

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss:

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

JOSEPH COSTA,
Appellant

CASE NO. D-09-283

v.

CITY OF NEW BEDFORD,
Respondent

Appellant's Representative:

William M. Straus, Esq.
15 Hamilton Street
New Bedford, MA 02740

Respondent's Representative:

Jane Medeiros Friedman, Esq.
First Assistant City Solicitor
City of New Bedford Law Department
133 William Street
New Bedford, MA 02740

Commissioner:

Paul M. Stein

DECISION

Pursuant to the provisions of G.L. c. 31 § 43, the Appellant, Joseph Costa, appealed to the Civil Service Commission (Commission), from a decision of the Respondent, the City of New Bedford (New Bedford), as Appointing Authority to suspend him for forty-eight hours of duty without pay from his position as a Firefighter with the New Bedford Fire Department (NBFD). A pre-hearing conference was conducted on July 10, 2009, and a full hearing was held before the Commission at the Southern New England School of Law on March 26, 2010 and April 2, 2010. At the Appellant's request the hearing was declared public. Witnesses were not sequestered. Nine exhibits were marked. New Bedford called three (3) witnesses and the Appellant called two witnesses and testified on his own behalf. The hearing was digitally recorded. The Commission received proposed Decisions from the parties on May 28, 2010.

FINDINGS OF FACT

Giving appropriate weight to the Exhibits; to testimony of the Appellant, NBFD Chief Paul Leger, NBFD Lieutenant James Allen, NBFD Firefighter Michael Pimental, New Bedford EMS Department Paramedic Patrick Lofgren and New Bedford Assistant City Solicitor Blair Bailey; and to inferences reasonably drawn from the evidence I find credible, I make the findings of fact set forth below.

The Appellant

1. The Appellant, Joseph Costa (Costa), is a tenured civil service employee with more than twenty years of experience as a NBFD Firefighter. He had no prior disciplinary record, save for once having been verbally reprimanded for leaving his car in a superior officer's assigned parking spot. (*Exh. C-1; Testimony of Costa*)

2. On May 11, 2009, Costa and his NBFD colleague Michael Pimental, went to New Bedford City Hall where an arbitration hearing was scheduled to take place involving their commanding officer, Lt. David Aguiar. The hearing involved Lt. Aguiar's alleged altercation with a since-retired District Fire Chief at the scene of a response to a sewer spill in New Bedford. According to several witnesses, a long-standing controversy had precipitated from the matter, some believing Lt. Aguiar was justly disciplined and others believing that the former District Chief had acted "way out of line" and had wrongfully targeted and accused Lt. Aguiar of being insubordinate. The arbitration settled prior to any witness's testimony. (*Testimony of Costa, Pimental, Allen & Chief Leger*)

3. Costa and Pimental, as firefighters assigned to work under Lt. Aguiar, were also on scene at the sewer spill. They said they had direct knowledge that supported Lt. Aguiar's side of the story. For reasons that were not fully explained, they said they had been previously "denied" the

opportunity to be witnesses. Neither Costa nor Pimental had experience with the arbitration process and I infer that their statements meant that New Bedford had not called them as witnesses, but, if deemed necessary, they would have testified to their percipient knowledge on Lt. Aguiar's behalf had the arbitration gone forward. (*Testimony of Costa, Pimental & Allen*)

4. While the parties to the arbitration negotiated with the arbitrator, the other attendees congregated in two separate groups, one at each end of the hallway on the third floor of New Bedford City Hall. One group included Costa, Pimental, Lt. James Allen (also president of the NBFD Local 841, International Association of Firefighters) and others who supported Lt. Aguiar. The other group included witnesses called on behalf of the city to testify against Lt. Aguiar, including District Chief Gomes and New Bedford EMS Department Paramedic Patrick Lofgren. (*Testimony of Costa, Chief Leger, Lofgren, Pimental & Allen; Exh. A-9*)

5. Costa and Pimental knew Lofgren by name but had never met him. Lofgren worked out of a different duty station from Costa and Pimental and he had no recollection of ever coming into contact with either of them during any on-duty EMS calls. Someone pointed out who Lofgren was to Costa while they were in the hallway in City Hall. Lofgren did not learn who Costa and Pimental were until later. (*Testimony of Costa, Pimental & Lofgren*)

