

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

**One Ashburton Place--Room 503
Boston, MA 02108
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DONALD GOSSIC,
Appellant

Case No. D1-15-31

v.

FALL RIVER SCHOOL COMMITTEE,
Respondent

Appearance for Appellant:

Phillip Brown, Esq., Assoc. Gen. Counsel
AFSCME Council 93
8 Beacon Street
Boston, MA 02108

Appearance for Respondent:

Bruce Assad, Esq.
16 Bedford St.
Fall River, MA 02720

Commissioner:

Paul M. Stein¹

DECISION

The Appellant, Donald Gossic, acting pursuant to G.L.c.31,§41-§43, appealed to the Civil Service Commission (Commission) from the decision of the Fall River School Committee (FRSC) to terminate him from his labor service position as a Painter. The Commission held a pre-hearing conference on March 13, 2015 and a full evidentiary hearing at the UMass School of Law in Dartmouth on October 2, 2015.² The full hearing was declared private and witnesses were sequestered. FRSC called three witnesses and Mr. Gossic testified on his own behalf. Twenty-five (25) exhibits were received in evidence, one exhibit (Exh. 26-ID) was marked for identification and one exhibit (Exh. 6-ID) was withdrawn. The hearing was digitally recorded and a copy of the CD was provided to each party.³ Both parties submitted proposed decisions.

¹ The Commission acknowledges the assistance of Law Clerk Jaime Caprietta in the drafting of this decision.

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

³ The plaintiff in any judicial appeal of this Decision would be obligated to supply the court with a hearing transcript to the extent that he/she challenges the Decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

FINDINGS OF FACT

Based on exhibits and the testimony of the witnesses:

Called by the Appellant

- Donald Gossic

Called by the Respondent

- Thomas Coogan, FRSC Chief Operating Officer
- Timothy McCloskey, FRSC Director, Engineering & Maintenance Services
- Lori Midura, FRSC Human Resources Administrative Assistant

and inferences reasonably drawn from the credible evidence, I make these findings of fact:

Appellant's Employment

1. The Appellant, Donald Gossic began employment as a Jr. Custodian with the FRSC on or about October 7, 2002. (*Exhs17; Testimony of Gossic*)

2. In 2006, Mr. Gossic was appointed to the labor service position of Painter in the FRSC Maintenance Department, which is the position he occupied until his termination. He worked mainly at the Durfee High School building. (*Exhs.17; Testimony of Gossic*)

3. FRSC painters perform a wide variety of assignments with numerous open work orders pending at any given time. Painting work was considered a “lower priority” level of maintenance; most projects did not have specific deadlines and the painters worked at their own pace and set their own priorities. When a work order required moving furniture or keeping students out of the rooms being painted, those projects had to be scheduled when students were not present or the areas were not being used. Although emergencies rarely arose, some work did take precedence over others; repainting a wall after a water leak repair and removing offensive graffiti were two examples Mr. Gossic mentioned of work that he considered to need more immediate attention. (*Exh.26-ID; Testimony of Gossic, McCloskey & Coogan*)

4. The FRSC Maintenance Department is managed by Timothy McCloskey who supervises approximately twenty personnel, including carpenters, electricians and painters, to cover

maintenance and repairs (not including custodial services) at the FRSC's sixteen school buildings and one administration building, At one time there were as many as four painters but, at the time of Mr. Gossic's termination, he was one of two painters then employed. At the time of the Commission hearing, the FRSC had budgeted for two painters but continued to operate with only one, not yet having replaced Mr. Gossic. (*Testimony of McCloskey & Coogan*)

5. Mr. McCloskey's direct supervisor is Thomas Coogan, the FRSC Chief Operating Officer, who oversees all non-educational functions, including facilities management, transportation, custodial services, nutrition and maintenance. (*Testimony of Coogan*)

6. Mr. Gossic's prior disciplinary record included two warnings as a custodian and one warning and a five-day suspension as a painter:

- He received a warning for being late to work on June 3, 2005.
- An (undated) note appears in his file about how he had been falling behind in his custodial duties after being out of work due to an allergic reaction to a bee sting.
- Mr. McCloskey issued him a warning for leaving work early on March 10, 2008.
- On January 24, 2012, Mr. Gossic left work without permission prior to his scheduled.
- On January 24, 2012, Mr. Gossic left work without permission prior to his scheduled lunch break, contrary to departmental policy set forth in memoranda dated April 6, 2010 and March 8, 2011. During his absence, Mr. Gossic was pulled over and arrested, apparently for operating an unregistered vehicle as well as other charges, which prevented him from returning to work and completing his shift that day. He received a 5-day suspension for this misconduct.⁴

