

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

RICHARD J. DOHERTY,
Appellant

v.

TOWN OF BOURNE,
Respondent

Case No.: D1-11-64

DECISION

The Civil Service Commission (Commission) acknowledges receipt of the following documents:

- Report of the Administrative Law Magistrate dated March 7, 2012;
- Appellant's written objections to the magistrate's recommended decision dated April 6, 2012;
- Respondent's written objections to the magistrate's recommended decision dated April 9, 2012;
- Respondent's response to the Appellant's written objections dated April 24, 2012;
- Appellant's response to the Respondent's written objections dated April 30, 2012.

After careful review and consideration of these documents and the underlying record, the Commission, for the reasons cited below, voted 5-0 at an executive session on May 31, 2012 to:

- Adopt the findings of fact of the magistrate;
- Adopt the conclusions of the magistrate – in part;
- Adopt the magistrate's recommendation to modify the penalty imposed from a termination to a 15-month suspension.

Reasons for the Commission's 5-0 vote

Mr. Doherty, an 18-year employee of the Town of Bourne, was terminated from his position as a firefighter for violating various rules of the Bourne Fire Department. Those rule violations, generally, fall into two categories:

1. Being untruthful or making intentional misrepresentations;
2. Posting profane or disrespectful messages or images on his computer that brought discredit upon the Fire Department and fellow employees.

The Commission's role here is two-fold: determining whether there is just cause to discipline Mr. Doherty and, if so, whether a modification of the penalty is warranted.

Just Cause Standard

G.L. c. 41, § 43 provides that:

“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.” (emphasis added)

In School Committee of Brockton v. Civil Service Comm’n, 43 Mass. App. Ct. 486, 488 (1997), the Appeals Court stated that “[t]he term “just cause” must be construed in light of the purpose of the civil service legislation in which it appears. That purpose is ‘to free civil servants from political pressure and arbitrary separation ... but not to prevent the removal of those who have proved to be incompetent or unworthy to continue in the public service.’” Id., citing Cullan v. Mayor of Newton, 308 Mass. 578, 581 (1941). “‘Just cause’ means ‘substantial misconduct which adversely affects the public interest by impairing the efficiency of public service.’” Police Comm’r of Boston v. Civil Service Comm’n, 19 Mass. App. Ct. at 599 (1996), citing Murray v. Second Dist. Court of Eastern Middlesex, 389 Mass. 508, 514 (1981).”

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 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).

Under Section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew.” Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. However, “[t]he commission’s task...is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . 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’”, which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006). See Watertown v. Arria, 16 Mass. App. Ct. 331, 334, rev.den., 390 Mass. 1102 (1983) and cases cited.

Untruthfulness

The Town has not shown, by a preponderance, of the evidence, that Mr. Doherty violated the rules of the Bourne Fire Department that prohibit employees from being untruthful or making intentional misrepresentations. While the magistrate recommended a different conclusion regarding this offense, we do not believe that conclusion is supported by the record.

For decades, the Commission has steadfastly upheld disciplinary actions against public employees who have been untruthful, including law enforcement officials who have fudged the truth. See MacHenry v Wakefield, 7 MCSR 94 (1994). Lying in a disciplinary investigation alone is grounds for termination. LaChance v. Erickson, 118 S. Ct. 753 (1998), citing Bryson v. United States, 396 U.S. 64 (1969). The Commission has stated that “it is well settled that police officers voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens.” Garrett v. Haverhill, 18 MCSR at 381, 385 (2005). Specifically, there “is a strong public policy against employing police officers who are untruthful.” Royston v Billerica, 19 MCSR 124, 128 (2006). Therefore, “a police officer that has lost his credibility can no longer effectively perform the duties of the position.” Pearson v. Whitman, 16 MCSR 46, 50 (2003). Meaney v. Woburn, 18 MCSR 129, 133-35 (discharge upheld for police officer based, in part, on officer’s consistent dishonesty and “selective memory” during departmental investigation of officer’s misconduct); Pearson v. Whitman, 16 MCSR at 49-50 (appointing authority’s discharge of police officer who had “a problem with telling the truth” upheld); Eisenbeiser v. West Springfield, 7 MCSR 99, 104 (discharge upheld based, in part, on officer’s dishonesty as his misconduct was ongoing, intentional and showed no signs of improvement); Rizzo v. Town of Lexington, 21 MCSR 634 (2008); (discharge upheld based partially on officer’s dishonesty regarding a use of force incident); Desharnias v. City of Westfield, 23 MCSR 418 (2009) (discharge upheld based primarily on officer’s dishonesty about a relatively minor infraction that occurred on his shift). Kinnas v. Shrewsbury, 24 MCSR 67 (2011) (discharge upheld for being untruthful about whether he accessed a fellow employee’s family Facebook account and made inappropriate postings).

In regard to untruthfulness, we draw no distinction between the high standard expected of police officers and that required of firefighters such as Mr. Doherty. Here, however, for the reasons cited below, the Town has not shown that Mr. Doherty was untruthful.

The Town relies on two events to support their charge of untruthfulness. One of those alleged events, however, occurred as part of the local appointing authority hearing *after* the Appellant was sent a notice of itemized charges. As part of that local hearing, the hearing officer determined that Mr. Doherty’s testimony was not credible because he equivocated on the issue of whether he was aware of the rules and regulations of the Bourne Fire Department. While the hearing officer was on solid ground using this statement to make a credibility assessment, the Town erred by listing that credibility assessment as another example of untruthfulness that justified Mr. Doherty’s termination. Mr. Doherty was unaware of this new allegation at the time he was terminated and, thus, had no opportunity to contest the allegation.

