

V1/26

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2019-3005

OCTAVIUS ROWE

vs.

CIVIL SERVICE COMMISSION & another¹

**MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS
FOR JUDGMENT ON THE PLEADINGS**

Plaintiff Octavius Rowe filed this action seeking judicial review of the decision of Defendant Civil Service Commission ("Commission") upholding the decision of Defendant Boston Fire Department ("Department") terminating his employment as a firefighter. The parties have filed cross-motions for judgment on the pleadings. For the following reasons, Rowe's motion is **DENIED** and the Commission and the Department's motions are **ALLOWED**.

BACKGROUND

The following facts are taken from the administrative record.

Rowe is a black male who resides in Roxbury, Massachusetts. Rowe was appointed as a firefighter for the Department on October 31, 2002. Since 2007, Rowe has been assigned to Ladder 28, Engine 48 in Hyde Park. Rowe is a long-time member and Vice President of the Boston Society of Vulcans, a non-profit organization of black and Latino firefighters.

In 2005, Rowe was suspended for four tours for violating Department Rule 18.44(k), prohibiting the use of abusive or threatening language. Rowe was disciplined after calling another firefighter a "faggot" and stating, "I'll kick your fucking ass, you fucking faggot."

¹ Boston Fire Department

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In 2015, Rowe started a nine-week summer program for the “detoxification of young black males,” “Know Thyself.” During a 2017 podcast interview discussing “Know Thyself,” Rowe identified himself as “a Boston firefighter.” Rowe is also the founder of the Boston chapter of the “Straight Black Pride Movement.” A website for the “Know Thyself” program identifies Rowe as “Founder and Lead Organizer; Octavius Salih Rowe; VP, Boston Society of Vulcans; Chairman, Straight Black Pride – Boston.”

In February 2017, a resident reported to the Department that a white Boston firefighter, JC, had made the following post on his personal Facebook page:

Rachel Maddow needs to [sic] fucked roughly in the ass by a MAN! . . . I’m about as sick of her as I am of Lizzy Warren ..and she needs to see the business end of a large strap on in the same fashion! ..They are both revolting.

As a result of the post, the Department charged JC with violating Department rules related to conduct unbecoming, conduct prejudicial to good order, abusive or threatening language, and obscene, indecent or profane language. JC resigned from his position as a Department firefighter before a disciplinary interview and/or hearing took place. The charges against JC remain pending should he seek to return to work for the Department.

In July 2017, Department Lieutenant Sean O’Brien received a photo on his phone of Rowe wearing a sweatshirt with the word “Caucasians” written across the front and a white cartoon face with blonde hair and a dollar sign in place of a feather. The picture was a play on the Cleveland Indians’ logo. Rowe wore the sweatshirt as a “parody” while off-duty. Lt. O’Brien sent the photo to the Department’s Deputy Chief of Personnel, Scott Malone, because of concerns about a race-based double standard regarding social media discipline, given JC’s “forced” resignation over the above-referenced post.

After finding similar shirts online for the “Detroit Africans” and “San Francisco Asians,” Deputy Chief Malone concluded that Rowe’s sweatshirt was “provocative” and “race-baiting.” Consequently, Deputy Chief Malone began a review of Rowe’s social media and online activity.

On August 21, 2017, Rowe posted a caricature of Nat Turner on his personal Facebook page, in which Turner is holding the severed head of a man in one hand and a bloodied 2x4 in the other hand. Next to the caricature were the words “Nat Turner’s slave rebellion.” As part of the post, Rowe wrote “PRAISE NAT TURNER #natturnday.” On October 1, 2017, a member of the public identified only as “JShun” on Twitter tweeted a cropped version of this post to Boston Mayor Marty Walsh and then-Department Commissioner Joseph Finn stating, “Ladder28 Hyde Park Octavius Rowe. No double standard for #hate speech.” The picture tweeted to Mayor Walsh and Commissioner Finn did not include the face of the caricature of Nat Turner, the words “Nat Turner’s slave rebellion,” or Rowe’s own words in conjunction with the post. On October 2, 2017, Commissioner Finn placed Rowe on paid administrative leave.

