

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

ANTONIO McQUEEN,
Appellant

v.

BOSTON PUBLIC SCHOOLS,
Respondent

Case No.: D-08-33

DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on September 25, 2008 to acknowledge receipt of the report of the Administrative Law Magistrate dated August 15, 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, but for a different reason from that reached by the magistrate in her conclusion.

Although the magistrate did not address the c. 31 §35 issue, the matter was raised by the Respondent in its post hearing brief. The Respondent argues that the Appellant's posting to East Boston High School was a reassignment – not a transfer. We agree.

In order to invoke the protection of c. 31 §35, the Appellant is required to establish that he was "transferred" within the meaning of Civil Service Law. This he failed to do. "The Civil Service Commission has defined the term "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..." Sullivan v. Dep't of Transitional Assistance, 11 MCSR 80 (1998); *also see* Sands v. Salem, D-06-346 (September 12, 2008) The only distinction between the Appellant's employment prior to the action taken by the Appointing Authority in February 2008 and his current employment is the physical location. The Appellant was posted from the Holland Elementary School to the East Boston High School in the same city of Boston, in the same school district. Finding #20. The Appellant retained the same position of junior custodian and retained the same rate of pay. Finding #22. Even if the Appellant could have proven that he was transferred, his sole remedy is that which is provided for in §35. Although the distance of travel from the Appellant's residence has increased, § 35 imposes an

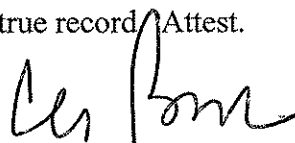
additional burden of proof upon the Appellant: such a change in travel must "...impose unreasonable hardship on the employee..." The Appellant must now use public transportation to get to work at East Boston High School; previously he walked to work. Finding #21. However, traveling from his home to work - still in the Boston area, still in the same school district - cannot qualify as a "hardship."

Thus, since no transfer occurred, the Appellant's appeal must fail for lack of jurisdiction.

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; Henderson, Marquis, Stein and Taylor, Commissioners) on September 25, 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:
Antonio McQueen, *pro se*
Brendan Greene, Esq. (for Appointing Authority)
Shelly Taylor, Esq. (DALA)

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

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August 15, 2008

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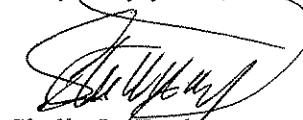
Christopher C. Bowman, Chairman
Civil Service Commission
One Ashburton Place, Room 503
Boston, MA 02108

Re: *Antonio McQueen v. Boston Public Schools,*
Docket No. CS-08-33

Dear Mr. McQueen, Attorney Greene and Chairman Bowman:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c)(1), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

Very truly yours,



Shelly L. Taylor
Chief Administrative Magistrate

SLT/das

Enclosure

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COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative
Law Appeals

Antonio McQueen,
Appellant,

v.

Docket No. D-08-274
DALA No. CS-08-33

Boston Public Schools,
Appointing Authority.

Appearance for Appellant:

Antonio McQueen, *pro se*
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Appearance for Appointing Authority:

Brendan Greene, Esq.
Office of Labor Relations
Boston Public Schools
26 Court Street
Boston, Massachusetts 02018

Administrative Magistrate:

Natalie S. Monroe, Esq.

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RECOMMENDED DECISION

Antonio McQueen is appealing the Boston Public Schools' decision to transfer him from his position as a Junior Custodian at the Holland Elementary School to the position of Junior Custodian at the East Boston High School. Mr. McQueen appealed under the provisions of G.L. c. 31, § 43.

I held a hearing on April 24, 2008, at the offices of the Division of Administrative Law Appeals, 98 North Washington Street, Boston. Before the beginning of the hearing, the Boston Public Schools submitted a set of proposed stipulations of fact, which was marked as Exhibit A for identification. Mr. McQueen and the Boston Public Schools

agreed to stipulate to the facts set forth in the following paragraphs of Exhibit A: ¶¶ 1, 2, 3, 4, 5, 7 and 8.

