

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

PAUL COKELY,
Appellant

v.

D1-07-204

CAMBRIDGE SCHOOL COMMITTEE,
Respondent

Appellant's Attorney:

Joseph L. DeLorey, Atty
AFSCME Council 93
Boston, MA 02108
617-367-6000

Respondent's Attorney:

Laurie W. Engdahl, Atty.
Collins, Loughran & Peloquin, P.C.
320 Norwood Park South
Norwood, MA
781-762-2229
lengdhal@collinslabor.com

Commissioner:

Daniel M. Henderson

**DECISION ON CAMBRIDGE PUBLIC SCHOOLS' MOTION TO DISMISS
FOR LACK OF JURISDICTION**

On or About November 4, 2009 the Appellant Paul Cokely ("Appellant" or "Employee") filed an appeal with the Civil Service Commission (the "Commission"). This filing was not docketed as a new appeal but treated as a Motion to Enforce the Commission's prior decision on this matter, dated January 22, 2009. The Cambridge

Public Schools (the “Employer”) filed a motion to dismiss the above-referenced appeal or Motion to Enforce, on or about December 21, 2009. As grounds therefore, the Employer states that it has fully complied with the Decision of the Commission and further states that the Commission lacks jurisdiction to hear the appeal of the Appellant. More particularly, the Appellant claims that he is entitled to be returned to the job location to which he had been assigned at the time of his discharge (i.e., the King-Amigos Elementary School), which does not constitute a matter within the Commission’s jurisdiction. On or about December 30, 2009, the Appellant then filed an Opposition the Employer’s Motion to Dismiss for Lack of Jurisdiction. On or about January 11, 2010, the Employer filed a “Reply” to the Appellant’s Opposition.

On December 21, 2009 a hearing was held at the Commission on the Appellant’s Motion to Enforce and the Employer’s Motion to Dismiss. One CD recording was made of the hearing.

The parties do not dispute that the Appellant has been reinstated to his position as Senior Custodian at the Cambridge Public Schools. Moreover, the Appellant has received full compensation pursuant to the make whole order of the Decision of the Civil Service Commission. Accordingly, because the Appellant’s new appeal is based solely on his claim that he is entitled to a particular job location assignment per the Decision of the Commission; the appeal must be dismissed as beyond the jurisdiction of the Commission.

BACKGROUND

1. On or about January 22, 2009, a majority of the Civil Service Commission (Henderson, Taylor and Stein, Commissioners) voted to allow the Appellant’s appeal

from his discharge with the Cambridge Public Schools and ordered the Appellant to “be returned forthwith to his position without any loss of pay or other benefits.”

2. Following the denial of the School’s Motion for Reconsideration, the Appellant was returned to his position as Senior Custodian in the Cambridge Public Schools.

3. The Appellant was returned to the position of Senior Custodian “without loss of pay or other benefits,” as the Appellant accepted payments in full compensation of that portion of the Decision.

4. According to the Appellant’s appeal, he resides at 85 Pickering Street in Needham Massachusetts.

5. The Appellant works as the Senior Custodian at the Cambridge High School 9th Grade Campus, 359 Broadway in Cambridge. At the time of his discharge in 2007, the Appellant was assigned as the Senior Custodian at the King-Amigos Elementary School, located at 100 Putnam Avenue in Cambridge.

6. The commuting distance from 85 Pickering Street in Needham to the King-Amigos Elementary School is approximately 14.7 miles. The commuting distance from 85 Pickering Street in Needham to the Cambridge High School 9th grade campus is approximately 15.4 miles.

CONCLUSION

1. The Employer Has Complied With The Decision Of The Commission, Issued On January 22, 2009, In That It Is Undisputed That The Appellant Has Been Returned To His Senior Custodian Position Without Loss Of Pay Or Other Benefits.

Prior to his discharge, the Appellant held the position of Senior Custodian with the Cambridge Public Schools. Under G.L. c. 31, § 1 a “civil service position” is “an office or position, appointment to which is subject to the requirements of the civil service

law and rules.” The title “Senior Custodian” is the position to which the Appellant was appointed. A “civil service position” does not include by definition the particular work location to which one may be assigned; nor is G.L. c. 31 concerned with hours of work, location, shift assignment, particular job duties or supervisory assignments.

In this regard, the Appellant does not dispute that he has been restored to his appointed position as Senior Custodian with the Cambridge Public Schools, nor does the Appellant claim that he has not otherwise been made whole. Rather, the Appellant claims that he was not returned to the particular work location to which he had been assigned at the time of his discharge.

Accordingly, because the Decision directs the Appointing Authority to return the Appellant to his “position” without any loss of pay or other benefits, and the Employer has done so, the Appointing Authority is in full compliance with the Decision of the Civil Service Commission dated January 22, 2009.

