

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

Suffolk, ss.

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

LOUIS DEBENEDICTIS,
Appellant

v.

BOSTON FIRE DEPARTMENT,
Respondent

Case No.: D-16-118

Appearance for Appellant:

Joseph L. Sulman, Esq.
Law Office of Joseph L. Sulman, Esq.
391 Totten Pond Road, Suite 402
Waltham, MA 02451

Appearance for Respondent:

Barbara Parker, Esq.¹
City of Boston
Office of Labor Relations
Boston City Hall, room 624
Boston, MA 02201

Commissioner:

Cynthia A. Ittleman

DECISION

Pursuant to G.L. c. 31, § 43², the Appellant, Louis DeBenedictis (Appellant or Mr. DeBenedictis), filed an appeal on July 8, 2016 contesting the decision of the Boston Fire Department (Respondent or BFD) to suspend him for two (2) tours.³ A pre-hearing conference was held at the offices of the Commission on July 26, 2016. A full hearing was held on August

¹ Formerly, Attorney Thomas Costello represented the Respondent in this case.

² At the full hearing, the Appellant waived his section 42 appeal.

³ In addition, the Appellant was barred from firefighter details for six (6) weeks, over which the Commission does not have jurisdiction under G.L. c. 31, § 43.

29, 2016 and October 20, 2016.⁴ The witnesses (except the Appellant) were sequestered. The hearing was digitally recorded and the parties were given copies of the digital recording of the hearing.⁵ The parties submitted post-hearing briefs. For the reasons stated below the appeal is denied.

FINDING OF FACTS

Based on Exhibits 1 through 25, as well as the stipulations of the parties, the testimony of:

Called by the Respondent:

- Chief of Operations for Support Services, John F. Walsh
- RA, JDC Demolition
- District Fire Chief, Personnel Division, Neal A. Mullane
- District Fire Chief, District 3, Paul Burke
- Chief of Operations for Field Services, Gerard T. Fontana

Called by the Appellant:

- Deputy Fire Chief, Division 1, Bart Shea
- Firefighter Louis DeBenedictis

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

1. The Appellant has been a firefighter at the BFD since 2014. He is assigned to Engine 8.

Prior to that, the Appellant has been a call or full time firefighter in other communities

⁴ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission, with Chapter 31 or any Commission rules taking precedence if there is a conflict between them. There is no such conflict here.

⁵ 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.

since 2002. The Appellant has worked hundreds of details in his career. (Testimony of Appellant)

2. BFD Standard Operating Procedure (SOP) #402, about paid details, provides in section 5.1.8,

In the following cases, the District Chief shall be asked to respond through the Fire Alarm Office (FAO) whenever additional cutting and welding is being performed that is not in direct sight of the detail member. If it is discovered that there is not an adequate number of detail members to safely oversee the areas undergoing the additional cutting and welding, the contractor shall be asked to stop such work until the district Chief arrives.

(Ex. 13)(emphasis added)

3. SOP #402, section 5.1.9 provides, in pertinent part,

If there are any confrontational interactions with a contractor or other personnel, or if there are any activities taking place in violation of the BFPC [Boston Fire Prevention Code] or requirements of the permit, the District Chief shall be notified through the FAO

(Ex. 13)(emphasis added)

4. Special Order No. 8, issued February 25, 2015, provides, in part, “[a]ll members shall review SOP #402 prior to working paid details to understand their duties and responsibilities. ...” (Ex. 11)

5. The Respondent’s Paid Detail Checklist provides, in part,

You are responsible for any occurrence during the tour of duty you are assigned. You are considered to be ON DUTY, and shall conduct yourself accordingly.

... Arrival ...

Ask to check their permit for expiration date, company doing work, address, and floors where work will be done (contact District Chief if there is a discrepancy or if you feel there is a safety issue) ...

