

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

JERRY PAONE,
Appellant

v.

D-12-189

CITY OF LYNN,
Respondent

Appearance for Appellant:

Wayne Soini, Esq.
AFSCME Council 93
8 Beacon Street
Boston, MA 02108

Appearance for Respondent:

David Grunebaum, Esq.
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Commissioner:

Cynthia A. Ittleman, Esq.

DECISION

The Appellant, Jerry Paone (hereafter “Appellant” or “Mr. Paone”), pursuant to G.L. c. 31, § 43¹, duly appealed to the Civil Service Commission (hereafter “Commission”) on June 8, 2012, opposing the decision of Mayor Judith Flanagan Kennedy (hereinafter “Mayor”), of the City of Lynn (hereafter “the City”) and Appointing Authority, placing him on a three (3) day suspension as an employee of the Inspectional Services Department (hereafter “ISD” or “Department”) for the City.

¹ The appeal asserted claims pursuant to G.L. c. 31, § 42 and 43. However, at the hearing, the Appellant waived the section 42 claim.

A prehearing conference was held on July 3, 2012 and a full hearing was held on November 26, 2012.² At the prehearing conference, at which Chairman Bowman presided, a question was raised regarding the timeliness of the appeal. On July 12, 2012, the Appellant filed a letter and affidavits in support of the timeliness of the appeal. On July 13, 2012, the Appointing Authority submitted an opposition, urging the Commission to dismiss the appeal for lack of timeliness. By email dated July 13, 2012, Commissioner Bowman denied the motion to dismiss.

At the hearing, the witnesses were sequestered, with the exception of the Appellant, Joseph Martin (AFSCME Local 1736 President), and Mark Raftery (Acting Supervisor of Maintenance and Custodians of ISD) and Michael Donovan (Director of ISD and Building Commissioner).³ As no notice was received from either party, the hearing was declared private. The Appellant made an oral motion in limine at the hearing to preclude evidence of previous incidents of discipline, arguing that certain discipline had been reduced or expunged. Following oral argument, the motion was denied, it was ruled that any such evidence would be given the weight it is due and that the parties may argue the weight it is due in their recommended decisions. The full hearing was recorded and a copy of the recording was sent to each of the parties and was made part of the record. Thereafter, the parties submitted proposed decisions. For the reasons stated herein, the appeal is denied.

Based on Exhibits 1, 1A, 2, 3, 3A-3P and 5 entered into evidence by the Appointing Authority and Exhibits 4 and 6⁴ entered into evidence by the Appellant at the hearing; the time records of custodians, including the Appellant, for Thanksgiving week 2011 submitted post-

² The hearing on this case was held at 9:30 a.m. on November 26, 2012. A hearing on another appeal by the Appellant (D-12-226) was also held on November 26, 2012 immediately after the hearing on the instant case.

³ Mr. Raftery testified as the City's first witness and then was allowed to assist the City's counsel for the remainder of the hearing. Mr. Donovan was present at the hearing as the City's representative and testified subsequently. Mr. Martin assisted the Appellant's counsel while the City presented its case, then testified as the Appellant's first witness, and was allowed to assist the Appellant's counsel for the remainder of the hearing.

⁴ The sentence at the top of the page of Ex. 6 (beginning, "In reference to the letter ...") was stricken at the request of the Appointing Authority, following the parties' argument and a ruling thereon at the hearing.

hearing by the Appointing Authority, as agreed at the hearing; the collective bargaining agreement (hereinafter “CBA”) submitted post-hearing, as agreed at the hearing; and the testimony of:

For the Appointing Authority:

- Mark Raftery, Acting Supervisor of Maintenance and Custodians, Inspectional Services Department (hereinafter “ISD”), Lynn;
- Richard Connick, Supervisor of Custodians and Maintenance, ISD, Lynn;
- Michael Donovan, P.E., Director of Lynn Inspectional Services Department and Building Commissioner;
- Joseph Driscoll, Director of Personnel, Lynn (rebuttal witness);

For the Appellant:

- Jerry Paone, Appellant;
- Joseph Martin, Storekeeper, School Department, Lynn, and President of AFSMCE Local 1736 (Appellant’s Union)(hereinafter “Local 1736”);
- Matthew Breen, Acting Senior Custodian, ISD, Lynn;

And taking administrative notice⁵ of all matters filed in the case and pertinent statutes, regulations and policies, and reasonable inferences from the credible evidence; and taking administrative notice of the fact that the parties were informed at the hearing that they may produce evidence, post-hearing, of alleged disparate treatment and that the Appellant responded

