COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

STACEY DOTTIN,
Appellant

v.

Case No. D1-12-183

CAMBRIDGE PUBLIC SCHOOLS,
Respondent

Appearance for Appellant:

Winston Kendall, Esq.
136 Warren Street
Roxbury, MA 02119

Appearance for Respondent:

Maureen A. MacFarlane, Esq.
Legal Counsel
Cambridge Public Schools
159 Thorndike Street
Cambridge, MA 02141

Commissioner:

Cynthia A. Ittleman, Esq.[1]

DECISION

Pursuant to the provisions of G.L. c. 31, §§ 42 and 43, the Appellant, Ms. Stacey Dottin ("Appellant" or "Ms. Dottin"), filed a timely appeal with the Civil Service Commission ("Commission") against Cambridge Public Schools ("CPS" or "Appointing Authority") on May 30, 2012, contesting the City's decision to her terminate her from her position as Head Cook at the Fletcher Maynard Academy ("FMA"). On July 27, 2012, the Respondent filed a Motion to Dismiss the Section 42 appeal. On August 6, 2012, the Appellant filed an Opposition to the Motion to Dismiss and a Motion to Amend Appeal; the Respondent filed an Opposition thereto on August 9, 2012. The Commission ruled the Motion to Amend Appeal was moot on October

[1] The Commission acknowledges the assistance of Law Clerk Beverly J. Carey, Esq., in the drafting of this decision.

16, 2012. A pre-hearing conference was held on August 7, 2012 at the offices of the Commission at which Ms. Dottin waived her G.L. c. 31, § 42 appeal. On October 17, 2012, the Commission ruled the Respondent's Motion to Dismiss section 42 appeal was moot. On October 15, 2012, the Respondent sought to quash certain of Appellant's discovery requests or, in the alternative, to request that the Commission issue a protective order concerning personal information therein. The Appellant subsequently opposed the request to quash or for a protective order. On October 15, 2012, the Commission denied the Respondent's request to quash but granted the protective order.

A full hearing was held on October 25, 2012 at the same location. The witnesses were sequestered and the hearing was declared private as neither party requested that it be a public hearing. The hearing was digitally recorded and the parties were provided with copies of the recording. The parties submitted post-hearing memoranda on or about December 21, 2012. For the reasons stated herein, the appeal is allowed in part.

FINDINGS OF FACT

Based on the twenty-seven (27) exhibits entered into evidence, the stipulations of the parties, the testimony of:

Called by the City:

- Ms. Melissa Honeywood, Food Service Director, CPS;
- Ms. Robin Harris, Principle of FMA, CPS;
- Mr. Dana Ham, Director of Facilities, CPS;
- Mr. Jack Mingle, former Food Service Director, CPS (retired);
- Ms. Barbara Allen, Executive Director of Human Resources, CPS;

Called by Ms. Dottin:

- Ms. Stacey Dottin, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, and policies, a preponderance of the credible evidence and reasonable inferences therefrom, establishes the following findings of fact:

1. Prior to her termination of employment on May 18, 2012, Ms. Dottin was employed by the CPS as the Senior Cook/Head of Kitchen at the FMA. Her shift began at 6:30 AM and ended at 1:30 PM. (Testimony of the Appellant & Ms. Honeywood) Ms. Dottin worked at the FMA since some time in 2010, when she was transferred to the FMA from the Morse School. (Exs. 15, 18 & 27) Ms. Dottin began working for the CPS as a part-time cafeteria worker on or about May 15, 2000. (Ex. 27)

   Prior Discipline

2. On or about November 10, 2009, Ms. Dottin received a memorandum from Mr. Jack Mingle, then-Food Service Director. The memorandum followed a conversation they had that took place on or about November 9, 2009 and served as a written warning regarding Ms. Dottin's poor attendance. (Ex. 6)
3. On or about January 21, 2010, Ms. Dottin was notified in writing that, following a hearing that took place on or about January 12, 2010, she was to be suspended for ten (10) days without pay. In addition, Ms. Dottin was reassigned from the position of Head of Kitchen at the Morse School to the position of Head of Kitchen at the FMA. The underlying cause of the suspension was an incident that occurred between Ms. Dottin and a student and allegedly involved Ms. Dottin taking the student's hat, putting it in the trash and pouring cereal over it. The letter stated that "[a]ny further substantiated instances of inappropriate and unprofessional conduct may result in further disciplinary action, up to and including termination." (Ex. 15)

