

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

MARC HAYHURST &
BRIAN SUMMERING,
Appellants

v.

D-19-123 (Hayhurst)
D-19-124 (Summering)

BOSTON FIRE DEPARTMENT,
Respondent

Appearance for Appellants:

Leah Barrault, Esq.
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Appearance for Boston Fire Department:

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Commissioner:

Christopher C. Bowman

DECISION

On June 6, 2019, the Appellants, Marc Hayhurst (Lt. Hayhurst) and Brian Summering (Lt. Hayhurst) (Appellants), pursuant to G.L. c. 31, § 43, filed an appeal with the Civil Service Commission (Commission) contesting the decision of the Boston Fire Department (BFD) to suspend them for two tours or twenty-four hours each.

On July 16, 2019, I held a pre-hearing conference at the offices of the Commission. I held a full hearing at the same location on September 9, 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 November 22, 2019.

FINDINGS OF FACT

Thirty-six Respondent Exhibits (Exhibits R1 – R36) and six Appellant Exhibits (Exhibits A1-A6) were entered into evidence. Exhibits A4 & A5 were deemed confidential and are impounded. Based on these documents, the testimony of:

Called by the BFD:

- Connie Wong, Deputy Commissioner of Labor Relations, HR & Legal Affairs;
- Robert Calobrisi, Deputy Fire Chief, Division 1 / Group 3;
- David Walsh, Deputy Fire Chief, Personnel;
- John Walsh, Deputy Fire Chief, Operations;

Called by Appellants:

- Brian Summering, Appellant;
- Marc Hayhurst, Appellant;

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. Lt. Hayhurst has been employed by the BFD for twelve years and has served as a fire lieutenant since 2016. He has no prior discipline. (Testimony of Hayhurst & Exhibit A2)
2. Lt. Summering has been employed by the BFD for twenty-eight years and has served as a fire lieutenant since 2017. He has no prior discipline. (Testimony of Summering and Exhibit A1)
3. On December 13, 2018, the Appellants were the superior officers on duty for the night tour at the fire station on Hanover Street in the North End of Boston. (Testimony of Appellants)

² If there is a judicial appeal of this decision, the plaintiff becomes obligated to use the copy of the CD provided to the parties 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.

4. FF CB, a black male, was assigned to the North End fire station on December 13, 2018. He 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. (Exhibit R35: Testimony of CB)
5. 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. (Exhibit 35: Testimony of FF CB)
6. A white firefighter (GL), 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. GL 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 FF GL left the room. (Exhibit 35: Testimony of FF CB)
7. Shortly thereafter,. FF GL returned to the TV room, and sat in a recliner chair approximately nine (9) feet behind FF CB. FF CB heard the sounds of FF GL eating food from a bowl. (Exhibit 35: Testimony of FF CB)
8. FF CB stood up from his recliner, and exited the TV room to inform his commanding officer that night, Lt. Summering, of the incident. Lt. Summering was in his quarters located down a hallway outside the TV room. (Testimony of FF CB and Lt. Summering)
9. When FF CB knocked on Lt. Summering's door, Lt. Hayhurst, commanding officer on the engine that night, also opened the door to his adjacent quarters. (Testimony of Lt. Summering and Lt. Hayhurst)
10. FF CB told Lt. Summering: "You better get fucking [FF GL] 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. Summering and Lt. Hayhurst)

11. Lts. Summering and Hayhurst walked down the hall to the TV room, followed by FF CB. FF GL was slouched on a couch. One of the Lts. said “come on, [FF GL], get up,” or similar words to that effect. FF GL complied, and they guided him out of the TV room to the bunk room. (Exhibit 35: Testimony of FF CB, Lt. Summering and Lt. Hayhurst)
12. When the Lts. addressed him as he was slouched on the couch, FF GL’s demeanor indicated that he was intoxicated. (Exhibit 35: Testimony of Lt. Summering).
13. Lt. Summering told FF CB that the incoming Captain would handle the situation in the morning. FF CB informed Lt. Summering that he wanted FF GL to transfer out of the firehouse. (Exhibit 35: Testimony of Lt. Summering)
14. Approximately an hour after this incident, FF CB called his girlfriend to tell her he was fine and to say good night. (Exhibit 35: Testimony of CB)
15. FF CB slept in the TV room that night, which is his normal practice. (Exhibit 35: Testimony of FF CB)
16. Lt. JS arrived at the firehouse at around 6:30AM on December 13, 2018. Firefighter CB recounted to Lt. JS that FF GL, who was off-duty, had come into the TV room, intoxicated, started using the n-word and spat in FF CB’s direction. (Exhibit 35: Testimony of Lt. JS)
17. Fire Captain JR also arrived at the firehouse around 6:30 A.M. on December 13, 2018. Lt. Summering met him on the street outside the station and told Captain JR about the events of the early morning hours. Specifically, Lt. Summering told Captain JR that FF CB had knocked on his door and told him that FF GL was in the TV room “using the N-word and spitting all over the place.” Around that same time, Lt. Hayhurst confirmed Lt. Summering’s version of events to Cpt. JR. (Exhibit 35: Testimony of Captain JR)

