

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

Decision mailed: 4/25/08  
Civil Service Commission CB

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

**STEPHEN CUTONE,**  
*Appellant*

v.

**Case No.: D-06-222**

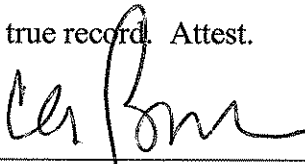
**MEDFORD SCHOOL  
DEPARTMENT,**  
*Respondent*

**DECISION**

After careful review and consideration, the Civil Service Commission voted at an executive session on April 24, 2008 to acknowledge receipt of the report of the Administrative Law Magistrate dated March 3, 2008. No comments were received by the Commission from either party. The Commission voted to adopt the findings of fact and the recommended decision of the Magistrate therein. A copy of the Magistrate's report is enclosed herewith. The Appellant's appeal is hereby *dismissed*.

By vote of the Civil Service Commission (Bowman, Chairman; Guerin, Marquis and Taylor, [Henderson – No] Commissioners) on April 24, 2008.

A true record. Attest.



\_\_\_\_\_  
Christopher C. Bowman  
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of a 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 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:

Valerie Barsom, Esq. (for Appellant)

Howard L. Greenspan, Esq. (for Appointing Authority)

Francis X. Nee, Esq. (DALA)

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

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March 3, 2008

Christopher Bowman, Chairman  
Civil Service Commission  
One Ashburton Place  
Boston, MA 02108

Valerie Barsom, Esq.  
21 Custom House Street, Suite 300  
Boston, MA 02110

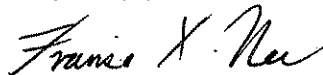
Howard L. Greenspan, Esq.  
220 Broadway, Suite 304  
Lynnfield, MA 01940

Re: *Stephen Cutone*, D-06-222, CS-07-85

Dear Chairman Bowman, Attorney Barsom and Attorney Greenspan:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01 (11) (c), they have 30 days to file written objections to the decision with the Civil Service Commission, which may be accompanied by supporting briefs.

Very truly yours,



Francis X. Nee, Esq.  
Administrative Magistrate

Enc.

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COMMONWEALTH OF MASS  
CIVIL SERVICE COMMISSION

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Stephen Cutone,  
Appellant

v.

Docket No. D-06-222  
DALA No. CS-07-85

Medford School Department,  
Appointing Authority

Appearance for Appellant:

Valerie Barsom, Esq.  
21 Custom House Street, Suite 300  
Boston, MA 02110

Appearance for Appointing  
Authority:

Howard L. Greenspan, Esq.  
220 Broadway, Suite 304  
Lynnfield, MA 01940

Administrative Magistrate:

Francis X. Nee, Esq.

**RECOMMENDED DECISION**

Under G. L. c. 31, s. 43, the Appellant, Stephen Cutone, is appealing the August 24, 2006 decision of the Appointing Authority, Medford School Department, to discharge him from his position of Junior Custodian for failure to perform his assigned duties during school vacation week; smoking on school property; failing to call in his absences to his Senior Custodian on two occasions; and abusing sick leave. (Ex. 16) The appeal was timely. (Ex. 23)

I held a hearing on January 25, 2007 at the office of the Civil Service Commission, One Ashburton Place, Room 503, Boston. The hearing was private because neither party filed a written request to make it public.

COMMONWEALTH OF MASS  
CIVIL SERVICE COMMISSION

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I admitted documents into evidence. (Exs. 1 – 23) I accepted 19 exhibits from the Appointing Authority and 5 exhibits from the Appellant. After the hearing, I marked the Appellant's Exhibit 1 as Exhibit 20, Appellant's Exhibit 4 as Exhibit 21, Appellant's Exhibit 5 as Exhibit 22, and the Appellant's appeal to the Civil Service Commission as Exhibit 23. Appellant's Exhibits 2 and 3 were duplicative of exhibits offered by the Appointing Authority. I remarked the exhibits to comply with the Commission's directive that exhibits be marked numerically, but not by party.

Testifying on behalf of the Appointing Authority were: Charles Walsh, Senior Custodian for the Medford School Department; Roger Windt, Building Manager; Paul Edwards, Director of Buildings and Grounds; and Roy Belson, Medford Superintendent of Schools.

The Appellant, Stephen Cutone, testified on his own behalf, as did John McLaughlin, Senior Building Custodian and President of the Medford Custodians Association.

The record was held open to February 7, 2007 for the submission of written closing arguments.

