

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

GREGORY R. LAVALLEE,
Appellant

v.

D1-19-059

BOSTON FIRE DEPARTMENT,
Respondent

Appearance for Mr. LaVallee:

Kevin R. Mullen, Esq.
John Greene, Esq.
15 Foster St.
Quincy, Massachusetts 02169

Appearance for Boston Fire Department:

Devin T. Guimont, Esq.
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City of Boston
Boston City Hall, Rm. 624
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Commissioner:

Christopher C. Bowman

DECISION

On March 18, 2019, the Appellant, Gregory R. LaVallee (Mr. LaVallee), pursuant to G.L. c. 31, § 42 (Procedural Appeal) and § 43 (Just Cause Appeal), filed an appeal with the Civil Service Commission (Commission) contesting the decision of the Boston Fire Department (BFD) to terminate his employment as a permanent, full-time firefighter.

On April 30, 2019, I held a pre-hearing conference at the offices of the Commission. A full hearing was held at the same location on June 17, 2019.¹ The hearing was digitally recorded and

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 Code Mass. Regs. §§ 1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

both parties were provided with a CD of the recording.² The hearing was private. The parties submitted post-hearing briefs on August 9, 2019.

FINDINGS OF FACT

Twenty-four (24) exhibits were entered into evidence (BFD Exhibits 1-19 and APP Exhibits 1-5; APP Exhibit 1 includes multiple documents marked as APP Exhibits 1A through 1M.)

Based on the these documents, the testimony of:

Called by the BFD:

- CB; BFD Firefighter;
- CH, CB's fiancée;
- BS, BFD Fire Lieutenant;
- MH, BFD Fire Lieutenant;
- JS, BFD Fire Lieutenant;
- JR, BFD Fire Captain;
- David Walsh, BFD Deputy Chief of Personnel;

Called by Mr. LaVallee:

- Scott Malone, BFD Deputy Fire Chief;
- SB, retired BFD Firefighter;
- BB, BFD Firefighter;

and taking administrative notice of all matters filed in the case and pertinent statutes, case law, regulations, policies and reasonable inferences drawn from the evidence; I make the following findings of facts:

1. At the time of his termination on March 15, 2019, Mr. LaVallee had been employed by the BFD for fourteen (14) years. He is a white male; thirty-nine (39) years old, married and has a young daughter. Prior to his employment as a firefighter, he had been honorably discharged after serving eight (8) years in the United States Navy. His last assignment with

² In a separate, but related appeal, Summering and Hayhurst v. Boston Fire Department, the parties had a transcript of this appeal (LaVallee v. BFD) prepared and I have added that transcript to the record.

the BFD was with Ladder 1, Group 3 on Hanover Street in the North End. (Testimony of LaVallee)

2. FF CB, a black male, has been a Boston firefighter for about twelve (12) years, and is also currently employed as a nurse at several local hospitals. Previously, FF CB served eight years as an Army Reservist, specializing in nuclear, biological, and chemical warfare. (Testimony of CB)
3. FF CB is assigned to Ladder 1, Group 4 at the same firehouse that Mr. LaVallee was assigned to. (Testimony of Mr. LaVallee and FF CB)
4. Although they are assigned to different Groups (3 & 4), the two firefighters occasionally worked together as a result of overtime shifts or shift swaps. (Testimony of Mr. LaVallee and FF CB)
5. CH, FF CB's girlfriend, is a nurse in a psychological ward at a local hospital, as well as a clinical nursing educator at a different local hospital, and at a local university. CH and FF CB have been in a romantic relationship for about five years. They have one child together, were expecting another at the time of the hearing, and share a home. (Testimony of FF CB and CH)
6. FF CB worked a shift swap at the Hanover Street station beginning December 12, 2018 at 6PM and extending through December 13, 2018 at 8AM. (Testimony of FF CB)
7. Between 12AM and 1AM on December 13, 2018, FF CB was in the station's TV room sitting in a recliner playing a video game called "Ark" on his Playstation gaming console. (Testimony of FF CB)
8. Mr. LaVallee, who was not on duty that night, entered the TV room with Chinese food, stumbling and smelling strongly of alcohol on his person and breath. Mr. LaVallee sat in a

chair to the right of the recliner, and asked FF CB if he would like any Chinese food. FF CB declined and Mr. LaVallee left the room. (Testimony of FF CB)

