

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

APPEAL NO. 2021-003AP

Effective Date: January 24, 2021

APPELLANT: **Brian Cole**

Hearing Date: May 27, 2021

City of Atlanta (“City”)  
Atlanta Fire Rescue Department (“AFRD”)

ACTION:

30-day (12-hour days) Suspension

HEARING OFFICERS/BOARD:

Mary Ann S. Phyll, Chair  
Herman L. Sloan  
Sterling P. Eaves, DWB

**APPEARANCES**

City of Atlanta Representative:

Keyshia Baytop, Fire Advocate, Office of Professional Standards (“OPS”), AFRD

City Witnesses:

Investigator Eddie Stubbs, OPS  
Deputy Chief Byron Kennedy  
Firefighter (“FF”) Brian Cole

Appellant Representative:

Ken W. Davis, Esq.

Appellant Witnesses:

Capt. Bobby Stewart, OPS  
Inv. E.C. Stubbs, OPS  
Capt. Arzell Bostic  
FF Nicholas Curry  
FF Jeff Stallette  
FF Brian Cole

**STATEMENT OF AUTHORITY AND PURPOSE**

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.

The Board’s purpose is to be the official protector of the Atlanta Civil Service System and to review adverse employment actions in accordance with the Code.

### **EXHIBITS**

#### **City of Atlanta:**

C-1 Notice of Proposed Adverse Action (“NPAA”) for Brian Cole

C-2 Notice of Final Adverse Action (“NFAA”) for Brian Cole

C-3 Admin. Complaint Investigation 2020-IA-031

C-4 Statement Packet for Brian Cole

C-7 Excerpt from AFRD Disciplinary Manual – Chart 5.7

C-8 Excerpt from AFRD Disciplinary Manual – Chart 5.10

#### **Appellant:**

F. Memo from Capt. Bostic to Inv. Stubbs - Dated July 7, 2020

I. Memo from Curry to Capt. Bostic - Dated June 3, 2020

### **STIPULATED FACTS**

1. Appellant, Firefighter Brian Cole (“Appellant”) began employment with the City of Atlanta on January 29, 2015.
2. The Appellant was an employee of the City of Atlanta on June 1, 2020.
3. On June 1, 2020, the Appellant had a personal Facebook account.
4. On or before June 1, 2020, the Appellant shared a Facebook post, and his comment to the post, on his Facebook page.
5. On June 1, 2020, the Appellant’s Facebook friend and co-worker, Firefighter Nicholas Curry,

discovered both the Facebook post and the comment made by the Appellant regarding the post.

6. Thereafter, Firefighter Nicholas Curry physically showed both the post and the Appellant's comment to Firefighter Marsby Reed and Firefighter Jeffery Sallette at Fire station 16.

7. The Appellant showed Lieutenant Jeremy Wykoff both the Facebook post and his comment to the post.

8. Captain Arzell Bostick became aware of both the Facebook post, and the Appellant's comment to the post, in which he referred the incident to OPS for investigation.

9. OPS Investigator Eddie Stubbs conducted an investigation regarding this incident. The investigation yielded an outcome of "SUSTAINED" for AFRD Work Rule 1.04-Courtesy/Subsection A.

10. The Appellant was served a Notice of Proposed Adverse Action (NPAA) on January 6, 2021, charging him with a violation of work rule 1.04, Courtesy/Subsection A, and proposing suspension without pay for 30 (12hr) days.

11. On January 12, 2021, Firefighter Cole was afforded an employee response session with First Deputy Chief Byron Kennedy. In attendance in this virtual meeting were First Deputy Chief Byron Kennedy, Captain Bobby Stewart of OPS, AFRD advocate Keyshia Baytop, Firefighter Cole, and union representative Paul Gerdis.

12. A Notice of Final Adverse Action (NFAA) was generated indicating that Firefighter Cole would be suspended without pay for a period of 30 (12hr) days to be served between January 24, 2021 and March 7, 2021.

