

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108
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ROBERT DOWNER,
Appellant

v.

D-03-188

TOWN OF BURLINGTON,
Respondent

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Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, s. 43, the Appellant, Robert Downer (hereafter "Downer" or "Appellant"), is appealing the decision of the Town of Burlington (hereafter "Town" or "Appointing Authority") on March 10, 2003 to suspend him for fifteen (15) days and demote him from Sergeant to patrol officer for a minimum of two years for allegedly making racially derogatory comments about a Burlington police officer and untruthfulness for failing to admit he made the alleged comments and falsely

accusing others in the Department of using the offensive term. The appeal was timely filed. Hearings were held on June 21, 2006, June 29, 2006 and August 1, 2006 at the offices of the Civil Service Commission before Commissioner Bowman. As no written notice was received from either party, the hearing was declared private. Nine tapes were made of the hearings as well as transcripts. All witnesses, with the exception of the Appellant and his wife, were sequestered. Both parties submitted post-hearing briefs.

FINDINGS OF FACT:

Based on the 54 documents entered into evidence (Appointing Authority Exhibits 1-11; 13-23; 26-28; 30-41; 46-54; and Appellant Exhibits 12; 24-25; 29; 42-45 (Confidential)) and the testimony of the following witnesses:

For the Appointing Authority:

- William R. Soda, former Burlington Police Chief;
- Spiro Tsingos, Burlington police officer;
- James Tigges, Burlington police officer;
- Anne Marie Tucciarone-Mahan, Burlington HR Director;
- Robert A. Mercier, Burlington Town Administrator;
- Harry L. Sawyer, Jr., Burlington police officer;

For the Appellant:

- Robert Downer, Appellant;
- Nancy Downer, Appellant's wife;
- Jason Rosario; friend of Appellant;
- William C. Preston, Jr., Burlington police officer;
- Gary Redfern, Burlington police officer (detective);
- Thomas Duffy; Burlington Police Lieutenant;
- George Devlin; Burlington Police Captain;
- Sheila McCravy; attorney at the Law Offices of Timothy Burke;
- Florencia Cora, friend of Appellant;

I make the following findings of facts:

1. The Appellant is a tenured civil service employee of the Burlington Police Department and has been employed there since 1985 when he was hired as a police officer. In March 1996, he was promoted to the rank of police sergeant. (Exhibit 12)

Summary of Prior Disciplinary Action

2. On January 31, 2001, the Appointing Authority placed the Appellant on paid administrative leave pending a disciplinary investigation. (Exhibit 12)
3. On August 9, 2001, following the disciplinary investigation and hearing, the Appointing Authority issued a decision suspending the Appellant for thirty (30) days and demoting him from sergeant to patrol officer for a minimum of two years for offenses that included making disparaging comments about the sexual orientation of three police officers and failing to tell the truth in an investigation. (Exhibit 12)
4. The Appellant appealed the above-referenced August 9, 2001 disciplinary action to the Civil Service Commission and, pending the outcome of that appeal, returned to work in his demoted position of patrol officer in late August 2001. (Testimony of Appellant; Exhibit 12)
5. The Appellant's appeal of the August 9, 2001 disciplinary action was subsequently heard by the Commission during twelve days of hearings in what the presiding Commissioner, who is no longer with the Commission, described as, "one of the longest and most involved cases in the history of the Commission." (Exhibit 12)
6. On May 19, 2005, four years after the discipline was imposed by the Town, the Commission, in a 73-page decision that would later be criticized by a Superior Court judge for some of its more colorful characterizations of witnesses and events in that case, concluded that that the Town's investigation was biased and that the Town had

failed to substantiate most of the charges against the Appellant. Hence, the Commission determined that the disciplinary action be modified to a written reprimand. Despite the Court's apparent concern about the blunt credibility assessments offered by the former Commissioner, it upheld the Commission's decision to reduce the discipline imposed to a written reprimand. (Exhibit 12; Town of Burlington v. Civil Service Commission and Robert Downer, Suffolk Superior Court, Docket No. 05-2601-F.)