9. Shortly thereafter, Mr. LaVallee returned to the TV room, and sat in a recliner chair approximately nine (9) feet behind FF CB. FF CB heard the sounds of Mr. LaVallee eating food from a bowl. (Testimony of FF CB)
10. FF CB was, at that point, conversing with his girlfriend, CH, via the online “party chat” feature on the Playstation console. (Testimony of FF CB)
11. FF CB and CH sometimes use the online “party chat” feature on the Playstation gaming console to communicate over Bluetooth headsets, which feature a microphone and speaker allowing the users to converse in real time. When users who are “friends” in the system have activated their Playstation console, each can see that the other is online, and can invite the other to chat over the headset. (Testimony of FF CB and CH)
12. While FF CB was communicating with CH through the party chat, he heard Mr. LaVallee say “you fucking [n-word],” and then he heard Mr. LaVallee “hock a louie,” a noise that indicated to FF CB that Mr. LaVallee was clearing his throat to spit. (Testimony of FF CB)
13. CH, while communicating with FF CB through the party chat, heard Mr. LaVallee say “fucking [n-word]” and then heard Mr. LaVallee “clear his throat as if to spit.” (Testimony of CH)
14. FF CB stood up from his recliner, and exited the TV room to inform his commanding officer that night, Lt. BS, of the incident. Lt. BS was in his quarters located down a hallway outside the TV room. (Testimony of FF CB and Lt. BS)
15. When FF CB knocked on Lt. BS’s door, Lt. MH, commanding officer on the engine that night, also opened the door to his adjacent quarters. (Testimony of Lt. BS and Lt. MH)

16. FF CB told Lt. BS: “You better get fucking LaVallee out of the TV room before I punch him in the face. He’s drunk, he’s saying [n-word] this, [n-word] that, and spitting on the floor.”
(Testimony of Lt. BS)
17. Lts. BS and MH walked down the hall to the TV room, followed by FF CB. Mr. LaVallee was slouched on a couch. One of the Lts. said “come on, Greg, get up,” or similar words to that effect. Mr. LaVallee complied, and they guided him out of the TV room to the bunk room. (Testimony of FF CB, Lt. BS and Lt. MH)
18. When the Lts. addressed him as he was slouched on the couch, Mr. LaVallee’s demeanor indicated that he was intoxicated. (Testimony of Lt. BS).
19. Lt. BS told FF CB that the incoming Captain would handle the situation in the morning. FF CB informed Lt. BS that he wanted Mr. LaVallee to transfer out of the firehouse. (Testimony of Lt. BS)
20. Approximately an hour after this incident, FF CB called his girlfriend to tell her he was fine and to say good night. (Testimony of CH)
21. FF CB slept in the TV room that night, which is his normal practice. (Testimony of FF CB)
22. Lt. JS arrived at the firehouse at around 6:30AM on December 13, 2018. Firefighter CB recounted to Lt. JS that Mr. LaVallee, who was off-duty, had come into the TV room, intoxicated, started using the n-word and spat in FF CB’s direction. (Testimony of Lt. JS; BFD Ex. 13 (Lt. JS “5A” report))
23. Fire Captain JR also arrived at the firehouse around 6:30 A.M. on December 13, 2018. Lt. BS met him on the street outside the station and told Captain JR about the events of the early morning hours. Specifically, Lt. JS told Captain JR that FF CB had knocked on his door and told him that Mr. LaVallee was in the TV room “using the N-word and spitting all over the

place.” Around that same time, Lt. MH confirmed Lt. BS’s version of events to Cpt. JR.

(Testimony of Captain JR)

