THE COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

DAVID DION,
Appellant
v.

D1-08-264

NEW BEDFORD SCHOOL DEPARTMENT,
Respondent

Attorney for the Appellant:

Michael J. Maccaro, Esq.
AFSCME Council 93
8 Beacon Street, 3rd Floor
Boston, MA 02108

Attorney for the Respondent:

Jane Medeiros Friedman, Esq.
First Assistant City Solicitor
City of New Bedford
133 William Street
New Bedford, MA 02740

Commissioner:

Paul M. Stein

DECISION

Pursuant to the provisions of G.L. c. 31 § 43, the Appellant, David Dion (hereinafter "Appellant") is appealing the decision of the New Bedford School Department (hereinafter the "Department" or "Appointing Authority") to terminate his employment as a Building Custodian for failure to call in when absent from work and for excessive absenteeism.

The appeal was timely filed. A full hearing was held on May 22, 2009 at the offices of the Civil Service Commission (hereinafter "Commission"). Because no written notice was received from either party to make the proceeding public, the hearing was declared private. The witnesses were not sequestered. The hearing was digitally recorded. Both parties subsequently submitted proposed decisions.

FINDINGS OF FACT:

Thirty-four (34) exhibits were entered into evidence at the hearing. The record was left open for the Appellant to submit one additional document at the request of the Commissioner. That document entered into the record as Exhibit 35 on May 26, 2009. Based on the documents submitted into evidence and the testimony of:

For the Appellant:

- David Dion, the Appellant, Building Custodian, New Bedford School Department

For the Respondent:

- Larry Martin, Assistant Principal, New Bedford School Department
- Bruce Feno, Supervisor of Custodians, New Bedford School Department
- Dr. Ronald F. Souza, Deputy Superintendent, New Bedford School Department

I make the following findings of fact:

1. The Appellant has been employed as a permanent Building Custodian for the Department since October 31, 2003. He was last stationed at the Alfred J. Gomes Elementary School. (Testimony of Appellant, Exhibit 1)
2. The Appellant has had attendance issues since 2004. In August 2004, he was given ninety (90) days notice to improve his questionable attendance. (Exhibit 2)
3. On November 15, 2004, Brian Abdallah (hereinafter "Abdallah"), Principal of Roosevelt Middle School, notified Dr. Ronald F. Souza (hereinafter "Souza"), Deputy Superintendent of the Department, that the Appellant had accrued a significant number of absences. Not only had he not come into work on November 12, 2004, he had not called in his absence. (Exhibit 3)

4. On December 8, 2004 Abdallah notified Souza of his continued concerns regarding the Appellant's chronic absences. He also mentioned that the Appellant had arrived ten (10) minutes late on December 8, 2004, falsified his "sign in time," and only corrected it when the falsehood was pointed out to him. (Exhibit 4)
5. On January 4, 2005, Abdallah informed Souza that the Appellant had not reported to work on January 3, 2005, and had also failed to call in his absence. (Exhibit 5)
6. On January 7, 2005, Abdallah informed Souza that the Appellant had also failed to appear on the consecutive days of January 4, 5 and 6, 2005. Abdallah strongly recommended that the Appellant be terminated. (Exhibit 6)
7. On January 18, 2005, Souza sent the Appellant notice for a hearing on January 19, 2005 to discuss disciplinary action for his failure to call in and to report to work. (Exhibit 7)
8. On January 19, 2005, the Appellant was terminated. This termination was overturned by the Superintendent. (Testimony of Souza, Exhibit 9, Exhibit 10)
9. On August 10, 2006 Dr. Deborah S. Sorrentino (hereinafter "Sorrento"), Principal of West Side Jr./Sr. High School, notified Souza of her recommendation that the Appellant be terminated for absenteeism and for not calling into to work. (Exhibit 11)
10. A hearing was scheduled for September 13, 2006 to discuss the proposed disciplinary action. (Exhibit 12)
11. On September 13, 2006 the Appellant was suspended for thirty (30) days without pay. (Exhibit 17)
12. On April 13, 2007 Martha E. Kay (hereinafter "Kay"), Principal of Alfred J. Gomes Elementary School, also recommended that the Appellant be removed. (Exhibit 19)

