 07/04/14 addressed from [the Appellant] to President Stephen Aiello ... this grievance is regarding a Written Warning issued to Deputy Schlichte following his behavior and actions on 6/26/14. ... On 7/4/14, I discussed this incident with Deputy Schlichte and as he wrote in his grievance he agrees the incident warrants discipline however he did express he felt the discipline was started at too high of a step.

The discipline I issued was in line with the offense committed. Under SOG 1-6-1 G., specifically paragraph 4. As such the following excerpt from SOG 1-6-1 applies.

G. Major Infractions

Immediate dismissal may be warranted when an employee commits one of the following major offenses or another one of similar magnitude. The progressive discipline policy outlined above does not need to be followed and more severe disciplinary action may be instituted immediately for the following major infractions:

...Insubordination, which includes rude or discourteous conduct towards a supervisor ...

In addition many of the comments documented in the grievance by Deputy Schlichte are inaccurate and have no bearing on the issue at hand. I will not address those in my Step 1 answer but these will be discussed in the near future to clarify and correct the inaccuracies.⁵

After careful review of this grievance I find it to be without merit and the grievance is denied at this step.

In accordance with Article 21 of the CBA Deputy Schlichte may appeal this decision to the Mayor’s designee (Personnel Director Polzin) under Section c. within seven (7) days ...
(Ex. 13)(*emphasis* in original)(emphasis added)

28. Personnel Director Polzin wrote to the Appellant on July 29, 2014, denying the

Appellant’s grievance of the Written Warning issued by Chief Smith. Ms. Polzin wrote, in part,

“I find that Chief Smith was warranted in issuing a written disciplinary warning to you based on your behavior and conduct on 6/26/14. By your own admission, you raised your voice, acted in an unprofessional manner and stormed out of the room. The Department’s SOG 1-6-1 defines a Major Infraction to include ***insubordination, which includes rude or discourteous conduct towards a supervisor as well as refusal to comply with a supervisor’s orders.***” Your behavior toward Chief Smith, Captain LoGrande and your fellow firefighters was

⁵ There is no indication what inaccuracies were at issue or how and when they were addressed but these matters are of no concern here since the subject of the instant appeal is the Appellant’s 2015 discipline, not his 2014 discipline.

disruptive, unprofessional and rude. As you mention in your memo, as a Deputy Chief you are held to a higher standard. A written warning is appropriate discipline for your behavior.”

(Ex. 28)(emphasis in original)

29. The 2014 discipline occurred in the following context. Following months of planning, the GFD changed from a forty-two (42)-hour work week with four (4) groups under four (4) deputy chiefs to a fifty-six (56)-hour work week, with three (3) groups under three (3) deputy chiefs effective July 1, 2014. All members of the GFD below Deputy Chief were allowed to bid for a berth, by seniority in rank, to join one (1) of the three (3) new groups⁶ to be headed by one (1) of three (3) Deputy Chiefs. On June 9, 2014, the Union grieved the exclusion of Deputy Chiefs from the bid process stating, in part, “[t]he resolution to this Grievance is to afford the personnel assigned to the rank of deputy chief the ability to bid for their berths as was afforded to all other personnel.” (Exs. 34 and 40; Testimony of Smith)

30. Chief Smith allowed the grievance seeking to include the Deputy Chiefs in the bid berth process on the day he received it. In allowing the grievance, Chief Smith wrote, in part,

“The resolution to this Grievance is to afford the personnel assigned to the rank of Deputy Chief the ability to bid for their berths as was afforded to all other personnel”.

As the Personnel Deputy is out of Town the bid shall be posted by the Deputy on Duty tomorrow, 06/10/14 at 1200 hours, closing on 06/24/14 at 1200 hours. This is being done to expedite completing the bid berth process in advance of the group consolidation and schedule change on July 1st, 2015.”

(Ex. 35)(emphasis in original)

31. On June 10, 2014, as the Deputy on duty at the time, the Appellant was expected to, and did issue a notice to all personnel about the grievance and approval thereof adding, in part,

⁶ Then-Deputy Chief Thomas Aiello was appointed Assistant Chief. (Testimony of Smith)

“The following bid berth is being posted as per contract article 21, section 4. The bids will be closed Tuesday June 24 at 1200 hours.