Thereafter, the Department retained a licensed private investigator, Eddie Dominguez, to assist in the investigation of Rowe’s online and social media activity. As part of the investigation, Dominguez reviewed entries from Rowe’s Facebook account and hours of audio of Internet radio shows, podcasts, and videos on which Rowe appeared. Dominguez provided copies of postings and transcripts of audio recordings that he found “problematic” to the Department. The material submitted by Dominguez involved three types of online and/or social media activity: (1) postings where Rowe made his own written statements/comments and uploaded his own pictures and videos on publicly accessible social media accounts; (2) re-posts where Rowe re-posted content from other sources often accompanied by his own written

comments; and (3) radio shows, podcasts, and videos on which Rowe appeared that were publicly available on sites other than Rowe's.

The City's Office of Labor Relations reviewed the material submitted by Dominguez; interviewed captains in Rowe's firehouse, Rayshawn Johnson and Darrell Higginbottom; interviewed twelve current and former firefighters from Rowe's firehouse; interviewed three other City employees who allowed Rowe to use City facilities for the "Know Thyself" program; and interviewed Rowe for approximately two hours.

Statements posted by Rowe that were reviewed by the Department included the following:

- A reference to the long-time head of the Boston Urban League as a "shoe-shine Negro";
- A reference to the then-Boston Police Superintendent (now Commissioner) as a "feckless, jolly black face";
- A statement that black men should not share their "genetic material" with a "filthy, filthy white woman" and that "laying with white women is like spitting in your mother's womb";
- A post listing the date, time and location (including the name of the school and a map) where Rowe objects to young boys and girls holding hands with members of the same sex;
- Multiple references to gay men as "homophiles," an amalgam of "homosexual" and "pedophile";
- A reference to so-called "homophiles" seeking to "normalize homophilia particularly among children in order to GAIN and EASE sexual access to them";
- Statements that there is no continuity as a team with homosexuals in the workplace, homosexuals are "cancerous," and that homosexuality is a psychological disorder and has nothing to do with love;
- References to lesbians as "lez-beasts";
- A reply to a person online stating: "You're QUEER. You're not significant enough for me to troll.";

- Another online reply stating: “Why haven’t any homophiles been killed by Police?”;
- A picture of Rowe, with a clenched fist, wearing a t-shirt with a stick figure with Pan-African colors kicking a stick figure with LGBTQ colors in the groin;
- A reference to the head of the Boston chapter of Black Lives Matter, a Boston resident, as a person with: “Homophile/Trans/Femm Interests”;
- A reference to Black Lives Matter as “HOMOPHILE LIVES MATTER”;
- A reference to leaders of Black Lives Matter as “slow-witted, uniformed agents of sexuality confusion/cooning” who “cannot have access to our children”;
- A reference to a black entertainer as a “COM-LETEE bitch”;
- Instructing black people to avoid voluntary contact with white people and declaring that it is dangerous to have friendships and relationships with whites;
- A post stating “#PSA White Chicks Are Not Your Friends”;
- Stating it “is a harbinger of not only your destruction as an individual but us as a people for you to even consider the white woman . . . as your natural mate”;
- A reference to “SmallHats (So-called Jews)”;
- A post containing a stereotypical caricature of a Jewish man with an evil, angry face and money in the background, asserting that “Jews aren’t a race” and that the Holocaust is a myth.

On April 13, 2018, the Department preferred charges against Rowe. Specifically, Rowe was charged with violating Rule 18.41 (discrimination and harassment), Rule 18.44(a) (conduct unbecoming), Rule 18.44(j) (conduct prejudicial to good order), Rule 18.44(k) (abusive or threatening language), Rule 18.44(m) (untruthfulness or willful misrepresentation), Rule 18.45(c) (improper or offensive language), the Social Media Policy, the City of Boston’s Discrimination and Anti-Harassment Policy, and the City’s Zero Tolerance for Violence Policy.

On April 20, 2018, the Department held a local appointing authority hearing before a Hearing Board comprised of a Department Deputy Chief and two District Chiefs. Eighteen exhibits were entered into evidence and approximately nine hours of testimony was given by seven witnesses.