### **VIOLATIONS**

30-Day Suspension- for violation of the Atlanta Fire-Rescue Department Work Rule(s):

1.04 Courtesy. Employees of the department shall be civil, orderly and courteous to the public, co-workers and supervisors, as defined in the COA Code of Ordinances §114-528:

Employees shall not use coarse, insensitive, abusive, threatening or profane language.

### **SPECIFIC CHARGES**

*"On June 1, 2020, multiple co-workers of yours witnessed a video and posting on your social media account (Facebook). This video showed an African-American male (civilian protester) yelling at another African-American male (National Guardsmen). You commented on this video stating that it was a shame, and that none of "them" would be*

*acting like this if “their” food stamps were taken away every time “they” acted that way.*

*Several of your co-workers who viewed the post were offended by the comments. One of your co-workers, who was your social media “friend,” responded by saying, “How you know he was on food stamps though.” Further, at least two of your co-workers voiced their concern about the post to you, after which time you changed your comment to read, “This is sad.”*

*However, on August 27, 2020, during your interview with, and written response to AFRD’s Office of Professional Standards, you were asked if you felt you had violated any work rules regarding this situation. You responded by stating no, you did not.*

*Therefore, your actions were in direct violation of the directive/SOP cited above.”*

### **FINDINGS OF FACT**

1. The Findings of Fact here are in addition to, thereby supplementing the Stipulated Facts (*supra*) in this case.
2. On June 1, 2020, the Appellant posted a video of a black male protestor screaming in the face of a black male National Guardsman on his personal Facebook (“FB”) page. The Appellant added a comment to the video saying that it was a shame, and that none of “them” would be acting like this if “their” food stamps were taken away every time “they” acted that way.
3. Shortly thereafter, the Appellant’s co-workers saw the Appellant’s post and responded to the Appellant either on FB or directly to him. At least one co-worker contacted the Fire Station’s commander, who was off duty and at home, to complain.
4. All co-workers who saw the Appellant’s post were offended by the Appellant’s post.

### **DISCUSSION**

The question before the Board is whether or not the Appellant’s FB post was coarse, insensitive, abusive, threatening or profane as prohibited by the applicable work rule. The Appellant contends that since he was expressing his opinion, his actions did not violate any AFRD policy or work rule.

Inv. Stubbs was the first City witness as the OPS investigator in this case. He outlined his usual manner of investigation, fact finding and deciding whether charges should be sustained. Inv. Stubbs stated that the Appellant’s co-workers found his words offensive and insensitive and that after the post, the Appellant’s co-workers could not trust him. Whether or not the post was removed before or during investigation did not matter. At the end of fact gathering in this case, because more than fifty-one (51) percent of supportive facts were present, he determined violations of

AFRD's work rules should be sustained. He then forwarded the entire investigative packet up his chain of command for potential dispensing of discipline against the Appellant.

The City's second witness was Dep. Chief Byron Kennedy who testified that he was the Chief's designee as the disciplining authority in this case. As is the usual process, AFRD's discipline review panel, which contained the Appellant's peers, reviewed the case, sustained imposition of discipline, and set a maximum appropriate discipline of thirty (30) twelve (12) hour days. Chief Kennedy and other AFRD command staff also conducted a review and response hearing for the Appellant to present his position to management. Afterwards, the NFAA was issued.

It was Chief Kennedy's opinion that the Appellant's words were offensive and insensitive which is impermissible in Work Rule 1.04, and which he believed was the only violation which should be charged. As to the quantity of discipline, Chief felt the discipline maximum was fitting for this case not only because it was within departmental discipline guidelines but also because the Appellant (1) has never taken ownership of his words, (2) brought discredit upon AFRD and the City not only by his words but by wearing official AFRD patch in the pictures of him on his FB page, (3) offended his co-workers, and (4) had received prior discipline which created an ongoing reckoning period affecting the potential discipline quantity dispensed against the Appellant. Chief Kennedy also said that a question of trust between the Appellant and co-workers was created by the FB post and remains unabated. As Chief said, each member of AFRD has to know that every other employee will unquestionably help and protect them in the challenging circumstances in which they serve. But now, a question lingers: will the Appellant treat others in the community the same way he did his fellow fire station employees?