The Intervening Bypass Appeal

7. While in his position as Sergeant, prior to being demoted, the Appellant had taken a civil service examination for the position of Lieutenant and was initially included on a promotional list in which he was ranked #1. The Town did not make any promotional appointments off the original list that included Downer's name as #1. (Downer v. Town of Burlington, CSC Case No. G-02-172)
8. Subsequent to his August 9, 2001 demotion to patrol officer, but before the Commission issued its decision on the Appellant's appeal, the state's Human Resource Division, per its normal practice, removed the Appellant's name from the promotional Lieutenant list. (Downer v. Town of Burlington, CSC Case No. G-02-172)
9. After the Appellant's name had been removed from the promotional list for Lieutenant, the Town subsequently requested new certifications from HRD from which they made three (3) Lieutenant appointments. (Downer, who was no longer on the list, was not one of them). (Downer v. Town of Burlington, CSC Case No. G-02-172)

10. The Appellant appealed the above-referenced “bypass” to the Commission and that bypass appeal was heard by this Commissioner approximately six months ago, in May 2006. Since the sole reason for removing Downer’s name from the promotional list for Lieutenant was the demotion which was subsequently overturned by the Commission, the Commission allowed the Appellant’s appeal and ordered that his name appear first on future promotional lists for Lieutenant until such time as the Town decides to either *hire or bypass* the Appellant. (Downer v. Town of Burlington, CSC Case No. G-02-172)

11. The above-referenced bypass appeal took on added significance in the instant appeal as counsel for the Appointing Authority (in both cases) sought to use comments made by Downer at that bypass appeal hearing six months ago to impeach his credibility.

Disciplinary Appeal Currently Before the Commission

12. Shortly after the August 9, 2001 disciplinary decision, the Appellant returned from paid administrative leave to his newly-demoted position of patrol officer. (Testimony of Appellant)

13. Sometime in September 2001, shortly after the Appellant’s return to the Department, the Burlington Patrolmen’s Association passed a resolution stating in part, that the Association had “no confidence in the character of Robert Downer and no confidence in his ability to perform harmoniously as a Patrolman and deplore his appointment as a Patrolman.” (Exhibit 24)

14. Also shortly after Downer returned from paid administrative leave, William C. Preston, Jr., a black police officer in the Town of Burlington, “became aware” that Downer may have previously made racially derogatory remarks about him. It was

suggested that he talk to Officers Tsingos, Tigges and Sawyer for more information.

(Testimony of Preston)

15. The information that Preston would glean from these three officers in September 2001 would form the basis of the disciplinary action that is the subject of the instant appeal. Therefore, how Preston “became aware” of this information and whether it was tinged by the ongoing acrimony in the Department, was a critical issue in this case. Unfortunately, Preston’s testimony in this regard was vague and contradictory.
 16. In 2001, as part of the Town’s disciplinary investigation, Preston unequivocally stated that he approached his three fellow officers (Tsingos, Tigges and Sawyer) to inquire whether or not they had any information regarding Downer making racially derogatory remarks about him. In fact, in 2001, Preston stated that one of the officers (Tsingos) refused to divulge any information unless he was ordered to do so by the Chief of Police.
 17. During his direct testimony before the Commission (now on behalf of the Appellant), however, Preston offered a wildly divergent account, testifying that, “a number of years ago, a couple people, spoke to me. All I can remember is Jimmy Tigges and Spiros Tsingos.” When asked specifically, “so Officer Tigges came to you and told you something about Mr. Downer?”, Preston stated during direct testimony, “Yes..[he] said that Downer, you know, had called me the N word.” When asked the same question regarding Officer Tsingos, Preston testified, “he came to me”.
- (Testimony of Preston)
18. On cross-examination, however, Preston acknowledged that he was mistaken and that he was the one who approached the three officers in question and that they were

simply responding to his questions. He also confirmed that Tsingos refused to divulge any information unless he was ordered to do so by the Chief of Police. (It has never been determined who initially told Preston that he should talk to the three officers in question.) (Testimony of Preston)

19. Preston's painful and untruthful testimony before the Commission appeared to be motivated by a friendship he has cultivated with the Appellant since 2001 ---leading him to now believe that Downer never made racially derogatory remarks about him.
20. Notwithstanding Preston's newfound friendship with the Appellant, Officer Preston testified that he was indeed told in 2001 by Officers Tigges and Sawyer (in response to Preston's inquiry) that each of them, on separate occasions, had heard Downer make racially derogatory remarks about Officer Preston. Upon being ordered by the Chief of Police, Tsingos eventually conveyed the same information to the Town's HR Director.
21. It is undisputed that racially derogatory comments, including referring to a black person as a "nigger", were prohibited in the Burlington Police Department when Downer was a sergeant. Further, it is undisputed by the parties that such comments are highly offensive and have no place in a police department or society at large.
22. Since at least January 1997, the Town has had a written anti-harassment policy that prohibits racially derogatory comments in the workplace. (Exhibit 26)
23. Given that an employee uttering the "N word" justifies harsh disciplinary action by an employer, the question facing the Commission is whether or not Downer actually made such racially derogatory comments about Officer Preston in the presence of

Officers Tsingos, Tigges and Sawyer. Each of these three officers testified before the Commission and form the basis of the Town's case against the Appellant.

