Decision mailed: 11/5/10
Civil Service Commission CB

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

EUGENE CASEY,
Appellant

v.

METHUEN PUBLIC SCHOOLS,
Respondent

Docket No: D1-07-124

Attorney for Appellant:

Michael Manzi, Sr. Atty.
Manzi & Manzi
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Lawrence, MA 01840

Attorney for Respondent:

Peter J. McQuillan, Atty.
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41 Pleasant Street, Room 311
Methuen, MA 01844

Commissioner:

Daniel M. Henderson

DECISION

Pursuant to the provisions of G. L. c. 31, § 41, Eugene Casey (hereinafter "Appellant") appeals the decision of the Superintendent of Methuen Public Schools, (hereinafter "MPS") claiming that he was terminated from his employment without just cause, on March 14, 2007.The appellant filed a timely appeal at the Commission. A full

hearing was held at the offices of the Civil Service Commission (hereinafter "Commission") on May 27, 2008. As no written notice was received from either party, the hearing was declared private. The witnesses were sequestered. Two (2) audiotapes were made of the hearing.

FINDINGS OF FACT

28 exhibits were entered into evidence. Based on the exhibits and the testimony of:

For the Appellant

- Joseph Salvo, former Business Manager of Methuen Public Schools,
- Colleen McCarthy, Director of Human Resources, Methuen Public Schools,

For the Respondent

- Jeanne C. Whitten, Ed. D., Superintendent of Schools of the Methuen Public Schools,

I make the following findings of fact:

1. The Appellant was appointed as a permanent custodian by the MPS on May 4, 2004. At all relevant time Casey resided in Methuen Mass. (Testimony, Stipulated Fact)
2. He was assigned as a custodian to the Comprehensive Grammar School, working the 2:00pm – 10:00pm shift. The school houses grades K – 8. (Testimony of Whitten, Stipulated Fact)
3. Jeanne Whitten, (hereinafter "Whitten") is the Superintendent of MPS and serves as the appointing authority. (Testimony of Joseph Salvo)
4. Joseph Salvo, (hereinafter "Salvo"), is the former Business Manager for the MPS. (Testimony of Joseph Salvo)(Testimony of Salvo)
5. In March of 2006, the Appellant was indicted by an Essex County grand jury for the following offenses: **Count 1**, (misdemeanor) c. 271, § 17A (using telephone for

gaming). **Count 2**, (felony) c. 271, § 17 (did own or occupy a place for registering bets) **Count 3**, (felony) c. 271, § 17A. (conspiracy [c. 274 § 7], to violate the gaming laws); and **Count 4**, (felony) c. 271, § 16A (did organize, promote, supervise, manage or finance a gaming operation) all counts occurred on numerous and diverse occasions at Methuen from October 12, 2005 to January 6, 2006. (Exhibits 1, 3, 4, 10)

6. The indictments resulted from an ongoing State Police criminal investigation into a widespread illegal gambling organization, involving surveillance and wiretaps on various telephones. The Appellant was not the target of the investigation and not an "operator" of this betting enterprise. (Testimony, exhibits, Exhibits 9, 10 13, reasonable inference)
7. The Appellant was formally arraigned in the Essex County Superior Court on said charges on April 25, 2006. (Exhibits 1, 3)
8. On or about April 26, 2006, the Superintendent of MPS suspended the Appellant without pay, pursuant to G.L. c. 268A, §25, due to his indictment in Superior Court on four (4) counts. This suspension was "further predicated upon this alleged criminal activity being conducted while in the performance of your duties as custodian, thereby constituting misconduct in your employment." (Exhibit 2)
9. G.L. c. 268A, §25, in relevant part states, "...an officer or employee of a county, city, town or district, howsoever formed, including, but not limited to, regional school districts and regional planning districts, or of any department, board, commission or agency thereof may, during any period such officer or employee is under indictment for misconduct in such office or employment or for misconduct

in any elective or appointive public office, trust or employment at any time held by him, be suspended by the appointing authority, whether or not such appointment was subject to approval in any manner...." and also states that "Any person so suspended shall not receive any compensation or salary during the period of suspension . . . . and further states ". . . .

"If the criminal proceedings against the person suspended are terminated without a finding or verdict of guilty on any of the charges on which he was indicted, his suspension shall be forthwith removed, and he shall receive all compensation or salary due him for the period of his suspension . . . ."

10. The Appellant did not appeal that suspension. (Exhibit 2)
11. The appointing authority is statutorily mandated to provide written notice of G.L. c. 268A § 23 to the employee, following appointment and obtain signed written acknowledgment of receipt from the employee. *See* c. 268A § 23(f) "Upon qualification for office following an appointment or election to a municipal agency, such appointed or elected person shall be furnished by the city or town clerk with a copy of this section. Each such person shall sign a written acknowledgement that he has been provided with such copy."
12. No evidence was presented to show that the MPS complied with the mandatory notice requirement of c. 268A § 23(f). (Exhibits and testimony)
13. At the time of his suspension, the Appellant's gross weekly pay was $ 692.80
14. Twenty-nine (29) named persons, including the Appellant were indicted as a result of this State Police investigation. It was estimated that the Appellant was paid, probably on a weekly basis for his part in this gaming enterprise. The

