

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

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

JERRY PAONE,  
Appellant

v.

D-12-226

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.  
55 William Street, Suite 210  
Wellesley, MA 02481

Commissioner:

Cynthia A. Ittleman, Esq.

**DECISION**

The Appellant, Jerry Paone (hereafter “Appellant” or “Mr. Paone”), pursuant to G.L. c. 31, § 43<sup>1</sup>, duly appealed to the Civil Service Commission (hereafter “Commission”) on August 3, 2012, opposing the decision of Mayor Judith Flanagan Kennedy (hereinafter “Mayor”), of the City of Lynn (hereafter “City”) and Appointing Authority, placing him on a five (5) day suspension as an employee of the Inspectional Services Department (hereafter “ISD” or “Department”) for the City.

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<sup>1</sup> In the appeal form, the Appellant indicated that he was appealing the actions of the Appointing Authority as to both G.L. c. 31, §§ 42 and 43. At the hearing, the Appellant waived the § 42 appeal.

A prehearing conference was held on September 25, 2012 and a full hearing was held on November 26, December 3, and December 17, 2012 (in Lynn and Boston).<sup>2</sup> At the hearing, the witnesses were sequestered, with the exception of the Appellant and Michael Donovan (Director of ISD and Building Commissioner).<sup>3</sup> As no notice was received from either party, the hearing was declared private. 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 the seventeen (17) Exhibits (Exhibit 3 having subparts 3A – 3P) entered into evidence<sup>4</sup>; the collective bargaining agreement (hereinafter “CBA”) submitted post-hearing, as agreed at the hearing; and the testimony of:

For the Appointing Authority:

- Michael Donovan, P.E., Director of Lynn Inspectional Services Department and Building Commissioner;
- Richard Connick, Supervisor of Custodians and Maintenance, ISD, Lynn (by stipulation<sup>5</sup>);

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<sup>2</sup> The hearing on this case was held at 1:00 p.m. on November 26, 2012. A hearing on the Appellant’s appeal of a three (3) day suspension (D-12-189) was also held on November 26, 2012 but in the morning.

<sup>3</sup> Mr. Donovan was permitted to remain present at the hearing as the City’s representative, advising Attorney Grunebaum, after he testified as the Appointing Authority’s sole attending witness.

<sup>4</sup> By agreement of the parties, Exhibits 3, 3A – 3P, 4, 5 and 6 in this case are the same documents, with the same exhibit numbers, that were entered into evidence in the three (3) day suspension hearing of Jerry Paone v. Lynn, Docket No. D-12-189, held on the morning that the instant hearing was held on November 26, 2012. At the hearing in D-12-189, the Appellant filed a motion in limine to exclude Exhibits 3A – 3P because some of the previous discipline may have or should have been expunged. After argument, the motion in limine was denied and it was determined that Exhibits 3A – 3P would be given the weight they are due. At the instant hearing, the Appellant orally objected to inclusion of Exhibits 3A – 3P, with the same argument that was made in a motion in limine in case D-12-189. After argument, the objection was overruled and it was determined that Exhibits 3A - 3P (along with Exhibits 4 – 6 from appeal D-12-189) would be given the weight they are due in the instant case.

<sup>5</sup> The parties stipulated that Mr. Connick was unavailable to attend the second day of hearing on December 3, 2012 and that had he attended, he, “ ... would testify that he attended a meeting with Mr. Donovan and Mr. Paone at which time Mr. Paone acknowledged an attendance problem and asserted he would use every contractually available day. This testimony was provided at the .A.A. (sic) Hearing.” Email message from Attorney Grunebaum, November 28, 2012. The Appellant concurred in the stipulation but stated that, as a result of such stipulation, the Appellant would present a rebuttal witness, Craig Whitcomb, local union representative for the Appellant at the local hearing. Email message from Attorney Soini, November 28, 2012. Mr. Whitcomb testified at the hearing.

For the Appellant:

- Jerry Paone, Appellant;
- Joseph Martin, Storekeeper, School Department, Lynn, and President of AFSMCE Local 1736 (Appellant's Union)(hereinafter "Local 1736");
- Craig Whitcomb, Custodian, ISD, Lynn, and Local 1736 Executive Board member;
- Lisa Mackey, Mr. Paone's aunt;

and taking administrative notice<sup>6</sup> of all matters filed in the case and pertinent statutes, regulations, policies, agreed post-hearing documents, and reasonable inferences from the credible evidence; a preponderance of the credible evidence establishes the following findings of fact:

