

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

**SUFFOLK, ss.**

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

**JOHN CABRAL,**  
Appellant

v.

**CASE NO: D-09-44**

**CITY OF NEW BEDFORD**  
Respondent

Appellant's Attorney:

Michael J. Maccaro, Esq.  
AFSCME Council 93  
8 Beacon Street, 3<sup>rd</sup> Floor  
Boston, MA 02108

City of New Bedford Attorney:

Jane Medeiros Friedman, Esq.  
First Assistant City Solicitor  
City of New Bedford  
133 William Street  
New Bedford, MA 02740

Commissioner:

Paul M. Stein

**DECISION**

The Appellant, John Cabral, acting pursuant to G.L. c. 31, § 43, duly appealed a decision of the City of New Bedford (New Bedford), the Appointing Authority, to suspend him for three days from his position as a Special Motor Equipment Operator (SMEO) for not responding to numerous snow emergencies. The appeal was timely filed and a full hearing was held by the Civil Service Commission (Commission) on July 24, 2009. The hearing was declared private as no party requested a public hearing. Witnesses were not sequestered. New Bedford called two witnesses and the Appellant testified on his own behalf. Twelve (12) exhibits were received in evidence and Exhibit 13 was withdrawn by New Bedford. The hearing was digitally recorded. The record was left

open and post hearing submissions (Exhibits 14-16) were received by the Commission from New Bedford on August 27, 2009.

### FINDINGS OF FACT

Giving appropriate weight to the Exhibits, the testimony of the witnesses (the Appellant; Euzebio Arruda, Highways Superintendent; and Ronald Labelle, Department of Public Infrastructure Commissioner) and inferences reasonably drawn from the evidence as I find credible, I make the findings of fact set forth below.

1. The Appellant, John Cabral (Appellant), was hired by the City of New Bedford, Department of Public Works as a Heavy Motor Equipment Operator (HMEO) on November 18, 1996 and was made permanent in that position on June 23, 1997. Mr. Cabral was subsequently made permanent in the civil service position of Special Motor Equipment Operator (SMEO) on November 6, 2000. (Exhibit 1; Testimony of Appellant)
2. On December 2, 2002, Mr. Cabral was transferred to the Water/Wastewater Department and on July 1, 2003 the Appellant was transferred to the Department of Public Infrastructure. (Exhibit 1)
3. Manny Rose (Rose) is employed by New Bedford as a water foreman and is Mr. Cabral's direct supervisor when Mr. Cabral plows roads during snow emergencies. (Testimony of Appellant; Testimony of Arruda; Testimony of Labelle)
4. As Mr. Cabral's field supervisor, Mr. Rose has the authority to grant Mr. Cabral permission to leave his shift early. (Testimony of Labelle)
5. Prior to the events that are the subject of this appeal, Mr. Cabral's disciplinary history in New Bedford indicates that he has been issued two oral warnings and a

one-day suspension. On December 22, 1999 Mr. Cabral received an oral warning for sleeping in his work vehicle during work hours. On April 30, 2003, Mr. Cabral received a one-day suspension for causing damage to city equipment. On December 10, 2003, Mr. Cabral received an oral warning for failing to notify employer of his absence until 9:15 A.M. (Exhibits, 3, 6, & 7; Testimony of Labelle).

6. Mr. Cabral maintains a Commercial Drivers License (CDL) and is qualified to operate New Bedford's heavy machinery, including backhoes and a six-wheel truck. In the winter, Mr. Cabral's duties include performing snow removal within New Bedford. (Testimony of Appellant; Testimony of Arruda)
7. During the winter of 2008-2009, Mr. Cabral was assigned the snow plow route known as "Church Street to Ashley Blvd, and Irving Street to Tarklin Hill Rd." (Exhibit 14; Testimony of Appellant; Testimony of Labelle)
8. The swift removal of snow from the roadways during a snow emergency is essential to New Bedford's ability to provide emergency services and ensure public safety. New Bedford has designated certain employees, including Mr. Cabral, as "essential personnel." Unlike other civil service employees, essential personnel are required to work during emergencies and cannot use vacation or sick time during these periods. (Testimony of Arruda; Testimony of Labelle)
9. Essential personnel are given advance notice before the start of the winter season because the prompt and reliable performance of plowing is prerequisite to New Bedford's ability to provide other services. (Testimony of Arruda; Testimony of Labelle)