Testimony of Officer Tsingos

24. Spiros Tsingos has been a Burlington police officer since 1985. In 1999 and 2000, his regular shift was the day shift and he only occasionally worked with Downer when Downer was a sergeant. (Testimony of Tsingos)
25. In mid-to-late August 2001, Officer Preston approached Tsingos and said that he heard that Downer made some comments about him (Preston) and wanted to know what the comments were. Tsingos told Preston that he did not want to get involved and that he wouldn't testify unless ordered to do so. Tsingos was eventually ordered by the Police Chief to speak with the Town's HR Director regarding Preston's inquiry. (Testimony of Tsingos)
26. Tsingos testified before the Commission in this case that, "around 2000" he and Downer were on duty during a "midnight shift". Tsingos, who didn't usually work that shift, was serving as a patrol officer and Downer was the shift supervisor. Tsingos testified that he (Tsingos) was sitting at a desk and Downer was a few feet away looking at the lineup board that listed the schedules of all officers in the Department. Downer was going down the list making comments about various officers. Tsingos testified that when Downer got to the name of Officer Preston, "he called him a 'fucking lazy nigger, doesn't know how to read and write and he only got the job because he was a nigger'." (Testimony of Tsingos)
27. Tsingos did not report the above-referenced incident at the time because he "didn't want to get involved." (Testimony of Appellant)

28. Tsingos previously testified before the Commission in the Appellant's prior appeal of the Town's August 9, 2001 disciplinary action against the Appellant. The former Commissioner who heard that appeal, in discounting his testimony, commented that, "Tsingos has a poor reputation for truth and veracity in the Department." (Downer v. Town of Burlington, CSC Case No. G-02-172)
29. The Appellant and two other members of the Burlington Police Department testified before the Commission in this case that early in their careers, approximately 16-21 years ago, Tsingos exaggerated many of his personal accomplishments including, but not limited to, his martial arts ability, his formal education, and his ability to fly military aircraft. (Testimony of Appellant; Lieutenant Duffy and Detective Redfern)
30. Even assuming that Tsingos once exaggerated his personal accomplishments approximately two decades ago, that must be weighed against the fact that Tsingos has a spotless record as a police officer, even receiving positive evaluations from one of the superior officers who testified before the Commission regarding Tsingos's alleged exaggerations. Further, Tsingos was a reluctant witness from the get-go, not wanting to offer any incriminating information against Downer absent an order from the Police Chief. During his testimony before the Commission, Tsingos did not seek to overreach, testifying that he never heard the Appellant make any other racially derogatory remarks, that he never saw the Appellant treat Officer Preston differently than anyone else, and prior to this incident, he did not believe the Appellant was a racist. Finally, despite rigorous cross-examination, Tsingos didn't waiver on the key facts of his testimony. Even considering that Tsingos, like all of his colleagues, is a

well-trained witness inherent in his duties as a police officer, I find his testimony before the Commission in this case to be credible. (Testimony, Demeanor of Tsingos)

Testimony of Officer Tigges

31. James Tigges has been a Burlington Police Officer since 1987, full-time since March 1988. He is the Department's scheduling officer for details and overtime. He is also the Department's crime analyst and reviews all major cases in the Department to determine trends in the Town and region. (Testimony of Tigges)
32. Sometime in August or September 2001, Officer Preston approached Tigges and said, "Have you heard Downer make comments about me?" Tigges asked Preston to step inside a nearby lieutenant's office and told Preston about a comment he heard the Appellant make "three or four years ago". (Testimony of Tigges)
33. Tigges testified before the Commission that "approximately three or four years prior to Preston asking me", he was working at the Burlington Police Department desk on the 8:00 A.M. – 4:00 P.M. shift. Then-Sergeant Downer was standing in the dispatch area standing near the "six-week calendar". Tigges testified that he (Tigges) had just taken a call from Officer Preston who was looking for the night off. Upon relaying this information to Sgt. Downer, who was the shift supervisor at the time, Tigges testified that Downer shook his head and said, "he's nothing but a lazy fucking nigger" in reference to Officer Preston. (Testimony of Tigges)
34. Tigges testified that he was "stunned" and "taken off guard" by the comment, but never said anything to Downer about it. (Testimony of Tigges)
35. Tigges is a good witness with high credibility. He openly, but remorsefully acknowledged at this Commission hearing that "during the first half of (his) life",

prior to joining the Burlington Police Department, he did use the “N word” when referring to African-Americans. He attributed these prior misdeeds to his upbringing in an East Boston housing development where such talk was, regrettably, “a way of life”. Tigges has been married to a “dark-skinned” Jamaican woman for 18 years and has two children and he cited this as one reason that he found Downer’s comments particularly troubling. (The fact that Tigges’s wife is Jamaican, and not African – American, would become an issue later in assessing the credibility of Downer after he alleges that he (Downer) heard Tigges use the “N Word” while he was a member of the Burlington Police Department.)(Testimony, Demeanor of Tigges)

