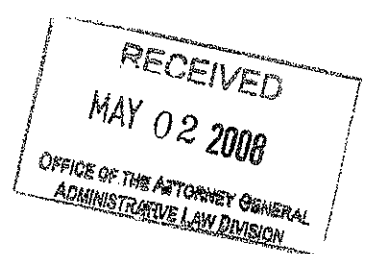


*Naubey*

COMMONWEALTH OF MASSACHUSETTS



SUFFOLK, ss  
NOTICE SENT  
B.J.R.  
C.L.A.P.  
L.J.P.  
J.D.R.

SUPERIOR COURT  
CIVIL ACTION  
NO. 08-5443-D

ROBERT DOWNER

v.

(LAT)  
TOWN OF BURLINGTON AND THE MASSACHUSETTS CIVIL SERVICE  
COMMISSION

**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION  
FOR JUDGMENT ON THE PLEADINGS**

The Plaintiff, Robert Downer ("Downer"), filed this action pursuant to M.G.L. c. 30A, §14, and M.G.L. c. 31, §44, seeking judicial review of a final administrative decision of the Massachusetts Civil Service Commission ("the Commission") in *Robert Downer v. Town of Burlington*, Civil Service Commission, Docket No. D-03-188. The Commission upheld the Town of Burlington's Administrator's 15 day suspension, and minimum two year demotion which was imposed on the plaintiff for making racially derogatory remarks and for being untruthful during the investigation.

For the following reasons, the Town of Burlington's Motion for Judgment on the Pleadings is **ALLOWED**, and the plaintiff's Motion for Judgment on the Pleadings is **DENIED**.

**FACTUAL BACKGROUND**

The following facts are taken from the Administrative Record ("A.R.") including the Hearing Officer's findings and subsequent Commission final decision which have been incorporated in to the record filed with this Court:

Downer is a tenured civil service employee of the Burlington Police Department, and has been employed as a police officer since 1985. A.R. at 544. He was promoted to the rank of Sergeant in March of 1996. A.R. at 544. In a previous disciplinary matter initiated in January 2001, Downer was suspended for 30 days, demoted to the rank of Patrolman for a two year period, and made ineligible for promotion during that period for offenses that included making disparaging remarks about the sexual orientation of a police officer and failing to tell the truth in an investigation. A.R. at 544. Downer appealed that decision 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. A.R. at 544. The Commission's decision in that case was issued in May 2005. It modified the Town's suspension and demotion to a written reprimand only. A.R. at 545. The Town of Burlington subsequently appealed the Commission's decision pursuant to c. 30A, §14 and a judge of the Suffolk Superior Court upheld the Commission's modification of a written reprimand. A.R. at 545.

On August 20, 2001 Downer returned to work at the police department. Shortly after his return, William C. Preston, Jr., a black police officer in the Town of Burlington, "became aware" that Downer may have made racially derogatory remarks about him years before. A.R. at 546. After Officer Preston learned of the alleged racial remarks he filed a discrimination complaint against Downer. A.R. at 554. Based on Preston's complaint the Town initiated an investigation of these new charges, and began interviewing several Department employees including Officers Tsingos, Tigges, and Sawyer, the three officers who had told Preston about Downer's racial slurs. A.R. at 554. During the investigation, the three officers submitted written statements to the

investigator which were provided to the plaintiff. A.R. at 554. During the investigation the plaintiff denied ever making the remarks attributed to him by Officers Tsingos, Tigges and Sawyer. A.R. at 554.

On March 10, 2003, after a full investigation, the Town imposed on Downer a 15 day suspension and a minimum two year demotion from Lieutenant to Sergeant for making racially derogatory remarks and for being untruthful during the investigation. A.R. at 555. Downer appealed to the Civil Service Commission pursuant to G.L.c. 31, §43 and hearings were held in June and August of 2006. Civil Service Commissioner Christopher Bowman served as the Hearing Officer on plaintiff's appeal. The hearings commenced on June 21, 2006. On November 30, 2006 the Commission issued a final decision, adopting the findings of Hearing Officer Bowman in which he recounted the testimony of witnesses, made credibility assessments, and concluded in light of all the facts and conclusions as he found them, that the disciplinary action imposed by the Town was appropriate and Downer's appeal should be dismissed. A.R. at 568.

#### **The Racial Incidents at Issue**

(1) Officer Tsingos's testified before the Hearing Officer that, "around 2000" he and Downer were on duty during a "midnight shift" where Downer was serving as the shift supervisor. A.R. at 549. At one point during the shift Downer was reading the line-up board that listed the names and schedules of all the officers in the Department. A.R. at 549. Tsingos testified that when Downer got to Officer Preston's name, "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'." A.R. at 549. Tsingos did not report the incident at the time, he testified, because he "didn't want to get involved." A.R. at 549.

