

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

**RICHARD McCARTHY,**  
Appellant

v.

Docket No. D-02-414

**BROOKLINE SCHOOL  
DEPARTMENT,**  
Respondent

Appellant's Attorney:

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Respondent'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, Richard McCarthy (hereafter "McCarthy" or "Appellant"), is appealing the decision of the Appointing Authority, the Brookline School Department (hereafter the "Department"), demoting him from his position of Senior Custodian to Junior Custodian in April 2002. The appeal was timely filed. A Full Hearing with sworn testimony was heard by then-Commissioner

Daniel M. Henderson, Esq. in the office of the Civil Service Commission (hereafter “Commission”) on January 18, 2006. Commissioner Henderson left the Commission before a decision in the case could be issued. The case was subsequently assigned to the above referenced Commissioner for a de novo Full Hearing which was held at the offices of the Commission on April 13 and June 1, 2007. As no written notice was received from either party, the hearing was declared private. Three (3) audiotapes were made of the hearing. Attempts were made by the parties, following the hearing, to reach a settlement agreement in this matter but the efforts were unsuccessful. Proposed Decisions were then submitted by the parties, as instructed.

**FINDINGS OF FACT:**

Based upon the documents entered into evidence (Joint Exhibits 1-52), the testimony of the Appellant, Richard McCarthy; James Pagliarulo, Manager of Building Services for the Department; and Gerald Trombley, Employee Assistance Coordinator, I make the following findings of fact:

1. The Appellant is a tenured civil service employee of the Town of Brookline. He commenced his employment with the Town in September 1984 in the position of Junior Custodian. In 1992, the Appellant was promoted to Senior Custodian at the Runkle Elementary School (“Runkle”). (Testimony of Appellant)
2. At all relevant times, Runkle was staffed by a Junior and a Senior Custodian during the school year. (Testimony of Appellant)

3. As a Senior Custodian at Runkle, the Appellant's shift was from 6:00 am to 3:00 pm. His responsibilities included being in charge of the cleaning and sanitary maintenance of the school building, the operation and care of the heating, ventilation, plumbing and electrical systems, the care of other building equipment and building furnishings and supervising the Junior Custodian assigned to Runkle. The Appellant testified that he performed all duties assigned to him. (Testimony of Appellant, Pagliarulo and Exhibit 1)
4. The Appellant's disciplinary history included suspensions for absences from work that occurred in June and July 1999. He had also been suspended for work performance issues in February and June 1999. (Exhibits 15-18)
5. On September 14, 1999, the Appellant was given a written reprimand from the Acting Supervisor of Custodians regarding his failure to perform his duties as Senior Custodian because he did not complete the tasks assigned to him in time for the opening of Runkle for the school year on September 7. (Exhibits 19, 20 and 21)
6. James Pagliarulo ("Pagliarulo") became Manager of Building Services for the Appointing Authority in October 1999. He stated that, at that time, he had occasion to review the Appellant's personal file and noticed his adverse attendance and performance issues and also that the school had not been ready for opening day in September. (Exhibit 19)
7. Pagliarulo testified that Senior Custodians are working supervisors and need to have a "sense of ownership" of their respective buildings. (Testimony of Pagliarulo)

8. Pagliarulo testified that it was important for the Appellant to arrive on time at Runkle each day in order to open the school and get it running for the arrival of teachers and students. He stated that it takes approximately an hour to open a school building and that punctuality is important because, if the Senior Custodian is not there, people have to wait to get into the school. (Id.)
9. Pagliarulo testified that custodians receive twelve (12) sick days a year, one per month, which may be accumulated. (Id.)
10. Pagliarulo offered thoughtful testimony. He provided straightforward, professional answers and information and he had a good recall of details. He was comfortable in his demeanor and appeared to have no ill-will towards the Appellant of any kind. I credit his testimony as being credible, informative and appropriate. (Demeanor of Pagliarulo)
11. The Appellant testified that he began having financial difficulties in mid-1998 that led to his filing for personal bankruptcy. He stated that his marriage was ending badly in April 2001 and he subsequently had child support obligations he was unable to meet. (Testimony of Appellant)
12. A February 2, 2000 letter from Pagliarulo to the Appellant concerned several incidences of unsatisfactory performance of his duties as a Senior Custodian and recommended that the Appellant be suspended for three (3) days without pay for failure to carry out his duties as a Senior Custodian. (Exhibits 26-29)
13. On April 11, 2000, the Appellant was informed by a letter from Pagliarulo that he was being suspended for one day without pay, on April 20, 2000, for excessive tardiness and inappropriately changing his work schedule. (Exhibit 29)