Have a proper type and fully charged extinguisher immediately available in the area of welding or cutting taking place

(Ex. 12)(emphasis in original)

6. Often details are performed by line fire fighters. There are no supervisors on detail sites.
(Testimony of Burke)
7. The Appellant relies on details to supplement his income and learn the city. A fire detail involves providing a safety watch, usually at a construction site where “hot work” is performed. “Hot work” involves workers who are welding or using a torch to cut metal, both of which create a fire risk.⁶ (Appellant) Cutters use face masks when working. A torch that comes within three (3) inches of someone’s face would burn them. (Testimony of RA)
8. On May 6, 2016, the Appellant was assigned to a fire detail at 33 Congress Street where demolition work involving cutting was being done to remove building components pursuant to a permit issued 2/1/16 and expiring on 1/1/17, on flights 1 through 9, the sub-basement, basement and roof. The Appellant had worked at this detail on two (2) prior occasions and seen the permit before but he did not see it on May 6, 2016. (Testimony of Appellant; Exs. 15 and 16)
9. RA has worked at JDC Demolition for approximately three (3) and ½ years. He is a Labor Foreman who worked on the job at 33 Congress Street, which was being gutted for construction and he was present on May 6, 2016. The demolition work there included cutting metal. RA knows the job of fire details, which includes seeing, or being in the area of the cutting work. His office obtains the construction permits but he knows that permits indicate what floors the workers can cut on. He has worked with the Appellant on other occasions and they had a previous disagreement. (Testimony of RA)

⁶ The permit required a paid detail rather than a fire watch because the contractor was going to be performing hot work. (Ex. 15)

10. On May 6, 2016, there were approximately thirty-five (35) workers on the site and there were at least two (2) fire details at the 33 Congress Street site. There were at least two (2) cutters in the building that day – Cutter #1 in the sub-basement and another Cutter #2 who was approximately six (6) to eight (8) feet above the sub-basement in an elevator shaft that was open to the basement/sub-basement area. Cutters #1 and 2 were between eight (8) feet and fifteen (15) feet from each other. (Testimony of RA) The Appellant arrived before 7:00 a.m. Shortly thereafter, the Appellant met RA on the mezzanine/first floor and RA told the Appellant to go to the sub-basement. (Testimony of Appellant; Ex. 24) RA wanted the Appellant to be on the sub-basement so that he (the Appellant) could observe both Cutters # 1 and 2. However, shortly thereafter, RA received a phone call from Cutter #2 in the sub-basement saying that the Appellant had told him not to light his torch. RA told Cutter #2 to light the torch and begin cutting. Over the next approximately two (2) hours, Cutter #2 repeatedly called RA, informing him that the Appellant was not letting him light his torch and cut and with RA telling Cutter #2 to light the torch and proceed with cutting. Eventually, RA came downstairs and approached the Appellant and spoke to him angrily, stating that he had the right to have both cutters working as both cutters were within the Appellant’s view. (Testimony of RA) RA and the Appellant both said they would call “the chief”. (Testimony of RA and Appellant) Sometime thereafter but before 9:25a.m., the Appellant called the Fire Investigation Unit (FIU) and left a message for Lt. Fitzpatrick. (Testimony of RA)
11. The Appellant called the Fire Department’s Fire Alarm Unit at approximately 9:25 a.m. on May 6, 2016. A transcript of this call, and calls between others with whom the FA operator communicated in this regard, states in part,

Page 1 – lines:

1 M [male – i.e. Appellant] (inaudible).

2 F:[female – i.e. operator] Boston Fire.

3 M: (inaudible) engine eight (inaudible).

4 F: I can't under --, uh, uh.

5 M: Hello.

6 F: Hi.

7 M: (inaudible) engine eight.

8 F: Yeah. What's up?

9,10 M: (inaudible) I'm at 33 Congress. Fire detail. Can I get the district chief down, please?

11 F: What do you have down there?

12-14 M: What I have down here is an, uh, uh, told them to stop welding because they're welding on two separate floors without a fire watch (inaudible).

15 F: OK, what – what's the address that you have?

16 M: (inaudible) coming at me with a torch (inaudible).

17-18 F: They're coming at you? I'll start the police down there now but w— what's the address? Hello.

19 M: OK.⁷

20 F: Sir.

21 M: Yeah, it's (inaudible) here.

22 F: Thirty-three Congress?

23 M: Congress, yeah.

Page 2 - lines:

1-2 F: All right, I'll start the cops and chief down there right away.

3 M: Yeah.

4 F: All right, 836 (inaudible). ...

7-10 F (to others, not the Appellant): The guy hung up. Hey will you start the cops down 33 Congress Street? They're welding down there. I'm getting the chief. They're welding down there and the guy is going after them with a torch. A detail firefighter. ...