(2) Officer Tigges testified before the Hearing Officer that three to four years prior to 2001 he was working the desk during a shift with Sergeant Downer, who was the shift supervisor at the time. A.R. at 551. Tigges testified that after he told Downer that Officer Preston had called in looking for the night off, Downer shook his head and said, "he's nothing but a lazy fucking nigger" in reference to Officer Preston. A.R. at 551. Tigges testified that he was "stunned" and "taken off guard" by the comment, but never said anything to Downer about it. A.R. at 551.

(3) Officer Sawyer also testified before the Hearing Officer about a racial incident he witnessed. A.R. at 553. Sawyer testified that sometime between 1997 and 1999, he was working the desk when Officer Preston called into the station looking for time off. A.R. at 553. Because Downer was the commanding officer, Sawyer testified that he transferred the call to him. A.R. at 553. Sawyer testified that when Downer got off the phone with Officer Preston, he 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." A.R. at 553.

### **DISCUSSION**

Judicial review of an administrative decision under M.G.L. c. 30A is confined to the administrative record.<sup>1</sup> Under M.G.L. c. 30A, §14(7) a reviewing court may affirm the decision of the agency, remand the matter for further proceedings before the agency, or set aside or modify the decision of a state agency, such as the Civil Service Commission, only if it finds that "the substantial rights of any party may have been prejudiced because the agency decision is in violation of constitutional provisions, or in

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<sup>1</sup> M.G.L. c. 30A, § 14

excess of the statutory authority or jurisdiction, or based upon an error of law, or made upon unlawful procedure, or unsupported by substantial evidence, or unwarranted by facts found by the court on the record as submitted, or arbitrary and capricious and an abuse of discretion." M.G.L. c. 30A, §14. Substantial evidence is defined as "such evidence as a reasonable mind might accept as adequate to support a conclusion." McCarthy v. Contributory Ret. Appeal Bd., 342 Mass. 45, 47 (1961); Cataldo v. Contributory Ret. Appeal Bd., 343 Mass. 312, 314 (1961); G.L. c. 30A, §1(6).

When reviewing an agency decision, the court is required to "give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." G.L. c. 30A, §14(7). In determining whether an agency's decision was arbitrary and capricious, this Court must look at whether it "lacks any rational explanation that reasonable persons might support." Cambridge v. Civil Serv. Comm'n., 43 Mass. App. Ct. 300, 303 (1997).

The plaintiff asserts that the Commission's final decision must be vacated for all of the statutory grounds provided in G.L.c. 30A, § 14, but focuses his argument on two claims, first, that there is no evidence in the record to support the Hearing Officer's findings and subsequent Commission decision and, second, that the Commission's decision is not supported by substantial evidence. I will discuss each claim in turn.

Downer argues that the Hearing Officer's determination that he became friendly with Officer Preston only after the charges were brought is without support in the record. Downer argues that this inference undercuts his credibility and reduces the probative value that their friendship has on the issue of whether the plaintiff made the racial slurs. Downer argues that the timeline of their friendship is important because he would not use

racist slurs against a friend. The timing of Downer and Preston's friendship was referenced in the final decision only in regard to Preston's testimony before the Hearing Officer, which he described as "vague and contradictory." Previously, during part of the Town's disciplinary investigation, Officer Preston stated that he approached his three fellow officers, Tigges, Tsingos and Sawyer, to inquire if they had any knowledge regarding Downer making racially derogatory remarks about him. But when he testified before the Hearing Officer on behalf of Downer, Preston testified that the officers approached him with the information. A.R. at 547. While the Hearing Officer does discuss the timing of Downer and Preston's relationship, he does so only to comment about it as being the reason behind "Preston's painful and untruthful testimony before the Commission" which the Hearing Officer found to be "motivated by a friendship he had cultivated with [Downer]....leading [Preston] now to believe that Downer never made racially derogatory remarks about him." A.R. at 547.

Therefore, I conclude that the Hearing Officer's opinion regarding the timing of the friendship between Downer and Preston had little or no bearing on his ultimate decision that Downer had engaged in racially derogatory conduct.

Downer also contends that the Hearing Officer failed to consider the evidence that Downer has significant interracial relationships. Downer had several character witnesses testify before the Hearing Officer that he is not a racist. Downer argues that the Hearing Officer's failure to address the testimony or note its significance is a failure to take into account evidence which detracts from his decision. The Hearing Officer does touch upon each character witness's testimony and notes that each of them testified that Downer isn't the kind of person to make racially derogatory comments. A.R. at 566. The Hearing

Officer also takes into account Downer's own testimony as well as the testimony of the officers who witnessed the incidents. It is on the basis of the whole record that the Commission must base its final decision and here the Hearing Officer weighed all of the testimony heard before him when making his findings. In the end the testimony of the three officers was given more weight by the Hearing Officer and thus by the Commission than the character witnesses chosen by the plaintiff to speak on his behalf.

