COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

THOMAS BRANCO,
Appellant

v.

D1-15-170

METHUEN PUBLIC SCHOOLS,
Respondent

Appearance for Appellant:

Anthony Augeri, Esq.[1]
The Augeri Law Group
231 Sutton Street, Suite 1-A
North Andover, MA 01845

Appearance for Respondent:

Michael J. Maccaro, Esq.
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Commissioner:

Cynthia A. Ittleman

DECISION ON RESPONDENT'S AMENDED MOTION FOR SUMMARY DECISION

Thomas Branco (Mr. Branco or Appellant) filed the instant appeal at the Civil Service Commission (Commission) on August 28, 2015, under G.L. c. 31, §§ 42 and 43, challenging the decision of the Methuen Public Schools (Respondent) to terminate Mr. Branco's employment. A prehearing conference was held in this regard on October 6, 2015 at the offices of the Commission, at which time the Respondent filed a Motion for Summary Decision (Motion). The Appellant, acting pro se at the time, did not file an opposition to the Motion. The Respondent filed an Amended Motion for Summary Decision (Amended Motion) on October 15, 2015. The Appellant, then represented by counsel, filed an Opposition to the Amended Motion (Opposition)

[1] Attorney Augeri did not represent the Appellant until on or about October 22, 2015, after the prehearing conference but prior to the motion hearing.

on November 6, 2015. A hearing[2] was held on the Amended Motion on November 17, 2015 at the Commission. This hearing was digitally recorded and the parties received a CD of the recording.[3] The parties submitted post-hearing material at my request. The Amended Motion is allowed in part and denied in part.

FINDINGS OF FACT

Based on the prehearing stipulations and submissions of the parties; the documents and memoranda submitted in support of, and opposition to the Motion; any and all other documents filed by the parties in the case; stipulations; and the parties' arguments at the motion hearing, and supplemental submissions submitted upon my request, I find the following material facts are not in dispute:

1. The Appellant was hired as a custodian on November 1, 2000. Subsequently, he was moved to maintenance. (Stipulation)
2. On June 4, 2015, the Appellant's wife obtained an abuse prevention order at the Lawrence District Court requiring the Appellant to stay away from his family and surrender any firearms to the police. The order states, in part, "VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE punishable by imprisonment or fine or both." (Court Documents)(emphasis in original) The order notified the Appellant that the order would expire and a hearing would be held on the order on June 16, 2015. (Id.)

[2] The Standard Adjudicatory Rules of Practice and Procedures, 810 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission, with G.L. Chapter 31, or any Commission rules, taking precedence.

[3] If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this 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. If such an appeal is filed, this CD should be used to transcribe the hearing.

3. On June 5, 2015, a criminal complaint was issued against the Appellant for committing an assault and battery against a household member (G.L. c. 265, § 13M(a)) and threatening to commit a crime (G.L. c. 275, § 2) on June 4, 2015.
4. On June 8, 2015, the Appellant was arraigned in Lawrence District Court for the two (2) crimes that he was charged with committing on June 4, 2015.
5. On June 15, 2015, the Appellant was arrested and charged with possession and intent to distribute Class B illegal drugs.
6. On or about June 15, 2015, at a criminal court proceeding involving the charges against the Appellant for assault and battery and threats to commit a crime, the Appellant was ordered held without bail for ninety (90) days at the Essex County Jail.
7. By letter dated June 16, 2015, the Appellant wrote the following to the Superintendent Judith Scannell, in full,

> "I, Thomas F. Branco, Jr. am going through a divorce, and a terrible time right now. I need to seek a substance abuse treatment program, and cannot do so until I am released from detainment. I am requesting to be placed on unpaid leave until I can get my affairs in order, and the treatment I need." (Amended Motion, Attachment A)

   The Respondent did not approve this request.
8. On June 16, 2015, a court hearing was held regarding the abuse prevention order against the Appellant. The order was extended for one (1) year, the Appellant was ordered not to abuse his family, and the order was modified to delete the provisions requiring him to stay away from his family; however, the firearm surrender provision remained in effect.
9. "The Merrimack Valley Police Log in the Eagle Tribune online for June 17, 2015 reported that the Appellant had been arrested for violation of a restraining order and

illegal possession of a class B substance." (Amended Motion, Attachment A) The Eagle Tribune newspaper also published two (2) articles about the Appellant's arrest.

