

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

**One Ashburton Place - Room 503
Boston, MA 02108
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DENNIS PERKINS,
Appellant,

CASE NO: D-09-373

v.

CITY OF ATTLEBORO,
Respondent

Appellant's Attorney:

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Commissioner:

Paul M. Stein

DECISION

The Appellant, Dennis Perkins, appeals to the Civil Service Commission (Commission), pursuant to G.L.c.31, § 41-43, from a decision of the City of Attleboro (Attleboro), suspending him for two tours of duty as Captain with the Attleboro Fire Department (AFD) after finding that he mismanaged an incident involving a subordinate. Five days of hearings were held, on March 12, 2012 at the University of Massachusetts School of Law at Dartmouth, and on June 2, 2010, July 7, 2010, July 22, 2010 and November 22, 2010 at Attleboro City Hall. As no written notice was received from either party, the hearing was declared private and witnesses were sequestered. The hearing was digitally recorded. Fifty-seven exhibits were received in evidence and twenty-two witnesses were called to testify. Proposed decisions were submitted by the parties on March 25, 2011.

FINDINGS OF FACT

Giving appropriate weight to all exhibits, testimony of the witnesses, and inferences reasonably drawn from the credible evidence, I make the findings of fact set forth below.

The Appellant

1. The Appellant, Dennis Perkins, was appointed as a permanent Firefighter/Paramedic with the AFD on July 24, 2000. He was promoted to his present position of Captain on December 1, 2002. (*Exh.16; Testimony of Appellant*)

2. Capt. Perkins's prior service included employment as an EMT/Paramedic with the City of Boston's EMS Department from 1991 to 1998, and as a Firefighter/Paramedic with the Randolph Fire Department from 1998 until he transferred to the AFD. (*Testimony of Appellant*)

3. Since 2006, Capt. Perkins also has held an outside job with Lifeline Ambulance, a private ambulance service, where he holds a position of Paramedic Supervisor. (*Testimony of Appellant*)

Structure of the Attleboro Fire Department

4. The Mayor of Attleboro is the Appointing Authority for civil service positions in the AFD. (*Undisputed Facts; Testimony of Appellant*)

5. The AFD consists of a Chief, four Deputy Chiefs, three Line Captains, one Fire Prevention Captain and approximately sixty-five Firefighters. (*Testimony of Livesey*)

6. The AFD operates four fire stations (Headquarters, South Attleboro, Twin Village and Briggs Corner) with four "Platoons" (A through D) of approximately 16-18 firefighters, who work a rotating 24-hour shift schedule (with shifts starting at 7:30 am), i.e., one 24-hour shift on, followed by two days off, followed by another 24-hour shift on, and then 5 consecutive days off. (*Testimony of Appellant, Livesey*)

7. AFD Captains are responsible for making apparatus assignments for the firefighters under their command. This practice varies somewhat for each station and is dependent on available staff. The apparatus assignments are reviewed by a Deputy Chief to assure that each piece of apparatus is manned by an appropriately qualified firefighter but, otherwise the distribution of assignments is generally left to the sound discretion of the Captain in charge. *(Testimony of Appellant, Hardman, Livesey)*

8. In July 2009, the AFD Fire Chief was Ronald Churchill, a 26-year veteran of the department, who had attained the maximum retirement age. By virtue of pending special legislation, however, eventually enacted on August 4, 2009, he was authorized to remain in his position through 2010. *(Testimony of Churchill; Administrative Notice [Ch. 54, Acts of 2009])*

9. When Chief Churchill's tenure was extended, Capt. Perkins stood tied for first with Scott Lachance on the active civil service eligible list for Deputy Chief (established 8/1/2008) and second behind that candidate on the active eligible list for Fire Chief (established 8/1/09). *(Exhs. 46 & 47; Testimony of Appellant)*

10. Chief Churchill publicly advocated for the candidate ranked third on the eligible list to become his successor as Fire Chief. *(Exhs. 47 & 54; Testimony of Churchill)*

11. On July 3, 2009, Capt. Perkins wrote a letter to the President of Local 848 of the Firefighters' Union, expressing his views that it was in the best interest of the union and the AFD that Chief Churchill's tenure not be extended. Although he stated that Chief Churchill had served with distinction for many years, he reasoned that the mandatory retirement age should be honored for a variety of reasons, ranging from the stressors on a Fire Chief in managing a fire scene to the fiscal situation facing the City. *(Exh. 23; Testimony of Appellant & Churchill)*