(*Exhs.1 through 4, 7 & 15*)

Appellant's Sick Time and Injured on Leave

7. Pursuant to the terms of the applicable Collective Bargaining Agreement (CBA) with the union (AFSCME Council 93) representing the FRSC maintenance staff, Mr. Gossic accrued up to 17 sick days per year. The CBA authorized the FRSC to require a doctor's note from any

⁴ The discipline was limited to violation of the workplace rules for attendance. The underlying circumstances of the alleged off-duty criminal conduct, or the resolution thereof, was not established and I make no findings as to the specifics of the substantive criminal charges. (*Exh. 7; Testimony of Coogan; Testimony of Gossic*)

employee who had been absent for more than 12 days in a given work year who requested sick leave. (*Exh. 23; Testimony of Coogan*)

8. Departmental memoranda prescribed further rules regarding sick time. Initially, the practice required the employee to report the first sick day and, again, to call when returning. As of 2009, the policy was changed to require a call each day they were sick and provide the reason for their absence. (*Exh. 18 & 19 & 23; Testimony of Coogan; Testimony of McCloskey*)

9. Mr. Gossic was one of approximately 20 to 25 of the total custodial and maintenance staff whose absences exceeded the 12-day threshold prescribed by the CBA. In a Performance Evaluation that Mr. Gossic received in June 2011, Mr. McCloskey noted: “Donald has shared some personal issues that has led to some tardiness and excessive sick leave usage. The situation seems to be improving at this time.” (*Exh.22*)

10. Because he had exceeded the CBA threshold, however, beginning in December 2011, Mr. Gossic was required to submit doctor’s notes for all sick leave absences. He fully complied with this requirement. (*Exhs. 5 & 8*)

11. Mr. Gossic received approval for all requested sick leave during the 2012-2013 school year (13½ days); the 2013-2014 school year (11 days); and the 2014-2015 school year (4½ days). (*Exhs. 16 & 17*)

12. In June 2014, Mr. Gossic was injured at work. He was placed on workers’ compensation leave and did not return to work until October 2014. After exhausting his remaining vacation and sick leave, he requested, and was awarded, compensation from the custodial/maintenance Sick Leave Bank created under the CBA. This award required him to “repay” the Sick Leave Bank from future accrued sick leave after he returned to work. (*Exhs. 16 & 23; Testimony of Gossic*)

13. The CBA contains the rules governing accrual and approval for taking vacation time. FRSC maintenance staff were required to take their vacation time (1 to 5 weeks per year depending on length of service), as a general rule, in full week increments. Many vacation weeks included a paid holiday, however, so there were so-called “loose days” that maintenance staff could take a day at a time. The CBA allowed up to 75% of a trade group of maintenance personnel to take vacation at any given time and, if there were only two employees in a particular trade – such as painters – only one painter was allowed to take a vacation at time. (*Exhs. 23 & 25; Testimony of McCloskey; Testimony of Coogan; Testimony of Gossic*)

14. FRSC did not have specific written rules regarding vacation time, as opposed to sick time. It was well-known, however, that all vacation time needed to be approved by the employee’s supervisor. Generally, the procedure required the employee to submit a request in writing although emergency time off could be approved by calling the supervisor and documenting the request at a later date. (*Exhs. 20, 21, 23 & 25; Testimony of McCloskey; Testimony of Coogan; Testimony of Midora; Testimony of Gossic*)⁵

15. January 25, 2015 was a regular work day for Mr. Gossic, although the schools closed for a teachers’ Professional Day. Mr. Gossic spent the day painting baseboards in the Industrial Arts area, an ongoing routine project expected to take six to eight more days. No emergency projects required his attention during that week. (*Testimony of Gossic; Testimony of McCloskey; Testimony of Coogan*)⁶

⁵ I note that the February 2, 2015 disciplinary letter issued by Mr. Coogan to Mr. Gossic on his 5-day suspension stated that, when he had called Mr. McCloskey to inform him he had been pulled over and arrested “Mr. McCloskey told you [Gossic] to take it from your accrued time, using vacation or personal time.” (*Exh. 7*)

⁶ Neither Mr. McCloskey nor Mr. Coogan track painting work orders or prioritize them in the ordinary course of business (as they did for other maintenance tasks), so evidence about pending work relied on oral testimony and personal recollection. The one document proffered by either party was a list of uncertain origin, marked for identification (*Exh. 26-ID*), which described some on-going work that included painting bathrooms (which continued through June) and recoating “old” green chalk boards (completed in February).

