

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

LAMONT DAVIS,
Appellant

v.

D1-13-65¹

NEWTON FIRE DEPARTMENT,
Respondent

Appearance for Appellant:

Charles A. Clifford, Esq.
305 Main Street
Charlestown, MA 02129

Appearance for Respondent:

Donnalyn Kahn, Esq.
Newton Law Department
1000 Commonwealth Avenue
Newton, MA 02459

Commissioner:

Christopher C. Bowman

DECISION

Pursuant to G.L. c. 31, § 43, the Appellant, Lamont Davis (Mr. Davis), filed a timely appeal with the Civil Service Commission (Commission) on March 18, 2013, contesting the decision of the Newton Fire Department (Fire Department or City) to terminate him from his position as a firefighter. A pre-hearing conference was held at the offices of the Commission on June 4, 2013. A full hearing was held at the offices of the Commission on September 5, 2013. Neither party requested a public hearing, so the hearing was deemed private. The hearing was digitally

¹ A separate decision regarding Mr. Davis, under CSC Docket No. D-13-64, is also being issued today.

recorded and the parties were provided with a CD of the hearing. The parties submitted post-hearing briefs on November 4, 2013.

FINDINGS OF FACT

Based on Exhibits 1 through 12, the stipulations of the parties, the testimony of:

Called by the City:

- Bruce Proia, Fire Chief, City of Newton;
- Lee Gilliam, Firefighter, City of Newton;
- Karl Svartstrom, Firefighter, City of Newton;
- Julie Moore, Investigator;
- Dolores Hamilton, former Director of Human Resources, City of Newton;

Called by Mr. Davis:

- Lamont Davis, Appellant;
- Robert McIntosh, former Firefighter, City of Newton.

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

1. Mr. Davis is forty-two (42) years old. He is married, has two (2) children and lives in Brockton. (Testimony of Mr. Davis)
2. Mr. Davis was appointed as a firefighter by the City in 1995. He is also trained as a welder and is a member of Ironworkers Local 7. He recently received an Associates Degree in Fire Science. Mr. Davis enlisted in United States Marine Corps; served in Operation Desert Storm and was honorably discharged. (Testimony of Mr. Davis)

Prior Discipline

3. Mr. Davis was suspended for six (6) months in 2004 and received a written warning in 2010. (Stipulated Facts)² Mr. Davis was also suspended for one (1) day in February 2013 and for thirty (30) days in March 2013. (Testimony of Chief Proia)

Facts Related to Instant Appeal

4. Mr. Davis is African American. Firefighter Lee Gilliam is biracial, having one parent who is white and one parent who is African American. (Testimony of Firefighter Gilliam)
5. Firefighter Gilliam has been employed by the Newton Fire Department for 9 ½ years. During that time period, Firefighter Gilliam has occasionally, but not often, worked with Mr. Davis. (Testimony of Firefighter Gilliam)
6. Relatives of Mr. Gilliam are also employed by the Newton Fire Department. (Testimony of Firefighter Gilliam) They include 2 Fire Captains, 1 Fire Lieutenant and 2 Firefighters. (Testimony of Mr. Davis)
7. When Mr. Gilliam first joined the Newton Fire Department, he would help facilitate “shift swaps” for Mr. Davis. (Testimony of Mr. Davis and Firefighter Gilliam) I infer from their testimony that Firefighter Gilliam was at times the only person or one of the few persons willing to swap shifts with Mr. Davis.
8. On October 21, 2012, Mr. Davis and Firefighter Gilliam were working together on a particular fire apparatus. (Testimony of Firefighter Gilliam) The apparatus stopped at the parking lot of Shaw’s Supermarket in Newton to get coffee at Bruegger’s Bagels. At some

² In 2007, the Commission determined that the City did not have just cause to terminate Mr. Davis.

point, Mr. Davis and Firefighter Gilliam were alone near the fire apparatus. (Testimony of Mr. Davis and Firefighter Gilliam)

