COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss. One Ashburton Place - Room 503
Boston, MA 02108 (617) 727-2293

HENRY ALVES,
Appellant
v. **CASE NO: D1-08-124**

FALL RIVER SCHOOL COMMITTEE,
Respondent

Appellant's Attorney: Karen E. Clemens, Esq.
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Appointing Authority's Attorney: Bruce A. Assad, Esq.
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Commissioner: Paul M. Stein

DECISION

The Appellant, Henry Alves, appealed under G.L.c.31, §43, from a decision of the Fall River School Committee ("School Committee"), the Appointing Authority, terminating his employment as Junior Custodian for abandonment of his position, effective April 28, 2008. The appeal was timely filed and a full hearing was held by the Civil Service Commission (Commission) on September 26, 2008. The hearing was declared private as no party requested a public hearing. The hearing was recorded on one (1) audiocassette. Witnesses were not sequestered. The School Committee called two witnesses; the Appellant testified on his own behalf and called one witness. Eleven (11) exhibits were received in evidence. The record was left open for the receipt of additional documents which have been received from the Appellant and marked Exhibit 12.

FINDINGS OF FACT

Giving appropriate weight to the Exhibits, the testimony of Joseph Correia, School Committee Director of Administrative & Environmental Services; Lori Midura, School Committee Compliance Officer; Karen Hathaway, Staff Representative, AFSCME Council 93; and the Appellant, and inferences reasonably drawn from the evidence as I find credible, I make the findings of fact set forth below.

Appellant's Background

1. The Appellant, Henry Alves, was hired for the permanent civil service position of Junior Custodian in the Administrative & Environmental Services Department of the School Committee on or about February 5, 2007. Mr. Alves transferred from a position as Equipment Operator/Laborer with the City of Fall River (the City), a prior position he had held for approximately nine years. (*Exhibit 6; Testimony of Correia, Alves*)

2. Save for the attendance issues that resulted in the present appeal, Mr. Alves had a good work record in his ten years of employment with the City and the School Committee. (*Testimony of Correia, Alves*)

3. Mr. Alves is a fifty-eight year old veteran who served in Korea in the 1970s. He now acknowledges that he is an alcoholic and that he has struggled with alcohol substance abuse for much of his adult life, including his ten years of employment with the City and the School Committee. Mr. Alves's self described symptoms included memory loss, suicidal ideation and disabling depression. (*Exhibits 8, 9, 10 & 12; Testimony of Alves*)

4. During the period from February 2008 through August 2008, apparently initially due to symptoms of alcoholic gastritis and alcoholic hepatitis, Mr. Alves sought medical

and psychiatric treatment through a variety of providers, which culminated in the completion of a two-month residential substance abuse rehabilitation treatment program (from July through August 2008) sponsored by the Veteran's Administration. (*Exhibits 8, 9, 10 & 12; Testimony of Alves*)

5. The undisputed evidence established that until his admission to the Brockton VA in March 2008, Mr. Alves alcoholism was substantially untreated. According to the medical records, Mr. Alves also reluctantly agreed to a brief admission to Arbour Fuller-Hospital from April 16, 2008 through April 22, 2008, as well as several outpatient visits to the Emergency Room at St. Luke's Hospital and St. Anne's Hospital. His treatment began in earnest on June 1, 2008 with a second admission to the Brockton VA for one month, followed by a two-month long residential treatment program which he successfully completed on August 31, 2008. (*Exhibits 8, 9, 10, 12; Testimony of Alves*).

6. In sum, as of April 28, 2008, Mr. Alves had been absent without leave for at least three weeks, and was absent for an additional five weeks prior to his June 1, 2008 admission to the Brockton VA Hospital. Mr. Alves knew he "should have been at work" but failed to report because he was "abusing alcohol" and "not of sound mind." (*Testimony of Alves*)

7. As a result of the completion of the residential treatment program, Mr. Alves finally appears to have come to terms with his alcoholism and related illness. He candidly admits that he will always be an alcoholic and aspires to further treatment, which currently includes regular out-patient psychiatric care. He finally appears well on his way to an alcohol-free life-style. (*Testimony of Alves*)

Appellant's Attendance Problems

8. In February 2008, the School Committee's Executive Director of Human Resources, Gus Martinson, wrote to Mr. Alves to express his concern that Mr. Alves attendance record showed a significant number of absences during the 2007-2008 school year, and requested that Mr. Alves discuss this with his supervisor and, if there were extenuating circumstances, to provide documentation (doctor's note, letter, etc) to the Human Resources office. (*Exhibit 7*)

