

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

JAY DIBARI,
Appellant

v.

Docket No. D-05-326

BROCKTON PUBLIC SCHOOLS,
Respondent

Appellant's Attorney:

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Commissioner:

John J. Guerin, Jr.

DECISION

Pursuant to the provisions of G.L. c. 31, s. 43, the Appellant, Jay DiBari (hereafter "Appellant"), is appealing the September 7, 2005 decision of the Appointing Authority, the Brockton Public Schools, terminating him from his position of custodian. The appeal was timely filed. A Full Hearing was held at the offices of the Civil Service Commission on December 20, 2006, February 9, 2007, and April 20, 2007. As no written notice was received from either party, the hearing was declared private. Witnesses providing sworn testimony were ordered sequestered. Seven (7) audiotapes were made

of the hearing. Proposed Decisions were submitted by the parties following the hearing, as instructed.

FINDINGS OF FACT:

Based upon the documents entered into evidence (Joint Exhibits 1, 8, 10, 11, 19, 21, 22, 24, 26, 27, and 28, and Appellant's Exhibits 2, 3, 4, 5, 6, 7, 9, 12, 13, 14, 15, 16, 17, 18, 20, 23, 25, 29, 30 and 31), the testimony of the Appellant and the testimony of employees of the Brockton Public Schools: Kathleen Sirois, Senior Director of Human Resources; Peter Judge, Supervisor of Buildings and Grounds; Michael Towne, Night Supervisor of Buildings and Grounds; and Headmaster Jean Ryan from the Yellow House at the Brockton High School, I make the following findings of fact:

1. The Appellant was hired as a custodian for the Brockton Public Schools on or about October 1995. He was initially assigned as a second shift (3 p.m.-11 p.m.) custodian at the Brockton High School. (Testimony of Appellant and Mr. Towne)
2. The Brockton School Department employs approximately 120 custodians. Custodians are informed of their assigned areas upon hiring and upon change in assignment. As custodial vacancies arise, custodians who wish to be moved are able to bid to be reassigned to the school where the vacancy exists. Some time after the Appellant had been assigned to the Brockton High School, a custodian vacancy arose at the East Junior High School. The Appellant sought to be reassigned to that school and his request was granted. (Testimony of Mr. Judge)

3. Peter Judge has been employed by the Brockton Public Schools for more than 30 years and has overseen the work of the custodians for the majority of his tenure. Mr. Judge testified that, with regard to bathrooms, second shift custodians are responsible for cleaning the sinks, stalls, and the toilets. They are also expected to mop the floor, empty trash barrels, restock toilet tissues and towels, clean mirrors and remove graffiti. If a custodian encounters graffiti that cannot be removed with a solvent, he/she is required to immediately paint over the graffiti rather than allow it to remain visible. (Testimony of Mr. Judge)
4. While the Appellant was assigned to East Junior High, Mr. Judge received a number of complaints from the school's Principal regarding the Appellant's poor performance, generally, and specifically his poor performance in cleaning the classrooms and cleaning and stocking bathrooms within his work area. As a result, Mr. Judge involuntarily transferred the Appellant from East Junior High to the Davis School on December 28, 1998. (Exhibit 1 and testimony of Mr. Judge)
5. Mr. Judge testified that a transfer is a form of discipline. He stated that in his thirty (30) years overseeing custodians, he has only had to involuntarily transfer two or three other custodians. The others who have been involuntarily transferred improved their performance and did not have to be involuntarily transferred a second time. However, the Appellant had to be involuntarily transferred three times. Mr. Judge stated that no other custodians had received more complaints about performance nor been involuntarily transferred more than the Appellant. (Testimony of Mr. Judge)

