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COMMONWEALTH OF MASSACHUSETTS

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SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 17-00805

JUN 21 2019

Notified
LeMahieu (CRD) Attorney General
COM-AG/R. L. Division
BFD / C.S.W.
S, C/M / K.H.H.
J.M.S.

CITY OF BOSTON

vs.

MASSACHUSETTS CIVIL SERVICE COMMISSION & another¹

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

REC'D CIV. SERVICE COMM
JUN 21 2019 PM 3:08

The plaintiff, the City of Boston ("City"), brings this action pursuant to G. L. c. 31, § 44, and G. L. c. 30A, § 14, seeking to vacate a decision of the defendant, the Massachusetts Civil Service Commission ("Commission"), that reversed the disciplinary decision of the Boston Fire Department ("BFD") to suspend the defendant, Firefighter Mark T. Jones ("FF Jones"), for four tours of duty without pay. This matter is now before the Court on the City's motion for judgment on the pleadings.² For the following reasons, the City's motion is DENIED, and the Commission's decision is AFFIRMED.

BACKGROUND

The Commission found the following facts:

FF Jones has been a full-time firefighter with BFD since 1993, and has been assigned to the Charlestown firehouse since 1998. During the relevant time period, four work groups were assigned to the Charlestown firehouse with each group generally working two 24-hour shifts

¹ Mark T. Jones

² Pursuant to Superior Court Standing Order 1-96(4), Jones' response to the City's motion "shall be deemed to include a cross-motion for judgment on the pleadings pursuant to Mass. R. Civ. P. 12(c)."

during an eight-day work cycle. Each work group included a Captain, a Captain and Lieutenant, or two Lieutenants. FF Jones was a member of Group 4 under the command of Lt. Gregory Curry. Three firefighters in a different work group, Group 2, were under the command of Lt. Chris Corwin.

At the end of 2014, Lt. Corwin arranged for a \$200 Christmas gift to be given to Firefighter Kenny Ortega, who was a firefighter in his work group. The reason for the gift was that FF Ortega had undertaken the "thankless job" of managing the fire station's house fund. The house fund was used for miscellaneous purchases for the firehouse that BFD did not cover, including kitchen supplies, TVs, and barbeques. Under FF Ortega's management, the house fund went from a deficit to a surplus as a result of voluntary contributions made by Groups 1, 2, and 4.

Around the same time, the house fund received a \$300 bonus because the firehouse was one of the top ticket-sellers in the Firefighter's Union biannual death and welfare fund raffle. After a discussion with the union liaison, Lt. Corwin decided that Firefighter Edward Horne, another firefighter in his work group, should receive \$200 for leading the fundraising efforts. At Lt. Corwin's direction, \$200 was disbursed from the house fund to FF Horne. Although FF Jones' supervisor, Lt. Curry, was present during the discussion concerning the \$200 award, the decision was not put to a house "vote" of all groups as was customary, and the other firefighters only found out about the award after the fact.

In January 2015, after he learned of the disbursement to FF Horne, FF Jones wrote a note on the station "whiteboard," which was used by the firefighters to post informal notes to one another using erasable marker. Specifically, in reference to the money that the firehouse received as a result of the raffle, FF Jones wrote: "Where is the \$300 D&W?" Two unidentified

persons responded, "Who wants to know?" and "Ortega has it." At the time he wrote the note, FF Jones took no issue with the fact that FF Horne received the \$200 award, but was upset because he believed that Lt. Corwin unilaterally decided to spend house money without consulting others. He thought FF Horne should keep the money, but that Lt. Corwin should personally reimburse the house fund \$200. Lt. Corwin learned about FF Jones' message and was "disgusted by it." As a result, he pulled the whiteboard from the wall and threw it out a window onto the pavement outside the firehouse.

