

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

MARK T. JONES,
Appellant

v.

D-15-225

BOSTON FIRE DEPARTMENT,
Respondent

Appearance for Appellant:

Mark T. Jones, Pro Se

Appearance for Respondent:

Kay H. Hodge, Esq.
Stoneman, Chandler & Miller LLP
99 High Street
Boston MA 02110

Commissioner:

Paul M. Stein

DECISION

The Appellant, Mark T. Jones, appealed to the Civil Service Commission (Commission), pursuant to G.L.c.31,§43 contesting his suspension for four tours of duty by the Boston Fire Department (BFD) from his position as a BFD Firefighter.¹ A pre-hearing conference was held at the Commission's Boston Office on December 11, 2015 and a full hearing was held at that location on February 22, 2016 and March 24, 2016. No party requested a public hearing so the hearing was declared private. The full hearing was stenographically and digitally recorded and the resulting transcript was declared the official hearing record.² Thirty-eight exhibits were received into evidence (Exhs. 1 through 18, 19A-19C, 29, 21, 22A-22D, 23A-23C, 24A-24C, 25 through 28, 30 through 39) and one document marked for identification (Exh. 29ID). The BFD called nine witnesses and Firefighter Jones testified on his own behalf. Both parties submitted proposed decisions on June 30, 2016.

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 If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to supply the court with the 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.

FINDINGS OF FACT

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

Called by the Appointing Authority:

- Scott Malone, BFD Deputy Fire Chief
- Chris Corwin, BFD Fire Lieutenant
- Bryan Snell, BFD Firefighter
- Edward Horne, BFD Firefighter
- Bruce Bates, BFD Firefighter
- Adam Marshall, BFD Firefighter
- Anthony Tippett, BFD Firefighter
- Mark Williams, BFD Firefighter
- Hiram Ortega, BFD Firefighter

Called by the Appellant:

- Mark T. Jones, BFD Firefighter, 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, Mark T. Jones, is a full-time Firefighter with the BFD, a civil service position to which he was appointed in May 1993. (*Exh.1;Tr.II;303[Jones]*)

2. Since 1998, FF Jones was assigned to the Charlestown firehouse, which houses a ladder company (L9) and an Engine company (E32). (*Exh.10; Tr.I:40-41[Malone]; Tr.I:303[Jones]*)

3. The BFD operates on an eight-day work cycle with four work groups assigned to each fire company, with one group commanded by a Captain and the other three groups commanded by a Lieutenant. Generally, each group works two twenty-four hour shifts per work cycle, with three days off between shifts. Usually, for a half-hour period at the change of shift, both groups interact when the relieving shift is briefed and the departing shift cleans up and departs. The senior officer commanding the shift on duty at any particular time has the overall command of the firehouse (quarters) during a shift. (*Exhs 7 & 10; Tr.I:40-45,49,50-55, 74-79 [Malone]*)

4. At the time of this appeal, FF Jones was assigned to Group 4, Ladder 9, with two other Firefighters and commanded by Fire Lieutenant Gregory Curry. Group 4, Engine 32 worked the

same shifts as Group 4, Ladder 9, and included a Lieutenant and three Firefighters. (*Exh. 10; Tr.I:64, [Malone]; Tr.I:303 [Jones]; Tr.II:335-337[Jones]*)

5. The personnel (and racial composition) of the four work groups assigned to Charlestown at the time of the 2015 incidents in question are identified as follows:

| | <u>Ladder 9</u> | <u>Engine 32</u> |
|----------------|--|--|
| <u>Group 1</u> | Capt. V. L. (White) FF A.A. (Black) FF T.B. (White) FF Greg Burton (Black) FF M.J. (Black) | Lt. George Gilchrist (White) FF T.J. (White) FF R.M. (Hispanic) FF E. S. (White) |
| <u>Group 2</u> | Lt. Chris Corwin (White) FF Bryan Snell (Black) FF Mark Williams (White) FF Anthony Tippett (Black) | Lt. B.D. (Black) FF Hiram “Kenny” Ortega (Hispanic/Black) FF Edward “Eddie” Horne (Black) FF R.B. (Black) |
| <u>Group 3</u> | FF Adam Marshall (White) FF T.L. (Black) FF R.A. (Black) | Capt. D.O. (White) FF L.B. (Black) FF Bruce Bates (White) FF B.H. (White) |
| <u>Group 4</u> | Lt. Gregory Curry (Black) FF Mark Jones (Black) FF D.M. (Black) FF R.R. (Hispanic) | Lt. M.A. (Black) FF C.C. (Black) FF J.G. (Hispanic) FF L.H. (Black) |