1. Mr. Paone was born and raised in Lynn. He attended St. Mary's High School in Lynn and then attended Wentworth Institute, taking a couple of programs over two years, for which he received certificates regarding buildings and construction. Thereafter, he worked for a family business and then took the civil service examination. In February, 2006, Mr. Paone was hired as a tenured, permanent Junior Building Custodian for the City of Lynn. At all pertinent times, Mr. Paone was assigned to the 3pm to 11pm shift.  
(Paone Testimony)
2. Michael Donovan has been the Director of ISD in Lynn since 2004. (Donovan Testimony)

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<sup>6</sup> As indicated at the hearing the in three (3) day suspension case (D-12-189) and applied here as appropriate, (1) the date on a letter from Mr. Donovan at ISD to Mr. Driscoll in the Lynn Personnel Department requested by the Appellant is dated November 28, 2011but should be dated November 28, 2012, and (2) on Ex. 3, the two (2) incidents on a list of incidents in Mr. Paone's employment history at ISD were stricken as they had not yet occurred. (In the hearing for D-12-189, the first three (3) incidents were stricken as they had not yet occurred.)

3. Joseph Martin is a Storekeeper for the Lynn School Department. Mr. Martin is President of Local 1736. (Martin Testimony)
4. Craig Whitcomb has been a custodian at IDS for seven (7) years. Since last year, he has been a member of the Local 1736 Executive Board. (Craig Testimony)
5. Mr. Paone is familiar with Collective Bargaining Agreement (hereinafter “CBA”) for his bargaining unit. (Paone Testimony)
6. The CBA, Article 27, regarding Personal Leave, provides,

“Each [ISD] employee shall be granted five (5) personal days per year. A personal day is defined as a day to tend to urgent family or personal business, which cannot be performed except during the employee’s normal working hours, **it is specifically, (sic) agreed that personal days may not be used to extend vacations or holidays without the permission of the director or his designee.** Except for emergency circumstances, requests for personal days must be made in writing at least one (1) week prior to the requested personal day. Any personal day(s) not used by June 30, will be added to an employee’s accumulated, but not used, sick leave. Personal leave may be taken in one-quarter (1/4) day blocks. Newly hired Employees (sic) will be credited with personal time on a pro-rated basis for the remaining balance of the fiscal year.” (Ex. 8; *see also* Ex. 13)(emphasis added)

7. Supervisors’ names and phone numbers were listed in the ISD Opening Bulletin to All Custodians & Houseworkers for School Year 2010-2011 and in the same Bulletin for School Year 2011-2012. (Exs. 9, 10)
8. Mr. Paone was scheduled to work his assigned shift 3pm to 11pm on Thursday, May 17, 2012. (Paone Testimony; Donovan Testimony)
9. At the time of his shift on May 17, 2012, Mr. Paone was scheduled to take an approved vacation day on Friday, May 18, 2012. (Paone Testimony; Ex. 12)
10. Ms. Mackey often takes care of Mr. Paone’s grandparents (Ms. Mackey’s parents), who live in Lynn. Ms. Mackey’s mother has a heart condition and her father has Alzheimer’s

disease or dementia and is unable to care for his wife. On the morning of May 17, 2012, Ms. Mackey received a call from a visiting nurse at her parents' home who said that her mother's blood pressure was low and that she should be hospitalized. However, her mother did not want to go to the hospital so the nurse said that her mother should not be left alone. Ms. Mackey went to her parents' house and arrived at approximately 8am. At approximately 9:30am, Ms. Mackey received an urgent call from her son, who was being militarily deployed. Since Ms. Mackey could not stay with her mother, she called Mr. Paone and asked him to stay with her parents. (Mackey Testimony; Paone Testimony)

11. Ms. Mackey has six siblings, at least one of whom lives in Lynn. Two of Ms. Mackey's siblings are Ms. Mackey's grandmother's health care agents; one of these two siblings lives in Lynnfield, Massachusetts and Florida and the other sibling lives in Florida.<sup>7</sup> Another sibling lives in Hanover, Massachusetts. Ms. Mackey did not recall if she called anyone else in the family, beside Mr. Paone, to ask if they could stay with her mother, nor did she recall if Mr. Paone told her that he was assigned to work that day. (Mackey Testimony)

12. On or about 9am on May 17, 2012, Mr. Paone received a call from Ms. Mackey who asked him to take care of his grandmother, as he had done on other occasions. Ms. Mackey told Mr. Paone that his grandmother was in pain, anxious and having breathing problems but his grandmother did not want to go to a hospital. (Mackey Testimony; Paone Testimony)

13. Mr. Paone went to his grandmother's house in Lynn shortly after 9am. His grandmother was hysterical so he calmed her down, talked to her, gave her pillows and handed her her

