COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss:

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

PHILIP SWANSON,
Appellant,
v.
FALL RIVER SCHOOL COMMITTEE
Respondent.

CASE NO. D-09-419

Appellant's Attorney:	Karen E. Clemens, Esquire Associate General Counsel AFSCME Council 93 8 Beacon Street Boston, MA 02108
Respondent's Attorney:	Bruce A. Assad, Esquire 16 Bedford Street Fall River, MA 02720 (508) 673-2004
Commissioner:	Paul M. Stein

DECISION

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, Philip Swanson, appealed to the Civil Service Commission (Commission), from a decision of the Respondent, Fall River School Committee (hereinafter "FRSC"), as Appointing Authority, to suspend him from his position of Junior Custodian for a period of five (5) days. The appeal was timely filed. A pre-hearing conference was conducted on December 11, 2009 and a full hearing was held at the offices of the Commission on April 9, 2010. As no party requested a public hearing, the hearing was declared private. Witnesses were not sequestered. Fifteen (15) joint exhibits were entered into the record. (Exhibit No. 10 was marked for identification only.) FRSC called two witnesses and the Appellant testified on his own behalf. The hearing was digitally recorded. Both parties subsequently submitted proposed Decisions.

FINDINGS OF FACT

Giving appropriate weight to the Exhibits; the testimony of Thomas Coogan, FRSC Facilities Chief Operating Officer; James T. Medeiros, FRSC Assistant Director of Environmental Services, and the Appellant; and inferences reasonably drawn from the evidence as I find credible, I make the findings of fact set forth below.

1. The Appellant, Philip Swanson, is a tenured civil service employee who commenced employment with FRSC on or about September 28, 1987 as a Junior Custodian. (*Testimony of Appellant*)

2. Mr. Swanson had been assigned to the second shift at the Spencer Borden Elementary School for approximately seven years. At the time of his most recent discipline, his assignment included Area "2B", which included Rooms 201-223 and the library, on the second floor. (*Exh.15*; *Testimony of Appellant*)

3. As Junior Custodian, Mr. Swanson's core duties are to make sure that his assigned area is clean. (*Testimony of Appellant*)

4. Mr. Swanson's personnel file contains several previous negative performance actions taken against him. This includes a written warning in May 1999 for failing to clean his area, a one (1) day suspension in September 1999 for poor work performance, a verbal warning in October 2007 for unacceptable performance and a three (3) day suspension in November 2007 for sub-standard performance. (*Exhs. 4 thru 7*)

5. Mr. Swanson's file also indicates a two (2) day suspension in June 1989, but he credibly testified that this discipline was rescinded and should not have been considered as part of his prior record. (*Exh.9; Testimony of Appellant*)

6. Mr. Swanson's January 2009 performance evaluation, rated his quality and quantity of work as "Fair" and the Supervisor Comments state "Area is not acceptable" and "seems to do the least amount of work in the greatest amount of time". Additionally, the comments of the Supervisor state that, "If area not improved by end of year, will request termination." Mr. Swanson signed the performance evaluation and did not make any comments. (*Exh.3*)

7. On October 8, 14 and 22, 2009, after visits to the school, Contact Reports were initiated by Mr. James Medeiros, FRSC Assistant Director of Environmental Services. These Contact Reports indicated continued problems by Mr. Swanson in keeping his area clean to facilities and operations standards, as well as similar critiques about other custodians at that school. (*Exhibits 12 thru 14; Testimony of Appellant & Medeiros*)

8. It is a practice with Custodians, which was followed by Mr. Swanson, that when there is a negative contact report they put it on the wall and cross it off when they clean up the area. FRSC Facilities Chief Operating Officer, Thomas Coogan, testified that he was informed that Mr. Swanson's direct supervisor, Robert Medeiros, had reviewed these Contact Reports with Mr. Swanson, but Mr. Swanson claims that he never saw them. Although I am inclined to give Mr. Swanson the benefit of the doubt on this point, the fact remains that Mr. Swanson did not offer credible proof to refute the substance of the criticism contained in those reports. (*Testimony Appellant, Coogan & Medeiros*).

9. On October 29, 2009, in addition to his regularly assigned area (Rooms 201 through 223), due to the absence of another custodian, Mr. Swanson was also assigned responsibility for cleaning additional rooms 205 through 209 that evening. (*Exh.15; Testimony of Appellant*)

10. On October 30, 2009, the teacher in Room 204 reported to her Principal that on October 29, 2009 a child had spilled juice on the floor and it had not been cleaned. She reported that "in

fact, a mouse had crawled through the sticky mess and had left a trail of hair stuck to the floor." The Principal verified that the room had not been cleaned. The Principal also checked the bathroom attached to the room and found that it had not been cleaned. Also, the teacher in Room 203 reported that a child had dropped a sandwich on the floor on October 29, 2009 and that it was still there on October 30, 2009. These classrooms are used by medically fragile students, where hygiene and sanitary concerns are especially important. Upon receipt of this information, James Medeiros issued a letter to Mr. Swanson, describing what had been reported to him, and ordering that he be suspended for five (5) days. (*Exhs. 1 & 2; Testimony of Medeiros)*