36. Despite voting in favor of the union-sponsored “no-confidence” vote against Downer, Tigges did not appear to harbor any animosity toward Downer and even commented that Downer had attended his daughter’s birthday party at one time. (Testimony, Demeanor of Tigges)

37. While testifying before the Town Administrator as part of this investigation, Tigges was asked if he ever heard other employees use the “N word” in the Burlington Police Department. He told the Town Administrator, that, “a few years prior to hearing Downer’s comment”, he overheard now-former Burlington Police Chief Soda use the term and that he found it just as offensive then. (Testimony of Tigges)

Testimony of Harry L. Sawyer, Jr

38. Harry L. Sawyer, Jr. has been a Burlington police officer since 1987. His father was a Burlington police officer for 34 years. (Testimony of Sawyer)

39. Allegations that the Appellant made disparaging and untrue remarks about Sawyer's sexual orientation helped form the basis of the Town's prior August 9, 2001 disciplinary action against the Appellant. (Exhibit 12)
40. Sawyer and Downer do not like each other and Sawyer acknowledged during his testimony before the Commission in this case that he harbors animosity toward Downer. (Testimony of Sawyer)
41. In August 2001, Officer Preston asked Sawyer if had ever heard Downer use the "N word" in reference to him. Sawyer told Preston that he had never heard Downer use the "N word", but recounted disparaging comments he heard Downer make about Preston sometime between 1997 and 1999. (Testimony of Sawyer)
42. Sawyer testified before the Commission that sometime between 1997 and 1999, he was working the desk at the Burlington Police Department and Officer Preston called into the station looking for time off. Since Downer was the commanding officer, Sawyer testified that the call was transferred to then-Sergeant Downer. Sawyer testified that when Downer got off the phone with Preston, Downer said, "Billy P., isn't he a pissah?" then Downer mockingly used his hands to imitate Preston making a call with his finger near his ear and said, "Yo, Sarg, I needs the night off so I can be with my lady friends". (Testimony of Sawyer)
43. Sawyer has never heard Officer Preston use the phrase, "I needs the night off". (Testimony of Sawyer)
44. Despite the admitted animosity he has for the Appellant, Sawyer freely acknowledged that he has never heard Downer use the "N word" and has never seen Downer treat

Officer Preston differently than any other officer. I find the testimony of Harry Sawyer in this case to be credible. (Testimony of Sawyer)

The Town's Investigation

45. After obtaining the above-referenced information from Officers Tsingos, Tigges and Sawyer, Officer Preston went to Inspector Robert Aloisi, President of the Burlington Patrol Officers Association and told him that he wanted to meet with Acting Police Chief Barry Solomon and that he wanted to file a discrimination complaint against Downer. (Testimony of Preston)

46. Based on Preston's complaint, the Town initiated a disciplinary investigation, interviewing several Department employees including Officers Tsingos, Tigges and Sawyer. After their interviews, each of these individuals submitted written statements to the investigator and these statements were provided to the Appellant prior to his interview with the investigator. (Exhibits 4 & 27)

47. During the Town's investigation, Downer denied making the remarks attributed to him by Officers Tsingos, Tigges and Sawyer. (Exhibit 27)

48. In response to a question by the Appointing Authority investigator in this matter, Downer also stated that he once heard retired Police Chief Soda use the "N word" in a derogatory manner between 1996 and 1998. Further, Downer stated that sometime prior to 1996, Officer Tigges had used the "N word" in a derogatory manner during a conversation with the Appellant. (Exhibit 27)

49. Both Soda and Tigges deny the above-referenced allegation by Downer. (Testimony of Soda and Tigges)

50. After the Town's investigation was completed and a series of hearings were conducted in this case, at which the Appellant was present and represented by counsel, the Town imposed the 15-day suspension and, as in the prior August 9, 2001 discipline case, a minimum 2-year demotion upon Downer on March 10, 2003 for making racially derogatory remarks and being untruthful during the investigation when he denied making the statements and falsely accused former Chief Soda and Officer Tigges of using the "N word". (Exhibit 1)

