THE COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

WILLIAM TIMPERLEY,
Appellant

v.

TOWN OF BURLINGTON,
Respondent

Docket No.: D-09-163

Attorney for the Appellant:

Daniel W. Rice, Esq.
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639 Granite Street, Suite 203
Braintree, MA 02184

Representative of Respondent:

Darren R. Klein, Esq.
Kopelman and Paige, P.C.
101 Arch Street, 12th Floor
Boston, MA 02110

Hearing Officer:

Angela C. McConney, Esq.

DECISION

The Appellant, William Timperley (hereinafter "Appellant"), pursuant to G.L. c. 31 § 43, has appealed the February 2, 2009 decision of the Burlington Public Schools (hereinafter "Respondent") suspending him for two (2) days and removing him from its overtime list for a period of thirty (30) days for unacceptable behavior towards a staff member on January 20, 2009. The appeal was timely filed with the Civil Service Commission (hereinafter "Commission"). A full hearing was held on September 23, 2009 at the offices of the Commission. The hearing was digitally recorded. Copies of the hearing were forwarded to the parties, and a copy is retained by the Commission.

The parties agreed to submit post hearing briefs to the Commission within thirty (30) days.

On October 22, 2009, the Appellant filed an assented to Motion as to Interim Disposition of Appeal. On October 26, 2009, the Appellant filed an assented to Amended Motion as to Interim Disposition of Appeal. The Appellant sought to (1) dismiss the appeal without prejudice; (2) toll the period in order to file a Motion for Reconsideration and to seek judicial review; (3) in the event the parties cannot come to settlement, the Commission shall accept a Motion for Reconsideration under the same docket number and without an additional filing fee; and (4) said Motion shall be filed within one hundred and eighty (180) days.

The Commission entered an Order of Dismissal without Prejudice on October 29, 2009.

The Appellant filed a Motion for Reconsideration on March 22, 2010. The case was reopened under the same docket number of D-09-163. The parties agreed to submit post hearing briefs to the Commission by May 7, 2010. On May 4, 2010, the parties sought an extension of time until May 21, 2010 in order to submit the briefs. That request was ALLOWED. The Commission received the Appellant's post hearing brief on May 19, 2010. The Commission received the Respondent's post hearing brief on May 21, 2010.

FINDINGS OF FACT

Seven (7) exhibits were entered into evidence. Based on these exhibits and the testimony of:

For the Appointing Authority:

- Kerri Lynne Foley, Teacher and Girls Gymnastics Coach, Burlington High School
- Patrick Larkin, Principal, Burlington High School
- Dr. Eric Conti, Superintendent, Burlington Public Schools
- Christopher Mason, Custodian, Burlington High School

For the Appellant:

- Appellant, William Timperley
- Richard Baczewski, Boys' Gym Coach

I make the following findings of fact:

1. The Appellant has served as a junior school custodian for the Respondent since March 31, 2000. He was last assigned to Burlington High School. (Testimony of Appellant)
2. The Appellant has a myriad of health issues. He has suffered an aneurysm and a stroke. He is blind in one eye and has a cataract in the other. He uses a cane to walk, is hearing impaired, unable to write fast, and has difficulty processing information. (Testimony of Appellant)
3. As part of the Union's contract with the Respondent, a custodian must be present if there is an event in a school building. (Testimony of Larkin)
4. Superintendent Dr. Eric Conti (hereinafter "Dr. Conti") is the appointing authority for all school custodians. (Testimony of Conti)
5. Patrick Larkin (hereinafter "Principal Larkin") has been the Principal of Burlington High School since September 2007. (Testimony of Larkin)
6. The Appellant has received letters in regard to unsatisfactory performance over the years, but no suspensions. (Exhibit 4) These letters were placed in his file, and those incidents are documented as follows:
7. On May 8, 2000, Bob Marsh, the Senior Custodian (hereinafter "Marsh") wrote to the Appellant after teachers complained about the condition of floors in their classrooms. Marsh reminded the Appellant that he had to dry mop and spot mop his assigned classrooms monthly, and that he was also responsible for washing the stairwell once a week. (Exhibit 4)
8. On December 22, 2000, the Appellant made an inappropriate comment to the girlfriend of William Conners (hereinafter "Conners"), another custodian. The Appellant apologized when Conners registered his displeasure. Upon his complaint, Conners met with the Sexual Harassment Complaint Management Facilitators Katie Spinos, who also served as Assistant

