

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

One Ashburton Place, Room 503
Boston, MA 02108

OCTAVIUS S. ROWE,
Appellant

v.

D1-18-074

BOSTON FIRE DEPARTMENT,
Respondent

Appearance for Appellant:

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Commissioner:

Christopher C. Bowman

SUMMARY OF DECISION

Firefighter Rowe maintained a presence on social media and participated in various podcasts in which he regularly identified himself as a Boston firefighter. As part of those same public forums, he repeatedly spoke, wrote and/or posted bigoted comments that violate the norms of decency and various rules and regulations of the Boston Fire Department, including conduct unbecoming a firefighter, justifying his termination.

Firefighter Rowe's public posts and statements included: referring to the long-time head of the Boston Urban League as a "shoe-shine Negro"; referring 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 Firefighter 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 Firefighter Rowe, with a clenched fist, wearing a t-shirt with a stick figure with Pan-African colors kicking in the groin a stick figure with LGBTQ colors; 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 “HOMOPHILES LIVES MATTER”; a reference to the 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-PLETE bitch”; and a reference to “SmallHats (So-called Jews)”.

In addition to violating the norms of decency, these bigoted comments adversely affected the public interest by undermining the Boston Fire Department’s ability to serve *all* residents of Boston, regardless of their race, religion or sexual orientation. Keeping Mr. Rowe as a Boston firefighter would force Boston residents to allow a bigot into their homes in order to receive emergency services, an unacceptable outcome that is not consistent with the civil service law – or good conscience.

DECISION

On May 2, 2018, the Appellant, Octavius Rowe (Firefighter Rowe), pursuant to G.L. c. 31, § 43, filed a timely appeal with the Civil Service Commission (Commission), contesting the decision of the Appointing Authority, the Boston Fire Department (BFD), to terminate him as a firefighter. On June 26, 2018, I held a pre-hearing conference at the office of the Commission. A full hearing was held over five (5) days between October 15, 2018 and November 6, 2018.¹ A stenographer produced the official record of the proceedings by agreement of the parties. The hearing was private and the witnesses were sequestered. Following the close of the hearing, proposed decisions were submitted by the parties on January 19, 2019 (Firefighter Rowe) and February 4, 2019 (BFD).

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

FINDINGS OF FACT

Eighty-six (86) exhibits were entered into evidence at the hearing (Respondent Exhibits 1-51 (R1-R51) and Appellant Exhibits 1-35 (A1-A35)) Based upon the documents admitted into evidence, the stipulated facts, and the testimony of:

Called by Firefighter Rowe:

- Rayshawn Johnson, Fire Captain, BFD;
- Darrell Higginbottom, Fire Captain, BFD;
- Octavius Rowe, Appellant;

Called by the BFD:

- Connie Wong, Deputy Commissioner, BFD;
- Eduardo Dominguez, Private Investigator;
- Scott Malone, Deputy Chief, BFD;
- Sean O'Brien, Fire Lieutenant, BFD;
- John Walsh, Chief of Operations, BFD;

I make the following findings of fact:

Firefighter Rowe

1. Firefighter Rowe is a black male who resides in Roxbury, Massachusetts. He attended Boston Technical High School and graduated from Snowden International High School. He attended St. Paul's College and was enrolled at UMass Boston for two (2) years. (Testimony of Rowe)
2. Prior to his service as a firefighter, Firefighter Rowe worked at the Comprehensive Health Center and the Shelburne Community Center in Boston. (Testimony of Rowe)
3. On October 31, 2002, Firefighter Rowe was appointed as a firefighter for the Boston Fire Department. (Stipulated Fact and Testimony of Rowe)
4. Since 2007, Firefighter Rowe has been assigned to Ladder 28, Engine 48 in Hyde Park. (Testimony of Rowe)

5. Firefighter Rowe has been a long-time member (and Vice President) of the Boston Society of Vulcans (Vulcans), a non-profit organization of black and Latino firefighters that has advocated, among other things, for more diversity in BFD appointments and promotions.
(Testimony of Rowe)
6. In 2015, Firefighter Rowe started “Know Thyself”, a nine-week summer program for the “dextoxification of young black males”. During a 2017 interview as part of a “podcast”, Firefighter Rowe, talking about “Know Thyself”, stated:

“So this is 2017 going into ’18. So we started in 2015. This is our third iteration. We had to skip a summer or two as I was – I’m a Boston firefighter for people who may not know, and for a couple of summers I was studying for the lieutenant’s exam.” (emphasis added)
(Exhibit R29 at 26)
7. For his Know Thyself program, Firefighter Rowe used two (2) different City of Boston facilities (Shelburne Community Center and Mildred Avenue Community Center).
(Testimony of Wong)
8. Firefighter Rowe is also the founder of the ten (10)-member Boston chapter of the “Straight Black Pride Movement (SBPM)”. (Testimony of Rowe)
9. A website for the “Know Thyself” program, under a photograph of Firefighter Rowe, states:

“Founder and Lead Organizer; Octavius Salih Rowe; VP. Boston Society of Vulcans; Chairman, Straight Black Pride - Boston”. (emphasis added) (Exhibit R4A at 12)²

Events Immediately Preceding BFD’s Investigation of Firefighter Rowe

² Firefighter Rowe repeatedly identifies as a firefighter on the Internet as a Boston firefighter and/or Vice President of the Boston Society of the Vulcans, a position that identifies himself as a BFD member in many other occasions as well. (See Exhibits R4A at 118, 122; R24 at 42, 47; R27 at 2, 13, 16; see also Testimony of Dominguez: “I Google searched Mr. Rowe and came up with that he was a Boston firefighter.”)

10. In February 2017, the Vulcans, in conjunction with the Lawyers' Committee for Civil Rights and Economic Justice, sent a letter to the Boston Fire Commissioner, protesting the lack of hiring of minorities and women in the BFD. (Testimony of Rowe; Exhibit R11)
11. Also in February 2017, a citizen reported to the BFD that JC, a white Boston firefighter, had posted the following 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.”
(Exhibits R20, R37; Testimony of Malone and Walsh)
12. As a result of that posting, the BFD charged JC with violating BFD rules related to:

conducting unbecoming, conduct prejudicial to good order; abusive or threatening language and obscene, indecent or profane language. (Exhibit R37)
13. Firefighter JC resigned from his position before a disciplinary interview and a hearing could take place. The charges against JC remain pending should he ever seek to return to BFD employment. (Testimony of Malone and Walsh; Exhibit R37)
14. Fire Lieutenant Sean O'Brien has been employed by the BFD for sixteen (16) years. Lt. O'Brien was appointed as a firefighter by the BFD in 2003 after he and four (4) other white candidates filed a claim of reverse discrimination in federal court, effectively challenging a then-existing federal consent decree that created minority hiring preferences. (Testimony of O'Brien)
15. In July 2017, Lt. O'Brien received a photograph on his phone of Firefighter Rowe wearing a sweatshirt with the word “Caucasians” written across the front and a white cartoon face with blond hair and a dollar sign in place of a feather. (Testimony of O'Brien) The picture was a take-off on the Cleveland Indians baseball club's cartoon logo.