Appellant was not one of the operators of this enterprise. He was not one of the targets of this investigation. Others were named as the operators of this "gaming operation". Some others were identified as "gaming agents" for the gaming organization. Others (operators) were targeted by search warrants at their home and banks and upon execution of the search warrants, $400,000 was seized at a bank and gambling paraphernalia was seized at the home of one of these named operators in Tewksbury. The Appellant appeared to be a low-level employee or a "clerk" of this gaming operation. He was paid probably "anywhere between five hundred and seven hundred dollars a week". He was intercepted and identified when he spoke with the office or operator of this betting enterprise. By telephone, he "either disseminated betting lines on games, took in bets and registered bets from bettors, or laid off, if you will, those bets with people." (Exhibit 4 and Exhibit 13, Court Colloquy, p. 8-9, Exhibits and testimony, Exhibit 9, Grand Jury Transcript, pp. 73, 74, 77, 79, 81,117)

15. The State Police log of intercepted telephone calls, listed those calls by: date, time, IN/OUT, participants' names, telephone number and a short summary of the content. However, the length of the calls, the owner of the telephone number and the actual location of the telephone are not listed. Also the phones are not identified as either cellular of land-line telephones. (Exhibits 9 and 10)
16. The State Police investigation of surveillance and telephone intercepts indicated that Casey was working for the gaming operation and that Casey's residence at 65 Comet Street, Methuen MA was one of the several addresses targeted as a "bookmaking office" for betting by telephone. This information was obtained by

the State Police through an intercept, on a certain cellular telephone number registered to another named person. That named person was one of the twenty-nine indicted as a result of this investigation. However, Casey was not an organizer or operator of the ring. He essentially was an employee of the ring and received a weekly salary. The organizers and operators of the ring were identified by the State Police, as other people. Also, Casey's residence was used by another named person, a clerk of the gaming operation. This clerk, "typically worked out of Mr. Casey's home in Methuen." (Exhibit 9, pp 28-31)

17. There was only evidence of the Appellant's general shift time (2PM-10PM) at the school, but not his specific days off or his use of personal, vacation and other time off. It is also assumed that the Appellant had break and meal time at his disposal during the shift, yet with no evidence of any use restrictions. However, testimony from Superintendent Whitten, who reviewed other documentation in addition to the State Police log, indicated that the Appellant was "clearly on duty time... for some of them". I accept Whitten's testimony and find that the Appellant was on duty time for some of the intercepted telephone calls listed in the State Police log. (Testimony of Whitten, Exhibits 9 and 10, reasonable inference)
18. On or about January 19, 2007, the District Attorney nolle prossed counts 2, 3 and 4. Count 2, c. 271, § 17 (did own or occupy a place for registering bets) Count 3, c. 271, § 17A. (conspiracy[c. 274, § 7] to violate the gaming laws); and Count 4, c. 271, § 16A (did organize or promote a gaming operation) (Exhibits 4 &13)
19. On January 19, 2007, the Appellant plead guilty to only Count 1, (misdemeanor) violation of c. 271, § 17A; for use of the telephone for gaming purposes on

diverse dates between October 12, 2005 and January 6, 2006, at Methuen. (Exhibits 1 & 7) He admitted "disseminated betting lines on games, took in bets and registered bets from bettor, or laid off … those bets with people". This offense is a misdemeanor and carries a maximum penalty of one year in the house of correction and a fine of not more than $2,000. (Exhibit 13; p.8-9)

20. The Appellant received unsupervised straight probation for a period of two (2) years and a $2,000.00 fine. (Exhibit 13, Colloquy, p. 14. 15)

21. The single count, a misdemeanor, to which the Appellant pled guilty, could be characterized as a regulatory offense or a statutorily prohibited act. This offense by nature is secretive and beyond the notice of most adults. It is highly unlikely that any student would understand it upon observation. This offense should not be considered a breach of trust offense, as the appointing authority considered it. Superintendent Whitten wrongly considered a plea to this offense to be functionally equivalent to a plea of guilty to a larceny, both requiring termination from employment. The very experienced Joseph Salvo, a long time MPS Business Manager, School Committee member and City Councilor disagreed with Whitten's decision. He believed that the Appellant should have received a reprimand and then reinstated in his position. The Appellant Casey did not plead guilty to a crime of moral turpitude or a crime that is considered to be *malum in se* or "evil in itself" but only to a crime that is *malum prohibitum* or "prohibited evil". *malum in se* is defined as - n. [Latin "evil in itself"] "A crime or an act that is inherently immoral, such as murder, arson or rape…"The basis for the distinction between *mala in se* and *mala prohibita,* [Pl.] between what one might

call a crime and an offense – or between what one might call a felony and a misdemeanor, if one could modernize those terms so that the latter was given its natural meaning -…" *Malum prohibitum*, n. [Latin "prohibited evil"] "An act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral…." Black's Law Dictionary, (Seventh Edition), Bryan A. Garner Editor, West Publishing Co. St. Paul MN, (1999), Page 371. (Exhibits, testimony of Salvo, and Whitten, reasonable inference)

