

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108
(617) 979-1900

THERESA HUSSEY-ROGERS,
Appellant

D-18-041

D-18-102

v.

CITY OF SOMERVILLE,
Respondent

Appearance for Appellant:

Dennis M. Coyne, Esq.
McDonald, Lamond, Canzoneri
352 Turnpike Road, Suite 310
Southborough, MA 01772-1756

Appearance for Respondent:

Shannon T. Phillips, Esq.
Assistant City Solicitor
City of Somerville
93 Highland Avenue
Somerville, MA 02143

Commissioner:

Paul M. Stein

DECISION (CORRECTED)

The Appellant, Theresa Hussey-Rogers, acting pursuant to G.L.c.31,§43, brought these two appeals to the Civil Service Commission (Commission) challenging the decision of the Respondent, City of Somerville (Somerville) to suspend her for a total of thirty (30) days from her position as a Foreman in the Sewer Division of the Somerville Water & Sewer Department (WSD).¹ The Commission held a pre-hearing conference in Boston on May 22, 2018 and held a full hearing at that location on August 9, 2018, October 2, 2018 and December 16, 2018, which was digitally recorded.² As neither party requested a public hearing, the full hearing was declared private, with witnesses

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

² CDs of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CD to supply the court with the stenographic or other written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

sequestered. Forty-one (41) exhibits (*Exhs.1–30 & 34–44*) were received in evidence.³ The Commission received Proposed Decisions on March 8, 2019. For the reasons stated below, Ms. Hussey-Rogers’s appeals are allowed, in part, and modified to 10-day suspension.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by Somerville:

- John DeLuca, Somerville WSD Director
- Matthew Gagnon, Somerville WSD Engineer
- Mark Lawhorne, Field Operations Manager, Somerville WSD
- Rich Raiche, Somerville Interim Director of Capital Projects
- Candace Cooper, Somerville Personnel Director

Called by the Appellant:

- Theresa Hussey-Rogers, WSD Sewer Division Foreman, Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Theresa Hussey-Rogers, is a tenured Somerville civil service employee with over 28 years of service. For the past eleven (11) years, she has held the position of Foreman in the Sewer Division of the Water & Sewer Department (WSD). (*Stipulated Facts; Testimony of Appellant*)

2. Ms. Hussey-Rogers’ years of working around heavy machinery has left her with hearing loss which can sometimes cause her to speak more loudly than normal. (*Testimony of Appellant*)

3. As Sewer Division Foreman, Ms. Hussey-Rogers supervises the Sewer Division’s four Special Heavy Motor Equipment Operators (SHMEOs), who handle maintenance and repair of the city’s municipal sewer and drainage lines, catch basins and manholes. She has responsibility to

³Exhs.31, 32 & 33 were marked for Identification (ID).

assign work, enforce discipline, oversee preventative maintenance, respond to emergencies and communicate with the public. (*Exh.23; Testimony of Appellant, DeLuca & Cooper*)

4. Apart from the incidents that gave rise to this appeal, Ms. Hussey-Rogers has been regarded as a competent, professional employee who is devoted to her work. She received accolades from Somerville residents, the Somerville Mayor and other city managers, for her customer satisfaction and otherwise solid performance record. Until the events that gave rise to this appeal, she was subject to one prior discipline, a one-day suspension in 2007, which this Commission overturned on appeal.⁴ (*Exhs.1, 22 & 44; Testimony of Appellant*)

5. The WSD includes the Water Division and Sewer Division field staff, who are directly supervised by Mark Lawhorne, the WSD Field Operations Manager. The WSD employs a total of 20 personnel, including the WSD Engineer, Matthew Gagnon, who shares an office with Mr. Lawhorne. (*Exhs.26A through 26F; Testimony of DeLuca, Lawhorne & Gagnon*)

6. The WSD is headed by John DeLuca, who became the WSD Director in May 2017, after thirteen (13) years as the Assistant director of Water & Sewer for the Town (now City) of Framingham. Mr. DeLuca's office is connected through an inside door to the office occupied by Messrs. Lawhorne and Gagnon and also has access through a second door to the corridor that runs the length of the building which includes a file/storage area and exterior access at the opposite end of the corridor. (*Exhs.25, 26D through 26F; Testimony of DeLuca, Lawhorne & Gagnon*)

7. Ms. Hussey-Rogers's office is located across the DPW yard from the building where the offices of Messrs. DeLuca, Lawhorne and Gagnon are located. There are multiple security cameras placed throughout the DPW yard with clear views of all persons entering and exiting Ms. Hussey-

⁴ The Commission concluded that the suspension was unlawfully motivated by an animus against Ms. Hussey-Rogers by a former supervisor for successfully pursuing a gender discrimination claim at the Massachusetts Commission Against Discrimination (MCAD). (*Exh.44*)

Rogers' office and the building where Mr. DeLuca's office is located. (*Exhs.37A through 37E & 38ID; Testimony of Appellant*)

The Mondamin Court Incident

8. On May 30, 2017, Ms. Hussey-Rogers, along with one of the SHMEOs on her staff, responded to a call for service from a homeowner on Mondamin Court for a suspected sewer back-up. (*Exhs.10, 25 & 27; Testimony of Appellant*)