9. At the time of the October 21, 2012 conversation, Mr. Davis was engaged in litigation against the City of Newton. That litigation involved a 2008 discrimination complaint filed by Mr. Davis with the Massachusetts Commission Against Discrimination (MCAD) which was transferred to Superior Court. A weeks-long jury trial regarding this matter was eventually conducted two months later. (Testimony of Mr. Davis)
10. While walking toward the fire apparatus, Mr. Davis and Firefighter Gilliam began a conversation about shift swaps that occurred years earlier. (Testimony of Mr. Davis and Firefighter Gilliam) Firefighter Gilliam commented about what he perceived to be unfair swaps between the two of them several years earlier. (Testimony of Mr. Davis)
11. At some point during their conversation, Firefighter Gilliam told Mr. Davis that he (Davis) was always playing the “race card”. Mr. Davis understood this to be a reference to his pending litigation against the City. (Testimony of Mr. Davis)
12. At some point during this same conversation, Mr. Davis told Firefighter Gilliam that he (Gilliam) was a “house n-word”; a “corn bread” and “home grown”. (Testimony of Firefighter Gilliam) Lt. Karl Svartstrom heard Mr. Davis make the “corn bread” comment. (Testimony of Lt. Svartstrom)
13. Firefighter Gilliam understood all of these terms to be derogatory and inappropriate and as a reference to the fact that he is bi-racial. He did not view the comments as humorous and the comments made him very upset. (Testimony of Firefighter Gilliam)
14. When they arrived back at the station, Firefighter Gilliam told Mr. Davis that he found his comments to be offensive. Mr. Davis did not apologize for making the comments.

(Testimony of Firefighter Gilliam) Rather, Mr. Davis told Firefighter Gilliam that the two men would need to “agree to disagree”. (Exhibit 3)

15. Firefighter Gilliam told Lt. Svartstrom about the comments that Mr. Davis had made. Lt. Svartstrom observed that Firefighter Gilliam was very upset and advised him to file a written complaint if the comments bothered him. (Testimony of Lt. Svartstrom)

16. Mr. Davis had made comments to Firefighter Gilliam in the past that Firefighter Gilliam found offensive including, “you’re in with the ‘whities’”. (Testimony of Firefighter Gilliam)

17. Approximately two (2) weeks later, between November 4th and November 7th of 2012, Mr. Davis and Firefighter Gilliam exchanged a series of text messages regarding “swaps” and the October 21st incident. (Testimony of Firefighter Gilliam and Exhibit 8) The text messages were as follows:

11/4/12, 4:38 P.M. – From Davis to Gilliam: “Hey can you find someone for me on Thursday---day”

11/6/12, 11:29 A.M. – From Gilliam to Davis: “Ya. No luck finding coverage for you. U gotta start making some friends my man.”

11/6/12, 11:31 A.M. – From Davis to Gilliam: “Why what are they saying”

11/6/12, 1:42 P.M. – From Gilliam to Davis: “My cell is dead. U wanna agree to disagree... That pisses me off and I’ve told you that from the jump. U try to dogg me out in front of people and that’s why we had an argument after the fact.”

11/6/12, 1:42 P.M. – From Gilliam to Davis: “You do you”

11/6/12, 2:56 P.M. – From Gilliam to Davis: “yo I gotta get this off my chest, but last week when you dogged me out in front of the guys calling me cornbread and the us (sic) arguing to (sic) and your conclusion to agree to disagree; its Then infuriating that you feel that I should help you out with getting you coverage asking me multiple times. Its (sic) comes off to me as very antagonistic, plain and simple”

11/7/12, 2:58 P.M. – From Gilliam to Davis: “When I know your (sic) perceiving me as a joke and that your (sic) only trying to teach me a lesson is unacceptable”

11/7/12, 3:16 P.M. – From Davis to Gilliam: “Listen Lee why are you textin me. You last said for me to do me. You need to call me and say what is on your mind...so stop this textin shit please.”

Do not no (sic) if you sent this tex (sic) today or not but like I said if you have some thing to say then just call me and we can talk”
(Exhibit 8)

18. On November 8, 2012, Firefighter Gilliam penned a “To whom it may concern” letter recounting the October 21st incident. The last two (2) paragraphs of the letter state:

“Since this incident my anger has only grown mainly due to my exchanges we have had through text and phone calls because I want to settle this and have closure but was unable to obtain any. Lamounts (sic) texts consist and insist upon me finding him a person to work for him for Thursday Nov. 8th. I don’t owe and have never owed Lamount (sic) any time or tours of duty; which has only added to my frustration.

I feel not only is he being antagonistic but could care less how I feel. I don’t want to come to work having to feel less than human because of another person. I cannot sit and remain quiet over an issue that I feel strongly about. I conduct myself and others with respect and I do not feel that I deserve to feel and be treated this way.”
(Exhibit 3)

19. Then-Human Resources Director Delores Hamilton received Firefighter Gilliam’s written complaint and decided to turn the matter over to an investigator, a practice she has followed in the past whenever the complaint is of a serious nature or if the complaint involves someone Ms. Hamilton knows personally. (Testimony of Ms. Hamilton)

20. Mr. Davis ignored several attempts by Ms. Hamilton and the investigator to make a statement or answer questions regarding the complaint. (Testimony of Ms. Hamilton and Ms. Moore)

21. Mr. Davis did not participate in the investigation in part because of the then-ongoing jury trial regarding his discrimination complaint against the City. (Testimony of Mr. Davis)

22. Julie Moore is the individual who conducted the investigation. Ms. Moore is an attorney who is part of a firm in Wellesley specializing in employment practices. (Testimony of Ms. Moore)

23. Ms. Moore interviewed Firefighter Gilliam and Lt. Svartstrom. As part of her analysis and conclusion, dated January 16, 2013, Ms. Moore wrote:

“I find Gilliam to be credible. Further corroborating his version of events is Svartstrom who, admittedly, is friendly with both Gilliam and Davis. He has no reason to ‘take sides’ or otherwise advocate for Gilliam or confirm what he said if it was not true. The fact that Davis did not accept the City’s request to participate in the investigation and meet with me is also telling, as he chose not to tell his side of the story, if it differed.