16 F (to others, not the Appellant): They don't have permits or anything down there.

20 F: Hey, is the chief (inaudible).

21 M5: Uh, yeah, he's still here.

22 F: All right, start the chief down to 33 Congress Street. ...

⁷ I have listened to the recording multiple times and I cannot hear any the Appellant saying "OK" or make out whether anyone else saying OK at this point.

Page 3 – lines:

1-4 F: Yeah. Listen. The firefighter that's doing a detail on scene said there's no permits down there. And there's guys coming after him with a torch. So we start the cops down there too.

5 M5: (inaudible) OK, 33 Congress Street, got it, OK> ...

12 F: Yeah.

13 M: (Appellant) Hello.

14 F: Hi, it's fire alarm.

15 M: Yeah.

16-18 F: Hi, we got – yeah, we're going to send t—we have companies responding, we have the chief responding, and we have the police going.

19-20 M: (inaudible) supposedly he talked to the chief and the chief has given the OK to do.

21 F: Yeah.

22 M: Whatever they're doing here. But the guy did come at me with a torch.

Page 4 – lines:

1 F: (inaudible).

2 M: (inaudible) told me he's going to do what he wants to do.

3 F: OK, and, uh, what f—are you on – what floor –

4 M: (inaudible) we don't need company (inaudible) .

5-6 F: Well, we just want to send them down just to make sure you were safe.

7 M: I'm safe as far as –

8 F: All right (inaudible).

9-10 M: The nutcase with the torch (inaudible) don't want, uh, I just need the chief down here.

11 F: Yeah, he's coming.

12 M: To clarify this.

13 F: Yeah, what floor are you on?

14 M: (inaudible) all right. Bye.

15 F: Where – hey.

16 M: (inaudible)

17 F: What floor are you on?

18 M: (inaudible) basement second level basement. ...

Page 5 – lines:

...

13-16 F4 (another female voice) Hi, for engine 10 and ladder 3 that's going to be a – to assist a detail, we have car 3 also en route, uh, they're welding without permits. And they went after him with a fire torch, OK?

17 M7(another male voice) Oh, OK (inaudible). ...

10-14 M11 (another male voice speaking to one of the Chiefs) I need you to take a ride down to 33 Congress Street. We got the cops going and companies. We got a detail member down there who tried to shut a job down because they don't have any permits and they threatened the guy with a torch. They chased him around the building. ...

(Ex. 19; *see also* Ex. 21)(emphasis added)⁸

The Appellant did not state in this call that the contractor did not have any permits for the work at this detail site. The Appellant did not state in this call that the contractor's personnel "chase(d) him around the building". (Administrative Notice; Exs. 19 and 21)

12. District Chief Paul Burke (District Chief Burke) arrived at the detail site after the Appellant's call to the FA Unit. He has operated many, many details throughout his career at the BFD. When he receives permit applications, he indicates the number of details required. There is no requirement to have hoses at every building construction/demolition site – many of the sites do not have running water. Extinguishers at such sites are adequate. (Testimony of Burke)

13. At the detail site, District Chief Burke spoke with the Appellant, then RA and Cutter #2, who was in the sub-basement. District Chief Burke noticed that Cutter #2 in the sub-basement and Cutter #1 in the open elevator shaft, were in the line of sight from the Appellant's detail, the two (2) cutters were near each other, and that you could see the lower half of the second cutter's body while he was working, so there was no violation of the permit. Standing in the middle of the room would have allowed the Appellant to see both cutters. There was no need for hoses at the detail site because there were limited combustibles and the floor was made of cement, not wood. In addition, District Chief

⁸ The FA operator was not disciplined in connection with this call. (Testimony of Walsh) As noted in these excerpts from the call to the FA operator, it was, at times, difficult for the Appellant and the FA operator to hear each other, which may have been, at least in part, some the reason for such difficulty. I note also that the FA operator and others whom she contacted regarding the Appellant's call also had difficulty hearing one another.

Burke said that he saw two (2) extinguishers at the site. After he met with the Appellant and the JDC employees, District Chief Burke assigned the Appellant to another part of the detail site and assigned a different detail firefighter at the site to the sub-basement.