14. On October 11, 2000, the Appellant received a written warning from Pagliarulo for failing to report to work at his scheduled time on October 2, 2000. In the warning, Pagliarulo referred to the Appellant's last citation for excessive tardiness on April 11, 1999 and stressed that, as Senior Custodian, the Appellant must arrive on time each day. He wrote that, "If this pattern continues further disciplinary action including suspension without pay, demotion, and or termination will result. (Exhibit 31)
15. On or about November 27, 2000, the Appellant suffered a work-related back injury. As a result, he was restricted upon his return to work with regard to his lifting, carrying and push/pull limits by the Appointing Authority's Occupational Health Clinic. (Exhibit 33)
16. In a January 22, 2001 letter from Pagliarulo to the Appellant, Pagliarulo stated that due to the Appellant's sporadic return to work and his physical limitations, he was being temporarily transferred to Brookline High School, effective January 29, 2001, until it could be determined that he was physically capable of returning to his position as Senior Custodian of the Runkle School. (Id.)
17. Subsequent to the Appellant's transfer to Brookline High School to serve as a Junior Custodian, he continued to receive a Senior Custodian salary.
18. On March 16, 2001, the Appellant was cleared to return to work from his back injury with restrictions. (Exhibit 34)
19. The Appellant was absent from work without pay from April 4 through April 27, 2001. (Exhibit 39)

20. On April 11, 2001, Pagliarulo wrote to the Appellant that, as he had continued to be absent from work since being cleared to return and although he had called to inform Pagliarulo to report he was unable to work due to illness, he was being required to submit a full written report from his physician as to the nature of his continued absence and prognosis for return to work. (Exhibit 35)
21. Pagliarulo testified as to an April 12, 2001 incident in which he had met with the Appellant to discuss his continuing absence and the Appellant had left the meeting in an aggressive manner, slamming the door against the wall. (Exhibit 36)
22. Pagliarulo stated that on or about April 15, 2001, the Appellant left him a voice mail message that concluded with the Appellant saying, "I'd appreciate it if you'd shut your mouth because you've been warned." (Exhibit 37)
23. In the spring of 2001, Gerald Trombley ("Trombley"), the Employee Assistance Coordinator for the Town of Brookline since 1970, became aware of the Appellant from the Occupational Health nurse and anonymous sources in Human Resources who were concerned with the Appellant's mental health. (Testimony of Trombley)
24. Trombley offered sincere, credible and professional testimony with regard to his seeking to aid the Appellant. He stated that the Appellant presented to him as depressed, with physical ailments and significant post-divorce financial issues and that, subsequent to their first meeting, the Appellant spent three to four weeks at McLean Hospital in the Spring of 2001. (Exhibit 41 and Testimony of Trombley)

25. Trombley testified that his role in the spring of 2001 was to stabilize the Appellant's condition. He stated that the Appellant thought he could handle issues himself but could not and became frustrated. (Testimony of Trombley)
26. On April 27, 2001, the Appellant left Pagliarulo a message on his cell phone stating that he would be out of work for at least another week or so. (Testimony of Pagliarulo)
27. A May 25, 2001 note to the Appellant from Pagliarulo stated that the Appellant had not contacted the office since his April 27, 2001 message and requested the Appellant to contact him as soon as possible. (Exhibit 38)
28. By letter dated June 11, 2001, Pagliarulo requested that the Appellant submit medical documentation supporting his absenteeism from April 17 through May 2, 2001 and from May 29, 2001 to present. Pagliarulo wrote that he was requesting the Appellant to provide an up-to-date job-readiness evaluation addressing his present ability to perform the essential duties of his job description, with or without reasonable accommodations. (Exhibit 39)
29. On June 14, 2001, Trombley wrote to Peter Rowe ("Rowe"), Assistant Superintendent for Administration and Finance, notifying Rowe that he was assisting the Appellant in clarifying his fitness for duty. (Exhibit 40)
30. The Appellant was cleared to return to work on June 19, 2001 by the Appointing Authority's Occupational Health Physician following a non-work related heel fracture with limitations on lifting and carrying of fifteen pounds and pushing/pulling of 25 pounds. (Exhibit 42)

31. In late June 2001, the Appellant requested twenty (20) days sick leave from the custodial sick leave bank, which is operated by AFSCME employees. Trombley testified that, during a meeting with the Appointing Authority relative to this request and his (Trombley's) concerns about the Appellant, the Appointing Authority questioned the authenticity of the medical documentation that had been submitted by the Appellant and refused to release the sick bank money. The request was subsequently granted in July 2001. (Exhibit 44 and testimony of Trombley)
32. An August 2, 2001 letter from Pagliarulo to the Appellant stated that, due to the Appellant's history of absences, he was required to submit a physician's verification for future absences. (Exhibit 45)
33. Pagliarulo testified that by 2002, the Appellant exhibited an inability to perform as a Senior Custodian. (Testimony of Pagliarulo)
34. In an April 9, 2002 letter from Pagliarulo to the Appellant, Pagliarulo noted that since the Appellant's July 20, 2001 return to work, he had been out seventeen (17) days and that he was required to produce a physician's verification for all future illnesses. Pagliarulo wrote that, based upon the Appellant's "continued high level of absenteeism, your extensive disciplinary history, and your ability over the past six months to only perform Junior Custodial duties with supervision, demonstrates that we cannot restore you to a Senior Custodial position." Pagliarulo stated that the Appellant, therefore, was being transferred from Senior Custodian to Permanent Junior Custodian, effective April 17, 2002, with an accompanying reduction in pay. (Exhibit 2)