⁵ This includes taking notice that after argument and a ruling thereon at the hearing, (1) a letter in the file from Mr. Donovan at ISD to Mr. Driscoll in the Lynn Personnel Department produced by the Appointing Authority after the hearing in response to the Appellant’s request at the hearing and that such letter is dated November 28, 2011 but should be dated November 28, 2012, and (2) on Ex. 3, regarding Mr. Paone, the top three entries were stricken.

by email on February 11, 2013 (9:07a.m.) that “no person in the bargaining unit earlier was alleged to have worked “the wrong eight hours in the wrong school[;]”a preponderance of the evidence establishes the following findings of fact:

1. At all pertinent times, Mr. Paone was a tenured, permanent Junior Building Custodian for the City of Lynn who began working in that capacity in February 2006. At or about November 2011, Mr. Paone was working at the Connery School in Lynn but he was unassigned and he could be assigned anywhere. (Paone Testimony) Mr. Paone was assigned to work the 3pm to 11pm shift. (Paone Testimony, Exs. 1, 2, 3D, 5)
2. Mr. Paone’s employment history at ISD includes the following:
 - a. On May 25, 2011, Mr. Paone was issued a written warning for calling the attendance line on May 5, 2011, stating that he was using a personal day. Mr. Paone did not obtain permission from a supervisor to take a personal day on May 5 as required by CBA article 27 and he was scheduled to take a vacation day Friday, May 6, 2011. (Ex. 3B)
 - b. On January 16, 2007, Mr. Paone was issued a written warning relative to his excessive use of sick time July 1, 2006 to December 31, 2006. The warning was to remain in Mr. Paone’s personnel file for one year, following which it will be expunged from his file. During that time period, the warning could be used as part of the progressive discipline procedure. The warning permitted Mr. Paone to submit documentation for consideration. (Ex. 3P)⁶
 - c. On March 27, 2007, Mr. Paone was issued a notice of a one-day suspension for being absent for work without sick leave on March 23, 2007. Mr. Paone could request a hearing in this regard and he was informed that any further occurrence of this behavior would result in his being subject to further disciplinary action, including termination. The one-day suspension was reduced to written warning. (Ex. 3O)
 - d. On August 8, 2008, Mr. Paone was issued a verbal warning for failing to clean specific areas of a building on July 29, 2008, indicating that future actions of a similar nature would result in disciplinary action up to suspension or termination. The warning was to remain in Mr. Paone’s file for one year, it would be expunged thereafter, it could be used as part of progressive discipline, and Mr. Paone had the right to grieve the matter. (Ex. 3N)
 - e. On January 21, 2009, Mr. Paone was suspended for one (1) day for failing to appear for an overtime assignment on January 19, 2009 that he accepted and that he did not contact the attendance line or notify the Supervisor that he would not

⁶ There is no indication whether Mr. Paone submitted documentation to ISD in this regard.

appear. Mr. Paone had a right to a hearing in this regard and was advised that any further occurrence of this behavior would result in his being subject to further discipline including termination. (Ex. 3M)