16. Firefighter Rowe wore the sweatshirt as a “parody” while he was off-duty. (Testimony of Firefighter Rowe)
17. When Lt. O’Brien saw the photograph it “made [him think] ... It stirred conversation, healthy conversation, about, you know, basically, how a Native American feels when they have – like, they see an Atlanta Braves’ shirt or a Cleveland Indians shirt.” (Testimony of O’Brien)
18. Lt. O’Brien sent the photograph to Scott Malone, BFD’s Deputy Chief of Personnel, because of “concerns” about a race-based double standard regarding social media discipline, given that the BFD had forced a white firefighter – “JC” – to resign over the posting referenced above. (Testimony of Lt. O’Brien)³
19. Deputy Chief Malone concluded that Firefighter Rowe’s sweatshirt was “provocative” and “race-baiting” especially after finding online other, similar shirts for the “Detroit Africans” and “San Francisco Asians” [worn by persons not associated with the Boston Fire Department]. As a result, Deputy Chief Malone began reviewing Firefighter Rowe’s social media and other online activity. (Testimony of Malone)
20. As a result of his online review, Deputy Chief Malone found other content including comments written by Firefighter Rowe on his Facebook page in response to an article about the murder of a black man, stating about Congressman Steve Scalise, who had just been shot:
- “[a]nd y’all want me to shed tears...send up prayers..for some punk bitch Senator who stopped a random bullet while enjoying his position in the system of Racism/White Supremacy? G...the ENTIRE...FOH!”
(Exhibit R4A at 29)

³ Lt. O’Brien testified that other firefighters had a concern about a race-based double standard. I find that Lt. O’Brien himself had that concern.

21. On August 21, 2017, Firefighter Rowe posted on his Facebook page a caricature of Nat Turner in which Nat Turner is holding in one hand the severed head of a man, and in the other hand, a bloodied 2x4. Next to the caricature are the words “Nat Turner’s slave rebellion”. When Firefighter Rowe posted this caricature on his Facebook page, he wrote: “PRAISE NAT TURNER #natturnday”. (Exhibit R4A at 89)⁴
22. On October 1, 2017, a member of the public – “JShun” on Twitter – tweeted a *cropped* version of the above-referenced Facebook Post to Boston Mayor Martin Walsh and BFD Commissioner Finn stating: “Ladder28 Hyde Park Octavius Rowe. No double standard for #hate speech.” The picture sent to Mayor Walsh and Commissioner Finn had cropped out: a) the face of the caricature of Nat Turner; and b) the words “Nat Turner’s slave rebellion”. The tweet sent to Mayor Walsh and Commissioner Finn also did not include Firefighter Rowe’s written post stating: “PRAISE NAT TURNER #natturnday”. (Exhibit R14)
23. On October 2, 2017, Commissioner Finn placed Firefighter Rowe on paid administrative leave. (Exhibit R12)
24. In a letter to Firefighter Rowe dated October 5, 2017, Commissioner Finn wrote:
- “On Monday, October 2, 2017, you were placed on paid administrative leave with pay pending an investigation relating to your social media activities. You are hereby notified, effective immediately, that you are prohibited from entering any Boston Fire Department firehouse, facility or property without prior authorization from myself or from one of the Chiefs of Operations while you are on administrative leave with pay. This directive shall be in effect until further notice from the Department.” (Exhibit R12)

⁴ “On the evening of August 21–22, 1831, an enslaved preacher and self-styled prophet named Nat Turner launched the most deadly slave revolt in the history of the United States. Over the course of a day in Southampton County, Turner and his allies killed fifty-five white men, women, and children as the rebels made their way toward Jerusalem, Virginia (now Courtland). Less than twenty-four hours after the revolt began, the rebels encountered organized resistance and were defeated in an encounter at James Parker's farm. Following this setback, Turner and other rebels scrambled to reassemble their forces. The next day, a series of defeats led to the effective end of the revolt. Whites quickly and brutally reasserted their control over Southampton County, killing roughly three dozen blacks without trials.”

(https://www.encyclopediavirginia.org/Revolt_Nat_Turner_s_1831)

BFD's Review of Firefighter Rowe's Social Media Accounts & Podcasts

25. The BFD retained Eddie Dominguez, a licensed private investigator, to assist them with their investigation of Firefighter Rowe. Mr. Dominguez was formerly employed by the Boston Police Department (BPD) for twenty-nine (29) years, including twenty-two (22) years as a detective. He has also been an investigator for Major League Baseball (MLB). (Testimony of Dominguez)
26. As part of his investigation, Mr. Dominguez reviewed entries from Firefighter Rowe's Facebook account and hours of Internet radio shows / podcasts / videos on which Firefighter Rowe appeared. He provided copies of postings and transcripts of audio recordings that he found "problematic" to the BFD. (Testimony of Dominguez)
27. The City's Office of Labor Relations: a) reviewed the material submitted by Mr. Dominguez; b) interviewed Captains Rayshawn Johnson and Darrell Higginbottom, both Captains in Firefighter Rowe's firehouse; c) interviewed twelve (12) current and former firefighters from Firefighter Rowe's firehouse; d) interviewed three (3) other City employees who had allowed Firefighter Rowe to use City facilities for the Know Thyself program; and e) interviewed Firefighter Rowe for approximately two hours. (Testimony of Wong)
28. The information submitted by Mr. Dominguez involves three types of online/social media activity: postings, where Firefighter Rowe made his own written statements/comments and uploaded his own pictures and videos on publicly accessible social media accounts; re-postings, where Rowe re-posted content from other sources (or links to those sources) often with his own written comments; and radio shows/podcasts/videos on which Rowe appeared,

which were publicly available on sites other than Rowe's. (Exhibits R4A, 4B, 4C; Testimony of Dominguez)

29. Statements directly written or spoken by Firefighter Rowe; and/or photographs in which Mr.

Rowe personally appears⁵, include the following, with **emphasis added**:

- I. "Although Marvel has officially said there will be no sexuality in BP, we just can't trust that edit. From the hiring of Ta Nihsi Coates, an admitted feminist who I strongly suspect is a homosexual himself...to Marvel doubling down on this despicable move in **hiring a RAGING lez-beast in Roxanne Gay** to retcon homosexuality into the Wakandan lore, the objective is clear. To INDELIBLY assign homosexuality to Black / Afrikan people...when in actuality, it an INTRINSICALLY European phenomenon. Furthermore, if Wakanda is an ISOLATIONIST culture...and homosexuality is present...that would suggest that it manifested organically, which is in STARK (no pun) CONTRADICTION to reality. NO homosexuality appeared in Afrika before European infestation. A dozen Black scholars can corroborate that." (Exhibit R4A at 8; Facebook Account)
- II. "Someone should teach **homophiles** to kick out somma that good ol' acceptance. Y'know...that stuff that **homophiles** are always crying about NOT getting." (Exhibit R4A at 27; Facebook Account)
- III. [*Responding to an article with the headline: "A Boston police officer is suspended for posting a racially offensive video online"*]:

"Breakdown:

'He will undergo significant sensitivity and unconscious bias retraining, said Evans.'