At the April 20, 2018, local hearing, Rowe provided the Department with posts he alleged represented objectionable conduct by other firefighters, who were white and not disciplined. Among them were firefighters MD and MG, both white males. A review by the Department showed that MD made the following posts on his Facebook account:

- Calling former President Obama an “asshole”;
- “Houston has a large Black American population. Has BLM organized any rescue efforts?”;
- Referring to former President Obama as a “Bastard hypocritical motherfucker!,” “hates White America,” is a “symbol of racism that I would like removed from my country,” is a “cop-hating terrorist” and a “Muslim”;
- Below a photo of two black women fighting: “Another day in taxpayer assisted housing!”;
- “White Irish Slaves were treated worse than any other race in the US but you do not hear them bitching how the world owes them a living because The Irish are not pussies looking for free shit”; and
- “I Never Ever Trust a Dirty Fucking Muslim.”

The Department brought charges against MD on June 20, 2018, for violation of Rule 18.41 (discrimination and harassment), Rule 18.44(a) (conduct unbecoming), Rule 18.44(j) (conduct prejudicial to good order), the Social Media Policy, and the City of Boston’s Discrimination and Anti-Harassment Policy. Prior to a disciplinary interview and hearing, MD resigned from his position within the Department. The charges against MD remain pending should he ever seek to return to work with the Department.

Rowe presented two postings that appeared to be from a Facebook account belonging to firefighter MG. In the first post, other Boston firefighters are referred to as “douche bags” and “phony fucks.” The second post read,

all lives matter means shut up nigger????? Hahahahahaha funny i don't see a mark on this man, his t-shirt isn't ripped or slightly askew what channel can I follow this on?? cnn...nope msnbc...nope, bet...nope, fox news nope, local channels nope.

The Department asked Dominguez to review MG's social media activity. Subsequently,

Dominguez submitted a report to the Department which read, in part:

Mr. [G] has a Facebook account and appears to also hold a Pinterest account.

A review of all publicly available social media on Facebook and Pinterest revealed limited postings, photographs, and other information. There were some indications in Mr. [G]'s profile of his employment with the Boston Fire Department, including photographs of him in his Boston Fire Department uniform [].

His Facebook profile cover photograph [] depicts what appears to be a photograph taken from inside of a vehicle of an older black male standing outside holding his hand up. The hand appears to contain an unknown item. It is unclear what the photograph is depicting and the connection to Mr. [G]. Mr. [G] has used the photograph of this older black male as part of his Facebook profile cover photograph dating back to 2012. Ed Dominguez believes he recognizes this older black male as a homeless person that has panhandled on Morton Street since the early 1990s.

The Department brought MG in for a "disciplinary interview." At that time, MG admitted to authoring the Facebook post calling other Boston firefighters "douchebags" and "phony fucks." However, MG denied that he wrote and/or posted the posting with the words "shut up nigger." The Department concluded that it was unable to determine whether MG wrote the second post or not. MG was given a written warning for the first post.

On April 24, 2018, the Hearing Board issued its recommendation that Rowe be found guilty of all charges except the charge based on Rule 18.44(m) (untruthfulness or willful misrepresentation). On April 30, 2018, Commissioner Finn accepted the Board's recommendation and terminated Rowe from his position as a Department firefighter. Rowe timely appealed to the Commission. The Commission held a hearing over five days between October 15, 2018, and November 6, 2018. Eighty-six exhibits were entered into evidence and eight witnesses testified at the hearing. The Commission opted to consider only those posts

personally written by Rowe and posted to his personal Facebook account. Those statements included:

- A reference to the long-time head of the Boston Urban League as a “shoe-shine Negro”;
- A reference to the then-Boston Police Superintendent (now Commissioner) as a “feckless, jolly black face”;
- A statement that black men should not share their “genetic material” with a “filthy, filthy white woman” and that “laying with white women is like spitting in your mother’s womb”;
- A post listing the date, time and location (including the name of the school and a map) where Rowe objects to young boys and girls holding hands with members of the same sex;
- Multiple references to gay men as “homophiles”;
- A reference to so-called “homophiles” seeking to “normalize homophilia particularly among children in order to GAIN and EASE sexual access to them”;
- References to lesbians as “lez-beasts”;
- A reply to a person online stating: “You’re QUEER. You’re not significant enough for me to troll.”;
- Another online reply stating: “Why haven’t any homophiles been killed by Police?”;
- A picture of Rowe, with a clenched fist, wearing a t-shirt with a stick figure with Pan-African colors kicking a stick figure with LGBTQ colors in the groin;
- A reference to the head of the Boston chapter of Black Lives Matter, a Boston resident, as a person with: “Homophile/Trans/Femm Interests”;
- A reference to Black Lives Matter as “HOMOPHILE LIVES MATTER”;
- A reference to leaders of Black Lives Matter as “slow-witted, uniformed agents of sexuality confusion/cooning” who “cannot have access to our children”;
- A reference to a black entertainer as a “COM-LETEE bitch”; and
- A reference to “SmallHats (So-called Jews)”