16. On Tuesday January 27, 2015, in anticipation of a major blizzard (Winter Storm JUNO), the Fall River Schools remained closed and did not reopen that week. All nonessential employees were to contact their supervisors, but maintenance employees were expected to show up. (*Exh. 12; Testimony of McCloskey; Testimony of Coogan*)

17. Mr. Gossic texted Mr. McCloskey to inform him that he was unable to report for work on January 27, 2015 and that he would be using vacation time to cover his absence. Mr. McCloskey texted back approving the request. FRSC payroll records recorded the absence as a vacation day. (*Exhs. 9, 11 through 13, 16 & 17; Testimony of Gossic and McCloskey*)

18. Later in the day, Mr. Gossic went out to shovel snow in his driveway with his landlord. As was his habit, Mr. Gossic placed his cell phone in his pocket in case his family needed to communicate with him without having to leave their residence on the third floor. Unbeknownst to him at the time, while he was shoveling the snow, Mr. Gossic's cell phone slipped out of his pocket. (*Testimony of Gossic*)

19. The next morning, January 28, 2015, Mr. Gossic awoke feeling sick, which he attributed to his doctor having recently changed the regimen of antibiotics he was prescribed. He decided to continue to stay out of work. (*Testimony of Gossic*)

20. Mr. Gossic knew that he did not have any available sick leave, as he had used up all his accrued time and still had a negative balance owed to the Sick Leave Bank. Mr. Gossic knew that he still had six "loose" vacation days available, but that he needed Mr. McCloskey's approval to use them. (*Exh. 24; Testimony of Mr. Gossic*)

21. When he went to text Mr. McCloskey, however, he discovered that his cell phone was missing. He went outside to try to find his the phone but was unsuccessful. He returned to his

apartment and went to bed. Later that day, Mr. Gossic's spouse found the phone which, by that time, had been smashed and was no longer operative. (*Exh. 27; Testimony of Gossic*)

22. Mr. Gossic kept all his contact information stored on his cell phone. He did not remember Mr. McCloskey's phone to text him or call him. (*Exh. 24; Testimony of Mr. Gossic & Mr. Coogan*)

23. Mr. Gossic remained out of work the rest of the week. He made no further effort to contact Mr. McCloskey or any other FRSC personnel. (*Testimony of Gossic*)

24. Mr. McCloskey noted Mr. Gossic's continued absences and he informed Mr. Coogan on Thursday, January 29, 2015. Neither man made any effort to contact Mr. Gossic. Mr. Coogan instructed Mr. McCloskey to have Mr. Gossic, before he was allowed to return to work, to report to him [Coogan]. At some point over the weekend, Mr. Coogan prepared a letter (dated Sunday, February 1, 2015) which stated, in relevant part:

"[Y]our employer has had no contact from you since Tuesday the 27th. You were in a 'no call, no show' status on 1/28, 12/29, and 1/30 2015. Mr. McCloskey has heard nothing from you or anybody else concerning your absence over the weekend of January 31st or Feb 1, 2015.

"You are hereby suspended without pay pending a hearing to terminate your employment."

"Fall River Public Schools intends to terminate your employment for just cause. The specific reason for seeking your termination is your absence without contact from Jan. 28 through Feb 1, 2015. This "AWOL" situation places you in a situation constituting and demonstrating job abandonment."

The letter informed Mr. Gossic that a disciplinary hearing would be held on Thursday, February 5, 2015 and that he was placed on "unpaid administrative leave effective immediately." (*Exh. 9; Testimony of McCloskey; Testimony of Coogan*)

25. When Mr. Gossic next attempted to return to work on Monday, February 2, 2015, he reported an hour early, intending to speak to Mr. McCloskey at his administrative office to

explain his absences for the past week. Mr. McCloskey had already left his office, however, and Mr. Gossic proceeded to Durfee High School, expecting to see Mr. McCloskey there, and then resume his work duties. (*Exhs. 12 & 13; Testimony of Mr. Gossic; Testimony of Mr. McCloskey*)

26. Mr. Gossic fully expected that Mr. McCloskey would give his approval to use three additional “loose” vacation days to cover his absences on January 28, 29 and 30, 2015. Mr. McCloskey had never disapproved Mr. Gossic’s request for vacation time that he had on the books, even without prior documentation. There was no dispute that Mr. Gossic had sufficient vacation days accrued to cover the absence. (*Exhs. 7, 16, 17, 24 & 25; Testimony of Gossic; Testimony of McCloskey*)