12. Unbeknownst to Capt. Perkins, his union leadership had chosen to support Chief Churchill's request to extend his tenure, and Capt. Perkins's opposition was made known to Chief Churchill. (*Testimony of Appellant & Churchill*)

13. Ultimately, Mayor Dumas appointed Scott Lachance, the top ranked candidate, to succeed Chief Churchill, effective July 1, 2010. (*Administrative Notice [www.cityofattleboro.us/fire_department; Attleboro Sun Chronicle, http://www.thesunchronicle.com/news/attleboro-welcomes-chief-lachance/article_116d2257-44b4-5cf3-af3a-5102978ced11.htm]*)

The July 4, 2009 Incident

14. On July 4, 2010, Capt. Perkins, was assigned to the South Attleboro Fire Station "D" shift. This was not Capt. Perkins's usual duty station but he had been filling in intermittently at South Attleboro for Capt. Gagne, who was out on sick leave. (*Testimony of Appellant, Bailey, Livesey*)

15. South Attleboro station runs a Rescue unit (ambulance), which requires a minimum of two paramedics, and one fire engine. The normal complement of firefighters assigned to South Attleboro on the "D" Shift included Gerry Brogan, Phil DeCosta, Vincent Bailey and Craig Lander. (*Testimony of Livesey, Brogan, DeCosta, Bailey & Lander*)

16. On July 4, 2009, Firefighter DeCosta was out on injured leave and was replaced by Firefighter Charles Moore. (*Testimony of Appellant, Bailey, Moore*)

17. The firefighters who worked South Attleboro Fire Station under Capt. Gagne had come to expect an informal set rotation of assignments. Capt. Gagne left up to the men to keep track of the rotation assignments they had worked out among themselves. He would typically ask "Who is on what piece today", and the men would let him know so that he could report the duty assignments for the day to the Deputy Chief. (*Testimony of Bailey, Lander & Brogan*)

18. Most AFD firefighters consider working the ambulance, responsible for handling emergency medical calls, to be a more stressful and less desirable assignment than being assigned to a piece of fire apparatus, where the duties involve serving as the chauffeur (driver) for the officer in charge. (*Testimony of Livesey, Bailey, Brogan & Moore*)

19. When Firefighter Bailey arrived for his shift on July 4, 2010, based on the normal rotation, he expected that Firefighter Lander would be assigned to the engine (as the driver) and it would be his turn to be “on the rescue”. (*Testimony of Appellant, Bailey & Moore*)

20. During a discussion in the kitchen area prior to the start of the shift, Capt. Perkins informed Firefighter Bailey that his shift assignment for the day would be on the engine for that shift. Also present for this discussion was Capt. Hardman, who had commanded the prior shift and was coming off duty, as well as Firefighters Moore and Lander. (*Exh. 9 & 57ID; Testimony of Appellant, Hardman, Bailey, Moore, Lander & Guillette*)

21. Firefighter Bailey told Capt. Perkins he would rather ride the rescue. (*Testimony of Appellant, Bailey, Lander*)

22. Capt. Perkins responded that he was the Captain and, as such, he would make the assignments, not Firefighter Bailey. (*Testimony of Appellant, Lander & Guillette*)

23. Firefighter Bailey refused to accept the assignment and began what developed into a verbal shouting match with Capt. Perkins. When it became apparent that Firefighter Bailey would not calm down, Capt. Hardman told Capt. Perkins and Firefighter Bailey to leave the kitchen area and “take it into the Captain’s office.” (*Exhs 7, 9 & 10; Testimony of Appellant, Bailey, Hardman, Lander & Moore*)

24. Firefighter Bailey refused to meet with Capt. Perkins. He said he was going to call Deputy Livesey and started to move to a wall phone. (*Exh. 9; Testimony of Appellant & Bailey*)

25. Capt. Perkins stopped him and said: “I’ll call the Deputy”, which he did. Deputy Livesey said he would come over to the station immediately and all personnel should remain there. (*Exhs. 1, 2 & 44; Testimony of Appellant, Livesey, Hardman, Moore & Bailey*)

26. Before Capt. Perkins had a chance to call the Deputy, Firefighter Bailey said “screw this” and stated he was going home. At no time did he receive permission to do so. He stormed downstairs and went outside where he called Deputy Lifesey from his own cell phone. Deputy Livesey told Firefighter Bailey that he was coming over to the station and that Firefighter Bailey should stay there until he arrived. (*Exhs. 9, 10, 21 & 44; Testimony of Livesey, Bailey & Moore*)