22. Joseph Salvo, former Business Manager of the MPS testified that throughout his tenure of service to the City of Methuen: as an elected School Committee member for fourteen years, eight years elected to City Council and as Business Manager of the MPS for four and one half years, he witnessed a wide variety of disciplinary proceedings regarding city employees. After Appellant's appearance in the Superior Court in which all of the felonies charged were nolle prossed and he pled guilty to the misdemeanor, Mr. Salvo testified that the Appellant was in fact qualified and eligible for reinstatement to his position as custodian with the Methuen Public Schools. Upon questioning, Mr. Salvo's stated that his decision was based on his vast experience as a City Councilor, a School Committee member and as Business Manager with the City of Methuen, during which time he had an abundance of time to become familiar with such disciplinary proceedings regarding city employees. In making the determination that the Appellant's offenses were not of the nature to warrant termination, Mr. Salvo considered his own experience and all of the relevant circumstances and warned the Appellant that consequences of further such behavior could result in

termination. He told the Appellant that he would be issued a reprimand for the offenses. He then told Mr. Casey to report to Colleen McCarthy of Methuen Human Resources office in order to start the reinstatement documentation process and get back on the payroll. (Testimony of Salvo)

23. Salvo testified that the entire custodial staff, including head custodians and supervisors, is under his overall supervision in the chain of command. However, The Superintendent of MPS is above him. Whitten told him that he went beyond his authority in this matter of reinstating the Appellant. Whitten "overrode his order" and told him to telephone the Appellant and inform him not to return to work. Whitten was aware of the Eagle Tribune articles at the time of this conversation and override of his order. Salvo could not recall any other prior job termination for similar behavior or a misdemeanor conviction, with no prior discipline in his over twenty years of experience with the City. (Testimony of Salvo)

24. Colleen McCarthy, then Director of Human Resources for the MPS testified that she was present at a meeting with the Appellant, Salvo, Custodian Supervisor Andy Durso and others, in which it was determined to reinstate the Appellant or return him to employment after the resolution of the criminal matters. However, it was then determined that Superintendent Whitten's approval was needed for the reinstatement and that approval could not be obtained. (Testimony of McCarthy)

25. On February 23, 2007, the MPS served Appellant a Notice of a Just Cause Disciplinary Hearing pursuant to G.L. c. 31, § 41, due to his "voluntary plea of guilty" of violating G.L. c. 271, § 17A. "Said criminal conduct occurred" on

divers dates during the period between October 12, 2005 and January 6, 2006, while in the performance of his duties as an employee of the MPS. (Exhibit 5)

26. The Disciplinary Hearing was held by the MPS on March 13, 2007, and on March 14, 2007 the MPS terminated the employment of the Appellant. (Exhibits 5 &6)
27. On March 14, 2007 the MPS terminated the employment of the Appellant for the following stated reasons: **1.)** Being indicted and arraigned on four (4) criminal felony counts. **2.)** Entering a voluntary guilty plea on January 19, 2007 to a single count of violation of G.L. c. 271 § 17A (misdemeanor) occurring on divers dates between October 12, 2005 and January 6, 2006. **3.)** Said conduct occurring during the course of performance of your duties as an employee of the MPS. **4.)** During the course thereof you were paid for this criminal activity while simultaneously receiving a salary from the MPS. And **5.)** Knowingly and willingly participating in an ongoing criminal enterprise during the above-mentioned period.(Exhibit 6)
28. Superintendent Whitten was not then Superintendent at the time of the alleged events, police investigation and suspension of the Appellant. She reviewed all of the documentation including: the police records, grand jury transcript, court records, felony indictments including the Appellant's Colloquy with the judge on his plea. She read several of the newspaper articles regarding these events. She believed that the Appellant was using a telephone for gaming while on duty. She believed that the police telephone logs showed that although the Appellant had been on vacation for some of the calls, it also showed others to be "clearly on duty time". She considered the "notoriety" from the newspaper articles, the "embarrassment" from the public knowledge of gaming taking place on school

property where teachers and students were present and the risk for potential repeat offenses. She admitted that she had no evidence that any of the gaming activity had come to the attention of students or teachers. She admitted on cross-examination that she would have treated a conviction or a plea of guilty for "any offense" including a larceny, the same way she treated this gaming offense. She repeatedly and affirmatively stated in her testimony that the circumstances here and the plea of guilty established that "he can not be trusted" and the trust factor appeared to be the ultimate determining factor for her. (Testimony and demeanor of Whitten, reasonable inference)

29. The Eagle Tribune, a local newspaper, published numerous articles, many of which were front-page, depicting amongst other things that Mr. Casey was a major operator handling up to $500,000.00 in weekly wagers. Whitten had read at least several of these newspaper articles and had also heard discussions of the contents of the articles. She generally reads the Eagle Tribune every morning. She was aware of the reference to the figure of $500,000.00 in weekly wagers in the betting enterprise. The articles further contained allegations that Casey's home was the locus out of which this gambling ring operated. The Superintendent erroneously relied upon unsubstantiated facts, namely the aforementioned articles which significantly exaggerated Casey's role in the gambling operation. These articles incorrectly portrayed Casey as an integral part, an organizer or operator of this gaming ring and this perceived notoriety, based on the newspaper articles, ultimately formed a significant basis for the Superintendent's decision to initially

suspend him and eventually terminate him from his employment. (Exhibits, testimony, testimony and demeanor of Whitten, reasonable inference)