27. When Mr. Gossic arrived at Durfee High School, he was directed to meet with Mr. Coogan who delivered his pre-written February 1, 2015 letter to him. Mr. Gossic explained that he had not texted Mr. McCloskey again because he had lost his cell phone with all his contact information. He said that, once he returned to work and explained that, he thought Mr. McCloskey would approve vacation time to cover the time off. He agreed he “could have done more” to let his supervisor know sooner that he was not coming to work and apologized for not doing so. (*Exh. 9; Testimony of Coogan; Testimony of McCloskey; Testimony of Gossic*)

28. By letter dated February 6, 2015, following the February 5, 2015 hearing, FRSC Superintendent Meg Meyo Brown, the Appointing Authority, informed Mr. Gossic: “In accordance with the notice of intent to dismiss dated Feb. 3, 2015 [sic] (enclosed) you are hereby notified that your services as a painter for the Fall River Public School system will terminate effective at the close of school on Friday February 6, 2015. . . . A hearing was held on Feb. 5, 2015 . . . and a decision was reached to proceed with terminating your employment.” (*Exh. 10*)

29. FRSC subsequently withdrew the February 6, 2015 termination letter and restored Mr. Gossic to paid administrative leave status, pending further notice and hearing. By notice letter dated March 20, 2015, FRSC again informed Mr. Gossic of a further hearing on March 26, 2015 on it “intent to terminate’ his employment. (*Exh. 11*)

30. Following the March 26, 2015 hearing, Mr. Coogan wrote a letter to Mr. Gossic which stated, in relevant part:

“On Tuesday January 27, 2015, you contacted your supervisor, Tim McCloskey, to inform him that you were unable to report for your shift due to the snow storm (JUNO)[Y]our employer had no contact from you since. . . . Due to your pattern of absenteeism which raises the suspicion of abuse of sick time, you have spent several years on a monitoring program for attendance issues. The unexplained absence occurred while you were fully aware that the department was paying close attention to your attendance.

Fall River Public Schools intends to terminate your employment for just cause. The specific reason for seeking your termination is your absence without contact for three days from Jan. 28 through the 30th, and no contact or explanation until Feb 2, 2015. This “AWOL” incident placed you in a situation of job abandonment.”

(*Exh. 13*)

31. On March 26, 2015, Mr. Coogan also reported his recommendation to Superintendent Meg Meyo Brown:

“On Monday, January 26, 2015, the district held their mid-year professional day. Forecasts called for blizzard conditions for the overnight and through Tuesday, January 27. On Tuesday morning, a cancellation call went out, with the usual directive for Facilities staff to check with their supervisor”

Don Gossic, a painter for Facilities, called his supervisor Tim McCloskey to tell him that he would not be able to come in, and that he would use a vacation day for Tuesday. Mr. Gossic failed to report or contact the department on Wednesday, January 28, through Friday the 30th. His status of “no call, no show’ was even more concerning, given that he is [sic] a chronic attendance problem, and has been on a watch program for several years. He is aware that we monitor his attendance closely. He has consistently used all or a high percentage of sick days, which led to the suspicion of abuse. Last year, he received an allotment of days from the sick bank, so he has virtually no accrued sick time after the 12+ years of service in the district.”

“When Mr. Gossic finally appeared for work on this [sic] Monday, Feb. 2, He [sic] offered no acceptable explanation and requested he be allowed to use vacation time for his 3 days of unexcused absence. He was placed on unpaid suspension pending a hearing for termination.”

“Termination hearings were held on February 5, 2015 and March 26, 2015. . . . My request is that he be terminated immediately. He has previous discipline (He was disciplined in 2005, 2008, and in 2012 he received a 5 day suspension for leaving his assigned work post without permission or communication with his supervisor, and was subsequently arrested during his unauthorized absence, leading to further time and days away from work. He has been on the attendance watch list for multiple years, and admitted he made no attempt to communicate for the absence without leave (AWOL) episode. No new evidence presented at the hearing on March 26.”

