COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

JEFFREY FERRIN,
Appellant

v.

D-09-265

CITY OF PITTSFIELD,
Respondent

Appellant's Attorney:

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Respondent's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION

The Appellant, Jeffrey Ferrin (hereinafter "Ferrin" or "Appellant"), pursuant to G.L. c. 31, § 43, is appealing the decision of the City of Pittsfield (hereinafter "City" or "Appointing Authority") to suspend him for three (3) days for making an offensive comment over the City's two-way radio system while on duty.

The Appellant filed a timely appeal with the Civil Service Commission (hereinafter "Commission") on May 28, 2009. A pre-hearing conference was conducted on July 8, 2009 and a full hearing was conducted on September 16, 2009 at the Pittsfield City Hall

in Pittsfield, MA. The hearing was declared private and witnesses were sequestered. The hearing was digitally recorded. The parties submitted post-hearing briefs on November 5, 2009.

FINDINGS OF FACT:

Eight (8) exhibits were entered into evidence. Based on the documents submitted and the testimony of the following witnesses:

For the Appointing Authority:

- Bruce Collingwood, Commissioner of Public Works and Utilities;
- Robert Scales, Highway Craftsman;
- Shane Gerwaski, Maintenance Craftsman

For the Appellant:

- Jeffrey Ferrin, Appellant;
- Arnold Raney, Highway Craftsman;

I make the following findings of fact:

1. The Appellant, Jeffrey Ferrin, is a tenured civil service employee in the City of Pittsfield in the position of highway crafstman. He has been employed by the City since 2004. (Stipulated Facts and Testimony of Appellant)

Prior Discipline

2. On April 11, 2006, the Appellant received a written warning for damaging city equipment. (Exhibit 3)

3. On April 28, 2008, the Appellant received a written letter of reprimand for dereliction of duty and insubordination. According to the written letter of reprimand, the Appellant acknowledged that he shouted at his supervisor and called him an asshole. (Exhibit 3)
4. On August 12, 2008, the Appellant received a verbal warning for general misconduct. (Exhibit 3)
5. On October 23, 2008, the Appellant received a 1-day suspension for leaving work the without permission. (Exhibit 3)
6. On November 13, 2008, the Appellant received a written warning for insubordination. (Exhibit 3)
7. On November 19, 2008, the Appellant received a written letter of reprimand for unauthorized union business during working hours, dereliction of duty and insubordination. (Exhibit 3)
8. On December 23, 2008, the Appellant received a written warning for using a city vehicle for personal business. (Exhibit 3)
9. On January 14, 2009, the Appellant received a written warning for failure to meet work standards. (Exhibit 3)
10. On January 15, 2009, the Appellant received a written letter of reprimand for unauthorized union business during working hours. (Exhibit 3)
11. On January 19, 2009, the Appellant received a written warning for failure to meet work standards. (Exhibit 3)
12. On May 14, 2009, the Appellant received a verbal warning for poor general conduct. (Exhibit 3)

13. On May 18, 2009, the Appellant received a verbal warning to failure to wear his work uniform. (Exhibit 3)

14. On May 20, 2009, the Appellant received two verbal warnings for failure to wear his work uniform. (Exhibit 3)

Disciplinary Appeal currently before the Commission

15. On March 4, 2009, DPW employee Shane Gerwaski was snow plowing for the City. The Appellant and DPW employee Arnold Raney were snow plowing in another truck. (Testimony of Appellant and Gerwaski and Raney)

16. At approximately 7:05 P.M., Mr. Gerwaski, who had been working for approximately twelve hours at this point, almost hit a pedestrian who was wearing dark clothes while Mr. Gerwaski was trying to clear a snow drift. (Testimony of Gerwaski)

17. After almost hitting the pedestrian, Mr. Gerwaski stated into the City's two-way radio system words to the effect, "how ignorant does one have to be to walk outside at night with dark clothing on." (Testimony of Gerwaski)

18. Mr. Gerwaski then heard the Appellant state over the two-way radio system, "just like our President." (Testimony of Gerwaski)

19. In a written statement that Mr. Gerwaski prepared only six days after the incident, he recalled the Appellant stating, "like the person running our country." Mr. Gerwaski acknowledged that he would have had a clearer recollection of events only days after it occurred. (Testimony of Gerwaski)

20. Asked what his reaction was to the Appellant's statement, Mr. Gerwaski, a white male who has worked for the City for 4 ½ years, said, "not good; I perceived it as a racial statement." (Testimony of Gerwaski)

21. Mr. Gerwaski was a good witness and I credit his testimony. He is a soft-spoken individual who appeared to take his sworn testimony seriously. He did not appear to have any ulterior motive for testifying against the Appellant and candidly acknowledged that he had not previously heard the Appellant make any racial statements. (Testimony, demeanor of Gerwaski)
22. Robert Scales is a black male who has worked as a highway craftsman for the City for the past 10 years. On the night in question, he and his wife were sitting at home in the living room and had the radio scanner turned on. (Testimony of Scales)
23. While listening to the scanner, Mr. Scales heard Mr. Gerwaski say words to the effect, "how ignorant is it to be wearing black at night?" (Testimony of Scales)
24. Mr. Scales then heard the Appellant immediately respond to Mr. Gerwaski by stating into the radio words to the effect, "look who's running our country." (Testimony of Scales)
25. Mr.Scales, who was visibly upset during his testimony before the Commission, testified that he was "furious" and considered the statement by the Appellant to be inappropriate. He was particularly upset at how flippantly the Appellant made the remark. (Testimony of Scales)
26. Mr. Scales testified that he confronted the Appellant the next morning and made it clear that he (Mr. Scales) was "pissed off" at the Appellant for his remarks. He then told his supervisors that he did not want to be assigned to work with the Appellant on a going-forward basis. (Testimony of Scales)