51. Since Downer's previous August 9, 2001 2-year demotion from sergeant to patrol officer was still under appeal with the Commission, the Town treated Downer as though he was a sergeant when they imposed the discipline in the instant case. (Exhibit 1)

Several Character Witnesses Testified before the Commission that Downer is not a Racist

52. Nancy Downer has been married to the Appellant for 21 years. She attended the first two days of hearings in this matter and testified on behalf of the Appellant. Ms. Downer was born in Peru and identifies herself as Hispanic. She testified that she has a "black background", that her great-grandmother is black and that people view her brother, who she described as "Mulatto", as black. (Testimony of Nancy Downer)

53. Ms. Downer testified that during her 21 years of marriage to the Appellant, "no issue of race has ever come up" and she has never heard her husband make a racial remark or make any derogatory remarks about black people. (Testimony of Nancy Downer)

54. Jason Rosario has worked for Verizon for 12 years and met the Appellant while he was doing details at Verizon worksites. Rosario, a Cape Verdean, testified that he considers himself "pretty much black". (Testimony of Rosario)

55. Rosario testified that he has a social relationship with Downer and has been over to Downer's house on dozens of occasions over the past 5 or 6 years. Rosario testified that, "never in my life have I heard him (Downer) make racial remarks" and that calling Downer a racist is "insane, ludicrous". (Testimony of Rosario)
56. George Devlin is the "senior Captain" in the Burlington Police Department and has been an employee in the Department for 17 years. He testified that he has a "good relationship" with Downer and has never heard Downer use racial remarks, speak in a derogatory manner about minorities or treat anyone differently because of their race. (Testimony of Devlin)
57. Florencia Cora, who identifies herself as Puerto Rican, works at Verizon and, like Mr. Rosario, got to know the Appellant when he was working detail duty at Verizon worksites. She testified that she has never heard the Appellant make racial remarks and that he does not treat minorities differently than anyone else. She described Downer as "an oversized Boy Scout". (Testimony of Cora)

The Appellant's testimony before the Commission

58. Downer adamantly denied that he is a racist. When asked if he had ever used racist terms, Downer stated, "not in my adult life". Asked if he had ever mocked Officer Preston in a racially derogatory manner, Downer replied with a resolute, "no". Although he acknowledged possibly using the term "lady friends" and "Yo" at some point in time, he denied making the comments in the context attributed to him by Officer Sawyer. (Testimony of Appellant)
59. Downer quickly sought to impugn the credibility of the Appointing Authority's three primary witnesses (Tsingos, Tigges and Sawyer) with a particular focus on Tsingos.

Downer recounted much of the testimony already offered by previous witnesses alleging that Tsingos had exaggerated his personal accomplishments approximately 20 years ago. Further, he stated that he had a “falling out” with Tsingos at one point saying that he (Downer) didn’t want to ride with Tsingos because of the way Tsingos treated the public. Later in his testimony, Downer speculated that Tsingos’s motivation in testifying against him was that “he just wanted to belong. They had this little group going to get me. This is how he was included.”(Testimony of Downer)

60. Downer attributed Sawyer’s testimony to the bad blood that developed between the two which sparked the Town’s August 9, 2001 disciplinary action against the Appellant. (Testimony of Downer)

61. Downer seemed somewhat at a loss, however, to explain why Officer Tigges would offer false testimony against him other than, “he wasn’t friendly with me...he wasn’t a guy I wanted to hang out with. He was very acidic...” Later in his testimony Downer testified that “Tigges does not like me – he was part of the vote to keep me out of the union...”. (Testimony of Downer)

62. Downer, did, however, repeat what he told the Town’s investigator, that he once heard Tigges use the “N word” while Tigges was a member of the Burlington Police Department. Downer testified that Tigges was at the front desk standing off to the side and he “said something to the effect of there is two types of blacks – there is African Americans, which my wife is, and there is Ns which that kid in the booking room is.” (Testimony of Appellant) Tigges previously testified that his wife is Jamaican, not African-American. (Testimony of Tigges)