4. On or about January 9, 2012, Ms. Dottin received written notice that, following a hearing that took place on or about December 21, 2011, she would be suspended for two (2) days without pay for her unfair and harsh treatment of her coworkers. The letter also stated that "[a]ny further substantiated instances of unfair and harsh treatment of [her] co-workers, including without limitation, being disrespectful, demeaning and aggressive towards [her] co-workers, will result in further disciplinary action, up to and including termination." (Ex. 16)

Incident with Coworker

5. Shortly after Ms. Dottin began working at the FMA, she had difficulties with her subordinate, Ms. O. (Testimony of the Appellant & Mr. Mingle; Ex. 7) Ms. Dottin frequently telephoned Mr. Mingle, her then-supervisor, to complain about problems she was having with Ms. O. (Testimony of the Appellant)
6. There was one particular incident that took place between the women in or about late February 2011, in which Ms. O pulled up her shirt in front of Ms. Dottin. (Testimony of the Appellant) Following this incident, Ms. Dottin went to the Human Resources office in or about March 2011. Ms. Allen was not in her Human Resources office so Ms. Dottin spoke to a subordinate. Ms. Dottin reported that she had been sexually and verbally harassed by Ms. O. No written complaint was made. (Testimony of the Appellant)
7. On or about April 14, 2011, a disciplinary hearing for Ms. O was held by the CPS. As a result of the hearing, Ms. O was issued a written reprimand on or about April 20, 2011[2] for her refusal and failure to perform tasks assigned to her by the head of kitchen. Ms. O was directed to "conduct [herself] in an appropriate and professional manner at all times." Ms.

[2] This document, entered into evidence as Exhibit 25, is dated April 20, 2011. However, in the first paragraph it states that the hearing was held on April 14, 2012. This date appears to be erroneous and should be April 14, 2011, based on the remainder of the letter and other evidence and testimony on this subject.

O was provided a copy of the CPS Non-Discrimination Policy and Prohibition Against Sexual Harassment for to her review and sign. In addition, effective on or about April 25, 2011, Ms. O was reassigned from the FMA to another school. The local hearing officer could not determine whether Ms. O had engaged in sexual harassment towards her coworker. However, the local hearing officer did find that Ms. O had engaged in "confrontational exchanges" with a coworker on a number of occasions and that she had behaved in an inappropriate and unprofessional manner. (Ex. 25)

Events Related to Termination

8. On or about the morning of April 3, 2012, Ms. Melissa Honeywood, the food service director for the CPS went to the FMA to observe breakfast. Ms. Honeywood arrived at approximately 6:35 AM. Ms. Dottin was not present when Ms. Honeywood arrived even though her shift begins at 6:30 AM. Ms. Honeywood waited for Ms. Dottin, who did not arrive until approximately 6:49 AM. (Testimony of Ms. Honeywood; Ex. 1)
9. Also on April 3, 2012, Ms. Honeywood had a conversation with Ms. Dottin and mentioned that she her shift began at 6:30 AM and she was expected to be on time. Ms. Honeywood stated that she would later issue a verbal reprimand to Ms. Dottin and have her acknowledge it. (Testimony of Ms. Honeywood; Ex. 1)
10. Ms. Dottin claimed that she was late because it was street sweeping day in the FMA area and parking was a challenge. (Testimony of the Appellant & Ms. Honeywood). Ms. Honeywood did not find Ms. Dottin's reason for being late compelling, given the amount of time that Ms. Dottin had worked at the FMA. (Testimony of Ms. Honeywood)
11. On or about April 4, 2012, at approximately 6:15 or 6:20 AM, Principal Harris observed Ms. Dottin when Ms. Dottin arrived. Ms. Dottin appeared to be struggling to get out of her car and had to hold on to the roof for support. Ms. Dottin seemed to have difficulty

maintaining her balance and was leaning against her car door when a parent stopped to speak with her. (Testimony of Principal Harris; Ex. 3)