6. I found Mr. Judge to be one of the most effective witnesses, in terms of credibility, subject knowledge, professionalism, responsiveness and clarity that I have experienced in my over 3 ½ years as a hearing officer. His recall of the details of this matter, encompassing a lengthy period of time, was excellent, adding weight to his testimony. Notably, I found absolutely no indication whatsoever that Mr. Judge harbored any ill-will or exhibited any type of bias against the Appellant. On the contrary, I found that Mr. Judge took steps to correct the Appellant's deficient work habits and to try to find a work environment where the Appellant might thrive.
7. On June 5, 2000, the Principal of the Davis School wrote the Appellant about his unsatisfactory work. (Exhibit 2 and testimony of Mr. Judge)
8. On December 8, 2000, a letter was sent by a female teacher at Davis School to the Appellant's immediate supervisor, Sue Riley, stating that the Appellant was not adequately cleaning and stocking the women's bathroom. Ms. Riley made Mr. Judge aware of this letter. No other complaints were made about any other custodian at Davis School during this time. (Exhibit 3 and testimony of Mr. Judge)
9. In a letter dated January 5, 2001, 29 female staff members at the Davis School signed a petition titled 'Unclean State of Ladies Room' complaining about the Appellant's continued failure to clean the ladies' room in his work area. (Exhibit 4 and testimony of Mr. Judge)

10. In May 2001, Mr. Judge received a letter signed by twenty female staff members at the Davis School complaining about the Appellant's continued failure to clean the lunch room and teachers' room. (Exhibit 5 and testimony of Mr. Judge)
11. Mr. Judge transferred the Appellant out of the Davis School and into the Plouffe School, effective June 18, 2001. (Exhibit 8 and testimony of Mr. Judge)
12. By letter dated March 25, 2004, Mr. Judge received a complaint about the Appellant's work from the Principal at the Plouffe School. She wrote Mr. Judge that the Appellant was not cleaning the bathrooms, the floor was not washed, there were no paper towels and the mirror was dirty and streaked. The letter indicates that the Principal had spoken with the Appellant throughout the year about his poor cleaning. The letter also notes that the Appellant was using staff computers to visit websites with themes such as gambling and racing at dog/horse tracks. Use of computers is not within the job duties of the Appellant nor in his job description. (Exhibit 6 and testimony of Appellant, Ms. Sirois, and Mr. Judge)
13. Following receipt of this complaint, Mr. Judge again spoke to the Appellant about his poor work performance. (Testimony of Mr. Judge)
14. In April 2004, the Principal of the Plouffe School, Anita Perry, again complained to Mr. Judge regarding the continued issues she had with the lack of cleaning by the Appellant. Mr. Judge informed her that her complaints should be taken to Ms. Kathleen Sirois, the Senior Director of Human Resources. (Testimony of Mr. Judge)
15. On April 27, 2004, a meeting took place between the Principal of the Plouffe School, Ms. Sirois, the Appellant and an AFSCME Union Representative

- regarding the Appellant's poor performance and attendance record. A follow-up meeting was scheduled for May 10, 2004 to determine whether the Appellant's performance had improved. (Exhibit 7 and testimony of Sirois)
16. On May 10, 2004, Ms. Sirois and Ms. Perry met with the Appellant at the school. The three walked around the Appellant's work area and Ms. Sirois and Ms. Perry pointed out his work deficiencies as well as the Appellant's on-duty use of the District's computers to view inappropriate sites. The Appellant acknowledged that he would clean the areas in question. (Exhibit 9 and testimony of Sirois)
17. By letter dated May 28, 2004, the Appellant received a written disciplinary letter from the then-superintendent Joseph Bage for his improper use of the Plouffe School's computers. (Exhibit 12)
18. The Appellant acknowledged receipt of a copy of the District's Employee Acceptable Use Policy for computers which bars access to pornographic, gambling and other inappropriate web sites and, also, that use of the computer is not part of his job description. He testified at the Commission hearing that he was not skilled in using the computer and that the inappropriate sites came up when he struck errant keys. I found his explanation of inadvertently accessing a series of similar, and similarly inappropriate, websites to be not credible. It would be a tremendous stretch of credulity to believe that a true neophyte in the operation of a computer could amass an inventory of sites with similar content by merely tapping random keys. It is clear that the Appellant found on the internet that which he intentionally sought. (Exhibit 14 and testimony of Appellant)