(Testimony of Burke; Ex. 1)

14. On May 6, 2016, after his site visit, District Chief Burke (District 3) wrote a 5A (report of his findings) to Commissioner Finn, sending a copy to Deputy Chief (Division I) Bart Shea, District Chief Burke's supervisor. District Chief Burke's report indicates, in part,

... I was dispatched by fire alarm to 33 Congress Street for a reported physical assault of a fire fighter working a paid detail ... Upon arrival I met two fire companies, Engine 10 and Ladder 3, also dispatched to the incident. Because of the nature of the call Boston Police were also dispatched. Fire Fighter Louis DeBenedictis stated that he attempted to prevent the contractor from welding operations on the same floor in two locations and met resistance from the contractor. He also stated that one of the welders threatened him by lighting his welding torch in close proximity to him.

Upon investigation I determined that the contractor did in fact adhere to all safety rules pertaining to the coverage of two welding locations on the same floor within fifteen feet of sight of the detail firefighter, also the welder in question lit his torch in the process of performing his work duties. Because of the seriousness of the allegations, the multi-agency response, and after further inquiry it was determined that firefighter DeBenedictis acted in a similar manner at previous paid details, and the fact that his conduct reflects negatively on all members of the Boston Fire Department, it is my request that Fire Fighter Louis DeBenedictis, Engine Company 8, be prohibited from working any and all paid details for a period of one year.

(Ex. 1)(emphasis added)

15. On May 9, 2016, Deputy Chief Shea sent District Fire Chief Burke a copy of his (Burke's) 5A. Deputy Chief Shea has been on perhaps one (1) detail in his career. However, having been the BFD Fire Marshall, Deputy Chief Shea has worked on permits

and other matters related to details. (Testimony of Shea) Deputy Chief Shea added, in part,

I have not interviewed [the Appellant], but FF Denedictis' (sic) behavior warrants further review ... furthermore, he should also be expected to explain his apparent frivolous claim of assault and reported past conduct ... I recommend something less than the 1 year suspension from working paid details, possible 30 days, followed by restrictions * (sic) limiting him from working only paid details where an officer is also assigned to supervise his performance. * (sic) Further stipulations would require him to route all communications through said officer and that he must pass on all possible issues arising with contractors ... This restriction could be * (sic) continued until such time he has certified as trained in performing fire watches through the hot work training that it being developed through the Fire Marshals (sic) office* (sic)⁹ (Ex. 23)

16. On May 16, 2016, Deputy Chief (Div. I) Shea Chief wrote to the Personnel Division, reporting on the investigation he (Deputy Chief Shea) conducted on May 7 concerning District Chief Burke's 5A (report). His report indicates, in part,

... The incident resulted in a multi unit/agency (sic) response for a reported 'Detail FF being threatened with a torch'. (Inc# 16-0027968, Time: 09:26). ... I interviewed FF DeBenedictis in front of Local 718 President Rich Paris and DFC Paul Burke the following morning He vehemently denied having requested a response for apparatus or police for an assault as had been believed. He stated that he had asked only for the chief, and that it was only through questioning by the FAO [Fire Alarms Office] operator that he mentioned that someone had 'lit a torch in this face'. I personally verified these statements as true by listening to the incident audio tapes from FAO.

During the interview he stated that he had been monitoring the work on an upper level when the second torch was found in use in the basement out side (sic) of his ability to monitor both. It was when he confronted the second worker in the basement that a verbal altercation ensued which then included [RA] [foreman of the construction company working on site]. During that time FF DeBenedictis said after being told not to light it, the worker lit the torch close enough to him that he felt the heat on his face. Based on the descriptions by (sic) [RA] and

⁹ There is no indication what the asterisk that appears here twice is intended to indicate.

FF DeBenedictis, in my opinion lighting the torch was not intended to harm or as a threat, but very likely as an act of defiance.