(*Exh.10;Tr.I:80-82[Malone];Tr.I:149-150[Corwin];Tr.I:232-233[Horne];Tr.I:244-245 [Bates]; Tr.I:254-255 [Marshall]; Tr.I:259-260 [Tippett]; Tr.I:270-272 [Williams]*)

6. Prior to 2015, FF Jones was disciplined four times:

- May 1995 – Oral Warning (Sleeping on duty)
- June 1995 – Official Reprimand (Misdirected apparatus to wrong location)
- Nov 1995 – Four Tour Suspension (Disrespect, failed to obey orders, shirking duty)³
- May 2000 – Oral Reprimand (AWOL and disrespect of superior)

(*Exhs.7,9,30A-D,31A-D,32A-D,33A-B,34A-C;Tr.I:50-55[Malone];Tr.II:337-349 [Jones]*)⁴

³ This discipline was initially imposed in 1995 without a prior statutory hearing and vacated by the Commission. FF Jones alleged that the discipline was the result of a snafu in the detail records and personal animus toward him by the superior officer. The BFD found the claim of discrimination unfounded and reinstated the suspension after a hearing in March 1997. (*Exhs. 29, 31A-31D, 32A-32B, 33A-33B; Tr.II:33347-348 [Jones]*)

⁴ BFD also proffered evidence in rebuttal of other earlier discipline that was not documented by percipient records and was excluded. (*Exh. 39; Tr.II:416-417*)

7. At some point toward the end of 2014, Lt. Chris Corwin, the L9 Group 2 officer, arranged to provide a \$200 “Christmas” gift to Firefighter “Kenny” Ortega, one of his Group 2/L9 firefighters, in recognition of Firefighter Ortega’s hard work in turning around the fire station’s house fund, which consists of voluntary contributions used for miscellaneous purchases that the BFD didn’t cover (kitchen supplies, TVs, barbeques, etc.). Firefighter Ortega had agreed to take over the “thankless job” of managing the house fund and turned a \$1,500 deficit into a \$3,500 surplus. Group 2 “fronted” the money, and Groups 1 and 4 (but not Group 3) pitched in a share. (*Ex.12;Tr.I:46-48[Malone];Tr.I:151-152[Corwin];Tr.I:286-287,294-297 [Ortega]*)

8. Also, at the end of 2014, the Charlestown house fund received a \$300 bonus as one of the top ticket-sellers in the Firefighters Union biannual death and welfare fund raffle. Lt. Corwin, after discussion with the union liaison (FF Greg Burton, Group 1/L9), decided that FF Eddie Horne, another Group 2/L9 firefighter, receive \$200 for leading this achievement, as was done with FF Ortega. At Lt. Corwin’s direction, FF Ortega dispersed the \$200 from the house fund to FF Horne. Although Lt. Curry (Group 4/L9) was present during the discussion, the decision to make this \$200 award was not put to a house “vote” of all groups as was customary and the news of the award only became known after the fact. (*Exh.12; Tr.I:59-60 [Malone]; Tr.154-155,197-199 [Corwin]; Tr.I:294-294-296 [Ortega]; Tr.I;234-237 [Horne]; Tr.II:357-358 [Jones]*)

9. On January 8, 2015, after getting wind of what had been done, FF Jones wrote a message on the station “whiteboard”⁵ which stated: “Where is the \$300 D&W?”, to which unidentified persons added the comments: “Who wants to know?” and “Ortega has it.” (*Exh.24A; Tr.I:156, 196-199 [Corwin]; Tr.II:359 [Jones]*)

⁵ The “whiteboard” hung on the wall and was used by firefighters to post informal notes (using erasable markers) on a variety of subjects of personal interest, sometimes sarcastic and tongue-in-cheek banter, as well as serious notes on the passing of a firefighter, notices about the availability of station t-shirts, etc. (*Exhs.24A, 24B & 24C; Tr.I:156, 159[Corwin]; Tr.II:358-361 [Jones]*)

