

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

One Ashburton Place: Room 503
Boston, MA 02108

(617) 727-2293

BEVERLY J. FREEMAN,

Appellant

v.

D-17-017

BOSTON FIRE DEPARTMENT,

Respondent

Appearance for Appellant:

Kevin R. Mullen, Esq.
15 Foster Street
Quincy, MA 02169

Appearance for Respondent:

Thomas H. Costello, Esq.
City of Boston, Office of Labor Relations
Boston, MA 02201

Commissioner:

Paul M. Stein

DECISION

The Appellant, Beverly J. Freeman, appealed to the Civil Service Commission (Commission), pursuant to G.L.c.31,§43 contesting her one tour (24 hour) suspension by the Boston Fire Department (BFD) from her position as Fire Alarm Operator.¹ A pre-hearing conference was held at the Commission's Boston offices on February 14, 2017. The BFD moved to dismiss the appeal as untimely, which the Appellant opposed. After hearing, on March 22, 2017, the motion was denied. A full evidentiary hearing was held on May 5, 2017. The hearing was declared private. Witnesses were sequestered. The motion hearing and the full hearing were digitally recorded and CDs of the recording was provided to the parties.² Fourteen exhibits were received into evidence (Exhs. 1 through 14) and one document was marked for identification (Exh. 15ID). Both parties submitted proposed decisions on July 7, 2017.

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

² If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CDs to supply the court with the written transcript of the hearings 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.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by the Appointing Authority:

- John Walsh, BFD Chief of Operations
- Peter Clifford, BFD Superintendent
- Steve Keeley, BFD Assistant Superintendent
- Supervisor X, BFD Principal Fire Alarm Operator

Called by the Appellant:

- Beverly J. Freeman, Appellant, BFD Fire Alarm Operator

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Beverly J. Freeman, holds the tenured civil service title of permanent full-time Fire Alarm Operator (FAO) in the Fire Alarm Division of the BFD, a position she has held since October 2001. Prior to the incident involved in this appeal FAO Freeman has never been the subject of any discipline. She is considered a “good employee”. (*Exh. 6 [Ch.21.1-21.25];*

Testimony of Appellant, Keeley & Clifford)

BFD Fire Alarm Operations

2. The BFD Fire Alarm Division, currently under the command of Superintendent Peter Clifford, has responsibility for the BFD communication center, a 24/7 operation which receives emergency (911) calls for service, dispatches the appropriate BFD responders, and communicates with the responders en route and on-scene of an incident. (*Exh. 6 [Ch.21.1-21.25]; Testimony of Appellant, Clifford & Keeley)*

3. The Fire Alarm Division runs four work groups, with a staff of approximately six personnel on each shift, typically one Principal FAO, one Senior FAO and up to five FAOs per shift. The shift supervisor (operator-in-charge) is the senior officer on duty, usually the Principal FAO or the Senior FAO. (*Exh. 6 [Ch.21.12]; Testimony of Clifford, Keeley)*

4. FAOs rotate assignments approximately every two to three hours among three main duties: (a) Call-takers, who answer incoming 911 calls, identify the location and nature of the emergency, classify (Type Code) the emergency and enter the appropriate Type Code/Subtype into the computer system (CAD) which automatically transmits the information for further action by Dispatch; (b) Dispatchers, who are responsible to dispatch the apparatus and personnel, based on the location and the BFD's Basic Response Pattern associated with the assigned Type Code/Subtype for the incident involved; and (c) Radio, who communicate directly with the BFD incident command and other responders for the duration of the incident. Audio recordings are kept of all 911 and dispatch calls, and all transmissions, from initial alarm to closure are also entered into the CAD, from which a written record (Boston Fire Incident History) can be produced. (*Exhs. 7 through 12; Testimony of Appellant, Clifford, Keeley & Supervisor X*)

5. The BFD Basic Response Pattern, promulgated by order of the Fire Commissioner, provides a detailed set of protocols for handling hundreds of different kinds of emergency calls and incidents. Emergencies are coded by Type (e.g., Alarm, Bomb, Burn, Cardiac, Fire, Hazmat, etc.) and, within each Type, by Subtype. The protocols prescribe a precise level of response for any given incident, depending on the Type Code/Subtype, and the characteristics and location of the incident. (*Exhs. 6 [Ch.21.26] & 7; Testimony of Clifford & Keeley*)