18. 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, FF GL 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 FF GL to transfer out of the station. (Exhibit 35: Testimony of Captain JR)
19. Captain JR and Lt. JS then met with FF GL to question him about what had occurred. Captain JR told FF GL that FF CB had accused FF GL of using the n-word and spitting in his direction hours earlier in the TV room. In response, FF GL: 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. (Exhibit 35: Testimony of Captain JR)
20. FF GL acknowledged to Captain JR and Lt. JS that he had been drinking the night before and that he had just lost a close friend. (Exhibit 35: Testimony of Captain JR)
21. Captain JR observed that FF GL looked “out of it” and he (Captain JR) could smell alcohol on FF GL’s breath. (Exhibit 35: Testimony of Captain JR)
22. After that meeting, FF GL approached FF CB on the apparatus floor of the firehouse. FF GL stated “I could kiss you right now,” which FF CB interpreted as being “fake nice.” FF GL further stated “I’m sorry if I said something that offended you,” or something similar, referring to the incident in the early morning hours. (Exhibit 35: Testimony of FF CB)
23. FF GL told FF CB that Cpt. JR had asked to see the two of them, and so FF CB agreed to accompany FF GL back to Cpt. JR’s office upstairs. (Exhibit 35: Testimony of FF CB)
24. In Cpt. JR’s office, FF CB stated that FF GL 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 FF GL

anymore, and wanted him to transfer. FF GL told FF CB that he was sorry if he said anything to offend FF CB. (Exhibit 35: Testimony of Cpt. JR)

25. When FF GL returned to work, the BFD placed FF GL on paid administrative leave while the BFD conducted an investigation of FF CB's allegations. (Exhibit 35: Testimony of Dep. Walsh)

26. The BFD asked everyone with information to complete a "5A" report and then interviewed each of them. (Exhibit 35: Testimony of Dep. Walsh).

27. 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 [GL] 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 Lavalle. He then said with a loathsome tone, 'N****r...fucking n****r' and then proceeded to hock a loogie and spit twice. FF then follows with 'N****r...I'll fuckin' fuck you up right now n****r.'" He continued this rant for approximately 30-40 seconds. I then turned around to see if FF [GL] was possibly on the phone or watching a video, to which he was not.

My girlfriend who heard the entire interaction because FF [GL] 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." (Exhibit R6)

28. 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. (Exhibit R16)

29. 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 [GL] 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:

- “N****r...fucking n****r”
- “N****r...I’ll fuckin’ fuck you up right now n****r” and
- “You fucking n****r...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 [GL]’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.” (Exhibit R16)

30. The BFD’s February 20, 2019 investigative report does not make any finding that the Appellants violated any BFD rules or regulations, but does state that “the investigators hereby refer this matter to BFD’s Personnel Division for further follow up, including a review of additional violations of BFD Rules and Regulations.” (Exhibit R16)

31. 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. [GL] (White), entered the fire house after having been out drinking. [GL] was noticeably drunk, stumbling while walking around. At this point, I was speaking with my girlfriend, [CH], via headset.

[GL] 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 [GL] from the room and put him into the bunkroom. Mr. Summering and Mr. Hayhurst 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.” (emphasis added) (Exhibit A4)

32. FF GL was terminated on March 15, 2019. (Exhibit 35)

33. Sometime after March 15, 2019, Chief David Walsh, Chief John Walsh and Deputy Chief Robert Calobrisi met to discuss the Appellants' actions during the December 13, 2018 night tour in question. (Testimony of Chief David Walsh)

34. On April 22, 2019 and April 27, 2019, the Appellants were suspended for two tours of duty (i.e. – twenty-four hours each). (Exhibit R19 and R23)

35. The suspensions letters stated in relevant part:

“ ... On December 13, 2018 at approximately 0100 hours, an off duty member of the Engine Company 8 entered the firehouse, under the influence of alcohol and then threatened and spit at another on-duty member of the firehouse. When a member, on or off duty, threatens another member of the department, it is the officers responsibility to promptly report offensive and inappropriate behavior to their superior officer immediately. Consequently, you shall receive a two (2) tour suspension for violation of Rule 18.44 (k); §§ (1) and (2), accompanied by an Official Reprimand.” (Exhibits R19 and R23)