- f. On February 10, 2009, Mr. Paone's one-day suspension for failing to report to work for an overtime assignment on January 29, 2009 was reduced to a written warning, indicating that a further occurrence of this behavior would result in Mr. Paone being subject to further discipline up to and including suspension. (Ex. 3L)
- g. On September 15, 2009, Mr. Paone was issued a written warning for failing to appear for work at the Lynn Public Library on September 12, 2009, failing to call a supervisor to report that he would not attend, and having assured a senior custodian the night before that he would attend. The warning informed Mr. Paone that further actions of a similar nature would result in discipline up to and including suspension or termination, the warning would remain in his file for one year, and the warning could be used as part of progressive discipline for that period. (Ex. 3K)
- h. On May 27, 2010, Mr. Paone was issued a notice of verbal warning for leaving the building to which he was assigned on May 20, 2010 and finishing his shift at another building without contacting a supervisor in violation of department policy. The notice informed Mr. Paone that any future actions of a similar nature would result in progressive disciplinary action. (Ex. 3J)
- i. On June 1, 2010, Mr. Paone was issued a written warning for calling out sick to the attendance line on May 28, 2010 when the department requires that a custodian who is sick is to notify his department head or supervisor by phone at specific times for each shift. The warning informs Mr. Paone that further actions of a similar nature would result in disciplinary action up to and including suspension or termination and that the warning would remain in his file and may be used as part of progressive discipline. (Ex. 3I)
- j. On June 3, 2010, Mr. Paone was notified that the verbal warning given to Mr. Paone in Exhibit 3J for his conduct on May 20, 2010 was rescinded and replaced by a one-day suspension, that his conduct violated procedure, policy, the CBA and his conduct was insubordinate, that he may request a hearing in this regard and that any further occurrences of this behavior would result in further discipline, up to and including suspension or termination. (Exs. 3H, 3F)
- k. On September 20, 2010, Mr. Paone was suspended for one (1) day for calling in sick in an untimely manner on September 17, 2010, as he did on June 1, 2010 (*see* Ex. 3I) in violation of the CBA, and informed him that he may request a hearing in this regard. The suspension notice indicates that any further occurrences of this behavior will result in further disciplinary action up to and including suspension or termination. (Ex. 3D)
- l. An October 28, 2010 agreement between Mr. Paone, IDS and Local 1736 suspended Mr. Paone's one-day suspension for failing to call the attendance line in a timely manner prior to taking sick leave on September 17, 2010 if there is no reoccurrence within one year. If there were no such reoccurrence, the suspension would be vacated and removed from his file. If there were a recurrence, Mr. Paone would serve the suspension and be subject to discipline for the reoccurrence. (Ex. 3C)

3. At all pertinent times, Mark Raftery was Acting Supervisor of Maintenance and Custodians, at ISD in Lynn. Mr. Raftery has worked for the city of Lynn for nearly twenty (20) years. He was a Local 1736 official for ten (10) years, six (6) years as President and four (4) years as a member of the 1736 Executive Board. (Raftery Testimony) One of Mr. Raftery's responsibilities is to direct and schedule workforce assignments for Lynn custodians. (Ex. 5)
4. At all pertinent times, Richard Connick was Supervisor of Custodians and Maintenance at ISD in Lynn. He has worked in Lynn since 2004. In this capacity, his duties are to oversee all custodians at the different schools and city buildings in Lynn. (Connick Testimony)
5. Michael Donovan has been the Director of ISD in Lynn since 2004 and he has been in Lynn for more than fifteen years. ISD includes inspectors for buildings, health, plumbing, gas, and electrical inspectors, facilities maintenance staff, custodians, traffic light maintenance and fire alarm staff. (Donovan Testimony)
6. Joseph Martin is a Storekeeper for the Lynn School Department. He has been there for more than twenty (20) years. He began work there as a custodian. Custodians were transferred from the School Department to the City in or around 2006 following approval of a home rule petition. Mr. Martin is also President of Local 1736. (Martin Testimony)
7. At all pertinent times, Matthew Breen was an Acting Senior Custodian. He is regularly assigned to and in charge of Callahan Elementary School. He also worked at the Connery School in spurts, for approximately five or six weeks in 2011, including

Thanksgiving time. He has been a City employee for approximately eighteen (18) years.
(Breen Testimony)

8. Mr. Driscoll has been the City's Director of Personnel since 2005 and is familiar with the process of responding to personnel requests for information in their files. (Driscoll Testimony)

9. Mr. Raftery usually schedules the custodians a week prior to the assigned week.

Custodians do not have authority to reassign themselves. The week preceding Thanksgiving week in 2011, Mr. Raftery called Mr. Paone on his cell phone to discuss Mr. Paone's assignment for Thanksgiving week. Mr. Raftery told Mr. Paone that during his 3pm to 11pm shift, Mr. Paone would work on Monday and Tuesday before Thanksgiving, splitting each day to work part of the day at Lynn Vocational Technical Institute (hereinafter "Tech Institute") and part at Lynn English High School (hereinafter "Lynn English") and that he was to work his shift on Wednesday at Lynn English.