24. Captain JR then saw FF CB on the apparatus floor, and asked FF CB to accompany him to his office upstairs. Once in his office, FF CB told Cpt. JR that, earlier in the morning, Mr. LaVallee entered the TV room intoxicated, with Chinese food and started calling FF CB the n-word multiple times. FF CB told Captain JR that he wanted Mr. LaVallee to transfer out of the station. (Testimony of Captain JR)
25. Captain JR and Lt. JS then met with Mr. LaVallee to question him about what had occurred. Captain JR told Mr. LaVallee that FF CB had accused Mr. LaVallee of using the n-word and spitting in his direction hours earlier in the TV room. In response, Mr. LaVallee: a) said he had been trying to watch a movie in the TV room at the time; b) referenced a movie by the name of *Once Upon a Time in America*; and c) said “no, I didn’t say that” in reference to the n-word. (Testimony of Captain JR)
26. Mr. LaVallee acknowledged to Captain JR and Lt. JS that he had been drinking the night before and that he had just lost a close friend. (Testimony of Captain JR)
27. Captain JR observed that Mr. LaVallee looked “out of it” and he (Captain JR) could smell alcohol on Mr. LaVallee’s breath. (Testimony of Captain JR)
28. After that meeting, Mr. LaVallee approached FF CB on the apparatus floor of the firehouse. Mr. LaVallee stated “I could kiss you right now,” which FF CB interpreted as being “fake nice.” Mr. LaVallee further stated “I’m sorry if I said something that offended you,” or something similar, referring to the incident in the early morning hours. (Testimony of FF CB)
29. Mr. LaVallee told FF CB that Cpt. JR had asked to see the two of them, and so FF CB agreed to accompany Mr. LaVallee back to Cpt. JR’s office upstairs. (Testimony of FF CB)

30. In Cpt. JR's office, FF CB stated that Mr. LaVallee called him the n-word and spit in his direction while drunk earlier that morning in the TV room, adding that he could not work with Mr. LaVallee anymore, and wanted him to transfer. Mr. LaVallee told FF CB that he was sorry if he said anything to offend FF CB. (Testimony of Cpt. JR)
31. The incident traumatized FF CB, and he later discussed the incident with a therapist because it weighed heavily on his mind. (Testimony of FF CB)
32. Following the incident of December 13, 2018, Mr. LaVallee took leave and sought medical treatment for about one month. (Testimony of Mr. LaVallee)
33. When Mr. LaVallee returned to work, the BFD placed Mr. LaVallee on paid administrative leave while the BFD conducted an investigation of FF CB's allegations. (Testimony of Dep. Walsh)
34. The BFD asked everyone with information to complete a "5A" report and then interviewed each of them. (Testimony of Dep. Walsh).
35. FF CB's 5A report, completed on December 14, 2018 states in part:

"I was in the TV room on my playstation 4 wearing headphones and talking to my girlfriend in a party chat ... Around 12:10, I observed FF Greg Lavallo stumble into the TV room with a plate of food in his hand, visibly intoxicated. It was then confirmed through the smell of alcohol on his breath when he asked me 'if I wanted some Chinese food' to which I shook my head no.

Around 12:20, I was sitting on the brown leather recliner chair approximately 9 feet from FF Lavallo. He then said with a loathsome tone, 'Nigger...fucking nigger' and then proceeded to hock a loogie and spit twice. FF then follows with 'Nigger...I'll fuckin' fuck you up right now nigger.'" He continued this rant for approximately 30-40 seconds. I then turned around to see if FF Lavallo (sic) was possibly on the phone or watching a video, to which he was not.

My girlfriend who heard the entire interaction because FF Lavallo (sic) wasn't quiet about it asked me if 'she heard what she thought she just heard' to which I replied 'yes, I'm gonna go now.'" I then ended the playstation party chat and proceeded to walk to the officers quarters." (BFD Ex. 13)

36. During an interview on January 18, 2019, FF CB's statement to investigators largely mirrored his 5A report, except that he told investigators that Mr. LaVallee also said "Do you want to fight me?" while in the TV Room. (BFD Ex. 9)
37. During an interview on January 25, 2019, Mr. LaVallee told investigators that he had been drinking whiskey and beers prior to entering the firehouse; that he could not remember entering the firehouse that morning; that he did not remember using the n-word; and that the first thing he remembers is Fire Captain JR telling him, at around 6:30 A.M., that he (LaVallee) had been in a confrontation with FF CB. (BFD Ex. 9)
38. The BFD prepared a written summary of its investigation at the conclusion of the investigation. Under the heading "Findings" on the final page of the 8-page summary dated February 20, 2019, it states:

"The investigators find that FF LaVallee violated BFD's Rules and Regulations, including, but not limited to Rule 18.41, the City of Boston's Policy on Discrimination, Harassment and Retaliation and Zero Tolerance for Violence Policy when he made the following racial, threatening comments:

- "Nigger...fucking nigger"
- "Nigger...I'll fuckin' fuck you up right now nigger" and
- "You fucking nigger...do you want to fight me, I'll fuck you up"

and spit at FF [CB]. We base this finding on the totality of the information collected during the investigation, not merely on FF LaVallee's inability to remember the incident and his resulting inability to contradict or deny FF [CB]'s report. Rather, for the reasons detailed above, we find FF [CB]'s report credible." (BFD Ex. 9)

39. Two (2) days later, on February 22, 2019, FF CB signed and submitted an Equal Employment Opportunity Commission (EEOC) charge of discrimination with the Massachusetts Commission Against Discrimination (MCAD). That charge states in part:

“In or around December 12, 2018 I was working on Group 3 at the Boston Fire Department. Another firefighter, Mr. Greg LaValle (sic) (White), entered the fire house after having been out drinking. Mr. Lavalle (sic) was noticeably drunk, stumbling while walking around. At this point, I was speaking with my girlfriend, [CH], via headset.

Mr. Lavalle (sic) began to say ‘F***ing n***r’ or words to that effect and spitting towards me. [CH] overheard these comments and was surprised. I ended the call with [CH] and walked out of the room to inform Mr. [BS] and Mr. [MH] of what had happened. Mr. [BS] and Mr. [MH] removed Mr. Lavalle (sic) from the room and put him into the bunkroom. Mr. [BS] and Mr. [MH] did not inform the chief of this incident, as is standard protocol, stating that they would ‘deal with it in the morning’ or words to that effect.” (App. Ex. 4)

40. On February 27, 2019, the BFD preferred eight charges and specifications against Mr.

LaVallee for violations of BFD Rules and City policies. (BFD Ex. 4). On March 5, 2019, the BFD again notified Mr. LaVallee of the specifications against him and an upcoming hearing on the charges scheduled for March 14, 2019. (BFD Ex. 5).

41. The BFD held the hearing on March 14, 2019. The BFD gave Mr. LaVallee the opportunity to cross-examine witnesses and present evidence. (BFD Ex. 16)

42. Following the hearing, the three-member Hearing Board sustained all of the charges against Mr. LaVallee. (BFD Ex. 17). Fire Commissioner Joseph Finn adopted the Board’s findings and terminated Mr. LaVallee’s employment on March 15, 2019. (BFD Ex. 19).

43. In March 2011, Mr. LaVallee was suspended for four (4) tours for entering a firehouse while off-duty for making an “inappropriate racial comment” to two black firefighters. Deputy Chief Malone confirmed that the “inappropriate racial comment” included the n-word.

Legal 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 ...”

“Before such action is taken, such employee shall be given a written notice by the appointing authority, which shall include the action contemplated, the specific reason or reasons for such action and a copy of sections forty-one through forty-five, and shall be given a full hearing concerning such reason or reasons before the appointing authority or a hearing officer designated by the appointing authority. The appointing authority shall provide such employee a written notice of the time and place of such hearing at least three days prior to the holding thereof ... “

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, § 42 states in part:

“Any person who alleges that an appointing authority has failed to follow the requirements of section forty-one in taking action which has affected his employment or compensation may file a complaint with the commission . . . If the commission finds that the appointing authority has failed to follow said requirements and that the rights of said person have been prejudiced thereby, the commission shall order the appointing authority to restore said person to his employment immediately without loss of compensation or other rights.”

G.L. c. 31, § 43 states in part:

“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 . . . 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.

Analysis

As a preliminary matter, this appeal was filed under both G.L. c. 31, § 42, contesting whether the BFD properly followed the *procedural* requirements to terminate Mr. LaVallee, and G.L. c. 31, § 43, contesting whether there was *just cause* to terminate his employment. I briefly address the procedural portion of the appeal.

The BFD notified Mr. LaVallee of the specific allegations and charges against him well in advance of the pre-termination hearing. Mr. LaVallee's attorney appeared at the pre-termination hearing on Mr. LaVallee's behalf. Mr. LaVallee's attorney submitted documentary exhibits into evidence at the pre-termination hearing and called a witness in his defense. Mr. LaVallee's attorney cross-examined the BFD's witnesses. The BFD provided Mr. LaVallee with a detailed written explanation of the BFD's decision to terminate him following the pre-termination hearing including information regarding his right to file an appeal with the Commission. The BFD's decision to not provide Mr. LaVallee with a copy of FF CB's personnel file, which the Commission also denied as part of the discovery process, was justified. The BFD's decision to not provide Mr. LaVallee with a copy of FF CB's EEOC complaint, while different from the Commission's decision, was grounded in a good faith belief by the BFD that providing such information was not warranted. More importantly, that decision, standing alone, did not constitute the type of procedural error that prevented the full hearing that Section 41 requires.