Translation: We'll have some hand-picked inoffensive NEGRO...or some self-styled ineffectual white 'expert on Racism' talk to him for a couple hours.

'Officer Joseph DeAngelo, a four and a half year member of the force, who patrols the Roxbury area.'

4.5 years? This lil punk hasn't been on the job long enough to be mad about nothing.

He (and his pals) are COMING IN...straight from Iraq...with this vitriol. But Veterans Preference, right?

⁵ As part of the full hearing, I had Firefighter Rowe take a yellow highlighter and highlight those statements on that he wrote himself. (Exhibit R4A)

‘DeAngelo came forward and owned up to making the video mean to spoof his Buddy and fellow officer, said Evans’

Notice the emphatic tone. Mousey might as well have said ‘Hey...Boys will be Boys!’

‘The department consulted with members of the black community and agreed upon apunishment : a one year suspension with six months to serve.’

Again, **shoe-shine negroes like Darnell Williams** betray and undersell Black People Again.

‘Superintendent in Chief William Gross says his embarrassment and remorse was clear. Not once did I ever hear from him, I’ll do anything to save my job. But, what we hear from him is, I want to show everybody I’m not a racist, says Gross.’

Laughable.

Gross, once again, shows why he was selected for that Superintendent position. To be the feckless, jolly black face to coddle enemies of our community and schmooze over instances like this. (Exhibit R4A at 35; Facebook Account)

IV. [*Responding to an article with the headline: “Tanzania’s president is cracking down on LGBTQ rights. He says cows would approve”*]:

“Excellent” (Exhibit R4A at 38; Facebook Account)

V. [Responding to a post regarding Black Lives Matters [BLM]:

“Right, Mariano..you’re going to remain confused as long as you are under – informed on how Racism / White Supremacy manifests.

Garza was very specific when detailing HER definition of ‘Queer’.

She described it as an ‘umbrella term’ and then strangely included immigrants, the incarcerated and the disabled...whom, apparently, ONLY BLM perceives as ‘Queer’

I certainly do not.

She only included those groups in order to shroud her preference for the only group she’s concerned with.

Trans-homophiles..who she mentioned FIRST.

The interview is on You Tube. See for yourself.

If BLM wants to be ‘unapologetically queer’ ...

Then their name should reflect that desire.” (Exhibit R4A at 48; Facebook Account)

VI. *[Continuing to respond to posts from a user by the name of “Marino”]:*

“We’ve established who you are.

You’re QUEER.

You’re not significant enough for me to troll.”

.....

“Stop begging, Marino []

That’s all you’ve done in this thread.

I can’t call it an ‘exchange’ or ‘conversation’...because YOU haven’t adequately contributed a THING.

What evidence or proof do YOU have to support the claim that BLM is NOT a party to promulgation of Homosexuality?

Give me an instance where they came out publicly against it..or even pedophilia.

Why haven’t there been any BLM wide – spread demonstrations as a result of the most recent killings?

Why haven’t any homophiles been killed by Police?

Get to work. Earn your keep.” (Exhibit R4A at 57,61; Facebook Account)

VII. *[Responding to a video of a local television broadcast with the caption “BLM [Black Lives Matters] Discusses Upcoming Protests” and a video picturing MC, a black female Boston resident who is the head of the Boston Chapter of BLM]:*

“THIS (among other items) is PRECISELY why a Straight Black Pride chapter will be commencing in Boston on Saturday, September 16th.

SBPM REFUSES to amalgamate the interests of Black/Afrikan people with Homophile/Trans/Femm Interests, Individuals and ‘organizations’ like HLM (HOMOPHILE LIVES MATTER) and [MC]⁶

Not only will we never consider ANY Queer, Trans, Femm ‘leadership’ at any point, anyone partnering with these elements on these issues will immediately be attached to them as enemies of the Natural Black Family.

These slow-witted, uninformed agents of sexuality confusion/cooning will not serve up to their allies (proponents of Racism/White Supremacy) and they cannot have access to our children! (Exhibit R4A at 85; Facebook Account)

VIII. [Continuing to respond to posts regarding the topic above]:

“Yes, ma’am, Ill be BRIEF with the words..And I’ll post some corroborating materials....then u can take it further.

BLM was ORIGINALLY a GRASSROOTS org in Ferguson...headed by local strong heterosexual black activists who were working among Black folks LONG before [illegible] During the uprising, the **homophiles ABSCONDED with the name and stuck** 3 homophile females as the founders. George Soros starts funding it with the expressed purpose of merging homophile issues with Black ones to shift / dilute our focus and strength AWAY from our priorities.

BLM is the modern iteration of the NAACP in the sense that it is a force NOT CONTROLLED by uncompromised Black People to DERIDE our trajectory toward liberation.” (Exhibit R4A at 86; Facebook Account)

IX. [Responding to a news article titled: “City employee files sexual harassment complaint against Felix G. Arroyo”]:

“Ah! The sweetest thing I’ve ever known.

..is when CHICKENS come home to roost.

Speaking of chickens, **this punk** cowered and whined when I confronted him on other of his subversive and sniveling actions against the citizens of this city..

...yet he can get super aggressive..grabbing on women in threatening manners?

⁶ In his post, Firefighter Rowe uses the full first and last name of MC and acknowledged that he was aware that she is a Boston resident.

Both he and his baby boy brother are the truest definitions of complete and utter SUCKERS!”

....

[Responding to a post regarding this same article]:

“You yourself referred to him as ‘Queer’

Now that may have a multi-dimensional meaning among homophiles...but among Straight Black and PROUD individuals...whatever definition you use, it has NO place with us.

Your personal association to Felix or [illegible] bears NO weight on the FACTS that they are both **feckless chumps**...and BOTH have engaged in predatory behaviors.” (Exhibit R4A at 91, 92; Facebook Account)

X. [Commenting on the photograph of a black entertainer]:

“He been absorbing.. and is now personifying..the new mantra propagated by the components of the American Social Order (schools, Gay Lives Matter, numerous political entities, hip-hop & movies, church, etc.)

That Black manhood is either ‘toxic’ or amorphous.

That gender is ‘fluid’.

Me?

I say he’s COM-PLETE bitch.” (Exhibit R4A at 98; Facebook Account)

XI. “No rational person can say that schools are the PROPER place for this type of deposition, even for a proper natural sexual interactions.

But the fact that **homophiles** continue to exhaust every avenue available to them to do is PROOF of their objective.

Normalize homophilia particularly among children in order to GAIN and EASE sexual access to them.” (Exhibit R4A at 107A; Facebook Account)

XII. **“So...**

I’m driving home from an appointment in [redacted].

Clearly, It’s dismissal time for [name redacted] Middle School.

Out of the throngs of largely Black and Brown babies, I see a group of about six walking on the sidewalk, counter traffic.

4 girls, 2 boys.

