COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

KEVIN BURNS,
Appellant

v.

CASE NO: D1-10-94

FALL RIVER PUBLIC SCHOOLS,
Respondent.

Appellant's Attorney:	Jaime DiPaola-Kenny, Esquire Assistant 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
Commissioner:	Paul M. Stein

DECISION

The Appellant, Kevin Burns, acting pursuant to G.L.c.31 § 43, duly appealed a decision of the Fall River Public Schools ("Fall River"), the Appointing Authority, to discharge him from employment as a Junior Custodian for smoking and drinking an alcoholic beverage during his shift and while on school premises on March 30, 2010. A full hearing was held by the Civil Service Commission (the "Commission") on August 27, 2010. The hearing was declared private as no party requested a public hearing. Witnesses were not sequestered. Fall River called one witness; the Appellant called two witnesses and additionally testified on his own behalf. Sixteen (16) exhibits were received into evidence. The hearing was digitally recorded. Both parties submitted post hearing proposed decisions.

FINDINGS OF FACT

Giving appropriate weight to the Exhibits, the testimony of the witnesses [the Appellant, Mr. Kevin Burns; Mr. Ronald Gagnon, President of AFSCME, Local 1118; Mr. Richard Barnett, Clinical Therapist at Stanley Street Treatment and Resources ("SSTAR"); Mr. Thomas Coogan, Chief Operating Officer, Fall River School District], the stipulations of the parties and inferences reasonably drawn from the evidence as I find credible, I make the findings of fact below.

1. The Appellant, Kevin Burns, was originally appointed as a Junior Custodian on the Spare List for the Fall River Public Schools in November 1987 and received the appointment to a permanent assignment at the Kuss Middle School on and effective November 20, 1989. (*Testimony of Mr. Burns, Exhibit 15*)

2. During his tenure as a Junior Custodian, Mr. Burns received two (2) written warnings(12/10/1993 and 03/14/2002); three one (1) day suspensions (05/20/1996, 06/24/1999, 05/24/2000); three, three (3) day suspensions (03/18/2002, 03/19/2003, 12/08/2005); and was placed on probation (11/05/2007). All of these disciplinary actions were initiated for having a dirty/unclean area. (*Exhs.13, 15*)[1]

3. In his performance evaluation for the period of September 2008 to January 2009, Mr. Burns received "Good" ratings, meaning he met Departmental Standards, in all but one (1) subcategory of review. (*Exh.14*)

4. Although Mr. Burns had not received a suspension since 2005, I find it reasonable to infer that Fall River continued to have issues with Mr. Burns' work performance after 2005, as evidenced by his probation in November of 2007. (*Exh.5*)

[1] While Exhibit 6 imposes a five (5) day suspension, the Parties stipulated on the record that five (5) day suspension was reduced to a three (3) day suspension. Further, Exhibit 5 referenced the potential of a five (5) day suspension. The Parties further stipulated on the record that no such five (5) day suspension was imposed at that time.

5. On Tuesday, March 30, 2010, the Fall River School District cancelled school for the day due to widespread flooding in Fall River. No students were in the building, but certain administrators and janitorial staff were present. (*Testimony of Coogan and Burns, Exh.1*)

6. On March 30, 2010, Mr. Burns was assigned to B.M.C. Durfee High School. (*Exhibit 1*)

7. During his shift on March 30, 2010, Mr. Burns smoked a cigarette, was in possession of a can of beer and drank said beer while on school premises in violation of school department policies. Mr. Paul Marshall, Principal of B.M.C. Durfee High School witnessed these acts. (*Testimony of Burns and Coogan, Exh.1*)

8. On March 30, 2010, Mr. Marshall suspended Mr. Burns with pay and recommended his termination. (*Exh.1*)

9. Mr. Burns was placed on paid administrative leave effective March 31, 2010, the day after the incident which gives rise to this disciplinary matter, by the Fall River Superintendent of Schools, Meg Mayo-Brown ("Superintendent Mayo-Brown"), by letter dated April 12, 2010. (*Exh.3*)