6. Lt. Allen testified that Gomes and Lofgren were not percipient witnesses to the environmental spill response, but presumably were witnesses to collateral matters involving Lt. Aguiar that New Bedford contended may have had some bearing on the level of discipline imposed on Lt. Aguiar. No one, including Lofgren, explained precisely why Lofgren had been called as a witness, but Allen, Costa and Pimental thought it was because Lofgren he had lodged a prior charge against Lt. Aguiar, although that charge was dropped when it was determined that it was a case of mistaken identity on Lofgren's part and was unfounded. Allen said that Costa

and Pimental seemed particularly upset that Gomes, himself, as a fellow-union member, would testify against Lt. Aguiar and that Lofgren would give testimony that could have had nothing to do with the incident in question and that they “surmised” would be simply an untruthful “assassination of character.” (*Testimony of Costa, Pimental & Allen*)

7. To all who testified before the Commission, Costa and Pimental’s demeanor appeared normal in the hallway outside of the arbitration room and talking was in conversational tone. There was no unusual interaction in the hallway between the two opposing camps while they awaited the outcome. Lt. Allen was certain that neither Pimental nor Costa was in a NBFD uniform. (*Testimony of Testimony of Chief Leger, Lofgren, Costa, Pimental & Allen*)

8. Once the settlement of the Lt. Aguiar arbitration was announced, Gomes approached Pimental and Costa and said, “Phew, I’m glad that’s over with.” This began what Gomes described in a written memorandum to Chief Leger dated May 17, 2009 as an “animated discussion of our opinions on the matter” that continued as Gomes, Costa and Pimental proceeded downstairs and out the side exit of City Hall and onto the sidewalk along 6th St.¹ The discussion became loud and included derogatory remarks directed at Gomes, principally by Pimental, who used profanity and called Gomes a “rat” and “this is why you will never be Chief”. Pimental said it was “not something I’m proud of but something I did.” I found his testimony to be candid and consistent with his demeanor and other evidence that inferred, of the two men (Costa and Pimental), Pimental was more acerbic and volatile, while Costa presented as mostly quite even-tempered and calm. (*Testimony of Costa & Pimental; Exhibit A-9*)

9. According to Gomes’s written statement (he did not testify before the Commission), he then crossed 6th St. to his truck parked on the north side of William St. and proceeded to drive

¹ A schematic diagram is attached showing the intersection adjacent to City Hall and the approximate positions of the principal witnesses to the incident as it unfolded.

east down William St. to the stop sign at the corner of 6th St. as Costa and Pimental were making their way on foot across the intersection. As Gomes approached them in his truck, he pulled over, lowered his window and Gomes renewed the “discussion” again, which continued briefly “in a loud and animated fashion”. Then he pulled away, turned right on 6th St. proceeding south and left the scene. Costa and Pimental do not have a materially different recollection of their interaction with District Chief Gomes save that the details of the language used were more explicitly profane and demeaning than Gomes’s memorandum suggested. (*Exh. A-9; Testimony of Costa, Pimental, & Chief Legerl*)

10. Meanwhile, Lofgren exited City Hall by the main entrance (on William St.) and walked to his car, parked on the south side of William St., also facing east (William St. is a one-way street), across from Gomes. In a written statement given to his supervisor later that day, Lofgren stated that, as he was walking to his car, he heard and observed a firefighter whom he didn’t know yelling and acting aggressively toward Gomes. Lofgren stated he got into his car, pulled out of the parking spot, drove east on William St. and stopped at the intersection of William and 6th St. (*Testimony of Lofgren; Exh. C-2; See also testimony of Costa, Pimental & Bailey*)

11. Lofgren stated that, as he pulled up to the intersection, the man he didn’t know (but later identified as Costa) were crossing the street and began directing his anger toward Lofgren. As Costa “was coming toward me”, Lofgren testified, he put up his door windows and locked his car. He said Costa crossed in front of the car and stood at the passenger side door, screaming, “You f[...]ing piece of shit. I’m going to kick your ass you little asshole. I’ll f[...]ing kill you, you piece of shit. That’s right you better f[...]ing drive away because you’re the one that’s going to need an EMT if you don’t.” Lofgren stated that Costa directed various other insults and threats at him as he attempted to drive away for which he did not give particulars. He stated

that he did not immediately drive off because he was stopped at the intersection with traffic. He said Costa wore a tee shirt or sweat shirt with letters “NBFD” or something that identified him as a NBFD firefighter. (*Testimony of Lofgren; Exhibit C-2*)