That turns to the issue of whether the BFD had just cause to terminate Mr. LaVallee from his employment as a Boston Firefighter. In that regard, the Commission is, once again, faced with an appeal involving the use of the repugnant n-word. The context in which it occurred here is particularly ugly. Mr. LaVallee, a white firefighter, does not dispute that, while off-duty, he walked into the North End firehouse during the early morning hours so intoxicated that he cannot remember what transpired in the TV room where on-duty Firefighter CB, a black firefighter, was sitting.

I credit FF CB's testimony that Mr. LaVallee entered the TV room in a drunken state, sat down in a chair next to FF CB, smelling of alcohol and eating Chinese food. I also credit FF CB's testimony that Mr. LaVallee: a) briefly left; b) then re-entered the TV Room, sitting down

on recliner chairs approximately nine (9) feet behind FF CB; c) began spitting on the floor; and d) then said, “fucking n-word”.

I credit FF CB’s testimony in this regard for the following reasons. First, FF CB appeared to be genuinely outraged during his testimony before the Commission when recounting what he heard Mr. LaVallee say in the TV Room that morning. His testimony, standing alone, rang true to me. Second, FF CB immediately reported to two (2) Fire Lieutenants on duty that night that Mr. LaVallee was in the TV Room, drunk, using the n-word and spitting all over the place. The spontaneity of FF CB’s decision to report the matter reinforces that his anger and disbelief that Mr. LaVallee had used the n-word was genuine, as opposed to something that was concocted in an attempt to falsely accuse Mr. LaVallee of misconduct. Third, FF CB’s girlfriend, CH, offered credible, corroborating testimony before the Commission, stating that she heard Mr. LaVallee say “fucking n-word” when she was chatting with FF CB on the play station headset that morning. She spoke only to what she recalled hearing that morning and did not attempt to perfectly sync her testimony with FF CB’s testimony.

I did consider those factors that could potentially detract from FF CB’s testimony regarding whether Mr. LaVallee used the n-word that morning, including that FF CB has offered what appear to be conflicting statements regarding whether Mr. LaVallee made *other* statements in the TV Room that morning, discussed in more detail below. Ultimately, however, FF CB’s testimony that he recalled hearing Mr. LaVallee use the n-word that morning has been consistent and unwavering in each of his verbal and written statements that are part of the record. I also considered the testimony of a retired Boston firefighter that recalled an event many years ago in which, according to the retired firefighter, FF CB made a false allegation against a local restaurant after he (FF CB) was required to wait outside the establishment with several others

because the restaurant was nearing capacity. Even if true, that information did not change my assessment of FF CB's credibility regarding whether he heard Mr. LaVallee use the n-word on December 13, 2018. Finally, I considered testimony that Mr. Lavallee and FF CB had a verbal argument months earlier that ended with FF CB allegedly referring to Mr. LaVallee as an "asshole" and FF CB suggesting that Mr. LaVallee transfer to another firehouse. The fact that this verbal altercation occurred, however, did not change my opinion that FF CB was telling the truth regarding Mr. LaVallee using the n-word in the firehouse on December 13th.

By entering the firehouse in a drunken state and using the n-word while spitting on the floor, Mr. LaVallee engaged in substantial (and abhorrent) misconduct which adversely affects the public interest and constitutes a violation of various rules and regulations of the BFD, including conducting unbecoming a firefighter. BFD policy forbids "[c]onduct unbecoming a member, whether on or off duty, which tends to lower the [fire] service in the estimation of the public," and "[c]onduct prejudicial to good order."

The BFD also found that: a) Mr. LaVallee spat *at* FF CB in the TV Room that morning; and that b) Mr. LaVallee stated: "Nigger...I'll fuckin' fuck you up right now nigger" and "You fucking nigger...do you want to fight me, I'll fuck you up". Those findings are not supported by a preponderance of the evidence. First, a review of the record shows that FF CB never actually stated (verbally or in writing) that Mr. LaVallee spat *at* him. It appears that the word "at" was first used *by the BFD* in its investigative report. FF CB has, at different times, reported that Mr. LaVallee was "spitting"; "spitting all over the place"; and/or "spitting toward me." Further, based on FF CB's own testimony and the enlarged color photographs he submitted during his testimony, FF CB was sitting in a large recliner chair with a tall back, facing in the opposite direction of Mr. LaVallee, who was sitting on recliner chairs approximately nine (9) feet away.