13. On July 3, 2007 Kay sent a letter to the Appellant reprimanding him for being absent on July 2, 2007 and July 3, 2007 without calling anyone or leaving a message at the school. She also mentioned his chronic absenteeism, lack of professionalism and personal courtesy. (Exhibit 20)
14. On May 13, 2008 Bruce A. Feno (hereinafter "Feno"), Supervisor of Custodians, sent a letter to the Appellant informing him that his frequent absenteeism would not be allowed to continue, and that he had to provide a doctor's letter for any further sick days. (Exhibit 21).
15. The Appellant continued to miss work. (Exhibit 26)
16. On September 15, 2008 Feno sent a letter to the Appellant notifying him that his frequent use of sick time must improve. He also warned that further absences could result in disciplinary action. (Exhibit 27)
17. On September 6, 2008 Dr. Portia S. Bonner (hereinafter "Bonner"), Superintendent of Schools, sent a notice of hearing for October 9, 2008 to discuss disciplinary action for excessive absenteeism. (Exhibit 29)
18. After the October 9, 2008 hearing, Souza informed the Appellant that based on the testimony, there was just cause for his termination. (Exhibits 30 and 31)
19. On October 17, 2008 the Appellant appealed his termination to the Commission. (Exhibit 34)
20. At Commission hearing on May 22, 2009, the Appellant testified that he has struggled with alcohol abuse for much of his adult life, including during his years of employment with the Department. He also testified that he had suffered from depression during his employment with the Department. He stated that all of his attendance issues were related to his alcohol dependence and depression. (Testimony of Appellant)

21. The Appellant further testified that after his termination, he sought medical treatment and counseling for his alcohol dependence and depression and has been sober since his termination. He credits his termination as a sign that he needed to get his life in order. The Appellant testified that he is currently fully capable of performing his job duties and would like a second chance. (Testimony of Appellant)

MAJORITY'S ULTIMATE FINDINGS AND CONCLUSION

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 has the duty to 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., Town of Falmouth v. Civil Service 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 Service Comm'n, 38 Mass App.Ct.473,477 (1995); Town of Watertown v. Arria, 16 Mass.App Ct. 331,334, rev.den.,390 Mass. 1102, (1983).

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 Service v. Municipal Ct., 359 Mass. 211, 214 (1971); City of Cambridge v. Civil Service 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). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass. App. Ct. 486,

488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983) The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in governmental employment decisions.' " Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of the "merit principle" which governs Civil Service Law that discipline must be remedial, not punitive, designed to "correct inadequate performance" and "separating employees whose inadequate performance cannot be corrected." G.L.c.31,§1.

The Appointing Authority's burden of proof 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 at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing)

In performing its appellate function, "the commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew. . . . [after] 'a hearing de novo upon all material evidence and a decision by the commission upon that evidence and not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer' . . .For the commission, the question is . . .'whether, *on the facts found by the commission*, there was reasonable justification for the action taken by the appointing authority *in the circumstances found by the commission to have existed when the appointing authority made its decision*.' " Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003) (affirming Commission's decision to reject appointing authority's evidence of appellant's failed polygraph test and prior domestic abuse orders and crediting appellant's exculpatory testimony) (*emphasis added*). cf. Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (inconsequential differences in facts found were insufficient to hold appointing authority's justification unreasonable); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (commission arbitrarily discounted undisputed evidence of appellant's perjury and willingness to fudge the truth); Town of Watertown v. Arria, 16 Mass. App. Ct. 331, 334, rev.den., 390 Mass. 1102, (1983) (commission improperly overturned discharge without substantial evidence or factual findings to address risk of relapse of impaired police officer) See generally Villare v. Town of North Reading, 8 MCSR 44, reconsid'd, 8 MCSR 53 (1995) (discussing need for de novo fact finding by a "disinterested" Commissioner in context of

procedural due process); Bielawksi v. Personnel Admin'r, 422 Mass. 459, 466, 663 N.E.2d 821, 827 (1996) (same)

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

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. In this area, the Commission has been delegated with "considerable discretion", albeit "not without bounds", to modify a penalty imposed by the appointing authority, so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. E.g., Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594,600 (1996) and cases cited.

> "It is well to remember that the *power to modify is at its core the authority to* review and, when appropriate, *to temper, balance, and amend*. The power to modify penalties permits the furtherance of uniformity and equitable treatment of similarly situated individuals. *It must be used to further, and not to frustrate, the purpose of civil service legislation, i.e., 'to protect efficient public employees from partisan political control' . . and 'the removal of those who have proved to be incompetent or unworthy to continue in the public service*'."

Id., 39 Mass.App.Ct. at 600. (*emphasis added*). See Faria v. Third Bristol Div., 14 Mass.App.Ct. 985, 987 (1982) (remanded for findings to support modification)

