

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, SS.

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

HERIBERTO NATAL,
Appellant

v.

CITY OF NEW BEDFORD,
Respondent

CASE NO: D1-07-173

Appellant's Attorney:

Jaime DiPaolo-Kenney, Esq.
Associate General Counsel
AFSCME Council 93
8 Beacon Street
Boston, MA 02108

City of New Bedford Attorney:

Jane Medeiros Friedman, Esq.
First Assistant City Solicitor
City of New Bedford Law Department
133 William Street
New Bedford, MA 02740

Commissioner:

Paul M. Stein

DECISION

The Appellant, Heriberto Natal, acting pursuant to G.L.c.31, § 43, duly appealed a decision of the City of New Bedford (New Bedford), the Appointing Authority, to discharge him from employment as a Cemetery Department Building Maintenance Person for alleged retaliation against a co-worker who had filed a grievance claiming she had been harassed by him. A full hearing was held by the Civil Service Commission (Commission) on October 24, 2008, January 5, 2009 and January 13, 2009. The hearing was declared private as no party requested a public hearing. Witnesses were sequestered. New Bedford called five witnesses and the Appellant called one witness and testified on his own behalf. Thirty-six (36) exhibits were received in evidence. The hearing was digitally recorded. Post hearing submissions were received by the Commission from both parties on April 21, 2009.

FINDINGS OF FACT

Giving appropriate weight to the Exhibits, the testimony of the witnesses (the Appellant; Ms. Elizabeth Medina; New Bedford Cemetery Dep't Office Manager Sandra Manning; New Bedford Cemetery Dep't Maintenance Man Scott Lewis; New Bedford Cemetery Dep't Clerk Fatima Martins; New Bedford Personnel Director, Angela Natho; New Bedford Police Detective Robert Holmes) and inferences reasonably drawn from the evidence as I find credible, I make the findings of fact set forth below.

1. The Appellant, Heriberto ("Ed" or "Eddy") Natal, originally became employed by the New Bedford Park Department as a seasonal labor in 1994 and 1995. (*Exhibit 1*)

2. In September 1995, Mr. Natal was appointed to the position of Zoo Caretaker in the Park Department on an emergency basis and, in November 1995 the appointment became permanent. (*Exhibits 1 & 3*)

3. During his tenure as Zoo Caretaker, Mr. Natal received six written and one verbal warning for various offenses that included baiting and misusing a zoo animal (1996), no-call no show (1997), for failing to properly secure elephants (1998), verbal hostility to a supervisor on two occasions (1998), improper telephone protocol (1999) and sick leave abuse (1999). (*Exhibits 4 through 10*)

4. In July 2000, following a hearing on allegations that Mr. Natal had engaged in sexual harassment in violation of New Bedford's Sexual Harassment Policy, Mr. Natal consented to a thirty (30) day suspension, which he served from July 9, 2000 through August 17, 2000, to complete sexual harassment training, and to a transfer from the Park/Zoo Department to the position of Building Maintenance Man in the Building Department, effective August 18, 2000. (*Exhibits 2, 11, 12 & 13*)

5. Mr. Natal worked as Building Maintenance Man in the Building Department and later the Department of Public Facilities until July 2006, during which time he received his normal step increases in pay, a satisfactory performance review, and was not subject of any discipline. (*Exhibits 1, 32; Testimony of Appellant*)

6. On September 20, 2005, Mr. Natal attended a seminar conducted by the Massachusetts Commission Against Discrimination entitled “Understanding and Preventing Sexual Harassment in the Workplace”. In conjunction with this seminar, New Bedford provided, and Mr. Natal acknowledged receipt of a copy of the “City of New Bedford Anti-Discrimination & Anti-Harassment Policy” (*Exhibits 2, 14 & 15*)

7. On January 4, 2007, Mr. Natal re-confirmed that he had received and read the Anti-Discrimination and Anti-Harassment Policy. (*Exhibit 16*)

8. The Introduction to the City of New Bedford Anti-Discrimination and Anti-Harassment Policy states:

“It is the goal of the City of New Bedford to promote a workplace that is free of discriminatory harassment (“harassment”) of any type, including sexual harassment. Discriminatory harassment consists of unwelcome conduct, whether verbal or physical, that is based on a characteristic protected by law, such as sex, race, color, national origin, religion, age, disability, sexual orientation, genetics, active military status and involvement in any protected activity(ies). The City of New Bedford will not tolerate harassing conduct that affects employment conditions, that interferes unreasonably with an individual’s performance or that creates an intimidating, hostile or offensive work environment.”