### **FINDINGS OF FACT**

1. Stephen Cutone worked for the Medford School Department from November 1991 to August 24, 2006 when he was terminated from his position as Junior Custodian. (Ex. 16, Testimony)

2. During school vacation week in February 2006, the custodians at the Columbus School in Medford were assigned to do heavier than usual cleaning while the school building was empty.
3. During that week, the Senior Custodian at the Columbus School, Charles Walsh, received a call from the school principal reporting that the cleaning assigned to Mr. Cutone had only been half completed.
4. Mr. Walsh inspected the areas for which Mr. Cutone was responsible. Mr. Walsh observed that the kindergarten bathrooms were not clean, and had not been restocked. The classroom floors had been dry mopped, but not washed. The counter tops, sinks and walls had not been washed. The rugs were not vacuumed, but were rolled up. The main office floor was not washed. The principal's bathroom was not cleaned. The art and music rooms on the fourth floor were not cleaned. (Testimony, Walsh)
5. Mr. Walsh called Roger Windt, the Medford School Department Building Manager. Mr. Windt met Mr. Walsh to inspect the school. Mr. Windt noted that the sinks and mirrors in the kindergarten bathrooms were dirty, the paper supplies had not been restocked, the floors had been dry mopped but not washed, the counter tops and sinks were not washed, and the rugs were rolled up. Mr. Windt noted that the condition of the areas of the building not assigned to Mr. Cutone were acceptable. (Testimony, Windt)
6. Paul Edwards, Director of Buildings and Grounds, inspected Mr. Cutone's work after the school principal made a complaint. He noted that the

bathrooms had urine on the seats and there were many stains visible. There was soap on the floor. (Testimony, Edwards)

7. By letter of March 1, 2006 the Manager of Buildings and Grounds issued a written warning to Mr. Cutone, outlining Mr. Cutone's failure to complete his cleaning assignments during school vacation week. "The Department Director, Director of Management and Operations and the Superintendent will be sent this warning for further review and you will be subject to further disciplinary action up to and including suspension and termination." (Ex. 14)
8. It is a school department policy that any Junior Custodian calling in sick is to make two calls: one to the sick line to report the absence, and a second call to his Senior Custodian to report the absence. This policy was put in writing and distributed on December 30, 2002. (Testimony, Walsh; Ex. 2)
9. On March 17, 2006 Mr. Cutone was out sick, but he failed to call Mr. Walsh, his Senior Custodian, to report his absence. By memo of March 20, 2006 Mr. Walsh noted Mr. Cutone's failure to call him, and reminded Mr. Cutone of the policy. (Ex. 17)
10. Under state law, there is no smoking in municipal buildings, including schools and school grounds. (Testimony, Buckley)
11. On March 16, 2006 John Buckley, Director of Management Operations for the school department, observed Mr. Cutone smoking on school grounds. Mr. Buckley told Mr. Cutone there was to be no smoking on school grounds. Mr. Cutone said he knew that. (Testimony, Buckley)

12. Two or three weeks later, Mr. Buckley again saw Mr. Cutone smoking on school grounds. Mr. Cutone said, "You got me again." (Testimony, Buckley)
13. On August 2, 2006 Mr. Cutone was due back at work at 6 a.m. after a four-week vacation. At 6:08 a.m. Mr. Cutone called Mr. Walsh to say that he was running late and had missed his bus. Mr. Walsh became upset and started to yell at Mr. Cutone. Mr. Cutone said, "Well then forget about it. I'll just bang out sick." Mr. Walsh memorialized this encounter in a memo to Msrs. Buckley, Edwards and Windt. (Ex. 18)
14. Mr. Cutone called in sick on August 3, 2006. (Testimony, Walsh)
15. By letter of August 3, 2006 the Superintendent of Schools issued a notice of contemplated action to Mr. Cutone, informing him that the Superintendent intended to dismiss him for just cause, including specifically: his failure to complete his assigned cleaning duties during school vacation week in February 2006; his violation of the smoking policy on March 16, 2006; his failure to call his Senior Custodian on March 17 and March 20, 2006 to report his absence; and his failure to report to work as scheduled on August 2 and 3, 2006. A hearing was scheduled for August 14, 2006. Mr. Cutone was also suspended without pay for five days from August 7 – 11, 2006. (Ex. 15)
16. At the Appointing Authority hearing, Mr. Cutone did not deny the charges against him. (Testimony, Belson)
17. By letter of August 24, 2006 the Superintendent issued a letter of decision, informing Mr. Cutone that after hearing on August 21, 2006 he had decided to terminate Mr. Cutone for the deficiencies noted in the notice of contemplated

action, and because "Your overall performance as a custodian since being demoted from a senior custodian to a junior custodian on March 31, 2005 has not been acceptable. ... This discharge is a result of the deficiencies in your performance as heretofore stated, as well as a long history of warnings, suspension, as well as a demotion. Your discharge is effective immediately on August 28, 2006." (Ex. 16)