12. Lofgren testified before the Commission that the New Bedford EMS Department is separate from, but works frequently with, NBFD personnel in responding to medical emergencies and fire scenes. The rescue apparatus to which he was assigned is housed at NBFD Station 9, with separate living quarters but a shared kitchen & bathroom. He said the interaction on May 11, 1009 was not typical of his experience with NBFD firefighter who were very helpful and professional “99.9% of the time”. He did not dispute that profanity could be heard at work, but never physical “threats” made against another person. (*Testimony of Lofgren & Allen*)

13. The testimony given by Costa and Pimentel contradicts Lofgren in several material respects. Costa testified that, after the altercation with Gomes on the sidewalk, he and Pimental walked toward the intersection of William and 6th Street. They saw Lofgren approaching in his car, and appeared to be making a “rolling stop” through the intersection as they were crossed about four feet in front him. He asked Costa, in a rhetorical manner, “Who is this guy?” Costa looked into the car and saw Lofgren who gave Costa a big, cocky grin. Costa admits swearing at Lofgren through the passenger side window (which was up), but denied touching the vehicle or making any threatening statements. Costa said he felt it was necessary to swear at Lofgren because “He wanted to let him know what kind of character he possessed for testifying. He could have refused.” (*Testimony of Costa & Pimental*)

14. According to Pimental, he remembered Costa saying to Lofgren, “What are you smirking at? You are an F’ing rat. You have no business being here. Get the F out of here.” Then Lofgren drove off. This altercation lasted a few seconds and took place just before Gomes drove through

the intersection shortly thereafter and exchanged further words with Pimental and Costa, as described earlier. (*Testimony of Pimental, Costa & Bailey*)

15. Costa emphatically refuted the claim that he was wearing his NBFD-issued tee shirt. He testified that he never wears his NBFD uniform off duty and did not wear it on May 11, 2009, which was his day off. He explained that he holds a second job delivering for Star Oil Co. and wore a shirt with the logo of the oil company on the left front of his chest. There was no lettering on the back. A copy of the shirt Costa said he wore was produced during his testimony. Both shirts are similar navy blue in color with white silver screen lettering above the left front pocket. I found Costa's testimony on this point compelling and true and it added considerable veracity to the other parts of his largely plausible testimony as well. (*Testimony of Costa*)

16. Blair Bailey is a part-time Tax Title Attorney for the City of New Bedford who worked in the City Solicitor's Office. He exited the front door (William St. side) of City Hall at approximately 11:00 a.m. on May 11, 2009, to go to the parking lot across William St. where he had parked his car. (*Testimony of Bailey: Exh. C-3*)

17. In a written statement to the First Assistant City Solicitor, dated May 18, 2009, Atty. Bailey stated that, after he walked out the front door, "I observed a group of four people" on William St. The group included two individuals whom he identified later from photographs shown to him, as Pimental and Costa, "an EMT that I do not know" and "a man I later identified as District Chief Gomes." Bailey also recalled seeing another person and her child standing near the intersection at this time. (*Testimony of Bailey, Exh. C-3*)

18. Atty. Bailey stated that the EMT walked away from City Hall and proceeded to his vehicle while Gomes was walking up William St. He also stated that Pimental and Costa were verbally berating and assaulting both of the other "two gentlemen". He stated that Costa told

Gomes, among other things, that “he was going to ‘get him’, that he should ‘watch his back’ and that he was going to ‘fucking kill you’.” Bailey is the only witness to attribute such remarks to Costa. (*Testimony of Bailey, Costa & Pimental, Exhs. C-3 & A-9*)

19. In his statement, Atty. Bailey said “it was readily apparent that the individuals involved were New Bedford firefighters. Costa was wearing what appeared to be a blue NBFD tee shirt.” Atty. Bailey reaffirmed in testimony before the Commission that he saw Costa wearing a NBFD shirt and added that he had a lot of friends in the NBFD and he knows the apparel well. (*Exh. C-3: Testimony of Bailey*)

20. Both Pimental and Costa were wearing civilian attire, and Atty. Bailey was clearly mistaken in this regard. His erroneous assumption causes me to doubt that his powers of observation and recollection were entirely trustworthy and to question whether he correctly perceived and was able to distinguish the statements and behavior he attributed to each of the participants involved. After taking into account all of the credible evidence, I also conclude that Bailey wasn’t able fully to discriminate between the separate episodes that day between Gomes and Lofgren. Rather, by the time Mr. Bailey wrote his memo a week later, his memory somewhat comingled the encounters and the actions of the parties involved. (*Exh. C-3: Testimony of Bailey, Costa, Pimental & Allen & Lofgren*)