9. Apparently as a result of this communication, or as a result of follow-up initiated by Joseph Correia, School Committee Director of Administrative & Environmental Services, Mr. Alves discussed his absences with Mr. Correia, stating only that he was having "personal issues". Despite Mr. Alves continued absences through February and into March, 2008, Mr. Alves did not acknowledge to Mr. Corriea that he was abusing alcohol or otherwise brought up any medical or psychiatric disability for which he was seeking treatment. (*Testimony of Correia, Alves*)

10.By agreement with Mr. Alves, Mr. Correia applied all of Mr. Alves unused sick time, personal time and vacation time to his absences through March 11, 2008, which exhausted all of Mr. Alves accrued leave. (*Exhibit 6 & 11; Testimony of Correia*)

11. Mr. Correia first came to learn that Mr. Alves's absences were due to a medical condition (although not clearly specified) on or about March 15, 2008, when a physician from the VA Hospital in Brockton sent Mr. Correia a letter explaining that Mr. Alves was hospitalized, would be discharged on March 19, 2008 and would be ready to return to work on Friday, March 21, 2008. (*Exhibit 8; Testimony of Correia, Midura*)

12.Mr. Alves returned to work on Monday, March 24, 2008, and worked for two weeks (3/24-3/28, 3/31-4/4). He failed to report for work on Monday, April 7, 2008 and has not reported for work since. (*Exhibit 11; Testimony of Correia*)

13. On April 16, 2008 (mail receipt indicating it was sent on April 17, 2008), Mr. Correia wrote to Mr. Alves to inform him that he had been on unauthorized leave since March 12, 2008 and that the School Committee considered that he has abandoned his position and voluntarily separated himself from employment with the School Committee. The letter notified Mr. Alves that a hearing on his termination was scheduled for April 24, 2008. (*Exhibit 1*)

14. Mr. Alves signed a receipt acknowledging the April 16, 2008 letter on April 22, 2008. (*Exhibit 1; Testimony of Alves*)

15. The School Committee attendance policy provides that an employee absent due to illness must call in at the inception of the illness but, if the illness is extended, the employee is not required to call in sick each day, but only to inform the School Committee when the employee is ready to return to work. After five days of absence, a doctor's note is required to support a continued authorized absence for medical reasons. (*Testimony of Correia*).

16. According to the medical records, on April 13, 2008, Mr. Alves had sought treatment at St. Luke's Hospital for "suicidal ideation" and was directed to Arbor-Fuller Hospital where he was admitted on April 16, 2008 and discharged on April 22, 2008. The Arbour-Fuller Hospital records describe his Chief Complaint as "loss of job and drinking". His history states: "Recent stressors appear to be financial, loss of job, and also recently losing his girlfriend. The patient drinks approximately a pint of brandy and

up to 18 beers per day. He has been drinking for approximately 40 years. He has not had any sustained sobriety." (*Exhibit 12; Testimony of Alves*)

17. Mr. Alves did not attend the April 24, 2008 hearing nor did he personally communicate with anyone at the School Committee prior to that date, or at any time thereafter for that matter. Several representatives from AFSCME Council 93, did attend the hearing on April 24, 2008 on his behalf, including his union staff representative, Karen Hathaway. Ms. Hathaway testified that she had learned that Mr. Alves was possibly in the hospital. Mr. Correia confirmed that, as of the date of the hearing, he was aware of the fact that Mr. Alves's recent absences were attributed to a drinking problem. (*Testimony of Hathaway, Correia, Alves*)

18. On April 24, 2008, after closing the hearing, Mr. Correia made a written recommendation to terminate Mr. Alves for abandonment of his position. (*Exhibit 2*)

19. Mr. Correia testified that he would "probably not" have recommended that Mr. Alves be terminated if Mr. Alves had continued to report for work once he had returned at the end of March, although he noted that the Superintendent of Schools is the final decision maker. (*Testimony of Correia*)

20. On April 28, 2008, FRSC Superintendent of Schools, Dr. Nicholas Fischer, approved Mr. Correia's recommendation that Mr. Alves employment be "immediately terminated." FRSC forwarded an "Absence and Termination/Form 56 to the Massachusetts Human Resources Division (HRD) stating that Mr. Alves had been terminated for "Permanent Separation-Unauthorized Absence, Section 38" (*Exhibits 3, 4*)