I conclude that Firefighter Lee Gilliam’s complaint of inappropriate racial remarks have merit.”
(Exhibit 8)

24. As part of her report, Ms. Moore wrote:

“Gilliam was bothered by the environment created by Davis and others, which included making racial comments. Because of the culture, Gilliam said that he transferred to a different station.”
(Exhibit 8)

25. Firefighter Gilliam did not want to disclose the names of other individuals who had made racial comments and Ms. Moore considered it to be outside the scope of her investigation.
(Testimony of Ms. Moore)

26. On February 1, 2013, a jury trial regarding litigation between Mr. Davis and the City concluded and a verdict entered in favor of the City. As referenced above, that litigation involved a 2008 discrimination complaint filed by Mr. Davis with the Massachusetts Commission Against Discrimination (MCAD) which was transferred to Superior Court.

27. On March 7, 2013, Chief Proia conducted a local appointing authority hearing (Section 41 hearing) to determine whether Mr. Davis should be disciplined, up to and including termination, for the October 2012 incident. Chief Proia heard from Lt. Svartstrom, Firefighter Gilliam and Ms. Moore. Mr. Davis did not testify at the Section 41 hearing and Chief Proia drew an adverse inference as a result. (Testimony of Chief Proia)

28. On March 15, 2013, Chief Proia, who is the Appointing Authority, penned a letter to Mr. Davis upholding five (5) charges against him, including: 1) violating the City's Harassment Prevention Policy; 2) conduct unbecoming a Fire Department employee; 3) conduct detrimental to good order; 4) violation of a federal or state law, regulation or ordinance adopted by the City of Newton; and 5) conduct reflecting adversely on the department or its uniform. As a result, Mr. Davis was terminated, effective April 16, 2013, at the conclusion of his most recent thirty (30)-day suspension. (Exhibit 10 and Testimony of Chief Proia)
29. At least one (1) other firefighter has been terminated by the Newton Fire Department for making racially derogatory comments. That firefighter referred to an Asian police officer as "googly gook eyes." That firefighter had no prior disciplinary history. (Testimony of Chief Proia)³

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

³ The other terminated firefighter filed an appeal with the Civil Service Commission. (See 24 MCSR 495 (2011)). His appeal was dismissed as it was not filed in a timely manner. However, the decision in that matter notes that the racial remarks were only one part of the charges against that firefighter. That firefighter was stopped by an Asian police officer and arrested for OUI. He ultimately admitted to sufficient facts to the OUI. As part of the stop, he made the alleged racial remarks referenced by the Fire Chief. However, that firefighter was also observed smoking during this traffic stop, which is a violation of state law and an automatic grounds for termination. The OUI, his smoking and the racial remarks all formed the basis of the City's decision to terminate that firefighter. As Chief Proia did not mention this in his testimony, I was unable to ask him if that firefighter would have been terminated based solely on the racial remarks that he made to the Asian police officer.

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, rev.den., 426 Mass. 1102, (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass. App.Ct.486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983)

The 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).

ANALYSIS

The crux of this appeal involves whether Mr. Davis, who has been a Newton firefighter for eighteen (18) years, made racial remarks to a fellow firefighter and whether those remarks constitute harassment. The preponderance of evidence shows that he did make the remarks and that they do constitute harassment.

I did not credit those portions of Mr. Davis's testimony in which he denied uttering the offensive n-word. According to Mr. Davis, he told Firefighter Gilliam that he was a "house" and then paused but did not say the n-word. Rather, according to Mr. Davis, he only implied it. That

is nonsense. Mr. Gilliam offered straightforward, credible testimony which convinced me that Mr. Davis told him that he (Gilliam) was a “house n-word”.

Even if the n-word was actually spoken, Mr. Davis argues that it does not constitute harassment as it was only meant to provide Firefighter Gilliam with a “history lesson”. According to Mr. Davis, in historical terms, Firefighter Gilliam could be compared to a “house n-word” while he (Davis) would be considered a “field n-word”. According to Mr. Davis’s logic, these references are appropriate as Firefighter Gilliam, who is bi-racial, is more accepted by his fellow non-minority colleagues than he is.