12. On or about April 4, 2012, Ms. Honeywood returned to the FMA with written documentation of the verbal reprimand she had issued Ms. Dottin for being late on the previous day, April 3, 2012. (Testimony of Ms. Honeywood; Ex. 1)
13. Ms. Honeywood had not informed Ms. Dottin when she would be at the FMA prior to her arrival on or about April 4th. Ms. Honeywood arrived at approximately 6:38 AM and Ms. Dottin was not present. At approximately 6:45 AM, Ms. Dottin arrived in the FMA kitchen. (Testimony of Ms. Honeywood; Ex. 2)
14. When Ms. Dottin arrived in the kitchen and saw Ms. Honeywood waiting for her, Ms. Dottin immediately became loud and took on an aggressive tone, saying, in sum and substance, "I knew you [Ms. Honeywood] were going to be here. I knew you were going to write me up for being late." (Testimony of Ms. Honeywood)
15. Ms. Dottin said that she was very upset and that parking was an issue. Ms. Honeywood suggested that they move to the cafeteria area in order to discuss the reason Ms. Dottin had been issued a verbal warning and why she was late again. Both Ms. Honeywood and Ms. Dottin moved to the cafeteria area and sat down. (Testimony of Ms. Honeywood; Ex. 2)
16. During this conversation, Ms. Honeywood observed that Ms. Dottin was shaking, her tone was aggressive, and her speech was slurred and disjointed at times. (Testimony of Ms. Honeywood; Ex. 2)
17. When a student entered the cafeteria, Ms. Honeywood suggested that she and Ms. Dottin move the conversation back to the kitchen, so as to avoid discussing the matter in front of students. (Testimony of Ms. Honeywood; Ex. 2)

18. Ms. Honeywood began moving towards the kitchen when she observed Ms. Dottin stand up, appear to lose her balance, and fall backwards onto the floor. When she fell, the back of Ms. Dottin's head struck the floor. (Testimony of Ms. Honeywood; Ex. 2)
19. Ms. Honeywood immediately went to Ms. Dottin's side and asked if she was alright. Ms. Dottin did not appear to have lost consciousness. Ms. Honeywood then asked the student who had entered the cafeteria to get the school nurse and to tell Principal Harris what happened. Ms. Dottin replied that she felt dizzy and just wanted to lay there for a minute. (Testimony of Ms. Honeywood; Ex. 2)
20. At approximately 7:10 AM, the student informed Principal Harris that her assistance was needed in the cafeteria. Shortly thereafter, Principal Harris arrived in the cafeteria and saw Ms. Dottin laid out on the floor, holding her head, and Ms. Honeywood next to her. When she noticed a small spot of blood on the floor, Principal Harris retrieved a clean cloth from the kitchen to put on the back of Ms. Dottin's head. Ms. Dottin was asked to apply gentle pressure to the wound. (Testimony of Ms. Honeywood & Principal Harris; Exs. 2 & 3)
21. When Ms. Dottin was ready, Ms. Honeywood and Principal Harris attempted to help Ms. Dottin sit in a chair. Ms. Dottin appeared to have very little body control, was very unbalanced, and visibly shaking. Ms. Honeywood and Principal Harris managed to help Ms. Dottin into the chair on the second attempt. (Testimony of Ms. Honeywood)
22. While seated in the chair, Ms. Dottin repeatedly stated that Ms. Honeywood made her nervous and she just wanted to go home. She was sobbing and her speech was slurred at times. (Testimony of Ms. Honeywood; Ex. 1)
23. Both Ms. Honeywood and Principal Harris thought that they should call 911 but Ms. Dottin refused and just wanted to drive home. Ms. Honeywood and Principal Harris thought this was a bad idea and that Ms. Dottin was in no state to drive. (Testimony of Ms. Honeywood;