The other incident also does not support the charge of untruthfulness. That incident, as outlined in the findings, involved a curious string of events that show the vague nature of this charge. Mr. Doherty, after working his normal 24-hour shift and responding to multiple emergencies, and shortly before leaving for a long-planned camping trip with his son, was ordered to stay for another shift as part of forced overtime. In response, Mr. Doherty tended

to the dispatch desk. The reason given for this required overtime was that the Fire Department needed coverage for firefighters who were participating in the Town's Fourth of July parade. Yet, shortly after beginning his forced overtime shift, a Fire Lieutenant ordered Mr. Doherty to participate in the parade – an order with which he complied. It was in part of this exchange that a question arose as to whether Mr. Doherty had been ordered – or voluntarily chose to – perform dispatch duties. In this context, the Town's serious charge of untruthfulness in this regard is an unwarranted stretch of the imagination. Moreover, the Town took no immediate action in regard to this purported untruthfulness until several weeks later, when it tacked this charge on to other unrelated charges discussed below, suggesting that the Town never actually believed that Mr. Doherty made untruthful statements on the Fourth of July.

Just Cause Re: Profane or Disrespectful Statements, Messages or Images

We adopt all of the conclusions of the magistrate related to the other rule violations. Mr. Doherty used obscene, indecent and disrespectful language which was discourteous, rude and insolent. His actions reflected discredit upon the Department, his fellow Town employees, Town residents and upon the Fire Department and his actions were prejudicial to the good order of the Fire Department.

He referred to a Bourne police sergeant, who was subsequently promoted to Police Chief, as a "jackass". He ridiculed the Bourne Police Chief by posting messages falsely claiming that the Police Chief answered "who gives a fuck" when he was asked about the Town's response to a pending storm. He used highly offensive language to ridicule fellow employees who participated in the Fourth of July parade and the Town of Bourne. He referred to the Deputy Fire Chief as an "****hole dep who thinks he knows everything ...". Finally, he ridiculed the Fire Chief and Town Manager when he showed another employee a computer image of two animals fornicating and referred to them as the Fire Chief and Town Manager. Almost all of these postings were made while Mr. Doherty was on-duty, being paid by the taxpayers of the Town.

We carefully considered – and rejected – the unpersuasive arguments of Mr. Doherty that these actions were part of protected speech. We do not believe the caselaw cited supports this argument nor do we believe that the workplace has evolved so dramatically that supervisors must endure being referred to in the most profane terms. Further, we reject the Appellant's argument that the offensive animal posting was inappropriately considered by the magistrate. That event occurred before Mr. Doherty was charged, was directly related to the overall charges proffered by the Town and was appropriately considered at the de novo hearing conducted by the magistrate.

Modification of Penalty

Having determined that it was appropriate to discipline the Appellant, the Commission must determine if the Town 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 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 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 Comm'n, 447 Mass. 814, 823 (2006).

It is overwhelming clear that the Town relied heavily on the charges of untruthfulness in addition to Mr. Doherty's other misconduct to justify the harsh penalty of termination. As referenced above, we have reached a significantly different conclusion than the Town regarding the untruthfulness charges. The Town has not shown, by a preponderance of the evidence, that Mr. Doherty violated the rules related to untruthfulness and this alone warrants a modification of the penalty.

We also share the magistrate's well-reasoned explanation that the penalty is not consistent with the principles of progressive discipline. There are indeed instances where an Appointing Authority is justified in terminating an employee with little or no prior discipline. In many of the cases cited above regarding untruthfulness, the terminated employee had no prior discipline and the Commission upheld the termination. There are countless other cases as well related to misconduct other than untruthfulness where the Commission has upheld a termination of an employee with little or no prior discipline.

The facts here, however, paint the picture of a Town that was fully aware – for months – of Mr. Doherty's offensive postings and took no disciplinary action against Mr. Doherty. Instead, the Town apparently monitored these postings and, at some point, decided the offensive postings had reached a point of critical mass and charged Mr. Doherty with a pattern of posting offensive messages and images. It is not lost on the Commission that the final posting before the disciplinary action was taken was a posting that ridiculed the Town Manager, who serves as the Appointing Authority.

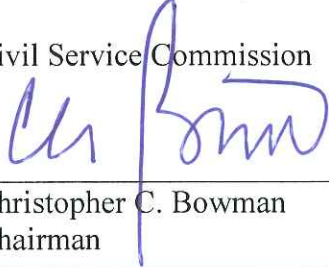
For all of the above reasons, intervention by the Commission is warranted in the form of ordering a reduced penalty. There is no objective formulaic method to arrive at the appropriate reduced penalty, but we are guided by CSC caselaw in this regard. While, for the reasons cited above, we have concluded that termination was not warranted, the Appellant did indeed engage in misconduct that warrants a harsh penalty in the form of a 15-month suspension.

Mr. Doherty should not view this this modification as a badge of honor. He engaged in misconduct that was harmful to the Town, the Fire Department and his fellow Town employees. If Mr. Doherty has used this time to reflect upon his actions, it would follow that any return to the Fire Department would be preceded by a public apology to those individuals he so recklessly disparaged and assurance that such unacceptable behavior will not occur in the future. If not, we suspect that Mr. Doherty's return to the Fire Department will be short-lived.

For all of the above reasons, the Appellant's appeal under Docket No. D1-11-64 is *allowed in part*. His termination shall be modified to a 15-month suspension. He shall not be entitled to any pay or other benefits, including creditable service toward retirement, for this period of time.

By a 5-0 vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on May 31, 2012.