10. At the time he wrote the note on the whiteboard, FF Jones had no quarrel with FF Horne receiving the \$200, but was upset with the way he believed Lt. Corwin unilaterally decided to spend house fund money “without consulting with anybody else.” FF Jones thought that FF Horne was entitled to keep the money as “Eddie was duped in all of this also”, but made it known that he thought Lt. Corwin should reimburse the \$200 to the house fund himself. *(Tr.II:356-360 [Jones])*

11. Upon learning of what FF Jones had done, Lt. Corwin was “disgusted by it”. Lt Corwin pulled the whiteboard from the wall and threw it away, tossing it out a window onto the pavement outside the firehouse. *(Exhs. 12 & 24A; Tr.I:157-158 [Corwin];Tr.II:360-361 [Jones])*

12. A few months later, during his shift on March 21, 2015, FF Jones came to learn that the mothers of two firefighters had passed away. There no longer being any whiteboard, FF Jones wrote on the wall where the whiteboard had hung, with an erasable marker: “LARRY & JULIAS MOMS PASSED”. *(Exhs 15 & 24C; Tr.I:159 [Corwin]; Tr.II:361-364 [Jones])*

13. Upon reporting for duty that morning, March 22, 2015, Lt. Corwin noticed the message about the deaths, which he called “graffiti”, and ordered FF Jones, who admitted writing it, to “clean it off, get it off the wall.” FF Jones stated that the message should remain up to be sure everyone knew of the two deaths. Lt. Corwin repeated the order. FF Jones again declined and went to the kitchen with another Group 4 firefighter to have breakfast. Lt. Corwin approached them, ordered the to “get the f—k out of the firehouse, you’re relieved”, and the two Group 4 firefighters left the station. *(Exhs.12, 14 & 15; Tr.I:159-160 [Corwin]; Tr.II:362-364 [Jones])*⁶

14. As a result of the March 22, 2015 incident, FF Jones received an oral warning from Lt. Corwin for “Insubordination, disrespect, insolence or like behavior to a superior; Failure to obey

⁶ Another unrelated, message, of unknown origin, also then appeared on the wall, referring to FF Burton that FF Jones had not written. *(Exhs. 12, 14 & 24C; Tr.II:441 [Jones])*

orders, conduct prejudicial to good order; and Damage to department property through willfulness” due to the March 21-22, 2015 incident. He was also ordered to perform eight extra “night watches” (the firefighter assigned to staff the front desk overnight) as in-house punishment. (*Exh. 14; Tr.I:160 [Corwin]; Tr.II:365 [Jones]*)

15. On March 25, 2015, FF Jones filed a “5A” (internal communications through channels to the Fire Commissioner), complaining about what he called Lt. Corwin’s “inordinate and unjust influence over the members of L9 and E32” and accused Lt. Corwin of being “on a campaign of harassment against me for simply asking questions.” He followed up this complaint with another 5A dated April 5, 2015. (*Exhs. 13, 15 & 38; TR.I:56-57 [Malone]Tr.II:366-368 [Jones]*)

16. Upon learning about the mounting tension at the Charlestown firehouse and, after consulting with the Group 4 members of E32/L9 and the City of Boston Office of Human Resources (OHR), BFD District Fire Chief Wahlen concluded that “mediation was the best approach to resolving the situation”. (*Exhs. 11 & 16; Tr.I:52,69-71[Malone]*)

17. On or about April 30, 2015, Lt. Corwin issued a second Oral Warning to FF Jones for taking 30 minutes to depart the station after Lt. Corwin had ordered him to leave, citing him for “Disobeying a direct order, Disrespect or insolence to a superior, and Conduct prejudicial to good order.” (*Exh. 17*)

18. Upon receiving this second oral warning, FF Jones, himself, contacted Boston OHR to report his ongoing problems with Lt. Corwin, as well as the fact that the recommended mediation had not yet taken place. (*Exh. 38*)

19. By letter dated August 4, 2015, Boston OHR Director Vivian Leonard responded to FF Jones. The letter stated that, as a result of interviews and review of the relevant documentation and records, OHR did not find any violation of the City of Boston Policy on Discrimination,

Harassment and Retaliation or Work Place Violence” but “we did find that . . . Lt. Corwin engaged in behavior that was inappropriate, particularly given his position as an officer.” The letter also stated:

“We have . . . developed a series of recommendations and a work plan, to relieve tensions between yourself and Lt. Corwin, coach Lt. Corwin to maintain a professional standard of interaction with his subordinates, improve the working relationship between Groups 2 and 4 and enhance communications within L-9. It is our hope and expectation that this action plan carried out over the next two months will allow for a qualitative shift in the workplace environment.