9. Upon arrival, Ms. Hussey-Rogers spoke with the elderly homeowners who showed her where water was leaking into the basement. She first contacted the Water Department, who arrived and verified there were no water line leaks, and then proceeded to the end of Mondamin Court where the SHMEO had opened the manhole and showed her that there was a back-up in the sewer system. She directed the SHMEO to "jet" the line, meaning use a high-pressure hose carried on the "vactor-jetter truck" (which the SHMEO had brought to the scene) to flush out the line. (*Exhs.10 & 27; Testimony of Appellant*)

10. While the SHMEO was jetting the sewer line, Ms. Hussey-Rogers proceeded to check other nearby manholes, including on Beacon Street and other connecting streets, to confirm that the jetting was relieving the line. (*Testimony of Appellant*)

11. As Ms. Hussey was checking the lines, she got a call from Mr. DeLuca, who asked where she was, and she identified the street (Ivaloo) she was on near Mondamin Court and said it was "off Beacon". Being new to Somerville, Mr. DeLuca went to the wrong area of Somerville looking for the street where Ms. Hussey-Rogers told him she was. When he eventually arrived on scene, he was upset with Ms. Hussey-Rogers. She claimed he believed she gave her the wrong street address "on purpose" to send him on a "wild goose chase" to find her. (*Testimony of Appellant; Administrative Notice [<https://www.google.com/maps> [Ivaloo St,Somerville,MA 02143]]*)

12. Mr. DeLuca asked whether the line had been jetted. The SHMEO reported that he had “jetted by the connection”, which meant that the sewer line was clear. Mr. DeLuca then directed Ms. Hussey-Rogers to accompany him to the house where the leakage was occurring. He directed Ms. Hussey-Rogers to retrieve material from her truck so that **he** could perform a “dye test” that, together with the SHMEO’s report that the line had been jetted, confirmed **to him** that the problem was not the WSD’s responsibility, but something in the homeowner’s system that a private plumber needed to fix. Mr. DeLuca considered the matter closed. He directed Ms. Hussey-Rogers that there was no need for further follow-up on her part. (*Exh.27; Testimony of Appellant & DeLuca*)

13. In fact, the SMHEO had not jetted the line as far as he had reported to Ms. Hussey-Rogers and Mr. DeLuca, but had only jetted approximately six (6) feet down Mondamin Court when he hit a “sinkhole” and stopped well short of the sewer connection to the residence in question. (*Exhs.27 & 35; Testimony of Appellant, DeLuca and Cooper*)

14. Approximately two weeks later, the system again failed and required extensive repairs that were absorbed by the WSD. Ms. Hussey-Rogers was not on duty at the time and she was not involved in this subsequent incident and repair. (*Exh.27; Testimony of Appellant & DeLuca*)

15. On June 19, 2017, Somerville Personnel Director Candace Cooper placed Ms. Hussey-Rogers on paid administrative leave, ordering her to forfeit her keys, ID card and all city equipment, pending an investigation into her alleged misconduct in handling the May 30, 2017 Mondamin Court incident. She remained on administrative leave for fourteen (14) weeks and, on October 2, 2017, Ms. Cooper suspended her for two days. Neither the SHMEO nor Mr. DeLuca were disciplined. (*Exhs.10, 27, 28 & 36; Testimony of Appellant & Cooper*)

16. The basis for the discipline rested on Ms. Hussey-Rogers failure to adhere to an alleged “established policy” that required two (2) persons to be present during any jetting operations. Ms. Hussey-Rogers did not appeal this discipline to the Commission, and this Decision does not address

merits of that discipline. Ms. Hussy-Rogers vigorously denied that any such “two-person” policy existed, however, and protested what she considered an unnecessarily prolonged, sham investigation, writing letters in October 2017 to Ms. Cooper (10/11/2017 & 10/13/2017) and to the former Somerville Board of Aldermen (10/11/2017, 10/18/2017 & 10/23/2017). In addition, her union filed an unfair labor practice (ULP) complaint over the issue and, on May 9, 2018, the Division of Labor Relations found probable cause to believe that Somerville’s failure to properly bargain for the creation of a “two person” rule stated a violation of G.L.c.150E. (*Exhs.34, 35, 37 & 45; Testimony of Appellant; Administrative Notice [“Complaint of Prohibited Practice and Partial Dismissal”, In Re City of Somerville et al, DLR Case No. MUP 17-6038 (May 9, 2018), attached to Appellant’s Proposed Decision]*)

The December 8, 2017 Incident

17. On Monday, December 4, 2017, Ms. Hussey-Rogers wrote to the newly elected Board of Aldermen, renewing her complaint about the “serious miscarriage of justice in my workplace”, calling Ms. Cooper’s investigation into the Mondamin Court incident a “sham and a witch hunt to cover up their wrongdoings” and how she was “treated like a criminal” by being forced out on administrative leave without notice or opportunity to be heard and kept out on leave for 14 weeks. (*Exh.36; Testimony of Appellant*)⁵

18. Also, on December 4, 2017, Ms. Hussey-Rogers emailed Mr. DeLuca and Mr. Lawhorne to inform them that, since she came back to work after her 14 weeks of administrative leave and two-day suspension, her crew was not complying with certain job requirements, including signing in and