Deputy Fire Chief Steven Aiello- Please select whatever group you would like.
Group 1
Group 2
Group 3

Please sign below to confirm your selection in order to be eligible for this berth.
(the copy of record is the one in the Must Read, you must sign that copy)

On making your selection, the next senior Deputy Chief shall be allowed the same opportunity to select their group.”
(Ex. 36)(emphasis added)

32. Deputy Chief Aiello signed first and selected Group 3. Deputy Chief McRobb signed second, selecting Group 1. The Appellant did not sign and select a Group, asserting that the bid berth process did not operate as it should have. (Exs. 37 and 38; Testimony of Appellant)

33. By a June 25, 2014 email from Chief Smith to all officers, Chief Smith advised,

“The posted Bid Berth for the Deputies closed on 6/24/14 at 1200 hours and is attached. Although Deputy McRobb after the (sic) closed this at least indicates his preference which was not done by Deputy Schlichte on the posted bid berth document ...

The following bid berth assignments are effective 7-1-14 at 0700. If any of the Deputies choose to swap spots by mutual agreement notification must be made ASAP so the required changes to our various documents ... can be made.

Group 1 – Deputy A. McRobb

Group 2 – Deputy M. Schlichte

Group 3 – Deputy S. Aiello”

(Ex. 37)

At the time of this bid berth, Deputy Chief Stephen Aiello was the senior Deputy Chief, the Appellant was second most senior, and Deputy Chief McRobb was the most junior.

The Appellant wanted to lead Group 1. (Ex. 38; Testimony of Appellant)

34. By memorandum dated June 30, 2014 from the Appellant to union President Stephen Aiello, the Appellant asked the union President to grieve the bid berth process for Deputy

Chiefs so that he (the Appellant) could select the Group to which he would be assigned.

(Ex. 38)

35. Chief Smith received a copy of the Appellant's memorandum to the union President concerning the bid berth process and he (Chief Smith) responded to the union President and the Appellant by memorandum dated July 2, 2014, stating, in part,

“ I have received a grievance dated 6/30/14 addressed from (sic) [Appellant] to President [Aiello]. This grievance is apparently being submitted by [the Appellant] individually and not the executive board. After careful review I find there is no merit to this grievance and it is denied ...

In accordance with Article 21 of the CBA [the Appellant] may appeal this decision to the Mayor's designee (Personnel Director Polzin) under Section c. within seven (7) days”

(Ex. 39)(emphasis added)

36. By memorandum dated July 29, 2014, Ms. Polzin denied the Appellant's 2014 grievance concerning the bid berth process for Deputy Chiefs. The memorandum addresses several of the Appellant's specific arguments and responds to them in some detail, indicating that she was informed of the Appellant's concerns and addressed them. (Ex. 40)

37. On July 31, 2014, then-Mayor Carolyn Kirk wrote to the Appellant to deny his grievance request concerning the bid berth process for Deputy Chiefs, stating,

“Per your request, I have personally reviewed your grievance about the bidding of berths for Deputies. I am granting this exception, and it is not intended to be precedent setting. I have also reviewed the response prepared by our Personnel Department in conjunction with the Legal Department. I concur with the response prepared by Sally Polzin dated July 29, 2014.

Further, as you are aware, it is important to adhere to the proper chain of command and grievance procedure as laid out in the Collective Bargaining Agreement (CBA). With that said, while the CBA is an important tool to resolve issues, so are strong personal communication and relationship-building skills. I urge you to find a way to work with your colleagues more positively and to conduct yourself in a respectful manner with the Chief in all matters.”

(Ex. 46)

38. The Appellant's union did not pursue arbitration of the Appellant's 2014 discipline or the 2015 discipline. (Testimony of Smith)
39. In the spring of 2015, the Appellant also communicated directly, or through his attorney, with a member of the Gloucester City Council and Mayor Sefatia Romeo Theken, about the Deputy Chief bid berth process. (Ex. 41-43) The Respondent's General Counsel responded to the Appellant's letter to Mayor Theken, stating that the Mayor was "not in a position to circumvent the CBA and meet with [the Appellant] on this issue." (Ex. 43)
40. On July 13, 2015, Chief Smith called the Appellant to his office to tell him to sign a memorandum to be placed in his file regarding three (3) matters, along with documents relating to the three (3) matters, including the Appellant's contact with the Gloucester City Council and Mayor Theken concerning the 2014 bid berth process for Deputy Chiefs, and a message that the Appellant left in Chief Smith's office mailbox that states, "Chief, one of my pet peeves is computer reminded cards from my accountant, business, the mayor's office, etc. ... [p]lease save the paper and don't send any more". (Ex. 44) The Appellant told Chief Smith that the documents should not be in his file since they were unrelated to his job performance. On that basis, Chief Smith changed his mind and said he would shred the documents. At the Commission hearing, Chief Smith acknowledged that the Appellant was correct in regard to the memo and related documents and that he (Chief Smith) was wrong. (Id.; Testimony of Smith)

Conduct of Other Members of the GFD

41. On May 9, 2013, the Appellant sent a Verbal Warning to a firefighter with the subject title "Unprofessional and insubordinate conduct". (Ex. 14)(emphasis added). Specifically, the Appellant wrote, in part,

“On this date I attempted to ask for your input on the ongoing update of the department SOG related to the Fire Inspector position which you currently occupy. I had previously placed earlier draft SOGs on this topic in your mailbox for you to review and comment on and I had gotten no response.