21. The School Committee advised Mr. Alves by letter dated May 13, 2008 that his "services as a Junior Custodian were no longer needed" and, therefore, his employment

with the School Committee was terminated. Although the letter is noted to have been sent certified mail, there is no certified mail receipt in evidence. (*Exhibit 5*)

22. Except for (inadvertently muddled) references to "Massachusetts General Laws Chapter 31 through 45", none of the communications with Mr. Alves from FRSC contain any specific mention of the rights of review under the Civil Service Law, either by the HRD administrator under Sections 37 and 38 of the Civil Service Law or appeal to the Commission under Sections 41 through 45 of the Civil Service Law. (*Exhibits 1, 2, 5*)

23. On May 22, 2008, Mr. Alves filed a "just cause" appeal of his discharge with the Commission, pursuant to Section 43 of the Civil Service Law. (*Claim of Appeal*)

CONCLUSION

Summary of Conclusion

The parties dispute which provision of the Civil Service Law applies to this appeal. The School Committee treats the matter as a termination pursuant to Section 38 based on Mr. Alves's extended unauthorized absence from work. Mass. G.L.c.31, §38. The Appellant claims that the termination does not comply with Section 38 and that the appeal should be decided under the "just cause" provisions of Sections 41 through 43. Mass.G.L.c.31, §41-§43. Under either statute, the Commission determines that the appeal must be dismissed.

Termination for Unauthorized Absence Under Sections 37 and 38

Mass. G.L.c.31, §37, concerning authorized leaves of absence, provides:

> An appointing authority may grant a permanent employee a leave of absence . . . [A]ny grant for a period longer than fourteen days shall be given only upon written request . . . includ[ing] a detailed statement of the reason for the requested leave. . . . *No leave of absence for a period longer than three months, except one granted because of illness as evidenced by the certificate of a physician approved by the [HRD] administrator, shall be granted pursuant to this paragraph without the prior approval of the administrator*.
> . . .

Any person who has been granted a leave of absence . . . shall be reinstated at the end of the period for which the leave was granted and may be reinstated earlier. If the appointing authority, upon demand of such a person, shall fail to reinstate him to his civil service position, such person may request a hearing before the administrator. The administrator shall proceed forthwith to hold such a hearing and to render his decision.

If a person shall fail to return to his civil service position at or before completion of the period for which a leave of absence has been granted under any provision of this section, the appointing authority shall, within fourteen days after the completion of such period, such person a written notice setting forth the pertinent facts of the case and informing him that his employment informing him that his employment in such position is considered to be terminated, whereupon the employment of such person in such position shall terminate. The appointing authority shall file with the administrator a copy of such notice which shall state the date on which the employment of such person should be recorded as having terminated. *The provisions of sections forty-one through forty-five shall not apply to a termination made under this paragraph*. Nothing in this section shall be deemed to prevent the subsequent reinstatement of such person pursuant to section forty-six.

(*emphasis added*)

Mass. G.L.c.31, §38, concerning unauthorized absences, provides, in relevant part:

Upon reporting an unauthorized absence to the administrator pursuant to section sixty-eight,[1] *an appointing authority shall send by registered mail a statement to the person named in the report, informing him that (1) he is considered to have permanently and voluntarily separated himself from the employ of such appointing authority and (2) he may within ten days after the mailing of such statement request a hearing before the appointing authority. A copy of such statement shall be attached to such report to the administrator.*

The appointing authority may restore such person to the position formerly occupied by him or may grant a leave of absence pursuant to section thirty-seven if such person, within fourteen days after the mailing of such statement, files with the appointing authority a written request for such leave, including in such request an explanation of the absence which is satisfactory to the appointing authority. The appointing authority shall immediately notify the administrator in writing of any such restoration or the granting of any such leave.

If an appointing authority fails to grant such a person a leave of absence pursuant to the provisions of the preceding paragraph or, after a request for a hearing pursuant to the provisions of this section, fails to restore such person

[1] Mass.G.L.c.31, §68 states, in part: "Each appointing authority shall report in writing forthwith to the administrator of any . . . absence for more than a month because of illness or injury, unauthorized absence [and]. . . leave of absence for more than a month. . . ." See also PAR.13 (governing prior notice for leaves of absence longer than three months)