(Ex. 2)(emphasis added)

17. On May 24, 2016, Chief of Operations for Support Services John Walsh (Operations Chief Walsh) conducted an interview of the Appellant. Also present were Deputy Chief Scott Malone; District Fire Chief, Personnel Division, Neal Mullane (Chief Mullane); Union Local 18 Vice-President Robert Petitti, and Personnel Division A[cting] Deputy Fire Chief Michael Whelan (Deputy Fire Chief Whelan). Chief Walsh made notes of the questions he asked the Appellant and the Appellant's responses, and concluded that the Appellant was not credible based, in part, on the following:

when the Appellant arrived at the detail, he said that someone was already cutting but he did not stop that cutter;

the Appellant did not try to reach the chief because the contractor told the Appellant that he could not reach the chief;

the Appellant called the FIU (instead of the FAO), he said, because he was always told to call FIU with questions and that he had left a message for Lieut. Fitzpatrick¹⁰ at FIU about his concerns;

the Appellant did not look at the permit on May 6, 2016 to see if the contractor was required to have hoses or extinguishers;

the Appellant then called the FAO and said that someone was "coming at me with a torch"; and

it was unlikely that Cutter #2 lit his torch three (3) inches from the Appellant's face since Cutter #2 had been sixty (60) feet away from the Appellant at the time and he (Cutter #2) would have had to bring his equipment close to the Appellant, lit the torch, and then returned sixty (60) feet to the place where he had been standing.

(Ex. 24)

¹⁰ Chief Walsh wrote that the Appellant did not appear to know that Lieut. Fitzpatrick was in the Construction Safety Unit, not the FIU. Apparently, the Appellant thought that the FIU was the Construction Unit. (Ex. 24)

Chief Walsh faulted the Appellant for getting into an argument with the contractor, writing that the Appellant should have “immediately told [the contractor] to stop” and called the FA to speak to the Chief about it. (Id.)

18. On May 24, 2016, apparently after Operations Chief Walsh’s interview of the Appellant, Deputy Chief Scott Malone (who also attended the interview) wrote to Commissioner Finn,

Upon investigation into the paid detail of May 6, 2016, Fire Fighter Louis DeBenedictis of Engine Company 8, shall not be authorized for any paid details and removed from the list for a period of four (4) months to become effective 0800 hours, May 24, 2016 and continuing to 0800 hours, September 25, 2015. (Ex. 3)

19. Operations Chief Walsh emailed Deputy Chief Shea on May 25, 2016, concerning his May 24 interview of the Appellant, stating, in part,

... We believe that Chief Burke’s assessment that FF DeBenedictis (sic) made a frivolous and baseless request for assistance for an alleged assault was correct. In your interview he vehemently denied having requested a response for apparatus or police for an assault. He informs fire alarm twice on the tape ‘coming at me with a torch’ and ‘come at with a torch’. We think [BFD Fire Alarm] operators did not overact (sic) when FF DeBenedictis made this statement. He reported a situation that basically that (sic) he was in trouble. No different that (sic) a Police Officer response for an Officer in trouble. A torch can be used as a weapon. ... He actually escalated the situation ...

We found FF DeBenedictis to be very evasive on questioning. He seemed to change his story ... He did not check permits but he knew that had to have hoses in place? He did not know if fire extinguishers were needed? He reports he calls FIU [Fire Investigations Unit] or Fire Construction Unit before trying to call the Chief because [RA] told him the chief was not available? He reports to us that the welder walked 60 (feet not inches) to him and lit torch 3” from his face then turned around and walked back 60’. He did not file a police report for this alleged assault?

(Ex. 23)

20. Later on May 25, 2016, Deputy Chief Shea wrote to Operations Chief Walsh, “[m]y bigger concern is depending on how the rumors develop this could lead some guys to say the hell with calling the chief for anything.” (Ex. 23)
21. By memo to the Appellant from Assistant Deputy Chief dated June 3, 2016¹¹, the Appellant was informed that he was being “officially reprimanded” for violating SOP #402, sections 5.1.8 and 5.1.9, which reprimand would be an official part of his Department record for one (1) year, and that his name would be removed from the paid detail list for four (4) months. (Ex. 6) The memo also indicated that the Appellant had forty-eight (48) hours to request an appeal hearing at the appointing authority to determine if there is just cause for the discipline. (Id.)¹²
22. On June 9, 2016, the Appellant submitted to the Personnel Division a written request to appeal the Official Reprimand and the four (4) month removal of the Appellant’s name from the paid detail list. In addition, the Appellant requested copies of District Chief Burke’s 5A, the Appellant’s detail record for May 6 and related documents or notes, a copy of the transcript of his call on May 6 and two (2) calls made by Fire Alarm, and a copy of his “personal” (sic) file, all prior to the appeal hearing or questioning. (Ex. 4)
23. On June 17, 2016, Acting Deputy Fire Chief Mullane sent a letter to the Appellant stating that the Appellant’s appeal hearing would be held on June 24, 2016 at 15:30 hours “to determine if just cause exists for the R1-Official Reprimand ... for failure to follow Standard Operating Procedure No. [402, sections] 5.1.8 and 5.1.9, pertaining to Paid Details. ...” (Ex. 7) Attached thereto were copies of G.L. c. 31, § 41-45 and 62 (the latter