On August 29, 2019, the Commission voted to uphold the decision of the Department to terminate Rowe's employment. In that decision, the Commission stated a belief that the Department did not pursue the allegations against firefighter MG with the same due diligence the Department pursued the allegations against Rowe. Consequently, and based on the facts presented regarding the inquiry into MG's social media postings, the Commission initiated a Section 72 inquiry to ascertain what further action should be recommended by the Commission or taken by the Department to further investigate the allegation that MG allegedly used the "n-word" in a social media post. The Commission stated specifically that the Section 27 inquiry did "not detract from the overwhelming evidence showing that Firefighter Rowe repeatedly made bigoted comments about individuals based on their race, sexual orientation and religion . . . [T]he Section 72 inquiry [] is meant to ensure that *any* firefighter [] who posts bigoted comments about Boston residents based on their race, religion or sexual orientation, should find another occupation, either voluntarily or involuntarily."

DISCUSSION

General Laws c. 31, § 44, provides that "[a]ny party aggrieved by a final order or decision of the commission following a hearing pursuant to any section of this chapter or chapter thirty-one A may institute proceedings for judicial review in the superior court within thirty days after receipt of such order or decision." G.L. c. 31, § 44. The court reviews the commission's decision under the standards set forth in G.L. c. 30A, § 14, including whether there is substantial evidence in the record for the commission's decision, G.L. c. 30A, § 14(7)(e), or whether the decision is arbitrary, capricious, or otherwise not in accordance with law, G.L. c. 30A, § 14(7)(g). The party appealing an administrative decision bears the burden of demonstrating the decision's invalidity. *Brackett v. Civil Serv. Comm'n*, 447 Mass. 233, 242 (2006). That is a

“heavy burden,” *Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 263-264 (2001), because the court gives “due weight to the experience, technical competence, and specialized knowledge” of the commission in deciding these matters, and is “highly deferential to the agency on questions of fact and reasonable inferences drawn therefrom.” *Police Dep’t of Boston v. Kavaleski*, 463 Mass. 680, 689 (2012), quoting *Flint v. Commissioner of Pub. Welfare*, 412 Mass. 416, 420 (1992). “The reviewing court is [] bound to accept the findings of fact of the commission’s hearing officer, if supported by substantial evidence.” *City of Leominster v. Stratton*, 58 Mass. App. Ct. 726, 728 (2003).

Rowe contends that the Commission erred in finding “just cause” to terminate his employment. Rowe also contends that the Commission’s decision was based on errors of law; unsupported by substantial evidence; and arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

Rowe argues that his social media posts and other online activity constituted protected speech under the First Amendment to the United States Constitution and the Massachusetts Declaration of Rights. “[P]ublic employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee’s right, in certain circumstances, to speak as a citizen addressing matters of public concern.” *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). “In *Pickering v. Board of Education*, 391 U.S. 563 (1968), [the Supreme Court] . . . recognized that the State’s interests as an employer in regulating the speech of its employees differs significantly from those it possesses in connection with regulation of the speech of citizenry in general. The problem . . . [is] arriving at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public

services it performs through its employees.” *Connick v. Myers*, 461 U.S. 138, 140 (1983), quoting *Pickering*, 391 U.S. at 568 (internal quotation marks and citations omitted).