A few months later, in March 2015, FF Jones learned that the mothers of two firefighters had passed away. Because there was no longer a whiteboard, he wrote in erasable marker in the spot where the board used to hang: "LARRY & JULIAS MOMS PASSED." At the time, another unrelated message appeared on the wall of unknown origin but not written by FF Jones. The following day, Lt. Corwin noticed FF Jones' message and ordered him to clean it off the wall. FF Jones stated that the message should remain to ensure that everyone was aware of the deaths. Lt. Corwin again ordered FF Jones to remove it. FF Jones refused to do so and went into the kitchen to have breakfast with another firefighter. Lt. Corwin then ordered them to "get the f—k out of the firehouse, you're relieved," and they both left the firehouse. As a result of this incident, FF Jones received an oral warning from Lt. Corwin for "Insubordination, disrespect, insolence or like behavior to a superior; Failure to obey orders, conduct prejudicial to good order; and Damage to department property through willfulness." FF Jones was ordered to perform eight extra "night watches" as punishment. Thereafter, in March and April 2015, FF Jones filed two "5A" internal complaints concerning Lt. Corwin's behavior.³ The BFD District

³ A "5A" report is an internal communication that is forwarded through the chain of command to the BFD Commissioner.

Fire Chief, after learning of the rising tensions in the Charlestown fire station, determined that mediation was warranted to resolve the situation.

At the end of April 2015, Lt. Corwin issued a second oral warning to FF Jones for taking 30 minutes to depart the firehouse after Lt. Corwin ordered him to leave, and cited him for "Disobeying a direct order; Disrespect or insolence to a superior; and Conduct prejudicial to good order." After receiving this warning, FF Jones reported his ongoing problems with Lt. Corwin to the City's Office of Human Resources ("OHR") and noted that the recommended mediation had not yet occurred.

In May 2015, Lt. Corwin submitted a "5A" internal complaint concerning FF Jones and cited his "well documented" disruptive behavior towards Group 2. In June 2015, Lt. Corwin and a firefighter under his command, FF Bryan Snell, each submitted "5A" internal complaints indicating that they overheard FF Jones, who is black, greet another black firefighter using the "N-word."

In August 2015, the OHR Director sent FF Jones a letter concerning his April 2015 report to OHR about Lt. Corwin's conduct. In the letter, the OHR director reported that that as a result of interviews and upon review of the relevant records, OHR did not find any violation of the City's Policy on Discrimination, Harassment and Retaliation or Work Place Violence. OHR noted that it did find Lt. Corwin engaged in behavior that was "inappropriate, particularly given his position as an officer." The letter also indicated that OHR had developed a series of recommendations and a work plan to be carried out over the next two months to relieve the tension between FF Jones and Lt. Corwin, to coach Lt. Corwin to maintain professional interactions with subordinates, to improve the working relationship between Groups 2 and 4, and to enhance communications within the firehouse. At some point thereafter, BFD initiated a

mediation process that involved a series of four meetings some separately and some jointly with Groups 2 and 4.

During the mediation process, an altercation occurred between FF Jones and FF Snell involving a radio in the firehouse. Some firefighters believed that FF Jones was playing the radio too loud. They would turn the volume down and FF Jones kept turning the volume back up. At some point, in FF Jones' presence, FF Snell disconnected the radio by pulling the plug. On September 17, 2015, when the cord to the radio disappeared, FF Jones submitted a "5A" internal complaint to Lt. Curry reporting that the cord was "missing." While FF Jones made no representation as to who he believed was responsible in that complaint, he did tell FF Horne that he suspected that FF Snell had taken the cord which was overheard by another firefighter.

On September 25, 2015, Group 4 relieved Group 2 from duty. As FF Jones entered the kitchen, he heard FF Snell tell another firefighter that FF Jones is your friend "so long as you don't steal a power cord." When FF Jones asked FF Snell if he was talking about him, FF Snell replied, "If the shoe fits wear it." FF Jones then stated, "I never said you stole it. I said I thought you may have stolen it." At that point, FF Snell said that those statements were no different and started to raise his voice. He said that people who go around making such accusations are "cowards" and that he wanted to "slap the s—t out of" FF Jones. FF Jones replied, "Maybe your master told you to do it." When FF Snell inquired, "Who is my master," FF Jones did not answer. However, it is undisputed that FF Jones intended to imply that Lt. Corwin, who is white, was a "master" and FF Snell, who is black, was his "slave." At that point, two firefighters who were present left the kitchen and another tried to diffuse the situation by making small talk. When the argument was over, FF Jones went to work for the day and FF Snell departed the firehouse.