Ex. 2) Instead, Principal Harris suggested that another staff member, Mr. West, drive Ms. Dottin home and Mr. West arrived shortly after. (Testimony of Ms. Honeywood; Ex. 3)

24. Based on Ms. Dottin's behavior and shaking, Principal Harris was concerned that there was something more going on than the fall and decided to call 911 anyway. (Testimony of Principal Harris; Ex. 3)

25. Approximately five (5) to ten (10) minutes after Principal Harris called 911, Emergency Technicians ("EMTs") arrived. When asked by the EMTs, Ms. Dottin told them that she had taken medication earlier but only after Mr. West reminded her that she said earlier that day that she had taken medication. The EMTs suggested that Ms. Dottin go to the hospital. When Ms. Dottin still refused, the medics had her sign a waiver stating that she refused to go to the hospital against their recommendations. (Testimony of Ms. Honeywood & Principal Harris; Exs. 2 & 3)

26. At approximately 7:25 or 7:30 AM, the school nurse arrived to assist with Ms. Dottin and she brought a wheelchair. Three people were required to assist Ms. Dottin into the wheelchair. She had limited body control and needed to have her legs put into the leg holds on the wheelchair in order to ensure that she was safely in the chair. (Testimony of Ms. Honeywood & Principal Harris; Exs. 2 & 3)

27. Due to Ms. Dottin's behavior and after speaking to Chief Operating Officer Mr. Jim Moloney for advice, Principal Harris suggested that Ms. Dottin be subjected to a drug and alcohol test. Ms. Dottin refused to take a drug test, saying something like 'I'm not taking a drug test, you can fire me.' (Testimony of Principal Harris; Ex. 3)

28. Principal Harris obtained a copy of The Agreement Between The Cambridge School Committee And The Cambridge Food Service Employee Association ("CBA"), effective July 1, 2009 through June 30, 2012, and told Ms. Dottin that she had the right to request a

drug and/or alcohol screening test and if Ms. Dottin refused, it would constitute insubordination. (Testimony of Principal Harris; Respondent's Prehearing Memorandum Ex. 13)

29. Mr. Maloney also called Mr. Dana Ham, the Facility Director for the CPS, as a second administrator, to certify that Ms. Dottin seemed to be under the influence of drugs or alcohol. (Testimony of Principal Harris; Ex. 3)
30. Mr. Ham arrived on the scene at approximately 7:45 AM, shortly after Mr. Maloney called him. Mr. Ham observed Ms. Dottin in a wheelchair. She appeared to be agitated, was flailing her arms, and kept saying that she wanted to go home. (Testimony of Mr. Ham)
31. At some point after Mr. Ham arrived, Ms. Dottin was wheeled over to the stairs. When she stood up, she stumbled and Mr. Ham grabbed under her arm so that she would not fall. He was close enough to Ms. Dottin's person that he could smell some type of alcohol coming from her person. (Testimony of Mr. Ham; Ex. 5)
32. Aside from Mr. Ham, none of the other witnesses testified to smelling alcohol on Ms. Dottin's person. (Administrative Notice)
33. After observing Ms. Dottin on April 4, 2012, Mr. Ham concurred that she should submit to a drug and alcohol test. Principal Harris informed him that Ms. Dottin had refused. (Testimony of Mr. Ham)
34. Ms. Dottin was assisted into Mr. West's car and he drove her home. The school nurse accompanied Ms. Dottin and Mr. West. Principal Harris followed Mr. West's car, driving Ms. Dottin's car to her home. (Testimony of Ms. Honeywood & Principal Harris)
35. After she returned home, Ms. Dottin lay on the couch and put ice on her head. Later that day, at approximately 2:00 PM, Ms. Dottin took a taxi to the Cambridge Hospital Emergency Room. Ms. Dottin told the emergency room staff that she had had an anxiety

attack and that her knee gave out and she fell, hitting her head. Ms. Dottin took a couple of aspirins and returned home at approximately 4:00 PM. (Testimony of Ms. Dottin)