> *to the position formerly occupied by him, such person may request a review by the administrator. The administrator shall conduct such review, provided that it shall be limited to a determination of whether such person failed to give proper notice of the absence to the appointing authority and whether the failure to give such notice was reasonable under the circumstances.*
>
> *No person who has been reported as being on unauthorized absence under this section shall have recourse under sections forty-one through forty-five with respect to his separation from employment on account of such absence*.
>
> For the purposes of this section, *unauthorized absence shall mean an absence from work for a period of more than fourteen days for which no notice has been given to the appointing authority by the employee or by a person authorized to do so, and which may not be charged to vacation or sick leave, or for which no leave was granted pursuant to the provisions of section thirty-seven.*

Based on the evidence presented to the Commission, there are certainly questions as to whether the School Committee complied with the applicable reporting and notice obligations of Sections 37 or 38; whether Mr. Alves failed to obtain leave or give notice of his absences as required by those laws and, if so, whether his failure was "reasonable under the circumstances"; and whether the purported termination for "abandonment" met the fourteen-day absence threshold required by Section 38.[2]

Unfortunately, the applicable provisions of the Civil Service Law above explicitly provide that an employee's exclusive redress for an appointing authority's wrongful termination for unauthorized absence is review or appeal to the HRD administrator, with subsequent redress by certiorari or declaratory relief in the Superior Court, and that

[2] For example, as to Section 38: the School Committee's April 16, 2008 notice may have been premature, as the School Committee seems to have computed the "fourteen day" unauthorized absence window necessary to trigger termination under Section 38 by improperly counting time as "unauthorized leave" that Mr. Alves was "charged" for vacation and sick leave; the School Committee appears to overlook his two weeks return from March 28-April 4; neither the April 16, 2008 notice nor the May 13, 2008 notice conform precisely to the required statements specified in Section 38; the April 16, 2008 letter set a hearing date with less advance notice than the ten days time an employee is allowed by Section 38 to request such a hearing after being notified of his termination. As to possible applicability of Section 37, the School Committee did not report Mr. Alves's termination as a Section 37 discharge in the Form 56 to HRD and its case to the Commission appears inconsistent with a claim that that Mr. Alves was terminated for failure to report after a proper leave of absence had expired under Section 37. Finally, there are also questions as to whether Mr. Alves, himself, complied with his obligations under Section 37 or Section 38 as the case may be.

Commission lacks jurisdiction to decide any of these matters. See Police Comm'r v. Civil Service Comm'n, 29 Mass.App.Ct. 470, 561 N.E.2d 869 (1990), rev.den., 409 Mass. 1102 (1991), appeal after remand sub nom, Police Comm'r v. Personnel Admin'r, 39 Mass.App.Ct. 360, 656 N.E.2d 910 (1995), aff'd, 423 Mass. 1017, 671 N.E.2d 1231 (1996). See also Canney v. Municipal Ct., 368 Mass. 648, 335 N.E.2d 651 (1975); Sisca v. City of Fall River, 65 Mass.App.Ct. 266, 838 N.E.2d 609 (2005), rev.den., 446 Mass. 1104, 843 N.E.2d 639 (2006); Town of Barnstable v. Personnel Admin'r, 56 Mass.App.Ct. 1106, 778 N.E.2d 30 (2002) (Rule 1:28 opinion); Donnelly v. Cambridge Public Schools, CSC Case No. D1-08-120, 21 MCSR --- (2008); Fontanez v. Boston Police Dep't, 19 MCSR 159 (2006); Pimental v. Dep't of Correction, 16 MCSR 54 (2003), aff'd sub nom, Pimental v. Civil Service Comm'n, Suffolk Superior Civ. No. SUCV2003-5908 (June 6, 2005); Sheehan v. City of Worcester, 11 MCSR 100 (1998).

The Commission expresses no opinion whether Mr. Alves may have a proper claim under Section 37 or Sections 38, or whether such claims are still viable under the authority cited above and the specific circumstances of this case. It is clear, however, that, if any such claims do exist and are still timely, they are matters for the exclusive jurisdiction of the HRD administrator in the first instance, not the Commission.

Accordingly, if the appeal is treated as a termination for unauthorized absence under Section 38, as FRSC argues, the Commission is obliged to dismiss the appeal for lack of jurisdiction.