6. The "ALARM" Type Code means the receipt of a report that an alarm device was triggered and includes various Subtypes of medical, residential and institutional alarms (e.g., AFBEDU, FBHOS, AFBHOT). Reports from a licensed central station alarm company that it received a signal that an alarm had been triggered at one of its covered properties are coded as ALARM/ACS. The Alarm Type incident carries the lowest "Alarm Level" (0), an "Investigative" level response, generally, meaning that the BFD will dispatch "1+1", meaning

the one Engine and one Ladder (or 1 Tower Ladder if a high-rise structure is involved) from the nearest available fire station. (*Exh. 7; Testimony of Appellant, Clifford, Keeley & Supervisor X*)

7. The “FIRE” Type Code includes a variety of Subtype codes specific to the type of property involved (e.g., PLANE, SHIP, TRAIN, etc.) The FIRE Subtype Code for a Building Fire is “STB”, which stands for “Strike the Box”, and may carry an Alarm Level from 1 (First Alarm Fire) through 9 (Ninth Alarm Fire). (*Exh. 7*)

8. A building fire ALARM/STB Level 1 triggers the dispatch of 3 Engines, 2 Ladder Trucks, a Rescue (Ambulance), and a District Chief to assume incident command. In the case of a “high rise” building fire, additional personnel, including an evacuation chief and safety officer are also dispatched. (*Exhs. 6 & 7; Testimony of Clifford & Keeley*)

9. Responders to an STB alarm assume they have an “active” building fire situation, and the “mindset” is different than when responding to an “ALARM/ACS” investigatory alarm. From the moment they are dispatched by an STB alarm, BFD responders are evaluating the staging, building access and other strategic planning. In addition, details about the building stored in the CAD are radioed to the responders, so that they are apprised of the precise location of standpipes and are aware of any particular dangers or issues that could affect fire suppression strategy or safety of fire personnel or others. (*Exh. 10; Testimony of Clifford & Keeley*)

10. FAOs receive training upon hire (although such training did not begin until after FAO Freeman was hired). In 2015, newly appointed Superintendent Clifford implemented additional OJT training exercises, including refreshers on proper type-coding of emergencies as well as issues about potential liability to the BFD for the work that FAOs perform. A Training Officer was added to the Fire Alarm Division in 2016. FAO Freeman attended these training exercises. (*Exh. 13; Testimony of Appellant, Clifford & Supervisor X*)

11. Chapter 21 of the BFD's Rules and Regulations contains, among other things, the following rules pertaining to the duties of FAOs:

21.13. The operator-in-charge of a watch shall normally be a Principal Fire Alarm Operator. He/she shall be responsible for the efficient operation of the Fire Alarm Office. All operators serving with him/her shall be subject to his/her orders. In the absence of a Principal Fire Alarm Operator, the designated Senior Fire Alarm Operator shall assume the duties of a Principal Fire Alarm Operator.

21.14. The Principal Fire Alarm Operator will assign operators to various duties as required and supervise operations to see that the work of the Fire Alarm Office is performed efficiently and properly. . . .

21.18. Fire Alarm Operators shall acquire a thorough knowledge of all signals, calls, and location of fire companies and apparatus box locations and circuits, etc.; he/she shall familiarize themselves with and comply with the department Rules and Regulations and orders as issued applying to their duties.

21.19. All operators shall be alert and vigilant for all alarms, signals, radio, and telephone calls. . . . Upon the report of "smoke or fire showing" by the first arriving apparatus, the alert signal shall be sounded and all operators shall report to the Operation Area.

21.20. Operators shall give promptly all notifications required by the Rules and Regulations, and as otherwise ordered by the Fire Commissioner, Chief of Operations, Deputy Fire Chief of the Emergency Management Division and the Superintendent.

21.21. In the transmission of official or business messages, direct communication shall be established between the persons concerned, and only when direct communications cannot be made shall messages be accepted to be relayed.