⁵ No direct evidence was introduced to establish that Ms. Cooper and Mr. DeLuca ever saw the letters Ms. Hussey-Rogers wrote to the Board of Aldermen. Both Mr. Gagnon and Ms. Cooper acknowledged that Ms. Hussey-Rogers had informed her that she was writing to the Board of Aldermen, but neither one actually saw what she sent. Mr. DeLuca gave conflicting testimony about his knowledge of Ms. Hussey-Rogers’s complaints. He initially denied knowing that Ms. Hussey wrote to the Board of Aldermen but, later, said that he had heard a “rumor” she “sent something to somebody” but that it was “none of my concern.” (*Testimony of Cooper, Gagnon & DeLuca*)

out and remembering to take their “walkie-talkie” radios when they go out to a work site. She asked them to “help me out please.” (*Exhs.29, 30 & 43; Testimony of Appellant*)

19. On Tuesday, December 5, 2017, Mr. DeLuca met with Ms. Hussey-Rogers and her crew and addressed her complaints, telling the crew they needed to remember to sign in and sign out and to take their walkie-talkie radios with them. (*Exh.4, 5, 11, 29 & 30; Testimony of Appellant, DeLuca & Cooper*)

20. On Thursday, December 7, 2017, with no improvement in the situation, Ms. Hussey-Rogers sent Mr. DeLuca another, more detailed email message which stated, in part:

“Since my return to work . . . there is unquestionably a change in attitude toward me by several Sewer Employees. . . . I’m not sure the meeting we had on Tuesday helped much . . . [Employee] still refuses to take the radio and . . . yesterday [two Employees] both refused . . . Also yesterday at 1:15 pm I asked [two Employees] to go to the Police station to clean the basin [and] they returned to the dpw yard at 3:30. I asked [Employee] what they did for the last 2 hours and his reply was ‘we did nothing’. . . . [P]rior to June 19, 2017, besides a couple of issues when I assigned work or asked my workers to do a job assignment, I was never second guessed (sic) questioned or forced to repeat myself. . . . [R]egardless of this misogynistic attitude, I won’t stand for insubordination or allow anyone to disrespect me or my position as Foreman. Are you aware of anything that was said or happened . . . while I was out of work that would explain the drastic changes in the workers[‘] behavior? Going forward when any of these act (sic) occur I will inform you and I expect and hope the appropriate discipline actions to be taken. Thank you. Theresa.”

(*Exh.11; Testimony of Appellant*)

21. Mr. DeLuca had jury duty on December 7, 2017 and did not see Ms. Hussey-Rogers’s memo until arriving to work the following day. (*Testimony of DeLuca*)

22. As confirmed by the WSD phone logs, at 7:41 a.m. on December 8, 2017, after reading Ms. Hussey-Rogers’s December 7, 2017 e-mail, Mr. DeLuca called her and asked her to send her crew over to his office. When the crew had not yet reported, he followed that up with another call at 7:51 a.m. The crew arrived shortly thereafter. (*Exh.14; Testimony of Appellant & DeLuca*)

23. After speaking with the crew, as confirmed by the call logs, at 8:46 a.m., Mr. DeLuca again called Ms. Hussey-Rogers. He asked her to come to his office. (*Exh.25; Testimony of Appellant*)⁶

24. Ms. Hussey-Rogers spent a few minutes to collect some documents to bring with her, which included a check-list she maintained about on-going sewer projects, as well as some photographs taken to document her efforts to enforce the requirements that her crew sign in and out and remember to carry their radios when they were out on assignments. She left her office and walked across the WPD yard to Mr. DeLuca's office, arriving there shortly before 9:00 a.m. (*Exhs.29, 30, 57A-37E, 378ID [Chalk],39, 40A, 40B & 41; Testimony of Appellant*)

25. When Ms. Hussey-Rogers arrived at Mr. DeLuca's office, she stopped to speak to WSD Operations Manager Mark Lawhorne just outside Mr. DeLuca's office. Mr. Lawhorne recalled their conversation, in which Mr. DeLuca also participated, in part, covering several routine operational issues, including "what they're going to do for the day and what they did the night before" and closing out "a couple of 311 constituent issues". Ms. Hussey-Rogers then went into Mr. DeLuca's office. Mr. Lawhorne remained outside Mr. DeLuca's office. Shortly thereafter, he left the area to retrieve some files. (*Exhs.8 & 9, 26A-26D; Testimony of Appellant & Lawhorne*)

26. After Ms. Hussey-Rogers entered Mr. DeLuca's office, they sat down at a conference table opposite one another and the two of them continued to talk. Mr. DeLuca told Ms. Hussey-Rogers that he "talked to the guys about the issues in her email and, if it happens again . . . don't hesitate to come over and say something." They also discussed locating cameras at "Buena Vista" and "Derby" and Ms. Hussey-Rogers made notes about this subject on the check-list she brought with her to the