30. Superintendent Whitten testified that she had previously been employed in the public school systems of various cities and towns; including Melrose, Lincoln and Lowell. However she had never previously been involved in a disciplinary matter in which the employee had been terminated. This is her first termination disciplinary matter. She further testified that similarly another female custodian employed by the Methuen Public Schools System was arrested and charged with possession of cocaine. More specifically, the employee was arrested in a mall parking lot for purchasing the narcotics while her two small children were present inside her vehicle. That custodian later pled or admitted to sufficient facts conceding that the Commonwealth possessed sufficient evidence to convict her of the cocaine possession charge. However, the Court continued the matter without a finding and ordered the defendant to undergo drug treatment for her cocaine addiction. Unlike the Appellant here, this female custodian was neither disciplined nor sanctioned by the Methuen Public Schools System, only transferred from one school building to another. Further testimony revealed the female custodian worked the daytime shift where regular contact with students was likely if not inevitable. All of these circumstances of which Whitten was aware was substantial evidence of cocaine addiction with all of the liability, implications and problems associated with recidivism, student contact and continued illegal drug use, potentially on school property. Yet, Whitten failed to draw the nexus between this criminal drug offense or addiction and the female

custodian's more likely contact with students in her position of a day-shift school custodian. Whitten justified the lack of discipline for the female custodian based on no finding of guilty and the offense or arrest not taking place on school property. (Testimony of Whitten, reasonable inference)

31. No evidence was presented to show that the Appellant either failed to perform any of his assigned duties or performed any of his assigned duties in a less than satisfactory manner, due to his telephone or other alleged gaming related activities, or for any other reason. No evidence was presented to show that any MPS employees or students had observed or were aware of any of the Appellant's gaming activities. No complaints had been made about the Appellant's alleged gaming activities prior to the criminal indictments. (Exhibits and testimony)
32. The Appellant had no prior employment discipline before this present matter. Superintendent Whitten claimed to subscribe to the principle of progressive discipline. Whitten was aware that the Appellant had favorable witnesses testify on his behalf at the MPS disciplinary hearing and had strong letters of recommendation on file for his initial hiring. (Testimony of Whitten)
33. The Appellant chose not to testify at this Commission hearing. (administrative notice)

CONCLUSION

Under G.L.c.31, §43, a tenured civil service employee aggrieved by a disciplinary decision of an appointing authority made pursuant to G.L.c.31, §41, may appeal to the Commission. The Commission has the duty to determine, under a "preponderance of the evidence" test, whether the appointing authority met its burden of proof that "there was

just cause" for the action taken. G.L.c.31, §43. See, e.g., Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, (2006); 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. 331,334, rev.den.,390 Mass. 1102, (1983).

An action is "justified" if "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." 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). 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 the "merit principle" which governs 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.

The Appointing Authority's burden of proof is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) The Commission must take account of all credible evidence in the record, including whatever may fairly detract from the weight of any particular evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65 (2001)

It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. "[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance." E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003) (where live witnesses gave conflicting testimony at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing)

In performing its appellate function, "the commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew. . . . [after] 'a hearing de novo upon all material evidence and a decision by the commission upon that evidence and not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer' . . .For the commission, the question is . . .'whether, *on*

the facts found by the commission, there was reasonable justification for the action taken by the appointing authority *in the circumstances found by the commission to have existed* when the appointing authority made its decision.' " Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003) (affirming Commission's decision to reject appointing authority's evidence of appellant's failed polygraph test and prior domestic abuse orders and crediting appellant's exculpatory testimony) (*emphasis added*). cf. Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (inconsequential differences in facts found were insufficient to hold appointing authority's justification unreasonable); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (commission arbitrarily discounted undisputed evidence of appellant's perjury and willingness to fudge the truth); Town of Watertown v. Arria, 16 Mass. App. Ct. 331, 334, rev.den., 390 Mass. 1102, (1983) (commission improperly overturned discharge without substantial evidence or factual findings to address risk of relapse of impaired police officer) See generally Villare v. Town of North Reading, 8 MCSR 44, reconsid'd, 8 MCSR 53 (1995) (discussing need for de novo fact finding by a "disinterested" Commissioner in context of procedural due process); Bielawksi v. Personnel Admin'r, 422 Mass. 459, 466, 663 N.E.2d 821, 827 (1996) (same)

In reviewing the commission's action, a court cannot "substitute [its] judgment for that of the commission" but is "limited to determining whether the commission's decision was supported by substantial evidence" and is required to 'give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it. . .This standard of review is highly deferential to the agency on questions of fact and reasonable inferences drawn

therefrom.' " Brackett v. Civil Service Comm'n, 447 Mass. 233, 241-42 (2006) and cases cited.

G.L.c.31, Section 43 also vests the Commission with the authority to affirm, vacate or modify the penalty imposed by the appointing authority. The Commission has been delegated with "considerable discretion", albeit "not without bounds", to modify a penalty imposed by the appointing authority, so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. E.g., Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594,600 (1996) and cases cited.

> "It is well to remember that the *power to modify is at its core the authority to* review and, when appropriate, *to temper, balance, and amend*. The power to modify penalties permits the furtherance of uniformity and equitable treatment of similarly situated individuals. *It must be used to further, and not to frustrate, the purpose of civil service legislation, i.e., 'to protect efficient public employees from partisan political control' . . and 'the removal of those who have proved to be incompetent or unworthy to continue in the public service'*."