¹¹ The Appellant refused to sign this memo. (Ex. 6)

¹² Although this memo is dated June 3, 2016 and indicates that it was delivered to the Appellant on the same date, a date stamped June 6, 2016 appears near the place for the Appellant to have signed indicating his receipt of the memo but someone wrote that the Appellant refused to sign it. However, the Respondent has not averred that the Appellant’s request for appeal was untimely.

regarding punishment duty). Chief of Operations Fontana of Field Services was designated the hearing officer. (Id.)

24. Chief of Field Services Fontana conducted the Appellant's internal appeal hearing on June 24, 2016 as scheduled. In addition to Chief Fontana, the Appellant and his own attorney, those present included Deputy Commissioner Connie Wong, Acting Deputy Chief of Personnel Mullane, Boston Fire Local 718 President Rich Paris, Local 718 Vice President Petitti, and someone from the FA IT staff. The approximately fifteen (15)-minute hearing was "informal" and witnesses were not sworn. Deputy Chief of Personnel Mullane described the charges against the Appellant. The Appellant made various statements at the internal hearing. Counsel for the Appellant argued, in essence, that the Appellant had called a chief on May 6 as required and had not asked for the police to respond to the detail site. (Exs. 20 and 22)
25. On June 30, 2016, Chief Fontana wrote to Commissioner Finn, indicating that he conducted the appeal hearing that the Appellant, who was represented by his own counsel (not union representation), requested and, after considering the present infraction, the Appellant's past performance, and the progressive disciplinary guidelines, he recommended that the Appellant be suspended for two (2) tours and that his name be removed from the paid detail list be reduced to six (6) weeks instead of four (4) months. (Ex. 8)
26. By letter dated June 30, 2016, Commissioner Finn adopted Chief Fontana's findings, adding, "[a] suspension of two (2) tours generally is imposed upon members of the department who engage in similar conduct for the first time. ..." (Ex. 9)(also attaching copies of G.L. c. 31, § 41-45 and 62)(emphasis added)

27. The Appellant had one (1) prior discipline at the BFD. Specifically, on October 15, 2015, Deputy Fire Chief Michael Ruggere (Division 1, Group 2) wrote a memo to Commissioner Finn, in part, preferring charges against the Appellant as follows:

Violation of Rule: 18.44(a); Conduct unbecoming a member, whether or on or off duty, which tends to lower the service in the estimation of the public.

Specification: In that, Ladder Company 11 responded to Incident No. 15-0060303 on September 21, 2015 at 16:21 hours. Fire Fighter DeBenedictis was argumentative in front of a patient during an active emergency call and refused to move out of the way and allow fire Fighter Mercer to attend to the patient. In which, the patient stated 'Please, don't fight in front of me'.

Violation of Rule: 18.44(e); Disrespect or insolence to a superior officer.

Specification: In that, Fire Fighter DeBenedictis left the room and refused to come back into the room to attend to the patient, after he was ordered to do so by Fire Lieutenant Freeman and stated 'Im (sic) not going back in there, boss'.

Violation of Rule: 18.44(g); Neglect of, evading, or shirking duty.

Specification: In that, Fire Fighter DeBenedictis instead of getting the other medical equipment for the patient, Fire Fighter DeBenedictis left the room and refused to come back into the room.

Violation of Rule: 18.44(j); Conduct prejudicial to good order.

Specification: In that, Fire Fighter DeBenedictis was argumentative, and disrespectful, stated inappropriate comments and behavior, during Incident No. 15-0060303 in front of a patient and the Company Officer.