⁶At the Commission hearing, Mr. DeLuca testified that he did not recall making the 8:46 a.m. call or asking Ms. Hussey-Rogers to come to his office. This testimony conflicts with other versions he provided during the investigation of the incident and at the Appointing Authority hearing, when he said that, maybe, the call was a "pocket dial" but also stating that he may have called Ms. Hussey-Rogers before she came to his office to "give her the findings" from his meeting with the crew. At another point, however, he said the call had to have been after he had met with Ms. Hussey-Rogers and related some other matter. Because of these and other discrepancies, as explained later in this Decision, Mr. DeLuca's recollections of his encounters with Ms. Hussey-Rogers on the morning of December 8, 2017 receive diminished weight. (*Exh.s4 through 7 & 25; Testimony of DeLuca*)

meeting, using a purple pen that Mr. DeLuca handed to her. (*Exhs.26C, 26D, 29, 30 & 41; Testimony of Appellant*)⁷

27. At some point, Ms. Hussey-Rogers brought up the subject of Mondamin Court and asked Mr. DeLuca why he “put her out” over the Mondamin Court incident. Mr. DeLuca said he could not talk about that and then he asked her what she thought of him as a boss. Ms. Hussey-Rogers admitted that she told him “off the record” that he was a terrible boss, that nobody in the WSD liked him and she heard nobody liked him in Framingham where he came from. She said Mark Lawhorne had been a better boss than him, “we never had these problems” before and it “really sucks” how she has been treated since he came along. (*Exhs.29 & 30; Testimony of Appellant*)

28. After Ms. Hussey-Rogers finished her critique of Mr. DeLuca, their conversation returned to operational issues. She specifically recalled DeLuca telling her to make sure she got back to him after she checked the work on Buena Vista and Derby. She reminded him to order some manhole “ring and covers” to which he responded: “Thank you. I always forget.” (*Exhs.29 & 30, Testimony of Appellant*)

29. The door to Mr. DeLuca’s office leading to the office occupied by Messrs. Lawhorne and Gagnon remained “open or ajar” throughout the encounter. (*Testimony of DeLuca*)

30. Mr. Lawhorne estimated that Ms. Hussey-Rogers spent 12 to 15 minutes in Mr. DeLuca’s office. He heard her raise her voice, not loud enough that he was able to make out anything specific that she said., nor was Mr. Gagnon able to hear what was said. (*Exhs.2,3,8 & 9: Testimony of Gagnon & Lawhorne*)

⁷ Ms. Hussey-Rogers’s original checklist was introduced in evidence, showing these purple handwritten notes. (*Exh.41*). Mr. DeLuca had no memory of discussing operational issues during his December 8, 2017 morning meeting with Ms. Hussey-Rogers, but he does agree that December 8, 2017 as “probably” the date that it was “very possible” that the camera work at “Buena Vista” she described, did commence. (*Testimony of DeLuca*)

31. After leaving her meeting with Mr. DeLuca, Ms. Hussey-Rogers located Messrs. Gagnon and Lawhorne, who were then in the corridor near the file area. She described her conversation with Mr. DeLuca. In a statement prepared by Mr. Lawhorne that same day, he confirmed that she told them she had called Mr. DeLuca a terrible boss and said to them that she “did not pull punches” and called Mr. DeLuca a “f*****g a*****e” and “everyone hated him”, and, of particular concern, she repeated a rumor that she had been told by some (anonymous source) who knew him in Framingham that they “all hated him as well”. She also said that Mr. Lawhorne was a better boss, that they had no “problems” when he was in charge and, when Mr. DeLuca came, he “ruined a good environment.” This statement bothered Mr. Lawhorne who told her she should not have brought him into the situation. (*Exhs.2, 3, 8, 9 16, & 26E; Testimony of Gagnon & Lawhorne*)⁸

32. Ms. Hussey-Rogers then departed (shortly after 9:00 a.m.) to attend to business as usual for the day. She emailed Mr. DeLuca a status report at 10:46 a.m. The WSD phone records show that she called Mr. DeLuca at 11:56 a.m. to give him a progress report but he did not answer. (His calendar indicates he was then in a meeting off-site). She returned to his office at about 1:15 p.m. and found Mr. DeLuca in another (previously scheduled) meeting with Somerville Personnel Director Candace Cooper and the Water Department Foreman.⁹ She informed Mr. DeLuca that the Buena Vista job needed his approval for a detail [police officer] and that [saw] horses would be need to be put out. Mr. DeLuca said “OK”. (*Exhs.24, 25, 29, 30, 41 & 42; Testimony of Appellant & DeLuca*)

33. After finishing the Water Department meeting, Mr. DeLuca then told Ms. Cooper that he had another issue to discuss. He described the encounter with Ms. Hussey-Rogers that morning, calling

⁸ At the Commission hearing, Ms. Rogers denied using any vulgarity other than saying, as noted above, that she thought it “sucks” how he treated her. (*Testimony of Appellant*)

⁹ This meeting concerned an unrelated labor matter. (*Exh.25; Testimony of DeLuca & Cooper*).

her behavior “harassing and insubordinate”, said he did not feel safe around her and “strongly recommended” her termination. (*Exhs.15 & 25; Testimony of DeLuca & Cooper*)

34. At approximately 3:40 pm that afternoon, Ms. Cooper called Ms. Hussey-Rogers to her office and delivered a letter placing Ms. Hussey-Rogers on administrative leave (with pay) pending an internal investigation into allegations of her “grossly inappropriate” conduct toward Mr. DeLuca. She was ordered to leave the premises immediately, surrender her keys, ID and other Somerville property, and to report on December 12, 2017 for another meeting to discuss the matter. Ms. Hussey-Rogers was stunned and told Ms. Cooper she thought she had a “good meeting” with Mr. DeLuca. (*Exhs.12 & 13*)