36. BFD Rule 18.44 states in full:

The following offenses are specifically forbidden:

- a. Conduct unbecoming a member, whether on or off duty, which tends to lower the service in the estimation of the public.
- b. Being intoxicated or under the influence of liquor, drugs, or controlled substances, while on duty or in uniform.
- c. Bringing intoxicating liquors or narcotic drugs onto department property or buildings or keeping or using the same thereon.
- d. Violation of any criminal law. Disrespect or insolence to a superior.
- e. Absence without official leave.
- f. Disrespect or insolence to a superior.
- g. Neglect of, evading, or shirking duty.
- h. Failure to respond with the apparatus or to respond at all to an alarm.
- i. Misdirecting apparatus by announcement of wrong box number or otherwise.
- j. Conduct prejudicial to good order.
- k. *Abusive or threatening language*

Threats and intimidating conduct jeopardize the safety of members of the department and interferes with the order and teamwork which is essential to a fire company. The department will not tolerate threatening and abusive conduct. Disciplinary action, including discharge, will be imposed for violations of 18.44(k).

Procedure for Investigating Threatening Conduct:

1. *When a member of the department threatens an officer or fire fighter with physical harm, the officer or fire fighter shall immediately notify his/her superior officer.*
2. *The District Chief will be notified and promptly investigate the incident. If warranted, he shall notify the on-duty Deputy Fire Chief who will respond to the location. The Deputy Chief may relieve, with loss of pay, the member making threats for the remainder of the tour pursuant to G.L. c. 31, Section 41.*
3. *If the member making threats refuses to leave quarters and/or becomes disruptive, the District Chief shall request an immediate response from the Fire Investigation Unit (FIU). If the FIU is not available, the Boston Police Department shall be notified.*
4. *The company officer shall prefer charges for the following violations: 18.44 (a), (e), (j), (k), and any other rule or regulation, which may be violated.*
5. *The FIU shall accompany any fire fighter or officer who appears in court as a witness in a criminal matter concerning threats made by a member of the department. The FIU shall remain with the witness as long as necessary. Before the member is allowed to return to duty, he/she shall report to the department medical examiner to determine fitness for duty.*
6. *Obscene, indecent, or profane language, particularly if habitually indulged in.*
7. *Untruthfulness or willful misrepresentation in matters affecting the department or its employees.*
8. *Loss, injury, or damage to department property through willfulness or carelessness.*
9. *Substance Abuse.*

(Exhibit R1)

37. The BFD's "Harassment Free and Respectful Workplace Employment Rights and Responsibilities" guidelines, distributed to firefighters between January and March of 2019, references when an employee experiences "discrimination, harassment or retaliation, threats, bullying or other inappropriate conduct ..". Those guidelines outline "What [an] Officer [receiving a complaint] Must Do" stating: "When Officers become aware of such incidents, they must immediately (within 24 hours) notify the Deputy Chief of Personnel and/or Director of Human Resources." (Exhibit A3)

Legal Standard

G.L. c. 31, § 43 provides:

"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."

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).

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,'"

which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority; *Id.*, quoting internally from Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983) and cases cited.

Analysis

This matter began when an off-duty firefighter (FF GL), walked into the North End firehouse during the early morning hours so intoxicated that he could not remember what transpired in the TV room where on-duty Firefighter CB, a black firefighter, was sitting. FF GL entered the TV room in a drunken state, sat down in a chair next to FF CB, smelling of alcohol and eating Chinese food. FF GL left, then re-entered the TV Room, sitting down on recliner chairs approximately nine (9) feet behind FF CB; began spitting on the floor; and then said, “fucking n-word”.

FF GL was subsequently terminated and appealed his termination to the Commission. I heard that appeal; made findings consistent with the above and, based on his abhorrent behavior, recommended that the Commission affirm the BFD’s decision and deny FF GL’s appeal. A unanimous Commission decision denying FF GL’s appeal was issued on December 5, 2019.

The BFD, here and in the prior appeal, also found that FF GL spat *at* FF CB in the TV Room that morning; and that FF GL stated: “N****r...I’ll fuckin’ fuck you up right now n****r” and “You fucking n****r...do you want to fight me, I’ll fuck you up”. Those findings are not supported by a preponderance of the evidence for the same reasons stated in the Commission’s decision regarding FF GL. First, a review of the record shows that FF CB never actually stated (verbally or in writing) that FF GL 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 FF GL 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 FF GL, who was sitting on recliner chairs approximately nine (9) feet away. While the unsavory act of FF GL 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 FF GL was spitting *at* FF CB that morning.

