

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

JUSTA FERNANDEZ,
Appellant

v.

**WORCESTER PUBLIC
SCHOOLS,**
Respondent

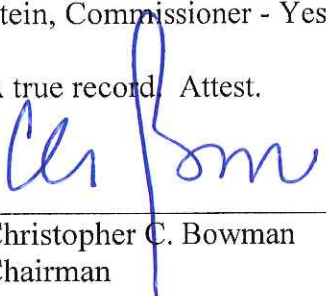
Case No.: D1-12-180

DECISION

The Civil Service Commission (Commission) voted at an executive session on July 11, 2013 to acknowledge receipt of the Recommended Decision of the Administrative Law Magistrate dated May 15, 2013. After careful review and consideration, the Commission, by a 5-0 vote, voted to adopt the findings of fact of the Magistrate. By a 3-2 vote (with Commissioners Stein, Ittleman and McDowell voting yes; and Chairman Bowman and Commissioner Marquis voting no), the Commission voted not to adopt the Magistrate's conclusion in which she recommended upholding the Appellant's termination and denying the appeal. Rather, the 3-2 majority voted to allow the Appellant's appeal in part and modify the termination to a 30-day suspension. A copy of the Magistrate's Recommended Decision and the conclusion of the majority is enclosed herewith. The Appellant's appeal is hereby ***allowed in part.***

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman - No; Ittleman, Commissioner - Yes; Marquis, Commissioner - No; McDowell, Commissioner - Yes; and Stein, Commissioner - Yes)¹ on July 11, 2013.

A true record. Attest.



Christopher C. Bowman
Chairman

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 this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

¹ Chairman Bowman and Commissioner Marquis voted no as they concurred with the Magistrate's conclusion that there was just cause to terminate the Appellant.

Notice to:

Matthew Jones, Esq. (for Appellant)

Sean Sweeney, Esq. (for Respondent)

Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, SS.

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

JUSTA FERNANDEZ,
Appellant

v.

CASE NO: D1-12-180

WORCESTER PUBLIC SCHOOLS,
Respondent

**THE COMMISSION MAJORITY'S REASONS FOR REJECTING
THE HEARING OFFICER'S RECOMMENDED DECISION**

After careful review and consideration, the full Commission adopted the findings of the Administrative Magistrate that there was just cause to discipline Ms. Fernandez. However, the Majority concludes that modification of the discipline from termination to a 30-day suspension is warranted pursuant to its authority granted under G.L.c.31, §43.

First, basic merit principles of civil service law and rules require “training and development for employees, as needed, to assure the advancement and high quality performance of such employees”, “correcting inadequate performance” through progressive discipline and “separating employees whose inadequate performance cannot be corrected.” The Commission has been delegated with “considerable discretion”, albeit “not without bounds”, to affirm, vacate or modify the penalty imposed by the appointing authority so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. G.L. c. 31, §43. See, e.g., Police Comm’r v. Civil Service Comm’n, 39 Mass.App.Ct. 594, 600 (1996) and cases cited.

“It is well to remember that the power to modify is at its core the authority to review and, when appropriate, 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'."

Id., 39 Mass.App.Ct. at 600. (*emphasis added*). See Faria v. Third Bristol Div., 14 Mass.App.Ct. 985, 987 (1982) (remanded for findings to support modification)

In this case, there is no indication that Ms. Fernandez's inadequate performance in this case cannot be corrected through an appropriate measure of remedial discipline. The Appellant's one prior discipline was a five-day suspension for striking a student on the hand that occurred more than five years ago and she has not repeated that mistake since then. In addition, Ms. Fernandez has not been informed that her performance was unacceptable until now. Further, the applicable policy did not require a monitor to sit in the middle to the rear of the bus but states that the monitor "should" sit there. Finally, it is not clear that even if Ms. Fernandez had been in the middle of the bus that she would have seen the two boys who exposed themselves since their laps were covered.