Today while you were in my office with [a Captain and a Coordinator] present I stated to you that I was working on what was probably the final draft of the SOG regarding the Fire Inspector position and I asked if you had anything to submit ... Your response was to state, ‘I never read those things’ in a derogatory tone. While making this comment you dismissed me with a wave of your hand while you turned on your heel and walked out of the office. Your comment and actions are unprofessional ...

I have spoken to you about your tone and attitude towards officers in the past with retired Chief Dench present. ...

Since this is the second time I have spoken to you about your tone and comments towards myself in my office in the presence of others, this is a verbal warning ...

However, the next time you disregard department policy regarding appropriate conduct towards myself or any other department officer you will be issued a written warning and be subject to further disciplinary action.”

(Id.)

Chief Smith agreed with this discipline. (Testimony of Smith)

42. Chief Smith has not issued a Written Warning or suspension to anyone beside the Appellant at the GFD since he arrived in 2012. (Testimony of Appellant)

43. Chief Smith has handled a variety of complaints or comments from other members of the GFD concerning, for example, scheduling, housekeeping, and facilities. Chief Smith did not find that such complaints or comments were insubordinate and he counseled the members of the GFD who made the complaints or comments if he deemed it appropriate. However, the complaints and comments did not involve a direct confrontation with Chief Smith on a substantive matter in front of all of the GFD officers like the Appellant’s July 2015 email message, the effect of which was to challenge the Chief’s authority.

(Testimony of Smith; Exs. 24 and 26; Administrative Notice)

Applicable Legal Standard

G.L. c. 31, §41 through §44, set forth the process through which a tenured civil service employee is typically disciplined by an appointing authority and, if aggrieved by that decision, entitled to appeal to the Commission for a de novo review of the appointing authority's decision. This appeal, however, arises from a rarely used section of civil service law contained in G.L. c. 31, § 41A, by which an employee and the appointing authority, by mutual agreement, may submit the matter directly to the Commission for hearing in the first instance. Section 41A provides:

“Upon the request of the appointing authority and a tenured employee, who is entitled to a hearing [by the appointing authority] pursuant to the first paragraph of section forty-one, a hearing before a disinterested hearing officer, designated by the chairman of the commission, may be held in lieu of a hearing before the appointing authority. Such a hearing officer shall make findings of fact and may make recommendations for decision to the commission. Following the decision of the commission, there shall be no appeal pursuant to the provisions of section fourth-three; provided however, that a petition to review may be filed pursuant to the provisions of section fourth-four. All requirements relative to written notice and the holding of hearings pursuant to this section shall be governed by those set forth in section forty-one.”

Id.

As noted in Condez v. Town of Dartmouth, 25 MCSR 515 (2015), the Commission is not aware of any judicial precedent concerning the standard of review or procedure for hearings held pursuant to Section 41A. Therefore, the decision in this matter will be analyzed under the same standards that the Commission applies to its de novo review of appeals brought under Section 43.

The role of the Commission is to determine whether the Appointing Authority proved, by a preponderance of evidence, just cause for the discipline imposed. G.L. c. 31, § 43. *See, e.g.*, City of Cambridge v. Civil Serv. Comm'n, 43 Mass.App.Ct. 300, 304 (1997); School Comm. of Brockton v. Civil Serv. Comm'n, 43 Mass.App.Ct. 486, 488 (1997); Town of 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.* (2000); McIsaac v. Civil Serv. Comm'n, 38 Mass App.Ct.473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 334, *rev.den.*, 390 Mass. 1102 (1983).

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 Serv. 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' " 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" of 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

An action is "justified" if "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 Serv. v. Municipal Ct., 359 Mass. 211, 214 (1971); Cambridge v. Civil Serv. 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). An appointing authority's burden of proof is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928).

The Commission must take account of all credible evidence in the record, including

whatever may fairly detract from the weight of any particular evidence. *See* Mass. Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001). It is the purview of the hearing officer to determine the credibility of testimony presented to the Commission. *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. Ret. 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, decision relying on an assessment of their relative credibility cannot be made by someone not present at the hearing).