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<sup>7</sup> There was no indication if the sibling who lives in both Massachusetts and Florida was here or in Florida at the time of the events here.

medicine. Mr. Paone did not dial 911 while he was with his grandmother. He stayed with his grandmother until approximately 7:30pm when his aunt, Ms. Mackey, returned. (Paone Testimony; Exs. 14, 17)

14. At approximately 11am on May 17, 2012, Mr. Paone called the attendance line at work, which is an answering machine, and said that he was taking a full personal day off. He did not know at that time when his aunt, Ms. Mackey, would return to his grandmother's house. Mr. Paone did not obtain permission to take May 17, 2012 as a personal day. (Paone Testimony; Ex. 13; Donovan Testimony) He did not speak to a supervisor, senior custodian or custodian in charge. (Ex. 12) When Mr. Paone called the attendance line, he just stated that he was taking an emergency personal time with no explanation. (Ex. 12)

15. Sometime between May 17, 2012 and May 22, 2012, Mr. Paone's supervisor, Mr. Raftery, called him to a meeting and said he should appear with a union representative. (Paone Testimony) The meeting was held on May 22, 2012 in Mr. Donovan's office. Mr. Donovan, Mr. Connick, Mr. Paone and Mr. Whitcomb (a union representative) attended. They discussed Mr. Paone's poor attendance. Someone suggested that Mr. Paone take leave under the Family Medical Leave Act (hereinafter "FMLA") under the circumstances of May 17 but Mr. Donovan said that FMLA does not apply to grandparents under these circumstances. (Paone Testimony) At the meeting, Mr. Paone acknowledged he had an attendance problem and asserted he would use every contractually available day, which information was conveyed at the Appointing Authority's hearing. (Stipulation – fn 5; Exs. 13, 14) Prior to the meeting on May 22,

2012, Mr. Paone did not meet with anyone at ISD to explain his absence on May 17.

(Paone Testimony)

16. By letter dated May 29, 2012 to Mr. Paone, Mr. Donovan described the May 22, 2012 meeting and placed Mr. Paone on a five (5) day suspension for continuing violations of the CBA, department policy and procedure in his unexcused absences and actions on May 17, 2012. The letter references attached copies of G.L. c. 31, §§ 41 – 45 and advises Mr. Paone he could request in writing a hearing within forty-eight hours of receipt of the letter. (Ex. 13)
17. On July 19, 2012, an Appointing Authority hearing was held in Lynn in regard to the five (5) day discipline. Mr. Paone testified at the Appointing Authority hearing and he was represented by Steve Lyons, Council 93 Business Agent. “Mr. Lyons pointed out the attendance records of several employees who appear to be chronically absent from work. In each case, Mr. Donovan testified as to various medical conditions, which required extended leaves for each of the employees questioned.” (Ex. 14)
18. On July 31, 2012, Michael Marks, hearing officer at the Appointing Authority hearing on July 19, 2012, submitted a memorandum to the Mayor about the hearing. (Ex. 14)
19. Mr. Paone was subsequently informed that the Appointing Authority approved the five (5) day suspension; Mr. Paone filed an appeal at the Commission on August 3, 2012.  
  
(Administrative Notice)
20. Mr. Paone’s employment history at ISD includes the following:
  - a. By letter dated 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)<sup>8</sup>
- 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 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

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<sup>8</sup> There is no indication whether Mr. Paone submitted documentation to ISD in this regard.

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)
- m. On or about May 15, 2012, Mr. Paone was suspended for three (3) days for violation of the CBA, Article 17, regarding hours of work and insubordination for changing both his shift work and building assignment on November 23, 2011 without a supervisor's approval. Mr. Paone appealed the three (3) day suspension to the Commission, which appeal (D-12-189) was denied. (Ex. 3; Administrative Notice)

## DISCUSSION

### *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*

Ms. Mackey testified that she is the primary caregiver of her parents (Mr. Paone’s grandparents). While Ms. Mackey may care for her parents often, Exhibit 2 shows that two of her siblings are her mother’s health care agents, indicating that she is not her mother’s sole familial caretaker. Further, although Ms. Mackey testified that there was no one left beside the Appellant to stay with her mother on May 17, 2012, she also testified that at least one of her siblings also lives in Lynn and there was no indication that she called anyone else in the family to request their assistance. Even if other family members were not available, Ms. Mackey testified that a housekeeper and a visiting nurse participate in her grandmother’s care, indicating that there were others caregivers involved. Indeed it was a visiting nurse who called Ms. Mackey to indicate that her mother needed assistance on May 17, 2012. For these reasons, I find that the credibility of Ms. Mackey’s testimony was limited.