In sum, for these reasons, the Commission Majority concludes that modification of Ms. Fernandez' discipline is warranted. Ms. Fernandez surely needs to understand that her duties as a bus monitor require a higher level of diligence than she evinced here. A suspension of 30 days is the appropriate remedial discipline that the Commission Majority concludes is sufficient to ensure that she performs her duties in the future with the required diligence that Worcester Public Schools expects. If, despite this remedial penalty, Ms. Fernandez shows a continued lapse of diligence, she would be properly subject to more severe discipline.



Cynthia Ittleman
Commissioner

Handwritten signature of Ellaina McDowell in blue ink.

Ellaina McDowell
Commissioner

Handwritten signature of Paul M. Stein in blue ink.

Paul M. Stein
Commissioner



THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

98 NORTH WASHINGTON STREET, 4TH FLOOR

BOSTON, MA 02114

RICHARD C. HEIDLAGE
CHIEF ADMINISTRATIVE MAGISTRATE

TEL: 617-727-7060
FAX: 617-727-7248

May 15, 2013

Christopher C. Bowman, Chairman
Civil Service Commission
One Ashburton Place, Room 503
Boston, MA 02108

Re: *Justa Fernandez v. Worcester Public Schools*
G1-12-180; DALA Docket No. CS-12-521

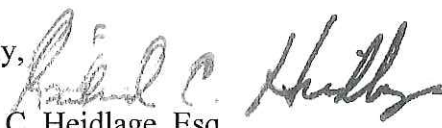
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CIVIL SERVICE COMMISSION

Dear Chairman Bowman:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c)(1), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

If either party files written objections to the recommended decision, the opposing party may file a response to the objections within 20 days of receipt of a copy of the objections.

Sincerely,


Richard C. Heidlage, Esq.
Chief Administrative Magistrate

Enclosure

cc: Matthew D. Jones, Esq.
Sean P. Sweeney, Esq.

THE COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Justa Fernandez,
Appellant

v.

Docket No. D1-12-180
DALA No. CS-12-521
DATED: May 15, 2013

Worcester Public Schools,
Appointing Authority

Appearance for Appellant:

Matthew Jones, Esquire
Massachusetts Teachers' Association
20 Ashburton Place
Boston, MA 02108

Appearance for Appointing Authority:

Sean P. Sweeney, Esquire
311 Village Green North, Suite A4
Plymouth, MA 02360

Administrative Magistrate:

Judithann Burke

CASE SUMMARY

The Appointing Authority, Worcester Public Schools, proved that there was just cause to terminate the employment of the Appellant, a Bus Monitor. A preponderance of the evidence reflects that the Appellant failed to supervise two children who were under her care while riding on a school bus on March 7, 2012. The two male students exposed their genitals to each other and other children.

RECOMMENDED DECISION

Pursuant to G. L. c. 31, §§ 41-45, the Appellant, Justa Fernandez, is appealing from the May 15, 2012 action of the Appointing Authority, Worcester Public Schools,

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discharging her from her position as Bus Monitor. (Exhibit 2.) The appeal was timely filed. A Section 43 hearing was held on September 27, 2012 at the Durkin Administration Building, 20 Irving Street, Worcester, MA.

At the hearing, twenty-four (24) exhibits were marked. The Appointing Authority presented the testimony of the following witnesses: Mary Sealey, Assistant Principal of the Columbus Park School in Worcester; "O.", one of the young male students involved in the incident on the bus on March 7, 2012; Mark Brophy, Director of Instructional Support Personnel in the Worcester Public Schools; John Hennessey, Director of Transportation for the Worcester Public Schools; and; Melinda Boone, Superintendent of Schools in the City of Worcester. The Appellant testified in her own behalf. The hearing was digitally recorded.

The record was left open for the filing by the parties of post-hearing memoranda of law and proposed findings of fact. The last of these was received on March 4, 2013, thereby closing the record.

FINDINGS OF FACT

Based upon the testimony and documents submitted at the hearing in the above-entitled matter, I hereby render the following findings of fact:

1. The Petitioner, Justa Fernandez, 47 y.o.a., began employment as a Bus Monitor for the Worcester Public Schools on August 30, 1999. (Fernandez Testimony.)
2. The Petitioner was born in the Dominican Republic and moved to the United States in 1982. She has lived in Worcester, MA since 1993. (*Id.*)

3. The Petitioner was assigned to Bus 22, a small special-education bus with a seating capacity ranging from 22 to 26 passengers. There are four (4) rows of seats on each side of the aisle from the front to the back of the bus. (Hennessey Testimony.)