2. The Appellant’s Job Assignment and Work Location Are Beyond The Jurisdiction of the Commission.

In any event, the matter of the Appellant’s assignment and work location is beyond the jurisdiction of the Commission. To the extent that the Appellant’s claim can be interpreted as a claim that he has been ‘transferred’ in violation of G.L. c. 31, § 35, the Appellant’s claim must fail because the change in assignment from one school to another within the same department and in same general geographical location does not constitute a “transfer” within the meaning of either G.L. c. 31, § 35.¹

¹ The Appellant was appointed Junior Custodian with the Employer in or about 1990. As the Appellant has not served as a tenured employee since prior to October 14, 1968, he cannot appeal any decision to “transfer” him under Section 41. According to the plain language of G.L. c. 31, § 41, the Appellant has no standing to appeal his assignment pursuant to this section under any set of facts, as he is not a “person aggrieved” under that section of G.L. c. 31.

In *Sullivan v. Department of Transitional Assistance*, 11 MCSR 80 (1998), the Commission ruled that a “transfer” involved a “change in employment under the same appointing authority from a position in one class to a similar position in the same or another class, or a change of employ in the same position, under the same appointing authority, from one geographical location to a different geographical location, provided that a different geographical location shall be one which is both more than a commuting distance from the employee’s residence than its prior location and more distant from the employer’s residence than his prior location. *Sullivan* at 81.

Here, there parties do not dispute that the Appellant has *not* had a change in employment to another class of positions. Thus, the Appellant would have to show that he has been assigned to a geographical location which is more than a commuting distance from his residence and is more distant than his prior location. In this regard, the Appellant’s commute has increased by a mere .7 miles from his prior location. More significantly, however, the distance is still well within a reasonable commuting distance of less than 16 miles.

In a recent case with similar facts to the case at bar, *McQueen v. Boston Public Schools*, 21 MCSR 548 (2008), the Commission dismissed the appeal of a custodian working for the Boston Public Schools, who claimed that his reassignment from one Boston public school to another constituted a “transfer” within the meaning of G.L. c. 31, § 35. The Commission held that such a change was merely a reassignment, and therefore was not within the jurisdiction of the Commission to review. The Commission held that, under section 35, the Appellant has the burden of proving that the change in travel constituted an unreasonable hardship on him. Notwithstanding that, in that case, the Appellant, who previously could

walk to work was forced to use public transportation to travel to his new work location, the Commission held that such a location change was not a “transfer” and therefore the Commission had no jurisdiction to review the actions of the appointing authority. See also, *Grinuk v. Chicopee Municipal Lighting Plant*, 7 MCSR 118 (1994) (employee who kept same salary, worked in same building one floor higher, kept same working hours, was not transferred even where internal job description was significantly different); *Choiniere v. City of Worcester*, 21 MCSR 129 (2008) (assignment was consistent with appointment as intermittent cafeteria helper, in that only work condition that materially changed was an initial decrease in hours).

There are certain issues which are permissible subjects for collective bargaining and other subjects which are prohibited. This issue could be a matter of collective bargaining under the CBA or agreement between the Appellant’s exclusive representative (union) and the Employer as a “terms and conditions of employment” pursuant to **G.L.Chapter 150E: Section 6. Negotiations; meetings** Section 6. “The employer and the exclusive representative shall meet at reasonable times, including meetings in advance of the employer’s budget-making process and shall negotiate in good faith with respect to **wages, hours, standards or productivity and performance, and any other terms and conditions of employment**, including without limitation, in the case of teaching personnel employed by a school committee, class size and workload, but such obligation shall not compel either party to agree to a proposal or make a concession; provided, however, that in no event shall the right of any employee to run as a candidate for or to hold elective office be deemed to be within the scope of negotiation.” (Emphasis added) The appropriate CBA should be consulted to determine this possible application.

The Appellant did not suffer any loss in job position rank or title or wages and was not “transferred” or “demoted” from his position within the meaning of civil service law. The Appellant was merely reassigned in the same position, rank and title to another physical location within the same department only a short distance away, without hardship or other harm. The Appellant failed to show by a preponderance of the credible evidence that he suffered any actual harm to his employment status cognizable under civil service law.

The use of the phrase in the original decision on this appeal “that the Appellant be returned to his position, without the loss of pay or other benefits” was intended to cover regular pay and benefits associated with that regular pay such as health insurance coverage. This has been my practice based on my understanding of the traditional use of the phrase.

The Cambridge Public Schools’ Motion to Dismiss is allowed, the Commission’s prior decision having been fully implemented, the Appellant’s Motion to Enforce is *dismissed*. As moot and for lack of jurisdiction.

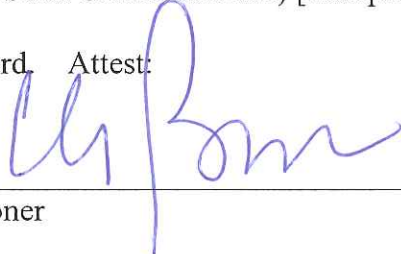
Civil Service Commission,



Daniel M. Henderson,
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman, Henderson, Taylor and Stein Commissioners) [Marquis absent], on February 11, 2010.

A true record. Attest:



Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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:

Joseph DeLorey, Atty.
Laurie W. Engdahl, Atty