(Raftery Testimony; Exs. 2, 5) At the local hearing, Mr. Raftery similarly testified that he scheduled Mr. Paone to work 3pm to 11pm, splitting Monday and Tuesday between Tech Institute and Lynn English and his full shift at Lynn English on Wednesday of Thanksgiving week. (Ex. 5) At the Commission hearing, Mr. Paone agreed that Mr. Raftery testified at both the local hearing and the Commission hearing that he had told Mr. Paone to work at Lynn English on Wednesday before Thanksgiving, 2011. (Paone Testimony)

10. During the phone conversation concerning Mr. Paone's assignment for the Thanksgiving week, Mr. Paone asked about changing the time of his shift. Mr. Raftery said not right now but that if it changes, Mr. Raftery would get back to Mr. Paone. Mr. Raftery had no

conversations with Mr. Paone later in the week of Thanksgiving about Mr. Paone's assignment. Mr. Raftery does not recall receiving any messages from Mr. Paone regarding his schedule for Thanksgiving week. Mr. Raftery received a question from the Lynn English custodian supervisor for the 3pm to 11pm shift and Mr. Raftery told the supervisor there was no change. Mr. Raftery left a message on Mr. Paone's phone on either November 22 or early November 23, 2011 saying that Mr. Paone had to work 3pm to 11pm at Lynn English. (Raftery Testimony; Exs. 1, 2, 5) At the local hearing, Mr. Raftery similarly testified that Mr. Paone requested a shift change for Wednesday, that he denied the request, he told Mr. Paone he would contact him if there was a change, and he left a phone message for Mr. Paone during Thanksgiving week stating his shift had not changed. (Ex. 5)

11. Exhibit 1, the custodian schedule for November 23 (the day before Thanksgiving in 2011), was changed after Mr. Raftery spoke to Mr. Paone about his schedule for Thanksgiving week, 2011 but it appears that Mr. Raftery did not change Mr. Paone's schedule for that week. The Punch Time for Local 1736 Employees for Thanksgiving week, 2011 (hereinafter "Punch Time"), entered into evidence post-hearing pursuant to a ruling at the hearing, indicates where and when custodians worked. (Administrative Notice; Raftery Testimony)
12. On November 23, 2011, Mr. Paone worked the 11am to 7pm shift at Connery School. (Punch Time; Exs. 2, 5; Connick Testimony; Raftery Testimony)
13. On or about November 24, 2011, 1:30 a.m., Mr. Connick received a call from Lynn Police stating that an officer was at Lynn English and found a window open in the school. At the police request, Mr. Connick sent an "on call" maintenance person to the school to

check the building and close the window. This was a four (4) hour, double time call.

(Ex. 2, Connick testimony)

14. Shortly after Thanksgiving in 2011, Mr. Connick asked Mr. Raftery the names of the employees who were supposed to work at Lynn English on Wednesday, November 23 on the 3pm to 11pm shift because custodians on that shift are responsible for making sure that windows were closed. Mr. Raftery asked the Lynn English staff if custodians worked the night of November 23; the staff did not believe that Mr. Paone was at the school that night. Mr. Raftery checked the Punch Time to see if Mr. Paone had punched in November 23 and found that Mr. Paone had punched in at Connery School and worked the 11am to 7pm shift. (Exs. 2, 5; Connick testimony)
15. At Connery School, Mr. Paone asked Mr. Breen and Ms. DeLisio (Junior Custodian in Charge) to see if there were any programs in the school after school hours and they told him there were no programs scheduled. Mr. Paone did not ask Mr. Raftery if he could change his shift. (Paone Testimony)
16. On a workday shortly after Thanksgiving, 2011, Mr. Raftery went to talk to Mr. Paone about his work on the day before Thanksgiving. (Paone Testimony, Raftery Testimony, Connick Testimony, Exs. 2, 5) Mr. Breen testified at the local hearing that he was present at this conversation between Mr. Raftery and Mr. Paone and that both Mr. Raftery and Mr. Paone spoke with raised voices during the conversation. Mr. Breen recalled that Mr. Raftery asked why Mr. Paone did not report to Lynn English on the Wednesday before Thanksgiving and that Mr. Paone said that he was never told to go to Lynn English. During the conversation, Mr. Raftery told Mr. Paone that for failing to work at Lynn English on Wednesday before Thanksgiving that Mr. Paone was going to

be “whacked” (meaning disciplined). (Paone Testimony; Raftery Testimony) Mr. Paone asked why people with less seniority than him were working the 11am to 7pm shift the previous Wednesday. (Ex. 5) At one point, Mr. Paone was talking and Mr. Raftery tried to say something and then told Mr. Paone to “shut up” and “listen”. (Breen Testimony) Mr. Breen indicated that the conversation ended abruptly and Mr. Paone refused further discussion on the matter. (Ex. 5) Thereafter, Mr. Paone sent a letter to Local 1376 and the Appointing Authority asserting that Mr. Raftery was harassing him; Mr. Paone believes that no action has been taken regarding his letter. (Paone Testimony; Ex. 6)