The preponderance of the evidence also does not support the finding that FF GL 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 FF GL. As referenced above, she testified only to hearing FF GL: "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 didn't ring true to me – at all. Further, based on the credible testimony of Fire Lt. Summering and Fire Lt. Hayhurst, FF CB, immediately after the interaction, did not tell them that Mr. FF GL 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. FF GL made these additional threatening comments.

That turns to the instant appeals regarding the Appellants. The BFD's notice of discipline to the Appellants states:

“... On December 13, 2018 approximately 0100 hours, an off duty member of the Engine Company 8 entered the firehouse, under the influence of alcohol and then threatened and spit

at another on-duty member of the firehouse. When a member, on or off duty, threatens another member of the department, it is the officers responsibility to promptly report offensive and inappropriate behavior to their superior officer immediately. Consequently, you shall receive a two (2) tour suspension for violation of Rule 18.44 (k); §§ (1) and (2), accompanied by an Official Reprimand.” (emphasis added)

As referenced above, the preponderance of the evidence does not support the BFD’s conclusion that FF GL “threatened and spit” at FF CB. Nor does the preponderance of the evidence support the BFD’s conclusion that FF CB made those allegations to the Appellants. Rather, the preponderance of the evidence supports the credible testimony of the Appellants, that FF CB told Lt. Summering, with Lt. Hayhurst nearby: “You better get fucking [FF GL] 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.”

The rules cited by the BFD as allegedly having been violated here state:

“When a member of the department threatens an officer or fire fighter with physical harm, the officer or fire fighter shall immediately notify his/her superior officer.”

“The District Chief will be notified and promptly investigate the incident. If warranted, he shall notify the on-duty Deputy Fire Chief who will respond to the location. The Deputy Chief may relieve, with loss of pay, the member making threats for the remainder of the tour pursuant to G.L. c. 31, Section 41.”

Since FF GL did not threaten FF CB with physical harm, nor did FF CB make such an allegation to the Appellants, the Appellants did not violate these rules. Likely sensing that potential outcome, the BFD, as part of the proceedings before the Commission, sought to expand the reasons why the Appellants may have violated these rules.

For the first time, the BFD argued that the Appellants violated this rule by failing to immediately notify the Deputy Fire Chief that *FF CB* told the Appellants that he (FF CB) would punch *FF GL* in the face if the Appellants did not get FF GL out of the TV Room. First, the notice of discipline never referenced this allegation. Rather, the notice specifically references

the alleged failure by the Appellants to notify the Deputy Fire Chief about FF GL's threats against FF CB, which never happened. Second, after conducting a thorough investigation, and viewing FF CB's statements in the proper context, the BFD exercised wise judgment and chose not to pursue charges against FF CB for making these statements. That is precisely the same type of sound judgment that the Appellants used that night when they did not immediately report FF CB's "threats" to the Deputy Fire Chief.

What the Appellants did do, both immediately, and within hours, appears both reasonable and consistent with BFD rules and guidelines. They acted immediately to diffuse a volatile situation and remove FF GL from the TV Room. They checked in with FF CB at least twice during the shift. Between 6:30 and 7:00 A.M. that same morning, they both immediately notified their incoming superior officers about what occurred, knowing that this serious matter would need to be reported up the chain of command.

Remarkably, one of the first actions taken by the incoming superior officers was to bring FF CB and FF GL together, in the same room, a head-scratching decision that had the potential of escalating a situation that the Appellants had effectively de-escalated hours earlier. Yet, the Appellants, neither of whom had previously faced discipline in their combined forty years of service, were each suspended for two tours. After carefully reviewing the entire record and all of witness testimony, it appears, to me, that the only logical explanation for the BFD's decision to pursue discipline against the Appellants, months after the events of December 13, 2018, relates to the allegation in FF CB's MCAD filing in which he states in part: "Mr. Summering and Mr. Hayhurst 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."

As stated above, FF GL engaged in egregious misconduct when he made racist comments to FF CB. The Appellants, however, did not engage in misconduct that night, and the BFD's decision to make them collateral damage, for what appears to be a strategic move to counter FF CB's MCAD complaint against the City, is inconsistent with basic merit principles – and good conscience.

The Appellants' appeals are *allowed*. The BFD's decision to discipline them is vacated forthwith. They shall be returned to their positions without any loss of pay or other benefits. The BFD shall reimburse the Appellants for defense expenses to the extent permitted by G.L. c. 31, s. 45.

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 march 12, 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 to:
Leah Barrault, Esq. (for Appellants)
Robert J. Boyle, Jr., Esq. (for Respondent)