COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

GEORGE OLIVEIRA,
Appellant
v.

CASE NO: D-09-196 (5 day suspension)
D1-09-387 (discharge)

FALL RIVER SCHOOL COMMITTEE,
Respondent

Attorney for the Appellant:

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Attorney for the Respondent:

Bruce A. Assad, Esq.
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Commissioner:

Paul M. Stein

DECISION

The Appellant, George Oliveira, brought this appeal pursuant to G.L. c.31, §43, seeking reversal of the Respondent Fall River School Committee's ("School Committee") decision to (1) suspend him for five (5) days and subsequently (2) terminate his employment as a Junior Building Custodian on October 16, 2009. At hearing on March 17, 2010, the School Committee presented evidence through three witnesses, Joseph Correia, Paul Marshall, and Keith Green. The Appellant testified on his own behalf and called Russell Costa as a witness. The parties also submitted a Stipulation of Facts. Sixteen (16) Exhibits were received in evidence. The hearing was digitally recorded.

FINDINGS OF FACT

Based upon the Exhibits, the parties' Stipulations, the testimony of Mr. Correia, Mr. Marshall, Mr. Green, Mr. Oliveira, and Mr. Costa, and the inferences reasonably drawn from that evidence, I make the findings of fact set forth below.

1. The Appellant began his employment with the School Committee as a Junior Building Custodian on June 26, 2000. (Exhibit 4)
2. On March 19, 2002, Appellant received a one (1) day suspension for insubordination and leaving for one hour without authorization during his shift at Doran Elementary School. (Exhibit 15)
3. On August 15, 2002, Appellant received a written warning for leaving before the end of his shift. (Exhibit 13)
4. On October 2, 2002, Appellant received a written warning based on reports of failure to properly clean his assigned area at Doran Elementary School, and also for using disrespectful language towards teachers and staff. (Exhibit 12)
5. On December 9, 2004, the Appellant received a written warning for failure to properly clean his assigned area. (Exhibit 11)
6. On March 26, 2007, the Senior Custodian at Kuss Middle School filed a written complaint regarding Appellant's failure to properly clean the front stairwell at Kuss Middle School. (Exhibit 10)
7. On March 28, 2007, the Appellant received a three (3) day suspension for failure to properly perform his cleaning assignment at Kuss Middle School. (Exhibit 9)
8. On March 26, 2009, Appellant received a five (5) day suspension for failure to perform his custodial duties at Durfee High School. (Exhibit 7)

9. On April 13, 2009, Appellant filed an appeal challenging the five (5) day suspension. (Testimony of Appellant)

10. On September 14, 2009, Joseph Correia, the School's Director of Administrative and Environmental Services, informed Thomas Coogan, the School's Chief Operating Officer, that he had inspected Appellant's assigned area at Durfee High School and determined that Appellant's cleaning was below standard. As a result of his inspection, Mr. Correia recommended Appellant's termination. (Exhibit 4)

11. By letter dated September 15, 2009, Mr. Coogan notified Appellant of the School Committee's decision to seek his termination. (Exhibit 3)

12. On October 12, 2009, the School Committee's Superintendent of School notified Appellant that his employment would be terminated as of October 16, 2009. (Exhibit 2)

13. The Appellant timely filed an appeal with the Commission on October 21, 2009.

CONCLUSION

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

> "If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of 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." *Falmouth v. Civil Service Comm'n*, 447 Mass. 814, 823 (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." *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).

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.'" *Falmouth*, 447 Mass. at 823.