21.26. Alarms shall be transmitted immediately upon receipt, subject to the instructions of the Basic Response Pattern as promulgated by the Fire Commissioner. . . . When in doubt as to whether or not the subsequent alarm received is for the same fire, the operator in charge shall use his/her discretion Operators shall not assume that every adjacent box is for the same fire. . . .

21.28. If the fire is reported in a building, after dispatching the nearest engine company and ladder company, the nearest box shall be transmitted subject to the instructions of the basic response pattern.

(Exh. 6 [Ch.21])

12. FAOs understand that, in their line of work, "seconds matter" and "time is of the essence." An operator may defer to a supervisor for advice, but, preferably, the FAO should first initiate an alarm and then confer with the supervisor. The FAO has a button that redirects a 911 call to a supervisor for immediate handling. In-person verbal contact is discouraged because it

means an operator must leave his/her station, it causes further time delay and in-house communications, unlike 911 or radio calls, are not recorded. (*Testimony of Clifford & Keeley*)

13. Should circumstances arise after resources have been dispatched that indicate the alarm level of the emergency was not as serious as originally coded, procedures allow for the alarm to be downgraded and allow apparatus to be diverted, called back or ordered to “Code C” response (meaning slow down and turn off the lights and sirens). Superintendent Clifford recited a saying that came up in the recent liability training he had initiated, to the effect: “You never get in trouble for sending more; you only can get in trouble for sending less.” Assistant Superintendent Keeley put it: “Better safe than sorry.” (*Testimony of Clifford & Keeley*)

The October 3, 2016 Incident

14. FAO Freeman was working on October 3, 2016 as the Call-Taker, when she received an incoming 911 call at 12:39:11 p.m. from a licensed central alarm company’s answering service operator who relayed a report from a technician working at 115 Chauncy Street, one of the alarm company’s monitored buildings, who was then on-scene testing the building generator. The call, which lasted about a minute, includes the following recorded exchange between FAO Freeman and the alarm company caller:

FAO: Boston Fire, what’s your emergency?

Caller: Hi. It’s 115 Chauncy Street.

FAO: 115 Chauncy?

Caller: Yeah.

FAO: Community Builders?³

Caller: Yup. Um, *they have a system on test, but I just spoke to the gentleman and he says there is smoke in the building so we believe there’s a real fire. He was doing a generator test, so he wanted to know if you guys could come down and check it out.*

FAO: OK. 115 Chauncy Street?

Caller: Yup.

FAO: What’s your call back number?

³ The CAD system automatically identifies the caller as a licensed central alarm company and provides the FAO with data on the licensee and the location involved. (*Exh. 12; Testimony of Keeley & Clifford*)

Caller: [Number Redacted]
FAO: OK, and you said he's testing the generator?
Caller: Yeah.
FAO: OK.
Caller: He put the system on test and when we go the fire alarm we didn't dispatch.⁴ But then he just called me and said there's smoke in there, so
FAO: OK. Is it from him testing the generator, or
Caller: No, no, no, that's not what he told me. He said "I think there may be a fire", so. . .
FAO: Alright. And do you have his call back number?
Caller: Um, I do not. I'm sorry.
FAO: You do not. OK. 115 Chauncy Street.
Caller: Yeah, 'cause we only have an answering service, so . . .
FAO: Alright. OK. Fire Department's on their way.
Caller: Alright. Thanks. Bye bye.

(Exhs. 8 & 9) (Emphasis added)

15. The building at 115 Chauncy Street is a 12-story residential structure in the Chinatown area of downtown Boston and is considered a "high rise" for BFD response purposes. At the time, the building also was categorized as a "dangerous" structure, because of hazards due to construction work that was on-going, which left ceilings, wiring and vents exposed, and there were open holes between several of the floors. The CAD system contained all of this information. (*Exhs. 10; Testimony of Clifford & Keeley*)

16. When FAO Freeman received the call about 115 Chauncy Street, the BFD was also on-scene at another fire on Lincoln Street, about two blocks away. The BFD Basic Response Pattern anticipates that there may be more than one active fire to suppress and the FAOs are trained to follow the procedures to ensure that all necessary resources are deployed in such circumstances to meet the proper level of emergency response required for every fire. (*Testimony of Appellant, Keeley, Clifford & Supervisor X*)