“ . . . Please contact my office immediately, if as a result of this investigation you experience retaliation or encounter any further incidents of inappropriate behavior.”

(Exh. 38)

20. On May 8, 2015, while the OHR investigation was pending, Lt. Corwin submitted a “5A” concerning FF Jones, reciting his “well documented” disruptive behavior toward Group 2 that began in January 2015. On June 1, 2015, Lt. Corwin and FF Snell each submitted a “5A” complaining that they just had overheard FF Jones speaking to FF Tippett (a black firefighter on Group 2/L9) and heard FF Jones giving a “morning greeting” to FF Tippett using the “N-word”. *(Exh. 18, 20 & 21; Tr.I:88-89 [Malone])*

21. Also in May 2015, FF Jones learned that a former member of his Group 4/L9 believed that Lt. Corwin had made disparaging comments to members of his new unit (E-48), and FF Jones assisted that firefighter in submitting a “5A” to state his complaint. The E-48 captain replied that, after investigation, he found no member of his company had any contact with Lt. Corwin. The BFD concluded that it appeared the firefighter had been returning to Charlestown and hanging out with his former colleagues who were on duty, and was upset because he was told that was inappropriate. BFD concluded that the firefighter’s allegations were unfounded. On August 12, 2015, the firefighter withdrew his complaint. *(Exhs. 19A-19C; Tr.I:83-87 [Malone]; Tr.II:374-377 [Jones])*

22. At some point after the August 8, 2015 OHR letter, BFD did initiate a mediation process in which two BFD command staff officers arranged a series of four meetings, initially separately with each group and then two meetings jointly with both Group 2 and Group 4. The mediation meetings were conducted as confidential sessions under the rules of the Boston Fire Department Mediation Program. (*Exh.11; Tr.I:52,89-92 [Malone];172,181 [Corwin]; Tr.I:305 [Jones]*)

23. Before the final group mediation meeting had occurred, an altercation occurred between FF Jones and FF Snell that resulted in the specific discipline that is the subject of challenge in this appeal. Lt. Corwin called the situation a “cat and mouse game” that started when FF Jones began playing music on the radio too loud, which annoyed the other firefighters who turned the volume down and FF Jones would keep turning it back up again. At some point, FF Snell disconnected the radio in FF Jones’s presence by pulling out the plug. When the cord later disappeared, on or about September 17, 2015, FF Jones submitted a “5A” to Lt. Curry in which he reported that the power cord had gone “missing”, but did not mention anyone he alleged was responsible. FF Jones did tell FF Horne that he suspected FF Snell had taken the cord, a comment that FF Marshall apparently overheard. (*Exhs. 18,22C, 23D & 39; Tr.I:274-275 [Williams]; Tr.II:393-395 [Jones]*). (*Exhs. 18 & 39; Tr.I:71-72 [Malone]; Tr.I:164 [Corwin]; Tr.II:392-393 [Jones]*)

24. On September 25, 2015, Group 4 was relieving Group 2 and FF Snell was in the kitchen when FF Jones entered. The percipient witnesses to the encounter recall it somewhat differently.

I find that, by the preponderance of the credible evidence, the following occurred:

- As FF Jones entered, he heard FF Snell telling another firefighter (most likely FF Adam Marshall) that FF Jones is your friend “so long as you don’t steal a power cord.”
- FF Jones asks FF Snell if he was speaking about him, and FF Snell replied: “If the shoe fits wear it.”
- FF Jones said “I never said you stole it. I said I thought you may have stolen it.”

- At that point the tone of the conversation changed. FF Snell said that was no different, and he started to raise his voice, saying that people who go around making those kinds of accusations are “cowards” and he wanted to “slap the s—t out of” FF Jones.
- FF Jones said to FF Snell: “Maybe your master told you to do it” and FF Snell asked “Who is my master?” FF Jones did not answer the question specifically but there was no doubt that he intended to mean the Group 2/L9 officer, Lt. Corwin.⁷
- As the conversation became heated, FF Bates and FF Tippet left the kitchen area. FF Horne saw that FF Jones was feeling threatened and he interjected some “small talk” to try to diffuse the situation. None of them had a complete recollection of the exchange over the word “master.”
- When the argument was over, FF Jones went about his duty for the day. FF Snell remained at the station until about 9:30 AM when he departed.