36. Following the incident, on or about April 6, 2012, Ms. Dottin obtained a note from a doctor with Harvard Vanguard Medical Associates stating that she was seen in the doctor's office that day. The letter stated that Ms. Dottin had severe arthritis of her right knee, which causes her to limp. (Ex. 24)
37. On or about April 10, 2012, Ms. Dottin obtained a note from Harvard Vanguard Medical Associates stating that Ms. Dottin was "under behavioral health care due to anxiety and stress concerns." The letter also stated that Ms. Dottin may experience an anxiety attack and was taking medication for these issues.[3] (Ex. 23)
38. Both Principal Harris and Mr. Ham are administrators who have completed Drug Free Workplace/Reasonable Suspicion Training through the CPS. (Ex. 14)
39. As part of the Drug Free Workplace/Reasonable Suspicion Training, "odor" is listed as one of the signs and symptoms of alcohol use. (Ex. 14)
40. Ms. Dottin was taking several prescription drugs at the time the incident occurred. She was on at least two (2) medications for her "mood," one (1) medication for acid reflux, and Oxycontin for back and knee pain, relating to previous surgeries. (Testimony of the Appellant)
41. On or about the evening of April 3, 2012, Ms. Dottin was drinking mixed drinks consisting of vodka and diet Coke. (Testimony of the Appellant)
42. According to the CPS Employee Handbook, "being intoxicated or under the influence of alcohol or drugs while on duty is strictly prohibited and is grounds for discipline up to and including termination." (Ex. 12)

[3] There is no indication when such care began.

43. The CBA sets forth the policy for drug and alcohol testing for members in Article 22:

> The following procedures shall govern the administration of the drug and alcohol screening process by the administration/management of the Cambridge Public Schools among members of this Unit to test for unauthorized use of a controlled substance and/or alcohol.
>
> Testing will be conducted on those individual employees where the facts are sufficient to constitute reasonable suspicion of unauthorized use of a controlled substance and/or alcohol. The Cambridge Public Schools shall have the right to require that the employee submit without delay to a urinalysis test and/or a breath alcohol test.
>
> Reasonable suspicion shall be based on information of objective facts obtained by the Cambridge Public Schools and the rational inferences which may be drawn from these facts. The credibility and reliability of information obtained, shall be weighed in determining the presence or absence of reasonable suspicion.
>
> The employee to be drug and/or alcohol tested will be notified of the test requirement just prior to obtaining the urine sample or breath alcohol test. Advance notification of the testing will not be given, in any circumstances, to prevent the likelihood of urine sampling tampering.
>
> The testing officer will maintain the sterility of the sample and the integrity of the sampling process, by executing a chain-of-custody process for the sample given and all related documentation. The sample shall be split into two (2) parts. One (1) part of the sample shall be tested. The other part of the sample shall be preserved for independent analysis in the event the first part of the sample tests positive.
>
> If an employee refuses to submit to a drug and/or alcohol screening test, under the agreement, it shall be considered insubordination warranting discipline under a just cause standard.
>
> A result of .02 as a breath alcohol level will be sufficient for a positive confirmatory alcohol screening test.
>
> An employee with a positive confirmatory drug and/or alcohol screening result will be suspended under a just cause standard. An employee with two (2) positive confirmatory drug and/or alcohol screening results within a five (5) year period will be discharged from employment.
>
> Nothing in this provision shall preclude the Cambridge Public Schools from disciplining or discharging an employee under a just cause standard for any misconduct engaged in by him/her collateral to the use of a controlled substance or the abuse of alcohol (e.g., assault and battery), provided that the fact of a

> positive screening result for a controlled substance or alcohol may not be used in any way in proving such misconduct.
>
> An employee who tests positive for a controlled substance and/or alcohol shall be medically evaluated, counseled and treated for rehabilitation as recommended by the employee's personal medical provider.
>
> An employee who completes a rehabilitation program will be retested randomly once every quarter for the following twenty-four (24) months. An employee who tests positive during the twenty-four (24) month period shall be subject to disciplinary action, up to and including discharge from employment.
>
> An employee who enters a rehabilitation program of their own initiative without having tested positive for a controlled substance and/or alcohol shall not be subject to retesting on a random basis.