21. For example, Atty. Bailey’s testimony directly contradicts Lofgren’s testimony to the extent Bailey said that, as he watched Lofgren walk up William St., verbal comments were made by the firefighters to Lofgren’s back while he was getting into his (parked) car. Mr. Bailey assumed Costa was yelling at Lofgren as he walked down the Street as he was the only person he said he saw in the direction Costa was yelling. I do not credit this testimony, as I find the testimony of Costa and Pimental, both of whom testified that they were focused on District

Chief Gomes at that point, and had no interaction with Lofgren until later, when he was already in his vehicle and proceeding into the intersection of William St. and 6th St. (*Testimony of Bailey, Lofgren, Costa & Pimental*)

22. Atty. Bailey testified that he watched in his car waiting to exit the parking lot onto William St. He said he “didn’t get all of it”, but he did hear Costa refer to Lofgren as a “little shit” and say “I’m going to get you” and something to the effect: “The next time I see you you’re the one who will need an EMT.” Mr. Bailey claims he is 100% certain that he heard these statements. (*Testimony of Bailey; Exhibit C-3*)

23. On receiving a verbal briefing from Gomes, as well as his written memorandum (which Chief Leger assumed Gomes had “toned down”), Chief Leger was inclined to let Gomes handle the matter internally as Gomes recommended, as Leger did not see anything beyond verbal venting that did not seem to warrant more severe action. However, after further investigation, including memoranda from Lofgren and Atty. Bailey, Leger notified Costa that he determined Costa had verbally assaulted and threatened both District Chief Gomes and Paramedic Lofgren on May 11, 2009, in public, and while “wearing the New Bedford Fire Department work uniform ... that indicated on the back ‘NBFD’.” Chief Leger ordered Costa to be suspended immediately for a period of four tours of duty (48 hours). (*Testimony of Leger; Exh. C-4*)

24. Costa exercised his right to request a hearing on the suspension which was held before Chief Leger on May 29, 2009. Chief Leger (since retired at the time of the Commission hearing), testified that Costa claimed he did nothing wrong and the entire incident was Chief Leger’s fault for his part in pressing charges against Lt. Aguiar. (*Testimony of Chief Leger*)

25. Following the hearing, Chief Leger ruled that the evidence confirmed his decision to discipline Costa for physically threatening Paramedic Lofgren, which he considered to be an

“assault”. He found this conduct was unbecoming a firefighter, in violation of NBFD’s Code of Conduct for Firefighters, §16.4 [“Always conduct themselves to reflect credit on the Fire Department”] and §16.6 [“Always conduct themselves in a manner that creates good order inside the department.”] of the Standard Operating Procedure #16. He also found that Costa had violated Section 27 of the General Rules of the NBFD, which provides:

“Criticism of superior officers, discourtesies to the public or to members of the department, unjust treatment of officers or members, and movement tending to create dissention’s [sic] or appearing to ignore responsible officials will be considered breaches of discipline and treated accordingly.”

(Exhs. C-5 through C-7; Testimony of Chief Leger)

26. Chief Leger distinguished Costa’s behavior towards Lofgren, which he found “crossed the line” and warranted discipline, and the behavior of Pimental, which did not result in any discipline of him. He testified that the “physically threatening remarks” were serious misconduct, whereas the other statements uttered by Pimental and/or Costa were not of the same character.

(Testimony of Chief Leger)