The court must make two inquiries to determine if speech by a public employee should be afforded constitutional protection. “The first requires determining whether the employee spoke as a citizen on a matter of public concern.” *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). “Speech involves matters of public concern ‘when it can “be fairly considered as relating to any matter of political, social, or other concern to the community,” or when it “is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.”’” *Lane v. Franks*, 573 U.S., 228, 241 (2014), quoting *Snyder v. Phelps*, 562 U.S. 443, 453 (2011). In its decision, the Commission “assumed that all of Firefighter [Rowe’s] postings and statements were made as a citizen on matters of public concern.” The court will follow suit.

The inquiry now turns to the issue of whether the Commission had an adequate justification for treating Rowe differently from any other member of the general public. See *Garcetti*, 547 U.S. at 418, citing *Pickering*, 391 U.S. at 568. “A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity’s operations.” *Id.* Public employees often occupy trusted positions in society. “When [such public employees] speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.” *Id.* at 419. The Department and its employees are in trusted positions in the community. In those positions, the Department must serve all residents of the City of Boston. The hateful, derogatory statements made by Rowe lowers the public’s estimation of the Department in the eyes of city residents, especially those who identify as

members of the groups Rowe targeted. Consequently, while Rowe may have been speaking on matters of public concern as a citizen, his statements impair the proper function of the Department, in that they erode the public's trust in the Department, and his speech is not constitutionally protected. See *id.* at 418-419.

The Commission's decision is justified if it is supported by substantial evidence. "Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion." *Singer Sewing Machine Co. v. Assessors of Boston*, 341 Mass. 513, 517 (1960). The Commission's decision also must not be arbitrary and capricious. A decision is arbitrary and capricious when it lacks any rational explanation that reasonable persons might support. *Attorney Gen. v. Sheriff of Worcester Cnty.*, 382 Mass. 57, 62 (1980).

The Commission based its decision to uphold the Department's termination of Rowe on the finding that the "postings by Firefighter Rowe violate various [Department] rules regarding discrimination and harassment; conduct unbecoming; conduct prejudicial to good order; abusive or threatening language; improper or offensive language, the Social Media Policy, the City of Boston's Discrimination and Anti-Harassment Policy, and the City's Zero Tolerance for Violence Policy." The Commission reviewed evidence accumulated from social media posts, podcasts, and interviews Rowe participated in. Across these mediums, Rowe consistently attacked individuals based on their religion, sexual orientation, and/or race. The content of Rowe's postings plainly violate the Department's policies prohibiting discrimination and harassment and relating to abusive, threatening, improper or offensive language. In addition to the Department rules, Rowe's statements plainly violated the City of Boston's Discrimination and Anti-Harassment Policy. It was reasonable for the Commission to find that all of Rowe's statements and posts constituted conduct unbecoming a firefighter and prejudicial to good order.

as they detract from the Department's reputation among the community. Some of Rowe's posts, including the post of him wearing a t-shirt with one stick figure kicking the other in the groin, plainly depict violence against certain individuals. Consequently, the Commission's finding that Rowe violated the City's Zero Tolerance for Violence Policy was warranted. Even with the Commission restricting the reviewed posts and statements to only those personally authored by Rowe, the Commission's decision to uphold the Department's termination of Rowe was based on substantial evidence and was not arbitrary and capricious.

To determine whether there was "just cause" for an employer's termination of an employee's employment, "the appropriate inquiry is whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service." *Murray v. Second Dist. Ct. of E. Middlesex*, 389 Mass. 508, 514 (1983). "The term 'just cause' must be construed in light of the purpose of the civil service legislation which . . . is 'to free public servants from political pressure and arbitrary separation . . . but not to prevent the removal of those who have proved to be incompetent or unworthy to continue in the public service.'" *School Comm. of Brockton v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 486, 488 (1997), quoting *Cullen v. Mayor of Newton*, 308 Mass. 578, 581 (1941). Rowe's statements were detrimental to the reputation of the Department within the community it serves, as they were hateful, discriminatory, and, in at least one instance, violent. Consequently, the Commission was justified in determining that Rowe was guilty of substantial misconduct warranting termination.

ORDER

For the foregoing reasons, Rowe's motion for judgment on the pleadings is **DENIED**,
and the Commission and the Department's motions for judgment on the pleadings are
ALLOWED.

¹⁵
Dated: January ~~12~~, 2020



Michael P. Doolin
Justice of the Superior Court