27. Firefighter Bailey did not follow Deputy Livesey’s order, but left the station and went home. He did not return to the station for several hours, after being advised to return by his union representatives. (*Exhs.5 & 44; Testimony of Appellant, Livesey & Bailey*)

Internal Investigation

28. Deputy Livesey initiated an investigation that, initially, focused on the alleged insubordination and AWOL behavior of Firefighter Bailey. The Deputy met separately with Capt. Perkins and Capt. Hardman. At Deputy Livesey’s request, both Capt. Perkins and Firefighter Moore submitted reports on July 4, 2009, attesting to this behavior. Capt. Perkins recommended “regrettably” that Firefighter Bailey should be disciplined. (*Exhs. 9, 10, 44: Testimony of Appellant, Livesey & Moore*)

29. Capt. Hardman submitted a report to Deputy Livesey on July 6, 2010, confirming that Firefighter Bailey had refused Capt. Perkins orders. (*Exh.44; Testimony of Hardman*)

30. Firefighter Lander submitted a report to Deputy Livesey on July 7, 2009. He said that, although he “could not defend the actions of FF Bailey disobeying an order, I feel there are many reasons FF Bailey had for not feeling comfortable operating engine 2 with Captain Perkins as his

officer.” He proceeded to describe two alleged derogatory remarks made by Capt. Perkins to Firefighter Bailey, who is one of a handful of African-American AFD firefighters: (a) a recent remark about Bailey “shining his [Perkins’s] shoes” and (b) another occasion in the past telling others to “watch their wallets” when Bailey was around. He also reported that, on July 4, 2009, when the incident occurred, Capt. Perkins was not wearing a proper uniform. Three days later, on July 10, 2009, Firefighter Lander amended his report to add additional alleged facts. (*Exh. 7*)

31. Also on July 10, 2009, Firefighter Bailey submitted his report. He did not deny refusing to drive the engine for Capt. Perkins, but said he did so because he is “not comfortable working with him” and “I don’t feel safe under his command and I feel stressed because of the situation.” He mentioned the alleged remarks about watching your wallets and shining shoes. (*Exh. 2*)

32. Thereafter, the investigation expanded into an inquiry into the racially discriminatory and hostile work environment allegedly created by Capt. Perkins. Reports were received, mostly unsolicited, from six other AFD Firefighters, only one of whom was a percipient witness to the events of July 4, 2009. These reports are severely critical of Capt. Perkins’s past behavior, in general but are short on specifics. A time frame is provided for only two alleged incidents, one in 2002 and one in 2004. (*Exhs. 11, 12, 13, 14, 32, 33, 34 & 44*)

33. On July 10, 2009, Capt. Perkins initiated a meeting with Deputy Livesey, about which Capt. Perkins made a contemporaneous, nearly verbatim record. Deputy Livesey told him “it doesn’t look good for you.” He told Capt. Perkins that “your men do not trust you” and are “scared to think you could be a deputy or a chief.” He said that he [Livesey] believed Perkins had engineered the spat with Firefighter Bailey as a pretext to engineer Bailey’s transfer so that Perkins’s friend, Firefighter Moore, could be transferred to South Attleboro. Capt. Perkins acknowledged that he had “made management errors when I was first promoted” over five years

ago, but noted that there had not been any serious issues for the past two years during which Deputy Livesey directly supervised him and had called him “the strongest captain on the platoon.” He explained that he came to work in his walking clothes but was always “properly attired for the workday.” As to Firefighter Bailey, Capt. Perkins stated he “did not want to see him severely disciplined, I would rather sit down” with him try to reconcile the differences between them. I find these statements to be truthful and an accurate report of Capt. Perkins meeting with Deputy Livesey. (*Exh. 36; Testimony of Appellant & Livesey*)

34. On July 20, 2009 Chief Churchill wrote Capt. Perkins to inform him that his office, as well as the office of Attleboro Mayor Dumas, had received letters of concern about his performance and treatment of firefighters, including working out of uniform, making racial comments to Firefighter Bailey, physically threatening firefighters, showing verbal contempt and disrespect for firefighters. Chief Churchill did not provide the specifics but gave Capt. Perkins an opportunity to address the concerns.. (*Exh. 8; Testimony of Appellant, Churchill*)

35. On July 22, 2009, Capt. Perkins responded to Chief Churchill’s letter with separate letters to Chief Churchill and Mayor Dumas, in which he acknowledged his past mistakes, expressing concern that untruthful rumors were being spread about him, and specifically denying any discriminatory animus against any person or group. He attached a number of character references from both within and outside the AFD. (*Exh. 5*)

