COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. **CIVIL SERVICE COMMISSION**
One Ashburton Place
Boston, MA 02108
(617) 727-2293

PAUL COKELY,
Appellant

v. D1-07-204

CAMBRIDGE SCHOOL COMMITEE,
Respondent

Appellant's Attorney:	Jaime DiPaola-Kenny, Atty AFSCME Council 93 Boston, MA 02108 617-367-6024 jdipaola@afscmecouncil93.org
Respondent's Attorney:	Laurie W. Engdahl, Atty. Collins, Loughran & Peloquin, P.C. 320 Norwood Park South Norwood, MA 781-762-2229 lendghal@collinslabor.com
Commissioner:	Daniel M. Henderson

DECISION

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, Paul Cokely, (hereafter "Cokely" or "Appellant") timely appealed the decision of the Appointing Authority, the Cambridge School Committee (hereafter "the School Committee") to terminate him as a Senior Custodian. A Full Hearing was held on at the offices of the Civil Service Commission on November 15, 2007 and March 5, 2008. As no written

notice was received from either party, the hearing was declared private. The witnesses were sequestered. Three audiotapes were made of the hearing.

FINDINGS OF FACT

During the hearing, twelve exhibits were entered into evidence by the Appellant and Appointing Authority. Based upon the documents entered into evidence and the testimony of:

For the Appointing Authority:

Ms. Lillian Rater, Family Liaison, Amigos Elementary School

Ms. Deborah Sercome, Principal, Amigos Elementary School

Mr. James Maloney, Chief Operating Officer, Cambridge School Department

For the Appellant:

Mr. Paul Cokely, Appellant

Mr. Steve Edmunds, Lead Custodian

I make the following findings of fact:

1. At the time of his termination, the Appellant was a tenured civil service employee in the position of Senior Custodian for the Cambridge Public School System. He began working for the Appointing Authority in 1990 in the title of Junior Custodian. From 1990 until 1997, the Appellant was assigned to Cambridge Rindge and Latin High School as a Junior Custodian. In 1997, the Appellant transferred to the Harrington School, an elementary school. (Testimony of Appellant)
2. In 1997, the Appellant took and passed the civil service examination for the position of Senior Custodian. Upon passing the examination, the Appellant bid for and

received the position of Senior Custodian at the Maynard School, an elementary school. The Appellant held this position until 2005. (Testimony of Appellant)

3. In 2005, the Appellant was assigned to the King-Amigos Elementary School as Senior Custodian. The King-Amigos is two separate schools: the King Elementary School and the Amigos Elementary School, a bilingual elementary school. The Amigos School and the King School share a single building. The Amigos School has a student population of approximately 310 students; the King School has approximately 250 students. Deborah Sercombe, the Principal of the Amigos School since spring 2007, is responsible for the operation and management of the school, which includes the supervision and evaluation of all staff, including Custodians working in her building. (Testimony of Rater and Sercombe)
4. James Maloney, the Chief Operating Officer of the Cambridge School Department, oversees all the non-academic staff, such as safety, information systems, custodians, food service, transportation and other functions. He testified that the School Department often rents its facilities to community and church groups on weekends, evenings and other non-school hours. During these events, a Custodian may be assigned to open the school and assist with set-up and clean-up before and following an event. These work opportunities are referred to as "details," and Custodians generally work these events on a voluntary basis. (Testimony of Maloney)
5. The Appellant volunteered for four different details to occur on Saturday, April 28, 2007. He was at the Amigos School for the first detail at 8:00 am; the Appellant next worked a detail in connection with a King School beautification project from 10:00 am to 3:30 pm. The Appellant was scheduled to begin working on the Hispanic

Writers Workshop at 4:00 pm. The final detail was to assist Steve Edmunds, Lead Custodian and also President of the Union, at the Cambridgeport School. (Testimony of Appellant and Sercombe)

