

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

THOMAS YAHOUB,
Appellant

v.

Docket No. D-05-91

TOWN OF MILTON
SCHOOL DEPARTMENT,
Respondent

Appellant's Attorney:

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8 Beacon Street
Boston, MA 02108

Respondent's Attorney:

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Commissioner:

John J. Guerin, Jr.

DECISION

Pursuant to G.L. c. 31, section 43, the Appellant, Thomas Yahoub (hereafter "Yahoub" or "Appellant"), is appealing the decision of the Respondent, Town of Milton School Department as Appointing Authority, to terminate him from the position of custodian. The appeal was timely filed. A hearing was held on September 22, 2005 at

the offices of the Civil Service Commission (hereafter “Commission”). As no written requests were received from either party, the hearing was declared to be private. Witnesses were not sequestered. Three (3) audiotapes were made of the hearing. Proposed Decisions were filed by both parties as instructed.

FINDINGS OF FACT:

Based upon the documents entered into evidence (Joint Exhibits 1 – 14 and Appellant’s Exhibit 1) and the testimony of the Appellant, Supervisor of Custodians Thomas Malloy, Director of Buildings and Grounds William Ritchie, Custodian and Union Steward Jason Scherer, Custodian John Mirotta and Superintendent of Schools Dr. Magdalene Giffune, I make the following findings of fact:

1. Thomas Yahoub was a custodian for the Milton School Department for five and one-half (5.5) years. (Testimony of Appellant)
2. On December 28, 2004, the Appellant was scheduled to work at the Pierce Middle School for the 4:00 p.m. to Midnight shift. (Id.)
3. On or about December 27, 2004, John Phalen, Principal of the Pierce Middle School, spoke with Mr. Ritchie. During that conversation, Principal Phelan expressed his dissatisfaction with the cleanliness of the building. (Testimony of Ritchie)

4. Mr. Ritchie spoke to Mr. Malloy about the situation and it was decided that they would visit the school during an evening shift. (Testimony of Ritchie and Malloy)
5. Mr. Ritchie spoke to Mr. Scherer about the decision to visit the school and Mr. Scherer suggested that Mr. Ritchie and Mr. Malloy visit other schools in addition to the Pierce Middle School so that it would not appear that one school was being singled out. (Testimony of Ritchie and Scherer)
6. On December 28th, Mr. Ritchie and Mr. Malloy visited the Glover School and drove around Milton High School prior to going to Pierce Middle School. (Testimony of Ritchie and Malloy)
7. Mr. Ritchie and Mr. Malloy arrived at Pierce Middle School around 9:00 p.m. (Testimony of Ritchie, Malloy and Mirotta)
8. Mr. Ritchie and Mr. Malloy spoke to Mr. Mirotta and Mr. Mirotta's son when they first entered the school. (Id.)
9. Mr. Mirotta told them that Rick Walker had worked earlier in the evening and that Mr. Yahoub was in his section. (Id.)
10. Mr. Ritchie and Mr. Malloy began to walk around the building to try to find Mr. Yahoub. They came upon a cleaning machine which was charging in the hall but Mr. Yahoub was not there. (Testimony of Ritchie and Malloy)
11. Mr. Ritchie and Mr. Malloy separated and walked through the building, including the basement, but did not find Mr. Yahoub. (Id.)