36. On July 28, 2009, Deputy Livesey issued a written report to Chief Churchill. Deputy Livesey found “sufficient evidence to support the charge of insubordination by Firefighter Bailey and that appropriate disciplinary action should be taken.” (*Exh. 44; Testimony of Livesey*)

37. Deputy Livesey’s report also concluded that the evidence “suggests” that Captain Perkins used “potentially racist and ethnic statements regarding Firefighter Bailey as well as maintaining

a highly stressful work environment” and that a Board of Inquiry should be convened to “make judgment as to the merits of these claims.” He stated:

“I recommend that the Board consist of members from outside the Attleboro Fire Department to ensure an unbiased and objective review of the facts.”

(Exh. 44: Testimony of Livesey) (*emphasis added*)

38. On August 3, 2009, Capt. Perkins met with Chief Churchill who ordered a written response to the six specific charges in Chief Churchill’s earlier July 20th letter. Capt. Perkins delivered a detailed, four-page single-spaced response on August 5, 2009. (Exh. 21; Testimony of Churchill & Appellant)

39. On August 5, 2009, Chief Churchill issued notice to Capt. Perkins suspending him for two tours of duty, to be served on August 10 and August 12, 2009 for two specific reasons:

- On July 4, 2009 you engaged in verbal confrontation with Firefighter Vincent Bailey concerning his assignment for the day, which nearly escalated into physical altercation due to your poor judgment and lapse of leadership in handling the situation.
- You have in the past made other remarks to Firefighter Bailey suggesting that people need to watch their wallets in his presence and asking him to shine your shoes. These comments are inappropriate in the workplace and show poor judgment and leadership on your part.

(Exh. 22)

40. Capt. Perkins appealed the discipline to Mayor Dumas, who upheld the suspension. This appeal duly ensued. (Exhs. 24 & 53; Claim of Appeal)

41. Meanwhile, on July 27, 2009, Firefighter Bailey had filed a charge of racial discrimination against Attleboro based on alleged harassment by Capt. Perkins. (Exh. 1; Testimony of Bailey)

42. In the “Respondent’s Position Statement” to Firefighter Bailey’s MCAD charge filed by Attleboro on September 14, 2009, Attleboro contended that it “took Mr. Bailey’s complaint very seriously” and had disciplined Capt. Perkins, stating, however, the problem with Capt. Perkins

was “not racial animus” but the fact that Capt. Perkins was a “tyrant” who “likes to humiliate” everyone, regardless of race, creed or color. (*Exh. 24*)

The Alleged Derogatory Remarks

43. There is no dispute that Capt. Perkins made remarks along the lines of having to watch your wallets with Firefighter Bailey. These remarks date back to an incident in 2004 and were, at most, made sporadically and in jest, and neither intended nor ever perceived as a racial slur. (*Testimony of Appellant, Churchill, Livesey, Bailey, Lander, LeRoque, Ventura & Priest*)

44. Firefighter Bailey was prone to bravado and often challenged other colleagues to physical challenges, such as footraces and pushups as well as playful boxing matches in which no blows were ever landed. During one footrace in 2004, which Capt. Perkins had won, Bailey came up behind him and grabbed Capt. Perkins back pocket and wallet, which is what spawned the wallet-related joke. (*Testimony of Appellant, Bailey, Lander & Priest*)

45. The evidence is disputed as to whether or not Capt. Perkins once allegedly told Firefighter Bailey he could “shine his shoes”. Most witnesses placed this incident at a 2008 fire scene on Cumberland Avenue, but Deputy Livesey, was present at the scene of that fire with Capt. Perkins and would likely have heard the remark. He had no recollection of any such remark, or any other racially derogatory remarks ever made by Capt. Perkins. Deputy Livesey pointed out that firefighters at a fire scene wear boots, not shoes. (*Testimony of Livesey*)

46. Capt. Perkins recalled the Cumberland Avenue fire, and recalled coming upon Firefighter Bailey at the scene and speaking to him about not attending to his work assignments, but he does not remember making the alleged remark about shining shoes. (*Testimony of Appellant*)

47. Firefighter Bailey testified erroneously that Cumberland Avenue fire had occurred in 2009 and that three firefighters (Priest, Laroque & Ventura) were present. The various other

eyewitnesses had different recollections of who was present when the remark was made, where it was made and what was said. Firefighter Lander placed the remark in the kitchen of the South Attleboro fire station, not the Cumberland Avenue fire scene at which he was not present. (*Testimony of Bailey, Lander, Brogan, DeCosta, Priest, Laroque, Ventura*)