10. The failure of essential personnel to report to work during a snow emergency creates a chain-reaction of problems and delays. The route of non-reporting essential personnel must be reassigned to other personnel to complete in addition to their pre-assigned routes. This trickle-down effect creates additional work per-person and requires supervisors to juggle assigned routes in order to ensure that the routes of the absent essential personnel are cleared. (Testimony of Arruda; Testimony of Labelle)
11. On July 1, 2008, Ned Bedford issued a memorandum to Mr. Cabral indicating that he was considered essential personnel for FY 08-09. The memorandum states, in part, that “Essential personnel CANNOT use personal, vacation or sick leave (unless authorized by a doctor’s certificate).” (emphasis original) (Exhibit 8).
12. This memorandum is sent to essential personnel annually and is usually mailed with paychecks. (Testimony of Labelle)
13. The bottom portion of the memorandum is designed to be detached. The instructions request that the recipient sign and return the bottom portion. (Exhibit 8)
14. New Bedford does not have record of whether Mr. Cabral received this memorandum because there is no signed copy in Mr. Cabral’s file. There is a copy of the memorandum in Mr. Cabral’s file and his name is typed on the signature line at the bottom of the memorandum. Mr. Cabral denies having seen this document or that he scribed the signature. Mr. Labelle acknowledged that he did not have personal knowledge as to the authenticity of the signature or how that memorandum came to be located in Mr. Cabral’s file without his confirmatory signature. The

evidence presented does not support a finding that Appellant received this memorandum. (Exhibit 8; Testimony of Appellant; Testimony of Labelle)

15. Prior to the beginning of the 2008-2009 snow season, Mr. Labelle conducted a “tailgate meeting” with Department of Public Infrastructure personnel, including Mr. Cabral. During this meeting, he reminded the employees that they are considered essential personnel and were required to work during snow and ice emergencies. Mr. Labelle stated that he could remember that Mr. Cabral was present at that meeting. However, he was not able to recall additional facts to corroborate or provide additional details to substantiate his recollection. (Testimony of Labelle)
16. Mr. Labelle was a very credible and candid witness. He avoided exaggerations or estimations about facts that he could not recall. The Commission credits his testimony and finds him to have been a very truthful witness. (Testimony of Labelle)
17. At some point during the 2008-2009 snow season, Highway Superintendent Arruda also had discussions with Mr. Cabral regarding the need for him to participate in snow removal activities. Although Mr. Arruda could not give a specific date of his discussions with Mr. Cabral, Mr. Arruda testified credibly, truthfully and to the best of his recollection. (Testimony of Arruda)
18. On January 20, 2009, Mr. Labelle issued a memorandum to Highways Superintendent Arruda and Wastewater Superintendent Vinnie Furtado indicating that Mr. Cabral had demonstrated poor responses to five declared snow emergencies. The memorandum indicated that on December 19, 2008, Mr. Cabral

went home early during a snow emergency because his teeth were hurting. Second, that on December 21, 2008, Mr. Cabral was unavailable despite repeated attempts to contact him. Third, that on December 31, 2008, Mr. Cabral went home sick on the New Years Eve half day. Fourth, that on January 11, 2009, Mr. Cabral conducted snow removal. Fifth, that on January 19, 2009, Mr. Cabral called-out sick and claimed to be suffering from hemorrhoids. (Testimony of Arruda; Testimony of Labelle; Exhibit 9)

19. At the hearing before the Civil Service Commission, Mr. Cabral offered his explanations for these events. Mr. Cabral did not attempt to recite what was previously discussed at the hearing conducted by the Appointing Authority. Mr. Cabral appeared to testify truthfully, to the best of his recollection regarding these events. (Testimony of Appellant)
20. On December 19, 2008 the City of New Bedford was in a snow emergency. During the afternoon of December 19, 2008 through the afternoon of December 20, 2008 the City of New Bedford received approximately 9.1 inches of snow. (Exhibit 16)
21. Mr. Cabral reported to work and completed plowing 99% of his assigned route in 7 ½ hours. Mr. Cabral's only remaining duties were one street and to "push in the corners" of a few streets that had already been plowed. (Testimony of Appellant; Exhibit 9, 15 & 16)
22. Mr. Cabral contacted Manny Rose, his field supervisor. Mr. Cabral informed Mr. Rose that he had finished plowing all but one section of his assigned route. Mr. Cabral informed Mr. Rose that his teeth were hurting and requested to stop plowing early. Mr. Rose approved Mr. Cabral's early release from work. Mr. Cabral's

testimony regarding receiving permission was not disputed by New Bedford.