LEGAL STANDARD

A tenured civil service employee may be disciplined only for “just cause” after due notice and hearing, followed by a written decision “which shall state fully and specifically the reasons therefore.” G.L. c.31,§41. An employee aggrieved such a decision may appeal to the Commission under G.L. c.31, §43, which 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 . . . 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 role of the Commission is to determine, under a de novo “preponderance of the evidence” test, “whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). Compare Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev.den., 440 Mass. 1108 (2003) (affirming de novo decision to reject appointing authority’s evidence of appellant’s failed polygraph test and prior domestic abuse orders and crediting appellant’s exculpatory testimony) with Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814,823 (2006) (inconsequential differences in facts found did not make appointing authority’s justification unreasonable). See also Police Dep’t of Boston v. Collins, 48 Mass.App.Ct. 411 (2000); McIsaac v. Civil Service Comm’n, 38 Mass. App.Ct. 473, 477 (1995); Watertown v. Arria, 16 Mass.App Ct. 331, rev.den., 390 Mass. 1102 (1983). See generally Villare v. Town of North Reading, 8 MCSR 44, reconsid’d, 8 MCSR 53 (1995) (discussing need for de novo fact finding by a “disinterested” Commissioner in context of procedural due process); Bielawski v. Personnel Admin’r, 422 Mass. 459, 466, 663 N.E.2d 821, 827 (1996) (same)

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." E.g., Commissioners of Civil Service v. Municipal Ct. 359 Mass. 211,214 (1971); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477,482 (1928); Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). 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 the “merit principle” which governs 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.

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); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1982). The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001). The Commission is guided by, but is not obliged to follow strictly, the rules of evidence applied in a judicial proceeding, and may credit hearsay it finds reliable, in its sound discretion, although that evidence that would be inadmissible in a court of law. See, e.g., Doe v. Sex Offender Registry Board, 459 Mass. 603 (2011); Costa v. Fall River Housing Auth., 453 Mass. 614, 627 (2009).

It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance.” E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003) (where live witnesses gave conflicting testimony, a decision relying on an assessment of their relative credibility can be made only by someone present at the hearing)

G.L.c.31, Section 43 also vests the Commission with authority to affirm, vacate or modify the penalty imposed by an appointing authority. The Commission has been delegated with “considerable discretion”, albeit “not without bounds”, to modify a penalty imposed by the appointing authority, so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. E.g., Police Comm’r v. Civil Service Comm’n, 39 Mass.App.Ct. 594,600 (1996) and cases cited. See Faria v. Third Bristol Div., 14 Mass.App.Ct. 985,987 (1982) (no findings to support modification)

In deciding to exercise discretion to modify a penalty, the commission’s task “is not to be accomplished on a wholly blank slate.” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983).

“After making its de novo findings of fact, the commission must pass judgment on the penalty imposed, a role to which the statute speaks directly. G.L.c.31,§43. . . .Here, the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether “there was reasonable justification for the action taken by the appointing authority in the circumstances found by the Commission to have existed when the appointing authority made its decision.’ ”

Id. See also Town of 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). (“The

power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded to the appointing authority.”) Thus, when it comes to the review of the penalty, unless the Commission’s findings of fact differ materially and significantly from those of 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.”. Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. cf. School Committee v. Civil Service Comm’n, 43 Mass.App.Ct. 486, rev.den., 426 Mass. 1104 (1997) (modification of discharge to one-year suspension upheld); Dedham v. Civil Service Comm’n 21 Mass.App.Ct. 904 (1985) (modification of discharge to 18-months suspension upheld); Trustees of the State Library v. Civil Service Comm’n, 3 Mass.App.Ct. 724 (1975) (modification of discharge to 4-month suspension upheld)

CONCLUSION OF THE MINORITY (STEIN, HENDERSON)

Applying the applicable standards to the facts of this appeal, I find that the preponderance of the evidence fails to establish “just cause” to suspend Firefighter Costa for his conduct on May 11, 2008. The core question in deciding this appeal is whether Costa, while wearing a NBFD uniform, did verbally assault Lofgren in a manner reasonably believed to be construed by him as a threat of physical harm. I find it is more likely than not, that Costa’s conduct did not rise to the level of threatening physical harm that troubled Chief Leger or otherwise amounting to conduct unbecoming a firefighter that would be likely to interfere with the good order and discipline of the NBFD or otherwise impair the public service. I conclude that, based on the facts that were established before this Commission, even Chief Leger would not have treated Costa any

differently than Pimental, who was not disciplined for publicly dressing down his own superior high-ranking District Chief with highly insulting and inflammatory language.

First, the verbal tirade against District Chief Gomes, although intemperate, did not result in any disciplinary response. Although both Pimental and Costa admitted to making disparaging remarks and “F-bombs” at Gomes, I believe Pimental’s candid testimony that he was the primary instigator in that regard and made inflammatory comments to Gomes that insulted a high-ranking superior officer on City property and called him a “rat” who will “never be Chief.” than Costa, there was no discipline action taken against Pimental. Despite Pimental’s admitted conduct, neither Gomes nor Leger considered disciplinary action was appropriate against either firefighter for that insulting verbal behavior, which, on the evidence presented to the Commission is not readily distinguishable from, and arguably not more insubordinate than, Costa’s verbal tirade against Lofgren.

