COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

PIERRE ALVES,
Appellant
v.

CASE NO: D1-09-379

FALL RIVER SCHOOL COMMITTEE,
Respondent

Attorney for the Appellant:

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Attorney for the Respondent:

Bruce A. Assad, Esq.
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Commissioner:

Paul M. Stein

DECISION

The Appellant, Pierre Alves, brought this appeal pursuant to G.L. c.31, §43, seeking reversal of the Respondent Fall River School Committee's ("School Committee") decision to discharge him from his employment as a Senior Building Custodian on September 15, 2009. At the evidentiary hearing on March 16, 2010, the School Committee presented evidence through two witnesses, Joseph Correia and Thomas Coogin, while the Appellant testified on his own behalf. Thirteen (13) Exhibits and the parties' Stipulation of Facts were received in evidence. The hearing was digitally recorded.

FINDINGS OF FACT

Based upon the Exhibits, Stipulations, and the testimony of Mr. Correia, Mr. Coogin, and Mr. Alves, and the inferences reasonably drawn from that evidence, I make the findings of fact set forth below.

1. On September 21, 1997, Appellant began his employment with the School Committee as a Junior Building Custodian at Doran Elementary School in Fall River, Massachusetts. (Testimony of Appellant)
2. In March 2002, Appellant was promoted to the Senior Building Custodian position at Doran Elementary School. (Exhibit 11)
3. During his employment with the School Committee, Appellant was also an active member of the United States Marine Corps, for which he honorably served two lengthy tours of duty in Iraq. During these tours, Appellant was granted military leaves of absence by the School Committee. (Testimony of Appellant)
4. Appellant suffered serious readjustment issues following his second deployment. (Testimony of Appellant)
5. Upon return from his military service in November 2007, Appellant failed to report to work with the School Committee or provide documentation of any medical or related condition that would excuse him from reporting. (Stipulation of Facts)
6. On January 14, 2008, Appellant met with the School Committee's Human Resources Executive Director, Gus Martinson regarding his employment status following his failure to report to work upon his return. (Stipulation of Facts)

7. At the meeting, Appellant agreed to return to his position as Senior Building Custodian at Doran Elementary School on January 28, 2008. (Stipulation of Facts)

8. Appellant failed to report for work on January 28, 2008. (Stipulation of Facts)

9. As a result of his failure to report to work on January 28, 2008, Appellant's employment with the School Committee was terminated on February 5, 2008. (Stipulation of Facts; Exhibit 1)

10. After hearings before the School Committee and an appeal by the Veterans Administration, the Superintendent of Fall River Schools reversed his decision to terminate Appellant's employment. (Stipulation of Facts)

11. The School Committee and Appellant entered into a Last Chance Agreement on March 31, 2009. (Stipulation of Facts; Exhibit 2)

12. The Last Chance Agreement provided that Appellant was no longer entitled to progressive disciplinary measures, and that his failure to further meet performance or employment standards would result in immediate termination of his employment. (Stipulation of Facts; Exhibit 2)

13. The Appellant returned to his position at Dolan Elementary School on April 13, 2009. (Stipulation of Facts)

14. On May 20, 2009, Appellant failed to report to work and failed to notify the Facilities and Operations Department of his absence or the reasons therefor. (Stipulation of Facts)

15. In response to Appellant's May 20, 2009 absence from work, the School Committee informed Appellant that any further violation of the parties' Last

Chance Agreement would result in his immediate termination. (Stipulation of Facts; Exhibit 4)

16. On June 12, 2009, the School Committee issued a notice to all Facility and Operations personnel, informing them of a new departmental policy requiring all employees to call the school each day of an unscheduled absence, and to provide a reason for their absence. (Stipulation of Facts; Testimony of Coogin; Exhibit 5)

17. Appellant acknowledged receipt of the new absence policy. (Exhibit 5)

18. On August 11 and 12, 2009, Appellant called in sick from work and informed his supervisor of his illness. (Stipulation of Facts; Exhibit 6)