6. The Appellant satisfactorily performed the first two details. At approximately 3:30 P.M., Ms. Sercombe called the Appellant over the school's intercom for assistance transporting folding chairs from the ground floor to the library on the second floor. The elevator was broken so the chairs had to be carried upstairs. The Appellant responded to Sercombe's call and was informed of the assistance needed to move the chairs upstairs. The Appellant told her that she should have asked him on Friday so that he could have scheduled another custodian to help him and that he was by himself today, and walked away without helping, leaving Ms. Sercombe, her husband and some parents later moved the chairs upstairs. (Exhibit 11 and testimony of Sercombe)
7. Ms. Sercombe testified that the Appellant was "clearly upset, agitated and preoccupied" that day. However, Sercombe in a written statement dated May 1, 2007, stated that "…After the library event, Paul appeared upset and disgruntled." (Exhibit 11 and testimony of Sercombe)
8. The Appellant testified that he attempted to transport the chairs but since he was the only custodian on duty, he was unable to independently move the cart normally used for such tasks. The Appellant stated that normally two custodians are needed to use the cart due to its heavy weight pushing it up the ramp and that the elevator in the building was broken. The Appellant testified that he did not refuse to do the job but stated to Sercombe that "I'll do the best I can" and help by carrying approximately

twelve chairs upstairs. He also testified that he was suffering from pain on that day due to a previous spinal cord injury he received while on the job. (testimony of Appellant)

9. The Appellant's third detail at the Amigos school was the Hispanic Writers Workshop. The permit for this event, signed by Ms. Rater, indicates that the Writers Workshop was to be in the cafeteria and the hours were listed as 3:30-6:00 pm, which including set up time. The permit indicated that 60-100 people would be attending and that food was being served. (Exhibit 12)
10. The Appellant testified that he was given no notification that food was to be served at the Writer's Workshop until 3:45 that day. He testified that he believed that more than 100 people were in attendance at the event. He also testified that if he knew food was being served he would have had another custodian assigned because clean up is greater and food events generally run later. He testified that he is normally notified of detail events either by a copy of the permit, or he is told by the faculty member running the event. He stated that he had not seen the Facilities Permit for this event ahead of time. On the permit itself, Faxed to Custodian is blank and dated, indicating it was not submitted to the Appellant. (Exhibit 12 and Testimony of Appellant)
11. Ms. Rater wrote a statement on May 1, 2007 which stated in relevant part, that "As I was setting up, I noticed that Paul was limping and as we spoke he seemed anxious and unhappy. I asked him what was wrong. He said he'd had a terrible week, probably the worst week in his life. I said to him it had been a hard week for me too, with all the activities and school events. He said to me, "If I had a gun I would shoot myself and some others too." Then he said, "I probably should not have said that." I

asked him if he was a religious person and if he prayed. He said he had been raised Catholic, but that he did not attend church and he did not pray anymore. I told him that I believed in the power of prayer and when I was going through difficult times praying helped me. I encouraged him to pray and said I would pray for him too. After the event I was still worried about the statement that he made. I worried that he might hurt himself or someone at school. I had no way of knowing if Paul meant what he said. The next morning, I called the principal Deborah Sercombe to let her know what Paul had said." It is noted that Lillian Rater made a mistake on the statement by incorrectly stating the date of the incident being Saturday April 26, 2007 instead of April 28, 2007. (Exhibit 9)

12. Lillian Rater testified that she has known the Appellant since 2003, when her school moved into the building. She had not had any prior disagreements or problems with the Appellant before this incident. Before her conversation with the Appellant, he did not look well or seem well to her that day. He seemed agitated and did not look like he could help out that day. Even after the conversation, he was just there but not helping. He seemed irritable and agitated. She admitted that her conversation with the Appellant included her revealing that her son had terrible acne and the Appellant also revealing that he was not close with his wife or children. She admitted that she omitted this part of the conversation in her written statement of May 1, 2007. (Testimony of Rater)

13. The Appellant testified that as Ms. Rater was bringing in bags with food to her office and the cafeteria, he informed her that she should have given him prior notice for the food and that normally food necessitated two custodians. He also told her that she

only had a permit for two hours and would now run over the allotted time because of the food service. The Appellant further indicated that clean up for the food would result in his tardiness for the fourth detail at the Cambridgeport School. (Testimony of Appellant)

14. The Appellant testified that Ms. Rater responded to his comment about the food by apologizing. She further stated that her life had been so stressful lately and she was worried about her son who was suffering with terrible acne. The Appellant testified that he, in turn, made a comment that she did not know what stressful was, his life had been crazy for the last month and said, "If I had a gun, I'd shoot myself." The Appellant then stated, "I probably should not have said that." (Testimony of Appellant)

15. Ms. Rater testified that the Appellant entered her office with her and she asked him what was wrong. The Appellant stated to Ms. Rater that he had had a terrible week. Ms. Rater stated that she, too, had a difficult week. She testified that the Appellant then stated, "If I had a gun I would shoot myself and some other people too." The Appellant thereafter stated to Ms. Rater "I probably shouldn't have said that," or words to that effect. (Exhibit 9 and testimony of Rater)