35. The Appellant requested a hearing in accordance with G.L. c. 31, § 41 regarding the demotion. The hearing was conducted on April 25, 2002. The Hearing Officer supported Pagliarulo's recommendation that the Appellant be demoted. (Exhibits 2 and 3)
36. On May 7, 2002, the Appointing Authority informed the Appellant by letter that there was just cause to demote him from Senior Custodian to Junior Custodian, effective May 13, 2002. (Exhibits 2, 3 and 4)
37. On May 30, 2002, the Appellant filed this appeal with the Commission. (Administrative Notice)
38. In a June 6, 2002 letter from Trombley to Rowe, Trombley wrote of his concern about what he perceived to be a "possible pattern of harassment against Mr. Richard McCarthy since his hospitalization in May 2001." (Exhibit 47)
39. Trombley stated that when he met with Rowe about the Appellant, Rowe basically told him to "butt out". Trombley stated that he felt blocked in attempting to advocate for the Appellant. I found Trombley to have been a needed life-line for the Appellant at a time in the Appellant's life when no other could be found. His advocacy and empathy for the Appellant are commendable. However, while his efforts on behalf of the Appellant were apparently helpful and restorative of the Appellant's life skills, this advocacy could not ameliorate the inability, at the time in question, of the Appellant to perform his duties as a Senior Custodian in the Brookline School Department. (Exhibit 48)
40. The Appellant offered forthcoming testimony and maintained a pleasant and cooperative demeanor during the hearing. He had good recall, provided detailed

answers and was appropriately contrite when explaining any poor behavior or bad judgment. Among the exhibits submitted were a 1997 Runkle School memorandum and a 2002 letter from the Brookline School Within A School complimenting the Appellant's work. I found the Appellant in 2007 to be a person who, having emerged from facing significant life-challenges in the early part of the decade, is a person who respects the new lease on life that he has obviously worked hard to forge for himself. He is as good and decent a person to have appeared before this Commissioner. It is our fervent hope that his personal rehabilitative work continues and that his demotion will not be a life sentence, so to speak. (Demeanor of Appellant and Exhibits 5 & 46)

#### **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).

In the present case, Pagliarulo’s credible testimony and a preponderance of other credible testimony and documentary evidence submitted has demonstrated that the Appointing Authority had reasonable justification for demoting the Appellant from his position as Senior Custodian to Junior Custodian in May 2002. The testimony of Pagliarulo indicated that the Appellant had legitimate, adverse issues regarding attendance, conduct and performance that led to his demotion. Similarly, documentary evidence substantiated the Appellant’s absenteeism and job performance issues both during and before Pagliarulo became Manager of School Building Services. Although the Appellant’s credible testimony illustrated that he was suffering from physical, mental and financial difficulties between 2000 and the time of his demotion, despite the difficult circumstances he encountered, including a work-related back injury, a non-work related heel injury, in-patient treatment at McLean Hospital and child support obligations he had difficulty meeting, he did not produce persuasive evidence that he was treated disparately or not in accordance with basic merit principles by the Appointing Authority. Moreover, despite Trombley’s credible testimony, the weight of the evidence indicates that the Appellant did not substantiate a claim of a possible pattern of harassment against him since his hospitalization in May 2001. In sum, the totality of the evidence demonstrates that there was reasonable justification for the action taken by the Appointing Authority in demoting the Appellant from Senior Custodian to Junior Custodian.

Further, while the Commission recognizes and congratulates the Appellant on what appears to be a personal renaissance, we can only make this decision based upon events and conditions as they were at the time of the demotion in May 2002. School Committee of Brockton v. Civil Service Commission (1997) 684 N.E.2<sup>nd</sup> 620, 43 Mass. App. Ct. 486. (Duty of agency reviewing school committee superintendent's decision to terminate tenured school committee employee was to apply facts found to determine whether there was reasonable justification for action taken by committee *in circumstances found by agency to have existed at time committee made its decision.* Emphasis added.)

Therefore, for all of the reasons stated herein, the Appellant's appeal on Docket No. D-02-414 is hereby *dismissed*.

Civil Service Commission

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John J. Guerin, Jr.  
Commissioner

By 3 – 1 vote of the Civil Service Commission (Bowman, Chairman; Taylor and Guerin, Commissioners – voting Yea and Henderson, Commissioner – voting Nay) [Marquis, Commissioner absent] on January 10, 2008.

A true record. Attest:

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Commissioner

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)(1), 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:  
Joseph L. DeLorey, Esq.  
George F. Driscoll, Jr., Esq.