10. By that same letter, Mr. Burns was notified (i) of Superintendent Mayo-Brown's intent to terminate his employment with Fall River and (ii) of the date of the hearing on the proposed disciplinary action. (*Exh.3*)

11. Following a hearing on April 27, 2010, pursuant to G.L., c. 31 § 41, Superintendent Mayo-Brown terminated Mr. Burns' employment effective May 7, 2010. This appeal duly ensued. (*Exh.4; Claim of Appeal*)

Treatment for Alcohol Addiction

12. On the same day of the incident, March 30, 2010, Mr. Burns contacted Mr. Ronald Gagnon, President of AFSCME, Local 1118 (the Union). Later that day, Mr. Burns and his wife

met with Mr. Gagnon to seek his guidance with pursuing alcohol treatment. (*Testimony of Gagnon and Burns*)

13. Mr. Burns first sought treatment on Wednesday, March 31, 2010, the day after the incident, at Stanley Street Treatment and Resources ("SSTAR") a community health resource center which has an inpatient detoxification program and provides outpatient counseling services. (*Testimony of Burns and Barnett*)

14. No beds were available on March 31, 2010, but Mr. Burns again sought treatment at SSTAR on Monday, April 5, 2010, and was admitted to the inpatient detoxification program where he remained until Wednesday, April 7, 2010. (*Testimony of Burns*)

15. Upon discharge from the inpatient program at SSTAR, Mr. Burns elected to continue outpatient therapy for alcohol addiction by meeting with an outpatient clinical therapist at SSTAR, Mr. Richard Barnett. (*Testimony of Barnett and Burns*)

16. While Mr. Burns' attempt to seek treatment for substance abuse is subsequent to the incident arising in this disciplinary matter, Mr. Burns did seek treatment and was living sober prior to his disciplinary hearing on April 27, 2010 and his ultimate termination on May 7, 2010. (*Testimony of Burns, Exh.4*)

17. On the day of his disciplinary hearing, April 27, 2010, Mr. Gagnon did inform Mr. Coogan that Mr. Burns was seeking treatment for his alcohol addiction. (*Testimony of Coogan and Gagnon*)

18. As of the date of this hearing, Mr. Burns has had seven (7) outpatient appointments with Mr. Barnett, has kept all of his appointments, accepted his issues with substance abuse and has been in full compliance with his therapy. (*Testimony of Barnett*)

19. In addition to his outpatient therapy, Mr. Burns has started attending Alcoholics Anonymous meetings. (*Testimony of Burns, Exh.16*)

20. Mr. Burns was candid in the admission of his actions (smoking and drinking a beer) on March 30, 2010 which he knowingly committed in violation of school department policies. (*Testimony of Burns*)

21. I find Mr. Burns is credible when he discusses his progress and commitment to remain sober and his subsequent wish to quit smoking once his health insurance permits. (*Testimony of Burns*)

Treatment of Other Fall River School District Employees

22. Four (4) members of the same Union bargaining unit, other than Mr. Burns, have sought treatment for substance abuse issues. (*Testimony of Gagnon*)

23. I have inferred from the testimony that two (2) of these employees (Mr. L and Mr. G.) sought treatment for substance abuse prior to the initiation of any formal disciplinary action being taken against them. These employees were retained by Fall River and were not disciplined on the basis of substance abuse or addiction. (*Testimony of Gagnon and Coogan*)

24. I have further inferred from the testimony that disciplinary actions were taken against the other two (2) members of the same Union bargaining unit (Mr. A. and Mr. V.) for performance related issues. Both were terminated from employment by Fall River, but each was rehired six months to one year later under a "Last Chance Agreement" with the notion that the substance abuse was a contributing factor to the performance issues which were the subject of the disciplinary actions. (*Testimony of Gagnon and Coogan*)

25. Mr. Burns was not offered a "Last Chance Agreement" similar to the other two (2) employees in his Union bargaining unit. (*Testimony of Coogan*)

26. Within the last seven (7) years, no other employee within the Union bargaining unit has been found in possession of alcohol or to be consuming alcohol on school premises. (*Testimony of Gagnon and Coogan*)