16. Ms. Rater stated that she became immediately uncomfortable and nervous, and attempted to redirect the conversation by discussing her son's recent stresses over acne and her view of the power of prayer, to which the Appellant replied that he was raised Catholic but did not practice religion. (Testimony of Cokely and Rater)

17. The Appellant testified that he absolutely did not at any time during the conversation with Ms. Rater say he would shoot other people. He testified that he does not own a

gun, has never attempted suicide or harmed himself in any way, and did not wish harm to anyone including the students or teachers at the King-Amigos School. The Appellant also stated that he has never been arrested for assault or domestic violence, and does he consider himself to be a violent person. I credit his testimony. (Testimony of Appellant)

18. The Appellant testified that when he stated, "If I had a gun, I'd shoot myself" he was merely using an expression common in his home growing up. His mother used the expression regularly as a hyperbolic expression when she was overwhelmed or under pressure. He did not did not mean or intend anything but hyperbole, by using the phrase. I credit his testimony. (Testimony of Appellant)
19. The Appellant testified that he was recently divorced, his father was in a nursing home and he was having financial difficulties. He stated that he was also stressed because he believed that he would be late getting to his next detail, which was scheduled to begin at 6:00 pm.
20. After the conversation with Ms. Rater, the Appellant called Edmunds to tell him he would be late to his detail at the Cambridgeport School. Edmunds testified that the Appellant did not seem agitated or upset on the phone. He stated knows the Appellant well since the two have worked together for all of the Appellant's seventeen years with the School Department. (Testimony of Edmunds)
21. The Appellant spent two and one half to three hours assisting with the Writer's Workshop and clean up. During this time, Ms. Rater, Ms. Sercombe and approximately one hundred parents and children were present. At no point did Ms.

Rater approach anyone, including Sercombe regarding the Appellant's alleged threat. (Testimony of Appellant, Rater, and Sercombe)

22. After the Writer's Workshop, the Appellant traveled to the Cambridgeport School for his fourth detail. Edmunds testified that when the Appellant arrived at the school his demeanor and tone of voice seemed fine and that the Appellant never mentioned harming himself or anyone else during the detail. Edmunds stated that in his opinion the Appellant did not act or talk like a threat to anyone. (Testimony of Edmunds)
23. Ms. Rater testified that she did not know who the Appellant was referring to by his comments, but that he may have been directing his statements at the Principal Deborah Sercombe. She stated that throughout the Writer's Workshop, she debated whether she should report the threats. Ms. Rater testified that when she got home that night she discussed the Appellant's statements with her husband, who is a psychiatrist, and he advised her to report them. (Testimony of Rater)
24. The next morning, Sunday, April 29, 2007, Rater called Principal. Sercombe and informed her that she was very concerned about the Appellant and had been concerned the day before during the event. Ms. Sercombe testified that Ms. Rater explained that the Appellant had stated to her "if I had a gun I would shoot myself and some other people too." (Testimony of Sercombe)
25. I do not find that Rater is accurate in her testimony that the Appellant spoke the words: "…and some other people too.". These additional words were convincingly denied by the Appellant. They seem to be add-on language, not naturally sounding or spoken and ringing untrue. Rater may not intentionally have fabricated this language but rather by mistake or trick of memory arrived at this version. Upon reflection after

review with her husband the add-on language was reported to Sercombe the following morning. If Rater were truly worried about the statement she heard, she would have relayed it to Sercombe or someone else during the critical 2-3 hours immediately after hearing it. It also would seem to be out of character for the Appellant to make such a statement, judging by his past behavior and demeanor. However, it would not be out of character for the Appellant to seek sympathy, when under stress, by making a hyperbolic statement. The Appellant had heard his mother often use the statement,(If I had a gun, I'd shoot myself) in his childhood , as hyperbole, in reaction to stress and probably seeking empathy.(Testimony and demeanor of Rater and Appellant)

26. Sercombe only knew what was relayed to her by Rater and her expression of concern was premised on the accuracy of those words and an inference of intent and capacity to carry out, based on that accuracy. However, she had recently suspended the Appellant and given him a poor performance evaluation, and discussed the matters with the Appellant in her office, all without incident or concern on her part. She had known the Appellant since 2003 and came to find that he was underperforming as a custodian. However that was not a new circumstance and the Appellant had reacted in a non-violent and non-threatening manner to being called on the carpet. The Appellant's typical response to this type of adversity is described elsewhere in these findings. She testified that she took a normal course of action, by contacting the Cambridge Police Department immediately, and asked them to get in touch with the School Department's Chief of Safety and Security, John Silva. Ms. Sercombe also spoke with Mr. Silva that day and communicated the information to him. She stated that she also called Dana Ham, the Director of Facilities, to learn if the Appellant was

scheduled to work that Sunday and found out that he was working a detail that day. Sercombe's reaction is a normal, precautionary and responsible response to the information received from Rater. (Testimony of Sercombe)