Harassment of employees occurring in the workplace, in connection with work-related travel, and/or work-sponsored events, will not be tolerated. Further, any retaliations against an individual who has complained about harassment or retaliation against individuals for cooperating with an investigation of a harassment complaint is similarly unlawful and will not be tolerated.

...

“Please note that . . . the policy is not designed or intended to limit our authority to discipline or take remedial action for workplace conduct which we deem unacceptable, regardless of whether that conduct satisfied the definition of harassment.”

The February 13, 2007 Incident

9. On February 13, 2007, Mr. Natal was working with the Cemetery Department Head, Arthur Tetreault, at the Cemetery Department Office. While repairing an exterior screen door, Mr. Natal remarked to Mr. Tetreault, who is of Portuguese descent, that “it must have been a dumb Portague who put in this door” or words to that effect. (*Testimony of Appellant, Ms. Martins*)

10. I find Mr. Natal was unaware that any other person was around when he made this comment to Mr. Tetreault and Mr. Natal did not intend that particular comment to be hostile. There is no evidence that Mr. Tetreault took offense. Mr. Tetreault knew that Mr. Natal’s spouse is also of Portuguese descent. (*Testimony of Appellant; Scott Lewis*)

11. I also find that the use of ethnic slang terms by the members of the Cemetery Department Staff was all too common. Mr. Tetreault often called Mr. Natal, who is of Puerto Rican descent, a “Rican” or a “Freakin’ Rican”. Ms. Fatima Martins, may have used the term “Freaking ‘Rican” to refer to Mr. Natal. One of the other maintenance men, Mr. Scott Lewis, of African-American decent, has been referred to as a “Jigga”. Ms. Martins also acknowledged that she has used the “F” word in conversations with her supervisor, Cemetery Department Office Manager, Sandra Manning. (*Testimony of Appellant, Ms. Martins, Mr. Lewis*)

12. Mr. Natal’s comment to Mr. Teatrault was overheard by Ms. Martins, who was walking from her car in the parking lot on her way back to the Cemetery Department Office. (*Testimony of Ms. Martins*)

13. Ms. Martins is clerk/typist who works in the office of the Cemetery Department. Ms. Martins began work for the Cemetery Department in September 2006. Although Mr.

14. Ms. Martins says she did take offense to Mr. Natal's remark, which she says was not the first such remark that had been made to her in the office. Ms. Martin's testimony to this effect is corroborated by the statement given by Scott Lewis during his interview by New Bedford Police Detective Holmes to the effect that Ms. Martins and Mr. Natal "have been going at it" from the day she first starting working for the Cemetery Department. (*Exhibit 18 & 33; Testimony of Ms. Martins, Mr. Lewis*)

15. Ms. Martins immediately filed a grievance seeking an order to prevent such verbal racial remarks in the future. (*Exhibit 18; Testimony of Ms. Martins, Mr. Lewis*)

16. On February 14, 2007, after Ms. Martins filed her grievance, Mr. Tetreault issued a verbal warning to Mr. Natal who promised that "it would not happen again" and Mr. Natal apologized to Ms. Martins. (*Exhibit 17; Testimony of Appellant, Ms. Martins*)

17. On February 28, 2007, New Bedford Personnel Director Angela M. Natho, met with Ms. Martins and her union representative in response to the request for a "Step 2" grievance hearing concerning Ms. Martin's harassment complaint. At this meeting, Ms. Martins stated she "just wanted it to stop" and that "it has for now". Ms. Natho issued a letter dated March 6, 2007, indicating that "I consider this grievance resolved." (*Exhibits 19 & 20; Testimony of Ms. Natho*)

The April 2007 Incidents

18. At the time of the incidents involved, Ms. Martins lived with a 20-year old brother Antonio, on the third floor of a three-decker residence on Phillips Avenue in New Bedford. The first floor unit is occupied by Ms. Nancy Purchase and her son, Steven Pinheiro. Mr. Pinheiro and Ms. Martin's boyfriend, name unknown, are described as brothers. The second floor unit is occupied by Mr. Richard Sayas. (*Exhibit 24; Testimony of Ms. Martins, Detective Holmes*)