4. School bus monitors are assigned to the city's special education busses in order to assist and monitor the children on their rides to and from school. The monitors assist the students in getting on and off of the busses and they ensure that the students are appropriately belted and safe to transport. They escort children across streets when necessary. It is the responsibility of the bus monitors to be prepared for all situations that may arise among the students while in transit. Monitors are expected to report any misbehavior. (*Id.* and Exhibit 8.)

5. The Appellant underwent annual training during in-service days in the month of August. This training included notification of school policies, bullying, bus evacuation, defensive driving, personal safety, learning disabilities and staying in control. (Brophy and Hennessey Testimony and Exhibits 10-15.)

6. Worcester Public Schools ^{the} Transportation Department School Bus Monitor Policies were also distributed in written form during trainings along with written Bulletins. Bulletin No. 7, which was disseminated during the August 2011 training, pertained to sexual harassment. Bulletin No. 8, disseminated at that same time, pertained to dealing with and addressing disruptive behavior. (Brophy and Hennessey Testimony and Exhibits 16-18 and 20.)

7. During the August 2011 training of the bus monitors, Mr. Brophy gave specific instructions pertaining to acceptable bus monitor behaviors on a bus. He included

examples about the duty of care and standard of care. He stressed the importance of the monitors being alert, doing their jobs, keeping their eyes on the students and reporting what they need to report. (Brophy Testimony.)

8. At the August 30, 2004 training, bus monitors received written instructions that they were required to “sit in the middle to rear of the bus in order to be better available to assist students during the trip.” The Appellant attended that training, as referenced by the payroll record. (Hennessey Testimony and Exhibits 20-21.)

9. Another version of the Bus Monitor Policies was distributed at the August 29, 2005 training session which the Appellant also attended for two hours. (Hennessey Testimony and Exhibits 22-23.)

10. The Appellant never requested that Mr. Brophy provide any documents in Spanish. She never indicated that she did not understand the trainings, whether the instructions were oral or presented in writing. (Brophy Testimony.)

11. The Appellant’s prior discipline includes a five (5) day suspension on March 15, 2007 for hitting the hand of a student under her charge. (Brophy Testimony and Exhibit 7.)

12. Columbus Park School is a pre-K through Grade 6 school with approximately 420 students. The school includes three “step classrooms” which are for children with social-emotional disabilities and who struggle with behavioral and socio-emotional needs. These classrooms have small class sizes and are overseen by a teacher and an instructional assistant. The students assigned to these classes have Individual Education Plans and approximately 90% of them are provided with transportation to and

from school by the City of Worcester. During the 2011-2012 school year, there were approximately thirty-five (35) students in the step classrooms. (Sealey Testimony.)

13. During the 2011-2012 school year, students "O" (10 y.o.a.) and "M." (9 y.o.a.) were in step classrooms at the Columbus Park School. Students "M.G." and "E.G." who are brothers, were attending the Columbus Park School, but were not in step classrooms. All of these young male students were assigned to Bus 22. (*Id.*)

14. The Appellant typically had twelve (12) students on her route. It is unclear how many students were on Bus 22 during the afternoon of March 7, 2012. (Appellant and "O" Testimony.)

15. On the afternoon of March 7, 2012, "O" and "M." got picked up from the Columbus Park School at approximately 1:45 P.M. They sat in seats toward the middle of the bus. "O" sat on the right side of the bus facing the front. He sat by himself. "M" sat in the seat across the aisle from "O" with "M.G." The Appellant was seated in the seat in front of "O" and she faced forward. ("O" Testimony and Exhibits 4-5.)

16. "O" and "M" covered themselves with their jackets and lifted the jackets up to expose their genitals. They were observed by a handful of other students on the bus. (*Id.*)

17. The Appellant did not observe "O" and "M" expose themselves. (Appellant Testimony.)

18. On or about March 8, 2012, "M"'s mother called the Columbus Park School and spoke with Assistant Principal Sealey. She indicated that "M" had come home the

previous afternoon and said that "O" had exposed himself on the bus the previous afternoon. (Sealey Testimony.)