Id., 39 Mass.App.Ct. at 600. (emphasis added). See Faria v. Third Bristol Div., 14 Mass.App.Ct. 985, 987 (1982) (remanded for findings to support modification)

In deciding whether to exercise discretion to modify a penalty, however, the commission's task "is not to be accomplished on a wholly blank slate. After making its de novo findings of fact, the commission must pass judgment on the penalty imposed, a role to which the statute speaks directly. [Citation] Here, the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether if "the circumstances found by the commission" vary from those upon which the appointing authority relied, there is still reasonable justification for the penalty selected by the appointing authority. "The 'power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded to the appointing authority." Falmouth v. Civil Service Comm'n, 61

Mass.App.Ct. 796, 800 (2004) quoting Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 600 (1996). Thus, when it comes to its review of the penalty, unless the Commission's findings of fact differ materially and significantly from those of the appointing authority or interpret the relevant law in a substantially different way, the commission is not free to "substitute its judgment" for that of the appointing authority, and "cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation."). Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited (minor, immaterial differences in factual findings by Commission and appointing authority did not justify a modification of 180 day-suspension to 60 days). See, e.g., Town of Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct. 796 (2004) (modification of 10-day suspension to 5 days unsupported by material difference in facts or finding of political influence); Commissioner of MDC v. Civil Service Comm'n, 13 Mass.App.Ct. 20 (1982) (discharge improperly modified to 20-month suspension); cf. School Committee v. Civil Service Comm'n, 43 Mass.App.Ct. 486, rev.den., 426 Mass. 1104 (1997) (modification of discharge to one-year suspension upheld); Dedham v. Civil Service Comm'n 21 Mass.App.Ct. 904 (1985) (modification of discharge to 18-months suspension upheld); Trustees of the State Library v. Civil Service Comm'n, 3 Mass.App.Ct. 724 (1975) (modification of discharge to 4-month suspension upheld)

The MPS based its discipline of the Appellant on G. L. c. 268A, §25. However, the authority under G. L. c. 268A, §25 of the employer to suspend or terminate an employee is limited. "Because the plaintiff was not indicted "for misconduct in [his public] office or employment," the sheriff did not have the power to suspend him under G. L. c. 268A,

Section 25" See. Robert M. Tobin v Sheriff of Suffolk County, 377 Mass. 212, 213 n. 3, (1978) and also See " We note that G. L. c. 268A, Section 23(f), as appearing in St. 1962, c. 779, gives the sheriff the power to take "appropriate administrative action as is warranted" where a court officer has pursued "a course of conduct which will raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust." *Tobin* at page 214 n. 6.

The SJC further stated that, "Not every misdeed or alleged misdeed by a court officer would require his removal from office, and yet some discipline or action to protect the public interest might be necessary. See G. L. c. 268A, Section 23(f)." The SJC in the Tobin decision makes a clear distinction between misconduct occurring while also holding an office or employment, but unrelated to it and "misconduct in that office or employment" and related to it. *Tobin* at page 214. Additionally, here with Casey, the MPS failed to satisfy the mandatory written notice and acknowledgement requirements of c. 268A, Section 23(f).

The Superintendent here with Casey, wrongfully utilized G.L. c. 268A, § 25 inasmuch as the legislative language clearly applies only to "indictment for misconduct in such office or employment and the term indictment implies or generally applies to a crime which is a felony. The Appellant was terminated from his employment as a custodian only after his plea of guilty to a single misdemeanor gaming offense, while all of the felony offenses were *nolle prossed.* The misdemeanor gaming offense to which he plead guilty could not be considered misconduct in such employment as it was unrelated to his employment in any definitive way. In Leavitt v. City of Lynn, 55 Mass.App.Ct. 12 (2002), G.L. c. 268A, § 25 was held not to apply to a situation where a human resource

manager of the city's school system was indicted on two charges arising out of his filing of a false claim in order to defraud an automobile insurer, where the human resource manager's duties did not include active involvement with students, his office was located in a school administration building, and the crimes committed were unrelated to his official duties. The Appellant-Casey's responsibilities – like Leavitt's – did not include teaching or contact with the student population and the misconduct committed was wholly unrelated to his official duties as a custodian.

The position of school custodian is not a position which involves a "special public trust" like a teacher or a police officer, which could thereby extend and magnify the position's responsibility for misconduct, as it has a special effect on the public trust. The special public trust position of a teacher or a police officer obviously includes the role model aspect of the position and with teachers especially, the impressionability or susceptibility of the students.

The circumstances of this appeal could be compared with those in Dupree , Ante., but the position of custodian contrasted with that special position of trust, a teacher. "There has never been an allegation, in the indictment or otherwise, that the plaintiff engaged in misconduct on school grounds, during work hours, or with school personnel or students." -"The issue before us is whether the plaintiff was indicted for misconduct "in . . . office or employment" within the meaning of G. L. c. 268A, Section 25. See Dupree v. School Committee of Boston 15 Mass App. Ct. 535, 536, p. 537 n. 3 (1982). An indictment for a crime arising from an employee's off-duty conduct is not generally considered misconduct in office under G. L. c. 268A, Section 25. Tobin v. Sheriff of Suffolk County, 377 Mass.212, 213 & n.3 (1979). There are, however, circumstances where the crime