Second, there is substantial evidence that Lofgren’s own actions contributed to the altercation. Lofgren testified that, when Costa and Pimental walked away from Gomes and “approached” his vehicle after he had stopped at William St. before turning onto 6th St, Lofgren rolled up his windows and locked his doors “as [Costa] was coming toward him”. Costa confirms that the passenger window was up as he shouted at Lofgren alongside his truck. This infers: (1) Lofgren must have seen Costa and Pimental before beginning to turn onto 6th St.; (2) if he was apprehensive, it was self-induced fear, and not because of any subsequent statements or “threats” Costa made after he rolled up his windows and started his turn; and (3) Costa’s outburst came after he must have come very close to being hit by Lofgren’s car.

Upon seeing Lofgren’s car, Pimental, said “Who is this guy?” to Costa. He clearly knew that it was Lofgren from seeing him at the arbitration hearing, so I infer this was a sarcastic

remark implying that Lofgren was showing no courtesy for them, as pedestrians, crossing the street, while he was making the turn from William onto 6th Street. There is a stop sign on William and as 6th St. has the right of way, but it is not plausible that Lofgren stopped due to “traffic”, as he claimed, when Costa and Pimental were then simultaneously walking diagonally across the intersection and headed in his direction. Costa walked around the front of Lofgren’s car toward the sidewalk on the passenger side window and Pimental walked around the back. I infer from the testimony about Costa “touching” Lofgren’s car that Costa probably did extend his hand instinctively for protection, as he would in passing in front of a moving vehicle. I also have credited the testimony of Costa that, when Costa first looked into Lofgren’s car, Lofgren looked back at him with a smirk on his face, which was clearly provocative behavior coming on the heels of the already stressful events that had just preceded it.

Third, the preponderance of evidence established that, in fact, Costa had no intention to, or actually created an apprehension of actual harm to Lofgren. Nothing in Costa’s essential clean record of employment, his demeanor as a witness, or any other specific credible evidence, warrants the inference that Costa had any known or perceived tendencies to violence or that Lofgren was reasonably placed in fear that Costa would follow through with such “threats”. Moreover, Lofgren did not impress me as someone easily bullied or likely to believe Costa truly meant to “kill him” or cause him any physical harm. Costa’s purported warning to Lofgren about needing an EMT “the next time I see you” certainly does not imply immediate physical harm, especially with Lofgren in a moving vehicle. Moreover, up to that point, Lofgren had never crossed paths with either Costa or Pimental while on-duty. Finally, Lofgren’s prior complaint about Lt. Aguiar that turned out to be a case of mistaken identity on Lofgren’s part adds further

doubt in my mind of the extent I can trust his powers of observations, his objectivity and motives.

I do not doubt that Costa probably used words similar to what Lofgren and Bailey attributed to him. Nevertheless, the outburst clearly remains a temporal, figurative response triggered by seeing Lofgren driving past them with a “big grin” on his face, and fueled by the long history of the underlying internal departmental dispute. This context cannot be discounted. There was no reason to believe the statements were to be taken literally or created any apprehension that any such “threats” would (or could) be carried out. Costa (or Pimental) intended (and their actions demonstrated) no more than verbally venting their frustration for Gomes’ and Lofgren’s part in aiding and abetting what they genuinely believed to be an unwarranted pursuit of the Lt. Aguiar collective bargaining disciplinary matter. Thus, this case differs from those in which off-duty employees were justly suspended for allowing a verbal confrontation with a co-worker or other party to escalate into actual physical violence. See, e.g., Skwira v. City of Holyoke, 22 MCSR 226 (appellants known to be off-duty police officers got into argument with nightclub customers which escalated into a street brawl); DeOlivieria v. City of Taunton, 21 MCSR 495 (2008) (police officers in verbal argument that lead to a fight); Andrade v. Town of Hudson, 21 MCSR 73 (2008) (self-identified off-duty police officer in barroom brawl); Nadile v. City of Somerville, 20 MCSR 484 (2007) (physical altercation in parking lot after work); Rivers v. Town of Williamstown, 19 MCSR 425 (2006) (police officer in barroom fight with fellow officer); Yukl v. Town of Montague, 14 MCSR 131 (2001) (appellant rammed fellow police officer’s car and wielded a crowbar); Leitch v. Town of Franklin, 12 MCSR 61 (1999) (firefighter tampered with co-worker’s gear, provoking fight). See also Tosca v. Department of Correction, 22 MCSR 162 (2009) (off-duty correctional officer resisted arrest); Higgins v. Plymouth Police Dep’t, 17