On October 7, 2015, FF Snell submitted a "5A" internal complaint through Lt. Corwin describing the encounter which he characterized as part of "a pattern of racism and disrespect to other members" that he found "offensive and hostile." On October 10, 2015, FF Ortega from Group 2 and a firefighter from Group 3 also submitted "5A" internal complaints through Lt. Corwin concerning the incident. FF Ortega stated in his report, "I feel these remarks are a continual reminder of a hostile work environment that FF Jones is creating."

On November 4, 2015, FF Jones was called to a meeting at BFD headquarters, which FF Jones believed to be related to a letter he sent to OHR in late October inquiring about the status of the "recommendations and work plan" referenced in its earlier letter. Instead, FF Jones met with the BFD Deputy Chief-Personnel, the District Fire Chief-Personnel, the Chief of Operations, the Deputy Fire Chief-Division 1, the Division 1, District 3 Fire Chief, and the President of the Firefighter's Union Local 718 to discuss the incident with FF Snell.

During the meeting, FF Jones admitted that he said FF Snell had taken the power cord, that FF Snell did it because Lt. Corwin was his "master," and that he meant FF Snell was acting like a "slave" and Lt. Corwin like a "slave owner." FF Jones also explained that he meant the comment as a joke. He further stated that he reported to Lt. Curry that FF Snell threatened to "slap the s—t out of me" and "to come by Eagleton Square," which is an area near where FF Jones lives. After FF Jones and the Union President left the room, Lt. Curry denied that FF Jones reported the threat to him. Upon his return, FF Jones was informed that he would be disciplined with a four-tour suspension without pay and ordered to participate in an Anger Management class. With respect to FF Jones' accusation that FF Snell had threatened him, FF Jones was ordered to submit further information through the chain of command and, upon receipt, a formal investigation would be conducted. By letter dated, November 4, 2015, FF Jones

was formally notified of the discipline for "Conduct prejudicial to good order" due to the "master" remark.

FF Jones appealed the decision to the Fire Commissioner who, after a hearing, upheld the discipline. In November 2015, on the same day that the Fire Commissioner rendered his decision, FF Jones submitted three additional "5A" internal reports through Lt. George Gilchrist. In those reports, FF Jones repeated his allegation that FF Snell threatened him and accused FFs Snell and Ortega of "slander" for making allegedly false claims about him during the hearing. He also questioned the credibility of another firefighter who reported that on September 12, 2015 (before the cord was discovered missing), he overheard FF Jones tell another unidentified person that FF Snell stole the power cord from the stereo in the gym because "[h]e was doing the bidding of his master." The BFD Deputy Chief-Personnel considered these "5A" reports submitted by FF Jones to be retaliation against people who reported what they heard.

FF Jones then appealed the decision to the Commission. The matter proceeded before the Commission for a hearing on February 22, and March 24, 2016. At the hearing, the Commission received 38 exhibits into evidence. FF Jones testified on his own behalf and BFD called nine witnesses: the BFD Deputy Chief-Personnel; Lt. Corwin; all three firefighters under Lt. Corwin's command, including FF Snell; two other firefighters in Group 2 under a different command; and two firefighters in Group 3. All but one of BFD's witnesses who worked in the firehouse recalled that FF Jones had previously made "racially-oriented comments" such as saying "It's a white man's world," and that the conflicts in Iraq and Afghanistan were a "white man's war," as well as liberally using the "N-word" with his black co-workers. The BFD Deputy Chief-Personnel explained that a four-tour suspension was the smallest amount of time that BFD imposed on other firefighters who were previously disciplined for one-time inappropriate

remarks concerning other firefighters, and cited two examples in support of this assertion.