35. Ms. Cooper thereafter received written statements from Mr. Lawhorne (dated December 8, 2017), Mr. DeLuca (dated December 11, 2017) and Mr. Gagnon (undated).¹⁰ She then met with Ms. Hussey-Rogers on December 12, 2017, interviewed Messrs. Lawhorne, Gagnon and DeLuca on December 18, 2017¹¹, and interviewed Mr. DeLuca again on January 23, 2018 to discuss the questions raised by the production of the WSD phone logs which appeared to present a different timeline than what Mr. DeLuca said he recalled at his initial interview. (*Exhs.2 through 9, 12, 15 through 17, 229 & 30: Testimony of Appellant, Cooper, DeLuca, Gagnon & Lawhorne*)

36. By letter dated February 1, 2018, Ms. Cooper provided Ms. Hussey-Rogers with an “Executive Summary” of the investigation she conducted into Ms. Hussey-Rogers’ alleged misconduct, as well as an investigation into allegations of mistreatment raised by Ms. Hussey-

¹⁰ Mr. DeLuca testified that his December 11th statement was based on “scratch notes” taken during his meeting with Ms. Hussey-Rogers to “record some times and all the words that were said” and that he “read my notes” to Ms. Cooper at the meeting on December 11. I do not credit this testimony. No such notes were produced. Ms. Cooper did not recall Mr. DeLuca reading from his notes and the only note Ms. Cooper remembers seeing at the December 8th meeting was a scrap of paper with a date and “8:25” written on it. (*Exhs.15 & 25; Testimony of DeLuca and Cooper*)

¹¹ During the December 18, 2017 interview, among other things, Mr. DeLuca told Ms. Cooper that he was worried that Ms. Hussey-Rogers would “do or say something to make me lose my pension” and said he “can’t jeopardize my future because of Theresa” and would do what he needed “to protect myself if the City won’t protect me.” (*Exhs.4 & 5; Testimony of DeLuca*)

Rogers in her email to Mr. DeLuca dated December 7, 2017. The allegations of mistreatment by Ms. Hussey-Rogers were found to be unsupported. A “show cause” hearing was scheduled to determine whether to impose a five-day suspension for Ms. Hussey-Rogers alleged misconduct. (*Exhs.18 & 21*)

37. Ms. Hussey-Rogers was represented by counsel but did not testify at the “show cause” hearing. By letter dated February 28, 2018, Ms. Cooper imposed a five-day suspension (the maximum discipline that may be imposed without a prior hearing) and continued her administrative leave thereafter, pending further disciplinary action after hearing before the Appointing Authority (the Mayor). (*Exh.19*)

38. On April 20, 2018, a hearing on appeal of the five-day suspension and a just cause hearing on further discipline was held before a hearing officer designated by the Mayor. Ms. Hussey-Rogers again was represented counsel but did not testify. After hearing testimony from Mr. DeLuca and Ms. Cooper, and taking documentary evidence, the hearing officer found that Ms. Hussey-Rogers had “acted in an unprofessional, inappropriate, threatening retaliatory and hostile manner toward Mr. DeLuca on December 8, 2018”. He concluded that just cause existed for the five-day suspension as well as an additional twenty-five-day suspension. (*Exh.20*)

39. In reaching his conclusion, the hearing officer stated that he took into account that: (a) the Collective Bargaining Agreement (CBA) entered into by Somerville with the Somerville Municipal Employees Association prohibits, among other things “[u]se of profanity or objectionably/offensive language in the presence of any other employee, once such conduct has been identified as unacceptable by individuals present, and even if it is . . . ‘shop talk’ ” and “harassment of any sort”; (b) as a supervisor, Ms. Hussey-Rogers should “lead by example”; (c) Ms. Hussey-Rogers was “attacking Mr. DeLuca for her perceived mistreatment in the Mondamin incident”, but neither that prior discipline nor any “bias or prejudice” played any part in Ms. Cooper’s decision to impose the

five-day suspension or to recommend that the Mayor impose additional discipline; and (d) because Ms. Hussey-Rogers chose not to testify, the hearing officer was unable to assess her credibility and applied an adverse inference, rejecting her denial that she “swore or berated Mr. DeLuca”, whose testimony he found credible. (*Exh.20*)

40. By letter dated May 21, 2018, the Mayor adopted the findings of fact and conclusion of law contained therein, upheld the five-day suspension and suspended her for an additional 25 days. In particular, the Mayor stated that his decision was based on the following:

“Based on evidence and testimony introduced at the hearing, you behaved in an unprofessional, inappropriate, threatening, retaliatory and hostile manner toward your supervisor John DeLuca, Director of Water and Sewer on December 8, 2017. You then left his office and immediately relayed your comments to Mr. DeLuca to Mark Lawhorne and Matt Gagnon of the Water and Sewer Department. The accuracy of Mr. DeLuca’s description of your behavior, and essentially the same details of the conversation with Mr. DeLuca, were confirmed by Mr. Lawhorne in both a written statement and his testimony at the hearing. You are a supervisor within the Water and Sewer Department and should lead others by example.”