Mr. Donovan testified knowledgably about ISD functions, the CBA, and related matters. Asked why he issued a five (5) day suspension to the Appellant, Mr. Donovan gave a detailed response, testifying that his decision was based on the CBA violation, that he reviewed the Appellant's prior discipline, including a recent three (3) day suspension, and that he believed the suspension for this event needed to be higher. He recalled details of the May 22, 2012 meeting, indicating who attended and some of the statements they made. There were no inconsistencies in Mr. Donovan's testimony, nor did other credible evidence contradict his testimony. In view of the foregoing, I find Mr. Donovan's testimony credible.

Mr. Whitcomb attended the May 22, 2012 meeting with the Appellant and he attended the Appointing Authority's hearing. Mr. Whitcomb recalled that the meeting occurred in May 2012 but could not recall the date. He recalled the location of the meeting and some of the conversation there, although he did not recall that the Appellant admitted, in effect, that his attendance record needed improvement. Mr. Whitcomb recalled some aspects of the Appointing Authority hearing but testified that the Appellant did not testify, which Exhibit 14 shows is incorrect. For the foregoing reasons, I find the credibility of Mr. Whitcomb's testimony is somewhat limited.

Mr. Martin testified straightforwardly and he had spent time reviewing records to support his testimony. He testified that he reviewed a list provided by the Appointing Authority indicating the attendance for all unit employees, to see how the Appellant's attendance record compared to that of others. *See* Exs. 11, 15. He asserted that the Appellant's attendance appears to be in the middle of the list and that certain supervising custodians had used considerably more sick leave. However, the list includes only current employees, not those who may have been employed at the pertinent time but who have left ISD. In addition, the list does not indicate whether

employees were on excused or unexcused leave such that, for example, it does not show that an employee was on workers compensation leave. In addition, Mr. Martin testified that an employee can call a supervisor regarding use of an emergency personal day as a courtesy but it is not required by the CBA. Given the limitations of the lists referenced and the text of Article 27 requiring a supervisor's permission for personal time the day before a vacation day, Mr. Martin's credibility is relatively limited.

The Appellant's testimony recounted the events of May 17, 2012 and the meeting on May 22, 2012 with limited details. When asked what he did for his grandmother on May 17, he talked about getting her medicine for her, putting a pillow under her feet, and keeping her calm. He did not call 911. This recollection undermines the argument that this was an emergency. With regard to the May 22 meeting, Mr. Paone indicated that Mr. Donovan said that he had the poorest attendance record. When asked his response to Mr. Donovan's statement, Mr. Paone testified that he did not respond. However, this statement is contradicted by credible evidence that Mr. Paone admitted his attendance could be improved. In addition, when asked why he did not call a supervisor for approval of the personal leave on May 17, Mr. Paone testified that he did not have their phone numbers. The credible evidence indicates that documents given to all custodians provide the names and phone numbers of supervisors to conduct. Further, Mr. Paone could have obtained a general office number for ISD through City Hall, for example, and requested a supervisor's phone number but he did not testify that he made any such efforts. In light of the foregoing, the credibility of Mr. Paone's testimony is limited.

### *Analysis*

There is no question that the Appellant failed to appear at work on May 17, 2012, that he left a message on the ISD attendance answering machine that he was taking a personal day off, that Article 27 of the CBA bars custodians from taking a personal day to extend vacations without the permission of a supervisor, that the Appellant was scheduled to take a vacation day on May 18, 2012, and that the Appellant did not request the permission of a supervisor to take the personal day on May 17, 2012. Therefore, the Appointing Authority has provided just cause for the three-day suspension it issued, which followed progressive discipline. The Appellant's conduct on May 17, 2012, indicated to the Appointing Authority that his understanding of the applicable rules of employment was different from its understanding. In addition, the Appellant's conduct on May 17, 2012 was the most recent of a long sequence of events in which the Appellant displayed similar conduct. 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 credible evidence establishes that the Appointing Authority had just cause to suspend the Appellant for five days for his conduct and that it implemented appropriate progressive discipline over a reasonable period of time, including modification of reprimands and discipline as warranted. I find no credible evidence of bias or other inappropriate motive on behalf of the Appointing Authority and there is no credible evidence of disparate treatment of the Appellant.

#### CONCLUSION

For the reasons stated herein, the Appointing Authority has established just cause for issuing a five (5) day suspension of the Appellant. Wherefore, the appeal is hereby *denied*.

Civil Service Commission

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Cynthia A. Ittleman  
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman - Yes; Ittleman - Yes, Marquis - Yes, and Stein - No, [McDowell-absent] Commissioners;) on February 21, 2013.

A true record. Attest:

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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)