Superintendent for Curriculum/Instruction (hereinafter "Spinos") and J. Kevin Foley (hereinafter "Foley"), Director of Pupil Services on January 3, 2001. Craig Robinson, the Director of Buildings and Grounds for the entire school district, (hereinafter "Robinson") was also present at the meeting. Robinson reported that he had spoken to the Appellant, and ordered him to keep his distance from Conners and to avoid any confrontations. He also reported that he asked Conners to inform him of any further complaints. (Exhibit 4)

9. On January 5, 2001, the Appellant met with Spinos, Foley, Robinson, and Robert Ganley, representative of the custodial union. (Exhibit 4)
10. Because of his infirmities, the Appellant was permitted to record the meeting upon the condition that he present a copy to Spinos and Foley. The Appellant informed the group that he had apologized for his conduct, and that if necessary, he would do so again. He also said that he did not know if his behavior made the woman uncomfortable. (Exhibit 4)
11. The meeting resulted in the Appellant being given another copy of the School Committee's policy concerning sexual harassment. While the Sexual Harassment Complaint Management Facilitators found that the Appellant's behavior didn't rise to the level of a violation of committee policy, they found that his remarks were inappropriate in a work setting. (Exhibit 4)
12. The Committee recommended that (1) Robinson meet with the Appellant to reiterate and review their findings; (2) that the Appellant be told that although this incident was not in violation of School Committee Policy, similar behavior could be found a violation in the future and result in further action; and (3) that Robinson should memorialize the meeting in the form of a letter to the Appellant. Robinson memorialized the meeting in a letter to the Appellant dated on February 2, 2001. (Exhibit 4)

13. On March 27, 2002, the senior custodian sent the Appellant a letter detailing that there was no toilet paper in four of the girls' bathroom stalls, and in one of the boys' bathroom stalls. The senior custodian also noted that the light outside the bathroom had not been changed since the previous Friday. (Exhibit 4)
14. Around July 2003, the Appellant received a one (1) day suspension. On his behalf, the Union filed a grievance with the Board of Conciliation and Arbitration. In 2007, the Appellant entered in a last chance agreement with the Respondent, which reduced the one (1) day suspension to a written reprimand. The agreement stated that the reprimand would be removed from the Appellant's file provided he received no further discipline by April 1, 2008. In consideration of the Respondent's concessions, the Union withdrew its grievance and arbitration with prejudice. Because of the Appellant's compliance, there were no previous suspensions on his record, and this 2003 was not considered in the determination of his discipline. (Exhibit 5)
15. In September 2006, there was an incident between the Appellant and another custodian. As a result, the Respondent placed a letter in the Appellant's file documenting that (1) he had created a hostile work environment for other employees, (2) that his continued behavioral outbursts would not be tolerated, and (3) that another occurrence of untoward behavior could be grounds for dismissal. The Appellant was ordered to attend a mandatory stress management program. (Exhibit 4)
16. In the Fall of 2008, Principal Larkin verbally warned the Appellant about his behavior. Students were waiting for rides home when the Appellant told them that he would call the police if they didn't leave. Principal Larkin advised the Appellant that the school should always know if police action were involved. The principal further advised him not to take

matters into his own hands when dealing with students, but to instead report those issues to the Principal. (Exhibit 1, Testimony of Larkin).

17. Kerri Lynn Foley (hereinafter "Foley"), a second grade teacher, has been the varsity girls' gymnastics coach at Burlington High School since September 2004. (Testimony of Foley)
18. On January 20, 2009, the Appellant was working overtime while Foley's team was participating in a gymnastics meet against Arlington. (Testimony of Appellant, Testimony of Foley)
19. The Appellant was present in order to perform his janitorial duties of supplying toilet paper, hand towels and soap. It was also his duty to clean up any messes that could occur in the bathrooms or in the gym during the meet. To be readily accessible in case of any accidents, he had to remain in the general area. (Testimony of Appellant)
20. After the meet, Foley dismissed the girls. (Testimony of Foley)
21. It was the Appellant's practice to have the teacher or coach present sign his overtime sheet in order for him to be compensated. He testified that he had been having his overtime slips signed for nine (9) years. (Exhibit 6)
22. In an excited and aggressive manner, the Appellant approached Foley waiving a folded piece of paper in the air while loudly stating: "You need to sign this." When she asked what the piece of paper was, the Appellant spoke even louder, and said, "You know exactly what it is." (Testimony of Foley)
23. Foley testified that she was uncomfortable signing something that she didn't understand. In her five (5) years of coaching, she had never signed an overtime slip for a custodian. (Testimony of Foley)