Furthermore Downer calls the attention of this Court to the circumstances surrounding the incidents; specifically (1) he points to the fact that there are no other witnesses to these alleged racial slurs except the three officers, (2) he argues that the Hearing Officer fails to address the fact the he would have been unlikely to use a racial slur in front of people he did not trust nor was friends with, and (3) he argues that the Hearing Officer fails to address the fact that the allegations were never reported until it became clear that Downer was going to return to work from his previous disciplinary action.

The final decision of the Commission does take into account each of Downer's concerns. Specifically the Hearing Officer stated that, "[G]iven 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." A.R. at 562. The Hearing Officer makes note of the fact that Downer's previous disciplinary investigation hadn't earned him any friends. A.R. at 561. With those observations in mind, the Hearing Officer reviewed the testimony and other evidence in detail. He made credibility determinations about the value of certain

witnesses or portions of their testimony and, traditionally, the conclusions drawn from evidence deemed credible or not credible are not open for review by this Court. See Retirement Board of Brookline v. Contributory Retirement Appeal Board, 33 Mass. App. Ct. 478, 480 (1992)(credibility determinations lie solely with the factfinder and are not subject to de novo review.) The Hearing Officer observed that Downer and the three witnesses had a prior history of bad dealings, "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 [Downer]." A.R at 562.

The Town's first witness, Officer Tsingos, as noted by the Hearing Officer "has probably endured the most collateral damage as a result of [these] disciplinary investigations against Mr. Downer." A.R. at 564. So much so that when Officer Preston first approached Tsingos he replied that he did not want to get involved and would only testify if he was ordered to do so. A.R. at 549. Tsingos was eventually ordered by the Police Chief to cooperate with the Town's investigation. A.R at 549. The Hearing Officer relied on his testimony and found him to be a credible witness because of his reluctance to get involved with the investigation as well as his spotless record as a police officer.

The Hearing Officer found Officer Tigges to be the most removed from the prior disciplinary action and therefore a credible witness in the instant matter. The Hearing Officer found his testimony to be credible and truthful based on his forthright testimony which in some circumstances cast himself and the department into a negative light. A.R. at 563.

The Town's third witness, Officer Sawyer, was the most involved in the prior disciplinary investigation as that incident revolved around comments made about him by



Downer. Sawyer readily acknowledged before the Hearing Officer the acrimonious relationship that exists between himself and Downer to this day. He testified that he has never heard Downer use the "N word" nor does he consider him a racist. But he did testify that Downer had made a racially derogatory remark about Preston after a phone conversation between Downer and Preston as previously described. The Hearing Officer found that although the "N word" was not used, the phrase contained racial overtones with the intent to mock Officer Preston's race.

Downer further argues that the Hearing Officer and thus the Commission's Decision failed to consider the Commission's own determinations made in his prior discipline case. In that decision the Commission found that there was a concerted effort by the Town to conspire against Downer to have him disciplined and that at least two officers had lied under oath during those proceedings. The Commission, however, is not bound by a decision made in a different matter concerning different facts. Therefore I give no weight to this argument.

Finally Downer argues that the Decision failed to explain why the punishment he received was far in excess of that given in a similar case. Downer seeks to contrast his punishment with the punishment imposed by the Town against a supervisor in another town department who had referred to employees of a town contractor as "fucking lazy niggers" in the presence of a black co-worker. A.R. at 567. The supervisor in that case was suspended for five days without pay. A.R. at 567. The Hearing Officer heard testimony by the Town Administrator, Robert Mercier, regarding the factors that were applied in that matter and how disciplinary action was determined as well as to the differences between the two cases. Subsequently, the Hearing Officer and thus the

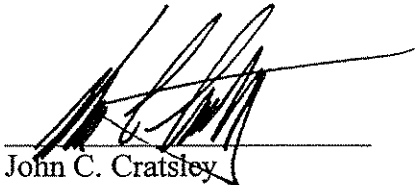
Commission found that while they may find the penalty in that case to be "grossly insufficient" they are not willing to use that case as a guide to lower the bar on what is sufficient in terms of discipline imposed on individuals who use racial slurs in the workplace.

### CONCLUSION

It is my opinion that the facts as found by the Hearing Officer as well as the credibility determinations made by him provide substantial evidence supporting the Commission's final decision and justify the Commission's decision to affirm the Town's disciplinary sanctions against Downer. The Hearing Officer and thus the Commission found the plaintiff's credibility to be "low" and did not give any weight to his denials that he did not make the racially derogatory remarks in question. The Hearing Officer and the subsequent Commission decision, however, did find the credibility of the three witnesses to be high and considered them all to be truthful. Essentially this appeal hinges on credibility issues and, as noted above, the Hearing Officer's credibility determinations as adopted by the Commission in their final decision are not open for review by this Court.

**ORDER**

For the foregoing reasons it is **ORDERED** that the plaintiff's Motion for Judgment on the Pleadings is **DENIED**. A Final Judgment shall enter for the defendant Town of Burlington affirming the Civil Service Commission decision dismissing Downer's appeal.



John C. Cratsley  
Justice, Superior Court

April 29, 2008