(*Exh. 12*)

32. By letter dated March 26, 2015, Superintendent Meg Meyo Brown informed Mr. Gossic that his employment was terminated effective March 27, 2015 for the “reasons” discussed at the hearings held on February 5, 2015 and March 26, 2015. (*Exh. 14*)

33. Save for concerns about his attendance record, Mr. Gossic was considered “a good painter who performs his duties well. . . . Donald is a willing employee who steps up to emergencies when needed.” (*Exh. 22; Testimony of McCloskey; Testimony of Coogan*)

STANDARD OF REVIEW

A tenured civil service employee aggrieved by disciplinary action of an appointing authority made pursuant to G.L.c.31, §41 may appeal to the Commission under G.L.c.31, §43, which provides:

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

Under Section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew.” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814 (2006). The role of the Commission is to determine “whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” 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); McIssac v. Civil Service Comm’n, 38 Mass.App.Ct. 437, (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 (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, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, (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 (2006). It is also a basic tenet of “merit principles” of 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

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, (1956). The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65, (2001).

The “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, (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 (2006).

ANALYSIS

FRSC failed to meet its burden to prove, by a preponderance of the evidence, “just cause” to terminate Mr. Gossic’s civil service employment. FRSC claims that Mr. Gossic had a “chronic attendance problem” and that his failure to get advance approval for absence from work for three days in January 2015 was a continuation of his “pattern of absenteeism which raises the

suspicion of abuse of sick time sick time” and amounted to “job abandonment” for which “no remedial hope” is possible. The evidence, however, paints a starkly different picture.

First, Mr. Gossic’s three –day absence was not job abandonment, either as a matter of fact or in law,. G.L.c.31 §38 defines an “unauthorized absence” as 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 time. . . .”(emphasis added) The facts here clearly do not fit this definition. Mr. Gossic had informed Mr. McCloskey that he was unable to work on January 27, 2015 and received approval to take the time off as a vacation day. Mr. Gossic had more than sufficient additional vacation time accrued to which the subsequent three days of absence could be charged.

Second, FRSC mischaracterizes Ms. Gossic’s prior attendance record. The only documented evidence of prior discipline for attendance issues consisted of being late for work once in 2005 and leaving early without approval, once in 2008 and, again, in 2012.⁷ None of these isolated incidents involved a “no call, no show” situation. Similarly, the evidence fails to support FRSC’s contention that Mr. Gossic has been a “chronic” abuser of sick time. FRSC knew that Mr. Gossic had personal and family issues that required him to exhaust his allowed sick time. The term “watch list” is not what the CBA describes. Mr. Gossic was required to provide medical documentation solely because he had passed the 12-day threshold specified in the CBA, not because there was a finding of “suspicion of abuse”, which is a separate grounds for invoking the CBA. He duly submitted doctor’s notes for all absences as required. There was **no** evidence that Mr. Gossic was actually “suspected” of, or ever actually “abused”, his sick time allowances.

⁷ I discount entirely, as unrelated to any alleged pattern of attendance issues, the undated incident in which Mr. Gossic was criticized for falling behind in his custodial work after suffering an allergic reaction to a bee sting.

What is particularly problematic is FRSC's reliance on Mr. Gossic's exhaustion of sick leave after he was injured on duty and went out on workers' compensation from June 2014 to October 2014, during which he used up all his sick time for the 2013-2014 school year and was granted additional sick time from the CBA Sick Leave Bank. The negative balance of sick time that he carried into the 2014-2015 school year was due to this perfectly legitimate situation.

Third, Mr. Gossic's prior record of illness has little bearing on the present discipline. Indeed, as of January 2015, he had used only a week's worth of sick time. Were it not for the fact that he owed the rest of his 17 day allowance to the Sick Leave Bank due to his workers' compensation injury, I find it likely that he would still have been able to have used sick time for the three days in January that he was not able to come to work. I find credible that Mr. Gossic's absences that week, in fact, were a direct consequence of another legitimate medical issue precipitated by a change in the antibiotic regimen that his doctor had made for the treatment he was still receiving from his injury. This absence would have qualified him for sick leave but for the fact that his prior use of the Sick Leave Bank had left him with a negative sick leave balance. There is simply no credible evidence that Mr. Gossic's absence in January 2015 was NOT legitimate.

Fourth, it is not Mr. Gossic's absence, per se, that FRSC relied on to support its decision to terminate him, but his failure to get advance approval to use vacation time to cover the absence. FRSC does not dispute that Mr. Gossic had sufficient "loose day" vacation time to cover his three day absence in January 2015 and that Mr. McCloskey had never refused to approve any such requests in the past. I also credit the testimony that Mr. Gossic was performing routine work at the time of his absence and his three-day absence did not materially detract from the completion of the pending work orders. In fact, I find it significant that FRSC continues to operate with only one painter, although it has sufficient funds in the budget to hire a second

painter. Finally, the evidence clearly established that FRSC had never found fault with either the quality or quantity of Mr. Gossic's substantive performance of his duties. Finally, I find credible the evidence that Mr. Gossic's expectation that Mr. McCloskey would approve his use of vacation time, once he explained himself, although mistaken, was the result of some ambiguity in the prior practice concerning what was needed to obtain approval for vacation time (which had not been the subject of specific written policy memoranda, as had been the case with sick time).