Civil Service Commission



Christopher C. Bowman
Chairman

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:

Leah Barrault, Esq. (for Appellant)
Timothy Zessin, Esq. (for Appellant)
Robert Troy, Esq. (for Respondent)
Craig Jordan, Esq. (for Respondent)
Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)



THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

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RICHARD C. HEIDLAGE
CHIEF ADMINISTRATIVE MAGISTRATE

TEL: 617-727-7060
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March 7, 2012

Christopher C. Bowman, Chairman
Civil Service Commission
One Ashburton Place, Room 503
Boston, MA 02108

Re: Richard J. Doherty v. Town of Bourne
D-1-11-64; DALA Docket No. CS-11-429

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COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

Dear Chairman Bowman:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c)(1), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

If either party files written objections to the recommended decision, the opposing party may file a response to the objections within 20 days of receipt of a copy of the objections

Sincerely,


Richard C. Heidlage, Esq.
Chief Administrative Magistrate

Enclosure

cc: Leah M. Barrault, Esquire
Robert S. Troy, Esquire

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

CIVIL SERVICE COMMISSION

RICHARD DOHERTY,
Appellant,

v.

TOWN OF BOURNE,
Respondent

Civil Service Case No. D1-11-64

DALA Docket No. CS-11-429

Dated: March 7, 2012

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Sandwich, MA 02563

Administrative Magistrate:

Judithann Burke, Esq.

CASE SUMMARY

The Respondent proved by a preponderance of the evidence that there was just cause to discipline the Appellant, a Bourne Fire Fighter and Paramedic, for posting Facebook messages and for making a verbal statement, all ridiculing officers in the Bourne Police and Fire Departments. Also via his Facebook account, he employed language offensive to the gay community. All of these postings were potentially available to the public. The Appellant also misrepresented to a Fire Lieutenant that he had been ordered by the Fire Chief to answer phones in Station 1 on July 4, 2010.

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CIVIL SERVICE COMMISSION

RECOMMENDED DECISION

Pursuant to G.L. c. 31, § 43, the Appellant, Richard Doherty, filed an appeal with the Civil Service Commission alleging that the Respondent, Town of Bourne and the Town's Appointing Authority, Thomas Guerino, its Town Administrator, did not have just cause to discharge him from his position as a Fire Fighter for the Bourne Fire Department in a termination letter dated February 23, 2011. (Exhibit 4.) The appeal was timely filed. (*Id.*) A Section 43 hearing was held on July 25, 2011, August 10, 2011, and September 12, 2011 when it was heard to completion at the offices of the Division of Administrative Law Appeals (DALA), 98 North Washington Street, Boston, MA.

At the hearing, twenty-four (24) exhibits were marked. The Respondent presented the testimony of the following witnesses: current Bourne Fire Chief Martin Greene; Bourne Police Chief Dennis R. Woodside; Lieutenant Penny Fusco Eldridge, a Paramedic in the Bourne Fire Department; Bourne Fire Fighter Jason Silva; former Bourne Fire Chief Steven Philbrick; former Bourne Acting Fire Chief David Doucette; Town of Hamilton Fire Lieutenant David Pelonzi; Town of Bourne Fire Fighter and Paramedic Julio Pomar, and, the Appellant, Richard Doherty. The Appellant was also questioned by his own attorney. The Appellant presented the testimony of the following witnesses: Thomas Guerino, Town Administrator in Bourne; Bourne Fire Fighter and current Union President of Local 1717, Gilbert Taylor; and, Wareham Fire Fighter David Wahlstrom. The proceedings were digitally recorded on three separate compact discs. The record was left open for the parties to file Proposed Findings of Fact and Conclusions of Law. These submissions were received on November 18, 2011, thereby closing the record. The

record was re-opened briefly in December 2011. On December 7, 2011, the Respondent filed a Motion to Strike Exhibits included as part of the Appellant's post-hearing brief. On December 12, 2011, the Appellant filed a Motion to Strike Portions of the Respondent's Brief. On December 14, 2011, the Appellant filed an Opposition to Respondent's Motion to Strike. The record closed on December 14, 2011 when the Opposition was received. No decision was rendered on any of the post hearing motions. The exhibits and the testimonial evidence constitute the evidentiary record in this case. The parties' briefs and appendices containing their legal arguments, case citations, and factual assertions are not weighed as evidence.

FINDINGS OF FACT

Based on the documentary and testimonial evidence submitted at the hearing in the above-entitled matter, I hereby render the following findings of fact:

1. The Appellant, Richard Doherty, 46 y.o.a., was first hired by the Town of Bourne in or about 1994 as a call fire fighter. He was thereafter appointed to the position of full time fire fighter in 1999, at which time he became a member of the Professional Fire Fighters of Bourne, IAFF Local Union # 1717. (Doherty Testimony.)
2. At all relevant times, Fire Fighter Doherty was a certified Paramedic. (*Id.*)
3. On or about December 7, 1999, the Town of Bourne Board of Selectmen published its Telecommunications Systems Policy. The policy outlined the proper use of the Town of Bourne's telecommunication systems and was designed to prevent the misuse of all town communication systems including town computers and town servers. The policy did not refer to personal computers, personal servers, Union computers or Union servers. (Exhibit 9 and Greene

Testimony.)

4. Bourne fire fighters are allowed to use their personal computers or the Union computer and server during their down time. Down time usually occurs in the evening after all chores are done and only if there are no emergency calls. (*Id.*)

5. The Union represents approximately thirty-seven (37) Bourne Fire Department employees including fire fighters, lieutenants, captains and deputy chiefs. (*Id.*)

6. The Appellant served on the Union's Grievance Committee from approximately 2004 until 2009. From 2009 until September 2010, he served as Union Vice President. (*Id.* and Doherty Testimony.)