12. Mr. Ritchie and Mr. Malloy met again, told each other that neither had seen Mr. Yahoub and then separated again. (Id.)
13. Mr. Ritchie went to the basement and saw wet footprints on the floor indicative of someone coming in the door from outside. He opened the door and saw a pick-up truck nearby which he approached, touched and found the hood over the engine to be warm. (Testimony of Ritchie)
14. Mr. Ritchie then followed the footprints and came upon Mr. Yahoub in the hall near the cleaning machine. (Id.)
15. Mr. Ritchie called out to Mr. Yahoub that he and Mr. Malloy had been looking for him, at which time Mr. Yahoub started to walk away from him. Mr. Ritchie called out for Mr. Yahoub to stop and he eventually did. (Testimony of Ritchie and Malloy)
16. Mr. Ritchie approached Mr. Yahoub and told him that neither Mr. Malloy nor he had been able to find him and that he knew Mr. Yahoub had been out of the building. Mr. Yahoub denied being out of the building and turned to show Mr. Ritchie and Mr. Malloy the floors that he had been cleaning. (Testimony of Ritchie, Malloy and Yahoub)
17. Mr. Ritchie and Mr. Malloy followed Mr. Yahoub down the hall toward the custodian closet and Mr. Ritchie was telling Mr. Yahoub that he (Yahoub) had been “caught” leaving the building and that he should just admit to it. (Id.)
18. Mr. Ritchie told Mr. Yahoub that he had seen the footprints and Mr. Yahoub’s truck. Mr. Yahoub denied that he had left the building except to

move his truck. Mr. Ritchie and Mr. Yahoub began to yell and swear at each other. (Testimony of Ritchie and Malloy)

19. Mr. Ritchie ended the argument by stating that he did not need any more information from Mr. Yahoub because he knew that he (Yahoub) had left the building and that he (Ritchie) would document the matter. (Testimony of Ritchie, Malloy and Yahoub)
20. Mr. Ritchie turned to leave when Mr. Yahoub jumped on him, knocking his glasses off and landing on top of him on the floor. (Testimony of Ritchie and Malloy)
21. Mr. Malloy, after his initial shock of seeing Mr. Yahoub physically attack Mr. Ritchie, stepped in to break them apart. (Id.)
22. Mr. Ritchie was underneath Mr. Yahoub and was swinging at him since Mr. Yahoub's hands were around his throat and Mr. Ritchie was attempting to escape his grasp. (Testimony of Ritchie)
23. Mr. Malloy pulled them apart and once standing, Mr. Yahoub said that he was a disabled veteran. (Testimony of Ritchie and Malloy)
24. Mr. Mirotta came around the corner and saw Messrs. Yahoub, Malloy and Ritchie in the hall. He heard Mr. Yahoub say that Mr. Ritchie had assaulted him and he heard Mr. Ritchie telling Mr. Yahoub that he wanted him to turn in his keys and leave the building. (Testimony of Ritchie, Malloy, Mirotta and Yahoub)
25. Mr. Mirotta asked what was going on and Mr. Ritchie answered by saying that Mr. Yahoub had knocked his glasses off. (Testimony of Mirotta)

26. As the four men walked down the hall to the front of the building, Mr. Yahoub continued to yell that he was a disabled veteran and that he was going to call the police and Mr. Ritchie kept repeating that he wanted Mr. Yahoub's keys. (Testimony of Ritchie, Malloy, Yahoub and Mirotta)
27. Mr. Yahoub and Mr. Mirotta went to the teachers' room and called the police. (Testimony of Yahoub and Mirotta)
28. Mr. Ritchie separately called the police. (Testimony of Ritchie and Malloy)
29. Mr. Malloy called Mr. Sherer and told him there had been a fight between Mr. Ritchie and Mr. Yahoub. (Testimony of Malloy and Sherer)
30. The police arrived and took statements from Messrs. Ritchie, Malloy and Yahoub. The responding officer, Patrolman Michael Lavangie, advised both parties that the Police Department could take out a complaint in court or that the parties could go to court and take out complaints on each other. Mr. Ritchie stated that he wanted the matter handled through the schools and Mr. Yahoub stated that he had already called his union representative. No court complaints were sought by either party. (Exhibit #11)
31. Mr. Yahoub went to Milton Hospital that night to seek treatment of injuries he claims to have sustained as a result of the altercation. (Testimony of Yahoub and Exhibits 12 & 15)
32. Mr. Ritchie went to South Shore Hospital the next day. (Testimony of Ritchie and Exhibit 14)