(Testimony of Appellant).

23. On December 21, 2008 the City of New Bedford experienced another snow emergency. (Testimony of Labelle; Exhibits 15 & 16).
24. That evening Mr. Cabral was at home with his daughter. Mr. Cabral's daughter attends college and was using the home computer for schoolwork. (Testimony of Appellant)
25. Mr. Cabral's telephone and internet use the same connection so that the use of the internet blocks incoming telephone calls. Mr. Cabral knew that he could not receive telephone calls if the internet was connected. (Testimony of Appellant)
26. Mr. Cabral testified that he observed the snow falling and eventually saw snow plows clearing the streets. (Testimony of Appellant)
27. Appellant decided to not terminate his daughter's use of the internet in order to contact New Bedford or to permit calls from his supervisors to come through to his telephone. (Testimony of Appellant)
28. During the evening of December 21, 2008, New Bedford tried repeatedly to contact Mr. Cabral by telephone but was not successful. New Bedford uses a cellular phone to attempt to contact late or absent employees because cellular phones generate a record of calls that may be used to establish proof that the calls were made. At the Appellant's Civil Service hearing, Mr. Labelle stated that New Bedford would provide these records to the Commission subsequent to the hearing, however the Commission did not receive these records. (Testimony of Labelle)

29. On December 31, 2008, New Bedford was experiencing another snow emergency. Mr. Cabral worked during the morning. While working, Mr. Cabral's boots became very wet and cold. Mr. Cabral sought and received permission from his supervisor, Manny Rose, to go home early. The Appointing Authority did not offer evidence or testimony contrary to Mr. Cabral's testimony. Mr. Cabral appeared to be very credible with regard to having received permission from Mr. Rose to leave his assignment early. (Exhibits 9, 15 & 16; Testimony of Appellant)
30. On January 11, 2009 the City of New Bedford experienced another snow emergency. On this occasion Mr. Cabral performed his snow plowing duties. (Exhibits 9, 15 & 16; Testimony of Appellant)
31. On January 19, 2009, New Bedford experienced another snow emergency. On this occasion Mr. Cabral called out from work and claimed that he was suffering from hemorrhoids. (Exhibits, 9, 15 & 16; Testimony of Appellant)
32. Mr. Labelle was not aware of any requests made by his office or staff to the Mr. Cabral to produce a doctor's note. Mr. Cabral had no recollection of being asked to provide a doctor's note. Therefore, Mr. Cabral did not produce a doctor's note prior to the Appointing Authority's hearing to discipline him. (Testimony of Labelle)
33. Manny Rose, Mr. Cabral's supervisor, has the authority to excuse Mr. Cabral from completing his shifts and allow him to go home. However, Mr. Rose was not present at the disciplinary hearing conducted on January 20, 2009. (Testimony of Labelle)



34. Subsequent to that disciplinary hearing, Mr. Cabral was issued a suspension for three days. The reason stated on the citation was “not responding to numerous snow emergencies.” (Exhibit 10; Testimony of Appellant; Testimony of Labelle)
35. On February 11, 2009 Mr. Cabral filed an appeal with the Civil Service Commission.

## **CONCLUSION**

### **Summary**

The preponderance of the evidence supports New Bedford’s decision to discipline Mr. Cabral due to his failure to report to work on December 21, 2008. However the evidence before the Appointing Authority was insufficient to support a three-day suspension; rather a one-day suspension is proper given the evidence presented and Mr. Cabral’s prior disciplinary record. The suspension for three-days is modified to one-day in accordance with merit principles and progressive discipline.

### **Applicable Legal Standards**

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 the 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 must “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 (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. 408, 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. of Boston, 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.