7. During the period in which he served as Union Vice President, the Appellant was shown a copy of the Manual for the Fire Department of the Town of Bourne by Town Administrator Thomas Guerino. (*Id.* and Exhibit 8.)

8. Prior to his appointment in Bourne in 1994, the Appellant had served as a call fire fighter in the Town of Pembroke for approximately one and a half years. (*Id.*)

9. Steven Philbrick served as the Bourne Fire Chief from 1992 through January 2000. (Philbrick Testimony.)

10. Daniel Doucette served as the Acting Bourne Fire Chief from January 2009 through January 2011 at which time he was demoted to the position of Deputy Fire Chief. (Doucette Testimony.)

11. Martin Greene was appointed to the position of Bourne Fire Chief in January 2011 and remains in that position. (Greene Testimony.)

12. The Bourne Fire Department sworn personnel work twenty-four (24) hour shifts which begin at 8:00 A.M. one day and end at 8:00 A.M. the next day. (*Id.*)

13. The Bourne Fire Department maintains four stations: Headquarters (Buzzards Bay), Station 2 (Monument Beach), Station 3 (Sagamore), and Station 4 (Pocasset). (*Id.*)

14. Prior to August 2010, the Appellant was assigned to Station 3. (*Id.*)

15. From August 2010 to his date of termination on February 23, 2011, the Appellant was assigned to Station 4. (*Id.*)

16. The Bourne Fire Department maintains a call fire department consisting of approximately twelve (12) individuals who are not sworn fire personnel. (*Id.*)

17. On September 7, 2007, the Appellant was notified that, as a result of his public behavior toward another Bourne fire fighter on August 14, 2007, he was being suspended for five (5) tours. He also received a warning letter. After a hearing and much exchange between the Town Administrator and the Union, the suspension was reduced to one (1) tour (twenty-four [24] hours) and EAP counseling. The parties were so notified via a letter dated June 17, 2008. (Exhibits 14 and 22 and Testimony.)

18. Julio Polmar, the other fire fighter with whom the Appellant was involved in the August 2007 incident, finds it difficult to work with or trust the Appellant, in large part due to the August 2007 incident. (Polmar Testimony.)

19. On April 22, 2010 at approximately 7:15 P.M., the Appellant and Bourne Fire Fighter/Paramedic Brandon Ferro were at the scene of a motor vehicle accident attending to injured parties. Bourne Police Officer James Czyryca was at the scene directing traffic.

At some point, the Fire Department Dispatcher sent out a call for a stove fire in the area. A few minutes later, a car driven by Bourne Call Fire Captain Ronayne came through the accident scene at a rapid rate of speed in order to get to the stove fire. He swerved around the tow truck and the accident debris at the scene. The Appellant felt that Captain Ronayne's vehicle came close to hitting him. One of the accident victims grabbed the Appellant and yelled "watch out."

The Appellant was upset at the reckless way he believed that Captain Ronayne and other call fire fighters drove when they responded to calls. He intended to make a formal report to his department. He approached Officer Czyryca officer at the scene who suggested that Call Fire Captain Ronayne may have been drunk. The Appellant then said, "When isn't he?" (Exhibit 6 and Testimony.)

20. The Appellant, Fire Fighter Ferro and Officer Czyryca met with Lt. Penny (Fusco) Eldridge and Deputy Chief Carrara at Station 2 to discuss the incident. The Appellant was still upset and kept stating that he wanted Captain Ronayne arrested. Captain Ronayne arrived at the station. Officer Czyryca was familiar with Ronayne and determined that the latter was not intoxicated. Captain Ronayne was not charged following an investigation. (*Id.* and Exhibit 5.)

21. On April 23, 2010, the Appellant went to the Bourne Police Station and requested a copy of the police report pertaining to the motor vehicle accident and Captain Ronayne's driving through the accident scene the previous evening. He was told by a Sgt. Woodside that he would have to pay \$2.00 and fill out a written request for the report, which would be sent out to him. (Exhibit 6 and Doherty Testimony.)

22. On April 27, 2010, the Appellant received a call from Heather Wysocki, a reporter for the Cape Cod Times. She informed him that she had received a copy of the police report concerning the April 22, 2010 incident. The Appellant was upset that Police Lt. Tavares had given the police report out to Ms. Wysocki while he himself had to “jump through hoops” for it. He wrote a letter to Acting Chief Doucette and Town Manager Guerino indicating his frustration at the situation. (*Id.*)

23. On April 28, 2010, the Cape Cod Times published Ms. Wysocki’s article “Bourne firefighters [*sic*] at odds.” (Exhibit 21.)

24. Facebook is a social networking website. A member of Facebook can create a profile containing personal information and post pictures and information on the “wall” of his/her profile that is visible either to anyone or to a select audience. Members of Facebook may acknowledge their relationship to one another publicly by becoming “Facebook Friends.” Often, a Facebook member’s “Friends” are able to see that member’s complete profile and wall and may post comments related to the pictures and statements on the individual’s Facebook page or wall. “Friends” are often allowed to post pictures and statements on one another’s walls. (Testimony and Administrative Notice.)

25. The Appellant had a “Facebook” account during and after April 2010. On April 28, 2010, he posted comments and a photo on his Facebook wall regarding the Bourne Police and Fire Departments’ handling of the April 22, 2010 incident with Call Fire Captain Ronayne.

At 8:56 A.M. he posted, “I would just like to thank SGT. Woodside for not giving me a copy of the police report, but the Department has no problem giving it to media! Great job jackass!”

