

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

DENISE BARRY,
Appellant
v.

D-17-130

BOSTON FIRE DEPARTMENT,
Respondent

Appearance for Appellant:

W. Chris Kneeshaw, Esq.
Lovenberg & Associates
6 Beacon Street #115
Boston, MA 02108

Appearance for Respondent:

Jessica Dembro, Esq.
City of Boston
City Hall: Room 624
Boston, MA 02108

Commissioner:

Christopher C. Bowman

DECISION

On June 28, 2017, the Appellant, Denise Barry (Ms. Barry), pursuant to the provisions of G.L. c. 31, § 43, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Respondent, the City of Boston (City) to suspend her for three (3) days from her position as Head Clerk in the City's Fire Department. On July 18, 2017, a pre-hearing was held at the offices of the Commission and a full hearing was held in the same location on August 30, 2017.¹ As no written

¹ 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.

notice was received from either party, the hearing was declared private. A CD was made of the hearing.²

FINDINGS OF FACT:

Fourteen (14) Exhibits were entered into evidence. Based upon these exhibits, stipulated facts, and the testimony of:

Called by the Boston Fire Department:

- C.K., Property Manager at housing complex in Charlestown, MA;
- Andrea Hennelly, Director of Human Resources, Boston Fire Department;

Called by Ms. Barry:

- L.D., Senior Administrative Assistant, Boston Fire Department;
- Denise Barry, 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:

1. The National Fire Incident Reporting System (NFIRS) is a reporting standard that fire departments use to uniformly report on the full range of their activities, from fire to Emergency Medical Services (EMS) to equipment involved in the response.
(Administrative Notice: www.usfa.fema.gov/data/nfirs)
2. In the Boston Fire Department (BFD), individuals, including City employees and member of the public, seeking to obtain an “NFIR Report” from the NFIRS must contact L.D., the Senior Administrative Assistant for the BFD. (Testimony of L.D.)

² If there is a judicial appeal of this decision, the plaintiff becomes obligated to use the copy of the CD provided to the parties to supply the court with the written transcript of the 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.

3. L.D. receives hundreds of such requests on an annual basis. She estimates that approximately thirty (30) of those requests come from City employees using a City email account. L.D. does not know and does not ask whether the request from City employees is for personal or work-related reasons. (Testimony of L.D.)
4. Until the underlying events regarding the instant appeal occurred, L.D. had never been instructed to redact information from these reports, including the names of individuals, unless the person listed on the report was a minor. (Testimony of L.D.)
5. When a member of the public made a request for an NFIR Report (e.g. – 100 Main Street), L.D.’s practice was to provide the citizen with any reports related specifically to that address. In most cases, if no reports were available for that specific address, the member of the public would typically identify other nearby addresses (e.g. 101 Main Street) and ask for any reports regarding these nearby addresses. (Testimony of L.D.)
6. If the person requesting the information was a City employee, L.D.’s practice was to automatically provide reports for any nearby addresses if no report existed for the specific address requested, without the City employee having to request this information. (Testimony of L.D.)
7. The City’s Information Technology Resource Use Policy (IT Policy) states in part:

“Personal Use: Information Technology Resources are provided solely for the conduct of City business. However, the City realizes and is aware of the large role technology (especially the Internet and email) plays in the daily lives of individuals. In this context, the City acknowledges that a limited amount of personal use of Information Technology Resources is acceptable. This use must not interfere with the user’s job responsibilities; it cannot involve any activities expressly prohibited by this or any other City policy; and it should be limited to designated break periods and/or the user’s lunch break.” (emphasis in original) (Exhibit 8)

8. The City's IT Policy also states in part:

“Unacceptable Use: Unless such use is reasonably related to a user's job, it is unacceptable for any person to use Information Technology Resources for: ... 3.2.3. the transmission of *confidential* information to unauthorized recipients.” (*emphasis added*) (Exhibit 8)

9. Among the documents exempt from the public records law in Massachusetts are:

“personnel and medical files or information; also any other materials or data relating to a specifically name individual, the disclosure of which may constitute an unwarranted invasion of personal privacy.” G.L. c. 4, § 7, clause Twenty-sixth, sub section (c).

10. The “Guide to the Massachusetts Public Records Law”, published by the Secretary of State, states in part:

“The second clause of the privacy exemption applies to requests for records that implicate privacy interests. Its application is limited to ‘intimate details of a highly personal nature.’ Examples of ‘intimate details of a highly personal nature’ include marital status, paternity, substance abuse, government assistance, family disputes and reputation.” (emphasis added) (Exhibit 7)

11. Ms. Barry has been employed by the BFD for approximately twenty-one (21) years and has been a Head Clerk since 1998. (Testimony of Ms. Barry) As a head clerk, she tracks the training requirements of BFD employees. (Testimony of Ms. Barry)

12. She recently received a one (1)-day suspension for referring to a BFD Deputy Commissioner as an “asshole”. (Exhibit 12) Prior to that incident, she had no discipline. (Testimony of Ms. Barry)

13. In the past, Ms. Barry has requested NFIR reports at the request of her relatives. (Testimony of Ms. Barry)

14. Ms. Barry has lived in an apartment complex in Charlestown, MA for eight (8) years. (Testimony of Ms. Barry)

15. A relative of Ms. Barry (the relative) and her son also reside in the apartment complex in Charlestown, MA (in a different apartment). The relative has lived in this apartment complex for her entire life (approximately 45-46 years). (Testimony of Ms. Barry)
16. Ms. Barry and the relative do not get along. (Testimony of C.K.)
17. The Charlestown apartment complex has a zero-tolerance policy regarding illegal drug use. (Testimony of C.K.)
18. On Friday, March 17, 2017, Boston Emergency Medical Services (EMS) responded to an apartment in the apartment complex regarding a suspected drug overdose. (Exhibit 5)
19. The person who had allegedly overdosed was the relative's son, who was visiting another apartment (other than the relative) in the apartment complex. (Exhibit 5)
20. On Monday, March 20, 2017 at 7:39 A.M., Ms. Barry, using her City email account, sent an email to L.D. stating:

"Hi [L.D.]:

Good morning! I hope all is well with you.