10. By letter dated July 8, 2015 addressed to the Appellant at the Essex County Sheriff's Department, Cell 414, and hand delivered to the Appellant, the Respondent notified the Appellant, in part, as follows,

> **"Re: NOTICE OF INTENT TO DISMISS**
>
> … This is formal notice that I, as your Appointing Authority, am considering the termination of your employment with the Methuen Public School. …
> I have scheduled a pre-termination hearing on this matter, at which you may be represented by your union representative or counsel, for Monday, July 13, 2015, at 10:00 AM in the Upper Programs at the Essex County Sheriff's Department …
>
> At your hearing, you will have an opportunity to respond to the circumstances summarized below as well as present any other information that may be relevant. At the conclusion of the hearing, I will assess all relevant and appropriate information and make a determination as to what action, if any, should be taken.
>
> The grounds upon which such disciplinary action is being contemplated are as follows:
>
> It is our understanding that you were arrested on Monday, June 15, 2015 at approximately 1:20 AM for violation of a restraining order and illegal possession of a class B substance. It has been reported that you are currently being held for 90 days without bail. On June 16, 2015, you submitted a note confirming that you are being detained. You did not provide a date you would return to work, nor did you previously request this leave of absence as required by the applicable collective bargaining agreement. Incarceration is never a permitted reason for the District to grant a leave of absence. As such, your absence from work since June 15, which as of the date of this letter is seventeen (17) work days, is unexcused and grounds for your termination.
>
> Further, pursuant to M.G.L. c. 31, § 38, because your unexcused absence has exceeded 14 days, you are considered to have permanently and voluntarily separated yourself from the employ of the Methuen Public Schools. This issue will be addressed at the hearing scheduled for July 13, 2015.
>
> In addition, the public reporting by local media sources of the details surrounding your arrest … have brought discredit to the Methuen Public Schools and is contrary to the standards expected of its employees. Specifically, in an article titled "School custodian facing drug charges," published July 1, 2015, it was

reported that you were arrested with 79 prescription painkillers. The discredit brought upon the Methuen Public Schools is a separate basis for your potential termination.

I am enclosing a copy of Massachusetts General Laws, Chapter 31, sections 41 through 45. You have such rights as specified therein, as well as all other rights provided by the law and the Collective Bargaining Agreement which governs your employment …"
(July 8, 2015 Notice of Intent to Dismiss)(**emphasis** in original)(emphasis added)

11. By letter dated July 10, 2015, the Respondent sent the Appellant a "Revised Notice of Intent to Dismiss" indicating that the hearing date was changed to July 15, 2015, indicated that the Appellant had been absent at that time for nineteen (19) work days and repeating the last paragraph of the July 8, 2015 letter regarding G.L. c. 31, ss. 41-45 and attaching copies thereof. (Amended Motion, Attachment A)
12. On July 14, 2015, the Respondent completed an "Absence and Termination Notice/Form 56", a form from the state's Human Resources Division (HRD), indicating that the Appellant's last date of paid employment was June 11, 2015, and marking on the form that this was a "Permanent Separation-Unauthorized Absence Section 38". (Amended Motion, Attachment A) There is no indication when the Respondent submitted this form to HRD and if it attached a notice that was sent to the Appellant regarding this action as pursuant to G.L. c. 31, s. 38. (Administrative Notice)
13. On July 14, 2015, the court disposed of criminal charges against the Appellant as follows:
    Docket No. 3304 – possession of illegal drugs with intent to distribute; the Appellant entered an Admission to Sufficient Facts for a Finding of Guilty
    Docket No. 3278 – violation of domestic abuse restraining order; the Appellant entered an Admission to Sufficient Facts for a Finding of Guilty and was found Guilty[4]

[4] Court Docket No. 3278 indicates both "Guilty" and "Admission to Sufficient Facts".

Docket No. 3273 – violation of domestic abuse restraining order; the Appellant entered an Admission to Sufficient Facts for a Finding of Guilty and was found Guilty[5]

Docket No. 3122 - assault and battery of a household member and threat to commit a crime; the Appellant entered an Admission to Sufficient Facts for a Finding of Guilty and was found Guilty[6]

Docket No. 3268 – possession of illegal drugs and violation of domestic abuse restraining order; the Appellant entered an Admission to Sufficient Facts for a Finding of Guilty and was found Guilty[7] for violating the restraining order and the drug possession charge was dismissed at the request of the prosecutor and replaced with Docket No. 3304

The Appellant was released from pretrial detention, placed on active probation for two (2) years, and required to attend a Batterers' Treatment Program, remain drug free, undergo random drug testing, abide by the restraining order, and enter and complete a specific long-term, outpatient substance abuse program.