At 7:04 P.M. the Appellant returned to posting with the comments, "Than (*sic*) let me make it perfectly clear, 95% of BPD I would treat like my family and would do anything for and those people know this the other 5%, strike that now 3%, can kiss my ass!!! Those 3%ers through (*sic*) me and this department under the bus! Don't tell me that that reporter went through the "proper channels" the same day she met w/Tavares and he gave the reporter the report!!!!!!

At 7:08 P.M. the Appellant added, "I HAVE NEVER NOT TOLD THE TRUTH!!!! IF THERE IS SOMEONE OUT THERE WHO DOESN'T LIKE THIS, COME TALK TO ME OR SHUT THE FUCK UP!!!!

At 8:26 P.M., the Appellant commented on Ms. Wysocki's article, "I would just like to address the Bullshit article that most of you read on the front page of Cape Cod Times. For the record I was contacted by the Times for a comment at that time I refused (*sic*) her to Union President Taylor for comment. I then found out that she was given a copy of the police report a day after Woodside to...

At 8:36 P.M. the Appellant posted, 'To all 1717 members, a couple of you contacted me and thought I contacted the press regarding the mvc accident last week. I can assure you I did not! If anyone has a question regarding this matter pick the phone up and call me!

At 9:05 P.M. the Appellant posted a photo of the likeness of a television character named "Lt. Dangle" who is an openly gay police officer on the show "Reno 911." Next to the photo, the Appellant inserted the phrase "3%er!"

(Exhibit 7 and Testimony.)

26. The Appellant was on duty when he posted the aforementioned comments. (Testimony.)
27. The Appellant testified during the Section 43 hearing that 3%ers are people who cannot be trusted. (Doherty Testimony.)
28. Former Bourne Fire Chief Steven Philbrick testified at the Section 43 hearing that "3%er" is a term referring to a homosexual. (Philbrick Testimony.)
29. Facebook "Friends" of the Appellant were able to gain access to the postings on his Facebook wall. Once viewed by his "Friends", the postings could be distributed to other

members of the public. (Exhibit 20 and Testimony.)

30. Following the Appellant's April 28, 2010 Facebook postings, Sgt. (now Chief) Woodside received many phone calls from members of the Bourne Police and Fire Departments who expressed their concerns. Then-Sgt. Woodside was uncomfortable and felt awkward at time when dealing with members of the Fire Department. They expressed concerns over the Appellant's postings and the state of any future relations of the Bourne police officers and fire fighters who were required to work together often. Then-Sgt. Woodside eventually reached out to the Fire Department to "calm Doherty down." (Woodside Testimony.)

31. Lt. Penny (Fusco) Eldridge called the Appellant's Facebook postings about Sgt. Woodside to Chief Doucette's attention. Neither the Chief nor anyone else from the Bourne Fire Department admonished the Appellant following his April 28, 2010 Facebook postings. (Testimony.)

32. In late 2009 and early 2010, Union officials met with Town Administrator Guerino on two separate occasions to discuss the Union's concern over the Town's increasing use of mandatory overtime to cover staffing shortfalls created by vacancies in the Bourne Fire Department. At both meetings, the Union was represented by the Appellant who was Union Vice President, and by Union President Gilbert Taylor. (Doherty and Guerino Testimony.)

33. The Union was concerned that the increasing use of mandatory overtime prevented fire fighters from resting during their overtime shifts, after having been up for twenty-four (24) straight hours. The Union officials believed that this situation presented a potential threat to public safety in the event that the fire fighters were too exhausted to perform their jobs

effectively. (Doherty Testimony.)

34. Mandatory overtime refers to the Bourne Fire Department practice of holding individual fire fighters over for a twelve-hour (12) overtime shift, immediately following the twenty-four (24) hour shift. (*Id.*)

35. In approximately 2009, the Appellant, who lived in Bourne at the time with his family, learned that his four year old son was developing serious respiratory issues. There is a large landfill in Bourne. Based upon advice from his son's pediatrician, the Appellant moved his family to Mattapoisett. After the move, his son's respiratory issues diminished. (*Id.*)

36. On July 3, 2010, the Appellant was assigned to work a twenty-four (24) hour shift at Station 4, which was scheduled to end at 8:00 A.M. on the Fourth of July. He had long-standing plans to take his son camping after work on July 4, 2010. (*Id.*)

37. During the that holiday weekend, the Appellant responded to a number of emergencies over the course of the evening hours (July 3-4) and was only able to get approximately two hours of sleep. At the end of his shift on July 4, 2010 at 8:00 A.M., then-Acting Fire Chief Doucette ordered him to report to Headquarters (Station 1) for a ten-hour mandatory overtime assignment. Station 1 is near the Town of Bourne landfill. Chief Doucette told the Appellant that he was being required to work overtime to cover for fire fighters assigned to Station 1 who wished to participate in the Fourth of July Parade. (*Id.*)

38. At Station 1, the Appellant began answering the emergency and public phones in the day room. Chief Doucette passed by and asked, "How's Rich (Appellant) today?" The Appellant responded "Answering phones." Chief Doucette responded "Have at it." (*Id.*)

39. The Appellant was annoyed that fire fighters who should have been working their regular shifts at Station 1 were out participating in parade activities. While on duty, he posted a comment on his Facebook wall:

Stuck at shit hole mandatory, on top of that I got to put up w/dick heads who love this Town and are involved in this stupid ass kissing politically motivated parade (*sic*)! I moved out of this shithole for a reason.

(Exhibit 7.)