17. Mr. Donovan contacted Mr. Connick, whom he asked to conduct an investigation concerning Mr. Paone’s work on the day before Thanksgiving in 2011. (Ex. 5) Mr. Connick submitted a report based on “... the facts as witnessed or indicated by myself or Mr. Mark Raftery...” to Mr. Donovan by letter dated December 9, 2011. (Ex. 2) Mr. Connick did not speak with Mr. Paone regarding the events. In his letter, Mr. Connick concluded that Mr. Paone did not intend to work the 3pm to 11pm shift on Wednesday, November 23, 2011 to which he was assigned. The letter further states that on June 3, 2010, Mr. Paone was issued a one-day “suspension letter for leaving his assigned work place and working at another location without requesting a reassignment or contacting a supervisor.” (Ex. 2) Mr. Raftery did not submit his comments to Mr. Connick in writing. (Connick Testimony)

18. Mr. Donovan learned that Mr. Paone had not worked the 3pm to 11pm shift at Lynn English after the holiday because of an overtime expenditure for maintenance in the early hours of Thanksgiving Day in 2011. He then asked Mr. Connick to investigate Mr. Paone’s assignment for the day before Thanksgiving. Mr. Donovan later received Mr.

Connick's letter concerning his investigation. He then reviewed Mr. Paone's employment history and issued the three-day suspension at issue in this case. Custodians are not permitted to change their assignment or hours they work; an assistant supervisor decides coverage by custodians which, in this case, would have been Mr. Raftery. Elementary schools release students at approximately 10:45am before Thanksgiving; however, the junior and senior high schools need custodial coverage beyond that time. (Donovan Testimony, Ex. 5)

19. On February 22, 2012, the Appointing Authority gave Mr. Paone notice of a disciplinary hearing to be held on March 15, 2012 for failing to report to his assigned workplace at the proper shift and included copies of G.L. c. 31, §§ 41 – 45. At the local disciplinary hearing, the following witnesses testified: Mr. Raftery, Mr. Connick, Mr. Donovan, Mr. Breen, and Mr. Paone. The local hearing officer submitted his report and recommendation to the Mayor on April 18, 2012 writing that the Appellant should be suspended for three (3) days. (Ex. 5)
20. At some point in time, Mr. Paone requested his records to review his employment history to inquire, among other things, if appropriate matters were expunged pursuant to the CBA. At the hearing, Mr. Paone had not received his records. (Paone Testimony). Mr. Driscoll testified that a copy of Mr. Paone's file has been made and was available for Mr. Paone to pick it up.⁷
21. On or about May 15, 2012, Mr. Paone received in the mail a copy of the hearing officer's report following the local hearing, along with a letter dated April 25, 2012 from the Mayor in which the Mayor concurs with the recommendation to suspend Mr. Paone for

⁷ It is not clear if Mr. Paone submitted his record request to the Appointing Authority's Personnel Office or Inspectional Services Division.

three days. (Administrative Notice – Letter from Attorney DeLorey to the Commission, dated July 12, 2012, Ex. 1 thereto)

Applicable Law

G.L. c. 31, § 43, 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.”

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, 268 N.E.2d 346 (1971); Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, *rev.den.*, 426 Mass. 1102, 687 N.E.2d 642 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427 (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, 684 N.E.2d 620, *rev.den.*, 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514, 451 N.E.2d 408 (1983)

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, 133 N.E.2d 489 (1956).

"The commission's task . . . is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether „there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision,”” which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006). *See* Watertown v. Arria, 16 Mass. App. Ct. 331, 334, 451 N.E.2d 443, *rev.den.*, 390 Mass. 1102, 453 N.E.2d 1231 (1983) and cases cited.

Under Section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew.” Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (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." Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, *rev.den.*, 426 Mass. 1102, 687 N.E.2d 642 (1997). *See also* Leominster v. Stratton, 58 Mass. App. Ct. 726, 728, 792 N.E.2d 711, *rev.den.*, 440 Mass. 1108, 799 N.E.2d 594 (2003); Police Dep’t of Boston v. Collins, 48 Mass.App.Ct. 411, 721 N.E.2d 928, *rev.den.*, 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm’n, 38 Mass.App.Ct. 473, 477, 648 N.E.2d 1312 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 451 N.E.2d 443, *rev.den.*, 390 Mass. 1102, 453 N.E.2d 1231 (1983).