I do agree with FRSC that Mr. Gossic had other options to attempt to reach Mr. McCloskey or someone else in the department to explain his continued absence and his lack of diligence warrants some remedial discipline. I also agree that it is fair, as a general rule, for FRSC to put the burden on the employee to keep the FRSC informed. Mr. Gossic's point, however, is also well taken that the FRSC's policies and practices regarding use of vacation time (unlike sick time) are not spelled out in writing and there is some ambiguity in the prior practice. I also credit the evidence that Mr. Gossic's absence did not make a material difference to the completion of work of the department in the ordinary course of business that week or thereafter. Thus, Mr. Gossic's failure to obtain advance approval for his three-day absence, does not rise to the level of misconduct required for termination under basic merit principles, i.e., that Mr. Gossic was "guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service" and that discipline must be remedial, not punitive, designed to "correct inadequate performance" and "separating employees whose inadequate performance cannot be corrected."

Fifth, Mr. Gossic's termination process is replete with evidence of procedural missteps. Although the procedural flaws were eventually cured, and are not the subject of this appeal, they do evidence a level of pre-disposition toward termination of Mr. Gossic that was based, at best,

on erroneous information, and at worst, infers arbitrary and capricious actions on the part of the decision-makers. The fact that Mr. Coogan had decided to terminate Mr. Gossic (initially in violation of his rights under civil service law) without ever seeking to find out why he had not reported or wait to see if there was any rational emergency or other explanation, leads me to conclude that it was not the absence, per se, that drove the FRSC's decision to impose the ultimate penalty here.

In sum, as the facts presented to the Commission do vary from those relied upon by FRSC, I have considered what modification of the discipline, if any, is warranted in the exercise of the discretion vested in the Commission, as appropriate remedial, progressive discipline. I do find that Mr. Gossic's gross negligence in abandoning his effort to contact Mr. McCloskey because he had no way to "text" him, which he acknowledged was a mistake, does support "just cause" to warrant serious discipline, short of termination. After carefully considering all of the circumstances, I conclude that a six month suspension is the proper level of discipline. I reach this conclusion for several reasons: (1) Mr. Gossic's behavior, while negligent, was not proved to be willful; (2) FRSC erroneously characterized Mr. Gossic as a "chronic absentee" and treated his prior legitimate attendance record as "suspicion of abuse", unreasonably placing undue reliance on this history which caused FRSC to over-react to the specific situation that arose in January 2015; (3) FRSC proved no material detriment to the efficient operation of the maintenance department as a result of the absence; (4) I have concluded from observing Mr. Gossic at the hearing and listening to his testimony that he acknowledges his mistake and accepts responsibility for his actions; and (5) a six-month suspension is the absolute maximum level of discipline that I can find FRSC could have justified to ensure that all FRSC employees, Mr. Gossic included, appreciate that future misconduct of a similar nature will not be tolerated.

Accordingly, for the reasons stated, the appeal of the Appellant, Donald Gossic, is hereby *allowed in part*. The discipline imposed on Mr. Gossic is modified, in the exercise of the Commission's discretion, from a termination to a six-month suspension and, save for the suspension, Mr. Gossic shall be restored to his position without loss of compensation or other rights to which he is entitled under civil service law and rules.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein
Commissioner

By 4-1 vote of the Civil Service Commission (Bowman, Chairman [NO]; Ittleman [AYE], Camuso [AYE], Stein [AYE], and Tivnan [AYE], Commissioners) on April 28, 2016.

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)(1), 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. 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:

Phillip Brown, Esq. (For Appellant)

Bruce Assad, Esq. (For Respondent)

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

DONALD GOSSIC,
Appellant

Case No. D1-15-31

v.
FALL RIVER SCHOOL COMMITTEE,
Respondent

DISSENT OF CHRISTOPHER BOWMAN

I respectfully dissent.

The Commission should not provide a safe harbor for a public employee who fails to show up for work over three (3) consecutive days and then provides a wildly unbelievable tale in regard to why he was unable to contact his employer during this three (3)-day period.

Termination was the appropriate penalty here.

/s/ Christopher C. Bowman
Chairman
April 28, 2016