charged, no matter where or when performed, is so inimical to the duties inherent in the employment that an indictment for that crime is for misconduct in office. Cf. Attorney Gen. v. Tufts, 239 Mass. 458, 482 (1921) (removal of district attorney under G. L. c. 211, Section 4); Opinion of the Justices, 308 Mass. 619, 627, 629 (1941) ("misconduct and mal-administration in their offices," Massachusetts Constitution, Part II, c. 1, Section 2. art. 8); Bunte v. Mayor of Boston, 361 Mass. 71, 76 (1972) ("misconduct in office" for purposes of G. L. c. 121B, Section 6, could be shown by the "intentional violation of a known and significant rule or duty inherent in the obligations of [the] office")." See Dupree at pp. 538-539 addressing the special and statutory obligation of teachers to their students regarding drugs: "Teachers, too, are in a position of special public trust. As role models for our children they have an "extensive and peculiar opportunity to impress [their] attitude and views" upon their pupils. Faxon v. School Comm. of Boston, 331 Mass. 531, 534 (1954). More particularly, they also have special obligations to their pupils as to drugs. This is so not only because of the "frightening increase of drug use among the students," Tenth Interim Report of the Special Commission on Drug Abuse, 1974 House Doc. No. 5308, at 11, but because G. L. c. 71, Section 1, inserted by St. 1974, c. 753, specifically requires that "instruction as to the effects of . . . narcotics on the human system . . . be given to all pupils in all schools under public control.

In view of this statutory duty and the legitimate concern over the use of drugs by students, we think it within the discretion of the school committee to consider the indictment for possession of cocaine with intent to distribute to be an "indictment for misconduct . . . in office." The school committee could reasonably have decided that the plaintiff's alleged conduct with respect to drugs violated a "known and significant . . .

duty inherent in the obligations of his office," Bunte v. Mayor of Boston, 361 Mass. at 76, which severely impaired his value as a teacher and was in direct conflict "with the message his teaching should impart," McLaughlin v. Machias Sch. Comm., 385 A.2d 53, 56 (Me. 1978). See Tomerlin v. Dade County Sch. Bd., 318 So. 159, 160 (Fla. App. 1975); Wishart v. McDonald, 500 F.2d 1110, 1115 (1st Cir. 1974). Cf. McCaffrey v. School Comm. of Haverhill, 352 Mass.516, 518 (1967)." *Dupree* at pp. 538-539

The position of police officer is also one of special public trust, on which the SJC stated following: "When a police officer is formally charged with participation in criminal activities, his capability of performing his responsibilities to the public is gravely challenged. An entity of government cannot permit him to exercise his powers as a police officer until the doubt raised by the challenge is dispelled." Cf. Mayor of Medford v. First Dist. Court of E. Middlesex, 249 Mass. 465, 470 (1924) (off duty conduct may be of such a nature as to show policeman "unfit to continue to act as a police officer"); Broderick v. Police Commr. of Boston, 368 Mass. 33, 42 (1975), cert. denied, 423 U.S. 1048 (1976) (inquiry into private matters of police officers appropriate in areas where "private conduct may be deemed to have spilled over into the realm of official concern").

The emphatic determination by the SJC, that the type of Appellant's found misconduct here is not an indictment for nor an act of "misconduct in office or employment" is clearly stated in *Dupree idem.* at page 539 by referencing the Tobin decision the Appeals Court there stated, "We recognize that Tobin v. Sheriff of Suffolk County, 377 Mass. at 213 n.3, indicates that an indictment of a deputy sheriff, an officer of the court, "arising from the alleged bribery of the mayor of Revere," is not an

indictment for misconduct in office under c. 268A, Section 25. Although there is considerable force in the plaintiff's argument, adopted by the trial judge, that such an indictment is incongruous with the position of trust held by a deputy sheriff, see G. L. c. 272, Section 54; see also Massachusetts Bar Assn. v. Cronin, 351 Mass. 321, 323, 326 (1966), we think Tobin is to be distinguished."

The language and purpose of G.L. c. 268A, § 25 was clearly misapplied to the Appellant in this matter. He was not indicted for nor found guilty of "misconduct in such office or employment" addressed by this statute. School custodian is not a position of "special trust", as outlined in the case law that would expand the application of the statute to include the Appellant's shown misconduct. The statute requires "misconduct in . . . office." Except for cases involving teachers, police officers and other such positions of "special trust".

Casey's misdemeanor guilty plea should have been determined under the guidelines of G.L. Chapter 31, the civil service law. G.L. c.31, § 1 Definitions. "Basic merit principles", shall mean (a) recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment; (b) providing of equitable and adequate compensation for all employees; (c) providing of training and development for employees, as needed, to assure the advancement and high quality performance of such employees; (d) retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected; (e) assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national

origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens, and; (f) assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions." (Emphasis added)

The Appellant Casey did not plead guilty to a crime of moral turpitude or a crime that is considered to be *malum in se* or "evil in itself" but only to a crime that is *malum prohibitum* or "prohibited evil". *malum in se* is defined as - n. [Latin "evil in itself"] "A crime or an act that is inherently immoral, such as murder, arson or rape..."The basis for the distinction between *mala in se* and *mala prohibita,* [Pl.] between what one might call a crime and an offense – or between what one might call a felony and a misdemeanor, if one could modernize those terms so that the latter was given its natural meaning -..." *Malum prohibitum*, n. [Latin "prohibited evil"] "An act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral...." Black's Law Dictionary, (Seventh Edition), Bryan A. Garner Editor, West Publishing Co. St. Paul MN, (1999), Page 371. Moral turpitude is defined as "1. Conduct that is contrary to justice, honesty, or morality....- such as fraud or breach of trust." And further defined as "Moral turpitude means, in general, shameful wickedness – so extreme a departure from ordinary standards of honest, good morals, justice or ethics as to be shocking to the moral sense of the community. It has also been defined as an act of baseness, vileness, or depravity in the private and social duties which one person owes to another, or to society in general, contrary to the accepted and customary rule of right and duty between people." 50 Am. Jur. 2d *Libel and Slander* §165, at 454 (1995) as quoted in Black's, *ibid* at 1026.