(*Exh.20*)

41. These appeals from the five-day suspension and 25-day suspension duly ensued. (*Claims of Appeal*)

APPLICABLE LEGAL STANDARD

G.L.c.31,§41-45 allows discipline of a tenured civil servant for “just cause” after due notice, hearing (which must occur prior to discipline other than a suspension from the payroll for five days or less) and a written notice of decision that states “fully and specifically the reasons therefore.” G.L.c.31,§41. An employee aggrieved by such disciplinary action may appeal to the Commission, pursuant to G.L.c.31,§42 and/or §43, for de novo review by the Commission “for the purpose of finding the facts anew.” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006)

and cases cited. As prescribed by G.L.c.31,§43,¶2, the Appointing Authority bears the burden of proving “just cause” for the discipline imposed by a preponderance of the evidence.

“If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee, by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.” (Emphasis added)

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., 359 Mass. 211, 214 (1971); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) See also Mass. Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001).¹²

The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass.App.Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983) The Commission is guided by “the principle of uniformity and the ‘equitable treatment of similarly situated individuals’ [both within and across different appointing authorities]” as well as the “underlying purpose of the civil service system ‘to guard against political considerations, favoritism and bias in governmental employment decisions.’ ” Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of “merit principles” which govern

¹² The credibility of live testimony lies with the hearing officer. E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003). See Embers of Salisbury, Inc. v. 37 Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Ret. Bd. of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003) (assessment of conflicting testimony cannot be made by someone not present at the hearing).

civil service law that discipline must be remedial, not punitive, designed to “correct inadequate performance” and “separating employees whose inadequate performance cannot be corrected.” G.L. c.31,§1.

G.L.c.31, Section 43 vests the Commission with “considerable discretion” to affirm, vacate or modify discipline but that discretion is “not without bounds” and requires sound explanation for doing so. See, e.g., Police Comm’r v. Civil Service Comm’n, 39 Mass.App.Ct. 594, 600 (1996) (“The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio . . . accorded the appointing authority”) See also Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983).

ANALYSIS

Somerville has shown, by a preponderance of the evidence, that Ms. Hussey-Rogers admitted that she engaged in certain inappropriate, unprofessional, and insubordinate behavior toward Mr. DeLuca that properly warranted remedial action. After carefully reviewing the testimony and documentary evidence, however, I find that the conflicting evidence presented at the Commission hearing about what actually transpired at the December 8, 2017 meeting too inconclusive to establish by a preponderance of evidence the more serious charges of “threatening” or “retaliatory” workplace conduct. Accordingly, I conclude that the Commission should exercise its discretion to modify the discipline to a 10-day suspension for a first offense of this nature as the appropriate level of remedial discipline.

First, I agree with Ms. Hussey-Rogers that, for several reasons, the events of December 8, 2017 cannot be fully understood without taking notice of the earlier incident at Mondamin Court. Although the discipline was not appealed to the Commission, the present appeal is inextricably intertwined with certain facts involved in that prior episode. Specifically, at the time of the December

8, 2017 incident, Ms. Hussey-Rogers was actively pursuing a complaint with the Board of Aldermen, through regular channels, about her treatment which, in addition to the suspension itself, included her outrage at being humiliated and unreasonably kept out of administrative leave for 14 weeks for what was determined to be a minor offense (two-day suspension), imposed in reliance on a violation of the disputed “two person” work rule and implicating no misconduct that required her summary removal from the workplace for such an extended period. Her union grieved the matter that resulted in the discipline (not following a “two person” rule for jetting a line), which eventually resulted in a finding of probable cause for a ULP violation (issued after the Mondamin discipline, but before the final discipline imposed by the Mayor in these appeals).

Similarly, I take notice of the fact that Somerville neither disciplined or admonished the SHMEO, who performed the jetting and misled both Ms. Hussey-Rogers and Mr. DeLuca about what he did, nor addressed Mr. DeLuca’s role, although he was the senior manager “on scene” and was responsible for the initial decision to close the matter. Thus, this background was clearly on Ms. Hussey-Rogers’ mind when she asked Mr. DeLuca why he had “put her out” for her part in that incident. Since she did not appeal her discipline for her part in the Mondamin Court incident, I cannot reach any conclusion about whether or not the discipline in the Mondamin Court matter was or was not appropriate. I do take note, however, that it does explain the context for Ms. Hussey-Rogers’ harsh critique, which, at least, from her perspective, had a legitimate basis.

Second, I cannot credit Mr. DeLuca’s uncorroborated testimony about the details of the encounter in his office on December 8, 2017. Mr. DeLuca’s supposedly relied on the contemporaneous notes he took, but no one else saw such notes, they were not produced, and I do not credit that testimony. The phone logs and his calendar are inconsistent with his shifting memory. Somerville operated numerous video cameras that would have confirmed Ms. Hussey-Rogers’ travel, but Somerville could not explain why no films could be produced. It defies common sense to believe that Ms.

Hussey-Rogers showed up unannounced, not for the purpose of getting a report on the meeting with her crew and discussing the operational details of the day, but solely to rant against Mr. DeLuca. Nor does it make sense that, after she had behaved so badly that he was put in fear of physical harm, he would then ask her to sit down and tell him what she thought of him. It does also not make sense that he was truly in fear of harm when the meeting turned back into a cordial exchange and ended with discussion about routine matters, the documented follow-up later in the day was business as usual, and he waited until late afternoon to put Ms. Cooper on notice of an alleged imminent threat.