40. Sometime later, Fire Lieutenant Phil Tura came into the day room and asked him to go downstairs and participate in the Fourth of July Parade. The Appellant indicated that Chief Doucette had ordered him to remain on the phones. Lt. Tura left the room and consulted with Chief Doucette. The lieutenant returned to the dayroom and informed the Appellant that he was not under orders to stay at the phones and that he was to report to the parade. The Appellant complied at that time. (*Id.*)

41. Chief Doucette neither spoke to nor disciplined the Appellant as a result of the incident with Lt. Tura on July 4 or during the next several weeks. (Doucette Testimony.)

42. On several occasions in late 2009 and early 2010, the Appellant, who was assigned to Station 3 at the time, met with then-Acting Chief David Kingsbury to complain about the condition of the air filter systems in the station. (Doherty Testimony.)

43. Several fire fighters from Station 3 had approached the Petitioner in his capacity as Union Vice President and complained about a methane smell which was causing them to experience painful headaches at the station. (*Id.*)

44. During the early summer of 2010, Fire Fighter Ferro had posted to his Facebook "profile

page” a photograph of a clogged air filter at Station 3 with the caption, “Air filter from Station 3! Well, no wonder the A/C never works, the air can’t flow through all the dirt and mold!” (Exhibit 7.)

45. Several Bourne Fire Fighters posted comments in response to Ferro’s post. After he had gone off duty on July 4, 2010, the Appellant read the string of comments and realized that the picture was that which Union President Taylor had taken and shown to Acting Chief Kingsbury, who had claimed that filter had been repaired. The Appellant posted, “thank asshole dep who thinks he knows everything and was demoted.” (*Id.*)

46. On August 16, 2010, while he was off duty, the Appellant posted a photograph of an individual wearing a hazardous materials (hazmat) suit on his Facebook “profile” page with the caption, “Looking out the window, rain coming from the landfill!!! Between the Base and the dump, Bourne has to be the most toxic location in Mass.” (Exhibit 16.)

47. The Appellant and Wareham Fire Fighter David Wahlstrom are long-time friends. One weekend prior to August 2010, they were in New Hampshire working at a NASCAR event where they observed a cardboard cutout of the blue Vlasic Pickle Company mascot, a stork who holds a pickle as if he is puffing on a cigar. Because Wahlstrom often smoked cigars, the Appellant said, “you’re the original pickle puffer.” (Doherty and Wahlstrom Testimony.)

48. While he was off duty on August 20, 2010, the Appellant posted a message on his Facebook “profile page” to David Wahlstrom, a Facebook “Friend” of his. He said, “hey strap on nipples when u coming over for a beer? Pickle Puffer!” (Exhibit 7.)

49. The Appellant is aware that the term “pickle puffer” has been used as a negative

reference to a gay individual. (Doherty Testimony.)

50. In early September 2010, the Appellant received an email from a friend containing a photograph of a raccoon and a dog wherein the raccoon appears to be attempting to mount the dog. The Appellant found this humorous and, while off duty, he made it his screensaver on his personal computer. (Testimony and Exhibits 11 and 19.)

51. Shortly after setting up his new screensaver, the Appellant showed the picture to Fire Fighter Silva. Lt. (Fusco) Eldridge was in the room at the time. In her presence, the Appellant told Fire Fighter Silva that the picture of the dog and raccoon depicted Chief Doucette and Town Administrator Guerino. (Eldridge Testimony.)

52. In the days leading up to September 3, 2010, municipalities on the East coast were making preparations for Hurricane Earl. On September 3, 2010, the Appellant posted the dog/raccoon photograph on his Facebook "profile" page and included the comment "Big meeting regarding storm preparation! Our cameras were there!" This posting was made while the Appellant was off-duty. (Exhibits 11 and 19 and Testimony.)

53. Also on September 3, 2010, the Appellant reposted the photograph of the fictional character Lieutenant Dangle to his Facebook "profile" page with the caption: "Rumor has it when the PD Chief was asked "what are we doing for storm coverage", his response was "who gives a fuck." The Appellant was off-duty when he posted this comment. (Exhibit 15.)

54. Between April 28, 2010 and September 13, 2010, Chief Doucette required his secretary, a Facebook "friend" of the Appellant, to provide him access to the Appellant's "profile" page and content. (Doucette Testimony.)

55. Current Bourne Fire Chief Greene maintained a Facebook account in 2010 but was not a Facebook “friend” with the Appellant. He became aware of some of the content that the Appellant had posted and saw the Appellant’s Facebook postings himself on two occasions. First, he received access to the Appellant’s Facebook “profile” page via an email from a Bourne Fire Fighter who was a Facebook “friend” of the Appellant. On the second occasion, he was able to use his own Facebook account to access the Appellant’s “profile” page. (Greene Testimony.)

56. Bourne Fire Lieutenant David Pelonzi was a Facebook “friend” with the Appellant in 2010 and he printed out some of the Appellant’s Facebook postings. He himself never complained to the Town of Bourne or the Bourne Fire Department about the postings. (Pelonzi Testimony and Exhibits 15-17 and 19.)

57. Between April 28, 2010 and September 13, 2010, no Bourne fire fighter or police officer refused to work with the Appellant because of his Facebook postings and there was no disruption at the Fire Department. (Doucette Testimony.)

58. On September 13, 2010, Town Administrator Guerino issued a Disciplinary Notice to the Appellant, wherein he indicated that an Appointing Authority G.L. c. 31 § 41 hearing would take place on September 20, 2010 to determine whether there was just cause for the imposition of punishment or dismissal. Mr. Guerino reported that the Fire Chief was alleging that the Appellant had violated certain Town of Bourne Fire Department Rules and Regulations, specifically the following provisions of Rule 13: “Professional Conduct”:

Section 5: Profane, obscene, indecent, or disrespectful language is prohibited.

Section 7: No employee shall be untruthful or make an intentional misrepresentation in matters affecting the Department or its employees.