The two boys were holding hands.
Two of the four girls were holding hands.

There are no longer ‘schools’, ‘ya’ll.

These are FACTORIES.”

[Firefighter Rowe then posted a map “checking in” of the precise location of the [name redacted] Middle School in [redacted]]. (Exhibit R4A at 117; Facebook Account)

- XIII. “In the age of YouTube scholarship, I’m wondering why haven’t any **SmallHats (So-called ‘Jews’)** offered a forensic breakdown refuting any information presented in Min. Farrakhan’s speeches that they deem ‘anti-Semetic’?

This is a largely rhetorical question...but if such a video exists, please point me to it.”

(Exhibit R4A at 119; Facebook Account)

- XIV. Photograph of Firefighter Rowe, with a clenched fist, wearing a T-shirt with a stick figure with Pan-African colors **kicking in the groin a stick figure with LGBTQ colors.**

(Exhibit R4A at 120, 120A; Facebook Account)

- XV. “Dr. Claud Anderson was here a month or so ago, and he talked about how our problem, the African’s problem, is that we don’t recognize our exceptionality. When you know you’re exceptional, you don’t want to share it with nobody, and that’s one of the things that I want to infuse into the next generation, to – to keep that, particularly when it comes to them sharing their genetic material and anything else with this **filthy, filthy white woman.**” (Exhibit R23 at 17; Podcast)

- XVI. “Looking at – Sista Tasha recently posted something about Tyra Banks who has – who is a race trader and has father – has produced a child with this – some – some nameless – I don’t even know who he is, but then one of the most egregious acts, as of late, have been Serena Williams and her – and I’m just picking them out because they’re visible.” (Exhibit R23 at 17; Podcast)

- XVII. “Shout out to the elder Ashra Kwesi who said **laying with white women is like spitting in your mother’s womb.** (Exhibit R24 at 11)

XVIII. “Sometimes you have to lose. You know, one team has gotta win, one team has gotta lose. Sometimes you gotta lose, but it’s important to factor in how you lose. If you’re going to lose, you’re going to have to fight. Not only are we setting – are we setting these children up for death and destruction, the position, the posture in which they are taking this helm, they’re over scratching where they don’t itch, bagging white folks. No, it’s – that’s too much to ask for. So we’re going to die anyway, you might as well fight, and this has been my particular – I would say philosophy in any area I’ve been in, not just on the Fire Department, not just in the community, but anywhere. **If I’m going to go out, I’m taking someone with me.**” (Exhibit R24 at 10)

30. On April 13, 2018, the BFD preferred charges against Firefighter Rowe. Specifically, the BFD charged Firefighter Rowe 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. (Exhibit R3)
31. On April 20, 2018, the BFD held a local appointing authority hearing before a Hearing Board comprised of a BFD Deputy Chief and two District Chiefs. The Board received into evidence 18 exhibits (Exhibits R1 through R18 of this hearing) and heard approximately nine hours of testimony from seven witnesses, three of whom testified at this hearing (Wong, Higginbottom and Rowe) and four others. (Exhibit R19 at 2-3, 123, 354.)
32. On April 24, 2018, the Hearing Board issued its recommendation that Firefighter Rowe be found guilty of all charges against him with the exception of the charge based on Rule 18.44(m) (untruthfulness or willful misrepresentation). (Exhibit R36)

33. On April 30, 2018, BFD Commissioner Finn accepted the Board's recommendation and, as the Appointing Authority, terminated Firefighter Rowe from his position as a BFD firefighter. (Exhibit R33)

34. Firefighter Rowe timely appealed to this Commission.

Prior Discipline of Firefighter Rowe

35. The BFD reprimanded and suspended Firefighter Rowe for four tours in 2005 for violating Rule 18.44 (k) (prohibiting use of abusive or threatening language) after Firefighter Rowe called another firefighter a "faggot" and then stated "I'll kick your fucking ass you fucking faggot." (Exhibit R9 at 1; R50 at 2)

Allegations of Similar Conduct Regarding Other Firefighters

36. At his April 20, 2018 local hearing, Firefighter Rowe provided the BFD with posts that he alleged represented objectionable conduct by other firefighters, who were white and not disciplined. (Testimony of Walsh)

37. Among those investigated were firefighters MD and MG, both white males. (Testimony of Walsh)

Firefighter MD

38. The BFD's review showed that the following comments were posted by MD on his Facebook account:

- I. Calling former Present Obama an "asshole;"
- II. "Houston has a large Black American Population. Has BLM organized any rescue efforts?;"
- III. 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;"

- IV. Below a photo of two black women fighting: “Another day in taxpayer assisted housing!”
- V. “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.”
- VI. “I Never Ever Trust a Dirty Fucking Muslim.”

(Exhibit R51)

- 39. The BFD brought charges against MD on June 20, 2018, for violations 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. (Exhibit R38)
- 40. Prior to his disciplinary interview and hearing, MD resigned from his position as a BFD firefighter and is now retired. (Testimony of Walsh) The charges against MD remain pending should he ever seek to return to BFD employment. (Testimony of Malone and Walsh)

Firefighter MG

- 41. Among the documents that Firefighter Rowe presented to the BFD at the local appointing hearing were two (2) pages that appear to be postings from a Facebook account. Each page has the name of MG as the person who posted the comments. (Exhibit A15 & A16)
- 42. The posting on the first page states:

“not sure who to post this to but here it is...today supposedly boston e-37/I26 claimed to have rescued a person from a fire or annunciation red . well guess what? they didn’t LADDER COMPANY 4 MADE THE SAVE....ACTUALLY F.F. JAMES CASHINS E-14 DETAILED TO L-4 MADE THE SAVE . this job has denigrated to a bunch of self serving douche bags who would falsify a report so that their useless company can recieve (sic) accolades they didn’t earn...these phony fucks are polishing their badges for an award THEY DIDN’T EARN. pass the word LADDER 4 AND F.F. CASHINS FROM E-14 DESERVE THE AWARD NOT THE PHONIES.”

(Exhibit A15)

43. The posting on the second page states:

“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”

(Exhibit A16)

44. The BFD asked Eddie Dominguez to review MG’s social media activity. According to Mr.

Dominguez’s May 14, 2018 report to the BFD:

“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.