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 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. . . . [I]f 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 (1928) (*emphasis added*). The Commission must take account of all credible evidence in the 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 Offices v. Abban, 434 Mass 256, 264-65 (2001). It is the function of the hearing officer to determine the credibility of evidence and to resolve conflicting testimony presented through witnesses who appear before the Commission. See Covell v. Department of Social Svcs, 439 Mass 766, 787 (2003); Doherty v. Retirement Bd., 425 Mass. 130, 141 (1997); Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988).

“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.’” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006). See Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 334 rev.den., 390 Mass. 1102 (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 (2004) quoting Police Comm’r v. Civil Service Comm’n, 39 Mass.App.Ct. 594 (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 (2006).

#### Just Cause for Disciplining Mr. Cabral

The Appointing Authority’s decision to suspend Mr. Cabral for three days was not reasonably justified because the Appointing Authority lacked sufficient evidence and did not interview Mr. Rose prior to issuing its decision. There were five snow emergencies that occurred in New Bedford during December and January of the 2008-

2009 winter season. Mr. Cabral was suspended for “not responding to numerous snow emergencies.” An examination of the record before the Appointing Authority indicates that Mr. Cabral did report to work on three of the five snow emergency days.

The first and third snow days were on December 19<sup>th</sup> and 31<sup>st</sup>, 2008. On those occasions Mr. Cabral reported to work and completed most of his assigned route. Mr. Cabral contacted his supervisor, Manny Rose, and received permission to go home early. The reason provided on the 19<sup>th</sup> was that Mr. Cabral’s teeth hurt and on the 31<sup>st</sup> that his feet were freezing cold. Although English is not Mr. Cabral’s primary language, he appeared to be honest, sincere and testified credibly before the Commission. Mr. Cabral’s testimony that he was given permission to leave early is uncontested by New Bedford. Mr. Rose was not present at the Appointing Authority’s disciplinary hearing nor was he present at the hearing before the Commission. Mr. Labelle testified that as Mr. Cabral’s direct field supervisor, Mr. Rose had authority to dismiss Mr. Cabral. The Commission accepts Mr. Cabral’s testimony that he did receive permission prior to leaving his route early on those days. Furthermore, no evidence was presented that New Bedford attempted to contact Mr. Cabral later on those days to request that he return to work. Nor did New Bedford request at any time that Mr. Cabral provide a doctor’s note to excuse his early departures.

The second snow emergency occurred on December 21<sup>st</sup>, 2008. On that day Mr. Cabral admitted to having observed snow falling and trucks plowing outside his house. Mr. Cabral’s daughter was using his house’s one phone line to do school research. Mr. Cabral knew that his phone could not receive incoming calls while the internet was connected. Mr. Cabral is an experienced SMEO and has plowed snow during previous

winters. Mr. Cabral should have took the initiative to contact his supervisors to determine whether a snow emergency had been declared. Instead, Mr. Cabral admitted to permitting his daughter to continue to tie-up the phone line while Mr. Cabral waited for a telephone call that he knew could not come through. This exercise in poor judgment resulted in Mr. Cabral not reporting to work on that snow emergency.

The fourth snow emergency occurred on January 11, 2009. New Bedford does not dispute that Mr. Cabral reported to work and conducted snow removal on his assigned route.

The fifth snow emergency occurred on January 19, 2009. On that date Mr. Cabral called out sick because he was suffering from hemorrhoids. New Bedford did not present evidence that Mr. Cabral was requested to produce a doctor's note. Rather, Mr. Cabral's disciplinary hearing was held the next day, January 20, 2009. There was no time or opportunity for Mr. Cabral to obtain visit a doctor prior to the Appointing Authority's decision to suspend him.

Mr. Labelle testified that the decision to issue a three day suspension was based both on Mr. Cabral's discipline history as well as recent absences from duty. Mr. Cabral's past disciplines were two oral warnings in 1998 and 1999 for sleeping in his vehicle and a one day suspension in 2003 for damaging city property. However, New Bedford's January 2009 disciplinary hearing focused on the recent events regarding Mr. Cabral's "poor response" to snow removal. Mr. Labelle testified that during that hearing he was somewhat facetious toward Mr. Cabral and focused his questioning on why Mr. Cabral would fail to report to work after having observed snow falling and snow plows

clearing the roads. Mr. Cabral's sole explanation for that night was that he was waiting for their telephone call.