Here, however, Mr. Gilliam’s credible testimony shows that the context of the conversation here had little to do with our country’s lamentable history of slavery. Rather, two (2) firefighters were having a discussion that turned into a disagreement about swapping shifts. When, as part of that conversation, Firefighter Gilliam accused Mr. Davis of always playing the “race card”, Mr. Davis then made the offensive racial remark to Firefighter Gilliam telling him he was a “house n-word”, a “cornbread” and “home-grown”. While I have never personally heard the two (2) latter terms used in the context of racially-charged remarks, it is overwhelming clear to me that Firefighter Gilliam considered them to be an attack on the fact that he is bi-racial. I did not find Mr. Davis to be credible when he testified that the “cornbread” comment was only meant to refer to Firefighter Gilliam as “corny” or “soft”.

Firefighter Gilliam made it clear – then and now – that he was ashamed and embarrassed by the comments. Yet, Mr. Davis persisted and glibly offered that the two men would simply need to “agree to disagree”. In short, I concur with the City’s independent investigator, that Mr. Davis’s conduct constituted harassment against Firefighter Gilliam. Having shown that Mr. Davis engaged in this misconduct, there was just cause to discipline Mr. Davis.

Having determined that it was appropriate to discipline Mr. Davis for this incident, I must determine if the Fire Chief was justified in the level of discipline imposed, which, in this case, was termination.

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 Commission, 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 an employee’s discipline 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. Civ. Serv. Comm’n, 61 Mass. App. Ct. 796, 800 (2004) quoting Police Comm’r v. Civ. Serv. 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.” E.g., Falmouth v. Civil Service Commn, 447 Mass. 814, 823 (2006).

Here, after a de novo hearing at which I reviewed all of the documentary evidence and listened to the testimony of percipient witnesses, I have concluded, similar to the Fire Chief, that Mr. Davis made racially offensive remarks to Firefighter Gilliam which constituted harassment. Absent a showing by Mr. Davis that the discipline imposed here was not consistent with that meted out to others for similar offenses and/or that the termination was a pretext for other impermissible reasons,

the conduct here, coupled with Mr. Davis's past disciplinary history, would appear to warrant termination.

The City argues that another firefighter, with no disciplinary history, was terminated after making racial remarks to an Asian police officer. A review of the Commission's decision regarding that matter, however, shows that the racial remarks were only part of the charges against that firefighter. The charges also related to his OUI arrest, and his subsequent admission to sufficient facts on that charge, as well as a charge of smoking, which state law prohibits firefighters from doing.

I also considered that portion of the investigator's report that found that Firefighter Gilliam transferred to another fire station because of the culture created by Mr. Davis "and others". The investigator testified that she chose not to pursue the issue of "others" who may have engaged in similar behavior because Firefighter Gilliam refused to name these individuals and because it was beyond the scope of her investigation. While it may have been beyond the scope of the investigator's assignment, there was nothing preventing the Fire Department, or the City, upon receiving this information, from investigating those charges further. There is no evidence that they did so.

Finally, there is the timing of this termination. Starting in January 2013, a jury trial commenced involving Mr. Davis's charges of racial discrimination against the City, stemming from a 2008 complaint he filed with MCAD. The parties agree that the trial lasted weeks and a verdict entered in the City's favor in February 2013. Shortly after the jury found in the City's favor, the City commenced the local civil service hearing and terminated Mr. Davis.

While, taken together, these events could potentially paint the picture of a Fire Chief who was pre-determined to terminate Mr. Davis for reasons other than the offenses for which he was charged, I do not believe a modification of the penalty is warranted here.

First, Mr. Davis did engage in harassment against another firefighter. His remarks were unwelcome and offensive. Even when explicitly told by Firefighter Gilliam that the comments offended him, Mr. Davis persisted and failed to apologize.

Second, even as of the date of the Commission hearing, Mr. Davis has failed to recognize the harmful impact of his words and has failed to take responsibility for them, to the point of being untruthful about actually making the comments during his sworn testimony.

Third, Mr. Davis has a history of prior discipline ranging from warnings to short-term suspensions to a six (6)-month suspension.

Finally, the timing of Mr. Davis's termination appears to be more a function of when the actual misconduct occurred, as opposed to the jury trial which ended just prior to the City's decision to move forward with his termination.

CONCLUSION

For all of the above reasons, Mr. Davis's appeal under Docket No. D1-13-65 is hereby *denied* and the decision by the Newton Fire Department to terminate Davis is upheld.

Civil Service Commission

Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein) on January 9, 2014.

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 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.

Notice to:

Charles A. Clifford, Esq. (for Appellant)

Donnalyn Kahn, Esq. (for Respondent)