17. After completing the 911 call with the central alarm company, instead of immediately entering any Alarm Type-Code, FAO Freeman approached Senior FAO Supervisor X, who was

⁴ Generator testing typically will produce smoke, usually as exhaust from the building but in a few systems the smoke may appear to be coming from inside. (*Exhs 5 & 13; Testimony of Keeley & Clifford*)

stationed about 10 to 12 feet away, and was then Acting Principal FAO and the operator-in-charge as shift supervisor. (*Exh. 13; Testimony of Appellant & Supervisor X*)

18. FAO Freeman and SFAO Supervisor X have somewhat different recollections of the conversation between them, which was not recorded. To the extent their recollections differ, I find the version provided by FAO Freeman as more credible, more complete and more consistent with the documentary and recorded records in evidence. (*Exhs. 5, 8 through 14; Testimony of Appellant & Supervisor X*)

19. FAO Freeman was not sure whether to input the 911 call as an investigative level Central Station Alarm (ACS), because it had come from that source or, whether she should “Strike the Box”, i.e., treat the “third party” call as the report of an active “building fire” and input it as a First Alarm Building Fire (ALARM/STB, Level 1), although there was no one to contact on-scene to verify whether there was actually a fire. Had FAO Freeman been given a contact number for the technician on scene, she would have called him instead of going to SFAO Supervisor X. (*Exhs. 5 & 13; Testimony of Appellant*)

20. FAO Freeman informed SFAO Supervisor X that a central alarm company operator had called the 911 line and reported that a technician, who had been testing a generator at 115 Chauncy Street, had called the alarm company and reported that he had seen “smoke in the building” that was not due to the generator testing, and that the alarm company was unable to provide a contact number for FAO Freeman to reach the technician to verify the conditions. FAO Freeman did not specifically mention the word “fire” to SFAO Supervisor X. (*Exhs. 5, 13, 14; Testimony of Appellant & Supervisor X*)

21. FAO Freeman asked SFAO Supervisor X to tell her what to do and was told: “Hold on.” (*Exh. 13; Testimony of Appellant*)

22. After waiting in her supervisor's presence for approximately two to three minutes, FAO Freeman again asked for direction: "Should I Strike the Box?" to which SFAO Supervisor X said: "No. Send 1 & 1". (*Exh. 13; Testimony of Appellant*)⁵

23. Immediately upon receiving her supervisor's order, at 12:43:13 p.m., FAO Freeman entered ALARM (ACS) into the system, triggering an "Investigative" response to 115 Chauncy Street by Engine Company 10 and Tower Ladder Company 3, in accordance with the Basic Response Plan protocol. Each apparatus was less than a mile away from the building and arrived on scene at 115 Chauncy Street within three minutes. (*Exhs. 7 & 11; Testimony of Appellant*)

24. At 12:54:47 p.m., based on reports received from the BFD firefighters on-scene, SFAO Supervisor X changed the 115 Chauncy Street event Type Code from ALARM (ACS) to FIRE (STB), transmitting over the radio the "dangerous building" warning and the "hazards" listed for the property in the CAD system. The additional resources, including EMS responders, apparatus and personnel, were then dispatched as required for a First Alarm Building Fire. (*Exhs. 10 & 11*)

25. The incident ultimately became a Second Alarm Fire, with smoke eventually reported down as far as the 9th floor, requiring an emergency street closure and the evacuation of building residents, some of whom were persons with disabilities. Approximately two hours after the initial 911 call, the incident was closed at 14:38:16 p.m. (*Exh. 11; Testimony of Clifford*)

26. After reviewing the 911 recording, a portion of the incident radio traffic and the Boston Fire Incident History (printed 10/5/2016), Superintendent Clifford initiated an investigation into the circumstances surrounding the actions taken by FAO Freeman on October 3, 2016. FAO Freeman and SFAO Supervisor X were separately interviewed by a panel headed by Acting Fire