(Exhs.22A-22D, 23A, 23D & 39; Tr.I:220-222[Snell]; Tr.I:238-242[Horne]; Tr.I:245-247,252 [Bates]; Tr.I:256 [Marshall]; Tr.I:263 [Tippet]; Tr.I:291 [Ortega]; Tr.I:315-321 [Jones]; Tr.II:389-395 [Jones])

25. On October 7, 2015, FF Snell submitted a “5A” through Lt. Corwin describing his version of the September 25, 2015 encounter which he characterized as part of “a pattern of racism and disrespect to other members” that he found “offensive and hostile.” (*Exh.22A*)

26. On October 10, 2015, FFs Marshall and FF Ortega submitted a “5A” through Lt. Corwin describing their recollection of the September 25, 2015 encounter. In his report, FF Ortega stated: “I feel these remarks are a continual reminder of a hostile work environment that FF Jones is creating.” (*Exhs. 22B & 22D*)

27. Also on October 10, 2015, FF Williams submitted a “5A” with his recollection of a conversation that he said had overheard on September 12, 2015, in which FF Jones was heard to say (to person(s) not identified) that FF Snell “Stole the power cord from the stereo in the gym”

⁷ The “5A” reports submitted by FFs Snell, Ortega, Williams and Marshall all use the word “master”. (*Exhs. 22A-22D*). At the Commission hearing, FF Ortega said he heard FF Jones use another word, but I am persuaded by the preponderance of the evidence that the word FF Jones actually used was, in fact, “master.” (*Tr.I:tr.I:123 [Malone];Tr.I:221 [Snell]; Tr.I:246 [Bates]; Tr.I:276 [Williams]; Tr.I:291 [Ortega]; Tr.I:318-319 [Jones]; Tr.II:391-392 [Jones]; Tr.II:407-410 [Malone]*) There is no dispute that FF Jones intention was to imply to FF Snell that Lt. Corwin was a “master” and FF Snell was his “slave.” (*Exhs. 39; Tr.391-392 [Jones]; Tr.II: 407-408 [Malone]*)

because “He was doing the bidding of his master.” FF Williams stated that he had informed Snell of what he had heard because “it seemed to me to be provocative and intended to create a hostile environment.” (*Exh. 22C*)

28. On November 4, 2015, FF Jones was called to a meeting at BFD headquarters. FF Jones thought the meeting was to discuss the October 24, 2015 letter FF Jones had recently sent to OHR Director Vivian Leonard regarding the status of the “recommendations and work plan” she had indicated would be implemented. (*Exhs 37 & 39; Tr.I:97, 125-126 [Malone]; Tr.I:305-306 [Jones]*)

29. When FF Jones arrived at BFD, he was met by BFD Deputy Chief-Personnel Scott Malone, along with District Fire Chief-Personnel Mike Whelan, BFD Chief of Operations Jack Walsh, Deputy Fire Chief-Division 1 Steve McNeil, Division 1, District 3 Fire Chief Paul Burke, and Richard Paris, President of Firefighter’s Union Local 718. He then learned that the purpose of the meeting was to confront him about his September 25, 2015 interaction with FF Snell. (*Exh.39; Tr.I:305-307 [Jones]*)

30. FF Jones admitted that he had said that FF Snell had taken the power cord, that FF Snell did it because Lt. Corwin was his “master”, and that he meant that FF Snell was acting like a “slave” and Lt. Corwin was acting like a “slave owner.” FF Jones meant it to be taken as a joke. (*Exh. 39; Tr.II:407-410 [Malone]*)

31. FF Jones also stated that FF Snell threatened to “slap the s—t out of me” and to “to come by Eagleton Square” (which is near where FF Jones lives). FF Jones said he reported this threat to Lt. Curry. (*Exh. 39; Tr.I:307 [Jones]*)

32. FF Jones and Union President Paris left the room. Lt. Curry was asked if FF Jones ever reported the threat by FF Snell to which Lt. Curry said “No”. (*Exh. 39; Tr.II:411-412 [Malone]*)

