

**CITY OF ATLANTA
CIVIL SERVICE BOARD
FINDINGS OF FACT AND ORDER**

APPEAL NO. 2020-005AP

Effective Date: February 11, 2020

APPELLANT: **Zachary Atha**

Hearing Date: November 13, 2020

City of Atlanta (“City”)
Atlanta Police Department (“APD”)

ACTION:

HEARING OFFICERS/BOARD

Total 20-day Suspension

Plemon El-Amin, Chair
Mary Ann Phyll
Sterling P. Eaves, DWB

APPEARANCES

City of Atlanta Representative:

Jessica P. Johnson, Esq.

City Witnesses:

Sgt. William Dean, APD, Office of Professional Standards (“OPS”)
Asst. Chief Todd Coyt, APD

Appellant Representative:

Stephanie A. Mutti, Esq. SEIU/NAGE/IBPO/IAEP

Appellant Witnesses:

Ofc. Zachary Atha, Appellant

STATEMENT OF AUTHORITY

Under the authority and provisions of Chapter 114, Article VI, Division 3, Sections 114-546 through 556 of the Atlanta City Code (“Code”), a hearing in the above-referenced case was held virtually via Zoom Webinar, facilitated by the City, pursuant to Mayor Keisha Lance Bottoms Executive Order regarding COVID-19, and before the above-named hearing officers of the Atlanta Civil Service Board (“Board”) on the date set forth above.

EXHIBITS

City of Atlanta:

- C-1. Page 1 of Notice of Final Adverse Action issued on January 30, 2020.
- C-2. Page 2 of Notice of Final Adverse Action issued on January 30, 2020.
- C-3. OPS Complaint File Closeout Report, Control Number 19-I-0577-SOP, Accused Employee: Ofc. Zachary Atha, including the Notice of Proposed Adverse Action dated January 28, 2020.
- C-4. APD SOP 2010 Work Rules, including §4.1.4 and §4.2.33.
- C-5. APD SOP 6050 Department Employees Duties Regarding IT, §4.6.6.

Appellant:

- A-1. APD SOP 2010 Work Rules, including §4.1.4 and §4.2.33.

STIPULATIONS

1. I, Zachary Atha, was made aware of APD Work Rules 4.2.33 and 4.1.4.
2. I, Zachary Atha, was made aware of APD SOP 6050, Section 4.6.6 Social Networking Site(s) Regulations and Restrictions (“Social Media SOP”).
3. I, Zachary Atha, agree that I commented “Draining the swamp, 1 bad apple at a time” on a social media post regarding the death of [US] Rep. Elijah Cummings.

VIOLATIONS

20 day suspension under the Social Media SOP by violating:

- §4.1.4 Conduct (10 day suspension)
- §4.2.33 Conformance to Directives (10 day suspension)

SPECIFIC CHARGES

_____ *“On or about October 17, 2019, you posted inappropriate, negative and insensitive remarks to your Facebook social media account regarding the death of United States*

Representative Elijah Cummings. You, by your own admission, conveyed that your remarks “Draining the swamp, 1 bad apple at a time” was a direct response to the recent death of United States Representative Elijah Cummings.

Additionally, your Facebook page contained a photograph of you wearing a City of Atlanta Police Academy t-shirt.

Your actions and/or inaction as described above are in violation of work rule, 4.2.33/APD.SOP.6050, Section 4.6.6 Social Networking Site(s) Regulation(s) and Restrictions.

- 1. Department employees shall conduct themselves in a manner which does not bring discredit [on] Department employees, the APD, the City of Atlanta, or the community when utilizing social networking sites on and off duty.*
- 2. Department employees shall not identify themselves or other employees directly or indirectly on-line as a member of the Atlanta Police Department, except when utilizing legitimate and professional web pages or sites that are primarily used for posting, viewing, and submitting a Department employees’ resume.”*

FINDINGS OF FACT

1. The Appellant works for APD as a Police Officer and has been employed by the City for seven (7) years.
2. The Appellant has a personal Facebook page (“Page”) through which he keeps in contact with his family, friends, and others in the law enforcement community.
3. In October, 2019, the Appellant received an article on his Page that US Representative Elisha Cummings had died. Following that article, he typed the below words and he posted the article with his comment on his Page:

“Cleaning-up the swamp, 1 bad apple at a time.” (“Cummings Remark”).
4. On that same day and within 6 hours of his posting, he was told by his supervisor that APD command staff knew about his post and was upset. The Appellant removed his comment from his Page immediately.
5. Shortly thereafter, the Appellant was notified that he was to report to OPS for an investigative interview. During that interview, the Appellant was informed that a picture was on his Page displaying him in an “Atlanta Police Recruit” t-shirt (“Self Picture”) and that his command staff had not approved of him appearing on social media in clothing that displayed APD.
6. In that same OPS interview, because the Appellant had not posted the Self Picture on his

Page, he contacted his mother, who was the only other person in the picture, and he asked her to remove it from her Facebook page instantly, which she did.

7. On October 25, 2019, the OPS investigation was completed and a Notice of Proposed Adverse Action was issued recommending a 20-day suspension with the Notice of Final Adverse action following.