11. At the appointing authority hearing held on November 12, 2009 before Mr. Coogan, Mr. Swanson explained that he had been having eye problems recently, and that he would likely require surgery. He provided a doctor's note that supported these facts. At the hearing before the Commission, Mr. Swanson testified that he could see well enough on October 29, 2008 to drive to work. (*Exhs 1 & 11: Testimony of Appellant & Coogan*)

12. By letter dated November 16, 2009, Mr. Coogan upheld Mr. Swanson's five (5) day suspension. His letter stated:

> "On November 12th, a hearing was held at your request to appeal a suspension that was assigned to you as a result of unsatisfactory performance. The specific reason for issuing the request to suspend you was your failure to properly clean your area. . . .This same issue came up in 2007 for the same area. . . .This marks the 6th time that negative performance action has been taken against you.
>
> . . .
>
> "After reviewing the issues you raised in the hearing and carefully listening to your side of the situation, I find that while your medical issues may contribute to some diminished performance but a failure to remove trash and properly clean and sanitize a room where children's health is an issue is inexcusable and unacceptable. In addition the fact remains that this area was addressed with you before and recently in contact reports and conversations with your supervisor. You yourself produced a copy of the report dated October 22, which contained information regarding the condition in the area."

(*Exh.1*)

13. On November 24, 2009, Mr. Swanson timely filed an appeal with the Commission. (*Claim of Appeal*)

14. At the hearing before the Commission, Mr. Swanson admitted that he had seen the juice on the floor of Room 204. He said he dry mopped it and left it to clean the other areas. He testified that is was not mouse hair in the spill as alleged, but remnants left from the dry mop. He intended to go back to wash the floor but said he forgot because he had so many additional rooms to clean that evening. He denied ever seeing the sandwich in Room 203, stating that he has only seen Cheerios in that room. (*Testimony of Appellant*)

CONCLUSION

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

> "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 role of the Commission is to determine, under a "preponderance of the evidence" test, "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, rev.den., 426 Mass. 1102 (1997). See also 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 (2000); McIsaac v. Civil Service Comm'n, 38

Mass. App. Ct. 473, 477 (1995); Watertown v. Arria, 16 Mass. App. Ct. 331, rev.den., 390 Mass. 1102 (1983).

In performing its appellate function, "the commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew. . . . [after] 'a hearing de novo upon all material evidence and a decision by the commission upon that evidence and not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer' . . .For the commission, the question is . . .'whether, *on the facts found by the commission, 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*.' " Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003) (affirming Commission's decision to reject appointing authority's evidence of appellant's failed polygraph test and prior domestic abuse orders and crediting appellant's exculpatory testimony) (*emphasis added*). cf. Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (inconsequential differences in facts found were insufficient to hold appointing authority's justification unreasonable) See generally Villare v. Town of North Reading, 8 MCSR 44, reconsid'd, 8 MCSR 53 (1995) (discussing need for de novo fact finding by a "disinterested" Commissioner in context of procedural due process); Bielawksi v. Personnel Admin'r, 422 Mass. 459, 466, 663 N.E.2d 821, 827 (1996) (same)

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); Cambridge, 43 Mass. App. Ct. at 304; Selectmen of Wakefield v. Judge of First Dist. Ct., 262

Mass. 477, 482 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass. App. Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983). The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in governmental employment decisions.'" " Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of the "merit principle" which governs 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, 35-36 (1956); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1982). 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).

It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. "[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance." E.g., Leominster v.

Stratton, 58 Mass.App.Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003) (where live witnesses gave conflicting testimony at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing) The Commission is permitted, but not required, to draw an adverse inference against an appellant who fails to testify at the hearing before the appointing authority (or before the Commission). Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006)

G.L.c.31, Section 43 also vests the Commission with the authority to affirm, vacate or modify the penalty imposed by the appointing authority. The Commission has been delegated with "considerable discretion", albeit "not without bounds", to modify a 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. 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 deciding whether to exercise discretion to modify a penalty, however, the commission's task "is not to be accomplished on a wholly blank slate. After making its de novo findings of fact, the commission must pass judgment on the penalty imposed, a role to which the statute speaks directly. G.L.c.31,§43. Here, the commission does not act without regard to the previous

decision of the [appointing authority], but rather decides whether "there was reasonable justification for the action taken by the appointing authority in the circumstances found by the Commission to have existed when the appointing authority made its decision.' " Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983). "The 'power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded to the appointing authority." Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct. 796, 800 (2004) quoting Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 600 (1996).