27. While Mr. Burns was terminated for smoking and drinking an alcoholic beverage on school premises, I reasonably infer from his testimony and from Mr. Gagnon's testimony that he was not surprised to learn of Mr. Burns' addiction that substance abuse was a contributing factor to his actions of March 30, 2010. (*Testimony of Burns and Gagnon*)

Issue of Smoking on School Premises

28. Mr. Burns had received two verbal but undocumented warnings concerning smoking on school premises prior to March 30, 2010. (*Testimony of Burns and Coogan*)

29. I have inferred from Mr. Coogan's testimony that other employees have smoked on school premises in violation of school department policies. (*Testimony of Mr. Coogan*)

30. Within the last seven (7) years, the Union has not been notified of any verbal warnings, documented warnings or subsequent discipline against any of its members, including Mr. Burns (excepting the present instance) for smoking on school premises in violation of school department policies. (*Testimony of Gagnon*)

31. Based upon the testimony, it is reasonable to infer that no Fall River employee has been terminated or otherwise severely disciplined simply for smoking on school premises in violation of school department policies. (*Testimony of Coogan and Gagnon*)

CONCLUSION

Summary of Conclusion

The preponderance of the evidence and the prior Commission's decisions support Fall River's decision to impose discipline upon Mr. Burns' for smoking and drinking an alcoholic beverage during his shift and while on school department premises. However, Mr. Burns'

contention that similarly situated employees within his own bargaining unit were given a last chance of which he was not afforded has merit. As a result, this Appeal shall be allowed in part and modified for the reasons set forth below.

Applicable Legal Standards

Under G.L.c.31, §43, 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. The Commission must determine, under a "preponderance of the evidence" test, whether the appointing authority met its burden of proof that "there was just cause" for the action taken. G.L.c.31, §43. See, e.g., Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823, (2006); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Serv. Comm'n, 38 Mass App.Ct.473,477 (1995); Watertown v. Arria, 16 Mass.App Ct. 331,334, rev.den.,390 Mass. 1102 (1983).

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 Serv. Comm'n, 43 Mass. App. Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983). It is a basic tenet of the "merit principle" of 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.

An action is "justified" if "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 Serv. v. Municipal Ct., 359 Mass. 211, 214 (1971); Cambridge v. Civil Serv. Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). An appointing authority's

burden of proof 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 (1928) The Commission must take account of all credible evidence in the record, including whatever may fairly detract from the weight of any particular 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, decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing)

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 . . . 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) See also Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823; Cambridge v. Civil Serv. Comm'n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997); Watertown v. Arria, 16 Mass. App. Ct. 331, 334, rev.den., 390 Mass. 1102, (1983). See generally Villare v. North Reading, 8 MCSR 44, reconsidered, 8 MCSR 53 (1995) (discussing de novo fact finding by "disinterested" Commissioner in context of procedural due process)

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 Serv. 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, the Commission's task "is not to be accomplished on a wholly blank slate". 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." E.g., Falmouth v. Civil Serv. 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). cf. School Comm. v. Civil Serv. Comm'n, 43 Mass.App.Ct. 486, rev.den., 426 Mass. 1104 (1997) (modification of discharge to one-year suspension upheld); Dedham v. Civil Serv. Comm'n 21 Mass.App.Ct. 904 (1985) (modification of discharge to 18-months suspension upheld); Trustees of the State Library v. Civil Serv. Comm'n, 3 Mass.App.Ct. 724 (1975) (modification of discharge to 4-month suspension upheld)

Just Cause for Disciplining Mr. Burns

The evidence proved that Mr. Burns violated Fall River policies. He admitted his misconduct during this hearing. By consuming an alcoholic beverage and smoking on school grounds, "[Mr. Burns…is] guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service." School Comm. v. Civil Service Comm'n, 43Mass.App.Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist.Ct., 389 Mass. 508, 514 (1983). Therefore, I find Fall River had just cause to discipline Mr. Burns.