Other material discrepancies in his testimony include:

- Mr. DeLuca said at his December 18, 2017 interview that his encounter with Ms. Hussey-Rogers lasted about “2 minutes”; at the Commission hearing he said it was five minutes. He said Ms. Hussey-Rogers spent the whole-time ranting and swearing at him and they did not discuss any operational matters.
- In rebuttal testimony before the Commission, after hearing Ms. Hussey-Rogers’ testimony, Mr. DeLuca admitted that the Buena Vista camera work did “probably” begin on December 8, 2017 as Ms. Hussey-Rogers had testified.
- He testified that the meeting began about 8:15 am when Ms. Hussey-Rogers “stuck her head in” his office and ended at 8:25, the time that he said he noted on his “scratch notes” he showed to Ms. Cooper, but which he could not produce.
- His encounter caused him to be late for a 9:00 a.m. meeting in the building.¹³

¹³ This fact was confirmed by Rich Raiche who conducted that meeting in an interview with Ms. Cooper on January 23, 2018 and in his testimony before the Commission. (*Exhs.7 & 24: Testimony of Raich & DeLuca*)

- He initially denied making the 8:46 a.m. call to summons Ms. Hussey-Rogers to his office. When shown the phone logs at his second interview on January 23, 2018, he remembered the call and thought it was a “regular business call but can’t say for sure” what it was about.
- At the appointing authority hearing, he testified that, after meeting with the Sewer Department crew about Ms. Hussey-Rogers’ concerns, he did “called her on the phone”.
- At the Commission hearing, Mr. DeLuca said he “never did” make a phone call to update Ms. Rogers on the meeting with her crew. He did not recall his prior testimony to the contrary. He said the 8:46 a.m. call on the phone log “might have been a pocket dial.”
- He testified that Ms. Hussey-Rogers became so “verbally abusive” and “aggressive” that he feared that she was “going to try something” and maybe “swing a fist”, so he said to her: “Why don’t you take a seat and tell me what you think about me.” He said they then both sat down across a table, she continued ranting, using even more vulgar and disparaging language. He said nothing and she “got up and walked out.”

In sum, the preponderance of the evidence proves that Ms. Hussey-Rogers came to see Mr. DeLuca at his invitation, that most of the 15 to 20 minute meeting that morning covered business routine matters and was conducted in a civil manner, both before and after the subject of her opinion of Mr. DeLuca came up. Ms. Hussey-Rogers’ other contacts throughout the rest of the day – email and in-person – also were routine and totally professional.

I find that Ms. Hussey-Rogers was brutally honest about her feelings when invited by Mr. DeLuca to tell him what he thought of him as a boss, but I do not credit Mr. DeLuca’s uncorroborated version of everything he claimed she said to him which I conclude he exaggerated. Messrs. Lawhorne and Gagnon did not personally hear Ms. Hussey-Rogers use vulgarity, but I do credit what Mr. Lawhorne reported in his statement written almost immediately after the encounter. Thus, the preponderance of the evidence does prove that Ms. Hussey-Rogers crossed the line of what is acceptable workplace

conduct for a supervisor when interacting with her Department Head and other WSD employees. The preponderance of the evidence established that she admitted to Mr. Lawhorne (her direct supervisor) and to Mr. Gagnon that she “did not pull punches” and acknowledged that she had called Mr. DeLuca a “f*****g a*****e” and “everyone hated him”, and, of particular concern, she repeated a rumor that she had been told by some (anonymous source) who knew him in Framingham that they “all hated him as well” A supervisor should know to express criticism constructively, not emotionally, and to refrain from vulgarity and rumor-mongering. Certainly, Ms. Hussey-Rogers would not tolerate such behavior from any member of her crew.

In sum, I conclude that the preponderance of the evidence established that Ms. Hussey-Rogers was insubordinate and did act inappropriately and unprofessionally by expressing profanity and unsourced rumors and, then, repeating what she said to Mr. Lawhorne and Mr. Gagnon. To this extent, discipline is justified. I cannot conclude, however, that her behavior rose to the level of “threats”, “and “retaliation” or put Mr. DeLuca in any reasonable fear for his safety, as he and Somerville claimed.

Finally, I take account, as I must, of the fact that Somerville was entitled to draw an adverse inference from Ms. Hussey-Rogers’ failure to testify at the Appointing Authority hearings. While I take her point that the result of such hearings were a foregone conclusion, the Commission must not ignore her decision not to put forward her defense and allow the fact-finder to weigh conflicting testimony, especially when credibility is on the line. Somerville’s decision to draw the adverse inference, is a factor that I weighed when deciding the degree to which the discipline should be modified. Had she been more forthcoming, at the appointing authority level and at the Commission hearing, I could have justified a lesser discipline than I recommend here.

On the other hand, I have also weighed Ms. Hussey-Rogers’ positive, prior record of discipline, which included only a one-day suspension that was overturned by this Commission and a two-day

suspension for sub-standard performance in the Mondamin Court incident. Apart from that incident, she has a solid record of performance over her twenty-eight (28)-year career, eleven (11) as a supervisor. This is the first time she has been disciplined or counseled for insubordination. Without any prior record of such behavior, under all of the circumstances I have described, I conclude that a ten-day suspension is sufficient remedial discipline consistent with basic merit principles for of the misconduct that was proved.¹⁴

CONCLUSION

For these reasons, the Appellant's appeals in Case Nos. D-18-041 and D-18-102 are **allowed, in part**, and the discipline is modified to a ten (10) day suspension.