Credibility

In his testimony, the Appellant appeared in turns to be agitated and indifferent, stating at times that he felt he was not treated fairly throughout the Appointing Authority's process of this matter and that the Appointing Authority was, in effect, piling on. He was earnest in his comments and demeanor. He testified that when Mr. Raftery called his cell phone the week before Thanksgiving in 2011 that Mr. Raftery told him he was assigned to split shifts at Lynn English and Tech Institute on Monday and Tuesday of Thanksgiving week and that on Wednesday he would work at Connery School or that Mr. Raftery said only that he would get back to him about his Wednesday assignment. However, Mr. Raftery testified that the when talked to the Appellant at Connery School after Thanksgiving, to find out where the Appellant worked on the previous Wednesday, the Appellant said he worked at Connery School and asked why people with less seniority than he had were working 11am to 7pm that day. This indicates that the Appellant was aware that he was obliged to work his 3pm to 11pm shift on the Wednesday before Thanksgiving and that he did not want to work his assigned shift. In other words, the Appellant decided where and when to assign himself. With regard to the timing of his shift the day before Thanksgiving, the Appellant testified that everyone (apparently the principal, Acting Senior Custodian Breen and Custodian in Charge Ms. DeLisio, all at Connery School) told him that if there were no programs at school he could change his shift to 11am to 7pm. Mr. Donovan testified that Mr. Martin, on behalf of Local 1736, had requested that on the day before a holiday, custodians on the 3pm to 11pm shift be allowed to work the 11am to 7pm shift as long as there was coverage. However, there was no further evidence in this regard and that the policy was in effect at the time of these events. In any event, the Appellant did not contact Mr. Raftery, who supervised and assigned the Appellant, to inquire in this regard. Asked why he didn't call

Mr. Raftery, the Appellant testified that it was not his job to call in, that he was not a supervisor. I find the Appellant's explanations without merit. Further, when Mr. Raftery gave the Appellant his Thanksgiving week work assignment, the Appellant had asked if he could change his shift to the 11am to 7pm shift. Mr. Raftery told him not at that time but if things changed, he would get back to the Appellant. In the only contact in this regard that Mr. Raftery had with the Appellant during the Thanksgiving week, Mr. Raftery called the Appellant and left a message for the Appellant reiterating that he was assigned to Lynn English for the 3pm to 11pm shift on Wednesday. Also, when asked if the events here, combined with previous incidents in the Appellant's employment history, indicate that he has a problem with work attendance, he answered non-responsively that it depends on the definition of the word problem. Further, the Appellant has provided varying explanations for his conduct. At the Commission hearing, the Appellant said that Mr. Raftery did not tell him to work at Lynn English on Wednesday before Thanksgiving but at the local hearing, he testified on direct examination that Mr. Raftery did not schedule for Wednesday and told him that he would get back to him concerning his Wednesday schedule. On cross-examination at the local hearing, the Appellant testified that Mr. Raftery never scheduled him to work at Connery School and did not assign him to work the 11am to 7pm shift. In sum, the Appellant testified in earnest but his testimony included either unsupported, contradicted, or unresponsive statements which, when combined, impair his credibility.

Mr. Breen testified essentially about his observations of the contentious, post-Thanksgiving meeting with Mr. Raftery and the Appellant. He recalled when voices became raised in the meeting, that Mr. Raftery told the Appellant that they were going to "whack you," and that Mr. Raftery told the Appellant to "shut up", as well as other details of the meeting, indicating that he recalled the meeting fairly clearly. In light of the details of his testimony, some of which were,

no doubt, uncomfortable, and that the findings of the local hearing corroborate his testimony at the Commission hearing, I find that Mr. Breen's testimony was credible.

Mr. Martin testified sincerely and professionally. He stated that he has never been disciplined. In addition, he testified in some detail regarding certain matters, such as the staffing plan (Ex. 1) for November 23, 2011, and indicated that he requested the time sheet to determine the accuracy of the information available about the Appellant's work on November 23. He also testified with some detail about the local hearing, asserting that the local hearing findings (Ex. 5) did not fairly indicate that the Appellant testified at the local hearing that Mr. Raftery had told him (the Appellant) that he could return to Connery School on Wednesday, November 23. However, he acknowledged that he did not participate in the conversation between Mr. Raftery and the Appellant regarding the Appellant's work assignment for Thanksgiving week. Mr. With regard to the Appellant's letter complaining of harassment by Mr. Raftery, Mr. Martin indicated that as Local 1736 president, he is the person who makes the final decision whether a matter is grieved. However, when asked if he grieved the Appellant's harassment letter he stated that he had not filed a grievance but that other Local 1736 executive board members could have filed a grievance for it. Given the limited contradictions in his testimony, I find that Mr. Martin's testimony was relatively credible.