On February 17, 2017, the Commission issued its decision, vacating the disciplinary action taken against Jones by a 3-2 vote. In its decision, the Commission explained that while Jones engaged in “unacceptable behavior” by making the “sarcastic and . . . racially-charged analogy of ‘Master’ and ‘Slave’,” it cautioned that his behavior could not be viewed in a vacuum. See A.R. at 68. The Commission went on to conclude that it should modify FF Jones’ discipline because of “disparate treatment.” Specifically, the Commission explained that: “BFD failed to investigate and fully appreciate the context in which the offense occurred, singling out FF Jones for discipline although others were responsible for contributing to the behavior for which he was solely held culpable, none of whom received discipline, let alone comparable discipline.” *Id.*

The Commission cited four reasons for its decision. First, the Commission credited FF Jones’ version of events finding that the incident at issue “was preceded by a pattern of petty annoyances of [FF Jones], principally instigated by Lt. Corwin and FF Snell.” *Id.* The Commission questioned Lt. Corwin’s good faith in disciplining Jones for refusing to erase the note from the wall, and found the incident where Lt. Corwin threw the whiteboard out the window to be “troubling.” The Commission also credited the OHR’s conclusion that Lt. Corwin engaged in “inappropriate” conduct that warranted remedial action including coaching of Lt. Corwin with respect to his treatment of subordinates, but found that BFD did not take such action despite FF Jones’ requests.

Second, the Commission did not credit the firefighter who testified that he overheard FF Jones accuse FF Snell of stealing the power cord and make a similar “master” comment on a date prior to the incident at issue. Rather, the Commission found that FF Jones casually remarked

about the missing cord to another firefighter.

Third, the Commission found that the incident at issue began with FF Snell taunting FF Jones, suggesting that Jones was “coward” and that he wanted to “slap the sh—t” of out him. The Commission found that both men had a well-known mutual disrespect for one another, both had short fuses when their buttons were pushed, and neither showed a level of self-control that could have diffused the situation. The Commission noted, “[D]espite the clearly conflicting evidence about what had occurred on September 23, 2015 and [BFD]’s promise to investigate FF Jones[’] counter-charges against FF Snell, FF Jones was suspended summarily and no further investigation of the counter-charges against FF Snell was pursued.” *Id.* at 70.

Finally, the Commission noted that FF Jones holds “strong political views when it comes to the subject of race relations, and has not been shy about expressing them.” *Id.* The Commission warned that while FF Jones has a right to hold his views, all employees “must use common sense and temper their use of pejorative language in the workplace to make a point, whether in jest or in earnest.” *Id.*

Ultimately, the Commission concluded that:

FF Jones’s sarcastic jab at FF Snell (and, indirectly at Lt. Corwin) was inextricably intertwined with their ongoing mutual hostility toward each other, which had already created a volatile work environment and was complicating the on-going efforts to achieve a mediated solution to the situation. But for the fact that FF Jones was singled out and received disparate treatment for his contribution to the breakdown in workplace relationships, some level of discipline against him clearly would have been in order. I cannot, however, overlook the fact that FF Jones was not solely responsible for instigating and contributing to the breakdown in the workplace at the Charlestown firehouse and that, primarily, it is Lt. Corwin and FF Snell (out of the 32 personnel stationed in Charlestown) who claimed to be the most affected, both of whom had some personal beef with FF Jones and both of whom also exhibited poor behavior.

Id. The Commission found that the disparate discipline of FF Jones did not meet the basic merit principles of Massachusetts civil service law that require BFD to treat all employees in a fair and

equitable manner. On these grounds, the Commission vacated BFD's discipline decision.

On March 17, 2017, the City initiated this action against the Commission and FF Jones, seeking judicial review of the Commission's decision pursuant to G. L. c. 31, § 44, and G. L. c. 30A, § 14.