19. According to Ms. Martins, Phillips Avenue was a "very quiet" street. According to Detective Holmes, Phillips Avenue is not considered a "high crime" area by the New Bedford Police Department. (*Testimony of Ms. Martins, Detective Holmes*)

20. In late March 2007, most likely the 28th or 29th, Mr. Natal asked Mr. Lewis to borrow his BB-gun. It was well-known that Mr. Lewis owned a BB-gun by Cemetery Department personnel. (*Exhibits 24, 3 & 33; Testimony of Appellant, Mr. Lewis*)

21. Mr. Lewis brought the BB-gun to work later that day and gave it to Mr. Natal. Mr. Natal brought the BB-gun home and stored in the rear cargo area of his 1990 Toyota Camry station wagon, Registration No. MA18SD89, which he called his "weather-beater" and which he regularly drove to work and parked in the employee parking lot in front of the Cemetery Department office. (*Exhibits 24, 31, 33 & 36; Testimony of Appellant, Ms. Martins, Mr. Lewis*)

22. On the morning of April 3, 2007, Ms Martins left her residence to drive to work when she found three holes in the windows which were smashed on the driver's side of her car, which she had parked on the street the night before. She filed a police report of this incident that same day. This report does not name any suspects. (*Exhibits 21, 22 &*

33; *Testimony of Ms. Martins; Mr. Lewis, Detective Holmes*)

23. The following day, April 4, 2007, Ms. Martins returned from work and parked her car in the street in front of her residence. At approximately 11:15 p.m. she says she heard a “popping” sound and looked out the window to see driving past her what she later reported to the police she was sure to be Mr. Natal’s car, which she described as an old maroon-colored Toyota Corolla station wagon. (*Exhibit 22; Testimony of Ms. Martins*)

24. Ms. Martins immediately called the New Bedford Police who responded at 11:34 p.m. The responding officer noted the above information and interviewed the first floor tenant, Mr. Pineiro,¹ who said he ran outside when he heard the popping sound and saw the suspect vehicle. He described the car as a maroon station wagon and said he had dented it by throwing a boulder at the car that hit the passenger side door, but was unable to get the license plate number. The responding officer made a registry check that identified an active registration in Mr. Natal’s name for a red 1990 Toyota Camry sedan, MA18SD89, filed a report and requested referral to the detective unit for further investigation. (*Exhibits 22, 24 & 36; Testimony of Ms. Martins*)

25. The next evening, Ms. Martins called Mr. Natal’s home, speaking first with Mr. Natal’s wife with whom she apparently had unpleasant words. Ms. Martins called again and this time spoke to Mr. Natal, who said he would meet Ms. Martins at the police station. When Ms. Martins and her brother met Mr. Natal at the police station, they were told that the matter was being handled at a different location so they left. During this visit, Mr. Natal offered to pay Ms. Martins for the damage to her car. (*Exhibit 24; Testimony of Appellant, Ms. Martins*)

¹ The initial police report incorrectly refers to Mr. Pinheiro as “Mr. Grajales”. (*Exhibits 22 & 24*)

The New Bedford Police Department Investigation

26. Detective Sergeant Robert Holmes, a 22-year veteran of the New Bedford Police Department was assigned to investigate the damage to Ms. Martins' car. Detective Holmes testified that he investigated the matter and documented his findings in a detailed 11-page police report dated April 10, 2007. I find that Detective Holmes conducted a timely, diligent and professional investigation. I find that the information he reported from the witnesses he interviewed presented an accurate and reliable version of the events as perceived by those witnesses. I find that, although Detective Holmes did not follow every lead to the ultimate end, and was personally acquainted with Mr. Natal, his investigation carefully addressed all the material issues and demonstrated no bias or preconception about the case. (*Exhibits 24, 33, 34 & 35; Testimony of Detective Holmes*)

27. Detective Holmes's investigation included interviews of Ms. Martins on April 7, 2009; video-taped interviews of Mr. Natal and Mr. Lewis at the New Bedford Police Station on April 9, 2009; interviews on April 9, 2007 of Ms. Manning, Mr. Tetreault, Mr. Steven Pinheiro and Ms. Nancy Purchase at the Phillips Street apartment; and a telephone interview with Mr. Richard "Rico" Sayas (2nd floor tenant) on April 10, 2007. (*Exhibits 24, 33, 34 & 35; Testimony of Detective Holmes*)²

28. On or about April 10, 2007, after completing his investigation, Detective Holmes, requested a criminal complaint be issued against Mr. Natal for two counts of willful and malicious damages to an auto and one count of assault by means of a dangerous weapon, to wit a BB-gun on Mr. Pinheiro. On May 23, 2007, a criminal complaint issued against

² The Appellant objected to the introduction of that part of video-taped police department interview of Mr. Natal (Exhibit 34) following his assertion that did not want to continue the interview. Although Mr. Natal received a Miranda warning prior to making any statements, the Commission excluded from evidence the objected to portion of Mr. Natal's interview. The Commission has drawn no adverse inference from Mr. Natal's assertion of his Miranda rights.