Mr. Raftery testified calmly and in a professional manner at the Commission hearing. As the Appellant noted, Mr. Raftery testified repeatedly and consistently that he assigned the Appellant to work part of the shift at Lynn English and part at Tech Institute on Monday and Tuesday of Thanksgiving week and the full shift at Lynn English that Wednesday. In addition, Mr. Raftery knows the Appellant from when he (Mr. Raftery) was union president and, in fact, Mr. Raftery was involved in facilitating a reduction of a one-day suspension to a written warning, suggesting

that Mr. Raftery had no bias against the Appellant. The Appellant alleges that, in effect, Mr. Raftery is not credible because he is looking for a scapegoat to blame for the open window at Lynn English that was found by police in the early hours of Thanksgiving in 2011 but there was no further evidence to support this allegation. Mr. Raftery appeared to have good recollection of the events at issue with the exception to an aspect of the contentious exchange he had with the Appellant in Mr. Breen's presence after the 2011 Thanksgiving holiday. Specifically, Mr. Raftery was asked whether, as Mr. Breen testified, he had told the Appellant to "shut up" and "listen". Mr. Raftery said, in essence, that he could not recall. Although a significant amount of time had passed since the contentious meeting was held, these are words that people are not likely to forget and, if anything, are more likely to remain in one's memory. In addition, Mr. Raftery's recollection about the precise date of the contentious meeting appeared to have faded. With these limited exceptions, I find that Mr. Raftery was generally a credible witness.

Mr. Connick generally appeared familiar with these events and his role in them. He recalled and testified calmly and in a straightforward manner, albeit uncomfortably on a couple of occasions. Mr. Connick admitted that he did not consult the Appellant in compiling his investigation report for Mr. Donovan. When asked why he did not meet with the Appellant about the events and his investigation, Mr. Connick stated only that Mr. Raftery is the Assistant Supervisor, suggesting that he was comfortable receiving information about the events from Mr. Raftery, combined with his own observations. Mr. Connick's report would have been strengthened if Mr. Connick had obtained the Appellant's account of events relating to work on the day before Thanksgiving. For these reasons, I find that Mr. Connick's testimony was relatively credible.

Mr. Donovan testified knowledgeably about the functions of ISD in general, the CBA, and related matters. He also recalled, for example, how he learned about the events at issue here, that he asked Mr. Connick to prepare a report on the events, that he reviewed the Appellant's employment history upon receiving Mr. Connick's report, and how employment histories are maintained and/or expunged when appropriate. Mr. Donovan recalled specifically that on another occasion for which the Appellant had been disciplined the Appellant had left Pickering School, to which he was assigned, and gone to another building for the rest of his shift without telling anyone. He also testified that Mr. Martin, for Local 1736, had requested that on the day before the holiday custodians on the 3pm to 11pm shift be allowed to work the 11am to 7pm but he did not indicate the status of Mr. Martin's request at the time of the events here. Nonetheless, as he testified at the local hearing, Mr. Donovan testified emphatically at the Commission that custodians cannot change their assignments and hours. Based on Mr. Donovan's knowledge and recollection, I find that his testimony was credible.

Mr. Driscoll testified as a rebuttal witness for the Appointing Authority on the subject of the Appellant's request for his personnel file. The Appellant asserted that he had repeatedly requested his file and not received it. Mr. Driscoll testified that he was aware of a request from the Appellant, that he asked his staff to copy it, and that the copy was available for the Appellant to pick up. The Appellant did not indicate when he requested his file and Mr. Driscoll did not indicate whether he received any other requests for the file. Therefore, I find Mr. Driscoll's testimony credible regarding the production of the Appellant's personnel file on this occasion.