Section 8: Conduct of an employee which is prejudicial to good order is prohibited.

Section 18: No employee shall be discourteous, rude or insolent to any member of the public or Department employees.

Section 19: Any type of misconduct which reflects discredit upon an employee as a Department member, or upon his fellow employees, or upon the Fire Department is prohibited.

Mr. Guerino went on to note that the Appointing Authority or its designated hearing officer would review allegations suggesting that the Appellant had "violated the aforesaid Rules and Regulations in the following manner:"

Posting Facebook messages ridiculing and disparaging members of the Bourne Police Department;

Posting Facebook pages, including a message juxtaposing a picture of a local special needs adult with a Bourne Fire Fighter, deriding a member of the community and a fellow Fire Fighter;

Posting a Facebook message containing a slur offensive to the homosexual community;

Posting a Facebook message ridiculing and disparaging members of the Fire Department, including a superior officer;

Demonstrating a lack of control and unprofessional behavior with regard to a driving incident involving a Bourne Fire Department Captain; and

Falsely informing Lt. Tura that Chief Doucette ordered you to answer the phones during the 2010 4th of July Parade, when Chief Doucette gave no order for you to do so.

(Exhibit 1.)

59. The Appellant was unaware of Chief Doucette's and the Town's concerns about his April

28 comments regarding the Bourne Police Department, his July 4 postings, the July 4 incident with Lt. Tura, the August 20 posting to Fire Fighter Wahlstrom, his posted comment on Fire Fighter Ferro's "profile" page, or any other of his myriad postings until he received his September 13, 2010 Disciplinary Notice. (*Id.* and Testimony.)

60. On or about March 10, 1986, the Bourne Fire Department adopted a Discipline Policy; the purpose of which was to ensure "fair and consistent discipline for all employees of the Bourne Fire Department." The Discipline Policy adheres to the principle of progressive discipline and specifically requires the Town to use incremental discipline to address employee misconduct.

1. Informal verbal warning = minor infractions.
 - a. Discuss problem with employee
 - b. More severe action for second offense...
2. Written formal warning = second offense or more serious infraction.
 - a. Discuss documented infraction with employee
 - b. Stated time period for correction
 - c. Severe action for next offense...
3. Suspension of five days or less for repeated infractions or major offense.
 - a. No prior hearing required
4. Suspension of more than five days, demotion or discharge.
 - a. Prior hearing required . . .
5. Immediate suspension=Flagrant infractions – stealing, personal injury to others, gross dereliction of duty, etc . . .
 - a. Procedure same as item no. 3 or 4, depending on length of suspension.

(Exhibit 13.)

61. Hearing Officer Charles M. Sabatt issued his report on February 16, 2011. He did not find that the Appellant had demonstrated a lack of control or unprofessional behavior during the

immediate aftermath of the April 22, 2010 the driving incident that involved Captain Ronayne. Mr. Sabatt did not find that the Appellant had disparaged the special needs adult referenced in paragraph 2 in the section delineating the specific Rule violations in the September 13, 2010 letter. Otherwise, Mr. Sabatt found that the Appellant had violated Bourne Fire Department Rules and Regulations, Rule 13, Professional Conduct, Sections 5, 7, 8, 18, and 19. (Exhibit 2.)

62. On February 23, 2011, Town Administrator Guerino accepted the report of the Hearing Officer, and issued his Decision that the Appellant could no longer function as a Fire Fighter and Paramedic in the Town of Bourne and that there was just cause for punishment. He noted that the only appropriate punishment was the separation of the Appellant from employment. (Exhibit 3.)

63. The Appellant filed a timely appeal. (Exhibit 4.)

CONCLUSION AND RECOMMENDED DECISION

After a careful review of all of the testimony and documents in this case, I have concluded that the Respondent had just cause to impose some discipline on the Appellant for certain of his behaviors between April 28 and September 13, 2010. The Respondent has met its burden of proving that the Appellant violated Rule 13 of the Town of Bourne Fire Department Rules and Regulations, Sections 5, 7, 8, 18 and 19, all pertaining to profane or disrespectful language and misconduct which reflects discredit upon fellow public safety officers. The Respondent has also proven that the Appellant misrepresented to Lt. Tura that he had been ordered by Chief Doucette to answer the Station 1 phones on July 4, 2010.

While it was not established during the 2010 hearing that the Appellant acted in an unprofessional manner or displayed a lack of control at times immediately surrounding the events of April 22, 2010, his Facebook postings concerning then-Sgt. Woodside and other Bourne Police Officers the following week did indeed demonstrate a lack of professionalism and control. There were myriad constructive ways he could have communicated with members of the Bourne Police Department about their handling of the investigation and the issuance of the police report. Instead, while on duty, he sarcastically thanked Sgt. Woodside and then called him a "jackass." In follow up postings on the subject, he went on to insinuate that 3% of the Bourne Police Department staff, including Lt. Tavares and Sgt. Woodside, were dishonest and unreliable. Although he could have chosen a photo of any other television character who portrays a police officer, he chose to post the picture of Lt. Dangle, the gay officer from the show Reno 911 beside the notation "3%er". In so doing he tacitly ridiculed and disparaged certain members of the Bourne Police Department with whom he was displeased on more than one level. These postings violated Rule 13, Sections 5, 7, 8 and 18.

The Appellant ridiculed the Bourne Police Chief again on September 3, 2010 when he indicated that the police chief had answered "who gives a fuck" when he was asked what was being done about storm coverage. He reposted the picture of Lt. Dangle with this message. This activity violated Rule 13, Sections 5, 8, 18 and 19.