33. FF Jones and Union President Paris returned to the room and were informed that FF Jones would be disciplined with a four-tour suspension and ordered to participate in an Anger Management Program. As to FF Jones's accusation that FF Snell had threatened FF Jones, FF Jones was ordered to submit further information through the chain of command and, upon receipt, a formal investigation would be conducted. Upon being informed of this decision, FF Jones became angry and was escorted out by Union President Paris. (*Exh. 39; Tr.I:109 [Malone]; Tr.I:305-308 [Jones]*)

34. By letter dated November 4, 2015, FF Jones was formally notified that he was suspended, without pay for four tours, commencing 0800 hours November 7, 2015 and continuing to 0800 hours, November 13, 2105, and required to attend Anger Management Classes. The letter stated that the discipline was imposed for violation of BPD rule 18.44(j) – Conduct prejudicial to good order, in that:

“Fire Fighter Jones accused Fire Fighter Bryan Snell of Ladder Company 9 of stealing and made a derogatory remark, referring to the Company Officer as “Master”, and that Fire Fighter Snell was doing as his “Master” told him. Fire Fighter Jones continues to demonstrate prejudicial treatment, abusive and inappropriate comments to other members of Ladder Company 9. In keeping with progressive discipline code and for the good of the Department and the service, Fire Fighter Jones shall receive a Four (4) Tour suspension accompanied by an Official Reprimand and shall attend Anger Management Counseling as outlined by the EAP Coordinator.”

(*Exhs. 2, 7 through 9*)

35. FF Jones appealed the discipline and, on November 17, 2016, after hearing on November 12, 2015, Fire Commissioner Joseph Finn upheld the discipline. This appeal duly ensued. (*Exhs. 3 through 6; Claim of Appeal*)

36. On November 17, 2015, FF Jones submitted a series of three additional “5A” reports through Lt. George Gilchrist (L32/Group 1) which, among other things, repeated his allegation that FF Snell had threatened him and accused FFs Snell and FF Ortega of “slander” in making

false claims about him at his disciplinary hearing. FF Jones also questioned the credibility of FF Williams's recollection of the conversation he "overheard", which did not identify who FF Jones was speaking to and could not have occurred on September 12, 2015 as the power cord did not go missing until a week later. (*Exhs. 23A-23C*)⁸

37. Deputy Chief Malone considered these "5A" reports "retaliation against the people who stood up and wrote what they heard." (Tr.I:97-98 [*Malone*])

38. On or about November 19, 2015, Deputy Chief Malone received a report from the Anger Management Program coordinator, who attested that FF Jones was "in compliance with all program requirements" and was "attending weekly sessions and actively participating in group". The report stated: "Attitude and Participation was excellent in the sessions. He was a pleasure in all the sessions." (*Exh. 28*)

39. At the Commission hearing, the BFD called the Group 2/Ladder 9 officer, Lt. Corwin and all of the firefighters under his command (FFs Snell, Williams and Tippett), along with two other firefighters assigned to Group 2/Engine 32 (FFs Horne and Ortega), as well as two other firefighters in Group 3 (FFs Marshall and Bates). Save for FF Marshall who had not heard FF Jones make any racially-charged remarks before the "Master" incident, these witnesses recalled previous racially-oriented comments that FF Jones had made in years past, such as saying "It's a white man's world" and how the conflicts in Iraq and Afghanistan were a "white man's war", as well as his liberal use of the "N-word" in interacting with other black co-workers. (*Tr.I:149-202 [Corwin]; Tr.I:205-232 [Snell]; Tr.I:232-244 [Horne]; Tr.I:244-254 [Bates]; Tr.I:254-259 [Marshall]; Tr.I:259-270 [Tippett]; Tr.I:270-281 [Williams]; Tr.I:281-300 [Ortega]*)

⁸ No evidence was produced to establish what, if anything, was done thereafter to conduct the investigation into FF Jones's allegations that he had been threatened by FF Snell September 25, 2015 or to investigate any of the other allegations set forth in the November 17, 2015 "5A" reports. (*Exhs. 23A & 39*)

40. FF Snell clearly took offense at FF Jones's remarks, and made his objections known to Lt Corwin and FF Jones. (*Exhs. 20 & 21, 24C; Tr.I:171 [Corwin]; Tr.I:208-209, 218 [Snell]*)

