

**COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, ss.**

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

**ANTONIO MCQUEEN,**  
Appellant

v.

**BOSTON PUBLIC SCHOOLS,**  
Respondent

**D-18-182**

Appearance for Appellant:

Thomas R. Landry, Esq.  
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225 Friend Street  
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Appearance for Respondent:

Jeremiah F. Hasson, Esq.  
Deputy Director, Labor Relations  
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Commissioner:

Paul M. Stein

**DECISION**

The Appellant, Antonio McQueen, acting pursuant to G.L.c.31,§43, appealed to the Civil Service Commission (Commission), challenging the decision of the Respondent, the Boston Public Schools (BPS), to suspend him for ten (10) days from his tenured position as a BPS Junior Custodian.<sup>1</sup> The Commission held a pre-hearing conference in Boston on November 6, 2018, and held a full hearing at that location on January 16, 2019, which was digitally recorded.<sup>2</sup> The full hearing was declared private. Thirteen (13) Exhibits were received in evidence at the hearing (*Exhs. 1 through 13*). The Commission received Proposed Decisions on March 20, 2019. For the reasons stated below, the Appellant’s appeal is denied.

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<sup>1</sup> The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

<sup>2</sup> CDs of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CD to supply the court with the stenographic or other written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

## **FINDINGS OF FACT**

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

*Called by the BPS:*

- Pauline Lugira, BPS Principal, Lila Fredrick Pilot School
- Danny Glavin, BPS Custodial Services Area Manager
- Mike DiAngelis, BPS Custodial Services Area Manager

*Called by the Appellant:*

- Antonio McQueen, BPS Junior Custodian, Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Antonio McQueen, is a tenured BPS civil service employee who has held the position of Junior Custodian since 2004, working primarily at the Lila Frederick Pilot School. (*Stipulated Facts; Testimony of Appellant*)

2. During his employment as a BPD Junior Custodian, prior to the 2017-2018 school year, Mr. McQueen received the following discipline:

- a. May 31, 2007 – Written warning for unjustified absences and improvement plan re: same, including compliance with policies regarding sick time.
- b. February 7, 2008 – Written reprimand for unjustified absences and improvement plan re: same, including compliance with policies regarding sick time and tardiness.
- c. February 25, 2008 – Five-day suspension and transfer to another school for poor job performance (quantity and quality of work), threatening the Senior Custodian and falsifying daily time sign in/sign out attendance sheets; improvement plan to remediate this misconduct.
- d. April 4, 2008 – Three-day suspension for unacceptable attendance and improvement plan to remediate attendance issues.
- e. January 15, 2009 – Five-day suspension for poor job performance, threatening and insubordinate behavior toward Supervisor; improvement plan re: same and compliance with BPS policies regarding sign in/sign out and snow removal duties.
- f. February 2, 2009 – One-day suspension for failure to follow snow removal policy and improvement plan to remediate this misconduct.
- g. June 12, 2009 – Docked thirty (30) minutes pay for tardiness.

- h. December 29, 2014 – Written reprimand for unsatisfactory attendance, including possible pattern of sick leave abuse on Mondays or Fridays; improvement plan to remediate attendance issues.
- i. May 6, 2015 – Docked thirty (30) minutes pay for tardiness.

*(Exhs. 9 through 11)*

3. During the 2017-2018 school year, beginning in February 2018, Mr. McQueen also received verbal counseling from the BPS Custodial Services Area Manager Mike DiAngelis for (1) disrespecting Principal Lugira who directed him to clean up spilled food (initially reported as feces) dropped on the cafeteria floor and failing to comply with the directive immediately, waiting until the last lunch was finished and all students were gone; (2) failing to locate and remove a dead rodent from the library office (which the professional staff member ultimately was required to dispose of herself); and (3) malingering in the teacher lounge on multiple occasions during lunch periods when he was expected to remain on duty in the cafeteria. *(Exhs. 2, 3 & 5; Testimony of Appellant, Lugira & DiAngelis)*<sup>3</sup>