DISCUSSION

This appeal involves alleged conduct by the Appellant off the job and on his personal Page. The umbrella provision under which the infractions are charged is the Social Media SOP. The City/APD alleges that (1) under Work Rule §4.1.4, the Appellant posted Cummings Remark which was inappropriate, negative and insensitive and (2) under Work Rule §4.2.33, the Appellant displayed the Self Picture which was not approved by APD.

Because the Appellant has admitted to posting the Cummings Remark on his Page in the stipulations of fact in this appeal, no discussion is needed about whether or not the Appellant posted the Cummings Remark to his Page. Notwithstanding, in his defense the Appellant believes that the Cummings Remark was taken out of context and that his comment was a political comment and not a disrespectful or racially motivated one. In fact, the Appellant testified that he had earlier posted the same comment on his Page when US Senator John McCain died. No one in APD reacted to that posting. The Appellant testified that in the current instance, no one from the APD refused to work with him, nor did any co-workers mention their offense to the posting. Further, to his knowledge, the Appellant testified that no member of the public was offended or made any complaint to APD.

Continuing his defense, the Appellant states that he has a First Amendment right to say and, post on his personal Page, his political views and that this right acts as an absolute bar to discipline by APD. When this issue was first stated by the Appellant at the appeal hearing, the Appellant was informed that the CSB panel was convened to only hear his appeal based upon the City Code, performance rules and procedures of the APD and that the Board lacks legal authority to hear and decide the Constitutional issue raised.

The Appellant's next point of defense addresses the meted discipline. He believes that he was disciplined twice for the same infraction and that he should have been disciplined only once. Reviewing the specific facts that are listed in the charging documents though, and as earlier stated, it is clear that there was not just one alleged infraction but two alleged infractions: (1) the Cummings Remark and (2) the Self Picture.

On behalf of the City, APD Asst. Chief Todd Coyt explained how he came to the decision to discipline the Appellant. He stated that all sworn law enforcement is expected to remain impartial and unflappable and never lose propriety on and off the job. While this mandated higher standard of conduct may be unfair, at the moment an officer is first sworn into law enforcement, he or she knows, understands and accepts this ominous responsibility plus the scrutiny of both their work and personal conduct that came with it.

Chief Coyt also said that in a day when law enforcement is in general under attack, one individual officer can unwittingly post something on their personal social media that is seemingly innocent while another person viewing the same posting could find it to be offensive and inflammatory. He believed that the Cummings Remark was inappropriate, negative and insensitive as charged. When the Cummings Remark was coupled with the posting by the Appellant of the Self Picture, thereby connecting APD with him, Chief Coyt testified that he felt that the recommended discipline of twenty (20) total days suspension was fitting.

In examining the second alleged violation involving the Self Picture, the Appellant testified that he did not post the Self Picture to his Page but that immediately upon him being notified about its alleged existence on his Page, he requested its removal from his mother's Page, which was done. The Appellant points out that anyone including his mother, could have put the picture on *her* Facebook Page. Moreover, because of the information webbing that inter-connects Facebook users, limited by the security settings set of each user, it is possible that anyone linked to the Appellant could have posted the Self Picture on their Page and it be tagged or sent to the Appellant's Page simply because of the two users' Facebook connection.

APD alleging the Appellant posted the Self Picture to his Page because it was on his Page does not prove that the Appellant posted it there. The City provided no evidence at the hearing that supported this allegation. Sgt. William Dean from APD OPS testified that his job is to review OPS investigative files, attach charges to the file and forward the same up his chain of command for potential discipline. Sgt. Dean admitted on cross examination that it was not clear to him after his review of this file where the Self Picture came from - meaning that from the beginning, the picture might not have come from the Appellant's Page. He said that the Self Picture was one of many pages in the OPS file when he received it and there was no indication who found it and put it in file. Considering these facts, and since no one testified on behalf of the City to connect the dots between the *where* and *who*, e.g., that the Self Picture was found on the Appellant's Page and that the Appellant had in fact put it there, there can be no violation.

Sgt. Dean was also asked what was APD's average discipline imposed for violation of the Social Media SOP and he testified that before this case, the average dispensed discipline was one (1) day suspension and that after this case, the average increased to four (4) days suspension. Other than Sgt. Dean's testimony about the average discipline imposed, no other evidence was presented to explain why the meted discipline in this case was so high when compared with the average.

Before reaching its decision in this case, the Board recognizes that City Code §114-553(b) applies to this case. In an appeal of sworn law enforcement personnel, this Board can only affirm or revoke the dispensed discipline and the Board may not amend the discipline imposed. Accordingly, in applying §4.1.4 to the Appellant's conduct, the Board finds that the Appellant's posting of the Cummings Remark was in fact "inappropriate, negative and insensitive" as charged. But when §4.2.33 is applied to the unsubstantiated allegation regarding the Self Picture, the Board, on the other hand, is not persuaded that the Appellant did anything to violate this APD work rule.

ORDER

The Board **AFFIRMS** the discipline imposed by the City pursuant to the infraction under §4.1.4, but grants the appeal for the infraction of §4.2.33, and thereby **REVOKES** the 10 day suspension for that infraction, resulting in total discipline of ten (10) days suspension in this case.

This the 24th day of November, 2020.

Signed:

Plemon El-Amin

Plemon El-Amin, Chair

Mary Ann Phyll

Mary Ann Phyll

Sterling P. Eaves

Sterling P. Eaves, DWB