63. As part of an intervening bypass appeal hearing, referenced in findings of fact 7-11 of this decision, Downer, exuding the same steely resolve in which he has denied making racial remarks, stated unequivocally that he was ordered by former Chief Soda not to sign a promotional civil service list for the position of Lieutenant. While at times unsure if the Chief's order was given in 2001 or 2002, Downer was adamant that the order was given to him after her returned from his paid administrative leave, which ended in August 2001. If and when this order was given was a potentially substantive issue at the bypass appeal. (Testimony of Appellant)
64. Soda was Police Chief for the Town of Burlington from July 1989 to November 17, 2000, making it impossible that he issued an order to Downer not to sign a civil service list after Downer returned from paid administrative leave. (Testimony of Soda)
65. When the Appellant was asked by this Commissioner to explain the glaring discrepancy referenced above, he casually stated, "when exactly this conversation happened, I just can't say..." and then he inexplicably switched gears, asserting that he was #1 on the promotional lieutenant list in 1999. (Testimony of Appellant) The promotional list for lieutenant, as referenced in the prior bypass decision was not issued until 2000.
66. In the prior disciplinary case before the Commission, the former Commissioner, despite largely ruling in favor of the Appellant, still made note of the Appellant's rigid and uncompromising demeanor. These traits were again on full display during the instant appeal, particularly during cross-examination. Despite the sometimes theatrical back-and-forth between the Appellant and counsel for the Appointing

Authority, however, this Commissioner made every endeavor to objectively assess the Appellant's credibility. I found Mr. Downer's credibility to be lacking --as exemplified by the above-referenced discrepancy regarding if and when former Chief Soda ever ordered the Appellant not to sign a promotional list for Lieutenant. While any witness can be excused for a lapse in memory when asked to recall events that occurred several years ago, the Appellant's intransigence was troubling. He is often unwilling to concede a fact that might portray him in a bad light and is all too eager to try and change the focus of the question as a means of obfuscation when the facts don't support his original answer. (Testimony, Demeanor of Appellant)

Disciplinary Action by the Town against a Different Employee for a Racial Remark

67. On July 1, 2004, the Town of Burlington suspended a supervisor in another town department for five days without pay for referring to employees of a town contractor as "fucking lazy niggers" in the presence of a black town employee. (Testimony of Mercier and Confidential Exhibits 42-45)

68. Town Administrator Robert Mercier testified before the Commission that he considered several factors when deciding upon this employee's discipline including the fact that the employee admitted making the comment, immediately apologized and expressed sincere remorse for the comment, at one point breaking down in tears. (Testimony of Mercier)

CONCLUSION:

The role of the Civil Service Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service

Commission, 43 Mass. App. Ct. 300,304 (1997). See Town of Watertown v. Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995); Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is “justified” when 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.” Id. at 304, quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971). 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.” Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Committee of Brockton v. Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997). The Appointing Authority’s burden of proof is one of a preponderance of the evidence which is established “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). In reviewing an appeal under G.L. c. 31, §43, if the Commission finds by a preponderance of the evidence that there was just cause for an action taken against an appellant, the Commission shall affirm the action of the appointing authority. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 800 (2004).

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, 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." Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). *See* Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

Robert Downer is accused of making racial slurs against William Preston, a black police officer in the Burlington Police Department, while Downer was serving as a sergeant in the Department, sometime between 1997 and 2000. The charges surfaced shortly after Downer returned from paid administrative leave in August 2001 following a highly contentious disciplinary investigation by the Town involving, among other things, disparaging remarks Downer allegedly made regarding the sexual orientation of fellow officers. In that investigation, the Town had concluded that Downer made the disparaging remarks and was untruthful during the Town's investigation of the matter. The Town suspended Downer for 30 days without pay and demoted him from sergeant to police officer.

The incidents underlying the disciplinary investigation hadn't earned Downer any friends in his own police union either. In fact, shortly after his return from paid administrative leave in 2001, and also around the same time that the charges regarding alleged racial slurs surfaced, the union took a vote of no confidence in Downer.

Against this backdrop, Officer Preston, the department's only black officer at the time, became aware that Downer may have made racially derogatory comments about him. Preston was unable to remember, either at the time, or years later in his testimony before the Commission, how he became aware of this information, but does remember that someone suggested that Officers Tsingos, Tigges and Sawyer might have additional information.

Given the acrimonious nature that existed upon his return, it was not unreasonable for Downer to question, then or now, whether a conspiracy was in the works to seek his ouster, and this Commissioner was mindful of that possibility when assessing the credibility of the Town's three percipient witnesses. Put simply, the bar was higher than usual for these witnesses in determining whether or not their testimony was tainted by their personal bias against the Appellant.