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." *Tucker v. Pearlstein*, 334 Mass. 33, 35-36 (1956). The 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 commission's task, however, is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether 'there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision,'" which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. *Falmouth*, 447 Mass. at 823*; see Watertown*, 16 Mass. App. Ct. at 334. Likewise, the "power accorded the commission to modify penalties must not be confused with the power to impose penalties *ab initio*, which is a power accorded the appointing authority." *Falmouth v. Civil Service Comm'n*, 61 Mass. App. Ct. 796, 800 (2004); quoting *Police Comm'r v. Civil Service Comm'n*, 39 Mass. App. Ct. 594, 600 (1996). Unless the Commission's findings of fact differ significantly from those reported by the appointing authority or interpret the relevant law in a

substantially different way, the commission is not free to "substitute its judgment" for that of the appointing authority, and "cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation." *Falmouth*, 447 Mass. at 823.

Appellant's 5-day Suspension

Based on complaints from both the Paul Marshall, the Principal at Durfee High School, and Keith Green, the Senior Building Custodian, on March 26, 2009, the School Committee suspended Appellant for five (5) days. Both Marshall and Green testified credibly regarding the deplorable condition of the bathroom that Appellant was responsible for cleaning. The evidence revealed that the bathroom at issue likely remained in poor condition for several days or more before it was called to officials' attention. It is likely that the situation would have gone unnoticed for even longer but for the fact that one of the sinks or toilets became clogged and the overflowing water brought the situation to the attention of the school administration.

The evidence did raise a concern that the School Committee did not have a satisfactory explanation for why the supervisory routine permitted the bathroom condition to deteriorate to this level. While both custodial supervisors and school administrators make periodic checks of the bathroom facilities, it appear that, without much additional effort, this kind of situation could be corrected before it reached the state it did. For example, apparently, the day shift custodial supervisor opens up the bathrooms at the beginning of the day (they are locked in the evening after they are cleaned). Rather than simply unlocking the door and moving on, there was not clear reason why the supervisor could not simply check the condition of each bathroom as he or she unlocked it each day before school began.

Regardless of this possible lapse in supervision, it is undisputed that Appellant was responsible for cleaning this bathroom in question. The School Committee presented clear and convincing evidence that it had just cause to suspend Appellant for five (5) based on his failure to clean the bathroom at Durfee High School. Moreover, there is ample documentation that the School Committee imposed the suspension only after adhering to its policy of progressive discipline. The evidence indicates that Appellant's failure to clean the bathroom was the at least the seventh time he had been formally disciplined by the School Committee. Accordingly, the School Committee had just cause to impose a five (5) day suspension again Appellant.

Appellant's Discharge

On September 9, 2009, Joseph Correia, the School Committee's Director of Administrative and Environmental Services, inspected the front stairwell at Durfee High School, the cleaning of which Appellant was responsible, and found that its floors had not been properly cleaned and waxed. The evidence indicated this deficiency was not only a sanitary concern, but by waxing over dirt, Mr. Oliveira created a situation in which the floor could degrade more quickly and require repair or replacement. .Several witness testified credibly that Appellant failed to adequately clean the floor before it was waxed, resulting in several other custodians having to work overtime to remedy the problem. As a result of Appellant's shortcomings on this occasion, and in light of his prior performance and disciplinary issues, the School Committee elected to seek his termination. As noted above, the School Committee had diligently followed its progressive disciple policy in its discipline of Appellant over the years. Its decision to seek termination in this instance was simply the final step of this process marked by years

of disciplinary and performance related issues. The School Committee has provided us with a textbook example of how to apply progressive discipline and, when it becomes apparent that a chronically problematic employee's "inadequate performance cannot be corrected", to terminate the employee from public service. Based on the admitted evidence, the record is compelling that the School Committee had just cause to discharge Appellant.

For the reasons stated, the Respondent has established by a preponderance of the evidence that it had just cause under G.L. c.31, §41 to suspend Mr. Oliveria on Maerch 26, 2009 for 5 days [Appeal No. D-09-196] and, thereafter, to terminate Mr. Oliveira's employment on October 16, 2009 [Appeal No. D1-09-387]. Therefore, Mr. Oliveira's appeals are both ***dismissed.***

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell and Stein, Commissioners) on October 21, 2010.

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 to: Michael J. Maccaro, Esq.
Bruce A. Assad, Esq.