Other Prior Incidents

48. Considerable documentary and testimonial evidence was taken of sundry prior incidents involving Capt. Perkins, Firefighter Bailey and others, mainly focused on the period from 2002 to 2007. These incidents involved matters ranging from patient care issues, acrimonious and insubordinate behavior by and among other firefighters, and the theft of Capt. Perkins's helmet in 2007. Save for one incident involving a 12-hour suspension of a firefighter for insubordination, none of these incidents resulted in any form of formal discipline. (*Exhs. 3, 4, 25, 26, 27, 28, 29, 30, 31, 38, 45, 48, 49, 50, 51, 52; Testimony of Appellant, Churchill, Livesey, Bailey, Brogan, Guillette, Greve, LaRoque, DeCosta*)

49. Proof of Capt. Perkins's positive contributions during this period also was presented. A number of character witnesses from outside the AFD testified to their positive opinions of Capt. Perkins's supervisory abilities. (*Exhs.39,40,41,42,43; Testimony of Stark, Sturtevant, Morencey, Hitchborn, Kelly, Giannell, Ruggesco & Goldberg*)

CONCLUSION

Applicable Legal Standards

Under G.L.c.31, §43, a tenured civil service employee aggrieved by a disciplinary decision of an appointing authority made pursuant to G.L.c.31, §41, may appeal to the Commission. The Commission must determine, under a "preponderance of the evidence" test, whether the appointing authority met its burden of proof that "there was just cause" for the action taken. G.L.c.31, §43. See, e.g., Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823 (2006); Police

Dep't of Boston v. Collins, 48 Mass. App. Ct. 411, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Serv. Comm'n, 38 Mass. App. Ct. 473, 477 (1995); Watertown v. Arria, 16 Mass.App.Ct. 331, 334, rev.den., 390 Mass. 1102 (1983).

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 Serv. Comm'n, 43 Mass. App. Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983). It is a basic tenet of the "merit principle" of Civil Service Law that discipline must be remedial, not punitive, designed to "correct inadequate performance" and "separating employees whose inadequate performance cannot be corrected." G.L.c.31, §1.

An action is "justified" if "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 Serv. v. Municipal Ct., 359 Mass. 211, 214 (1971); Cambridge v. Civil Serv. Comm'n, 43 Mass. App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). An appointing authority's burden of proof 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); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) The Commission must take account of all credible evidence in the record, including whatever may fairly detract from the weight of any particular evidence. See, Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001).

It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance.” E.g., Leominster v. Stratton, 58 Mass. App. Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003) (where live witnesses gave conflicting testimony, decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing).

In performing its appellate function,

[T]he commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew. . . . [after] a hearing de novo upon all material evidence and . . . not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer. . . . For the commission, the question is . . . “whether, *on the facts found by the commission*, there was reasonable justification for the action taken by the appointing authority *in the circumstances found by the commission to have existed* when the appointing authority made its decision.”

Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-28 (2003) (emphasis added) (quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983)). See also Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823; Cambridge v. Civil Serv. Comm’n, 43 Mass. App. Ct. 300, 303-05, rev.den., 428 Mass. 1102 (1997). See generally Villare v. North Reading, 8 MCSR 44, reconsidered, 8 MCSR 53 (1995) (discussing de novo fact finding by “disinterested” Commissioner in context of procedural due process).

G.L.c.31, Section 43 also vests the Commission with the authority to affirm, vacate or modify the penalty imposed by the appointing authority. The Commission has been delegated with “considerable discretion”, albeit “not without bounds”, to modify a penalty imposed by the

appointing authority, so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. Police Comm'r v. Civil Serv. Comm'n, 39 Mass. App. Ct. 594, 600 (1996) and cases cited. See Faria v. Third Bristol Div., 14 Mass. App. Ct. 985, 987 (1982) (remanded for findings to support modification).

In deciding whether to exercise discretion to modify a penalty, the Commission's task "is not to be accomplished on a wholly blank slate." Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) (quoting Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983)). Unless the Commission's findings of fact differ materially and significantly from those of 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., Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823 (2006) and cases cited (minor, immaterial differences in factual findings by Commission and appointing authority did not justify a modification of 180 day-suspension to 60 days). cf. School Comm. v. Civil Serv. Comm'n, 43 Mass. App. Ct. 486, rev.den., 426 Mass. 1104 (1997) (modification of discharge to one-year suspension upheld); Dedham v. Civil Serv. Comm'n 21 Mass. App. Ct. 904 (1985) (modification of discharge to 18-months suspension upheld); Trustees of the State Library v. Civil Serv. Comm'n, 3 Mass.App.Ct. 724 (1975) (modification of discharge to 4-month suspension upheld).