4. On May 15, 2018, after a disciplinary hearing, BPS Senior Manager of Buildings & Grounds John McIntosh issued Mr. McQueen a Written Warning regarding attendance issues, requiring that Mr. McQueen improve his attendance and comply with the BPS policies regarding medical documentation for absences of five days or more and/or when a pattern of sick leave abuse is suspected. *(Exhs. 6, 9 & 11; Testimony of McIntosh)*

5. On May 23, 2017, Mr. DiAngelis arrived at the Frederick School during a lunch period on May 23, 2018, and Mr. McQueen was nowhere to be found. After looking for him for over half an hour, Mr. DiAngelis spotted Mr. McQueen walking up the school driveway. Mr.

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<sup>3</sup> Mr. DiAngelis assumed the role of Area Manager after the regularly assigned manager, Danny Glavin, went out on injured leave in January 2018 and continued in that role until Mr. Glavin returned to work in September 2018. Mr. Glavin had also experienced similar performance issues with Mr. McQueen earlier in the 2017-2018 school year, beginning in August 2017, of which Fredrick School Principal Pauline Lugira was later made Mr. DiAngelis aware. *(Exh.2; Testimony of Glavin, Lugira & DiAngelis)*

DiAngelis docked Mr. McQueen thirty (30) minutes pay for leaving the school grounds without signing out as required. (*Exh. 5; Testimony of DiAngelis*)

6. The attendance record for Mr. McQueen for the remainder of the school year, after the May 15, 2018 written warning, includes the additional absences stated below.

Friday, June 29, 2018 – Personal Day

Monday, July 2, 2018 – Vacation Day

Tuesday, July 3, 2018 – Sick

Thursday, August 9, 2018 – Sick

Friday August 10, 2018 – Vacation

Week beginning 8/13 & 8/20 – Two week Vacation

Monday, August 27, 2018 – Sick

(*Exhs. 7 & 8; Testimony of McIntosh*)

7. By letter dated September 11, 2018, following an appointing authority hearing on August 30, 2018, BPS Assistant Director of Facilities Management P.J. Preskenis issued Mr. McQueen a ten-day suspension, ordered that he be reassigned to another school without recourse to re-bid to the Frederick School and imposed an improvement plan to remediate the quantity and quality of his work and attendance and compliance with directives of superiors. The reasons for discipline included: (a) poor job performance; (b) failure to follow the directives of both the principal and the area manager; (c) failure to sign in/out when leaving the school; (d) failure to improve attendance after the 5/9/18 attendance hearing, including calling out sick after a vacation day and before a holiday; and (e) overall poor disciplinary history. (*Exh. 1; Testimony of McIntosh*)

8. On or about August 30, 2018, Principal Lugira prepared a performance evaluation of the custodian staff. She gave Mr. McQueen an overall rating of Unsatisfactory and graded him Unsatisfactory in every one of the ten categories of performance. Although Principal Lugira had complained previously about custodial performance across the entire school (especially the

performance and supervision of the night staff), she had seen some improvement from others during the year. Mr. McQueen was the only custodian whom she rated as overall Unsatisfactory at the end of the school year. (*Exhs. 3, 4 & 1*;: *Testimony of Lugira*)

9. This appeal duly ensued. (*Claim of Appeal*)

#### **APPLICABLE LEGAL STANDARD**

G.L.c.31,§41-45 requires that discipline of a tenured civil servant may be imposed only for “just cause” after due notice, hearing (which must occur prior to discipline other than a suspension from the payroll for five days or less) and a written notice of decision that states “fully and specifically the reasons therefore.” G.L.c.31,§41. An employee aggrieved by such disciplinary action may appeal to the Commission, pursuant to G.L.c.31,§42 and/or §43, for de novo review by the Commission “for the purpose of finding the facts anew.” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited.

The Commission’s role 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 Comm’n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). See also 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, rev.den., 390 Mass. 1102 (1983).

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence<sup>4</sup>, when weighed by an unprejudiced mind, guided by common sense and by correct

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<sup>4</sup> It is within the hearing officer’s purview to determine the credibility of live testimony. E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003). See Embers of Salisbury, Inc. v. 37 Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988); Doherty v. Ret. Bd. of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003) (where witnesses gave conflicting testimony, assessment of their relative credibility cannot be made by someone not present at the hearing).