(Ex. 13)

44. On or about April 12, 2012, Ms. Dottin received written notification from Mr. Jeffrey Young, Superintendent of the CPS, notifying her of contemplated disciplinary action against her for: (1) allegedly being under the influence of drugs and/or alcohol while on duty at the FMA on April 4, 2012; and (2) allegedly engaging in insubordination by refusing to submit to a drug and/or alcohol screening test on April 4, 2012. Ms. Dottin's hearing was originally scheduled for April 25, 2012, but was rescheduled to May 2, 2012, due to a scheduling conflict. (Ex. 19)

45. On or about May 18, 2012, following a hearing, Ms. Dottin received written notice from the Superintendent that she was discharged from her employment with the CPS, effective immediately. (Ex. 18)

46. On or about March 11, 2010, an employee of the CPS received a written warning after it was suspected that she was present at work under the influence of alcohol and tested positive when she submitted to an alcohol screening test. (Ex. 21)

DISCUSSION

Applicable Law

Pursuant to G.L. c. 31, § 43, a "person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, appeal in writing to the commission . . . ." The statute provides, in pertinent part:

> 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 the 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 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.

G.L. c. 31, § 43.

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." Cambridge v. Civil Serv. Comm'n, 43 Mass.App.Ct. 300, 304 (1997); Comm'rs of Civil Serv. v. Mun. Ct. of Bos., 359 Mass. 211, 214 (1971); 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. of Brockton v. Civil Serv. Comm'n, 43 Mass. App. Ct. 486, 488 (citing Murray v. Second Dist. Ct., 389 Mass. 508, 514 (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 (1956).

While the Commission makes *de novo* findings of fact, "the Commission's task, however, is not to be accomplished on a wholly blank slate." Town of Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823 (2006). "Here, the Commission does not act without regard to the previous decision of the town, 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.'" Id. (citing Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983)).

The Respondent's Argument

The Appointing Authority claims that it had just cause to terminate Ms. Dottin's employment. When Ms. Dottin arrived at work on the morning of April 4, 2012, she was agitated and shaking. Her physical appearance, demeanor and behavior, including mood swings, slurred speech, inability to balance or stabilize her body, inability to speak coherently, and the smell of alcohol on her person, led both Mr. Ham and Principal Harris to form a reasonable suspicion that Ms. Dottin was under the influence of alcohol and/or drugs. Furthermore, Ms. Dottin refused to submit to drug and alcohol testing, despite the fact that her refusal could result in disciplinary action.

The Appellant's Argument

Ms. Dottin admits that she had at least several alcoholic drinks the night before the events at work on April 4, 2012. However, Ms. Dottin asserts that she was suffering from physical and mental health problems on April 4 for which she was under medical care and taking medication, which lead to her fall and to experience other reactions. Ms. Dottin further argues that she was under stress because she had been subjected to acts of discrimination and

harassment in the course of her employment and that the CPS did not adequately investigate her complaints. Ms. Dottin also claims that the discipline imposed on her was not consistent with the discipline imposed on other employees for similar or more serious offenses and is "infected with invidious discrimination and retaliatory motivation."

Analysis

While it cannot be conclusively stated that Ms. Dottin was under the influence of drugs and/or alcohol on or about the morning of April 4, 2012, she testified before the Commission that she was taking a least three (3) prescription medications and had consumed at least three (3) alcoholic beverages on the evening of April 3, 2012. Ms. Dottin was being treated for anxiety and physical health problems. Regardless of the underlying cause, Ms. Dottin's appearance and behavior on or about April 4, 2012, led two administrators who had completed Drug Free Workplace/Reasonable Suspicion training, Principal Harris and Mr. Ham, to conclude that a drug and/or alcohol screening test was warranted. Article 22 of the CBA states that if an employee refuses to submit to a drug and/or alcohol screening test, "it shall be considered insubordination warranting discipline under a just cause standard." In view of her conduct and refusing to submit to a drug and/or alcohol test on or about April 4, 2012, Ms. Dottin acted in an insubordinate manner. As a result, the CPS had just cause to discipline Ms. Dottin.