⁵ I do not find credible SFAO Minehan's testimony to the effect that her response was to "Send something." This somewhat self-serving and ambiguous recollection seems wholly out of character with what would be expected from a supervisor being asked by a subordinate to clarify a question about the appropriate response to a 911 call. (*Exh. 14; Testimony of Minehan*)

Alarm Division Superintendent Edward Byrne. (*Exhs. 5, 8 through 12 & 14; Testimony of Appellant, Clifford & Supervisor X*)⁶

27. By disciplinary notice dated November 8, 2016, Acting Superintendent Byrne issued a one (1) tour suspension of FAO Freeman for “Not Following Department Procedure for a reported Building Fire”, in violation of BFD Rules and Regulations 21.28. (*Exh. 1*)

28. FAO Freeman requested an appeal hearing on the suspension. BFD Chief of Operation, John F. Walsh, was assigned to conduct the hearing which was held on December 27, 2016. FAO Freeman appeared and testified. She waived her union representation and was represented by counsel who appeared and argued on her behalf. (*Exhs. 2, 3 & 13; Testimony of Appellant*)

29. By letter dated December 29, 2016, Fire Commission Finn upheld the one (1) tour suspension imposed on FAO Freeman. Commissioner Finn’s letter states, in part:

On October 3, 2106, Operator Freeman received a call from an alarm company stating one of their technicians doing generator testing at 115 Chauncy Street reported there was smoke in the building. . . . Operator Freeman asked the caller if the smoke was related to the generator testing and was told no, no, no. . . . [T]he technician was reporting a fire in the building. Department procedures for this information given requires the operator taking the call to enter a STB type code into the CAD to get the appropriate response initiated. From the start of the call to when a . . . central station [alarm]was dispatched, three to four minutes had elapsed. Approximately 15 minutes after the receipt of the call, Tower Ladder 3 ordered the box to be struck for smoke on floors 11 and 12. This ultimately resulted in a two alarm fire with a report of disabled people needing assistance. On December 27, 2016 . . . you attended an appeal hearing . . . and had your attorney represent your interest.

I have given thought to the consistent application of the progressive discipline guidelines, my own understanding of the needs of the fire department, the circumstances of this infraction, and your past performance with the Department. The Department regards this as a matter of concern . . . Boston Fire Department rules, procedures and policies . . . not only protect the public, but are also for its own members.

You have the right to appeal this decision to the Civil Service Commission.

(*Exh. 4*)

⁶ Superintendent Clifford had begun a pre-approved medical leave prior to when the interviews were conducted. (*Testimony of Clifford*)

30. Ms. Freeman received Chief Finn's December 29, 2016 letter on or about January 4, 2017 but did not inform her attorney, who had no notice of the letter until the 19th or 20th of January. After meeting with her attorney on Monday, January 23, 2017, Ms. Freeman filed this appeal with the Commission by mail, postmarked January 25, 2017. (*Motion Hearing; Claim of Appeal*)

APPLICABLE CIVIL SERVICE LAW

A tenured civil service employee may be suspended for "just cause" after due notice and hearing upon written decision "which shall state fully and specifically the reasons therefore." G.L.c.31,§41. A person aggrieved by a decision of an appointing authority made pursuant to G.L.c.31,§41 may, within ten days after receiving notice of the appointing authority's decision, appeal to the Commission under G.L.c.31,§43, which provides, in part:

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

Under Section 43, the Commission makes a de novo review "for the purpose of finding the facts anew." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. The role of the Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). See also City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev.den., 440 Mass. 1108 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411,

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

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., 359 Mass. 211, 214 (1971); City of 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 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 "merit principles" which govern 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.

G.L.c.31, Section 43 also vests the Commission with "considerable discretion" to affirm, vacate or modify discipline but that discretion is "not without bounds" and requires sound explanation for doing so. See, e.g., Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct.

594, 600 (1996) (“The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio . . . accorded the appointing authority”)

“[T]he power to modify is at its core the authority . . . to temper, balance, and amend. The power to modify penalties permits the furtherance of uniformity and equitable treatment of similarly situated individuals. It must be used to further, and not to frustrate, the purpose of civil service legislation, i.e., ‘to protect efficient public employees from partisan political control’ . . . [Citations]”

Id., (*emphasis added*). See also Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983).