Mr. Natal on two counts of malicious damage. The complaint was dismissed on July 14, 2008. The Commission draws no adverse interference against Mr. Natal on account of the filing of these dismissed charges against him, except that Detective Holmes reasonably believed that there was probable cause for a complaint to issue at the time he requested it. (*Exhibits 24 & 30*)

The City of New Bedford Investigation

29. On April 6, 2007, New Bedford notified Mr. Natal that he was placed on paid administrative leave pending an investigation into a complaint by a co-worker for conduct allegedly in retaliation for having received a warning for inappropriate conduct and “other allegations that are being investigated by the New Bedford Police Department.” (*Exhibit 23*)

30. On April 12, 2007, New Bedford Personnel Director Angela Natho received a memorandum from Mr. Tetreault concerning certain events involving Mr. Natal and Ms. Martins. On April 16, 2007, Ms. Natho received a written report from Paula J. Loud, Private Detective, concerning the matter. Ms. Loud subsequently supplemented this report by e-mail dated May 11, 2007. (*Exhibits 25, 26 & 29*)³

31. On April 24, 2007, Mr. Natal was notified that, as a result of the City’s investigation, Mr. Tetreault had concluded that Mr. Natal had knowingly retaliated against his co-worker and set a hearing for April 30, 2007 on his contemplated termination from employment for this violation. Following that hearing, Mr. Tetreault

³ Although the Commission received the documents in evidence, neither Mr. Tetreault nor Ms. Loud testified at the hearing before the Commission. Accordingly, while the Commission accepts Exhibits 25, 26 and 29 for the fact that they were prepared, the Commission does not find sufficient reason to credit the hearsay statements contained in those documents (some of which are multi-layer hearsay) not corroborated by other evidence or testimony. The Commission notes, however, that much of the information contained in the documents was independently supported as set forth in other findings herein.

notified Mr. Natal that he was discharged from employment, effective April 30, 2007. This appeal duly ensued. (*Exhibits 23, 27, 28; Testimony of Ms. Natho; Claim of Appeal*)

The Circumstantial Evidence Connecting Mr. Natal to the Incidents

32. Mr. Natal does admit that he drove past Ms. Martins' house sometime in the afternoon or early evening of April 4, 2009, and saw her car parked there at that time, but there was no direct evidence or eyewitness who tied Mr. Natal to the scene at the time of either of incident involving damage to Ms. Martins' car later that night or the prior incident on April. (*Testimony of Appellant*)

33. I do find it reasonable to infer by a preponderance of evidence that Mr. Natal's Toyota station wagon was the vehicle that carried the perpetrator(s) responsible for causing the damage to Ms Martins' car on April 4th. While the evidence is circumstantial, I drawn these inferences from a compelling string of evidence provided by multiple sources which I have been convinced is reliable and credible. In particular, I am persuaded that the second floor tenant, Mr. Sayas, did in fact, see the license plate number (which was traced to Mr. Natal) and that Ms. Purchase wrote it down that night just as Mr. Sayas told it to her, and that she later gave the paper she wrote to Detective Holmes, who produced it at the hearing. I reject as not credible the suggestion that all of the witnesses involved somehow conspired to fabricate this evidence. I also credit the statement made by Mr. Lewis during his initial interview with Detective Holmes to the effect that Mr. Natal had stated (on Friday, April 6th) that the Toyota was dented when the car was retuned after being used by his "cousin", Alberto Gonzales. This statement, together with the statement of Mr. Pinheiro (both to the police who responded to the scene on April 4th, and repeated to Detective Holmes), that he had dented the Toyota by

th. (*Exhibits 24, 33, 35; Testimony of Appellant, Mr. Lewis, Detective Holmes*)