33. During the investigation of the incident, Mr. Yahoub stated to Assistant Superintendent of Schools Gary Osmond that he had left the building earlier that night to buy gas for his truck. (Exhibit 8 and Testimony of Yahoub)
34. At the hearing before the Appointing Authority, Mr. Yahoub and his representative were asked by Dr. Giffune if they wanted to add anything to the written statements which had been submitted. Mr. Yahoub stated that he was a disabled veteran but did not state what his disability was or how it was relevant to the charges which had been made against him. (Testimony of Giffune, Sherer and Yahoub)
35. Mr. Yahoub testified at the Commission hearing that his disability presents as a phobia of people being in too close proximity to him. He further testified that he has an approximately eight-foot “comfort zone” within which he is discomforted by another person’s presence. Mr. Yahoub stated that he never divulged this condition, nor did he ever provide specifics of this disability, to the School Department. (Testimony of Yahoub)
36. Mr. Yahoub had no record of prior discipline as an employee of the Milton School Department. (Id.)
37. Mr. Yahoub has a pending promotional bypass appeal at the Commission which he filed on August 19, 2004 (Administrative Notice)
38. By letter dated February 2, 2005, Dr. Giffune informed Mr. Yahoub that he was dismissed effective February 2, 2005. (Exhibit 3)

39. The credibility of the witnesses is established by the versions of the event and what had occurred earlier that night. Mr. Ritchie's and Mr. Malloy's testimonies were consistent with their written statements (Exhibits 4 and 7) to the pertinent points of the events leading to the physical altercation and who hit whom. Mr. Ritchie was sincere and detailed in his written statement and his testimony regarding the words he chose to use when confronting Mr. Yahoub about his inability to locate him in the building that evening. The fact that Mr. Ritchie was agitated and expressed that to Mr. Yahoub does not constitute provocation for a physical response and certainly does not justify Mr. Yahoub's striking of Mr. Ritchie. Mr. Ritchie's testimony that he was throwing defensive punches at the person or people on top of him credibly explains the injuries suffered by Mr. Yahoub.
40. Mr. Yahoub's version is inconsistent and has omissions which challenge his credibility. Mr. Yahoub's version of the evening are not substantiated by anyone and he is not credible because he misrepresented to Mr. Ritchie and Mr. Malloy that he had not left the building when he later acknowledged that he went for gas. Further, the time he claims to have been out of the building is questionable since he had to travel more than a few minutes to the gas station which is in the City of Quincy. In addition, had Mr. Ritchie seen him by the door in the basement, the confrontation would have occurred there, not in the upstairs hall. As is discussed below, Mr. Yahoub's claim that a bathroom was not built in the Pierce Middle

School as retaliation for his having filed a complaint with the Commission reveals that he is fabricating rationales for his actions.

41. Mr. Yahoub's testimony of the confrontation is unsubstantiated by any other testimony. Mr. Scherer and Mr. Mirotta did not provide any corroboration that Mr. Ritchie struck Mr. Yahoub first. Mr. Mirotta's testimony actually contradicted Mr. Yahoub's regarding being in the building since he saw Mr. Ritchie and Mr. Malloy twice looking for Mr. Yahoub after Mr. Yahoub's claim that he and Mr. Ritchie had seen each other in the basement.

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). Town of Watertown v. Arria, 16 Mass. App. Ct. 331 (1983). McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995). Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000). City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is "justified" when it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." City of Cambridge at 304, quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal

Ct. of the City of Boston, 359 Mass. 211, 214 (1971). The proper inquiry for determining if an action was justified is, “whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service.” Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983). School Committee of Brockton v. Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997). This burden must be met by a preponderance of the evidence. G.L. c. 31, §43.

The Commission determines that the Superintendent acted within her discretion when she determined that Mr. Yahoub jumped on Mr. Ritchie, knocking him to the floor and choking him, establishing just cause for his termination. Messrs. Ritchie, Malloy and Yahoub were the only people in the hall when the confrontation occurred. It is undisputed that there was a heated argument in which Mr. Ritchie swore at Mr. Yahoub and accused him of leaving the building during his shift. Mr. Yahoub claimed that he only left the building to move his truck and never told Mr. Ritchie that he had gone for gas earlier that night.