In deciding whether to exercise discretion to modify a penalty, however, the commission's task "is not to be accomplished on a wholly blank slate. After making its de novo findings of fact, the commission must pass judgment on the penalty imposed, a role to which the statute

speaks directly. [Citation] Here, the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether if "the circumstances found by the commission" vary from those upon which the appointing authority relied, there is still reasonable justification for the penalty selected by the appointing authority. "The 'power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded to the appointing authority." Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct. 796, 800 (2004) quoting Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 600 (1996). Thus, when it comes to its review of the penalty, unless the Commission's findings of fact differ materially and significantly from those of the appointing authority or interpret the relevant law in a substantially different way, the commission is not free to "substitute its judgment" for that of the appointing authority, and "cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation."). Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited (minor, immaterial differences in factual findings by Commission and appointing authority did not justify a modification of 180 day-suspension to 60 days). See, e.g., Town of Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct. 796 (2004) (modification of 10-day suspension to 5 days unsupported by material difference in facts or finding of political influence); Commissioner of MDC v. Civil Service Comm'n, 13 Mass.App.Ct. 20 (1982) (discharge improperly modified to 20-month suspension); cf. School Committee v. Civil Service Comm'n, 43 Mass.App.Ct. 486, rev.den., 426 Mass. 1104 (1997) (modification of discharge to one-year suspension upheld); Dedham v. Civil Service Comm'n 21 Mass.App.Ct. 904 (1985) (modification of discharge to 18-months suspension upheld); Trustees of the State Library v. Civil Service Comm'n, 3 Mass.App.Ct. 724 (1975) (modification of discharge to 4-month suspension upheld)

Applying these principles to this case, the Respondent has shown by a preponderance of the evidence that it had just cause to terminate the Appellant from employment as a Building Custodian.

The documentation and testimony submitted in this case demonstrate that the Appellant was employed by the New Bedford School Department as a permanent Building Custodian for approximately five (5) years. During his tenure, he was a chronically absent and proved to be an unreliable employee. He had been afforded several opportunities to improve his attendance. The Appellant received numerous warnings, both verbal and written, for excessive absenteeism and for failing to call work when absent. The Appellant served a thirty (30) day suspension for excessive absenteeism and failure to call work when absent. During his tenure, the principals of the (3) three schools where he had been assigned recommended that the Appellant be terminated for his excessive absenteeism and his failure to call work when absent.

During the hearing, the Appellant testified that his behavior was the result of alcoholism and depression and that he has been sober since soon after his termination, is in fact attending AA meetings every afternoon and several evenings. The Appellant's testimony made a strong and positive impression of the manner in which he has come to grips with a life-long struggle with alcohol abuse. I found the candor of his behavior commendable, and believe that the Appellant has made great strides in his personal life. However, while this may provide an explanation for the Appellant's behavior, it does not justify it.

The Department has met its burden and proven by a preponderance of the evidence that there was just cause to terminate the Appellant. Moreover, I find that there is no evidence of disparate treatment, inappropriate motivations or objectives, or other factors that would warrant the Commission modifying the discipline imposed upon him.

Potential Reinstatement

While the Commission does not grant relief to the Appellant in this case, the Commission applauds and respects what Mr. Dion has now done to address the problem that caused his inability to hold a job with the New Bedford School Department. Although the Civil Service Law incorporates a strong public policy that prohibits 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. As stated in Town of Plymouth v. Civil Service Comm'n, 426 Mass. 1, 7, 686 N.E.2d 188, 191 (1997):

> "While the legislative history is sparse, [G.L.c.31] §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 job performance is consistent with ameliorating deficient job performance*."

(*emphasis added*)

Mr. Dion's acknowledgement of his deficiencies and the corrective action he has taken are a model of this principle. All too frequently, the Commission sees just the opposite – an employee who neither accepts his short-comings nor responds to progressive discipline. The Commission urges the New Bedford School Department to take note of these ideals and to proactively consider any options to reinstate Mr. Dion and/or to extend him additional unpaid leave, if the opportunity is presently available or may arise in the future, out of respect for the merit principle and Mr. Dion's recent hard work at self-improvement.

_____

Paul M. Stein
Commissioner, for the Majority

For all of the above reasons, the Appellant's appeal filed under Docket No. D1-08-264 is hereby ***dismissed*.**

By a vote of the Civil Service Commission: to dismiss the appeal (Bowman, Chairman [AYE]; Henderson[AYE], Marquis [AYE], McDowell [NO] and Stein [AYE]Commissioners) on September 23, 2010.

A true record. Attest:

_____
Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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.
8 Beacon Street, 3rd Floor
Boston, MA 02108

Jane Medeiros Friedman, Esq.
First Assistant City Solicitor
City of New Bedford
133 William Street
New Bedford, MA 02740

THE COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

DAVID DION,
Appellant
v.

D1-08-264

NEW BEDFORD SCHOOL DEPARTMENT,
Respondent

DISSENT OF COMMISSIONER McDOWELL

I respectfully dissent.

I believe there is an open question as to whether the Appellant, who suffers from alcoholism, is a qualified individual protected under the American with Disabilities Act ("ADA") who, with a reasonable accommodation, could have performed the essential functions of the position of custodian.

Thus, I do not believe the record establishes that there was reasonable justification to terminate the Appellant based on the facts of this particular case.