27. The Appellant testified that on April 29, 2007, at approximately eleven o'clock A.M., he reported to work a detail at the King-Amigo School and was in his office when the Cambridge Police knocked on his office door. The Police asked him if he had any plans to hurt himself and he replied no. The Appellant was "pink slipped" and escorted by the police to Cambridge Hospital psychiatric ward, for evaluation and spent six hours there. He was found not to be a danger of harm to himself or others and released. However, he was also determined to be depressed and counseling or treatment was recommended. (Testimony of Appellant and Sercombe)
28. Mr. Maloney testified that the next day, Monday April 30, 2007, he held a meeting to determine whether there was sufficient evidence to move forward with a disciplinary hearing. He stated that there was sufficient evidence that the Appellant made the threatening statement and determined he had an obligation to provide a safe environment for the staff and 500 children in the two schools, noting that the shootings at Virginia Tech had occurred less than two weeks earlier. Again, this determination is premised on a determination of intent, based on the accuracy of Rater's conveyance of the language "…and some other people too." (Evidence, testimony, testimony of Mahoney)
29. The Appellant was immediately placed on administrative leave by Maloney. (Ex. 3)
30. Prior to the events giving rise to this appeal, the Appellant's disciplinary record included repeated absences without notice or authorization, and excessive

absenteeism. Specifically, his record included a February 6, 2006 one day suspension for failing to report for work or notify a supervisor of his absence and for excessive use of sick leave, a September 18, 2006 three day suspension, as well as a corrective action plan, for failing to report for work or notify a supervisor of his absence and for excessive use of sick time, and a five day suspension on or about March 1, 2007: four days for his continued excessive use of sick time and one day for his failure to adhere to custodial cleaning standards. The Appellant was also reassigned to the Plant Maintenance Office for a three week training period following his suspension, to assist him in "obtaining proper fundamentals of a successful Senior Building Custodian." However, the Appellant had never resorted to violence or threats of violence to these disciplines or adversity. These events and the other personal disappointments in the Appellant's life may have been the source of his apparent depression. (Exhibit 2, testimony of Rater, Sercombe and Appellant)

31. The Appellant did not have any prior discipline for violence, threats or similar behavior, in his criminal or work record. (Testimony of Appellant and Sercombe)

32. On or about Thursday, April 26, 2007, Principal Deborah Sercombe had met with the Appellant, in her office to present him with his performance evaluation. Apparently Sercombe was alone in her office with the Appellant, when she presented the evaluation. Sercombe rated the Appellant as not meeting Departmental standards. The Appellant was advised to improve his attendance, which would lead to improved leadership and supervisory skills, and to be more consistent in the level of cleaning throughout the building. Although it was an unsatisfactory evaluation, the Appellant remained sitting with his arms folded "very quiet, very still and very controlled"

despite being "somewhat upset". The Appellant then refused to sign the evaluation, as requested by Sercombe at the end of the meeting. (Exhibit 10, testimony of Sercombe)

33. Principal first met the Appellant in 2003, when the two schools merged. She has had supervisor authority over the Appellant since then, except for the three weeks he was under another person's supervision for remedial training purposes. She interacted with the Appellant on April 28, 2007, the date in question. He appeared to be upset and agitated that day. Sercombe was not aware that it took two people to operate the cart for carrying chairs. She also not aware that the Appellant was suffering from a spinal cord injury and was in pain on the date in question. (testimony of Sercombe)
34. On May 9, 2007, a hearing was held before a Hearing Officer. The Hearing Officer's findings are contained in a memo dated May 10, 2007. The letter outlines the charges as follows: "Your alleged threat made on Saturday, April 28, 2007 while on school property in the presence of the family liaison of the Amigos School to take a gun and kill yourself and several other individuals at your place of employment or words to that effect." This language is at variance with the language stated in Lillian Rater's memo of May 1, 2007. The Hearing Officer's memo states the Appellant's denial: "…but denied stating that he would kill others too or words to that effect." The Hearing Officer's memo points out in several places, the doubt or indefiniteness of the pivotal language attributed to the Appellant. The memo also references the significant level of administrative disruption, worry and concern, which resulted. It mentions the Virginia Tech shootings which had occurred 10 days before. These are

emotionally inflammatory references to the prejudice of the Appellant. (Exhibit 4 & 9, reasonable inferences)