34. I also find that it is reasonable to infer that the instrumentality used in the April 4th shooting incident was the BB-gun that Mr. Natal had borrowed from Mr. Lewis approximately a week earlier and which Mr. Natal had stored in the cargo area of his Toyota which was used in the shooting. Detective Holmes offered credible proof that the damage was done by a BB-gun. According to Mr. Lewis' statement to the police on April 9th, and his testimony at the hearing, both of which I find credible, in the days immediately following the April 4th shooting, Mr. Natal tried desperately to return the BB-gun to Mr. Lewis, who told him to "eat it", implying to me that they both had formed exactly that opinion, i.e., the most likely BB-gun used in the shooting was the one in Mr. Natal's Toyota that had been given to Mr. Natal by Mr. Lewis. (*Exhibit 24; Testimony of Ms. Martins, Appellant, Mr. Lewis, Detective Holmes*)

35. Finally, I infer that the two drive-by shootings of Ms. Martins car are more likely than not related, as Ms. Martins claims. Both incidents appeared to involve a late-night BB-gun attack that hit and smashed holes in the windows of her car. No other vehicle on the street appears to have been targeted or damaged. There was no testimony to suggesting that this type of vandalism had been a matter of concern to anyone on Phillips Avenue in the past or since these incidents. (*Exhibit 24; Testimony of Ms. Martins, Detective Holmes*)

The Appellant's Alibi Defense

36. Mr. Natal says that earlier in the day of April 4th, he had received a phone call from a friend from New Jersey, named Alberto Gonzales, who asked to borrow his car. Mr. Natal says he met Mr. Gonzales at a park on Purchase Street and, while on the way home to Acushnet via Phillips Avenue, noticed Ms. Martins' car and pointed it out to Mr. Gonzales, stating it belonged to "the girl" who made a "big issue" about him at work or similar words to that effect.. Mr. Natal says that after arriving home, Mr. Gonzales drove off in the Toyota and Mr. Natal had supper. He then called Elizabeth "Liz" Medina, a long-time female friend whom he knew from childhood in Puerto Rico, and with whom he maintained a social, but non-romantic relationship, and she agreed to accompany him to Brockton where Mr. Natal wanted to look at a truck he was interested in purchasing. He says that, due to the rainy weather, they didn't stay long in Brockton, but returned to watch movies at Ms. Medina's house until about midnight, when Mr. Natal went home. Mr. Natal says he was driving a Cadillac that night, another of his (*Exhibit 24; Testimony of Appellant, Ms. Martins, Ms. Medina, Detective Holmes*)

37. Mr. Natal variously described Mr. Gonzales as a "friend" or "cousin" who occasionally comes to New Bedford for reason unknown to Mr. Natal, and to whom Mr. Natal has previously lent his car. Mr. Natal doesn't know and doesn't ask where Mr. Gonzales lives in New Jersey or stays in New Bedford, what business he has in New Bedford, or how to contact him except through a Nextel "direct connect" number he was given. Mr. Natal said Mr. Gonzales "doesn't play with a full deck". (*Exhibit 24 & 33; Testimony of Appellant, Mr. Lewis, Detective Holmes*)

38. After learning of the shooting incident of April 4th, Mr. Natal says he spoke to Mr. Gonzales once by cell phone and told Mr. Gonzales that he was going to give the police Mr. Gonzales's Nextel phone number. According to Mr. Natal, that was the last time Mr. Natal he had any contact with Mr. Gonzales. By the time Mr. Natal was interviewed by Detective Holmes on April 9th, the Nextel "direct connect" number Mr. Natal had for Mr. Gonzales had been disconnected and even the New Bedford Police had no means to track him down. (*Exhibit 34; Testimony of Appellant, Detective Holmes*)

39. I find there is too much about Mr. Natal's version of events that does not carry the ring of truth. On one hand, Mr. Natal downplayed his conflict with Ms. Martins and asserted that the reprimand he received in February was "no big deal" and didn't bother him. Mr. Natal testified that he only briefly described Ms. Martins to Mr. Gonzales, in the short time they passed by Ms. Martins car, as "the girl" who had made a "big issue" about him at work and Mr. Gonzales laughed. I do not find credible that Mr. Natal would bring up Ms. Martins in that way. The alleged colloquy between two men does not make sense unless there was more to the conversation than Mr. Natal states to provide a context for the statement, or the two men must have had a prior conversation about it. Mr. Natal's statement also infers that, indeed, the February 2007 incident had not been forgotten and the animosity between Mr. Natal and Ms. Martins was still percolating (and more closely resembled the continuum of hostility as Mr. Lewis credibly had described it during his statement to the police). (*Exhibit 24 & 33; Testimony of Appellant, Detective Holmes, Mr. Lewis*)