Civil Service Commission

 /s/ Paul M. Stein
Paul M. Stein, Commissioner

By 3-2 vote of the Civil Service Commission (Bowman, Chairman [NO]; Camuso [AYE], Ittleman [AYE], Stein [AYE] and Tivnan [NO], Commissioners) on November 5, 2020.

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:

Dennis M. Coyne, Esq. (for Appellant)
Shannon T. Phillips, Esq. (for Respondent)

¹⁴As it the Commission's practice, the precise details of the monetary relief Ms. Hussey-Rogers should receive are a matter to be resolved by the parties or in a judicial forum.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503

Boston, MA 02108

(617) 727-2293

THERESA HUSSEY-ROGERS,

Appellant

D-18-041

D-18-102

v.

CITY OF SOMERVILLE,

Respondent

OPINION OF CHRISTOPHER BOWMAN AND KEVIN TIVNAN

We concur with Commissioner Stein’s well-reasoned conclusion that there was just cause to discipline the Appellant. Respectfully, however, we reach a different conclusion regarding whether a downward modification of the penalty imposed by the City in this matter is warranted.

In December 2017, the Appellant had a one-on-one meeting with her manager, John DeLuca, the Director of the City’s Water and Sewer Division. DeLuca has been employed in the water and sewer profession for over three decades and, prior to his appointment in Somerville, he had served as the Assistant Water and Sewer Director in Framingham for twelve (12) years.

According to DeLuca, the Appellant, during the one-on-one meeting, called him a “fucking asshole”; a “fucking maggot” and a “piece of shit”. According to the Field Operations Manager, whose testimony is credited in Commissioner Stein’s detailed findings, the Appellant, after leaving that meeting, boasted to him and one other manager about what she had just done, specifically telling the two of them that she had just told her boss that he was a “fucking asshole”. The Field

Operations Manager went into DeLuca's office immediately afterward and found DeLuca to be "shell-shocked" about what had just occurred.

As part of a thorough investigation, which included interviews with various individuals, the City's Personnel Director largely credited the statements of DeLuca and the Field Operations

Manager. While the Field Operations Manager stated that the Appellant only shared the “fucking asshole” comment with them, he told the City’s Personnel Director that the words “fucking maggot” were often used by the Appellant to describe City contractors. The Personnel Director also interviewed the Appellant. The Appellant: described the meeting with DeLuca as a “good ... operations meeting”; denied ever using any profanity; and stated that she had never used the words “fucking maggot”. The City’s Personnel Director found her statements largely incredulous; and recommended a 30-day suspension for what she considered egregious behavior by a supervisor who had recently been suspended for 2 days for performance related issues.

The Appellant was provided with a copy of the Personnel Director’s findings and recommendations and, consistent with the protections afforded to permanent civil service employees, the Appellant was given the opportunity to testify and present evidence to a hearing officer as part of a local appointing authority hearing prior to the imposition of a penalty greater than 5 days. The Appellant presented no evidence to refute the Personnel Director’s findings and she chose not to testify. The local hearing officer, who drew an adverse inference against the Appellant based on her decision not to testify, found the Personnel Director’s findings to be supportable and recommended that the 30-day suspension be imposed by the Appointing Authority, which it ultimately was. This appeal to the Commission followed.

As part of the hearing before the Commission, the Appellant submitted various documents that she never provided to the local hearing officer, including what she alleges are notes that she took during the one-on-one meeting with DeLuca, purportedly supporting her contention that it was a good “operations meeting”. Setting aside that the Appellant never presented these notes to the local hearing officer, her testimony on cross-examination raised serious questions as to whether these notes were actually taken during a *prior* meeting with DeLuca.

The Appellant, who opted not to testify at the local hearing, did testify at the hearing before the Commission. During her sworn testimony before the Commission, the Appellant denied using any profanity during her one-on-one meeting with DeLuca *and* she denied boasting about it with two managers shortly thereafter. Commissioner Stein did not credit this testimony and appropriately considered that the local hearing officer was entitled to draw an adverse inference based on the Appellant's failure to testify at the local appointing authority hearing.

Ultimately, Commissioner Stein found that, while the Appellant did call her boss a "fucking asshole" and she did tell two other managers that she had done so, the Appellant did not, contrary to what was found by the City, call DeLuca a "piece of shit" or a "fucking maggot" nor did she say anything that was threatening or would put DeLuca in fear, as found by the City.

In summary, Commissioner Stein found that the Appellant engaged in egregious, insubordinate behavior. She referred to her boss in profane terms during a one-on-one meeting and then boasted about it to two other managers. The Commission should not allow an appeal, in whole or in part, for persons who engage in such behavior and/or provide less than forthcoming testimony before the Commission.

For all of the above reasons, we do not believe a downward modification of the penalty is warranted.

Civil Service Commission

/s/ Christopher C. Bowman

/s/ Kevin M. Tivnan

November 5, 2020