Analysis

The Respondent has established by a preponderance of the evidence that it had just cause to discipline the Appellant. First, the Appellant does not dispute what he wrote in the July 9, 2015 email message that he sent to Chief Smith and the officers' group email message. While describing in the email message his efforts to update the SOGs in response to Chief Smith's email message on the topic, including the history that the union grieved the process, and rejecting Chief Smith's suggestion to form a committee to enhance the process, the Appellant added, "[s]o now we need to recreate the wheel and create a committee to use a shotgun approach to SOG renewal. Priceless." Ex. 7. There can be no serious doubt that these statements reflected, intentionally or otherwise, a direct challenge to Chief Smith's authority, which is not acceptable in a paramilitary organization like a Fire Department. Such conduct, in the context of a group email of all of the GFD officers, constituted substantial misconduct which adversely affects the public interest by impairing the efficiency of public service. The Chief was required to prepare a detailed response to the Appellant's words without disclosing that the

Appellant's conduct may be subject to discipline and to prepare an appropriate discipline so that the Chief's ability to effectively operate the GFD in the longer term would not be impaired.

As noted above, the Appellant does not dispute that he wrote what he did in his July 9, 2015 email message and, in fact, he has voiced regret for having written and sent it, although he has not apologized to the Chief therefor. The gravamen of the appeal is the discipline issued for the Appellant's email statements. The Appellant's argument in this regard begins with an analysis of events one year earlier. In 2014, the Appellant was issued a Written Warning for yelling at the Chief, loud enough that others in the GFD could hear, first in the Chief's office and then in the hallway, and sternly dismissing a fellow officer, about the bid berth process for Deputy Chiefs. Chief Smith issued the Appellant a Written Warning for his conduct. The Appellant asserts that the 2014 Written Warning should have been a Verbal Warning, and that, consequently, the next step in progressive discipline in 2015 would have been the issuance of a Written Warning, not a suspension. The Appellant's 2014 discipline is not the subject of this appeal. That notwithstanding, Chief Smith indicated that in deciding what form of discipline to issue to the Appellant in 2015, he considered, among other things, the Appellant's 2014 discipline. In 2014, Chief Smith found that the Appellant was confrontational and unprofessional to the Chief and to a fellow officer, which conduct was "unacceptable". As the Deputy Chief in charge of updating the SOGs and who has worked on them for years, the Appellant should have known better. In fact, in 2013 he issued a Verbal Warning to a firefighter for insubordination to the Appellant in front of one or two other officers. Moreover, the Appellant acknowledged that he should be held to a higher standard as an officer. Although the Appellant was permitted, under SOG 1-6-1, to issue discipline without regard to progressive discipline for insubordination, he chose not to. That Chief Smith chose to do otherwise with

regard to the Appellant's insubordination does not undermine it. This SOG clearly indicates that a Verbal Warning is issued for unintentional neglect of equipment, excessive sick leave, and related matters. The Chief found in 2014 that the Appellant's conduct did not fall into that category. Similarly, the Chief found in 2015 that the Appellant's conduct did not fall into that category. What the Chief found was that the Appellant's conduct in 2015 was discourteous and rude toward a supervisor, which conduct is included in the description of insubordination in SOG 1-6-1. As insubordination is listed as a "major offense" in this SOG, the Chief was not required to follow progressive discipline.

The Appellant's argument that he is the victim of disparate treatment and bias fails. While it appears to be accurate that he is the only member of the GFD who has been disciplined for insubordination since Chief Smith arrived in 2012, twice at that, the examples of the Chief's responses to the conduct of other members of the GFD in other email messages are not comparable. I thoroughly reviewed all of the examples of complaints or comments by other members of the GFD that the Appellant referenced. Chief Smith counseled the members of the GFD where he deemed it appropriate. These examples, unlike the Appellant's July 2015 email message to Chief Smith, do not involve a direct confrontation to, and challenge of Chief Smith on a substantive matter in front of all of the other officers. I find it troubling that the Appellant cannot distinguish his conduct from the conduct in the examples he cited.

The Appellant's blatantly discourteous and rude words in his July 9, 2015 email message to his supervisor, Chief Smith, copied to all of the GFD officers, were appropriately deemed insubordinate and provided just cause for discipline. Under the GFD SOG 1-6-1, insubordination is a "major offense" and it is within Chief Smith's authority to discipline the Appellant therefor with a one (1)-day suspension.

Conclusion

For the foregoing reasons, the Appellant's appeal, docketed as D-15-179, is hereby

denied.

Civil Service Commission

/s/ Cynthia A. Ittleman

Cynthia A. Ittleman

Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 16, 2017.

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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d)

Notice to:

David I. Brody, Esq. (for Appellant)

Thomas A. Mullen, Esq. (for Respondent)