Before the hearing began, moreover, the Boston Public Schools filed a motion to dismiss the appeal on the grounds that the Civil Service Commission did not have jurisdiction to review the school system's decision to transfer Mr. McQueen. After reviewing the motion, I determined that I would have to make factual findings in order to make a ruling. Further, it was not clear that the Boston Public Schools would prevail on the motion. In light of these factors, and to avoid requiring the parties and witnesses to return for a hearing if the motion was not granted, I took the motion under advisement and proceeded with a full hearing.

Three witnesses testified for the Boston Public Schools: Mark Mountain, Richard Stahly and Paul Wood. Mr. McQueen testified on his own behalf. Four exhibits (Exhibits 1-4) were entered into evidence at the hearing. There is one cassette tape of the hearing.

At the end of the hearing, I left the record open until May 8, 2008, to allow the parties to file post-hearing briefs. The Boston Public Schools filed a post-hearing brief on May 8, 2008. Mr. McQueen did not file a post-hearing brief. The record closed on May 9, 2008.

FINDINGS OF FACT

Based on the stipulations of fact, all of the evidence presented, reasonable inferences drawn from the evidence, and my assessment of the credibility of the witnesses, I make the following findings of fact:

1. Antonio McQueen began working for the Boston Public Schools on December 1, 2003, as a part-time custodian. (Stipulation No. 1).
2. Mr. McQueen became a permanent employee of the Boston Public Schools in 2004 and was assigned to the New Boston Pilot Middle School as a Junior Custodian. (Stipulation No. 2).
3. In November 2006, Mr. McQueen was transferred to the Holland Elementary School, where he worked the day shift. (Stipulation No. 3).
4. As a Junior Custodian at the Holland Elementary School, Mr. McQueen reported directly to Mark Mountain, who was the Senior Custodian at the school. (Stipulation No. 4).
5. Mr. McQueen and Mr. Mountain did not get along. (Testimony of Antonio McQueen, Mark Mountain and Richard Stahly; Exhibit 3).
6. Mr. Mountain had a temper and sometimes yelled at Mr. McQueen. (Testimony of Antonio McQueen, Mark Mountain and Richard Stahly).
7. Mr. McQueen demonstrated a bad attitude towards Mr. Mountain. He sometimes would not respond when Mr. Mountain talked to him. On one occasion in 2007, he told Mr. Mountain that they should take their disagreement "outside and settle it like men." (Testimony of Mark Mountain).

8. During lunchtime on January 31, 2008, Mr. Mountain approached Mr. McQueen while he (Mr. McQueen) was working in the school cafeteria. The lunchroom was crowded. (Testimony of Antonio McQueen).

9. Mr. Mountain accused Mr. McQueen of leaving work early the day before; Mr. McQueen denied that he had. (Testimony of Antonio McQueen and Mark Mountain).

10. During the discussion, Mr. Mountain yelled at Mr. McQueen. (Testimony of Antonio McQueen, Mark Mountain and Richard Stahly).

11. Mr. McQueen responded by suggesting that they “go outside and settle this like men.” Mr. McQueen also told Mr. Mountain that this was his “last warning.” (Testimony of Mark Mountain and Richard Stahly; Exhibit 4).

12. Mr. Mountain ended the conversation and called his supervisor, Robby Robinson. (Testimony of Mark Mountain).

13. The incident was then reported to Paul Wood, a Building Services Manager for the Boston Public Schools. (Testimony of Paul Wood).

14. Mr. Wood asked that Richard Stahly, an Area Manager for the Boston Public Schools, investigate the incident. (Testimony of Paul Wood and Richard Stahly).

15. Mr. Stahly went to the Holland Elementary School and met with Mr. Mountain and Mr. McQueen. He met with them at the same time. (Testimony of Richard Stahly, Mark Mountain and Antonio McQueen).

16. During the meeting, Mr. Mountain admitted that he had yelled at Mr. McQueen. (Testimony of Richard Stahly, Mark Mountain and Antonio McQueen).