Mr. [G]’s Pinterest account does not appear to be very active and is comprised of photographs of various vehicles. There is a blurry profile photograph which is unclear whether or not it depicts Mr. [G].[].” (Exhibit R51)

45. The BFD brought Firefighter MG in for a “disciplinary interview” at which time Firefighter MG admitted that he wrote and posted the “phony fucks ... douchebags” posting. Firefighter MG denied that he wrote and/or posted the posting with the words “shut up nigger”. The BFD concluded that it was unable to determine whether MG wrote the second posting or not. Firefighter MG was given a written warning for the first post. (Testimony of Walsh)

BFD / City Rules

46. BFD maintains Rules and Regulations (R 31), policies, general orders and special orders. (Exhibits R7, R41, R42A, R42B) that all govern firefighter conduct.
47. Rule 18.41 broadly prohibits discrimination against and harassment of any person on the basis of race, color, age, disability, national origin, religious creed, sexual orientation, veteran's status, marital status or sex and provides that "[a]ll members shall treat each other and the public in a manner that is non-discriminatory respectful and fair" (Exhibit R31 at 53-54).
48. Rule 18.44(a) prohibits "[c]onduct unbecoming a member, *whether on or off duty*, which tends to lower the service in the estimation of the public" (Exhibit R31 at 59) .
49. Rule 18.44(j) prohibits "[c]onduct prejudicial to good order" (Exhibit R31 at 60);
50. Rule 18.44(k) prohibits "[a]busive or threatening language" that "interferes with the order and teamwork which is essential to a fire company" (Exhibit R31 at 60).
51. Rule 18.45(c), "[i]mproper or offensive language" (Exhibit R31 at 67).
52. The BFD's Social Media Policy states that "improper usage [of social media] can have instant and long-term damage to the perception of the department and the user" and provides that "Members of the Boston Fire Department shall not use...[c]ontent that promotes, fosters, or perpetuates discrimination on the basis of race, creed, color,...religion, gender, marital status,...national origin...or sexual orientation."⁷ (Exhibit R7)

⁷All hearing witnesses – including Rowe himself – testified that then-Human Resources Director Robert Moran, in March 2011, distributed the Policy by email to all BFD members (R39; R7) and that, therefore, all members were bound by it as an official BFD policy. See Wong (I) at 93; Malone (II) at 215; O'Brien (II) 165-66; Johnson (IV) 73-79; Higginbottom (IV) 138-40; Rowe (V) at 25-26; Walsh (V) at 224-25. Although Rowe attempted to suggest that the policy did not exist based on a December 21, 2016 email from Scott Malone, BFD's then-Deputy Chief of Personnel, to Captain Rayshawn Johnson, that email made clear that firefighters should be disciplined based on their conduct regardless of the venue or

53. Special Order No. 14 (2012), reiterates Rule 18.44(a)'s "conduct unbecoming" standard and its application to social media activity and states that "[m]embers who participate in social media venues...and who identify themselves as members of the Boston Fire Department, must conduct themselves in a respectable and socially acceptable manner" (Exhibit R41 at 2).
54. In addition, some City of Boston ("City") policies also apply to firefighters and require annual confirmation of an employee's understanding. (Exhibit R5, R6, R8)
55. The City's Discrimination and Harassment Policy broadly prohibits discrimination and harassment based on, among other things, race, color, sex, sexual orientation and gender identity, and states "[t]he City expects all employees to conduct themselves in a professional manner with respect and concern for their fellow employees and members of the public. Discrimination, harassment and retaliation are unlawful and will not be tolerated" (R5 at 2) and gives as examples of prohibited harassment comments that are suggestive, offensive, belittling, derogatory or mocking of a person's culture or protected status; "the display of objects, pictures, cartoon, symbols or jokes that have a sexual, racial, ethnic, disability, homophobic, age-ist connotation," or displaying material or verbal or physical conduct that shows hostility or aversion to a person's protected status. (Exhibit R5 at 3).
56. The City's Zero Tolerance for Violence Policy broadly prohibits, among other things, threats of violence by City employees (Exhibits R6 at 5).

method, such as social media, used to communicate the message. A5. Malone conceded that he was not entirely clear in the email, and to the extent that his email was interpreted to mean that BFD had no social media policy, his email was in error. Malone (III) at 128-29.

Civil Service Law / Just Cause Standard

The Civil Service Commission is charged with ensuring that employment decisions are made consistent with basic merit principles. Basic merit principles requires, among other things:

“ ... retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected”; and ... assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens” and; “assuring that all employees are protected ... from arbitrary and capricious actions.”
G.L. c. 31, § 1)

G.L. c. 31, § 41 states in part:

“Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be discharged, removed, suspended for a period of more than five days ...”

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); Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 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 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983).

The Appointing Authority’s burden of proof by a preponderance of the evidence is satisfied “if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that

may still linger there.” Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956).

G.L. c. 31, § 43 states in part:

“If a person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, appeal in writing to the commission, he shall be given a hearing before a member of the commission ...

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.”

Under section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew;” Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. However, “[t]he commission’s task... is not to be accomplished on a wholly blank slate. After making its de novo findings of fact, the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether ‘there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision’,” Id., quoting internally from Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983) and cases cited.

First Amendment Protections

In a recent decision regarding First Amendment protections of public employees, the Appeals Court, in Condez v. Civ. Serv. Comm’n & Dartmouth, 18-P-555 (2019) (Rule 1:28 Decision), wrote:

“The First Amendment limits the government's authority to restrict and punish public employees' speech. In evaluating a claim that a public employer's disciplinary action was impermissibly made in retaliation for engaging in speech protected by the First Amendment, we employ the framework first articulated in Pickering v. Board of Educ., 391 U.S. 563 (1968), and later refined in Connick v. Myers, 461, 138 (1983), and Garcetti v. Ceballos, 547 U.S. 410 (2006) See Pereira v. Commissioner of Social Servs., 432 Mass. 251,256-257 (2000).

We proceed in two broad steps:

"The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." Garcetti, supra at 418.

The second step, known as the Pickering balancing, requires us to "balance 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." Pickering, supra at 568. The protected status of speech is a question of law for the court, not a question of fact for the agency. See Connick, supra at 148 n.7.”

Firefighter Rowe's Argument

Firefighter Rowe argues that his termination was not justified because:

1. His postings did not constitute misconduct because there is no nexus between his postings and his job as a firefighter.
2. The BFD's decision to terminate him runs afoul of the United States Constitution. Firefighter Rowe argues that, through his postings, he was speaking on matters of public concern and therefore these postings were protected expressions. Pereira at 257; and there was no evidence presented that his postings harmed the Defendant in any manner.
3. He was treated differently than other employees, including Firefighter MG.

BFD's Argument

The BFD argues that the decision to terminate Firefighter Rowe was justified because:

1. His conduct and statements violated various rules of the Department, including those regarding: conduct unbecoming, conduct prejudicial to good order, abusive or

threatening language that interferes with the order and teamwork which is essential to a fire company, and improper and offensive language.

2. While Firefighter Rowe may have a First Amendment right to make the statements he makes, he does not have the right to make those statements as a BFD firefighter. The BFD argues that, under well-settled U.S. Supreme Court precedent, the First Amendment does not protect public employees when the government's interest in providing efficient and effective services to the public outweighs their free speech interests. Pickering at 573; Connick at 140.
3. The BFD has investigated similar allegations against other firefighters, and when proven, moved forward with disciplinary action against them.

Analysis

The *genesis* of the BFD's investigation into Firefighter Rowe is troubling. A white firefighter, who was appointed years ago after successfully challenging a consent decree that mandated preferences for minority candidates, forwarded a Facebook posting of Firefighter Rowe to the BFD's Deputy Chief of Human Resources. In the posting, Firefighter Rowe is wearing a sweatshirt with the word "Caucasians" written across the front and a white cartoon face with blond hair and a dollar sign in place of a feather. The picture was a take-off on the Cleveland Indians baseball club's cartoon logo. Clearly, Firefighter Rowe, while off-duty, was simply joining a national conversation regarding the topic of professional sports teams using Native Americans in their name and logo, which many find to be racist.