The Commission has also reviewed the evidence to determine whether there is just cause to support the level of discipline, i.e., to suspend Mr. Cabral for three days, or whether modification of the discipline is warranted in the exercise of the Commission's discretion. Under "basic merit principles," the purpose of discipline is focused on "retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected..." G.L. c. 31, § 1. 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. "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 (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. E.g. Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006). Compare Town of Falmouth v. Civil

Service Comm'n, 39 Mass.App.Ct. 814, 823 (2006) (minor, immaterial differences in factual findings by Commission and appointing authority did not justify a modification of 180-day suspension to sixty days); Commissioner of MDC v. Civil Service Comm'n, 13 Mass.App.Ct. 20 (1982) (Same; discharge improperly modified to 20-month suspension) *with* School Committee v. Civil Service Comm'n, 43 Mass.App.Ct. 486, rev.den., 426 Mass. 1104 (1997) (modification of discharge to one-year suspension upheld); Dedham v. Civil Service Comm'n, 21 Mass.App.Ct. 904 (1985) (modification of discharge to 18-months suspension upheld).

Basic merit principles require that Mr. Cabral's suspension be modified. The Appointing Authority's hearing on January 20, 2009 was insufficient because it did not consider all the evidence and witnesses. Manny Rose, Mr. Cabral's field supervisor, was not present at the hearing. Mr. Cabral did not have the opportunity for Mr. Rose to confirm or deny Mr. Cabral's assertion that he was given permission to leave work early on two of the four snow emergencies. Mr. Cabral appeared to be honest and forthright in his testimony before the Commission. Mr. Labelle confirmed that Mr. Rose had authority to grant Mr. Cabral permission to leave early. Mr. Cabral should not be penalized for the Appointing Authority's decision to not produce Mr. Rose at either the hearing or the hearing before the Commission. Further, no requests were made that Mr. Cabral produce doctors' notes for either of the days that Mr. Cabral went home early. Likewise, the Appointing Authority's hearing was held the day after Mr. Cabral returned from work for calling out sick due to hemorrhoids. Even if Mr. Cabral intended to visit a doctor for treatment, he would not have had sufficient time to do so before the hearing.



Given the evidence, exhibits and testimony presented to the Commission, it appears that the Appointing Authority focused its hearing and subsequent discipline on Mr. Cabral's unexcused absence during the December 21, 2008 snow emergency. Mr. Cabral's absence on that date was not due to any medical emergency nor did he receive permission from a supervisor.

The Minority's (Stein, Henderson) Recommended Relief

For all the above reasons, the Appointing Authority has demonstrated by a preponderance of the evidence that there was reasonable justification to discipline the Appellant. However, the Commission finds that progressive discipline was not employed in this matter. Although reasonable justification for discipline exists, the Commission finds that the Appellant's behavior did not warrant a three (3) day suspension. The Commission hereby reduces the three (3) suspension to one (1) day.

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Paul M. Stein, for the Minority (Stein, Henderson)

CONCLUSION OF THE MAJORITY (BOWMAN, McDOWELL, MARQUIS)

We concur with the conclusion of the hearing officer, listed above as the Opinion of Minority, to the extent that there was reasonable justification to discipline the Appellant. We respectfully disagree, however, that the Commission's intervention is warranted in the form of an order reducing the Appellant's 3-day suspension to a 1-day suspension. In light of the misconduct that has been proven here and the Appellant's previous disciplinary record, a 3-day suspension is appropriate and consistent with the principles of progressive discipline.

The Appellant's appeal is hereby *dismissed*.

For the Majority:

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Christopher C. Bowman  
Chairman

By a vote of the Civil Service Commission; to Dismiss the Appeal (Bowman, Chairman[AYE] Henderson [NO], Marquis [AYE], McDowell [AYE] and Stein [NO], Commissioners) on September 23, 2010.

A true record. Attest:

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Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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 sent to:

Michael J. Maccaro, Esq. (for the Appellant) Attn: Joseph DeLorey, Esq.  
Jane Medeiros Friedman, Esq. (for the Appointing Authority)