Of the Town's three percipient witnesses, Officer James Tigges appeared to be the least involved in the prior disciplinary matter despite his acknowledgement that he was one of many officers to vote in favor of the union's no-confidence vote against Mr. Downer. His almost arms-length relationship to the prior matter made him a good witness in the instant matter. He offered candid, forthright testimony with no regard for whether or not his answers would reflect positively or negatively on himself, Mr. Downer, or in some cases, the Town and its former Police Chief, William Soda. For instance, he remorsefully acknowledged that, prior to joining the Burlington Police Department, he used the offensive "N word" and attributed it to his upbringing and his early childhood in an East Boston housing development. Further, Tigges, a witness for the Town, testified that he also heard former Police Chief Soda use the offensive "N

word” during his tenure in the Burlington Police Department. This was clearly not testimony that counsel for the Town was eager to hear, but Tigges appeared unfazed about any potential fallout from his testimony and focused solely on answering the questions posed to him in a truthful manner. His testimony regarding whether or not Robert Downer used a racial slur while serving as a sergeant was as equally forthcoming devoid of any attempt to overreach or pile on to the charges against Downer.

When asked by Officer Preston in 2001 if he (Tigges) had ever heard Downer use racial slurs against him, Tigges told him the truth. Tigges told Preston, and reiterated during his testimony before the Commission, that “approximately three or four years prior to Preston asking me”, he (Tigges) was working at the Burlington Police Department desk on the 8:00 A.M. – 4:00 P.M. shift. Then-Sergeant Downer was standing in the dispatch area standing near the “six-week calendar”. Tigges testified that he (Tigges) had just taken a call from Officer Preston who was looking for the night off. Upon relaying this information to Sgt. Downer, who was the shift supervisor at the time, Tigges testified that Downer shook his head and said, “he’s nothing but a lazy fucking nigger” in reference to Officer Preston. The Commission finds Officer Tigges’s testimony regarding this incident, as well as the incident involving former Chief Soda, to be truthful.

Officer Harry Sawyer, in contrast to Officer Tigges, was probably the most involved in the prior disciplinary investigation and acknowledges the acrimonious relationship that exists to this day between himself and the Appellant. In fact, it was Downer’s false allegations regarding Mr. Sawyer’s sexual orientation that triggered the prior disciplinary investigation. Despite his disdain for the Appellant, Mr. Sawyer’s testimony was absent

any attempt to pile on to the anti-Downer allegations. Sawyer readily acknowledged to Officer Preston and the Commission that he has never heard Downer use the “N word” and does not consider Downer a racist. He did, however, testify, both before at the Appointing Authority hearing and before the Commission that sometime between 1997 and 1999, he was working the desk at the Burlington Police Department and Officer Preston called into the station looking for time off. Since Downer was the commanding officer, Sawyer testified that the call was transferred to then-Sergeant Downer. Sawyer testified that when Downer got off the phone with Preston, Downer said, “Billy P., isn’t he a pissah?” then Downer mockingly used his hands to imitate Preston making a call with his finger near his ear and said, “Yo, Sarg, I needs the night off so I can be with my lady friends”.

At the Commission hearing, the above-referenced phrase was mercilessly parsed to determine what, if any of the words, taken on their own, have any racial overtones. In deciding cases, the Commission does not check common sense at the door. The phrase, as spoken, while not containing the offensive “N word” has racial overtones in which the person making the comments is seeking to mock and exaggerate the speech of the stereotype of African Americans. The Commission concludes that Mr. Sawyer’s testimony is truthful, that Mr. Downer made these comments and that they were spoken with the intent to mock Officer Preston’s race.

Officer Spiros Tsingos has probably endured the most collateral damage as a result of the disciplinary investigations against Mr. Downer. Eager to discredit any testimony of Officer Tsingos, witnesses for the Appellant were all too willing to paint Tsingos as untrustworthy, citing instances, mostly dating back to the 1980s, in which Tsingos

allegedly exaggerated his personal accomplishment. The back and forth on this issue took on a semi-comedic nature at the Commission hearing with the counsel for the Town even submitting a picture of Tsingos as a teenager dressed in a martial arts outfit in an attempt to show his prowess in the martial arts. The recounting of the alleged exaggerations, as told by the witnesses, seems to be taking on a life of its own, with each version adding a new element that portraying Tsingos in an even more negative light. It is no surprise then, that Tsingos initially balked at providing information about Downer when Officer Preston first approached him. His reluctance to get back in the fray, coupled with his spotless record as a police officer, added to his credibility in regard to statements he heard Downer make.