While the Facebook posting on August 10, 2010 in which the Appellant referred to Fire Fighter Wahlstrom as a "pickle puffer" was done off-duty and directed to his close friend, the Appellant knowingly chose a term that is often used as a slang or derogatory term for a gay

person. The use of any slang or crass term to reference an entire group of people might easily be construed by a member of that group and/or the public at large to be a slur against the entire gay community. This communication, potentially available to strangers, violates Rule 13, Sections 5, 8 and 18.

The Appellant posted more than one message that ridiculed and disparaged members of the Bourne Fire Department, including superior officers Doucette and Kingston. He was incensed that he had been ordered by Chief Doucette to work a mandatory overtime shift on July 4, 2010. His mindset was less than collegial. While on duty, he posted on Facebook his comment about "stuck at shit hole mandatory." This is a derogatory reference to the station and its overtime practices. He went on to ridicule those who were willing participants in the Fourth of July Parade as "dickheads" who loved "this Town" (his employer) and referred to the parade as the "stupid-ass kissing politically motivated paraid (*sic*). He went on to refer to the town which employed him as a "shithole." His choice of language was vulgar and his message implied intense hostility toward the citizens of the Town of Bourne at large as well as fellow fire fighters and officers. The method he opted to employ in order to communicate his opinions and feelings, posting them to Facebook, violated Rule 13, Sections 5, 7, 8, 18 and 19.

Later on July 4, after he had gone off-duty, the Appellant ridiculed Deputy Kingsbury, who had been demoted from the position of Acting Chief. He referred to Deputy Chief Kingsbury as an "asshole dep who thinks he knows everything but was demoted." These choices of tone and language violated Rule 13, Sections 5, 8, 18 and 19.

In early September 2010, the Appellant again ridiculed Chief Doucette and also ridiculed

Mr. Guerino. He indicated to Fire Fighter Silva in the presence of Lt. Fusco Eldridge that the photo depicted Chief Doucette and Thomas Guerino. This verbal mockery violated Rule 13, Sections 7, 18 and 19.

The Appellant had been a Bourne Fire Fighter for several years. Prior to that, he served on the Town of Pembroke Fire Department. He was well aware, or should have been well aware, of the difference between an order by a superior officer and a mere "have at it." While Chief Doucette may have been satisfied that the Appellant was spending some of his overtime shift answering the Station 1 phones on July 4, 2010, there is nothing in the Chief's acknowledgement "have at it" that can be construed as a direct order that the Appellant remain in the station and answer phones all day, as confirmed by Chief Doucette himself when asked by Lt. Turo. The Appellant did not want to be involved in the parade. He did not want to share in any of the parade festivities with fellow fire fighters or the general public. His representation to Lt. Turo that he had been ordered by Chief Doucette to remain in the station was disingenuous and self-serving. He violated Section 13, Rules 7, 8 and 19 with his attempt to avoid involvement in the parade.

In this same vein, I find the Appellant's assertions during the 2011 just cause hearing that he was unaware of/unfamiliar with the Rules and Regulations of the Fire Department to be disingenuous and self-serving. At one point he actually acknowledged that he had some exposure to the Rules and Regulations through Mr. Guerino. Further, it would be incredulous to assume that, in all of his years as Union Vice President, the issue of the applicability of certain of the Rules and Regulations to himself or fellow Union members never arose. The fact that he

may not have received a copy of said Rules from former Chief Philbrick at the time of his hire does not abrogate his duty as a Bourne Fire Fighter to be aware of and follow those rules.

I accept the Appellant's contention that the Town's Telecommunications Policy, which speaks to the use of the Town of Bourne's computers and servers, is inapposite here. The policy does not address the use of either the Union's computers and servers or town employees' personal computers.

Nevertheless, the Appellant is still culpable. As a Town of Bourne employee and Fire Fighter, he cannot invoke any free speech protections by virtue of the postings described herein. His communications were not restricted to members of the Union or uttered in the context of official Union business. Further, Constitutional issues are not pursued in the forum.

The Appellant's language and comments included rude and/or profane language directed at specific fellow public safety employees, many of them superior officers in the Bourne Fire and Police Departments. There were many other routes by which he could have channeled his criticisms concerning public safety policies of the Fire Department and/or the Town of Bourne without the levying of *ad hominem* attacks on specific individuals. As a Fire Fighter, he was required to know and should have known the difference. The Town of Bourne Fire Department Rules and Regulations, Rule 13, pertaining to "Professional Conduct" unequivocally prohibit such conduct.

The one mitigating factor in favor of the Appellant is the Town of Bourne's apparent failure to invoke the progressive discipline policy. The Appellant had received one written warning and a brief suspension prior to the February 2011 discharge. In imposing this harsh

sanction, the Respondent, which obviously viewed the Appellant's behavior as a major offense(s) opted not to impose any length of suspension and instead separated the Appellant from his employment. This decision was made in or about September 2010, after the Appellant had continued his offensive postings for over four (4) months. No one spoke to him or asked him to stop, even though they were aware of the postings. No one informed him that the postings were seen and read by a much larger audience than his own circle of Facebook friends. Instead, the first time the Appellant learned that his superiors had issues with certain of his Facebook postings was when he received the September 13, 2010 Disciplinary Notice. Had the Appellant been counseled or admonished early on in the course of events, the present situation may have been avoided.

In conclusion, I recommend that the Civil Service Commission find that the Appellant committed the Rule infractions set forth herein and that just cause existed for some discipline. I recommend further that said Commission examine the lack of progressive discipline in this case and consider imposing discipline other than discharge, i.e. a fifteen (15) month suspension.

Division of Administrative Law Appeals,
BY:



Judithann Burke
Administrative Magistrate

DATED: March 7, 2012