The Respondent did not approve the Appellant's request for unpaid leave. (Amended Motion - Attachment A)

14. The Respondent's employment hearing scheduled for July 13 was rescheduled to July 15, 2015 since the Appellant had been released from Essex County House of Correction. The Respondent hand-delivered the notice of the July 15 hearing to the Appellant.
15. The Respondent conducted the hearing on July 15, 2015 after the Notice of Termination form was filled out and the Hearing Officer Edward Lussier (Mr. Lussier) issued his Findings and Report (Report) by letter dated August 17, 2015 to Superintendent Scannell. The Report states, in part,

[5] Court Docket No. 3273 indicates both "Guilty" and "Admission to Sufficient Facts".
[6] Court Docket No. 3122 indicates both "Guilty" and "Admission to Sufficient Facts".
[7] Court Docket No. 3268 indicates both "Guilty" and "Admission to Sufficient Facts".

"On July 15, 2015, I presided over a hearing as your designee to consider whether [Mr. Branco] … should be terminated for the charges contained in your letter of July 10, 2015. Specifically, Mr. Branco was charged with 1) unexcused absence … between June 15, 2015 and July 14, 2015 for the reason of incarceration; and 2) bringing discredit on the Methuen Public Schools based on the publicly reported details of his arrest, which are contrary to the standards expected of employees of the Methuen Public School.

During this hearing, the District was represented by Attorney Sarah Catignani … Mr. Branco was not represented by counsel, but was joined to two (2) union members … Both sides were afforded the opportunity to make opening statements and call witnesses … The District offered and I accepted six (6) exhibits … Mr. Branco offered and I accepted three (3) exhibits … The District called one witness, Human Resources Director Colleen McCarthy, and Mr. Branco called no witnesses. The record was left open after the hearing and Mr. Branco, through counsel, on July 29, 2015, submitted and I accepted an additional exhibit.

Based upon the representations made by the parties, the testimony … , the exhibits … and Mr. Branco's complete personnel file, … I have made the following findings:

Charge 1:
… Court records detailing the five (5) pending cases against Mr. Branco were submitted into evidence. These records confirm that Mr. Branco was arrested on June 15, 2015 and was remanded to the Essex County Sheriff's Department for 90 days without bail until his release on July 14, 2015. The District did receive a note from Mr. Branco, dated June 16, 2015, which was submitted into evidence. This note confirmed that Mr. Branch was 'detained' and was requesting leave. The District asserted that incarceration is never a permitted reason for excused leave and, as such Mr. Branco's absence between June 15, 2015 and July 14, 2015, when he was released on probation was unexcused. The District stated that this absence was well in excess of the 14 days required under M.G.L. c. 31, § 38 for job abandonment and submitted a copy of the form that had been filed with [HRD] …

At the hearing, Mr. Branco denied that he had been involuntarily incarcerated and asserted that he was in a voluntary drug treatment program that was unrelated to his arrests. … I received a letter on July 29, 2015, which stated that Mr. Branco partook in the Pre-TRAC recovery program at the Essex County House of Correction from June 24, 2015 to July 14, 2015. This letter does not state that Mr. Branco was not an inmate or otherwise incarcerated while attending this program, and there is no evidence to suggest that this was a voluntary program unassociated with his incarceration.

Based on Ms. McCarthy's testimony and the exhibits submitted by the District, I find that Mr. Branco has been absent … since June 15, 2015. I find that his absence was for the reason of incarceration until July 14, 2015 … [and it] … was not excused. Ms. McCarthy further testified that it has never been the practice … to excuse absences for the reason of incarceration. While Mr. Branco asserted that he was in a voluntary drug treatment program at the Essex County Sheriff's Department …, as opposed to being incarcerated, the letter he provided does not support this statement …

Charge 2:
Mr. Branco was charged with acting in a way that brought discredit upon the Methuen Public Schools and was contrary to the standards expected of its employees. In particular, the public reporting of Mr. Branco's arrest, the details of his arrest, and his association with the Methuen Public Schools was the basis for this charge. Additionally, … it appears Mr. Branco pled guilty to several of the charges against him including 'A&B on Family/Household Member c 265 § 13M(a),' 'Threat to Commit Crime c275 §2,' and 'Abuse Prevention Order, Violate c209A, §7.' It also appears that Mr. Branco admitted to sufficient facts regarding the 'Drug, Possess to Distribute Class B c94C §32A(a)' charge.