Prior Discipline

18. Mr. Cutone had received prior progressive discipline. On October 4, 2001 Mr. Cutone held the position of Evening Senior Custodian. He was issued a warning letter that day by the Building Manager for being tardy on three occasions. "As the Evening Senior Custodian, it is imperative that you set an example for your direct reports. At this point in time, any tardiness at the start of your shift places another unnecessary burden on staff with myself included, in the repetitive evening start up procedures of opening doors for staff and contractors." Mr. Cutone was reminded to call his immediate supervisor when he was going to be late. (Ex. 1)
19. On March 25, 2003 the Building Manager issued a written warning to Mr. Cutone for allowing his crew to leave work prior to the end of the 3 – 11 p.m. night shift. Mr. Cutone was docked two hours without pay. (Exs. 3, 4, 5)
20. On April 1, 2003 the Building Manager issued an Informational Update of Previous Requests to Mr. Cutone, reminding him of the items for which he was responsible "as part of your regular shift work and acting senior responsibilities." The memo noted that "Smoking is not allowed in the direct



proximity of the building. All staff have been informed of this policy.

Without strict enforcement of this policy, I am requesting you to "Keep smoke breaks to a minimum amount of time"! There is no allowance in the union contract for specific cigarette breaks." (Ex. 6)

21. By memo of February 23, 2004 Mr. Cutone received an oral warning from the Building Manager. Mr. Cutone held the position of Acting Senior Custodian in the Roberts elementary school. He was notified that his six-month probationary period had been extended for another six months because of concerns about his tardiness in the morning; his unapproved extended lunch and break periods; his unavailability on his assigned Nextel phone during work hours; his failure to lead his assigned crew by example; his unavailability to staff and students during portions of the work day; his poor judgment in snow removal operations; and his failure to train all custodial staff on equipment operation. (Ex. 7)
22. On June 29, 2004 the Director of Buildings and Grounds issued three memos to Mr. Cutone. One memo memorialized a meeting of June 24, 2004 held in response to concerns of the principal of the Roberts School with respect to Mr. Cutone's "work ethic as a Senior Custodian." The principal was concerned about Mr. Cutone's lack of response to overhead page or Nextel telephone; his failure to be present in the building during work hours; his extended lunch and break periods; his washing of personal and kitchen staff vehicles during working hours; his performing childcare during working hours; his smoking within the confines of the building in the boiler or mechanical room; his late

- arrivals without notice to start his shift; his misuse of down time during the school day; his lack of leadership of senior responsibilities to day and evening staff; and his lack of monitoring and cleaning the outside grounds. (Ex. 8)
23. The second memo of June 29, 2004 was an oral warning with respect to the concerns raised by the school principal. "Failure to respond and future non-compliance on your lack of performance will result in a suspension without pay for a period of two days for the first offense and could lead to future disciplinary step actions." (Ex. 9)
24. The third memo of June 29, 2004 outlined other deficiencies, and enclosed a notice of a two-day suspension. The deficiencies noted were that Mr. Cutone failed to be present in the building on June 25, 2004 until 10:30 – 11:00 a.m.; on June 28, 2004 Mr. Cutone was observed outside the building at 7:30 a.m. without a device to pick up trash, although he claimed to be checking the grounds for cleanliness; on the same day Mr. Cutone was absent from the building from 11:35 a.m. until after 1:10 p.m. When contacted on his Nextel by the Director of Buildings and Grounds, Mr. Cutone said he would be back in a little while. (Ex. 19)
25. On March 9, 2005 Mr. Cutone was issued a warning by the Building Manager for tardiness and poor judgment with respect to snow removal. "[A]ny future digression will be met with further disciplinary action." (Ex. 11)
26. On March 10, 2005 Mr. Cutone received written notification from the principal of the Roberts School outlining Mr. Cutone's failure on March 9, 2005 to begin treating the icy walkways to the school promptly at the start of