19. Appellant did not report for work on August 13, 14, 17, 18, 19, 20 or 21, but neglected to follow the new call in procedure for these dates of absence. (Exhibit 6)

20. On August 24, 2009, Appellant produced documentation from his chiropractor excusing him from work from August 24, 2009 to September 3, 2009 because of "acute lower back pain." (Exhibit 13)

21. Appellant failed to produce credible medical documentation excusing or explaining his absences prior to August 24, 2009. (Testimony of Appellant)

22. As a result of his unreported absences, Appellant's employment with the School Committee was terminated on September 15, 2009. (Exhibit 6)

23. Appellant had been taking several medications during the period of his absences, and claims that the effects of the medication led to his inability to report to work. (Testimony of Appellant)

CONCLUSION

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.

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). 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." *Cambridge v. Civil Service Comm'n*, 43 Mass. App. Ct. 300, 304, *rev.den*., 426 Mass. 1102 (1997). *See also 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 (2000); *McIsaac v. Civil Service Comm'n*, 38 Mass. App. Ct. 473, 477 (1995); *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. of Boston*, 359 Mass. 211, 214 (1971); *Cambridge*, 43 Mass. App. Ct. at 304; *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.'" *Falmouth*, 447 Mass. at 823.

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). 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 (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. *Falmouth*, 447 Mass. at 823*; see Watertown*, 16 Mass. App. Ct. at 334. 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." *Falmouth v. Civil Service Comm'n*, 61 Mass. App. Ct. 796, 800 (2004); quoting *Police Comm'r v. Civil Service Comm'n*, 39 Mass. App. Ct. 594, 600 (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." *Falmouth*, 447 Mass. at 823.

The evidence presented in this case makes it abundantly clear that the School Committee adhered diligently to the principles of progressive discipline until it had no further options for Appellant. Appellant exhibited a history of attendance issues dating back to 2005, and this behavior continued through 2009 without any sign of significant improvement. Due in part to Appellant's brave military service and the effects he suffered from two separate tours of duty in Iraq, the School Committee was rightfully understanding and remarkably patient with Appellant's readjustment to civilian life upon his return in November 2007. However, the School Committee did not act unreasonably by drawing a proverbial line in the sand, imposing a zero-tolerance standard on Appellant through the parties' Last Chance Agreement. At some point, its bathrooms needed to be cleaned, its floors mopped, and its waste baskets emptied. Appellant's absence caused a particular hardship for the school at it approached the beginning of the school year and it

was attempting to make last minute preparations and repairs for the students' return in September.

Appellant can certainly make a good faith argument that he complied with the *spirit* of the Last Chance Agreement when he called in sick on the first two days of his prolonged absence. While this may be true, and Appellant's supervisors likely knew that he continued to be sick on the days he failed to call, the School Committee does not have to prove a breach of the Last Chance Agreement for it to have just cause in terminating Appellant's employment.

This in no way diminishes our appreciation and respect for Appellant's service to our nation. He selflessly and admirably put himself in harms way to protect many of our freedoms. Sadly though, his transition to civilian life, like so many other combat veterans, was scarred by horrific memories of war. However, as much as we, as citizens, are willing to applaud his military service, the taxpayers of Fall River have a right to have their tax dollars pay for services that benefit the City and its residents. As long as the School Committee continued to employ Appellant, taxpayers were not receiving these vital services.

To be clear, I take absolutely no pleasure in confirming a decision to discharge a combat veteran, particularly when his service was likely a contributing factor to his inability to perform his job as a civilian.

I conclude that the Respondent has established by a preponderance of the evidence that it had just cause under G.L. c.31, §41 to terminate Mr. Alves' employment on September 15, 2009. Therefore, Mr. Alves' appeal is hereby ***dismissed.***

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell and Stein, Commissioners) on October 21, 2010.

A True Record. Attest:

_____
Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of the Commission's 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: Michael J. Maccaro, Esq.
Bruce A. Assad, Esq.