Termination for Just Cause Under Section 41

Whereas FRSC treated this matter as a Section 38 termination, Mr. Alves purported to file the appeal as a violation of the "just cause" termination requirement of Section 41,

and asserts that the Commission does have jurisdiction to address his claim under Mass.G.L.c.31,§41-§43. The Commission is not certain that it may properly treat this case as a Section 43 appeal. The mere fact that the appeal was filed and docketed as such is not determinative. In order to bring closure to the matter, however, the Commission reviewed the evidence as if the appeal were brought under Section 43 and has concluded that, under a "just cause" standard, Mr. Alves's appeal must fail as well.[3]

A person aggrieved by disciplinary action 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:

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

Under Section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (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

[3] The Commission notes that the Appellant did not assert a Section 42 appeal, and did not adduce evidence of a procedural violation by the FRSC. A respectable argument could be made that FRSC did not comply with the notice requirements for a "just cause" termination and appointing authority hearing, but, it does not appear to the Commission that remand for that purpose, or reopening the hearing to adduce further evidence relative to a Section 42 or Section 43 claim would be of any substantial value under the circumstances. See generally, Burns v. City of Holyoke, CSC Case No. D-08-155, 21 MCSR --- (Decision on Motion to Dismiss, November 6, 2008) (filing §43 appeal maybe deemed waiver of §42 claim to an appointing authority hearing)

authority." City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997). See also City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728, 792 N.E.2d 711, rev.den., 440 Mass. 1108, 799 N.E.2d 594 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, 721 N.E.2d 928, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass App.Ct. 473, 477, 648 N.E.2d 1312 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (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. of Boston., 359 Mass. 211, 214, 268 N.E.2d 346 (1971); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427 (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, 684 N.E.2d 620, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514, 451 N.E.2d 408 (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, 857 N.E.2d 1053, 1059 (2006) and cases cited.

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, 133 N.E.2d 489 (1956).

> *The greater amount of credible evidence must in the mind of the judge be to the effect that such action 'was justified,'* in order that he may make the necessary finding. If the court is unable to make such affirmative finding, that is, *if on all the evidence his mind is in an even balance or inclines to the view that such action was not justified, then the decision under review must be reversed. The review must be conducted with the underlying principle in mind that an executive action, presumably taken in the public interest, is being re-examined.* The present statute is different in phrase and in meaning and effect from [other laws] where the court was and is required on review to affirm the decision of the removing officer or board, 'unless it shall appear that it was made without proper cause or in bad faith.'

Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427, 430 (1928) (*emphasis added*) The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 462 (2001)

"The commission's task, however, 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. Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006). See Town of Watertown v. Arria, 16 Mass. App. Ct. 331, 334, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983) and cases cited. "Likewise, the 'power accorded the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded the appointing authority.' " Town of Falmouth v. Civil Service Comm'n, 61 Mass. App. Ct. 796, 800, 814 N.E.2d 735 (2004) quoting Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594,600 659 N.E.2d 1190 (1996) Unless the Commission's findings of fact differ significantly from those reported by the appointing authority or interpret the relevant law in a substantially different way, the commission is not free to "substitute its judgment" for that of the appointing authority, and "cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation" E.g., Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006).

The testimony given by Mr. Alves at the Commission hearing made a strong and positive impression of the manner in which he has come to grips with a life-long struggle with alcohol abuse, the candor with which he is able to talk about his past behavior, and the clear impression that he now manages his life appropriately and stands fit for duty in his former job. As noted above, however, the question for the Commission is not whether the Commission (or the School Committee) ought to reinstate Mr. Alves now that he is in recovery, but solely whether the School Committee was justified in terminating Mr. Alves in April 2008, when that Appointing Authority decided to discharge him.

The undisputed evidence established that Mr. Alves had struggled with alcohol abuse for many years, apparently throughout his employment as an equipment operator/laborer with Fall River and in the year and a half of his employment as Junior Custodian for the School Committee. It is also undisputed that, his many prior weeks of absence aside, in April 2008 alone, Mr. Alves was absent without leave for at least three weeks, and was absent for an additional five weeks prior to his June 1, 2008 admission to the Brockton VA Hospital. Mr. Alves knew he "should have been at work" but failed to report because he was "still abusing alcohol" and was "not of sound mind." (*Testimony of Alves*)

Mass.G.L.c.31, §50 states: "No person habitually using intoxicating liquors to excess shall be appointed to or employed or retained in any civil service position. . . ." See, e.g., Town of Plymouth v. Civil Service Comm'n, 426 Mass. 1, 6-7, 686 N.E.2d 188, 191 (1997) (comparing scope of discretionary termination for alcoholism under c.31,§50 with c.41, §101A mandatory termination for smoking by public safety personnel); Smith v. Boston Police Dep't, 17 MCSR 31 (2004) (appellant's "egregious attendance" due to alcoholism justified termination for "substantial misconduct", noting applicability of §50)

In sum, the School Committee had good reason to find that Mr. Alves's failure to report to work or notify the School Committee of his absence was a serious attendance deficiency, directly attributable to his then untreated and "habitual" alcoholism, that reasonably justified discipline, including termination, of his civil service employment.