The nature of the offense to which Casey pled guilty is that of regulatory breach not a moral breach involving trust, in as much as the state is also in the gambling business with the State Lottery. Indeed, the Commission takes notice that the current Governor, as well as a considerable body of the legislature and the public, have expressed interest in expanding, not reducing, the scope of gaming activities within the Commonwealth. This was clearly a purely economic enterprise for Casey since he was paid probably on a weekly basis for his gambling activities. The economic or monetary factors regarding the Appellant were not clearly established by the evidence. However, the Court seems to have viewed it as an economic offense by virtue of the sentencing disposition on one (1) count, a misdemeanor, of straight probation for two (2) years and a $2,000 fine to be paid within 60 days of the disposition on 1/19/2007. The Court, at that time also *nolle prossed* the four (4) felonies at the request of the prosecutor.

Additionally, The MPS relied on G L. c. 268A § 25 to discipline the Appellant, yet failed to fulfill the mandatory notice requirement of G L. c. 268A § 23 (f): "Upon qualification for office following an appointment or election to a municipal agency, such appointed or elected person shall be furnished by the city or town clerk with a copy of this section. Each such person shall sign a written acknowledgement that he has been provided with such copy."

In another case the Appeals Court determined that there must be a "significant correlation" or "nexus" between the charged misconduct and his employment. The record of a proceeding before the Civil Service Commission supported its conclusion that a school superintendent had not demonstrated just cause for the termination of a custodian's employment based on his arrest for committing an unnatural act in a public park, in the

daytime but not during work hours, where there was no connection between that conduct and the custodian's fitness to perform his duties. School Committee of Brockton vs. Civil Service Commission, 43 Mass. App. Ct. 486, 489-492 (1997). Similarly to this present appeal, the arrest of the custodian in the *Brockton* case also received newspaper coverage. The Appeals Court in *Brockton* Ante at 491 determined "...that no evidence was presented of Wise being a threat to school children, coupled with his conclusion, adopted by the commission, of an absence of significant correlation between Wise's conduct and his employment indicates that the commission was satisfied that Wise had established that his discharge was based on factors unrelated to his fitness to perform his custodial duties." Additionally, Ante at 492, the Court determined that "...There is no indication that the trust imposed upon him by his custodial position is such as to render virtually any public indiscretion sufficient to support discharge, as in the case of a police officer".

The facts as found here regarding Casey shows that his transgression was not reasonably related to his fitness as an employee to perform in his position of custodian. The testimony of Joseph Salvo (former Business Manager for MPS and other City positions) clearly supports this claim based on his long prior experience in these matters. Salvo states that he made the determination that Casey's transgression was not so egregious or of a type to warrant termination. He told Casey that he would be reprimanded and warned him against further transgressions, but nonetheless told Casey to report to Human Resources in order to start the reinstatement process and get back on the payroll. However, Salvo was overruled by the appointing authority, Superintendent Whitten, who then initiated the termination process against Casey, relying on her personal, but legally untenable view of the relevant law.

It is also clear that the Appellant was discharged without regard for appropriate consideration of the principles of progressive discipline and disparate treatment based on the opinion and testimony of Joseph Salvo with his substantial and impressive relevant experience, who credibly testified that discharge was not the appropriates discipline for the Appellant's misconduct, as well as by Whitten's failure to even discipline the female custodian for arguably more serious and consequential misconduct, also resulting in a criminal court disposition. He did not receive fair and equitable treatment under the totality of the circumstances, pursuant to the civil service law and basic merit principles as defined in G.L. c. 31§ 1.

Finally, the evidence reasonable infers that the notorious, and in material part, mistaken publicity about the Appellant's role in the gaming operation, unduly influenced Whitten's decision, and perhaps, explains the excessive and disparate treatment meted out to the Appellant. This is another factor that the Commission considers relevant when weighing the reasonableness of what appears a disparate penalty imposed. See, e.g., Connolly v. Department of State Police, 22 MSCR 10 (2009).

Nevertheless, the Appellant did participate in an ongoing, illegal gaming operation for at three months, perhaps more. He received weekly monetary payments for his participation and at least some unquantified number of his telephone calls occurred during "duty time" that he was employed by the MPS, although there was no evidence that established whether he was on a break or the duration of the calls, nor was there evidence to establish that his calls interfered in any way with his custodial duties. Even though the Appellant performed all of his duties and assignments satisfactorily and no parents, students, teachers or other employees were aware of his illegal gaming activities;

he deserves discipline for his actions. Money was his motive to become involved in this illegal enterprise, without sufficient consideration to the potential consequences to his employer, the MPS, including notoriety or embarrassment. Thus, after carefully weighing and balancing the facts I found and applying the law appropriately to those facts, guided by equity, common sense and impartiality, I find that, this is an appropriate case in which the Commission should exercise its authority to modify the penalty imposed for the following reasons: (1) a mistaken interpretation of the law regarding the application of Chapter 268A to the Appellant's gaming activities as job related; (2) the undue influence of improper publicity; (3) evidence of disparate treatment of the Appellant; and (4) the Appellant's otherwise satisfactory employment with the MPS.