Even the firefighter who forwarded the posting testified that the photograph "made [him think] ... It stirred conversation, healthy conversation, about, you know, basically, how a Native American feels when they have – like, they see an Atlanta Braves' shirt or a Cleveland Indians shirt." Yet, this *same* firefighter forwarded the posting of Firefighter Rowe to BFD officials alleging a "double standard", alluding to the disciplinary action taken against Firefighter JC, a white male, for his public posting stating that a national broadcast journalist should be "fucked

roughly in the ass by a MAN”. Equating the two postings is absurd. Yet, it triggered the BFD’s initial decision to begin reviewing Firefighter Rowe’s Facebook postings.

Several weeks later, an anonymous Twitter account user, forwarded a cropped picture taken from Firefighter Rowe’s Facebook account to Mayor Walsh and Commissioner Finn, showing a black man holding the bloodied head of another man. Laying bare the intent of the anonymous Twitter account user, he/she effectively deleted the words referencing the “Nat Turner’s rebellion” which may have resulted in a more measured response by the Mayor and the Fire Commissioner. Instead, Firefighter Rowe was immediately placed on paid administrative leave and, in an extraordinary move, Rowe was barred from entering any BFD facilities. That swift action would be in sharp contrast to the relatively muted reaction of BFD officials, when it was alleged that a white firefighter had authored a Facebook posting containing the words “shut up nigger????”. As discussed in more detail below, I carefully considered whether these actions by the BFD showed some type of bias against Firefighter Rowe.

The BFD ultimately completed an investigation of Firefighter Rowe that included a review of public postings from his social media accounts and statements made on various “podcasts” that are available to the public. They also interviewed Firefighter Rowe, numerous BFD firefighters and other City officials as part of the investigation. As part of the de novo hearing before the Commission, which included five (5) days of hearing, I reviewed the testimony of several witnesses and dozens of exhibits.

For the purposes of deciding this matter, I have only given weight to those postings that were actually written by Firefighter Rowe and / or where he is pictured in a photograph on his own

Facebook page (as opposed to the postings of others that Firefighter Rowe “liked”, “shared”, “tagged” and/or posted on his own account.)⁸

The findings provide a list of verbatim statements written and publicly posted by Firefighter Rowe. As referenced above, all of the postings listed in the findings are postings that contain statements personally written by Firefighter Rowe and/or are photographs that he personally appears in.

Statements personally written by Firefighter Rowe and posted to his public Facebook account include:

- 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 Firefighter 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?”

⁸ To ensure clarity, I did not ignore or overlook any of the evidence presented, but, rather, gave it all careful review and consideration. For example, I did not overlook that Firefighter Rowe “shared” an abhorrent post discussing anal sex and feces. While it certainly reinforces the sinister intentions of his own posts, I did not find it necessary to give such posts weight to decide this appeal.

- A picture of Firefighter Rowe, with a clenched fist, wearing a t-shirt with a stick figure with Pan-African colors kicking in the groin a stick figure with LGBTQ colors.
- 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 “HOMOPHILES LIVES MATTER”.
- A reference to the 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”.
- A reference to “SmallHats (So-called Jews)”

Firefighter Rowe does not dispute that he wrote and posted all of the above on his public Facebook account. He does allege that certain statements, including his use of the term “homophile” is not intended to be derogatory. That is not credible. It is painfully clear that Firefighter Rowe equates homosexuality with pedophilia and his use of the word “homophile” is an amalgam of homosexual and pedophile. Even Firefighter Rowe conceded in his testimony his belief that they are “closely connected” and “[t]hat’s why we meld the two” going on to state, *without hesitation*, his belief that 90% of all homosexuals have been “introduced” to homosexuality “through a pedophilia experience, being sexually molested, raped or abused as a child from an adult.”

The postings by Firefighter Rowe violate various BFD 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. *All* of the postings constitute conduct unbecoming a firefighter as it lowers the Fire Department in the estimation of the public when one of their members verbally attacks individuals based

solely on their race, religion or sexual orientation, as Firefighter Rowe has done in each of the above-referenced posts. For the same reasons, all of Rowe's posts violate the BFD's policies prohibiting discrimination and harassment. Certain posts, including the post of Rowe wearing a t-shirt of an LGBTQ stick figure being kicked in the groin, violate the BFD's Zero Tolerance for Violence policy, while multiple other posts violate rules relating to abusive, threatening, improper or offensive language.

I considered Firefighter Rowe's argument that there is no relationship between his off-duty online activity and his employment as a firefighter. Of the posts identified in the findings, only one was posted while Rowe was on duty. Generally, when a civil service employee is off duty, his actions cannot be the subject of discipline unless they are work-related. If an employee establishes that his appointing authority's disciplinary action was based "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[.]" School Comm. of Brockton v. Civil Serv. Comm'n, 43 Mass.App.Ct. 486,497 (1997). Hence, there must be a nexus between Firefighter Rowe's conduct and his employment with the BFD.

In Baldasaro v. Cambridge, 10 MSCR 134 (1997), the appellant, an off-duty DPW employee, screamed profanity at an on-duty parking meter maid when she approached him about moving his vehicle. Id. at 135. The Commission held that off-duty conduct cannot be punished by an employer unless the conduct is work related. Id. The Appeals Court affirmed. The Court noted that the employee had sustained his burden of showing that there was no significant correlation between his conduct and his continuing fitness to perform his job.

Baldasaro differs significantly from this case. First, firefighters, inherent in their duties, enter the homes of Boston residents, often in response to a resident's call for emergency

services. That is significant for the following reason. If a local business owner posts bigoted rants on Facebook, customers can choose not to patronize his or her business. If a politician makes racist remarks, voters can choose another candidate. When a resident calls 911 seeking fire or rescue services, however, they don't have the option of denying access to their home to someone like Rowe, who posts bigoted comments to his public Facebook account while off-duty. That is because, until recently, Rowe *wore the uniform of the Boston Fire Department*, which carries with it both respect and authority, including the authority to enter the homes of Boston residents who call for fire and rescue services. Those residents include men and women who are lesbian, gay, bisexual, transgender and those who identify as queer and are questioning their sexual identity – people that Rowe publicly refers to as: “lez-beasts, homophiles and trans-homophiles” who, according to Rowe, are seeking to “normalize homophilia particularly among children in order to GAIN and EASE sexual access to them.” Boston residents should not have to allow bigots like Rowe into their home in order to receive emergency services from the Boston Fire Department. For these reasons, I find that there is a substantial correlation or nexus between Rowe's off-duty conduct and his employment, thus enabling the BFD to discipline him for his off duty misconduct.