MCSR 113 (2004) (off-duty police officer resisted arrest); Clemons v. Boston Police Dep't, 10 MCSR 118 (1997) (same)

Fourth, it is also important to note that Costa was clearly off duty at the arbitration hearing on May 11, 2009 and was not wearing his NBFD shirt. He was in fact wearing a blue shirt with a logo of the oil company he worked for. Both shirts are navy blue with similar white silver screen lettering above the left front pocket. The fact that Chief Leger relied on mistaken testimony to the contrary impermissibly influenced his conclusion in this matter. cf. O'Donnell v. Newton Police Dep't, 11 MCSR 277 (1998) (evidence inconclusive that appellant wore police clothing while drinking to excess and did not justify charges of conduct unbecoming an officer)

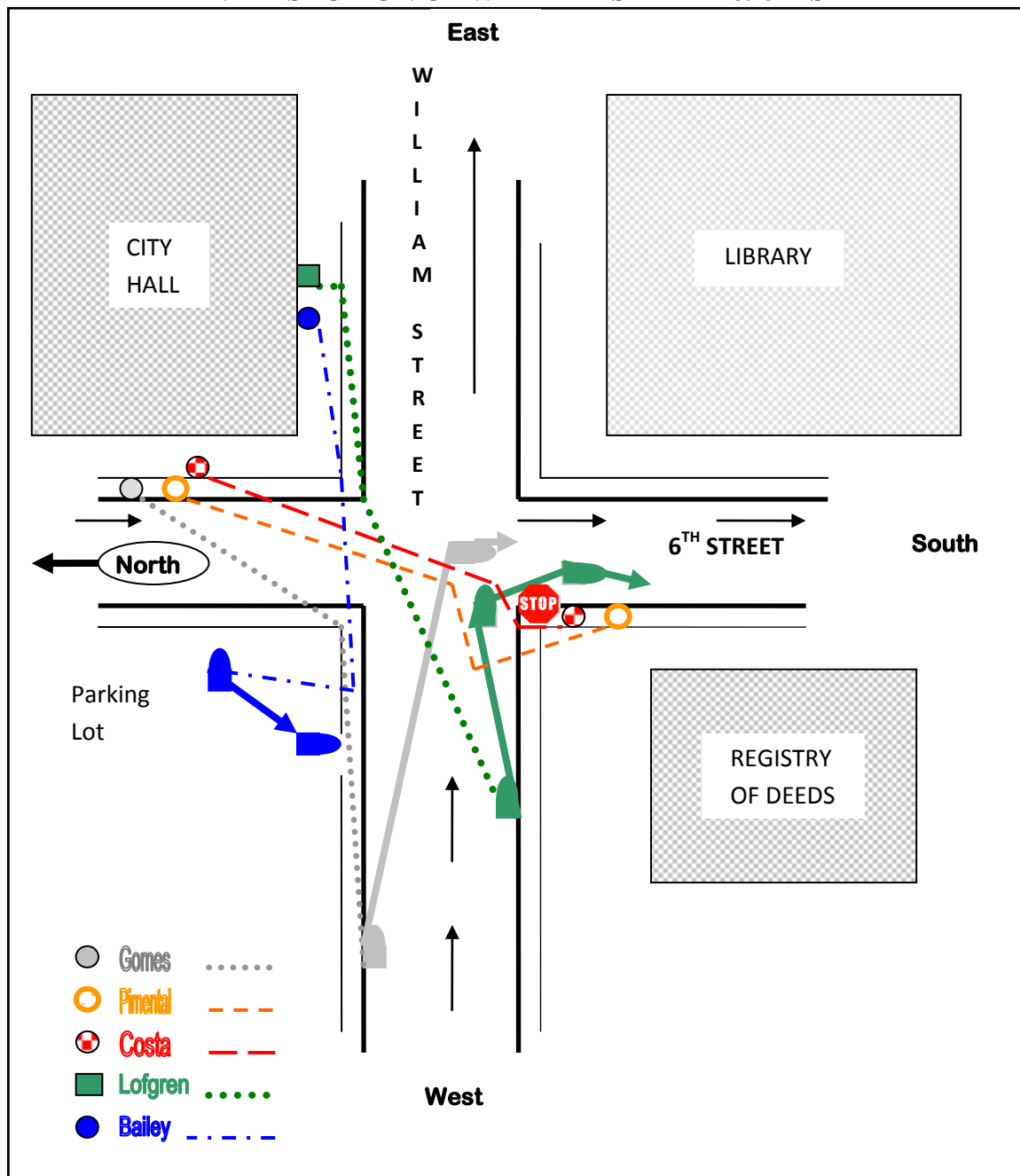
In sum, this episode was an isolated, off-duty incident that stemmed mainly from a firefighter's reaction in the aftermath of an arbitration case that had long "divided the department". These tensions were further incited when Lofgren gave Costa an "arrogant and cocky" grin and nearly sideswiped him. Under these circumstances, I do not believe the evidence sufficient to establish that, as to this isolated instance of off-duty behavior, precipitated by a collective bargaining dispute, and which never went any further, "the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service" in which Costs (or Lofgren) was employed.²