27. The Appellant responded to Mr. Scales by saying, "I'm sorry that you took it that way, but I will not apologize for your interpretation of what I said." (Testimony of Appellant)

28. Mr. Scales was a good witness and I credit his testimony. He had a clear recollection of the events in and his testimony rang true to me. His outrage regarding what he heard that night, and the context in which the words were made, was not feigned. He was genuinely angry about the Appellant's comments. (Testimony, demeanor of Scales)

29. The Appellant testified that he did hear Mr. Gerwaski's radio transmission on the night in question and that he did state into the two-way radio, "we know who's running this country." (Testimony of Appellant)

30. The Appellant testified that his comments were not in response to Gerwaski's radio transmission, but rather, were part of a conversation he was having with his co-worker, Arnold Raney, who was a passenger in the truck he was driving. (Testimony of Appellant)

31. The Appellant also testified that he wasn't even referring to President Obama, but, rather, was referring to "big business" as he and his co-worker were talking about "big oil, auto bailouts and AIG." (Testimony of Appellant)

32. When Mr. Raney, who was a sequestered witness, was asked what he knew about AIG, he responded, "what's AIG?". (Testimony of Raney)

33. Mr. Raney testified that he couldn't remember whether he heard the Appellant make any statement into the radio on the night in question, despite the fact that it is

undisputed by the parties that the Appellant did make a comment on the radio. (Testimony of Raney)

34. Mr. Raney considers himself to be a friend of the Appellant and acknowledged that he and the Appellant have visited each others' houses. Mr. Raney's discomfort while testifying was palpable. He appeared to be trying to reconcile the need to provide truthful sworn testimony while not wanting to paint his friend in a negative light. (Testimony, demeanor of Raney)

35. I can not credit the Appellant's testimony. His testimony was simply not plausible. The credible testimony of Mr. Gerwaski and Mr. Scales makes it clear that the Appellant, when he spoke into the two-way radio system on the night in question, was responding to a statement made by Mr. Gerwaski. Further, the Appellant offered no plausible explanation as to why he would activate the City's two-way radio system if he was indeed responding to a comment made by the passenger of his vehicle. (Testimony, demeanor of Appellant)

CONCLUSION

G.L. c. 31, § 43, provides:

> "If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority."

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214, 268 N.E.2d 346 (1971); Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass. App. Ct. 486, 488, 684 N.E.2d 620, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514, 451 N.E.2d 408 (1983)

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36, 133 N.E.2d 489 (1956).

"The 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, 857 N.E.2d 1053, 1059 (2006). See Watertown v. Arria, 16 Mass. App. Ct. 331, 334, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983) and cases cited.

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, 857 N.E.2d 1053, 1059 (2006) and cases cited. The role of the 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." Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997). See also Leominster v. Stratton, 58 Mass. App. Ct. 726, 728, 792 N.E.2d 711, rev.den., 440 Mass. 1108, 799 N.E.2d 594 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, 721 N.E.2d 928, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass App.Ct. 473, 477, 648 N.E.2d 1312 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983).

For all of the reasons referenced in the findings, I conclude that the Appellant made a statement with racial overtones on the City's two-way radio system on the evening on March 4, 2009. I base this primarily on the credible testimony of DPW employees Shane Gerwaski and Robert Scales. For the reasons cited in the findings, I do not credit the testimony of the Appellant. The Commission does not check common sense at the door when hearing disciplinary appeals and I do not believe the Appellant's implausible version of events. The City has proven by a preponderance of the evidence

that the Appellant made an offensive comment over the City's two-way radio system and they were justified in disciplining him for this.

Having determined that it was appropriate to discipline the Appellant, the Commission must determine if the City was justified in the level of discipline imposed, which, in this case, was a 3-day suspension.

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. Civ. Serv. 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 employees' suspensions 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., Town of Falmouth v. Civ. Serv. Comm'n, 447 Mass. 814, 823 (2006).

There is no evidence that the discipline imposed involved inappropriate motivations or objectives or any other factors that would warrant the Commission modifying the discipline. Further, the Appellant's 3-day suspension appears to be consistent with progressive discipline given that he has previously received numerous verbal and written warnings and a 1-day suspension.

For all of the above reasons, the Appellant's appeal under Docket No. D-09-265 is hereby ***dismissed***.

Civil Service Commission

Christopher C. Bowman, Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners [Henderson, Commissioner – No]) on December 10, 2009. A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice:
Thomas Donoghue, Esq. (for Appellant)
Fernand J. Dupere, Esq. (for Appointing Authority)