- his 7 a.m. shift. "On Wednesday, March 9, 2005, you did not prove to me as the building principal that you are capable of making the proper decisions needed to be in the role of the senior custodian." The principal asked for a meeting to be scheduled with the Director of Building and Grounds and the Building Manager. (Ex. 12)
27. After a meeting on March 31, 2005, Mr. Cutone was notified by letter of April 7, 2005 from the Superintendent of Schools that he was being demoted from Acting Senior Custodian to Custodian. "I trust that you understand the reasons for this decision and you will do everything in your ability to demonstrate that you are worthy of consideration for promotional opportunity at a future time." (Ex. 13)
28. Mr. Cutone did not grieve, or appeal to the Civil Service Commission, his demotion. (Testimony)

### **CONCLUSION AND RECOMMENDATION**

The Appointing Authority, Medford School Department, had demonstrated just cause for the termination of Stephen Cutone from his position of Junior Custodian.

#### **School Vacation Week, February 2006**

The Appellant did not complete his cleaning assignments during this week. In response to a complaint by the school principal, the Senior Custodian, Building Manager and Director of Buildings and Grounds inspected the areas for which the Appellant was responsible and found that his work was not completed.

The Appellant acknowledged at hearing that he failed to clean and restock some of the kindergarten bathrooms, that he did not wash the countertops and walls, and that he failed to clean the two classrooms on the fourth floor. The Appellant rated his performance that week as "fair."

The Appellant testified that he was not told to wash the countertops and walls, nor was he assigned to clean the fourth floor classrooms. He also testified that the school principal told him not to clean her office. He acknowledged that he never made these claims at the Appointing Authority hearing because he was nervous.

I reject the Appellant's testimony. I accept the testimony of Mr. Walsh that he assigned the Appellant to clean the two fourth floor classrooms. I find it unlikely that the school principal told the Appellant not to clean her office, in view of the fact that it was she who made the initial complaint about the Appellant's poor work to the Senior Custodian.

#### Smoking

The Appellant admits that he was found smoking on the school grounds on March 16, 2006, and again a few weeks later. On the second occasion he said, "You got me again." The Appellant was fully aware that smoking was not permitted on school grounds, and acknowledged that he knew the policy. Two weeks later he was found again to be smoking on school grounds.

The Appellant argues that many people smoke on school grounds, and no one has ever been disciplined for it.

I find the Appellant's argument unpersuasive. He was aware of the no smoking policy, and had received at least one written memo on April 1, 2003 reminding him

that he could not smoke in proximity to the school building. He persisted in smoking in proximity to the school building.

Failure to call his Senior Custodian

The Appellant was aware that when he was demoted to Junior Custodian, he had a duty to call in twice on each sick day; once to the sick line and once to his Senior Custodian. The Appellant admitted that he did not call his Senior Custodian on March 17 or March 20, 2006.

The record is unclear about whether the Appellant was actually absent on March 20, 2006, or whether he simply received a memo on March 20, 2006 with respect to his failure to call his Senior Custodian on March 17, 2006. The Appellant does not assert that he was not absent on March 20, 2006, and so I assume he was absent.

He argues that he did not call in to his Senior Custodian because he did not feel well enough to make a second phone call. I reject the Appellant's excuse. He knew the policy and chose not to follow the policy.

August 2, 2006

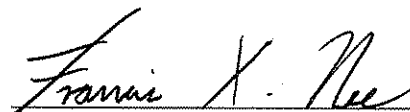
The Appellant called his Senior Custodian eight minutes after the start of his shift on August 2, 2006 to report that he would be late because he had missed his bus. When his Senior Custodian yelled at him, the Appellant said, "Forget it. I'll bang out sick." Calling in sick when one is not sick is an abuse of sick leave.

The Appellant testified that he actually told the Senior Custodian that, "I don't feel well. I'll bang out sick." I reject the Appellant's testimony. He was not sick on August 2, 2006; he was going to be late for work and called in for that reason. It was

only because he was annoyed that his Senior Custodian was yelling at him that he claims to have been ill.

In view of the Appellant's long history of warnings, suspensions and a demotion from Senior to Junior Custodian, and in view of his shoddy work performance during school vacation week, his failure to call in to his Senior Custodian to report his absence, his repeated flouting of the no smoking on school grounds policy, and his abuse of sick leave on August 2, 2006, I conclude that the Appointing Authority had just cause to terminate him from his employment.

DIVISION OF ADMINISTRATIVE LAW APPEALS

A handwritten signature in cursive script, appearing to read "Francis X. Nee", is written over a horizontal line.

Francis X. Nee  
Administrative Magistrate

DATED: 3/3/08