For the reasons stated above, I believed the appeal of Joseph Costa under Docket No. D-09-283 should be *allowed*.

² This conclusion does not mean to suggest that Costa should take comfort that he is wholly without blame in this case. He was clearly mistaken or misinformed about the legal procedures of an arbitration through which witnesses such as Lofgren are often ordered by their superiors or subpoenaed to attend, and may not necessarily be present by their own choosing. Moreover, while Costa is entitled to his personal opinion about the merits of the Lt. Aguiar matter, and to hold in disdain those who did not agree with him, that does not give him license to act out his anger, even verbally, as he did here. Had he been on-duty or in uniform, as Chief Leger presumed, and had there been appropriate, even-handed treatment accorded to Pimental, who was a willing participant who incited or contributed to the angry exchange, some lesser discipline against Costa also might have been justified, even in the absence of proof of any actual threat or use of force.

Paul M. Stein, Commissioner

INTERSECTION OF WILLIAM STREET & 6TH STREET



CONCLUSION OF THE MAJORITY (BOWMAN, McDOWELL, MARQUIS)

By a preponderance of the evidence, the City has shown that it had just cause for suspending the Appellant.

The incident in question occurred on the day of a scheduled arbitration hearing involving another member of the City's Fire Department. The Appellant, who was not called as a witness by either party at that hearing, opted to appear at the hearing location to "show his support" for the employee being disciplined.

The Appellant, who had no role in this arbitration proceeding, was "particularly upset" that two individuals, a Fire Lieutenant and an EMT, planned on providing testimony that he "surmised" would be harmful to his fellow employee.

The matter before the arbitrator did not go forward as the parties reached a settlement agreement. It is undisputed that as one of the witnesses (the EMT) was driving away from the hearing location, the Appellant began hurling vulgarities at the witness (i.e. – "you are a fucking rat") because "he wanted to let him (the witness) know what type of character he possessed for testifying." According to the Appellant, the witness "could have refused."

Presumably as the enforcer of good character, the Appellant then ominously told the witness that, the next time he saw him, the witness would need an EMT. Such threatening remarks can not be excused as a "temporal, figurative response."

The City, and its Fire Chief, were on firm ground deeming these remarks to be threatening and concluding that the Appellant's overall conduct that day was unbecoming of a New Bedford firefighter.

Prospective witnesses should not be threatened or called "fucking rats" for simply responding to lawfully-issued subpoenas, whether it be in the context of an arbitration hearing, a hearing

before the Civil Service Commission or any other quasi-judicial or judicial proceeding. Such behavior is outrageous and the Commission should not be a safe harbor for those who engage in it.

For these reasons, the Appellant's appeal under Docket No. D-09-283 is hereby *dismissed*.

For the majority:

Christopher C. Bowman
Chairman

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman – Yes; Henderson, Commissioner – No; Marquis, Commissioner – Yes; McDowell, Commissioner – Yes; and Stein, Commissioner - Yes) on July 14, 2011.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the 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 a Civil Service Commission's final 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.

Notice to:
William M. Strauss, Esq. (for Appellant)
Jane Medeiros Freidman, Esq. (for Appointing Authority)