Analysis

There appears to be no question that on November 23, 2011 the Appellant worked at Connery School from 11am to 7pm. The parties disagree whether the Appellant should have

worked at that time and place or he should have worked at Lynn English from 3pm to 11pm. A preponderance of the evidence shows that the Appellant was assigned to work at Lynn English on November 23, 2011 from 3pm to 11pm and that he failed to do so. Therefore, the Appointing Authority has provided just cause for the three-day suspension it issued, which followed progressive discipline. Based on the Appellant's employment history, by November 23, 2011, the Appellant had indicated to the Appointing Authority that his understanding of the applicable rules of employment was different from its understanding. The Appellant's conduct on November 23, 2011 affirmed the discrepancy in their views. The Appellant argued that his employment history should not be considered in this appeal or, at a minimum, certain verbal or written reprimands or discipline should not be considered here, as their effect was limited in time. While time limitations contained in the reprimands or discipline may apply with regard to the CBA and the grievance process, the Commission is not barred from considering prior reprimands or discipline. To the contrary, the Commission examines whether the Appointing Authority has followed the essential process of progressive discipline. Here, a preponderance of the evidence establishes that the Appointing Authority implemented appropriate progressive discipline over a reasonable period of time, including modification of reprimands and discipline as warranted.

The dispute between the parties is based, at least, on a phone conversation between Mr. Paone and Mr. Raftery in the week prior to Thanksgiving in 2011. While they concur that in that conversation Mr. Raftery told Mr. Paone that his assignment the following week was to split his 3pm to 11pm shift on Monday and Tuesday between Tech Institute and Lynn English, Mr. Paone asserted that Mr. Raftery never told him to work at Lynn English on Wednesday and that Mr. Raftery said he would get back to Mr. Paone about his Wednesday assignment. Mr. Raftery

testified that he had told Mr. Paone to work at Lynn English on Wednesday that week for his 3pm to 11pm shift, that Mr. Paone asked him at that time if he could work an earlier shift, and that Mr. Raftery denied the request but said he would get back to Mr. Raftery in that regard if circumstances changed. Since the phone conversation was between Mr. Paone and Mr. Raftery, there were no witnesses and the matter is decided based on credibility. As indicated above, I find that Mr. Raftery was the more credible witness. At the local hearing, Paone asserted that Mr. Raftery said that if he (Mr. Paone) didn't hear back from him (Mr. Raftery), he should go back to the Connery School on Wednesday before Thanksgiving. Mr. Raftery stated that he told Paone to work at Lynn English on Wednesday for the 3pm to 11pm shift. Exhibit 1, the Daily Staffing Plan for Wednesday, November 23, 2011, makes it clear that the Appellant was assigned to Lynn English for the 3pm to 11pm shift. In addition, as a matter of credibility, Mr. Raftery has now twice testified (at the local hearing and at the Commission hearing) that he told Mr. Paone that he was to work at Lynn English on November 23. The Appellant testified at the local hearing, but not at the Commission hearing, that Mr. Raftery told him he was assigned to Connery School on November 23. However, there is no support for the Appellant's contention. The Appellant further avers that in pursuing this disciplinary matter, Mr. Raftery was looking for someone to blame when the police reported that a window had been left open at Lynn English on the night of November 23, for which, the Appellant asserts curiously, a custodian would not be responsible. There is no further evidence to support this assertion either.

As to the different shift the Appellant worked at Connery School on November 23, the Appellant does not assert that Mr. Raftery said that he could change his shift from 3pm to 11pm to 11am to 7pm. Rather, the Appellant asserts that he understood that if there was nothing going on at the school to which he was assigned on the day before Thanksgiving, he could change his

shift to 11am to 7pm and that there was nothing going on at Connery School after that time. There was no supporting evidence that this was an established policy and that it did not require the notice or decision of a supervisor. Moreover, the Appellant testified that he did not call Mr. Raftery in this regard despite the fact that it was Mr. Raftery who had given the Appellant his assignment. Even if the Appellant had been scheduled to work at Connery School on the Wednesday before Thanksgiving in 2011, he was not authorized to change his shift from 3pm to 11pm to the 11am to 3pm shift. Significantly, Mr. Raftery received a call during Thanksgiving week from the Lynn English custodian supervisor, who was inquiring about the 3pm to 11pm shift, wanting to know if there was to be any change in the shift. Mr. Raftery told him that there were no changes. Lastly, there is no credible evidence of bias or disparate treatment that would undermine the Appointing Authority's just cause.

CONCLUSION

For the reasons stated herein, the Appointing Authority has established just cause for issuing a three (3) day suspension of the Appellant. Wherefore, the appeal is hereby *denied*.

Civil Service Commission

Cynthia A. Ittleman
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, and Stein, [McDowell-absent] Commissioners;) on February 21, 2013.

A true record. Attest:

Commissioner

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.

Notice:

Wayne Soini, Esq. (for Appellant)
David Grunebaum, Esq. (for Appointing Authority)