

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

**CIVIL SERVICE COMMISSION**

One Ashburton Place: Room 503  
Boston, MA 02108

SCOTT HAY &  
WAYNE SIMONE,  
Appellant

v.

METHUEN PUBLIC SCHOOLS,  
Respondent

D-09-364 (HAY)  
D-09-365 (SIMONE)

Appellants' Attorney:

James M. Bowers, Esq.  
261 Common Street  
Lawrence, MA 01840

Respondent's Attorney:

Edward F. Lenox, Jr., Esq.  
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Commissioner:

Christopher C. Bowman

**DECISION ON RESPONDENT'S MOTION TO DISMISS**

The Appellants, Scott Hay and Wayne Simone (hereinafter "Appellants"), pursuant to G.L. c. 31, § 35, filed appeals with the Civil Service Commission (hereinafter "Commission") on September 14, 2009, claiming that their positions were abolished and that they were improperly transferred by their employer, the Methuen Public Schools (hereinafter "Appointing Authority" or "Methuen").

A pre-hearing conference was conducted at the offices of the Commission on November 12, 2009. The Appointing Authority subsequently filed a Motion to Dismiss, arguing that the Appellants were not "transferred" but, reassigned. Therefore, according

to the Appointing Authority's argument, the Commission has no jurisdiction to hear these appeals. The Appellants did not submit an opposition.

*Applicable Standard on Dispositive Motion*

The party moving for summary disposition of an appeal before the Commission pursuant to 801 C.M.R. 7.00(7)(g)(3) or (h) is entitled to dismissal as a matter of law under the well-recognized standards for summary disposition, i.e., "viewing the evidence in the light most favorable to the non-moving party", i.e., Saugus has presented substantial and credible evidence that the opponent has "no reasonable expectation" of prevailing on at least one "essential element of the case", and that Ms. Andersons has not produced sufficient "specific facts" to rebut this conclusion. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008) Specifically, a motion to dismiss for lack of standing must allowed when the appellant fails to raise "above the speculative level" sufficient facts "plausibly suggesting" that Ms. Anderson would have the standing necessary to find her "aggrieved" within the meaning of G.L.c.31, §2(b) to pursue this appeal. See Iannacchino v. Ford Motor Company, 451 Mass. 623, 635-36, (2008) (discussing standard for deciding motions to dismiss); cf. R.J.A. v. K.A.V., 406 Mass. 698, 550 (1990) (factual issues bearing on plaintiff's standing required denial of motion to dismiss)

*Applicable Statute*

G.L. c. 31, § 35 states in relevant part:

"A person who is aggrieved by a transfer, other than an emergency transfer or assignment, made pursuant to this section but who is not subject to the provisions of section forty-one with respect to such transfer, may appeal to the commission pursuant to the provisions of section forty-three and shall be entitled to a hearing and

a decision by the commission in the same manner as if such appeal were taken from a decision of the appointing authority made, after hearing, under the provisions of section forty-one.”

*Prior Commission Decisions Regarding Transfers v. Reassignments*

In Appellant v. Department of Revenue, 1 MCSR 28, 29 (1985), the Commission dismissed the Appellant’s appeal on the grounds that the action being appealed was a reassignment as opposed to a transfer. In that case, the employee’s position in the Worcester office was eliminated and he was reassigned to the Cambridge office. The employee claimed that this change in duty was effectively a transfer. The Commission found that the distances to Cambridge or to Worcester from the employee’s home were approximately equal. It further found that that the reassignment did not affect the employee’s job title, duties, grade or salary.

In Sullivan v. Department of Transitional Assistance (11 MCSR 80, 82 (1998)), the Commission determined that it lacked jurisdiction to hear the appeal in that the action taken did not constitute a transfer, but, rather, a reassignment. The Commission restated its definition of a “transfer” as “a change of 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 employee’s residence than his prior location.” In Sullivan, the Appellant’s job title, duties and rate of compensation remained the same. The only distinction between his employment prior to the action taken and his new employment was the physical location of his office, which

was actually closer to his home. The Commission also ruled that it lacked jurisdiction to hear the Appellant's appeal in Sullivan as the Appellant did not commence employment with the Department of Public Welfare until June of 1978 and as such did not qualify for the statutory protections afforded to transferees under the provisions of G.L. c. 31, § 41. That statute grants procedural protections to employees who have been transferred without their written consent if they have "served as tenured employees since prior to October fourteen, nineteen hundred and sixty-eight (October 14, 1968)."

In McLaughlin v. Registry of Motor Vehicles (CSC Case No. G-01-1461 (2004)), the Commission determined that it lacked jurisdiction to hear the appeal in that the action taken did not constitute a transfer, but a reassignment. In McLaughlin, the Appellant was not transferred to a different position, but merely relocated to a different branch office while keeping the same job title, duties and pay.

In Sands v. City of Salem, 21 MCSR 502, 504 (2008)), the Commission, citing Sullivan, determined that it lacked jurisdiction to hear the appeal in that the action taken did not constitute a transfer, but, rather, a reassignment. In Sands, the Appellant, a Hoisting Equipment Operator, was no longer able to perform some of the essential duties in his previously held position. Therefore, in order to make reasonable accommodations for his medically documented permanent disability, he was reassigned to perform cemetery-related duties in the Cemetery Department. Although his distance of travel from his residence was greater than previously, the Commission concluded that the change in travel did not impose an unreasonable hardship on the employee.

In McQueen v. Boston Public Schools (21 MCSR 548, 551 (2008)), the Commission determined that it lacked jurisdiction to hear the appeal in that the action taken did not

constitute a transfer, but, rather, a reassignment. In McQueen, the Appellant was reassigned from one elementary school to another. In dismissing his appeal, the Commission considered that the Appellant retained the same position of junior custodian and retained the same rate of pay in his new position.

In Anderson v. Saugus Public Schools (CSC Case No. D-09-381) (2010), the Commission determined that it lacked jurisdiction to hear the appeal in that the action taken did not constitute a transfer, but, rather, a reassignment. In Anderson, the Appellant retained her title of Principal Clerk; she did not face any reduction in pay nor had she been assigned to a work location that resulted in a longer commute. While her functional duties had changed, those duties still fell clearly within the clerical series. Even if the functional duties were substantially different, as they were in the Sands case, the Commission concluded that this alone would not constitute a transfer that is reviewable by the Commission.

#### *Instant Appeals*

Here, the Appellants are both permanent junior building custodians. On September 2, 2009, although they were reassigned to building custodian positions different from those in which they had been serving, each of them has continued to serve in junior building custodian positions without any loss of compensation. Mr. May, who had previously worked in the functional title of “building custodian / store delivery person” and Mr. Simone, who had previously worked as building custodian / system-wide groundskeeper”, each have been reassigned to positions as junior building custodians in one of the elementary schools in the Methuen Public Schools. Further, the elimination of

the work assignments of the Appellants are the subject of a grievance that is being pursued to arbitration under the parties' collective bargaining agreement.

*Conclusion*

The Appellants have retained their title of junior building custodian; they have not faced any reduction in pay nor have they been assigned to a work location that resulted in a longer commute. While their functional duties have changed, those duties still fell clearly within the custodial series.

For all of the above reasons, the Appointing Authority's Motion to Dismiss is allowed and the Appellants' appeals under Docket Nos. D-09-364 and D-09-365 are hereby *dismissed*.

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Christopher C. Bowman  
Chairman

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

A true Copy. Attest:

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Commissioner  
Civil Service Commission

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:

James M. Bowers, Esq. (for Appellants)

Edward F. Lenox, Jr. (for Appointing Authority)