ANALYSIS

The BFD had just cause to suspend FAO Freeman for one (1) [twenty-four hour] tour due to her actions on October 3, 2016 which caused the BFD undue delay in responding to a fire emergency. Although FAO Freeman’s prior unblemished record, her good-faith effort to seek a supervisor’s direction and the supervisor’s own problematic conduct, may all be mitigating factors, do not provide reasons to modify the modest discipline imposed for what the BFD concluded was a serious lapse of judgment that put the public and the BFD at unnecessary risk.

First, there is no dispute that BFD rules and regulations mandate that, upon receipt of report of a fire in a building, the required action by the FAO on duty as Call-Taker is to immediately dispatch the nearest apparatus and then “Strike the Box”, i.e., FIRE/STB/Level 1, triggering the required additional minimum apparatus and personnel prescribed by the Basic Response Pattern to stage and suppress an active building fire. Nor can there be reasonable doubt that within the BFD, for purposes of dispatching the required response, reporting “smoke in building” is equivalent to reporting a “fire”.⁷ Indeed, simple common sense teaches that “where there’s smoke, there’s fire”; also, it is well-known that smoke inhalation (not burning) is the #1 hazard

⁷ Curiously, SFAO Minehan was the only BFD witness to see a difference between a report of “smoke” without mentioning “fire”, a distinction she used to explain her response to FAO Freeman, who allegedly had only mentioned smoke, during their conversations on October 3, 2016. (*Exh. 4: Testimony of Minehan*)

and cause of fire-related death. See, e.g., J.R. Hall, “Fatal Effects of Fire” (NFPA 2011), <http://www.nfpa.org/News-and-Research/Fire-statistics-and-reports/Fire-statistics/Demographics-and-victim-patterns/Fatal-effects-of-fire>

Second, here, the 911 call, both in content and tone, left no doubt that the technician on-scene had conveyed that what he saw indicated to him that there was a fire in the building. The alarm company operator had stated: “[W]e believe there’s a real fire” and when asked by FAO Freeman if it could be caused by the generator test, the emphatic response was “No, no, no, That’s not what he told me. He said there may be a fire” I find BFD was entirely reasonable to expect that, upon hearing a report of this nature, FAO Freeman needed no further information before she initiated an STB alarm. To be sure, in a perfect world, it would have been useful to have a contact number to reach the on-scene technician to obtain first-hand confirmation of the alarm company’s report as FAO Freeman desired. FAO Freeman should have known, however, from her BFD training and experience, that inability to get first-hand confirmation did not justify delaying the STB alarm, let alone, delaying any BFD response for three minutes.

Third, Superintendent Clifford made it clear to staff that, for at least two reasons, the prudent choice to be made in dispatching BFD responders has been, and always will be, “to send more, not less”. On the one hand, as Assistant Superintendent Keeley put it, “Better safe than sorry.” On the other hand, should it turn out that the extra apparatus and personnel were not needed, they could be diverted or called back, or, alternatively, put on “Code C” and proceed to the scene, but at normal speed without sirens or flashing lights. What cannot be called back are the three minutes between FAO Freeman’s statement to the alarm company operator that the “Fire Department’s on their way” and the “Investigatory” dispatch of a “1 & 1”, or the fifteen minutes until the STB was finally entered.

Fourth, I take FAO Freeman's point that she acted in good faith and in accordance with the order (albeit mistaken) given to her by her supervisor to send "1 & 1" (or, if the supervisor were believed, to "Send Something", which is even more open to interpretation). I do not doubt FAO Freeman's intentions, but that does not change the fact that she showed poor judgment and violated the Basic Response Pattern by choosing to delay any response until she had her supervisor's blessing. Moreover, although I credit FAO Freeman's account of the conversation with her supervisor, the mere fact that the conversation occurred remains problematic: (1) this process required FAO Freeman to leave her post; (2) the decision created an extremely unusual three minute delay in dispatching any BFD apparatus; and (3) without a recording of the conversation, the dispute about what actually was said and/or ordered cannot be proved with certitude, which complicated BFD's review of the incident and opened the door other liability issues that decision-making on an unambiguous record was meant to prevent.