While the unsavory act of Mr. LaVallee spitting on the floor while eating Chinese food and uttering the n-word, standing alone, represents substantial misconduct, the record doesn't support the allegation that Mr. LaVallee was spitting *at* FF CB that morning.

The preponderance of the evidence also does not support the finding that Mr. LaVallee stated "I'll fuck you up" and/or that he challenged FF CB to a physical fight. Based on FF CB's own 5A statement, his girlfriend heard the entire interaction between FF CB and Mr. LaVallee. As referenced above, she testified only to hearing Mr. LaVallee state: "you fucking n-word", but did not testify to hearing the additional statements referenced above. FF CB has offered divergent statements and testimony in an apparent attempt to explain this discrepancy, including belated statements that he was "muting" and "unmuting" the headphones or that he temporarily removed the headphones at one point. That's not consistent with his 5A statement and doesn't ring true to me – at all. Further, based on the credible testimony of Fire Lt. BS and Fire Lt. MH, FF CB, immediately after the interaction, did not tell them that Mr. LaVallee had made these additional threatening statements. Finally, although FF CB made this allegation regarding the additional comments in this 5A report, his own EEOC complaint does not allege that Mr. LaVallee made these additional threatening comments.

Having determined that Mr. LaVallee 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, although my findings do differ from the BFD regarding whether Mr. LaVallee spat at FF CB and whether Mr. LaVallee physically threatened FF CB, I have reached the same conclusion regarding the most serious allegation -- that Mr. LaVallee used the n-word in the firehouse in a conversation with a black, on-duty Boston Firefighter.

Prior Commission decisions have stated unequivocally that racist behavior by a public employee is grounds for termination, stating in Duquette v. Department of Correction, 19 MCSR 337, 341 (2006): "One would have hoped that this century's workplace had been purged of such offenses ... There is no place for such behavior in the workplace and there is no place for [Mr. Duquette] — or others that would engage in such behavior at the Department of Correction." When the Appellant in that appeal argued that employees who engaged in similar behavior were not terminated in the past, the Commission stated that it would not " ... use those cases as a guide (or moral compass) to lower the bar on what is considered appropriate discipline against individuals who use racist statements ..." Duquette at 340.

In Davis v. Newton Fire BFD, 27 MCSR 16 (2014), the Commission upheld the termination of a fire fighter based primarily on his engagement in racist harassment. Specifically, the Appellant in that case, Davis, who is African American, referred to another firefighter, who is biracial, as a “house n-word”; a “corn bread” and “home grown,” all derogatory references to the firefighter’s race, during a conversation about shift swaps.

In Green v. Harvard Vanguard Medical Associates, Inc., 79 Mass.App.Ct. 1 (2011), the Appeals Court, describing the n-word as a " ... racial epithet that is widely regarded as the most hateful and offensive in our culture", concluded that " ... as a matter of law, a supervisor's use of an offensive and racial epithet in a single, brief conversation was sufficiently severe or pervasive to give rise to a claim of a racially hostile work environment ...".

Mr. LaVallee argues that alcoholism, for which he has sought treatment, was the cause of his behavior and should be taken into consideration regarding whether termination is the appropriate penalty here. I am not unsympathetic to Mr. LaVallee’s challenges with alcoholism and applaud his efforts to seek treatment. However, this is the second time that Mr. LaVallee has been disciplined for using the n-word. In 2011, he engaged in the exact same egregious misconduct, entering a firehouse while off-duty, and using the n-word in reference to two (2) black firefighters. In that context, a downward modification of the penalty is not warranted here.

Conclusion

For all of the above reasons, Mr. LaVallee’s appeal under Docket No. D1-19-059 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 December 5, 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:

Kevin Mullen, Esq. (for Appellant)
John Greene, Esq. (for Appellant)
Devin Guimont, Esq. (for Respondent)
Barbara Parker, Esq. (for Respondent)
Connie Wong, Esq. (for Respondent)