I find that the details of Mr. Branco's arrest were published on at least three (3) occasions in the Eagle-Tribune (sic). Mr. Branco admitted during hearing that the details that were published were generally accurate. …

RECOMMENDATION
… I recommend that the Superintendent, as the appointing authority, terminate Mr. Branco's employment … I have found that Mr. Branco has been charged with two separate offenses … I find that any one of the charges in isolation warrants immediate termination. …"
(Report of Mr. Lussier)

16. Prior to the issuance of Mr. Lussier's Report, the Appellant gave Mr. Lussier a letter dated July 29, 2015 from Mr. Benjamin Thompson, Program Director of the TRAC Program, stating, in full,

> This letter is written for: Thomas F. Branco, Jr.
> Mr. Branco was in the Pre-TRAC Recovery Program here at the Essex County House of correction. Clients Attend 2 Recovery Group Meeting (sic) per day, 1 hour in duration. No clinical or treatment notations or records exist for pre-trial clients.
> Dates of Attendance: 6/24/15-7/14/15
> (Amended Motion, Attachment A)(emphasis added)

I take administrative notice that the TRAC program is a program offered by the Essex County Sheriff's office for Treatment and Recovery from Addictions in Corrections. (http://www.mass.gov/essexsheriff/programs/trac.html) "The TRAC program is an 80-bed substance abuse treatment area where inmates are classified based on their current charge and substance abuse history. …The program is modeled after a therapeutic community (TC) and is designed for participants to remain on the unit for 4 to 6 months. Each Community Member attends 4 meetings a day with a variety of curriculum …." (Id.)

17. By letter dated August 17, 2015, Supt. Scannell sent the Appellant a copy of Mr. Lussier's Report with a cover letter indicating that she accepted Mr. Lussier's Report and that he was terminated from his position with the Methuen Public Schools effective immediately, enclosing a check for accrued and unused vacation time and any wages due.
18. The Appellant timely filed a notice of appeal at the Commission on August 28, 2015.
19. The Appellant did not appeal to HRD. (Administrative Notice)

Prior to 2015

20. In or about 2003, the Appellant sustained a worker's compensation injury and was out of work for a while.
21. In or about January 2007, court documents indicate that an abuse prevention restraining order was issued against the Appellant at the request of his wife. The order remained in effect for one (1) year.
22. In June 2007, the Appellant was criminally charged for violating the existing abuse prevention restraining order but the charges were dismissed at the request of the Appellant's wife, who asserted the marital privilege, refusing to testify against the

Appellant. In the disposition of the case, the Appellant was "voluntarily committed to MASAC[8] on a Chapter 123 sec 35 commitment not to exceed 30 days …" (Opposition to Amended Motion, Ex. 1)

23. In or about 2007, the Appellant requested a leave of absence for a specific amount of time for substance abuse treatment and divorce matters, which leave request the Respondent granted.

24. The Appellant's prior discipline includes:

> July 2012 – verbal warning letter union contract prohibits discussing union business during the work day unit is approved in by Superintendent
> May 2007 - suspended five (5) days for failing to perform duties
> May 2007 – notice of poor job performance
> April 2007 – letter of reprimand for poor job performance
> April 2007 – notice of poor job performance
> March 2007 – verbal warning for poor job performance
> (Attachments to Respondent's August 17, 2015 Decision)

Standard of Review

An appeal before the Commission may be disposed of summarily, in whole or in part, pursuant to 801 C.M.R. 1.01(7)(g) and 801 C.M.R.1.01(7)(h) when, as a matter of law, the undisputed material facts affirmatively demonstrate that there is "no reasonable expectation" that a party can prevail on at least one "essential element of the case". *See, e.g.*, Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550 n.6, (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005).

Applicable Law

Leave of Absence

A permanent civil service employee may request a leave of absence from his or her employer pursuant to G.L. c. 31, § 37. Specifically, section 37 provides, in part,

[8] I take administrative notice that MASAC is the Massachusetts Alcohol and Substance Abuse Center of the Department of Correction.

> An appointing authority may grant a permanent employee a leave of absence or an extension of a leave of absence; provided that any grant for a period longer than fourteen days shall be given only upon written request filed with the appointing authority by such person … and shall be in writing. The written request shall include a detailed statement of the reason for the requested leave and, if the absence is caused by illness, shall be accompanied by substantiating proof of such illness. A copy of the written grant shall be kept on file by the appointing authority, who shall, upon request, forward a copy thereof to the commission or administrator. 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 administrator, shall be granted pursuant to this paragraph without the prior approval of the administrator. …
> 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, give such person a written notice setting forth the pertinent facts of the case and informing him that his employment in such position is considered to be terminated … The appointing authority shall file with the administrator a copy of such notice … 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.
> Id. (emphasis added)

Section 38 of G.L. c. 31 addresses the process involved in a leave of absence. This section states, in part,

> Upon reporting an unauthorized absence to the administrator pursuant to section sixty-eight, 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 …
> If an appointing authority fails to grant such 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 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 … shall have recourse under sections forty-one through forty-five ….