I also carefully considered Firefighter Rowe's argument that the discipline imposed here violates his First Amendment rights. While, ultimately, a Court is the proper venue to address Constitutional issues, I concur with the Boston Fire Department's argument that there is no basis for concluding that Firefighter's Rowe's interest in free speech outweighed BFD's interest in providing efficient and effective public safety services. In reaching this conclusion, I assumed that all of Firefighter's postings and statements were made as a citizen on matters of public concern and I have accepted Firefighter Rowe's assertion that his deep-rooted opposition to

homosexuality is based on his religious beliefs.

As argued by the Boston Fire Department, under well-settled U.S. Supreme Court precedent, the First Amendment does not protect public employees when the government's interest in providing efficient and effective services to the public outweighs their free speech interests. Pickering at 573; Connick at 140. A public employee "by necessity must accept certain limitations on his or her freedom." Garcetti v. Ceballos, 547 U.S. 410, 418 (2006). See also, Pereira at 251) (citing and following Pickering for principle that public employee's right to free speech is limited by public employer's interest "in promoting the efficiency of the public services it performs through its employees"). This is especially true with regard to public safety functions, where government employers traditionally have wide latitude in deciding when employee speech hinders efficient, effective public safety services. Firefighter Rowe's statements frustrated BFD's public safety mission and threatened "community trust" in the department, which is "vitally important" to its function. "[T]he more the employee's job requires...public contact, the greater the state's interest in firing her for expression that offends her employer." McEvoy v. Spencer, 124 F.3d 92, 103 (2d Cir. 1997) (alteration in original) (internal quotation marks omitted) (quoting Craig D. Singer, Comment, Conduct and Belief: Public Employees' First Amendment Rights to Free Expression and Political Affiliation, 59 U. Chi. L. Rev. 897, 901 (1992)). "[F]irefighters...are quintessentially public servants. As such, part of their job is to safeguard the public's opinion of them, particularly with regard to a community's view of the respect that...firefighters accord the members of that community." Locurto v. Giuliani, 447 F.3d 159, 178-79 (2d Cir. 2006).

To me, BFD's interest in providing efficient and effective public safety services, by employing Firefighters who do not publicly post bigoted remarks, outweighs Firefighter Rowe's

interest in free speech.

Having determined that Firefighter Rowe did engage in the alleged misconduct, I must determine whether the level of discipline (termination) was warranted.

As stated by the SJC in Falmouth v. Civ. Serv. Comm'n, 447 Mass. 814, 823-825 (2006):

“After making its de novo findings of fact, the commission must pass judgment on the penalty imposed by the appointing authority, a role to which the statute speaks directly. G.L. c. [31], s. § 43 (‘The commission may also modify any penalty imposed by the appointing authority.’) Here 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.’ Id. citing Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983).

“Such authority to review and amend the penalties of the many disparate appointing authorities subject to its jurisdiction inherently promotes the principle of uniformity and the ‘equitable treatment of similarly situated individuals.’ citing Police Comm’r of Boston v. Civ. Serv. Comm’n, 39 Mass.App.Ct. 594, 600 (1996). However, in promoting these principles, the commission cannot detach itself from the underlying purpose of the civil service system— ‘to guard against political considerations, favoritism and bias in governmental employment decisions.’ Id. (citations omitted).

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“Unless the commission’s findings of fact differ significantly from those reported by the town or interpret the relevant law in a substantially different way, the absence of political considerations, favoritism or bias would warrant essentially the same penalty. The commission is not free to modify the penalty imposed by the town on the basis of essentially similar fact finding without an adequate explanation.” Id. at 572. (citations omitted).

First, my findings do not differ significantly from those reported by the Boston Fire Department. While the BFD relied on a wider group of social media postings, including those that were not personally written by Firefighter Rowe -but, rather, tagged, shared or re-posted by him – I did conclude that the smaller group of social media posts and statements by Firefighter

Rowe violated the same rules cited by the BFD.

Second, I considered whether the troubling series of events that triggered the investigation of Firefighter Rowe, previously referenced, was evidence of some type of personal or other bias that warranted intervention by the Commission. The Commission confronted a somewhat similar question in Carey v. Holden, 31 MCSR 311 (2018). In Carey, a disgruntled police officer leveled unfounded charges against a supervisor. As part of an investigation into the unfounded allegations, however, the Town found evidence of other misconduct that warranted Carey's termination. In a concurring opinion upholding the termination, four (4) Commissioners stated:

“We write to emphasize that the record established that the Town comes before the Commission tainted by problematic origin of the charges and the behavior of certain officers involved has not been overlooked, none of which has any proper place in a public safety organization, and must not be viewed as condoned by this Commission. Nevertheless, the totality of the evidence of misconduct on the part of the Appellant ... stand as just cause for the discipline imposed. Indeed, it would discredit the bedrock of civil service law merit principles to excuse such a history of behavior because of the unseemly way in which that history eventually came to light.”

The same principle applies here. It is, frankly, unseemly, that the investigation of Rowe began based on a) a post forwarded by a white firefighter questioning whether a race-based double standard existed in the BFD; and b) a cropped (altered) post sent by an anonymous Twitter account user. As in Carey, however, the totality of the evidence of misconduct eventually discovered regarding Rowe, standing alone, justifies the BFD's decision to terminate him.

Third, I considered whether the decision to terminate Firefighter Rowe was consistent with progressive discipline, which the Commission has long held to be synonymous with basic merit principles when it pertains to discipline appeals. While Firefighter Rowe's disciplinary history is

limited to one, short-term suspension many years ago, the underlying misconduct in that matter underscores that Firefighter Rowe's homophobic rants appear to have been a longstanding problem, with Firefighter Rowe, true to form, telling another firefighter, "I'll kick your fucking ass you fucking faggot." Even, however, without that discipline, the egregious and multiple instances of misconduct discovered here would, standing alone, justify termination.

Finally, I considered whether there was equitable treatment of similarly situated individuals. Again, I did not ignore or overlook any of the evidence presented regarding various firefighters. After careful review, I found that the alleged misconduct of three (3) other firefighters were potentially comparable to Rowe's misconduct: Firefighters JC, MD and MG. As previously referenced, Firefighter JC's misconduct occurred prior to the discovery of Rowe's misconduct. He posted vile comments regarding Rachel Maddow and Senator Elizabeth Warren. In the case of JC, the BFD acted quickly to initiate disciplinary action against the firefighter, resulting in Firefighter JC's resignation from the Department.

The alleged misconduct by Firefighters MD and MG came to light at the local appointing authority hearing when Rowe's counsel produced documents purportedly showing offensive Facebook postings of these firefighters. Firefighter MD acknowledged being the author of hateful, bigoted postings, including one stating: "I Never Ever Trust a Dirty Fucking Muslim." The BFD, similar to the matter involving Firefighter JC, took prompt action to initiate disciplinary charges against JC, resulting in his resignation.

That leaves the allegations against, and the BFD's response to, Firefighter MG. As referenced in the findings, Rowe's counsel presented the BFD with two (2) pages that appear to be postings from a Facebook account. Each page has the name of MG as the person who posted the comments.