35. By letter dated May 14, 2007, the Appointing Authority terminated the Appellant. (Ex. 5)

36. The Appellant testified that he had a court date for a criminal complaint application for the alleged threat. He testified that nobody appeared for the Cambridge Schools and that the Clerk then left it open for six months until it was eventually dismissed. (Testimony of Appellant)

37. Throughout his testimony, the Appellant made good eye contact, was unhesitant, clear, concise and consistent. He is bright and has three years of college education He exhibited the tone, delivery and mannerism of a straight-forward and honest witness. When he was factually corrected, he readily admitted the fact. He was able to clearly recall the events in question and appeared sincere and truthful. He is a person who would apply a rule or practice with precision to justify his position, even if uncooperative but has no history of making threatening or violent statements or even veiled threats. On the contrary, he follows a pattern of being quiet or reticent in a stressful situation, as in his evaluation review with Principal Sercombe. I find the Appellant to be a credible and reliable witness. (Exhibits and testimony, Testimony and demeanor of Appellant)

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). *See* 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". Id. 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 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". 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).

The Appointing Authority's burden of proof is one of preponderance of the evidence which is established "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). In reviewing an appeal under G.L. c. 31, § 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 shall 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 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". Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). *See* Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-727 (2003).

It is the role of the Commission to assess the credibility of each witness. Ultimately, the Commission is the "sole judge of the credibility of the witnesses before it and of the weight to be given to the evidence presented." Boston Police Superior Officers Fed'n v. Civil Serv. Comm'n., 35 Mass. App. Ct. 688, 695 (1993).

In the present case, a credibility assessment must be made to determine exactly what took place and was said in Lillian Rater's office on April 28, 2007 between the two persons present when the alleged threat was made, the Appellant and Ms. Rater. The Appellant admitted stating, "[i]f I had a gun I'd shoot myself" but maintained he never stated that he would harm other people, specifically denying that he ever stated the words, "and some other people." Ms. Rater's testimony that the Appellant said, "If I had a gun I would shoot myself and some other people too" is not a statement that sounds or rings true. It sounds contrived or unnatural. Rater may have added the "…and some other people too" later, in augmentation in her mind or her memory. In any event, she did not

alert anyone at the critical 2-3 hour time frame of the statement. She waited until the following day, upon reflection after discussion with her husband. Rater also omitted from the written statement she provided to the Appointing Authority that she was complaining to the Appellant about her worry over her son's terrible acne and that the Appellant revealed that he did not have a good relationship with his wife and children. Yet, she admitted in her testimony that this was part of the conversation. This fact is important because this personal information is what led the Appellant to also reveal his feelings about being under stress or depressed. The circumstances indicate that both parties spoke as if it were a private, personal conversation in which they each unloaded private information about themselves. Further, Ms. Rater testified that the Appellant allegedly made the threat at approximately 3:45 PM during the set up time for the start of the 4:00 PM Writer's Workshop. The Writer's Workshop was scheduled to end at 6:00PM but may have run later, with the clean-up time. Principal Sercombe remained at the school until the clean-up was completed. The Writer's Workshop was set to have approximately sixty to one hundred people in attendance, including many children. Yet, Lillian Rater did not approach anyone, including Sercombe to notify them of the threat. Rather, she engaged in the activities until the completion of the clean-up. Her action, or lack of action for two to three critical hours, indicates that she was not truly afraid for herself or others.

Significantly, in order to credit Rater's version of the events and impute intent to the Appellant, one must find that the Appellant was intending on shooting himself and some other unnamed person(s), if he had a gun. However, there is no reliable evidence linking the Appellant's statement to identifiable persons. The indefiniteness of the language attributed by Rater to the Appellant is plain and obvious, when comparing the