> … 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.
> Id. (emphasis added)

Section 38 has been interpreted consistently to mean that jurisdiction to review a decision by an appointing authority to separate an employee for "unauthorized absence" lies exclusively with the Personnel Administrator [HRD]. *See, e.g.*, Police Comm'r v. Civil Service Comm'n, 29 Mass.App.Ct. 470 (1990), *rev.den.*, 409 Mass. 1102 (1991), appeal after remand sub nom; Reuter v. Methuen Public Schools, Mass.App.Ct. No. 14-P-759 (2015)(Rule 1:28 opinion); Police Comm'r v. Personnel Adm'r, 39 Mass.App.Ct. 360 (1995), *aff'd*, 423 Mass. 1017 (1996). *See also* Canney v. Municipal Ct., 368 Mass. 648 (1975); Sisca v. City of Fall River, 65 Mass.App.Ct. 266 (2005), *rev.den.*, 446 Mass. 1104 (2006); Town of Barnstable v. Personnel Adm'r, 56 Mass.App.Ct. 1106 (2002)(Rule 1:28 opinion); DeSimone v. Civil Service Comm'n, 27 Mass.App.Ct. 1177 (1989). The Commission's decisions have been uniformly to the same effect. Alves v. Fall River School Dep't, 22 MCSR 4 (2009); Donnelly v. Cambridge Public Schools, 21 MCSR 665 (2008); O'Hare v. Brockton, 20 MCSR 9 (2007); McBride v. Fall River, 19 MCSR 325 (2006); Fontanez v. Boston Police Dep't, 19 MCSR 159 (2006); Pimental v. Department 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); McDonald v. Boston Public Works, 14 MCSR 60 (2001); Sheehan v. Worcester, 11 MCSR 100 (1998); Brindle v. Taunton, 7 MCSR 112 (1994); Tomasian v. Boston Police Dep't, 6 MCSR 221 (1993). Under section 38, "[t]here is no right of review or opportunity to secure relief from the civil service commission by way of any procedure that is set forth in G.L. c. 31, ss. 41-45." Sisca, *supra*, at 270 (citations omitted). Moreover, an employee can not "unilaterally decide not to report for

duty on any given work day (or string of days), without notice, relying on an unspoken assumption that available sick or vacation leave can be exercised merely on a whim. Such a method of operation is wholly at odds with the language of s. 38 and its underlying policies, and surely would only produce absurd results if ever put into place." Id. at 272.

Discipline

A tenured civil service employee may be discharged for "just cause" after due notice and hearing upon written decision "which shall state fully and specifically the reasons therefore." G.L. c. 31, s. 41. Section 41 further provides, "[i]f such hearing is conducted by a hearing officer, his findings shall be reported forthwith to the appointing authority for action. Within seven days after the filing of the report of the hearing officer …the appointing authority shall give to such employee a written notice of his decision …" Id. A person aggrieved by a decision 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, in part:

> "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."
> Id. (emphasis added)

Under G.L. c. 31, s. 42, "[a]ny person who alleges that an appointing authority has failed to follow the requirements of section forty-one in taking action which has affected his employment or compensation may file a complaint with the commission. …" Id. If the Commission determines that the appointing authority did not follow the procedures in section 41 and the

person's rights have been "prejudiced thereby", section 42 provides a remedy, stating, " … the commission shall order the appointing authority to restore said person to his employment immediately without loss of compensation or other rights…." Id.

Under section 43, the Commission makes a de novo review "for the purpose of finding the facts anew." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (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 authority." City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, *rev.den.*, 426 Mass. 1102 (1997). *See also* City of 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, *rev.den.*, 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass.App.Ct. 473, 477 (1995); Town of 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., 359 Mass. 211, 214 (1971); *City of Cambridge v. Civil Service Comm'n*, 43 Mass.App.Ct. 300, 304, *rev.den.*, 426 Mass. 1102 (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, *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.' " Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of "merit principles" which govern civil service law that discipline must be remedial, not punitive, designed to "correct inadequate performance" and "separating employees whose inadequate performance cannot be corrected." G.L. c. 31, § 1.

A civil service employee may be disciplined for off-duty misconduct if there is a nexus between the misconduct and his or her employment. The Appeals Court has found,

> "Off-duty misconduct properly can be the basis for discipline when the behavior has a 'significant correlation' or 'nexus' between the conduct and an employee's fitness to perform the duties of his public employment. *See, e.g.*, City of Cambridge v. Baldasaro, 50 Mass.App.Ct. 1, 4, *rev.den.*, 432 Mass, 1110 (2000); School Committee of Brockton v. Civil Service Comm'n, 43 Mass.App.Ct. 486, 491-92, *rev.den.*, 426 Mass. 1104 (1997); Timperly v. Burlington School Committee, 23 MCSR 651 (2010)(misconduct by off-duty school custodian in public park)."
> Sisca & another v. City of Fall River & others, 65 Mass.App.Ct. 266 (2005)