19. By letter dated June 1, 2004, the Principal of the Plouffe School wrote the Appellant of her continued concerns with the cleanliness of the second floor, particularly the women's and students' bathrooms. (Exhibit 13)
20. Ms. Sirois and the Principal of the Plouffe School met with the Appellant on June 2, 2004 at the school. Ms. Sirois documented the meeting in a letter to the Appellant, stating that if improvement did not take place, disciplinary action up to and including termination may be necessary. (Exhibit 15 and testimony of Ms. Sirois)
21. On June 30, 2004, the Appellant was scheduled for jury duty. In order for an employee to take jury duty leave, he/she is required to fill out a form prior to taking the leave. Following the conclusion of jury service, the employee submits the "Record of Jury Service" form received from the court to the District's Human Resources office. The Appellant did not fill out the required form prior to taking off June 30, 2004 for jury duty but submitted the Record of Jury Service form to the District's Office on July 23, 2004. Following receipt of the Record of Jury Service form, Ms. Sirois sent the Appellant a letter, dated July 28, 2004, regarding his failure to fill out and submit the form prior to his service and also noting that the Appellant had failed to properly report to Mr. Judge that he wished to take off a half-day of vacation on July 1, 2004. (Exhibits 16, 17, 18 and testimony of Ms. Sirois)
22. Michael Towne, the District's Night Supervisor of Buildings and Grounds, is the supervisor of the night shift custodians. As part of his duties, he makes random,

unannounced checks at various schools during his shift. (Testimony of Mr. Towne)

23. On Friday, February 4, 2005, the Appellant “punched-in” his time card at 3:06 p.m. At 8:23 p.m., Mr. Towne arrived at the Plouffe School and noted that the Appellant’s car was not in the parking lot. Mr. Towne walked through the work area assigned to the Appellant and was unable to find him. Mr. Towne then examined the Appellant’s time card and saw that he had punched-in at 3:06 and had not punched-out, as was required, when he left. (Exhibits 20, 21, 22 and testimony of Mr. Towne)

24. Mr. Towne testified that he believed that the Appellant might be planning to return to the school and punch-out at the end of his shift. Having completed their work and the shift having come to a close at 10:54 p.m., the two other custodians punched-out and exited the building with Mr. Towne. As the three men were getting into their cars, Mr. Towne saw a car which he identified as the Appellant’s enter into the parking lot and drive toward the area where the custodians park. Upon seeing Mr. Towne, the operator of the car immediately exited the parking lot. Mr. Towne remained in the parking lot until 11:05 p.m. but the car did not return. I find, based on Mr. Towne’s testimony that he was familiar with the Appellant’s vehicle, that the car was being operated by the Appellant. (Testimony of Mr. Towne)

25. When asked at hearing about his absence during his shift, the Appellant stated that he suffers from allergies and other respiratory ailments. He testified that he left work around 7 p.m. on February 4, 2005 and drove to the Brockton Hospital.

He stated that he went to the emergency room but did not want to wait because he determined it was too busy. He stated that he then went home to his residence in Brockton. (Testimony of Appellant)

26. The Appellant testified that he made a second trip to the hospital some time after 10:30 p.m. that evening but determined the emergency room was still too busy. He then drove into the Plouffe School parking lot at approximately 11 p.m. He explained that he entered the lot because he saw his fellow custodians and wanted to speak to them. He stated that he saw Mr. Towne as he approached the building and changed his plans due to the fact that the other custodians had gotten into their cars as he got close enough to speak with them. I find that the reason the Appellant abruptly left the lot, without stopping to punch-out his time card or speak with the other custodians, was to avoid a confrontation with Mr. Towne relative to his absence from work that evening. (Testimony of Appellant)