Is there anyway you can send me a couple fire reports from District 3.

Friday March 17-Saturday March 18.

[2 addresses from apartment complex redacted; neither of which is the relative's apartment or the apartment where the alleged overdose occurred.]

Thank you
Denise" (Exhibit 4)
21. Later that morning, L.D. sent an email reply with a NFIRS Report from March 17, 2017 attached. The NFIRS report related to an apartment other than the apartments

identified in Ms. Barry's request. Rather, the NFIRS report attached to the reply email related to an incident in the same apartment complex within the date range identified by Ms. Barry. That apartment and incident involved the overdose of the relative's son. (Exhibit 4)

22. L.D., consistent with her longstanding practice, did not redact any information from the NFIRS report, including the name of the relative's son. (Testimony of L.D.)

23. Minutes after receiving the NFIRS report, Ms. Barry, using her City email account, forwarded the NFIRS report to the property manager at the apartment complex. (Exhibit 5)

24. The property manager reviewed the report, and consistent with her past practice and the complex's zero-tolerance policy regarding illegal drugs, forwarded the report to counsel for the housing complex. (Testimony of C.K.)

25. The property manager is unsure if she had already received a *police* report regarding this incident but she did, at some point, receive a police report regarding the same incident, and forwarded that to counsel for the complex as well. (Testimony of C.K.)

26. Even though the relative's son was not in the relative's apartment at the time, the apartment complex, based on the connection to the relative, successfully moved to evict the relative from her home of 45 years. (Testimony of C.K.)

27. On April 4, 2017, the relative filed a complaint with the BFD alleging that Ms. Barry violated her privacy when she forwarded the NFIRS report to the apartment complex using her City email account. (Exhibit 3)

28. On June 26, 2017, the BFD suspended Ms. Barry for five (5) days for violating state ethics law and the City's IT Policy by making personal use of non-public, confidential information. (Exhibit 13)
29. L.D. was counseled and re-trained. (Testimony of Ms. Hennelly)
30. Ms. Barry would probably not have been suspended had the BFD not determined that the information she provided to the apartment complex was confidential. (Testimony of Ms. Hennelly)

Legal Standard

G.L. c. 31, § 43 provides:

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

An action is “justified” if it is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law;” Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304 (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 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983).

Analysis

What Ms. Barry did here is unsavory. In an effort to have her relative evicted from her home of forty-five (45) years, she forwarded an NFIR report to the apartment complex management showing that Boston EMS had responded to an alleged overdose involving the relative's son while the son was visiting another apartment. The BFD has not shown, however, that Ms. Barry's actions, at the time, violated the state ethics law or the City's IT Policy.

The City's IT policy explicitly allows City employees to use their City email account for personal business under limited circumstances. The BFD candidly acknowledges that Ms. Barry's request here, using a City email account, standing alone, would not warrant a suspension. Rather, the BFD argues that Ms. Barry violated the state ethics law and the City's IT policy. They have not proven this.

In order to violate the state ethics law cited by the BFD, the employee must “ ... *knowingly*, or with reason to know, improperly disclose [confidential information] ...” Based on the candid testimony of L.D., the BFD's Senior Administrative Assistant responsible for issuing these NFIR reports, the BFD, prior to this incident, provided *hundreds* of NFIR reports to the public, *without any information (i.e. – name of patient) redacted from the report*. Given this, it cannot plausibly be argued that Ms. Barry knew, or should have known, that the information (i.e. – patient's name) was confidential and/or should not be disseminated. Further, if any violation occurred here, it occurred when L.D. and/or the Records Access Officer for the BFD, allowed this information to be

distributed to Ms. Barry and hundreds of others for years. *After* the BFD received this complaint, they took action to clarify when information should be confidential and, if so, when such information should be redacted or withheld. In short, Ms. Barry is being disciplined based largely on the *BFD's* past failure to adequately protect confidential information. I considered the BFD's unpersuasive (and convoluted) argument that Ms. Barry violated the ethics law and the City's IT policy by receiving special treatment when L.D. provided her with an NFIR report for a nearby address, as opposed to the exact address requested. Again, this is an action by L.D., not Ms. Barry. Further, according to the credible testimony of L.D., she took this step for *all* City employees, as opposed to waiting for a follow-up inquiry. To ensure clarity, I am not suggesting that L.D. engaged in misconduct here. Rather, she appears to have simply been abiding by a longstanding practice that ultimately is the responsibility of BFD senior managers, including the individual designated as the Records Access Officer.

Conclusion

For all of the above reasons, Ms. Barry's appeal under Docket No. D-17-130 is hereby ***allowed***. Her three (3)-day suspension is overturned and she shall have all pay and benefits associated with these three (3) days restored to her.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 12, 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)(1), 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:

W. Chris Kneeshaw, Esq. (for Appellant)

Jessica Dembro, Esq. (for Respondent)