DISCUSSION

I. Legal Standard

A. Standard Applicable before the Commission

A tenured civil service employee who is aggrieved by a disciplinary decision of an appointing authority, including a decision to impose a suspension, may appeal the decision to the commission. See G. L. c. 31, § 41. Upon appeal, the commission conducts a de novo hearing and finds facts anew. See *Falmouth v. Civil Service Comm'n*, 447 Mass. 814, 823 (2006). The commission may consider all evidence before it that it deems relevant even if that evidence was not before the appointing authority when it made its decision. See *Thompson v. Civil Serv. Comm'n*, 90 Mass. App. Ct. 462, 467 (2016). “[T]he commission then must determine, by a preponderance of the evidence, whether the appointing authority met its burden of proof that there was just cause for the action taken.” *Id.* at 463. “[T]he question before 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 [is] 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). “The commission’s role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority’s actions.” *Beverly v. Civil Serv. Comm'n*, 78 Mass. App. Ct. 182, 187 (2010).

The commission also is vested with the “authority to review and amend the penalties of the many disparate appointing authorities subject to its jurisdiction.” *Falmouth*, 447 Mass. at 824. Indeed, while “[t]he power to modify penalties permits the furtherance of uniformity and the equitable treatment of similarly situated individuals[,] . . . [i]t must be used to further, and not to frustrate, the purpose of civil service legislation, i.e., ‘to protect efficient public employees from partisan political control.’” *Police Commissioner of Bos. v. Civil Serv. Comm’n*, 39 Mass. App. Ct. 594, 600 (1996), quoting *Debnam v. Belmont*, 388 Mass. 632, 635 (1983). “It is not to be used ‘to prevent the removal of those who have proved to be incompetent or unworthy to continue in the public service.’” *Police Commissioner of Bos.*, 39 Mass. App. Ct. at 600, quoting *Cullen v. Mayor of Newton*, 308 Mass. 578, 581 (1941). In practice, “[u]nless the commission’s findings of fact differ significantly from those reported by the [city] or interpret the relevant law in a substantially different way, the absence of political considerations, favoritism, or bias would warrant essentially the same penalty.” *Falmouth*, 447 Mass. at 824. “The commission is not free to modify the penalty imposed by the [city] on the basis of essentially similar fact finding *without an adequate explanation.*” *Id.* (emphasis added).

B. Standard Applicable on Judicial Review

Either party has the right to seek judicial review of the commission’s decision under G. L. c. 30A, §14. See G. L. c. 31, § 44. On review, the court accepts the commission’s factual determinations if supported by substantial evidence in the record, and inquires only as to whether the commission’s decision was “legally tenable.” *Thompson*, 90 Mass. App. Ct. at 463-464, quoting *Commissioner of Health & Hosps. of Boston v. Civil Serv. Comm’n*, 23 Mass. App. Ct. 410 (1987). When, as here, the appointing authority appeals the commission’s decision, it bears the “heavy burden” of establishing that the decision was invalid. *Police Dep’t of Bos. v.*

Kavaleski, 463 Mass. 680, 689 (2012). The court is required to give “due weight to the experience, technical competence, and specialized knowledge” of the commission in such instances. See *id.*, quoting G. L. c. 30A, § 14(7). “This standard of review is highly deferential to the agency on questions of fact and reasonable inferences drawn therefrom.” *Kavaleski*, 463 Mass. at 689, quoting *Brackett v. Civil Serv. Comm’n*, 447 Mass. 233, 242 (2006).

II. The Merits

The City argues that the Commission exceeded its statutory authority when it found that the factual basis for imposing discipline occurred but nonetheless reversed BFD’s disciplinary decision. As a result, the City asserts that this Court must vacate the Commission’s decision and reinstate FF Jones’ suspension. The Court disagrees.