When a civil service employee's off-duty misconduct is public and of a nature that diminishes the respect for, and confidence in his or her employer, it establishes the requisite nexus to his employment. The employee's behavior "adversely affect[s] the public interest in that it is unlikely that the residents of [the municipality] would choose to have their tax dollars spent to pay the salary of someone" whose behavior fails to meet the "standards of acceptable behavior, behavior that comports with the [municipality]'s norms of conducting business or, more broadly, any standard of decency." Schiavone v. Civil Service Commission, Mass.App.Ct. No. 12-P-502 (issued pursuant to rule 1:28)(2013). *See* Wood v. City of Pittsfield, 20 MCSR 361 (2007)(school custodian's appeal untimely but even if timely, appeal would be denied because he pleaded guilty to assault with a dangerous weapon, assault and battery, and witness intimidation). *See also* Patruno v. City of Chicopee, D1-16-128 (February 2, 2017); Gonzalez v. Department of

Correction, (27 MCSR 325 (2014); Draper v. Town of Brookline, 26 MCSR 320 (2013); Burt v. City of New Bedford, 11 MCSR 202 (1998); Crimlisku v. Waltham School Department,10 MCSR 141 (1997); and Ratta v. City of Watertown, 18 MCSR 150 (2005).

G.L. c. 31, section 43 also vests the Commission with some discretion to affirm, vacate or modify the discipline imposed by an appointing authority, although that discretion is "not without bounds" and requires sound and reasoned explanation for doing so. *See* Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 600 (1996) and cases cited. ("The power accorded to 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") "[T]he power to modify is at its core the authority . . . to temper, balance, and amend. The power to modify penalties permits the furtherance of uniformity and equitable treatment of similarly situated individuals. It must be used to further, and not to frustrate, the purpose of civil service legislation, i.e., 'to protect efficient public employees from partisan political control' . . and 'the removal of those who have proved to be incompetent or unworthy to continue in the public service' [Citations]" Id. (emphasis added). *See also* Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983).

Substance Abuse Commitment

G.L. c. 123, § 35 provides for the commitment of a person for substance abuse treatment. Prior to 2016, this statute provided, in part,

> "Any police officer, physician, spouse, blood relative, guardian or court official may petition in writing any district court or any division of the juvenile court department for an order of commitment of a person whom he has reason to believe is an alcoholic or substance abuser. Upon receipt of a petition for an order of commitment of a person and any sworn statements the court may request from the petitioner, the court shall immediately schedule a hearing on the petition and shall cause a summons and a copy of

> the application to be served upon the person in the manner provided by section twenty-five of chapter two hundred and seventy-six. In the event of the person's failure to appear at the time summoned, the court may issue a warrant for the person's arrest. Upon presentation of such a petition, if there are reasonable grounds to believe that such person will not appear and that any further delay in the proceedings would present an immediate danger to the physical well-being of the respondent, said court may issue a warrant for the apprehension and appearance of such person before it. No arrest shall be made on such warrant unless the person may be presented immediately before a judge of the district court. The person shall have the right to be represented by legal counsel and may present independent expert or other testimony. If the court finds the person indigent, it shall immediately appoint counsel. The court shall order examination by a qualified physician, a qualified psychologist or a social worker. …"
> Id.

The Parties' Arguments

The Appellant argues that the Amended Motion should be denied because the Respondent did not follow the procedural notice requirements of G.L. c. 31, s. 38. He also avers that the Amended Motion should be denied with regard to G.L. c. 31, ss. 41-45 based on his conduct in the summer of 2015. In support of these arguments, the Appellant states that the Respondent never informed him that his 2015 leave request was denied and while the statute does not require the appointing authority to approve the leave request, the Respondent's conduct in this regard was arbitrary. In addition, he asserts, he experienced similar difficulties in 2007, he requested leave for treatment and was granted leave by the Respondent. Further, the Appellant avers that his substance abuse treatment in both 2007 and 2015 was voluntary. Since the 2007 matters are similar to the 2015 matters, the Appellant argues, the Respondent should have granted him leave in 2015 and his employment should not have been terminated. Moreover, the Appellant argues that his problems began when he sustained a worker's compensation injury in or about 2003, which led to his problems with pain medication and substance abuse. Procedurally, the Appellant asserts, the Respondent also failed to follow the

procedural requirements for disciplinary proceedings under G.L. c. 31, s. 41because the hearing was held on July 15, 2015 and the Respondent did not issue its decision until August 17, 2015.