The posting on the first page stated:

“not sure who to post this to but here it is...today supposedly boston e-37/I26 claimed to have rescued a person from a fire or annunciation red . well guess what? they didn't LADDER COMPANY 4 MADE THE SAVE...ACTUALLY F.F. JAMES CASHINS E-14 DETAILED TO L-4 MADE THE SAVE . this job has denigrated to a bunch of self serving douche bags who would falsify a report so that their useless company can receive (sic) accolades they didn't earn...these phony fucks are polishing their badges for an award THEY DIDN'T EARN. pass the word LADDER 4 AND F.F. CASHINS FROM E-14 DESERVE THE AWARD NOT THE PHONIES.”

The posting on the second page stated:

“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”

In response, the BFD asked Ed Dominguez to review MG's social media activity.

Dominguez was unable to find these posts on MG's Facebook account. Rather, he only found 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 [].

Disturbingly, Dominguez found that MG's profile photograph depicted what appeared to be a photograph taken from inside of a vehicle of an older black male standing outside holding his hand up. According to Dominguez:

“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 BFD brought Firefighter MG in for a “disciplinary interview” at which time Firefighter MG admitted that he wrote and posted the “phony fucks ... douchebags” posting, but denied

that he wrote and/or posted the posting containing the words “shut up nigger”. According to the BFD, they were unable to determine whether MG wrote the second posting or not and only gave Firefighter MG a written warning for the first post.

Based on a review of the record currently before the Commission, I am not satisfied that the BFD pursued the same due diligence regarding the allegations against Firefighter MG that it did against Rowe for the following reasons. First, standing alone, the fact that Firefighter MG had, for years, purportedly used the picture of a black homeless man as his Facebook profile photo, should have been a bright red flag to the BFD. I only learned of that information after ordering the BFD to produce all records related to Dominguez’s investigations of firefighters other than Rowe. There is nothing in the record to show that Firefighter MG was questioned about this inexplicable observation by Dominguez.

Second, the BFD witnesses stated at the hearing before me that they were unable to research this issue further, in part, because Rowe’s counsel refused to produce any further information regarding the source of the postings. At my request, Rowe’s counsel produced what was entered, post-hearing, as Appellant Exhibit 35. That document provides the names of two (2) Boston firefighters who, at a minimum, could provide the BFD with additional information as part of a meaningful investigation into whether Firefighter MG posted the second posting. There is no indication that the BFD followed up on that important information.

Third, the BFD’s quick acceptance of Firefighter MG’s denial regarding the second post is problematic, particularly given that the second post appears to be similar to the first post (which MG admitted to posting) in regard to tone and writing style.

In summary, when the BFD is presented with evidence that a Boston firefighter has allegedly used the n-word in a public posting, they should take every step possible to investigate the

allegation and, if proven, take appropriate disciplinary action, up to and including termination.

That has not happened here.

G.L. c. 31, § 72 states that:

“The commission or administrator [HRD], upon the request of an appointing authority, shall inquire into the efficiency and conduct of any employee in a civil service position who was appointed by such appointing authority. The commission or the administrator may also conduct such an inquiry at any time without such request by an appointing authority. After conducting an inquiry pursuant to this paragraph, the commission or administrator may recommend to the appointing authority that such employee be removed or may make other appropriate recommendations.” (emphasis added)

Based on the facts presented here, a Section 72 inquiry by the Commission is warranted.

By separate order this day, the Commission is opening such an inquiry to ascertain what further action should be recommended by the Commission or taken by the BFD to further investigate the allegation that a BFD firefighter has allegedly used the n-word in a social media posting that has come to the Commission’s attention in the course of the present appeal.

This Section 72 inquiry, while designed to ensure the equitable treatment of similarly situated individuals, does not detract from the overwhelming evidence showing that Firefighter Rowe repeatedly made bigoted comments about individuals based on their race, sexual orientation or religion. Put another way, the Section 72 inquiry ordered here is meant to ensure that *any* firefighter, such as Mr. Rowe, who posts bigoted comments about Boston residents based on their race, religion or sexual orientation, should find another occupation, either voluntarily or involuntarily.

Conclusion

For all of the above reasons, Firefighter Rowe’s appeal under Docket No. D1-18-074 is hereby *denied*.

Civil Service Commission

/s/ Christopher Bowman

Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Camuso, Stein and Tivnan, Commissioners) on August 29, 2019.

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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d)

Notice to:

Robert Johnson, Jr., Esq. (for Appellant)
Kay H. Hodge, Esq. (for Respondent)
John M. Simon, Esq. (for Respondent)
Barbara Parker, Esq. (for Respondent)

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108

I-19-181

Re: Civil Service Commission inquiry pursuant to G.L. c. 31, § 72 regarding an allegation that a firefighter employed by the Boston Fire Department (BFD) used the racist “n-word” in a social media posting.

INQUIRY

1. On August 29, 2019, the Civil Service Commission (Commission) issued a decision (Rowe v. Boston Fire Department, D1-18-074 (2019)), affirming the BFD’s decision to terminate a Boston firefighter (Octavius Rowe) for making bigoted comments on social media and podcasts related to individuals’ race, religion and sexual orientation.
2. As part of that appeal, it was alleged that another Boston firefighter, currently employed by the BFD, posted the racist “n-word” on social media.
3. As noted in Rowe, the Commission has concluded that the BFD has not taken sufficient steps to investigate this serious allegation.

For these reasons, the Civil Service Commission, pursuant to G.L. c. 31, § 72, opens an inquiry to ascertain what further action should be recommended by the Commission or taken by the BFD to investigate this allegation.

The BFD has thirty (30) days to file a written response to this inquiry which should include recommended steps for conducting a further investigation of the above-referenced allegation.

SO ORDERED.

Civil Service Commission

/s/ Christopher C. Bowman
Christopher C. Bowman
Chairman

Issued: August 29, 2019

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

One Ashburton Place, Room 503
Boston, MA 02108

OCTAVIUS S. ROWE,
Appellant

v.

D1-18-074

BOSTON FIRE DEPARTMENT,
Respondent

CONCURRING OPINION OF COMMISSIONER TIVNAN

I concur with the opinion of Chairman Bowman and re-emphasize that, back in 2005, Mr. Rowe was suspended for four (4) tours of duty for his outrageous and vile statement against another firefighter and threatening him with bodily harm. It appears that Mr. Rowe has failed to learn his lesson and correct his deplorable behavior and speech by failing to show care and respect to a fellow firefighter. He failed to work towards making amends by improving his department with the general public and all firefighters.

It is an honor to be a public servant for the people of a great metropolitan city of our Commonwealth. The position of firefighter is one of trust and respect, treating all people with kindness, compassion and care in time of difficulty and need.

Mr. Rowe made numerous disparaging, vile, repulsive statements about numerous segments and individuals of our population that were intolerant, hurtful and cruel. His opinions and statements now appear to be beyond remedial corrective assistance, education and retraining, including anger management, counseling and therapy.

Kevin M. Tivnan
Commissioner
August 29, 2019