Mr. Alves argues that the School Committee should not have terminated him without affording him access to an EAP (Employee Assistance Program) or granted him leave under the Family Medical Leave Act, 29 U.S.C. §2601 et seq. (FMLA). There may well be merit to these arguments, but the issues associated with those purported rights

implicate federal and Massachusetts discrimination and employment laws, and perhaps enforcement of collective bargaining agreements, beyond the scope of the Massachusetts Civil Service Law. These issues require adjudication of complex legal and factual issues which the evidence presented to the Commission does not begin to answer and as to which the Commission is not the definitive or appropriate forum. See, e.g., Darst v. Interstate Brands Corp., 512 F.3d 903, 908-909 (7th Cir. 2008) (worker suffering from alcohol abuse entitled to FMLA leave only for days in actual treatment programs and not for incapacity caused by addiction itself or time spent arranging to enter such programs) See also Mammone v. President and Fellows of Harvard College, 446 Mass. 657, 847 N.E.2d 276 (2006) (distinguishing lawful termination for egregious alcoholism-related misconduct as opposed to discriminatory termination for the handicap of alcoholism itself); Beame v. Mass. Container Corp., 18 Mass.L.Rep. 388, 2004 WL 2550470 (Sup.Ct.2004) (tardiness produced by mental illness justified termination because "attendance is an essential function of Beane's job"); Rios-Jimenez v. Principi, 520 F.3d 31 (1st Cir. 2008) (dismissing discrimination claim by employee with emotional disorder unable to comply with attendance and time-keeping requirements because "an employee who does not come to work cannot perform the essential functions of any job"); Ward v. Mass. Health Research Institute, Inc., 209 F.3d 29 (1st Cir. 2000) (distinguishing termination "because of tardiness" from termination "because of disability"); Lemere v. Burnley, 683 F.Supp. 275 (D.D.C. 1988) (alcoholic federal employee was properly terminated for pattern of unscheduled absences over two-year period).[4]

[4] While the present record does not warrant or permit the Commission to address these FMLA issues, the Commission does note, for example, that Mr. Alves absences from March 2008 through August 2008 appear to have been well in excess of the 12 weeks leave to which Mr. Alves may have been arguably entitled under the FMLA.

In sum, treating the appeal as a Section 41 termination, the Commission concludes that the evidence presented credible evidence amounting to just cause under G.L.c.31,§41 to terminate Mr. Alves's employment as of April 28, 2008.

Potential Reinstatement

While the Commission does not grant relief to the Appellant in this case, the Commission applauds and respects what Mr. Alves has now done to address the problem that caused his inability to hold a job with FRSC. Although the Civil Service Law incorporates a strong public policy that prohibits employment of persons who abuse alcohol, the merit principle is also imbedded with the concept that deficient performance can be changed through progressive discipline and corrective action. As stated in Town of Plymouth v. Civil Service Comm'n, 426 Mass. 1, 7, 686 N.E.2d 188, 191 (1997):

> "While the legislative history is sparse, [G.L.c.31] §50 was likely enacted because serious abuse of alcohol presumptively has a negative effect on job performance. *Allowing an employee to be reinstated after completion of an alcohol rehabilitation program and demonstration of satisfactory job performance is consistent with ameliorating deficient job performance*."

(*emphasis added*)

Mr. Alves's acknowledgement of his deficiencies and the corrective action he has taken are a model of this principle. All too frequently, the Commission sees just the opposite – an employee who neither accepts his short-comings nor responds to progressive discipline. The Commission urges the FRSC to take note of these ideals and to proactively consider any options to reinstate Mr. Alves and/or to extend him additional unpaid leave, if the opportunity is presently available or may arise in the future, out of respect for the merit principle and Mr. Alves's recent hard work at self-improvement.

For the reasons stated above, the appeal of the Appellant, Henry Alves, is hereby ***dismissed.***

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on January 8, 2009.

A True Record. Attest:

_____
Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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.

Notice to:
Karen E. Clemens, Esq. (for Appellant)
Bruce A. Assad, Esq. (for Appointing Authority)
John Marra, Esq (HRD)