Just Cause for Disciplining Capt. Perkins

Applying these principles to the facts of this appeal, Attleboro met its burden – by a preponderance of the evidence – to establish just cause for the discipline imposed on Capt. Perkins. The charge of alleged racially derogatory remarks not proved, but the evidence did establish that Capt. Perkins used poor judgment in handling Firefighter Bailey's insubordination

on July 4, 2009. His two–four suspension, accompanied by anger management training, was not out-of-line as appropriate remedial discipline for such behavior by a senior ranking fire officer.

The preponderance of the evidence demonstrated that Firefighter Bailey’s behavior was clearly insubordinate on July 4, 2009. The altercation on that day was instigated by him. His allegations of past racial discrimination, based on two stray remarks -- were made to deflect attention off his own misconduct onto Capt. Perkins. The remark about wallets was clearly nothing more than a joke made without animus of any kind. While I find it is more likely than not likely that something akin to the alleged remark about shining shoes was made, also without discriminatory intent, it is the type of crude joke that can carry a racially derogatory meaning and should be avoided in the workplace. A single stray remark, however, resurrected after more than a year from when it was made, long forgotten by everyone involved, and which no one, including Firefighter Bailey, ever took to be derogatory at the time, cannot, alone, justify the discipline imposed.

Nevertheless, Attleboro rightly may expect that commanding officers demonstrate effective management of problem employees at all times and show particular sensitivity to personality quirks of individual firefighters. Good management skill is less critical with model employees than with those who are less than stellar and known as such. In this regard, Capt. Perkins handling of the July 4, 2009 altercation with his subordinate, which led Firefighter Bailey to walk off the job, fell short of what Attleboro was entitled to expect. Had another Captain not been present to intervene, the situation likely would have escalated even further than it did. Attleboro had just cause to impose some level of progressive discipline and anger management training for Capt. Perkins’s lapse in judgment in crisis management during that July 1, 2009 incident.

Rejection of Modification of Discipline

When the facts found by the Commission differ from those upon which Attleboro relied, the Commission must consider whether to exercise its discretion to modify the penalty imposed.

Capt. Perkins made a plausible argument that certain members of the AFD, from the former Chief on down, stigmatized him unfairly for his prior, stale missteps made early in his tenure as a Captain and which he asserted he had since rectified. Proof of bias certainly may be a factor that would warrant modification of the penalty in a discipline case. The timing of the discipline, initiated soon after Capt. Perkins made known his opposition to Chief Churchill's extended tenure and Chief Churchill's subsequent efforts to have Mayor Dumas select the candidate on the eligible list ranked below Capt. Perkins as Chief Churchill's successor, certainly raises this issue beyond the speculative level. Here, however, the evidence does not demonstrate that Chief Churchill's predisposition, if any, to undercut Capt. Perkins's promotional opportunities, caused him to impose discipline that was disproportionate to what was objectively justified under the circumstances for the poor judgment on Capt. Perkins's part that was established by the evidence. In fact, Capt. Perkins was given the benefit of the doubt on a number of the allegations against him, receiving only a written warning about his reporting out of uniform and with all but two of the other initial charges being dropped in the final discipline letter. As it turned out, Mayor Dumas did not select the lower ranked candidate favored by Chief Churchill, but appointed the candidate ranked first on the list (tied with Capt. Perkins). Thus, Capt. Perkins, in fact, was not bypassed in favor of Chief Churchill's preference for promotion to Chief.

In sum, after carefully considering all of the circumstances that justify discipline against Capt. Perkins for poor judgment, and the degree of the penalty imposed, I conclude that it is not appropriate in this case for the Commission to exercise its discretion to modify Capt. Perkins's

two-tour suspension. That penalty may properly stand as reasonable progressive discipline under the circumstances of this case.

For the reasons stated above, the appeal of the Appellant, Dennis Perkins, is hereby *dismissed*.

Civil Service Commission

Paul M. Stein
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell, and Stein, Commissioners) on August 23, 2012.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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 this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

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

Notice:
Kathryn M. Fallon, Esq. (for Appellant)
Scott E. Bettencourt, Esq. (for Respondent)