Fifth, I considered whether the discipline should be reduced in the exercise of the Commission's discretion to modify a penalty. My findings and conclusions do differ somewhat from those on which the BFD relied, namely: my reconciling the discrepancy between what FAO Freeman claims she told her supervisor during their conversation in FAO Freeman's favor; my finding that the supervisor initially told FAO Freeman to "Hold On" and then did order a "1 & 1" and not an STB; and my conclusion that whether or not FAO Freeman had heard or mentioned the word "Fire", BFD Fire Alarm Operators knew or should have known to "Strike The Box" whenever there was a credible report of "smoke" in the building.

I am troubled that FAO Freeman, alone, was disciplined, when SFAO Supervisor X's actions may have been an equally significant (or as a supervisor, perhaps, a more significant) contributing factor leading to the BFD's delayed response to the Chauncy Street fire. I do not,

however, attribute this outcome to any animus or favoritism, but, rather, to the fact that the investigation that the BFD performed relied solely on crediting what seems to be the supervisor's account of what took place between FAO Freeman and her supervisor, which had placed all of the responsibility for the delay on FAO Freeman. Although I found reason to believe that was not the case,⁸ the fact remains that FAO Freeman's actions, alone, in seeking direction and in tolerating the initial three-minute delay, having not yet ordered ANY response and despite what she already knew, alone, does warrant some discipline. The BFD's choice of a one-tour suspension is not out-of-line with discipline that other fire services had meted out for similar infractions. See Caggiano v Marshfield Fire Dep't, 27 MCSR 638 (2014) (one day suspension of fire alarm dispatcher for mistakes in "communicating the severity" of the incident); Mead v. Town of Bedford, 6 MCSR 90 (1993) (firefighter's two-day suspension who failed to follow procedure to verify location of fire) Thus, this appeal is not an occasion in which the Commission is warranted to exercise its discretion to modify the discipline imposed by the BFD.

Finally, to the extent I have not addressed any of the other issues raised by the parties, they "have not been overlooked. . . . [N]othing in them . . . requires discussion." McCormack v. Department of State Police, 92 Mass.App.Ct. 1103, 2017 WL 3469601 (Rule 1:28), *citing* Commonwealth v. Domanski, 332 Mass. 66, 78 (1954). In particular, I need not revisit the BFD's motion to dismiss the appeal as it untimely as is no longer material to the outcome. But see Kilson v. City of Fitchburg, 27 MCSR 106 (2013) and cases cited, *aff'd sub nom*, Kelson v. Massachusetts Civil Service Comm'n, 2014 WL 11498140 (Sup.Ct. 2014).⁹ The Appellant's

⁸ If further investigation or other departmental remedial training, if any, is warranted in light of the findings and conclusions in this Decision, that is a matter that will be left to the BFD's sound discretion.

⁹ I do not mean to sanction a practice that an appointing authority decision in a civil service disciplinary appeal may be issued without providing a copy to the employee's counsel of record. Should this be a more widespread practice among appointing authorities, and not an isolated incident, as I suspect it was, the contention that such notice is not necessary or warranted can be more fully considered by the Commission in a future appropriate case..

contention that she did not receive a proper hearing at the appointing authority level is without merit. See, e.g., McIsaac v. Civil Service Comm'n, 38 Mass.App.Ct. 473, 476-77 (1995); Pierce v. City of Attleboro, 27 MCSR 329 (2014); Howard v. Town of Nahant, 25 MCSR 379, 384 (2012); Villare v. Town of North Reading, 8 MCSR 44 (1995).

CONCLUSION

Accordingly, for the reasons stated, the appeal of the Appellant, Beverly J. Freeman, in Appeal D-17-129 is *dismissed* and the one-day suspension is affirmed.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein

Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso [Absent], Ittleman, Stein & Tivnan, Commissioners) on January 3, 2018.

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 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. 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:

Kevin R. Mullen, Esq. (for Appellant)

Thomas H. Costello, Esq. (for Respondent)