Tsingos testified before the Commission that, “around 2000” he and Downer were on duty during a “midnight shift”. Tsingos, who didn’t usually work that shift, was serving as a patrol officer and Downer was the shift supervisor. Tsingos testified that he (Tsingos) was sitting at a desk and Downer was a few feet away looking at the lineup board that listed the schedules of all officers in the Department. Downer was going down the list making comments about various officers. Tsingos testified that when Downer got to the name of Officer Preston, “he called him a ‘fucking lazy nigger, doesn’t know how to read and write and he only got the job because he was a nigger’.” The Commission finds that Officer Tsingos’s testimony is truthful and that Downer did indeed make the racial slurs attributed to him by Tsingos.

Mr. Downer vehemently denies he is a racist and insists that, during his adult life, he has never used the term “nigger”. He offered up several character witnesses, including individuals that identify themselves as Hispanic (his wife), Cape Verdean, or Puerto

Rican, that insist that Downer simply isn't the type of person to make racially derogatory comments.

With the same steely resolve in which Downer insists he never used the offensive "N word", however, he also insisted to this Commissioner, in regard to a related bypass appeal, that he was ordered by Chief Soda not to sign a civil service promotional list after he returned from his paid administrative leave in 2001. Unfortunately, Chief Soda retired from the Burlington Police Department a year earlier, in 2000. It was a key issue upon which Downer sought to rely regarding his prior bypass appeal.

When the Appellant was asked by this Commissioner to explain the glaring discrepancy referenced above, he casually stated, "when exactly this conversation happened, I just can't say..." and then he inexplicably switched gears, asserting that he was #1 on the promotional lieutenant list in 1999. Overall, the Appellant's testimony appeared to be geared solely toward portraying himself in the best light and saying whatever it takes to ensure a positive outcome from the Commission. His credibility is low and the Commission does not give any weight to his denials regarding whether he made the racial remarks in question.

If the Commission decides to modify a penalty, it must provide explanation of its reasons for so doing, because a decision to modify shall be reversible if unsupported by the facts or based upon an incorrect conclusion of law. Faria v. Third Bristol Division of the Dist. Ct. Dep. 14 Mass. App. Ct. 985, 987 (1982). Police Commissioner of Boston v. Civil Service Commission. 39 Mass. App. Ct. 594, 602 (1996). When the Commission modifies an action taken by the appointing authority, it must remember that the power to modify penalties is granted to ensure that employees are treated in a uniform

and equitable manner, in accordance with the need to protect employees from partisan political control. *Id.* at 600. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 801 (2000).

In this case, Robert Downer was demoted from Lieutenant to Sergeant for a minimum of 2 years in addition to being suspended for 15 days. The Appellant sought to contrast this punishment with the disciplinary action taken by the Town against a supervisor in another department who used the “N word” to describe contract employees in the Town. On July 1, 2004, the Town of Burlington suspended a supervisor in another town department for five days without pay for referring to employees of a town contractor as “fucking lazy niggers” in the presence of a black town employee. Town Administrator Robert Mercier testified before the Commission that he considered several factors when deciding upon this employee’s discipline including the fact that the employee admitted making the comment, immediately apologized and expressed sincere remorse for the comment, at one point breaking down in tears.”

Further, the Appellant points to the testimony of the Appointing Authority’s own witness, Officer Tigges, in which Tigges stated that he heard former Police Chief Soda use the “N word” during his tenure with the Burlington Police Department. The Appellant points out that no action was ever taken to follow-up on this allegation made by an individual deemed credible by the Town.

First on the issue of Chief Soda, there is no evidence that the Town was aware of allegations that he used the “N word” during his tenure until after he had retired as the Town’s Police Chief, thus making any action by the Town impossible.

On the issue of the five-day suspension for a supervisor in another department who used the “N word”, the Commission finds that the penalty in that case case, while not pending before the Commission, was grossly insufficient given the facts involved. The Commission will not, however, use that case as a guide (or moral compass) to lower the bar on what is considered appropriate discipline against individuals who use racist statements against others in the workplace. (See Duquette v. Department of Correction, CSC Case No. D-02-81 (2006)). One would have hoped that the modern workplace had been purged of such offenses. This case, as others that the Commission has heard, clearly illustrates that it has not. There is no place for such behavior in the workplace and there is certainly no place for Robert Downer, or anyone else who exhibits such behavior, amongst the leadership ranks of the Burlington Police Department.

For all of the above reasons, the Appellant’s appeal under Docket No. D-03-188 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman, Commissioner

By vote of the Civil Service Commission (Goldblatt, Chairman, Guerin, Bowman, Marquis and Taylor, Commissioners) on November 30, 2006.

A true record. Attest:

Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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:

Brian Rogal, Esq.

Leo Peloquin, Esq.