The Appellant signed this memo on October 27, 2015. (Ex. 17)

28. On November 4, 2015, the Appellant signed a document indicating that he had been notified of charges against him, as indicated in Deputy Chief Ruggere's Oct. 15, 2015 memo to Commissioner Finn. In the November 4, 2015 document, the Appellant wrote, in part, "I admit" that he violated the rules cited in Deputy Chief Ruggere's Oct. 15, 2015 memo; he declined to participate in a hearing in these regards and wished to dispense with the notice of a hearing; he accepted a two (2)-week suspension "and other conditions which are consistent with the discipline imposed upon other members of the Department who have been in violation of" the cited rules; he understood that he was required to take

a fitness examination to return to duty, pursuant to the BFD Rehabilitation Agreement of the BFD/IAFF Local 718 Drug and Alcohol Free Workplace Policy; and that he had received copies of G.L. c. 31, § 41-45 and 62. (Ex. 18)

29. BFD Progressive Discipline Guidelines (Guidelines) provide discipline for first, second and third offenses, whether they are minor offenses, such as when an “infraction occurs under non-emergency conditions and could not affect emergency operations in any way”, or major offenses, such as when an “infraction occurs while in preparation for, during or returning from emergency operations”. For first time offenses, generally, the Guidelines provide for an oral warning and in-house discipline “if necessary”, notifying chain of command and Personnel Office in consultation. Second offenses, generally, involve a written reprimand and possible one (1) to five (5) day suspension, and consulting with the District Chief to make a recommendation to the Deputy Chief. A third offense, generally, involves preferring charges against a member of the BFD and consulting with the Personnel Officer through chain of command, if needed. In each case, the member is to be interviewed and “the facts, member’s past performance, equal treatment and past practices” are to be considered. (Ex. 25)

Applicable Law

G.L. c. 31, § 43, 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.

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

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. 300, 304, *rev.den.*, 426 Mass. 1102, (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass.App.Ct.486, 488, *rev.den.*, 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983). For the Commission to uphold an appointing authority's decision, it must find, based on the facts, that "there was reasonable justification for the actions taken by the appointing authority in the circumstances found by the Commission to have existed when the appointing authority made its decision." Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1984); *See* Commissioners of Civil Service v. Municipal Court of Boston, 369 Mass. 84, 86 (1975); Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003); *see* McCarthy v. Brookline School Department, 21 MCSR 13, 16 (2008).

The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard against political considerations,

favoritism and bias in governmental employment decisions.’ ” Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. Even if there are past instances where other employees received more lenient sanctions for similar misconduct, however, the Commission is not charged with a duty to fine-tune employees’ suspensions to ensure perfect uniformity. See Boston Police Dep’t v. Collins, 48 Mass.App.Ct. 408, 412 (2000).

“The ‘power accorded the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded the appointing authority.’ ” Falmouth v. Civil Service Comm’n, 61 Mass.App.Ct. 796, 800 (2004) quoting Police Comm’r v. Civil Service Comm’n, 39 Mass.App.Ct. 594, 600 (1996). Unless the Commission’s findings of fact differ significantly from those reported by the appointing authority or interpret the relevant law in a substantially different way, the commission is not free to “substitute its judgment” for that of the appointing authority, and “cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation.” Falmouth at 824 (citing Police Comm’r of Boston v. Civil Serv. Comm’n, [39 Mass.App.Ct. 594](#) , 600 (1996)).

Analysis

The Respondent has established by a preponderance of the evidence that it had just cause to discipline the Appellant for his conduct on May 6, 2016 at the Congress Street detail. The Appellant’s conduct here constitutes substantial misconduct which adversely affects the public interest by impairing the efficiency of public service. His detail shift on Congress Street began at 7:00 a.m. and problems arose shortly thereafter. RA wanted both Cutters #1 and 2 to be able to cut metal at the detail site since the Appellant would be able to stand in one (1) place and observe both cutters as they worked. The Appellant refused to allow Cutter #2 to light his torch so that he could work. The argument continued for approximately two (2) hours.