Having determined that discipline was warranted, I must determine if the CPS was justified in the level of discipline imposed, which, in this case, was termination. 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 v. Civil Service Commission, 447 Mass. 814, 823 (2006) and cases cited. Even if there are past instances where

other employees received more lenient sanctions for similar misconduct, however, the Commission is not charged with a duty to fine-tune an employee's discipline to ensure perfect uniformity. *See* Boston Police Dep't v. Collins, 48 Mass.App.Ct. 408, 412 (2000).

> "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. Civ. Serv. Comm'n, 61 Mass. App. Ct. 796, 800 (2004) quoting Police Comm'r v. Civ. Serv. 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." *E.g.*, Falmouth v. Civil Service Commn., 447 Mass. 814, 823 (2006).
>
> (Id.)

Here, after a de novo hearing at which I reviewed all of the documentary evidence and listened to the testimony of the witnesses, I have concluded that modification is warranted.

According to Article 22 of the CBA, an employee who tests positive for drugs and/or alcohol will be suspended under a just cause standard. An employee with two (2) positive test results for drugs and/or alcohol within a five (5) year period will be discharged from employment. Article 22 of the CBA also states that if an employee refuses to submit to a drug and/or alcohol screening test it is considered insubordination, warranting discipline. However, the CBA fails to specify the level of discipline to be imposed in such a situation. While some amount of discipline is certainly warranted for Ms. Dottin's insubordination in refusing to submit to the drug and/or alcohol test, termination is excessive in this instance. After all, pursuant to the CBA, termination is only specified for instances in which an employee has tested positive on two (2) occasions within a five (5) year period. Unfortunately, Ms. Dottin has been the subject of other disciplinary actions. Specifically, Ms. Dottin has received a written warning regarding her attendance, a ten (10) day suspension for unprofessional conduct following an incident with a student, and a two (2) day suspension for unfair and harsh

treatment of her coworkers. However, because Ms. Dottin did not have any history of drug and/or alcohol related discipline, or any previous incidents involving insubordination, and there is no evidence that another employee has been terminated for similar conduct, termination is unwarranted and it is inconsistent with the principles of progressive discipline.

For these reasons, Ms. Dottin's discipline is hereby modified from termination to a suspension. I am convinced that this penalty will provide the impetus for Ms. Dottin's future good behavior but if that does not prove to be the case, nothing herein would prevent the CPS from taking further disciplinary action, including up to termination of her employment, if just cause is sufficiently proved and termination therefor is warranted. The lengthy suspension is warranted due to the seriousness of the misconduct and to discourage similar behavior by others.

CONCLUSION

For the foregoing reasons, Ms. Dottin's appeal under Docket Number D1-12-183 pursuant to G.L. c. 31, § 43 is hereby ***allowed in part,*** such that her discipline is modified from termination to a suspension from May 18, 2012, the date of her discharge, until April 17, 2014.[4]

Civil Service Commission

Cynthia A. Ittleman, Esq.
Commissioner

[4] Ms. Dottin claimed that her termination was the result of discrimination or retaliation. While the Commission has no jurisdiction over these claims, as averred in this instance, which allegedly involve a coworker, Ms. O, Ms. Dottin's claims did not go unnoticed by the CPS. In fact, Ms. O was given a written reprimand and was transferred to another school on or about April 25, 2011, nearly one (1) year prior to Ms. Dottin's termination.

By a 3-1 vote of the Civil Service Commission (Bowman, Chairman - YES; Ittleman - YES, McDowell - NO[5], and Stein - YES, Commissioners) on March 20, 2014.

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:
Winston Kendall, Esq. (for the Appellant)
Maureen A. Macfarlane, Esq. (for the Respondent)

[5] Commissioner McDowell voted NO on this decision because she believed the modified discipline to be excessive.