The Respondent avers that its Amended Motion should be granted because the Appellant was absent for more than fourteen (14) days, the absence was unexcused and its notices to the Appellant satisfied the intent of G.L. c. 31, s. 38, the Appellant was afforded a hearing and it notified HRD of its actions. In addition, the Respondent argues that it did not approve the Appellant's request for leave, which leave request did not indicate how long he was requesting leave, unlike his request in 2007. Also, the Respondent asserts, the Appellant's request indicated that he was being detained and the Respondent does not approve leaves of absence based on incarceration. Further, the Respondent argues, even if its termination of the Appellant's employment under G.L. c. 31, s. 38 was inadequate, it provided him with notice and a hearing, pursuant to G.L. c. 31, ss. 41-45, for his conduct in the summer of 2015 when he was arrested for multiple criminal charges for violating a restraining order and possessing illegal drugs, and he was ordered to be held in detention for 90 days. This information having been reported repeatedly in the local newspaper, the Respondent argues, this conduct discredited the Respondent and the Appellant's conduct reflects a standard of behavior not accepted by the Respondent. In view of the Appellant's published criminal charges, the Respondent asserts, the Respondent had just cause to terminate the Appellant's employment under G.L. c. 31, s. 43. With regard to the Appellant's claim that the Respondent violated the procedural requirements of G.L. c. 31, s. 41 when the hearing officer did not issue his findings "forthwith" after the hearing and the Respondent did not issue its decision within seven (7) days thereafter, the Respondent avers that the hearing was held on July 15, 2015, the Appellant requested and was granted until

July 29, 2015 to produce certain information, the Respondent received the findings on August 17, 2015 and issued its decision the same day.

Analysis

The Respondent's Amended Motion is denied as to G.L. c. 31, s. 38 but allowed as to G.L. c. 31, ss. 42 and 43. The Appellant was absent from work for more than fourteen (14) days in 2015 when he was incarcerated. The Appellant notified the Respondent of his request for leave by note dated June 16, 2015. However, the Appellant's note states that he was going through a divorce and needed substance abuse treatment but he could not obtain treatment "until I am released from detainment." He added, "I am requesting to be placed on unpaid leave until I can get my affairs in order, and the treatment I need." (Appellant's June 16, 2015 letter to Supt. Scannell) That is, the Appellant's note to the Respondent did not disclose that he was being held for ninety (90) days without bail, did not provide a date upon which he would return and it was not submitted in advance of the leave he requested. This was not a "satisfactory" request to the Respondent, as required by G.L. c. 31, s. 38. The Respondent did not approve the request, nor was it required to do so. Further, the Appellant did not appeal to HRD.

That the Appellant had requested and received approved leave of absence in 2007 does not affect the outcome here, contrary to the Appellant's argument.[9] Although the Appellant was charged with violating an abuse prevention restraining order in both 2007 and 2015 and he was having substance abuse problems on both occasions, there are significant differences between the events in the two time periods. In 2007, the Appellant was charged once with violating a restraining order; the case was dismissed when his wife refused to testify and the Appellant was

[9] G.L. c. 31, s. 38 provides, in part, "If an appointing authority fails to grant such person a leave of absence … such person may request a review by the [HRD] administrator." There is no requirement that the Appointing Authority send the employee a denial, although, as a practical matter, the employee should be informed if his or her request has been denied. Neither does section 38 require the appointing authority to inform the employee that appeal of a termination for fourteen (14) or more days of unexcused absence pursuant to section 38 is appealable only to HRD.

voluntarily committed to substance abuse treatment for not more than thirty (30) days. In 2015, the Appellant was charged with repeatedly violating a restraining order, assault and battery, threat to commit a crime, possession of illegal drugs and possession of illegal drugs with intent to distribute, and was found guilty, or admitted to sufficient facts for a finding of guilty in all but two (2) of the criminal charges and placed on probation for two (2) years, requiring him to participate in substance abuse treatment and a batterers' intervention program, drug testing and to obey the restraining order. With charges pending, prior to adjudication, the Appellant was ordered held without bail for 90 days. He did not request a leave of absence until he was incarcerated. While incarcerated, the Appellant participated in a pretrial substance abuse program, not the four to six month, 80-bed treatment program at the Essex County House of Correction. There is no indication in the court records produced here that the court required it. Even if the court had required the Appellant to participate in the program or the Essex County House of Correction required it during the Appellant's pretrial incarceration, the group met for a one hour daily and the Appellant's participation ended when he was released three (3) weeks later when his cases were adjudicated. As a participant in the pretrial program, no records were maintained by the House of Correction regarding the Appellant's participation. However, had the Appellant not been incarcerated, he would not have had access to the pre-trial program. Even if the Appellant was involved in a voluntary substance abuse program in 2015, the Respondent was not obliged to approve of his request for leave simply because it had done so in 2007, especially in view of the multiple criminal charges against him at that time.