In sum, the MPS failed to show by a preponderance of the credible evidence in the record that it had just cause to discharge the Appellant as a school custodian for the reasons stated by the MPS. The appeal is allowed in part, and the discipline is modified and reduced from a discharge from employment to a suspension without pay for a period of one (1) year. However, the Appellant failed to testify at the Commission hearing,. In an effort to temper and balance this decision and its potentially distasteful impact on the taxpayers of Methuen for payment of back wages; The Appellant shall be reinstated to his position at a date one (1) year after his discharge date. However, that date shall be for civil service purposes (i.e. service seniority) only and not for compensation purposes. The Commission further exercises its authority under Section 43 and Chapter 310 of the Acts of 1996, and orders that the appointing authority's obligation to reinstate the Appellant with compensation shall be the date of receipt of this decision. In view of the nature of this relief, the Commission will allow the Appellant a period of 30 days to file a motion

for reconsideration on the issue of back wages. If that motion is filed, the Commission will entertain an appropriate request by MPS for discovery and further hearing on this aspect of the Commissions order, including any evidence of the Appellant's mitigation of damages, as to which the Appellant will be expected to testify.

For all of the above stated reasons, the appeal filed under Docket No. D1-07-124 is hereby ***allowed in part*** with a modified and reduced penalty as stated above.

Civil Service Commission,

Daniel M. Henderson,
Commissioner

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman-No; Henderson-Yes, Marquis-No, McDowell-Yes and Stein-Yes Commissioners) on November 4, 2010.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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:
Michael Manzi, Sr., Atty.
Peter J. McQuillan, Atty.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
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EUGENE CASEY,
Appellant

v. D1-07-124

METHUEN PUBLIC SCHOOLS,
Respondent

DISSENT OF CHRISTOPHER BOWMAN AND DONALD MARQUIS

We respectfully dissent.

The matter before the Commission is straightforward: Did the Methuen Public Schools have just cause to terminate Mr. Casey for engaging in criminal activity while on duty as a custodian at the Comprehensive Grammar School?

In all such disciplinary appeals, the Commission must determine if the Appointing Authority, at the time it issued the discipline, had just cause for termination and that the decision was free of any political considerations, favoritism and bias.

The hearing officer's conclusion that the decision to terminate Mr. Casey was based on considerations other than Mr. Casey's misconduct is not supported by substantial evidence. Respectfully, the fact that the Superintendent read about Mr. Casey's indictment in the local paper is not sufficient to establish bias on her part. Further, the hearing officer's conclusion that the Superintendent misconstrued the nature of the Appellant's criminal activity is not supported by the record. On the contrary, the reasons noted in the termination letter penned by the Superintendent on March 14, 2007 largely track the hearing officer's own findings.

Absent any such political considerations, favoritism or bias, the Commission's ability to modify the penalty is limited unless the Commission's findings of fact differ significantly from those reported by the Appointing Authority or the Commission interprets the law in a substantially different way.

As referenced above, the hearing officer's findings largely track those of the Superintendent including:

- The Appellant entered a voluntary plea of guilty to violating the provisions of Chapter 271, Section 17A of the General Laws, using a telephone for gaming purposes, a misdemeanor that carries a penalty of up to one year in the house of correction and a fine of $2,000 (Finding 19);
- The Appellant received $500 – 700 / week for engaging in this criminal activity (Finding 5);
- The Appellant engaged in this criminal activity while on duty as a custodian for the Methuen Public Schools (Conclusion, Page 27, Paragraph 3);
- The Appellant received unsupervised probation and a $2,000 fine (Finding 20).

The hearing officer, having made findings strikingly similar to those of the Superintendent, then embarks on a series of misplaced and unsupported conclusions of law to reach a result-driven decision to overturn the Appellant's termination.

In Finding 21, which we do not adopt, the hearing officer unilaterally determines that the Appellant's criminal activity, to which he entered a guilty plea, was nothing more than a "regulatory offense" as the Appellant's actions were "secretive and beyond the notice of most adults." Thus, according to the hearing officer, his actions do not warrant termination. This is absurd. Respectfully, the hearing officer has gone far afield here and applied the wrong standard to determine whether there was just cause for the Appellant's termination. Similarly, the hearing

officer's conclusion that Mr. Casey's misdemeanor guilty plea should have been determined under the guidelines of the civil service law's definition of basic merit principles is also misplaced and erroneous.

The hearing officer also erred by determining whether the City was justified in suspending the Appellant without pay, prior to his termination, under the provisions of G.L. c. 268A, § 25. The Appellant did not appeal that suspension and it is not before the Commission. Rather, the issue before the Commission is whether the Superintendent had just cause to terminate the Appellant under G.L. c. 31, § 43.

When applying the appropriate standard, there is overwhelming evidence to support the Superintendent's decision to terminate the Appellant. While on duty as a custodian, the Appellant engaged in criminal activity for which he eventually entered a guilty plea. No amount of revisionism can change this. In fact, the Appellant refused to tell his side of the story, opting not to testify before the Commission.

The Civil Service Commission should not be a safe haven for public employees such as Mr. Casey who engage in criminal activity while on duty. The Commission has improperly substituted its judgment for that of the Superintendent by overturning the Appellant's termination and imposing a 3 ½ year suspension without pay.

For these reasons, we respectfully dissent.

For the minority:

Christopher C. Bowman
Chairman
November 4, 2010