27. Following the incident on February 4, 2005, Mr. Judge involuntarily transferred the Appellant to the Brockton High School, effective February 21, 2005. The Appellant was assigned to the first-floor core section of the Yellow House of the High School. (Exhibit 24 and testimony of Mr. Judge)

28. Mr. Towne testified that prior to becoming Night Supervisor, he was a custodian and originally assigned to the first floor of the Brockton High School on the 3 p.m. to 11 p.m. shift. He provided detailed testimony regarding the layout of each of the three floors of the core section of the High School, stating it is divided into four identical, equal-sized, square quarter-sections called houses, with each section assigned a color: Red, Azure, Green and Yellow. There are four

custodians assigned to the core on each floor, one for each of the four different colored house sections of that floor. As there are three floors in the core section, there are twelve (12) custodians assigned to clean the core section of the High School on the 3-11 p.m. shift. Each of the twelve second-shift core custodians is assigned one fourth of his or her floor. (Exhibit 32 and testimony of Mr. Towne)

29. Each of the four colored house sections of the core on each floor contains one large boys' or girls' gang bathroom. Each of the second-shift custodians assigned on each floor of the core is responsible for cleaning the students' bathroom in his house's section of the core. Mr. Towne testified that the set of keys that each second-shift custodian is given contains a key to the bathroom that he/she is responsible for cleaning and that the Appellant was given a set of keys to access the girls' bathroom in his work area and was responsible for cleaning it. (Testimony of Mr. Towne)

30. Jean Ryan, Headmaster of the Yellow House at the Brockton High School, testified that she arrives to work very early in the morning and often unlocks the bathrooms and other doors that were locked the night before by the custodial staff. Soon after she arrived to work on the morning of May 5, 2005, Ms. Ryan unlocked the girls' bathroom on the first floor of the Yellow House. She found toilet paper strewn across the floor in one or more stalls, toilets that had not been cleaned, tissue left in the still-uncleaned sinks and vulgar graffiti scrawled across one of the stalls and across one of the tiled walls. Ms. Ryan, angered, sought out a camera and took photos of the conditions. (Testimony of Ms. Ryan)

31. On May 5, 2005, Ms. Ryan complained to Mr. Towne about the Appellant and e-mailed him the photos she had taken. (Exhibit 25)
32. Ms. Ryan offered sincere testimony that she was genuinely offended by the condition of the bathroom.
33. The Appellant testified that he did not clean the Yellow House first-floor bathroom on May 4, 2005 because it was not in his work area. He also stated that, even if it was in his area, he had not been given a key to the bathroom. However, the Appellant did state that he was given a set of keys when he got transferred to the High School but never tried any of those keys to unlock the girl's bathroom. He also claimed that he had spoken with a number of the other custodians who were assigned a quarter of the core on each of its three floors and they told him that the gang bathrooms were not their responsibility. The Appellant could not recall their names or the specifics about when the conversations took place. I find that the Appellant would remember these exchanges if they ever did occur. (Testimony of Appellant)
34. Although the Appellant credibly sketched his areas of responsibility on an erasable board in the hearing room as he understood them, I find that he offered testimony which conflicted with his that of Mr. Judge and Mr. Towne with regard to his responsibilities for cleaning the girls' bathroom at the Brockton High School.
35. Mr. Towne stated at hearing that the other eleven (11) second-shift custodians assigned to the core of the Brockton High School clean the one gang bathroom in their respective areas. He stated that because the Appellant was assigned to a