41. FF Ortega was uncomfortable when FF Jones "would say hello to me using the N-word" but he "chuckled" and tried to "shake it off and walk away" and did not ever tell FF Jones to stop using the N-word. He also became upset with FF Jones for "pushing my buttons a lot" about the raffle fund issue. Eventually, the two men avoided any personal interaction with each other. (*Tr.I:285-289 [Ortega]*)

42. FF Williams had not personally experienced any malicious behavior directed toward him by FF Jones, but believed that FF Jones did like to "push buttons" to see the reaction from other people. (*Tr.I:280-281 [Williams]*)

43. FF Bates said "every single person I've ever met in my life talks crap to people in some way or form." He called FF Jones a "race-baiter" who was trying just to "get a rise out of people" but FF Jones had "never done anything bad to me". He treated FF Jones behavior as "foolishness" that "just rolled off my back". (*Tr.I:250-251 [Bates]*)

44. FF Tippett had heard FF Jones use the "N-word" and make comments that relate to race "mainly like with politics and stuff . . . like we would see on TV, and he might make a statement or remark . . ." FF Tippett did not "particularly get hung up in what [FF Jones] says and his comments were "not that sensitive with me". (*Tr.I:261-269 [Tippett]*)

45. At the Commission hearing, Deputy Chief Malone explained his choice of a four-tour suspension for FF Jones's actions as meant to "change his actions, not to discipline him". It was "actually the smallest amount of time" the BFD had imposed on other firefighters previously disciplined for one-time use of inappropriate remarks concerning other firefighters. In particular, Deputy Chief Malone identified two four-tour suspensions meted out since 2000 for "first

offense” infractions, one for inappropriate remarks about a female firefighter and another for an inappropriate offensive racial comment. In addition to these two examples, the BFD has meted out discipline up to as much as 30 days in other cases of repeated infractions involving racially motivated actions or statements. (*Exhs. 8, 35 & 36; Tr.II:418-426,437-440 [Malone]*)

APPLICABLE CIVIL SERVICE LAW

A tenured civil service employee may be suspended for “just cause” after due notice and hearing upon written decision “which shall state fully and specifically the reasons therefore.” G.L.c.31,§41. A person aggrieved by a decision of an appointing authority made pursuant to G.L.c.31,§41 may appeal to the Commission under G.L.c.31,§43, which provides, 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; 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 makes a de novo review “for the purpose of finding the facts anew.” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. The role of the Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). See also City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev.den., 440 Mass. 1108 (2003); Police Dep’t of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm’n, 38 Mass.App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, rev.den., 390 Mass. 1102 (1983).

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) 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 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 also 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")

"[T]he power to modify is at its core the authority . . . to temper, balance, and amend. The power to modify penalties permits the furtherance of uniformity and equitable

treatment of similarly situated individuals. It must be used to further, and not to frustrate, the purpose of civil service legislation, i.e., 'to protect efficient public employees from partisan political control' . . . and 'the removal of those who have proved to be incompetent or unworthy to continue in the public service' [Citations]"

Id., (*emphasis added*). 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

The BFD's discipline upon FF Jones for his sarcastic and inappropriate use of a racially-charged analogy of "Master" and "Slave" to characterize the relationship between FF Snell and his commanding officer, Lt. Corwin, although unacceptable behavior, cannot be viewed in a vacuum. I conclude that the BFD failed to investigate and fully appreciate the context in which the offense occurred, singling out FF Jones for discipline although others were responsible for contributing to the behavior for which he was solely held culpable, none of whom received discipline, let alone comparable discipline. This disparate treatment warrants the Commission's intervention to modify his discipline and allow FF Jones's appeal.

First, I am persuaded that, for the most part, FF Jones's version of events leading up to the incident in question is more credible than that of most of the other witnesses. Thus, I credit his testimony that the incident in question was preceded by a pattern of petty annoyance of him, principally instigated by Lt. Corwin and FF Snell. Some of the provocation was minor, such as reprimanding FF Jones for delaying his departure from the fire station after completing a shift, or FF Snell meddling with the power cord to the "Boom Box" to prevent FF Jones from playing music too loudly. Other instances are more troubling, such as Lt. Corwin's outburst (for which he was not disciplined) in throwing the "whiteboard" out the window after seeing a remark written by FF Jones about the raffle bonus money. Similarly, I question Lt. Corwin's good faith in disciplining FF Jones for refusing his "order" to erase a note on the wall (where the

whiteboard had hung) about the passing of the parents of two firefighters (not the only handwriting then on the wall). I also credit the conclusions reached by the City of Boston's Office of Human Resources that Lt. Corwin had engaged in "inappropriate" behavior and that remedial actions were needed to improve the working environment, including, in particular, coaching Lt. Corwin "to maintain a professional standard of interaction with his subordinates." Despite FF Jones's requests, the BFD did not take such action against Lt. Corwin.