17. During the meeting, Mr. McQueen admitted that he had threatened Mr. Mountain by suggesting that the two men “go outside and settle it like men.” (Testimony of Richard Stahly and Mark Mountain).

18. Mr. Stahly told Mr. Mountain that he was not permitted to yell at Mr. McQueen. He told Mr. McQueen that he (Mr. McQueen) could not threaten Mr. Mountain. He then told the two gentlemen to return to work. (Testimony of Richard Stahly).

19. After the meeting, Mr. Stahly called Joseph Johnson, a Building Services Manager for the Boston Public Schools, and told him that Mr. McQueen and Mr. Mountain should not work together. (Testimony of Richard Stahly).

20. At approximately 6:30 a.m. on February 7, 2008, Robby Robinson and Mr. Wallace, the night supervisor at the Holland Elementary School, approached Mr. McQueen while he was working. They told Mr. McQueen that he was being relocated to the East Boston High School, effective immediately. (Testimony of Antonio McQueen).

21. Mr. McQueen did not want to be transferred to the East Boston High School. He lives less than five minutes from the Holland Elementary School and can walk to the school. By contrast, the East Boston High School is not close to Mr. McQueen’s home; he has no car and has to take public transportation to the school. (Testimony of Antonio McQueen).

22. Even though he was transferred to the East Boston High School, Mr. McQueen retained his position as a Junior Custodian and retained his rate of pay. (Testimony of Richard Stahly, Paul Wood and Antonio McQueen).

23. On February 8, 2008, Mr. McQueen appealed the Boston Public Schools' decision to transfer him to the East Boston High School. (Notice of Appeal, dated February 8, 2008).

24. On February 25, 2008, the Boston Public Schools suspended Mr. McQueen for five days. Mr. McQueen did not appeal the suspension. (Stipulation).

25. It costs Mr. McQueen approximately two hundred dollars a month to commute to the East Boston High School. (Testimony of Antonio McQueen).

CONCLUSION AND RECOMMENDATION

As previously discussed, the Boston Public Schools moved to dismiss Mr. McQueen's appeal on the grounds that the Civil Service Commission does not have jurisdiction over the school system's decision to transfer Mr. McQueen. I took the motion under advisement and conducted a full hearing. I now rule on that motion and conclude that it should be granted.

Chapter 31 of the Massachusetts General Laws provides, in pertinent part:

Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be ... transferred from his position without his written consent if he has served as a tenured employee since prior to October fourteen, nineteen hundred and sixty-eight....

G.L. c. 31, § 41 (emphasis added). Thus, an employee can appeal the decision to transfer him from his position without his consent, *but only* if he was a tenured employee as of October 14, 1968. *Id.*¹ In this case, Mr. McQueen began working for the Boston Public Schools in 2001; he became a permanent employee in 2004. Consequently, although Mr.

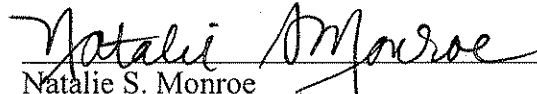
¹ While the Boston Public Schools argues otherwise, a transfer from one school to another may constitute a "transfer from [one's] position" within the meaning of G.L. c. 31, § 41. See, e.g., *Patterson v. Billerica Public Schools*, 20 MSCR 515, 516 (2007) (outlining test to determine whether a statutory transfer has occurred and citing leading cases on transfer).

McQueen was transferred to another school without his consent, he was not a tenured employee with the Boston Public Schools prior to October 14, 1968. Therefore, according to the plain language of Chapter 31, Mr. McQueen does not have a right to appeal the Boston Public Schools' decision to the Civil Service Commission.

Because Mr. McQueen was not a tenured employee with the Boston Public Schools as of October 14, 1968, I recommend that Mr. McQueen's appeal be dismissed for lack of jurisdiction.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Dated: 8/15/08


Natalie S. Monroe
Administrative Magistrate