- first-floor core house at Brockton High School when he started his job and knew he was responsible for cleaning a children's bathroom when he was first assigned, he was also instructed that that was part of his assignment when he was involuntarily returned to the High School in 2005. (Testimony of Mr. Towne)
36. Throughout his employment with the Brockton School Department, the Appellant knew what his cleaning responsibilities were and he knew what area of the school he was responsible for. (Testimony of Mr. Judge and Mr. Towne)
37. Mr. Towne stated that there have been no other complaints about the other custodians assigned to clean the bathrooms at the Brockton High School. (Testimony of Mr. Towne)
38. While the Appellant attempted to diffuse the complaints made against him by contending that he was being unfairly singled out for his poor performance, the testimony and evidence from school administrators showed that complaints were received from numerous individuals at the three different schools into which the Appellant had been transferred over the years, clearly demonstrating that the Appellant was not being singled-out. (Testimony of Appellant, Mr. Judge, Ms. Ryan and Mr. Towne)
39. Mr. Towne was a credible witness who offered good detail as to his duties and what was expected of his custodians. I found that he had a good knowledge of the subject matter and that his testimony was responsive and unhesitant.
40. Following an August 16, 2005 hearing, in accordance with G.L. c. 31, § 41, on the Appellant's ongoing performance issues and the events of February 4, 2005, the Appellant was terminated, effective September 7, 2005. (Exhibits 27 and 28)

CONCLUSION:

The role of the Civil Service Commission is to determine “whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997). In reviewing an appeal under G.L. c. 31, section 43, if the Commission finds by a preponderance of the evidence that there was just cause for an action taken against an Appellant, the Commission must affirm the action of the Appointing Authority. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 800 (2004).

The issue for the Commission is “not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the Commission, there was reasonable justification of the action taken by the appointing authority in the circumstances found by the Commission to have existed when the appointing authority made its decision.” Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). *See*, Commissioners of Civil Service v. Municipal Court of Boston, 369 Mass. 84, 86 (1975); Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

The Brockton Public Schools has demonstrated by a preponderance of the credible evidence that it had reasonable justification for terminating the Appellant from his position as a custodian. By credible testimony and documentary evidence presented regarding the Appellant’s ongoing job performance issues at the Davis School, the

Plouffe School and Brockton High School, as well as his misconduct on February 4, 2005, the Respondent substantiated the reasons for its action of termination. Specifically, Mr. Judge credibly testified regarding numerous complaints he received throughout the Appellant's employment as to his continued failure to clean the areas to which he was assigned, especially bathrooms, and to properly stock his assigned bathrooms with necessary toiletries. Mr. Judge stated that it was unique to receive the number of complaints from faculty and staff about the Appellant's poor performance and failure to do his job. Further, Mr. Towne provided credible testimony regarding the assignments and duties of second shift custodians and established that cleaning and stocking bathrooms was one of the primary tasks performed by custodians and that the Appellant consistently failed to perform those duties properly despite the many times he was spoken to about his inadequate performance. Moreover, while the Appellant attempted to diffuse the complaints made against him by contending that he was being unfairly singled out for his poor performance, the testimony and evidence from school administrators showed that complaints were received from numerous individuals at the three different schools into which the Appellant had been transferred over the years, clearly demonstrating that the Appellant was not being singled-out.

Additionally, the evidence indicated that the Appellant left the Plouffe School without punching out early on the evening of February 4, 2005. Given that the Appellant did not receive authorization to leave, did not actually enter the hospital for treatment and returned to the school at 11 p.m., the end of his shift, but drove away when he saw Mr. Towne, it appears likely that he was planning to return to work to punch out in order to

be paid for his entire shift. At the Commission's hearing, the Appellant's testimony was found to be self-serving, lacking in credibility and generally unreliable.

For all the reasons stated herein, the Appellant's appeal on Docket No. D-05-326 is hereby *dismissed*.

Civil Service Commission

John. J. Guerin, Jr.
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Guerin, Marquis, Taylor and Henderson, Commissioners) on October 11, 2007.

A true record. Attest:

Commissioner

A motion for reconsideration may be filed by either Party within ten days of receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c 30A, section 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 to:

Jason C. Howard, Esq.
Joseph T. Bartulis, Jr., Esq.