19. Sealey interviewed both "O" and "M." and determined that they both should be suspended from school for two (2) days. She and her superior also decided to file a report pursuant to G.L. c. 119, § 51A ("51A Report") as mandatory reporters. (*Id.* and Exhibit 4.)

20. The Appellant was assigned to another bus route during the course of the investigation by the Department of Children and Families (DCF). (Brophy Testimony.)

21. The DCF investigator spoke with a number of people concerning the events of March 7, 2012, including "M.", "O" and their families, Mr. Brophy, Mr. Hennessey and the Appellant. (Exhibits 5 and 6.)

22. On March 29, 2012, the DCF substantiated that the Appellant was neglectful on March 7, 2012. Based upon the definition of neglect as a "failure by a caretaker, either deliberately or through negligence or inability, to take those actions necessary to provide a child with minimally adequate food, clothing, shelter, medical care, supervision, emotional stability and growth, or other essential care", the DCF concluded that the allegation of neglect resulting from the incident was supported. The finding was appealed and the appeal was pending as of the close of this record. (Exhibits 4-6.)

23. On May 15, 2012, Melinda J. Boone, Ed. D., Superintendent of the Worcester Public Schools, notified the Appellant that she had reviewed the report of hearing Officer Mark Brophy and adopted the findings and conclusions therein. She dismissed the Appellant effective May 15, 2012. (Exhibits 2-3.)

24. The Appellant filed a timely appeal.

CONCLUSION AND RECOMMENDED DECISION

After a careful review of all of the testimony and exhibits in this case, I have concluded that the Appointing Authority had just cause to terminate the Appellant from her position as Bus Monitor for the Worcester Public Schools. The Appointing Authority has proven by a preponderance of the evidence that the Appellant neglected to exert appropriate supervision over the young boys in her care on March 7, 2012. See *City of Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300, 304 (1997); *Town of Watertown v. Arria*, 16 Mass. App. Ct. 331 (1983) and *City of Leominster v. Stratton*, 58 Mass. App. Ct. 726, 728 (2003).

It is clear from the credible testimony of "O" and the results reported from the investigations of DCF and Mr. Brophy that the highly inappropriate actions by "O" and "M" did indeed occur on Bus 22 during the afternoon of March 7, 2012. That the Appellant continues to insist that they did not occur only underscores the case against her. She did not see the event. She was not seated in a location which would enable her to supervise all of the children in her care. She neither moved nor looked around during the course of the bus trip. She was unavailable to guide "O" and "M" or protect the other children on the bus from the actions of "O" and "M".

The Appellant's lack of supervision and vigilance falls within the parameters of the DCF definition of neglect inasmuch as it was tantamount to "a failure by a caretaker, either deliberately or through negligence or inability, to take those actions necessary to provide a child with...supervision,...or other essential care." Further the Appellant's


failure to supervise these special needs children on that day reflected a lack of regard for her years of training as a Bus Monitor and the Worcester Public Schools' policies concerning the duty of care owed to children and the public in general.

The Appellant had been suspended in March 2007 after it had been established that she had slapped the hand of a child on her bus. This behavior, coupled with her failure to act appropriately and diligently on March 7, 2012, supports the conclusion reached by the Appointing Authority that she cannot effectively carry out the duties of a Bus Monitor for the Worcester Public Schools. The Appointing Authority's decision to terminate her employment was appropriate, and neither arbitrary nor capricious.

The decision of the Appointing Authority in this case was based upon adequate reasons sufficiently supported by credible evidence. Common sense and the correct rules of law render it "justified." See *Selectmen of Wakefield v. Judge of First Dist. Ct. of Middlesex*, 262 Mass. 477, 482 (1928). I recommend that the Civil Service Commission affirm the decision of the Worcester Public Schools.

Division of Administrative Law Appeals,

BY:



Judithann Burke,
Administrative Magistrate

DATED: May 15, 2013