Notwithstanding the very clear text of the Respondent’s SOP #402 requiring details to call the

FA Unit to speak to a chief when confrontations arise, the Appellant did not call the FA and ask to speak to a chief until 9:25 a.m., by which time the detail conditions had deteriorated such that the Appellant included in his request to speak with a chief a statement that a cutter had lit the torch inches from him (the Appellant), a statement he made to the FA operator three (3) times. In fact, the Appellant acknowledged SOP #402 but he testified at the Commission that he believes that there is an “unwritten rule” that firefighters working details address problems themselves, that it’s impractical to have a District Fire Chief running around to address little problems and that 99% of the problems at details are minimal and you do not call the District Chief about them. It is clear that the purpose of SOP #402 was to require details to request a District Chief to avoid the very type of problems encountered here. Although the Appellant’s phone call to the FA was hard to hear in places, the FA operator could be heard telling the Appellant that she was going to call the police and, later, that she did call the police to respond. Unfortunately, not unlike the telephone game, the last person receiving the information reports something very different from the information provided to the first recipient. Here, the FA operator incorrectly reported in her communications that the cutters, among others things, were working without permits, despite the fact that the Appellant did not say that to her. The situation worsened as someone who the FA operator asked to respond to the Appellant then reported that the Appellant was being chased around the building with a torch, which did not occur. Further, at various times during the Respondent’s investigations, the Appellant asserted that the torch was held three (3) inches from his face. As RA indicated, a lit torch three (3) inches from someone’s face would cause severe damage and, apparently, there was no such damage to the Appellant. Under urgent circumstances, as perceived here, errors can be costly, if not dangerous. The Appellant’s unsupported allegation, repeatedly made to the FA operator, that a cutter had lit a torch so close

to him resulted in BFD vehicles and personnel and police being sent to the detail site when a phone call hours earlier, as required by SOP #402, would have prevented them from being gathered and sent to the detail site and enabled them to respond to actual emergencies.

Moreover, the BFD is concerned that the Appellant's actions may result in other firefighters working details delaying or failing to contact the FA to speak to a chief before their situations get out of control.

Having established that it had just cause to discipline the Appellant, the Commission examines whether the discipline issued by the Respondent warrants modification. First, the Commission's findings here do not substantially differ from those found by the Respondent. Second, the Appellant was previously disciplined for his conduct during an EMT call one (1) year earlier, for which he was suspended for two (2) weeks. In this case, the Respondent suspended the Appellant for two (2) tours, even though, under progressive discipline guidelines, the Respondent may have been able to consider a discipline longer than the two (2)-week suspension he incurred one (1) year earlier. Finally, I did not detect any bias or other improper motive warranting modification of the two (2)-tour suspension.

Conclusion

Based on the findings of facts and applicable law and rules, the appeal under Docket No. D-16-118 is hereby *denied*.

Civil Service Commission

/s/ Cynthia A. Ittleman

Cynthia A. Ittleman
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on July 26, 2018.

Either party may file a motion for reconsideration within ten (10) 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 (30) day time limit for seeking judicial review of this Commission order or decision.

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

Notice:

Joseph L. Sulman, Esq. (for Appellant)

Barbara Parker, Esq. (for Respondent)

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

Suffolk, ss.

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CONCURRING OPINION OF COMMISSIONER STEIN

Although I concur in the Decision, I write to express my concern that the evidence of misconduct which the City of Boston alleged against the Appellant is less than conclusive as to certain of the charges. In particular, the Hearing Commissioner discredited certain statements attributed to the Appellant by the FAO operator, discounted District Chief Burke's report that the two welders were on the "same floor" and, indeed, leaves somewhat unclear, given the distances and configuration of the scene, how the Appellant could have had the two welders in his line of sight at all times. Ultimately, however, while these failure in the City's proof bear notice, none of these discrepancies undermine the essential problem with the Appellant's behavior on the date in question. Whether or not the Appellant was within his rights or not to order a stop to welding by one of the cutters is not germane; the City clearly established that the Appellant was clearly presented with a "confrontational interaction with a contractor" and also, perhaps, "activities taking place in violation of the BFPC" (including a welding that had commenced before Appellant arrived) that BFD rules clearly compelled him to contact a District Chief forthwith, and his failure to do so in a timely manner, justifies the two-tour suspension meted out in this case as an appropriate means to remediate this lapse of good judgment.