Second, for the most part, I also credit FF Jones's version of events immediately preceding the incident in question. Specifically, I credit FF Jones's "5A" reports that disputed FF Marshall's testimony about the conversation he allegedly "overheard" a week or so before the incident, as it is apparent that FF Marshall was not in the presence of FF Jones and did not have the date correct. I also credit FF Jones's testimony that, as he had stated in his "5A" reports, he noted that the power cord was "missing" and assumed, based on past experience, that FF Snell had taken it. Although FF Marshall stated that he is the one who passed on what he had heard FF Jones say, that testimony is contradicted by FF Snell and Lt. Corwin who give different versions of how they came to know of the conversation. Thus, I conclude that, as FF Jones testified, he casually remarked about the missing cord to FF Horne, but did not mention anything about a "master" at that time. In my view, the fact that FF Jones's report to his company commanding officer, Lt. Curry, prior to the September 25, 2015 confrontation in the kitchen, has no mention of any alleged racial nature of the remarks, also supports this conclusion.

Third, as reflected in the findings of fact, the heated exchange of words on September 25, 2015 began with FF Snell's taunting of FF Jones, which included a suggestion that FF Jones was a "coward" and FF Snell wanted to "slap the s--t" out of him, which FF Jones (and at least one other witness) viewed as a threat. The mutual disrespect each held for the other was well-known.

Both men had short fuses when it came to “pushing buttons”. Neither of them showed the level of self-control that could have diffused the situation. Yet, despite the clearly conflicting evidence about what had occurred on September 23, 2015 and BPD’s promise to investigate FF Jones counter-charges against FF Snell, FF Jones was suspended summarily and no further investigation of the counter-charges against FF Snell was pursued.

Fourth, I am well aware that FF Jones has strong political views when it comes to the subject of race relations, and he has not been shy about expressing them. I do not question that FF Jones honestly perceives his treatment as a race-based reaction to his advocacy for his positions which others do not share. It must be clear that I do not quarrel with FF Jones’s right to hold controversial views, but employees must use common sense and temper their use of pejorative language in the workplace to make a point, whether in jest or in earnest. They must understand that certain words have consequences, whether intended or not.

In sum, I conclude that FF Jones’s sarcastic jab at FF Snell (and, indirectly at Lt. Corwin) was inextricably intertwined with their ongoing mutual hostility toward each other, which had already created a volatile work environment and was complicating the on-going efforts to achieve a mediated solution to the situation. But for the fact that FF Jones was singled out and received disparate treatment for his contribution to the breakdown in workplace relationships, some level of discipline against him clearly would have been in order. I cannot, however, overlook the fact that FF Jones was not solely responsible for instigating and contributing to the breakdown in the workplace at the Charlestown firehouse and that, primarily, it is Lt. Corwin and FF Snell (out of 32 fire personnel stationed in Charlestown) who claimed to be most affected, both whom had some personal beef with FF Jones and both of whom also exhibited poor behavior. In any disciplinary matter, the BFD must apply fair and equitable treatment of all

employees as required by basic merit principles of the Massachusetts civil service law. Accordingly, the disparate discipline of FF Jones does not meet this requirement and may not stand.

CONCLUSION

Accordingly, for the reasons stated, the appeal of the Appellant, Mark T. Jones, under Docket No. D-15-225 is *allowed*.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein

Commissioner

By 3-2 vote of the Civil Service Commission (Bowman, Chairman [AYE]; Camuso [AYE], Ittleman [NO]*, Stein [AYE] & Tivnan [NO]*, Commissioners) on February 16, 2017.

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)(1), 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 a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's 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:

Mark T. Jones. (Appellant)

Kay H. Hodge, Esq. (for Respondent)

*Commissioners Ittleman and Tivnan voted NO because they each believed that the Appellant's conduct warranted some discipline and would have allowed the appeal, in part, and modified the discipline to a two-day suspension.