several exhibits containing the alleged statement. The "catch all" phrase of: "or words to that effect" is used repeatedly in the Respondent's findings, a few weeks after the incident. The Appellant was a long term employee with past discipline for tardiness, absenteeism and related behavior. He has never been charged with, disciplined for or accused of engaging in violence or threats of violence prior to this incident. Indeed, he had recently been involved in an adversarial evaluation situation with Principal Sercombe yet, did not resort to boisterous or threatening behavior then. Sercombe did not anticipate or experience any threats from the Appellant despite the Appellant being upset at the time. The evidence shows that the Appellant follows a the pattern of showing his displeasure, by being quiet or reticent to speak or by being less than cooperative, while citing a technicality as a defense, such as the school's failure to comply with a notice requirement or other practice. The Appellant is advised that in the future he should perform the designated assignment and later grieve or sort out the notice procedure. The Appellant has shown himself to be a less than cooperative employee, but he is not an employee who makes threats. This conclusion that he made a conditional threat ("If I had a gun") is further unsupported by the evidence as it is undisputed that the Appellant did not own or possess a gun at the time of the incident. He had not been seen with a gun. He had not been known to ever have threatened anyone with or without a gun. Accordingly, the condition precedent to the alleged threat—if I had a gun—could not be met.

Additionally, The Respondent's strong administrative response to this alleged incident; involving many people, seems to have accumulated and become the driving force behind its determination. I also credit Edmunds' testimony that he spoke with the Appellant, by telephone, within minutes of the alleged threat and the Appellant did not

seem agitated or upset. Edmunds also worked with the Appellant at another detail, after the Writer's Workshop event and testified he did not seem agitated or aggressive at this time either.

Based on the above, when weighing the testimony of these two witnesses, I credit the Appellant's version of events during the day in question. I find that the Appellant stated, "If I had a gun, I'd shoot myself." He testified convincingly that this phrase was something he'd hear regularly from his mother while growing up and used by her as hyperbole to connote stress but not an intention to actually harm anyone. Further, the Appellant was taken to the Cambridge Hospital psychiatric ward and examined. He was shortly released after being found not to be a threat to himself or others. However, the Appellant was determined to be suffering from depression and outpatient treatment or counseling was recommended. Moreover, both Ms. Rater and the Appellant's accounts are consistent that the Appellant immediately attempted to retract, after making the other admitted comment; "…I'd shoot myself." and said, "I should not have said that." This retraction is further evidence of the Appellant's state of mind and that the statement was not a threat or intended to be taken as a threat. The Respondent apparently chose not to pursue the matter in the criminal and/or civil court system. The Respondent failed to appear at the criminal clerk's hearing regarding a criminal complaint for threats. The Respondent also failed to seek any relief while the criminal complaint application was left open for six months prior to its dismissal. The Respondent also failed to seek a civil restraining order, or stay-away order against the Appellant under c. 209A or other statute.

The timing of Appellant's statement was understandably of much concern to the Respondent as it occurred within two weeks of the shootings at Virginia Tech. However,

the Appellant is a seventeen year veteran of the Cambridge Public School System. Nothing in his employment or personal history indicates a proclivity towards violence and he has never been disciplined for aggressive or hostile behavior. The evidence presented to this Commission was that the Appellant was of sound mind and was not a harm to himself or others, at the time of the alleged incident. He was released by the Cambridge City Hospital six hours after he was initially taken into custody and the criminal charges against him were dismissed.

In sum, I find that the Appointing Authority did not show, by a preponderance of the credible evidence in the record, that it was reasonably justified to terminate the Appellant. The Cambridge Hospital apparently did not find the appellant to be a threat of harm to himself or others but did find that he may have been suffering from depression at that time. The Appellant's behavior at the time also indicates depression. Therefore, I believe that both parties were remiss in not seeking to have the Appellant initially evaluated for counseling or other assistance through the Employee Assistance Program or other such program.

For all the above stated reasons, the Commission determines that by a preponderance of the evidence there was not just cause for terminating the Appellant from employment.

Although the Appellant did have a past disciplinary record for rules infractions and did act otherwise in an uncooperative manner, on the date in question; he was only charged and disciplined in this matter for making an alleged threat on April 28, 2007.

The Commission, orders that the Appellant be returned forthwith to his position, without any loss of pay or other benefits.

For all of the above reasons, the appeal under Docket No. D1-07-204 is hereby ***allowed***.

Civil Service Commission,

_____
Daniel M. Henderson,
Commissioner

By vote of the Civil Service Commission (Henderson, Taylor and Stein Commissioners), Marquis voted No [Bowman absent]on January 22, 2009.

A true record. Attest:

_____
Commissioner
CIVIL SERVICE COMMISSION

A motion for reconsideration may be filed by either Party within ten days of the 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 § 14(1) for the purpose of tolling the time for appeal.

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:

Jaime DiPaola-Kenny, Esq.
Laurie W. Engdahl, Esq.