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) See also Mass. Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001).

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 "merit principles" which govern 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.

G.L.c.31, Section 43 vests the Commission with "considerable discretion" to affirm, vacate or modify discipline but that discretion is "not without bounds" and requires sound explanation for doing so. See, e.g., Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 600 (1996) ("The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio . . . accorded the appointing authority") Id., (*emphasis added*). See also Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983).

## ANALYSIS

The BPS proved just cause for the discipline imposed on Mr. McQueen based on the pattern of his behavior over the better part of an entire school year, which included attendance issues, performance shortcomings, and a stubborn refusal to acknowledge his shortcomings, bring his conduct into compliance with BPS policies and follow the reasonable orders of his superiors, including the school principal and the custodial staff management. The BPS is entitled to expect more from an experienced, long-tenured custodian. A ten-day suspension was appropriate remedial discipline for the cumulative and persistent level of misconduct established here by a preponderance of the evidence.

The Appellant argues that the evidence of his misconduct was substantially all circumstantial, third-hand information and should not be relied upon to justify the discipline imposed. I do not agree. All of the incidents were documented and reported to the BPS Custodial Area Managers in the regular course of business. Both Mr. Glavin and Mr. DiAngelis had first-hand knowledge of many of the incidents, including finding Mr. McQueen in the teachers' lounge when he should have been on duty in the cafeteria, and his walking off school premises without signing out. The inference of attendance abuse (calling in sick just before and after a holiday and vacation days) is documented. Principal Lugira had direct knowledge of the failure to clean up a food spill in the cafeteria as well as Mr. McQueen's insubordinate behavior toward her on that occasion. Finally, to the extent that no witness with first-hand knowledge testified about certain reported incidents (e.g., the mouse in the library office), I find the documented reporting and testimony by Mr. Diangelis and Principal Lugira before the Commission to be reliable and to credibly support the conclusion that those incidents occurred as they described them, not in the self-serving way described by Mr. McQueen.

The Appellant also contends that he was unfairly singled out for discipline because Principal Lugira was predisposed against him and wanted to get him removed from her school. I agree that Principal Lugira had made her dissatisfaction with Mr. McQueen's recent performance quite clear, but that concern was the result of her professional observations of him during the 2017-2018 school year. Even Mr. McQueen agreed that he had known Principal Lugira for a long time and had enjoyed a cordial relationship until those recent series of incidents. As a school principal, Ms. Lugira is entitled to broad (although not unfettered) discretion in deciding in whom to hire and retain to work at the school and in whom she has confidence to interact with the staff and the students who attend there. See G.L.c.71,§59B (so-called "principal's choice law"); Almeida v. New Bedford Schools, 25 MCSR 467 (2012). Moreover, in this case, the decision to discipline and transfer Mr. McQueen was not one made by Principal Lugira alone, but was based on the consensus judgment of the BPS Facilities Management senior staff, which specifically took into account both Mr. McQueen's recent misconduct in the 2017-2018 school year, along with his prior record of discipline, none of which was attributed to Principal Lugira.

Finally, I have considered whether there is any reason for the Commission to apply its authority to exercise discretion and modify the discipline imposed. The misconduct established at the Commission hearing does not materially differ from that found by the BPS after its appointing authority hearing and I find no unlawful motives, bias or disparate treatment. Accordingly, there is no reason to disturb the BPS's choice of a ten-day suspension for the misconduct established by the evidence in this appeal.

## **CONCLUSION**

For the reasons stated above the appeal of the Appellant, Antonio McQueen, in Case No. D-18-182 is hereby ***denied***.



Civil Service Commission

/s/ Paul M. Stein  
Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso [absent], Ittleman, Stein and Tivnan, Commissioners) on February 13, 2020.

Either party may file a motion for reconsideration within ten days of the receipt of this 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 this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d)

Notice:  
Thomas R. Landry, Esq. (for Appellant)  
Jeremiah F. Hasson, Esq. (for Respondent)