Thus, when it comes to its review of the penalty, unless the Commission's findings of fact differ materially and significantly from those of 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."). Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited (minor, immaterial differences in factual findings by Commission and appointing authority did not justify a modification of 180 day-suspension to 60 days). See, e.g., Town of Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct. 796 (2004) (modification of 10-day suspension to 5 days unsupported by material difference in facts or finding of political influence); Commissioner of MDC v. Civil Service Comm'n, 13 Mass.App.Ct. 20 (1982) (discharge improperly modified); cf. School Committee v. Civil Service Comm'n, 43 Mass.App.Ct. 486, rev.den., 426 Mass. 1104 (1997) (modification of discharge to suspension upheld); Dedham v. Civil Service Comm'n 21 Mass.App.Ct. 904 (1985) (modification of discharge to suspension upheld); Trustees of the State Library v. Civil Service Comm'n, 3 Mass.App.Ct. 724 (1975) (modification of discharge to suspension upheld)

When reviewing the commission's action, a court cannot "substitute [its] judgment for that of the commission" but is "limited to determining whether the commission's decision was supported by substantial evidence" and is required to 'give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it. . .This standard of review is highly deferential to the agency on questions of fact and reasonable inferences drawn therefrom.' " Brackett v. Civil Service Comm'n, 447 Mass. 233, 241-42 (2006) and cases cited.

Applying the applicable standards to the fact of this appeal, the FRSC has shown by a preponderance of the credible and reliable evidence that it had just cause to suspend Mr. Swanson from employment for a period of five (5) days without pay for misconduct which materially affects the public interest. Here, FRSC gave Mr. Swanson multiple warnings and opportunities to properly clean his areas and he did not. FRSC is fully entitled to demand of its custodial staff strict adherence to hygiene and sanitary concerns, especially in an area used by medically challenged children where cleanliness was especially important to their safety.

Mr. Swanson clearly had notice of his negative performance as a custodian from his prior disciplines and January 2009 evaluations. Whether he saw all the October Contact Reports (he testified it was a common practice to put the negative Contact Reports up on the wall and he, himself produced a copy of the report dated October 22 at the appointing authority level hearing), the preponderance of evidence clearly supports the conclusion that those reports are substantively accurate., Mr. Swanson had prior disciplines for poor quality of work and failing to adhere to the School's standards of cleanliness: a one-day suspension in 1999 and a three-day suspension in 2007 as well as a "fair" January 2009 performance evaluation. Mr. Swanson was also warned in January 2009 that, without improvement, his termination would be considered.

FRSC also is fully justified to conclude that, again, on October 29, 2009, Mr. Swanson did not satisfactorily perform his job. It is undisputed that Mr. Swanson left a classroom knowing that he did not properly clean up the juice spill. Mr. Swanson testified he saw the spilled juice on the floor and left the classroom without cleaning it off the floor.[1] A preponderance of evidence also supports the conclusion that he failed to remove the sandwich on the floor of another classroom and failed to properly clean a bathroom as well. These were all part of Mr. Swanson's core responsibilities. Thus, Mr. Swanson failed to perform his work duties on October 29, 2009.

Mr. Swanson did not proffer satisfactory proof that he was a victim of disparate treatment or improper motive or bias. It is troubling that the supervisory Contact Sheets showed there were problems with other custodians who were not formally disciplined, but this evidence was not sufficient to warrant any inference that the other custodians situations were overlooked and/or not otherwise addressed appropriately, or that Mr. Swanson was singled out because of some inappropriate animus or bias, as opposed to his long record of prior disciplinary issues.

Mr. Swanson also argues that, on October 29, 2009, he was covering for another custodian and that he had been having trouble with his eyesight (although he was able to see the juice spill as well as drive a car). He also points out that FRSC improperly took his 1989 discipline into account, although he had been vindicated in that incident and the discipline rescinded. While these factors are legitimate mitigating circumstances, I do not find them sufficient reasons to override the justification for his discipline or consider them to be materially distinguishing

[1]. Mr. Swanson did raise sufficient doubt about whether the fibers in the juice spill were mouse hairs or mop hairs, as he claimed, but, in either case, the facts demonstrate his substandard performance.

circumstances that would warrant the exercise of the Commission's discretion to modify the 5-day suspension imposed in this case.

Accordingly, for the reasons stated above, the appeal of the Appellant, Phillip Swanson, filed under Docket No.D-09-419, must be and hereby is, the Appellant's appeal is hereby ***dismissed***.

Paul M. Stein

Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis [ABSENT], McDowell and Stein, Commissioners) on February 10, 2011.

A true record. Attest:

_____

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of the Commission's 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c.30A, §14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c.31, §44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c.30A, §14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice:
Karen E. Clemens, Esq. (for the Appellant)
Bruce A. Assad, Esq. (for the Appointing Authority)