The only issue in dispute is who initiated the physical contact in the hall. The reason for the disagreement (whether Mr. Yahoub was out of the building or not) and the reason for Mr. Ritchie and Mr. Malloy visiting the Pierce Middle School (complaints by the Principal about the cleanliness of the building by all of its custodians) are irrelevant. Dr. Giffune, as Appointing Authority, focused only on the physical altercation that occurred that night and the evidence presented substantiates that Mr. Yahoub initiated the offensive contact.

The evidence presented at the hearing before the Commission supports the conclusion that it was Mr. Yahoub who jumped on Mr. Ritchie, knocking his glasses off, choking him and landing on top of him. By assaulting a supervisor, Mr. Yahoub demonstrated that he was not an acceptable employee of the Milton Public Schools.

Physically attacking a supervisor is not an appropriate response to an argument, regardless of the words used or the accusations made. If Mr. Yahoub believed that there was any merit – the Commission finds no such merit - to his assertion that Mr. Ritchie acted improperly that night by arguing with him and accusing him of various acts, then the appropriate recourse was to file a complaint about Mr. Ritchie or to file a grievance under the terms of the collective bargaining agreement. It is well established that whenever an employee has a problem with a superior he/she is to comply with the superior's directive and later file a grievance. In this case, that means that when Mr. Ritchie informed Mr. Yahoub that he was going to document Mr. Yahoub's behavior, the proper course of action would have been to wait and file a grievance the next day, not physically attack Mr. Ritchie.

While the Commission may modify an action taken by an appointing authority, there is no basis for any modification here due to the egregiousness of the conduct. The purpose of modifying an action is to ensure that employees are treated in a uniform and equitable manner. The physical attacking of a supervisor is such outrageous behavior that to tolerate it by any action short of termination would create a hostile work

environment for all employees. The message to the perpetrator and the other employees would be that attacking a supervisor is not a significant act. By terminating an employee, the message is that the Appointing Authority will not tolerate violence in the workplace and will take the action necessary to assure a safe workplace. Mr. Yahoub's contention that he was provoked by words into attacking Mr. Ritchie does not absolve him nor justify the modification of the discipline. To do so would be to diminish the severity of the conduct.

Mr. Yahoub's contention that he was dismissed in retaliation for filing a previous bypass appeal (G2-04-363) with this Commission is unsubstantiated and the appeal is still pending as of the issuance of this decision. Mr. Yahoub also contended that he had a disability that caused him to attack Mr. Ritchie. However, no evidence thereof was adduced here. He asserted that Mr. Ritchie intentionally excluded a bathroom for the custodians from the plans for the new Pierce Middle School and denied him a personal locker because he filed a complaint when, in fact, none of the custodians at the Pierce Middle School have lockers. The argument that the Appointing Authority had ulterior motives behind the dismissal of Mr. Yahoub is unfounded.

For all of the aforementioned reasons, the Civil Service Commission has determined that the Appointing Authority has sustained its burden of proving reasonable justification for the termination of Mr. Yahoub in this matter. The preponderance of the evidence presented demonstrates that Mr. Yahoub's conduct merited his severance from public service and that termination was the appropriate punishment in light of all relevant facts.

The act of attacking a supervisor is a particularly egregious act which, even in the absence of prior disciplinary action, merits termination. Therefore, the appeal on Docket No. D-05-91 is hereby *dismissed*.

Civil Service Commission

John J. Guerin, Jr.
Commissioner

By vote of the Civil Service Commission (Chairman Goldblatt, Guerin, Marquis and Bowman, Commissioners) [Taylor, Commissioner absent] on February 8, 2007.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration 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 M.G.L. c 30A s.14(1) for the purpose of tolling the time for appeal.

Under the provisions of M.G.L. c. 31 s. 44, 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:

Wayne Soini, Esq.
Joseph A. Emerson, Jr., Esq.