In presenting his case, the Appellant pointed out that the City had introduced no corroborating evidence of him ever having been disciplined before this instance because there was none. The Appellant stated that a sustained failure-to-follow-chain-of-command charge was dismissed by his management and therefore could not be used against him. Regarding whether or not his co-workers should be able to trust him, the Appellant responded that his personal actions and feelings do not enter into his professional life.

The Appellant took exception to Inv. Stubbs' conclusion to sustain the charges. On cross, Appellant's counsel questioned Inv. Stubbs' method of deciding whether or not there were violation(s) of AFRD work rules. Inv. Stubbs made his decision on the complaining co-workers' testimony instead of an objective standard which the Appellant argues should have been used instead. But the Board finds this argument unpersuasive because no objective standard was suggested by the Appellant and decision making by humans is always subjective.

FF Nicholas Curry, FF Jeffrey Sallette, Bat. Chief Arzell Bostick II and the Appellant all testified during the Appellant's case. All corroborated the events in the Stipulated Facts of this case. FF Sallette also repeated what he told the Appellant on that day which was that he/Sallette was going to make an example of the Appellant because of what he wrote on FB. The Appellant later testified that he found Salette's words to be threatening and violative of the same work rule he was charged with violating. Additionally, and as Chief Bostick testified, when FF Reed called

him at home on the Chief's personal cell phone, FF Reed said "Chief you need to come down here and do something about this racist motherfucker." On cross, the Appellant pointed out that FF Reed's words also violated the same work rule and yet neither Sallette nor Reed had been disciplined. But this point was neutralized by the fact that the Appellant never lodged formal complaints to be investigated by OPS plus AFRD's command staff always has the discretion to decide who and who not to discipline after OPS sustains charges.

In his direct testimony, the Appellant stated that he knows his co-workers were offended and he understands why. Because Sallette told him that he would make an example out of the Appellant, that is why he removed the post. Addressing the fact that his co-workers do not now trust him, the Appellant states that nothing affects how he performs his job. When asked if he reported FF Reed and FF Sallette for their violations, he said he did not report them at the time. He simply showed the post to then Capt. Wycoff and then he deleted it.

Addressing the Appellant's assertion that he was free to speak his opinion wherever and whenever he liked, this Free Speech right was not an unconditional right as the Appellant argued but one which could be circumscribed, and as happened when he voluntarily accepted a job with AFRD. At the moment he took his oath and became a sworn officer with AFRD, he knew or should have known that going forward, in exchange for the job, he had chosen to restrict his own right of Free Speech on and off duty.

In closing, the Board has carefully examined all the evidence in this case and the Board finds that the Appellant's words on his FB page were in fact insensitive as prohibited by AFRD work rule 1.04. Contrary to the Appellant's request, the Board has no authority to downwardly amend the discipline in this case because the decision is limited by §114-553(b) of the Atlanta Municipal Code of Ordinances which in relevant part states:

*"...If the appellant is a non probationary sworn officer of...the department of fire who holds...any rank below that of captain, the hearing officer/panel may not modify, but must affirm or revoke [the] suspension..."*

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### **ORDER**

Accordingly, the Board finds that the City has carried its burden, that the discipline in this case was warranted, befitting, is hereby **AFFIRMED**, and the Appellant's appeal is **DENIED**. Going forward, the Board recommends that AFRD consider conducting regular mandatory sensitivity training for all of its personnel and develop and maintain a social media policy delineating the bounds in which its personnel may and may not use personal social media.

This the 8<sup>th</sup> day of June, 2021.

Mary Ann Phyll

Mary Ann S. Phyll, Chair

Herman Sloan

Herman L. Sloan

Sterling Eaves

Sterling P. Eaves, DWB