40. Mr. Natal was also inconsistent in his statements about the damage to his Toyota. He initially stated that the car was damaged when Mr. Gonzales returned it the day after

41. I also find it reasonable to infer, and do infer, that Mr. Natal has been in the vicinity of Ms. Martins' apartment prior to April 4th. I take official notice that 183 Phillips Street is located approximately one block east of Acushnet Avenue, a major north-south thoroughfare in New Bedford and a route that Mr. Natal stated he traveled to get to his home on Jean Street in Acushnet. I also infer that Mr. Natal was familiar with the area, and with Phillips Avenue specifically, by his testimony that he turned onto Phillips Avenue on April 4th as a means of circumventing the "traffic" on Acushnet Avenue knowing it would lead him to an alternative, presumably faster, route home that day. I also find that long-time Mr. Natal's friend "Liz" Medina, with whom it is said Mr. Natal spent most of the evening of April 4th, resides at 125 Fillmore Street which is located a few blocks east of Acushnet Avenue and one (1) mile from Ms Martins' apartment, so that Mr. Natal would likely take the same route north along Acushnet Avenue, past Phillips Avenue, in travelling from Ms. Medina's home to his. (*Testimony of Appellant, Ms. Medina, Mr. Lewis, Detective Holmes; Official Notice of area maps showing Fillmore Street and Phillips Avenue New Bedford and Jean Street, Acushnet on www.bing.com/maps*)

42. Finally, Mr. Natal's purported alibi does not fully exculpate him. While his testimony and Ms. Medina's testimony that they watched movies together until about midnight would conveniently just cover him for the night of April 4th, if I were to believe it entirely, which I do not, there is no evidence to account for Mr. Natal's whereabouts at the time of the similar, related original shooting on April 2nd. Since the preponderance of the evidence established that Mr. Natal's car was involved in the April 4th shooting, and assuming it was Mr. Gonzales, not Mr. Natal in the car that night, it is still a fair inference from the fact that there had been a shooting two days earlier with the same M.O. that either (a) Mr. Gonzales had been told about Ms. Martins before April 4th and had used Mr. Natal's car earlier than Mr. Natal says or (b) Mr. Gonzales was not around on April 2nd, making Mr. Natal the most likely suspect in the first shooting, with no alibi to account for his whereabouts. Thus, under either view of the evidence, I am convinced that Mr. Natal participated in or incited Mr. Gonzales to perpetrate the incidents.

CONCLUSION

Summary

The preponderance of the evidence supports New Bedford's decision to discharge Mr. Natal based on his unacceptable behavior, whether it was inciting or participating in the retaliatory shooting incidents that targeted his co-worker Ms. Martins and his mendacity in attempting to distance himself from responsibility for his actions. New Bedford had just cause to believe that Mr. Natal's continued employment presented an unreasonable risk of continuing an apparently escalating hostile work environment and nothing short of discharging Mr. Natal would resolve it appropriately.

Applicable Legal Standards

A person aggrieved by disciplinary action of an appointing authority made pursuant to G.L.c.31,§41 may appeal to the Commission under G.L.c.31,§43, which 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." (emphasis added)

Under Section 43, the Commission must "conduct a de novo hearing for the purpose of finding the facts anew." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (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." City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). See also City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev.den., 440 Mass. 1108 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 408, 411, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, rev.den., 390 Mass. 1102 (1983).

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First

_____, 262 Mass. 477, 482 (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, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist.Ct., 389 Mass. 508, 514 (1983) 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.' " Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited.

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

The greater amount of credible evidence must in the mind of the judge be to the effect that such action 'was justified,' in order that he may make the necessary finding. . . . [I]f on all the evidence his mind is in an even balance or inclines to the view that such action was not justified, then the decision under review must be reversed. The review must be conducted with the underlying principle in mind that an executive action, presumably taken in the public interest, is being re-examined. The present statute is different in phrase and in meaning and effect from [other laws] where the court was and is required on review to affirm the decision of the removing officer or board, 'unless it shall appear that it was made without proper cause or in bad faith.'

Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) (*emphasis added*) The Commission must take account of all credible evidence in the administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement

_____, 434 Mass 256, 264-65 (2001) It is the function of the hearing officer to determine the credibility of evidence and to resolve conflicting testimony presented through witnesses who appear before the Commission. See Covell v. Department of Social Svcs, 439 Mass 766, 787 (2003); Doherty v. Retirement Bd., 425 Mass. 130, 141 (1997); Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988)

“The commission’s task, however, 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’”. Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006). See Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 334 rev.den., 390 Mass. 1102 (1983) and cases cited.

“Likewise, 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.’ ” Town of Falmouth v. Civil Service Comm’n, 61 Mass. App. Ct. 796, 800 (2004) quoting Police Comm’r v. Civil Service Comm’n, 39 Mass.App.Ct. 594 (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. Civil Service Comm’n, 447 Mass. 814, 823 (2006).

Just Cause For Discharging Mr. Natal

Unlike the standard of proof “beyond a reasonable doubt” applicable to the charges against Mr. Natal in the criminal case, New Bedford did not assert, and it was not required to prove that Mr. Natal personally retaliated against Ms. Martins by damaging her car. New Bedford took the position that Mr. Natal was “instrumental” in the shooting and the preponderance of the evidence established that such a conclusion is a fair and reasonable inference. The two incidents occurred so close in time to each other, and so close in time to Mr. Natal’s request to borrow a BB-gun and his persistence after the shootings to return it immediately, that the evidence clearly warrants a finding that these events are more than merely coincidental. Mr. Natal’s mendacity about the extent of the grudge he harbored against Ms. Martins and the extent of their workplace conflict also supports the conclusion that Mr. Natal had not “come clean” and was not truthful about harboring any continuing animosity toward Ms. Martins after February 2007.

Thus, New Bedford was justified in discharging Mr. Natal for the reason that he probably was involved, or at least aided and abetted, consciously or negligently, one or both of the BB-gun attacks on Ms. Martins’ car. The evidence presented to the Commission supports such a conclusion by a preponderance of the credible and reliable evidence. Even if Mr. Natal’s connection to the shootings was no more than putting the idea into someone else’s head, New Bedford had just cause to discipline Mr. Natal for such misguided remarks that naturally and logically led someone else, especially one who “didn’t play with a full deck” , to take malicious action, whether fully intended by Mr.

Natal or not. A Navy saying puts it simply: “Loose Lips Sink Ships”. The idea of a “cat’s paw”, where one party is motivated to act on the stimulus of another, is an established theory of legal responsibility. See Llampallas v Mini-Circuits Lab, Inc., 163 F.3d 1236, 1249 (11 Cir. 1998), cert.den., 120 S.Ct. 327, 145 L.Ed.2d 255 (1998); Willis v. Marion County Auditor’s Office, 118 F.3d 547 (7th Cir. 1997) and cases cited; Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990)

The Commission has also reviewed the evidence to determine whether there is just cause to support the level of discipline, i.e., to discharge Mr. Natal for his inappropriate behavior, or whether modification of the discipline is warranted in the exercise of the Commission’s discretion. Under “basic merit principles”, the purpose of discipline is focused on “retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected. . . .” G.L.c.31, §1. 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.’ ” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. “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.’ ” Town of Falmouth v. Civil Service Comm’n, 61 Mass. App. Ct. 796, 800 (2004) quoting Police Comm’r v. Civil Service 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. Civil Service Comm’n, 447 Mass. 814, 823 (2006).

While an Appointing Authority might find that the type of risky behavior exhibited by Mr. Natal in this case could warrant discipline short of discharge, the Commission finds here, under all of the circumstances, including Mr. Natal’s past record of similar risky behavior and apparent recidivism, that New Bedford’s decision to terminate Mr. Natal was neither arbitrary nor disparate treatment in violation of basis merit principles. The Commission finds no cause to modify the discipline in this case.⁴

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on October 22, 2009.

A True Record. Attest:

Commissioner

⁴ The Commission notes that the Cemetery Department appears to have suffered from a culture of racial and sexually offensive language, generally, in which all employees (including Ms. Martins) participated to some degree. While those circumstances may have some bearing in weighing the severity of appropriate discipline in different case, the Commission notes that, here, Mr. Natal was not discharged for his hostile remarks directly to Ms. Martins, but for his subsequent clandestine behavior that resulted in vandalism to her car.

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)(1), 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 to:

Jamie DiPaola-Kenny, Esq. (for Appellant)

Jane Medeiros Friedman, Esq. (for Appointing Authority)