Although the Appellant was absent without approved leave for more than fourteen (14) days, the Respondent's Amended Motion under G.L. c. 31, s. 38 fails. The Respondent's Notice of hearing to the Appellant stated that it was considering terminating his employment based on

his unexcused absence and that a hearing would be held in that regard. However, the hearing Notice also informed the Appellant that he was subject to termination for the multiple criminal charges against him, repeatedly mentioned in the local newspaper, and it referred to, and enclosed copies of G.L. c. 31, ss. 41-45. Therefore, the Respondent's Notice effectively converted its hearing into a proceeding under G.L. c. 31, s. 43 and it cannot be said that the Appellant had no reasonable expectation of prevailing on at least one essential element of the case under G.L. c. 31, s. 38. There were also procedural shortcomings in the Respondent's processing of the section 38 matter. Specifically, there is no indication that the Respondent sent HRD a copy of the notice required by section 38 with the HRD form for termination for absence. In addition, the Respondent delivered the notice of hearing to the Appellant in hand, not by registered mail pursuant to section 38. However, these shortcomings did not constitute harmful error, nor did they have the same effect as the Notice to the Appellant indicating that he could be terminated for both his unexcused absence and his criminal conduct, referring to his rights under G.L. c. 31, ss. 41-45 and attaching copies of those sections of G.L. c. 31.

With regard to the Respondent's Amended Motion under G.L. c. 31, s. 42, the Appellant has no reasonable expectation of prevailing on at least one essential element of the case. First, the Appellant cannot establish that he was aggrieved by the timing of the Respondent's decision. The Appellant's disciplinary hearing was held on July 15, 2015. At the hearing, the Appellant requested time to produce documentation that he wanted the Respondent to consider in rendering its decision. The Appellant submitted the documentation on July 29, 2015. As a result, the Respondent could not have issued a decision after the July 15 hearing "forthwith" under G.L. c. 31, s. 41. Under section 41, after the hearing officer conducts the hearing and gives his or her findings to the appointing authority, the appointing authority has seven (7) days in which to issue

a decision to the employee. Although it took the hearing officer a bit longer than the two (2) weeks that the Appellant requested to supply additional documentation after the July 15 hearing, the Respondent issued the decision on the same day that it received the hearing officer's findings. There is no indication that the Appellant was "prejudiced thereby", as required by G.L. c. 31, s. 42.

With respect to the Appellant's appeal under G.L. c. 31, s. 43, he has no reasonable expectation of prevailing on at least one essential element of the case asserting that the Respondent did not have just cause to terminate his employment. The Appellant was duly informed of the hearing to be held on July 15, 2015 and the reasons therefor. The Appellant's conduct in the summer of 2015 provided ample reasons for termination of his employment. He was arrested and charged with a number of criminal law violations involving threatening a witness, assault and battery of a family matter, possession of illegal drugs with the intent to distribute the drugs, and multiple violations of a domestic abuse restraining order. In view of these charges, the Appellant was held without bail for ninety (90) days. He was found guilty or or admitted sufficient facts for a finding of guilt for nearly all of the charges. He was placed on probation for two (2) years, required to attend a batterer's treatment program, complete a substance abuse treatment program, and submit to random drug testing. The Appellant's criminal charges were repeatedly reported in the local press. The Respondent gave the Appellant proper notice of hearing and conducted the hearing to which the Appellant was entitled. The Respondent, a school district, found after the hearing that the Appellant's conduct had "brought discredit" to the schools and was contrary to the standards expected of its employees." (Respondent's August 17, 2015 Decision and Notice to Appellant after hearing) It is unlikely that the residents of Methuen would choose to have their tax dollars spent to pay the salary of the

Appellant, whose behavior fell well below the standards of acceptable behavior. Therefore, it cannot be said that the Respondent's actions were based upon "harmful error" or "upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform his position". G.L. c. 31, s. 43.

Conclusion

Accordingly, for the reasons stated, the Respondent's Amended Motion for Summary Decision is ***granted*** in relation to G.L. c. 31, ss. 42 and 43 and ***denied*** in relation to G.L. c. 31, s. 38 and the appeal of the Appellant, Thomas Branco, under Docket D1-15-170 is ***dimissed***.

Civil Service Commission
/s/
Cynthia Ittleman
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman, Camuso, Ittleman, Stein & Tivnan, Commissioners on March 16, 2017.

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 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. 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:

Anthony Augeri, Esq. (for Appellant)
Michael Maccaro, Esq. (for Respondent)