Although the Commission concluded that FF Jones made the “master” comment and that such conduct could serve as the basis for discipline, it set forth specific reasons why it viewed the decision to suspend FF Jones as “disparate treatment” in light of its factual findings.⁴ Specifically, the Commission found that Lt. Corwin and FF Snell primarily instigated the hostilities at the firehouse pre-dating the incident through a series of “petty annoyances;” that the incident at issue began with FF Snell “taunting” FF Jones; that BFD was aware that Lt. Corwin had issues maintaining professional interactions with subordinates, but did not take appropriate steps to remedy the situation despite FF Jones’ urging that BFD implement its described plan; and that BFD failed to investigate FF Jones’ accusation that FF Snell threatened him despite assurances that it would do so.⁵ Based on these facts, the Commission expressly concluded that

⁴ The factual findings were a product of a lengthy hearing conducted by the Commission, in which ten witnesses provided testimony, and the parties presented a body of evidence and arguments of counsel.

⁵ The Court rejects the City’s argument that the Commission found as a factual matter that FF Jones never reported FF Snell’s threats prior to the meeting at BFD Headquarters merely because it mentioned in its decision that Lt. Curry denied that FF Jones had made such a report to him. Moreover, irrespective of that issue, the Commission

FF Jones was singled out and treated differently than others who contributed to the rising tensions and discord in the firehouse. The facts and circumstances articulated by the Commission are sufficient to support the Commission's decision to reverse the BFD's disciplinary decision on the grounds of "disparate treatment." See *Falmouth*, 447 Mass. at 824 (commission must provide adequate explanation to support its decision to modify a penalty imposed by the appointing authority where it finds similar facts); *Faria v. Third Bristol Div. of Dist. Court Dep't of Trial Court*, 14 Mass. App. Ct. 985, 986 (1982) (commission must articulate the specific facts and circumstances that it relies on to modify a penalty, particularly where the matter involved a police officer who is in a position of public trust and engaged in serious misconduct). Cf. *Maynard v. Rego*, 87 Mass. App. Ct. 1133, 2015 WL 3938664, at *3 (2015) (Rule 1:28 decision) (commission was not warranted in reversing discipline imposed upon consideration of "comparative discipline" where it made no overt mention of favoritism or bias, and no such inference could be drawn from the facts found and conclusions reached).

The City contends that the Commission's finding that FF Jones was singled out and treated differently than others cannot be maintained because none of the other employees engaged in the same conduct as FF Jones, namely making a racially offensive comment. The Court, however, discerns no authority that precludes the Commission from considering the treatment of other individuals involved in the same incident if it deems such information relevant.⁶ Cf. *Boston Police Dep't v. Collins*, 48 Mass. App. Ct. 408, 412 (2000) (commission

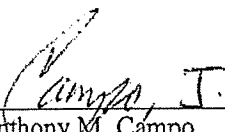
found that at BFD's direction FF Jones submitted his complaint up the chain of command following that meeting, and that despite assurances to the contrary, his claims were never investigated. See *Thompson*, 90 Mass. App. Ct. at 467 (commission may consider evidence not before the appointing authority when it made its decision).

⁶ This is not an instance, as the City argues, where the failure to punish one bad actor permits future bad actors from being punished. See *Desmond v. West Bridgewater*, 94 Mass. App. Ct. 1122, 2019 WL 661656, at *3 n.10 (2019) (Rule 1:28 decision). This is an instance where the Commission considered whether other bad actors *involved in the same events* were punished and found that they were not as only FF Jones was "singled out" for punishment.

exceeded its authority when it reversed a police lieutenant's suspension after finding he violated cited policies during an exchange with his superior but did not find that "bias directed against the particular employee improperly factored into the appointing authority's course of action," or "that the strained relations . . . between [the lieutenant and his superior] played any causal or motivating role in the department's ultimate disciplinary decision"). The City, therefore, has not met the heavy burden of demonstrating that the Commission's decision is not "legally tenable." Accordingly, the Court shall affirm the Commission's decision, which was the product of multiple witness testimony and a lengthy hearing.

ORDER

The Plaintiff City of Boston's Motion for Judgment on the Pleadings (Docket No. 8) is **DENIED**. The decision of Defendant the Massachusetts Civil Service Commission reversing the Boston Fire Department's suspension of Defendant Mark T. Jones is **AFFIRMED**.



Anthony M. Campo
Justice of the Superior Court

DATED: June 18, 2019