Support for Modification of Discipline

As noted above, the Commission is authorized to modify the discipline imposed after conducting its "de novo hearing for the purpose of finding facts anew" Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. The Commission also must consider "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across appointing authorities]" as well as "the underlying purpose of the civil service system [which is] '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. Furthermore, in reviewing appeals under G.L. c. 31 § 43,

First, the evidence warrants a finding that Fall River employees other than Mr. Burns have violated the no smoking policy, but that no individual has been terminated simply for violating

Fall River's no smoking policy. As such, I find that termination of Mr. Burns solely on the basis of smoking in violation of the no smoking policy would result in his disparate treatment.

Second, Fall River acknowledges that two members of Mr. Burns' bargaining unit were terminated from employment, but were subsequently offered "Last Chance Agreements" six months to one (1) year after their termination. These individuals ultimately were rehired subsequent to substance abuse counseling based upon the belief that the substance abuse was a contributing factor to the acts which gave rise to the discipline. Mr. Burns argues that Fall River's failure to offer him a similar "Last Chance Agreement" makes him the subject of disparate treatment. I find merit in his argument. Within a day or two of his offense, Mr. Burn's unequivocally acknowledged both his misconduct and the underlying cause that was driving his substandard performance. Well prior to his termination hearing, Mr. Burns already had taken steps to address his addiction. By April 27, 2010, Mr. Burns had acknowledged his affliction, sought treatment, engaged in counseling and begun his efforts to living a sober lifestyle.

Third, while Fall River attempts to distinguish Mr. Burns' misconduct from that of the other two employees (Mr. A. and Mr. V.), I am not persuaded. The specific acts of misconduct are different. Mr. Burns is the only bargaining unit member to have been caught consuming alcohol on school department premises. However, I find it reasonable to infer that Mr. Burns' substance abuse issues were a contributing factor to his actual misconduct, i.e., drinking while on school grounds. As such, I find Fall River's failure to offer a Last Chance amounts to disparate treatment such that modification of the discipline imposed is warranted.

In Dion v. New Bedford School Dep't, 22 MCSR 517 (2010), the Commission majority discussed at length the efforts made by that Appellant to address his personal issues and seek sobriety after his termination. In that case, absence of evidence of rehabilitation "at the time the

appointing authority made its decision" or proof of disparate treatment to warrant modification, required the majority uphold the termination. At the same time, the Commission majority stated:

> . . .[a]lthough the Civil Service Law incorporates a strong public policy that prohibits the employment of persons who abuse alcohol, *the merit principle is also imbedded with the concept that deficient performance can be changed through progressive discipline and corrective action*…[further] '[G.L.c. 31] s. 50 was likely enacted because serious abuse of alcohol presumptively has a negative effect on job performance. Allowing an employee to be reinstated after completion of an alcohol rehabilitation program and demonstration of satisfactory performance is consistent with ameliorating deficient job performance.'

Dion v. New Bedford School Dept., 23 MCSR 517, 520, *quoting* Town of Plymouth v. Civil Service Comm'n, 426 Mass. 1, 7, 686 N.E.2d 188, 191 (1997). The Commission encouraged the New Bedford School Department to consider options to reinstate Mr. Dion "out of respect for the merit principal and Mr. Dion's hard work at self-improvement." Dion v. New Bedford School Dep't., 23 MCSR at 520.

In the present appeal, a reduction of the discipline imposed from termination to an eight (8) month suspension and reinstatement would remove any disparate treatment and situate Mr. Burns similarly to his union colleagues. Further, such modification acknowledges his immediate, pre-termination efforts to address his personal issues with alcohol dependence and ultimately supports the merit principle imbedded throughout the Civil Service Law.

Accordingly, for the reasons stated above, the appeal of the Appellant, Kevin Burns, shall be and hereby is ***allowed, in part***. Mr. Burns' termination is modified to an eight-month suspension and, otherwise, he shall be entitled to be restored to his position without loss of any other benefits. Nothing in this Decision shall preclude Fall River from taking appropriate action against the Appellant to address future misconduct or performance issues, if any, including but not limited to termination, in a manner consistent with the requirements of civil service law and rules.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman [NO]; Henderson [AYE], Marquis [ABSENT], McDowell [AYE] and Stein [AYE], Commissioners) on March 10, 2011.

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)(1), 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:
Jamie DiPaola-Kenny, Esq. (for Appellant)
Bruce A. Assad, Esq. (for Appointing Authority)