24. Richard Baczewski (hereinafter "Baczewski"), the boys' gym coach, testified that in his twenty-three (23) years of coaching he has only signed about two (2) overtime slips. (Testimony of Baczewski)
25. The Appellant was angry and agitated, moving closer and closer to Foley while continuing to speak in a loud voice. (Testimony of Foley)
26. The only other people left in the gym were a student and her mother who were leaving through the far doors of the gym. Most of the remaining students were in the gym lobby waiting for rides home. (Testimony of Foley)
27. Foley testified that she now felt unsafe because there was no one left in the immediate vicinity and the lights were off. She then left the gym and went and put her belongings in her vehicle. The door she went through could not be opened from the outside. (Testimony of Foley)
28. After a few minutes, Foley reentered the school via another entrance and went into the gym lobby. She could hear the Appellant telling some remaining students: "You should tell Mr. Gillis [athletic director] that your coach left you, she left you …" (Testimony of Foley)
29. When the Appellant saw Foley, he yelled, "I saw you leave, I saw you leave. You were gone." The Appellant repeated this over and over again in front of the students. (Testimony of Foley)
30. Foley observed that the girls were nervous and uncomfortable due to the Appellant's behavior. She asked him to leave. When he refused, Foley said, "If you do not leave this area right now, I am putting a complaint in writing." The Appellant left the gym lobby area and returned to the gym. (Testimony of Foley)

31. Foley reported the incident later that day to the Athletic Director, Ed Gillis (hereinafter "Gillis"), who directed her to put the incident in writing. Foley wrote a report about the incident that same night. (Testimony of Foley, Exhibit 3)
32. Foley testified that the Appellant has made her and the girls on the team feel uncomfortable in the past. This was also not her first altercation with the Appellant: she had similar complaints to her supervisors. Foley testified that she had no issues with any of the other custodians. (Testimony of Foley)
33. Before the Commission, the Appellant testified that Foley did not like him, but he did not know why. He further stated that he did not try to make her feel uncomfortable and he usually tried to stay away from her. He testified that he approached her on January 20, 2009 because he needed the overtime slip signed. He testified that he did not ask the students to report Foley to Gillis and that Foley did not ask him to leave the gym. (Testimony of Appellant)
34. Baczewski stated that girls on the varsity gymnastics team had told him that they felt uncomfortable in the Appellant's presence. In fact, in January 2009, one of the girls asked Baczewski to ask the Appellant to leave because he staring at them. (Testimony of Baczewski)
35. Baczewski testified under subpoena from the Appellant. He presented his testimony in a courteous professional manner. He appeared to have no bias against the Appellant. I credit his testimony.
36. Two years before, Foley and her students were putting away the bleachers after a meet when the Appellant walked by and brushed her with his shoulder. Foley didn't think that the contact was accidental, and she reported the incident to Gillis. (Testimony of Foley)

37. Foley was a credible witness. Her demeanor was professional, and her testimony was unwavering and forthright. She testified about her concerns of interaction of the Appellant with the female students on her team, not to mention her contact with him. I believe that her discomfort in the presence of the Appellant was genuine. I credit her testimony.
38. In his testimony before the Commission, the Appellant denied that he had ever brushed by Foley. I do not credit his testimony. (Testimony of the Appellant)
39. Several days later, Principal Larkin asked Foley to meet with him. At the meeting, Foley submitted her report of the incident. (Testimony of Foley, Exhibit 3)
40. On February 3, 2009, Principal Larkin issued notice to the Appellant, suspending him for a period of two (2) days without pay and removing him from the overtime list for one (1) month. Principal Larkin also made a mandatory referral to the Employee Assistance Program. If the Appellant were to complete the requirements of the program before the end of the one (1) month suspension from overtime, he would be restored to the overtime list right away. (Testimony of Principal Larkin, Exhibit 1)
41. Dr. Conti realized that the February 3, 2009 letter mentioned the expunged discipline from 2003. (Exhibit 1, paragraph 6) He spoke to Principal Larkin and the 2003 expunged discipline was not considered in the issuance of the discipline in the instant matter. (Testimony of Dr. Conti and Principal Larkin)
42. Pursuant to union grievance procedure, on March 5, 2009, the Respondent held a meeting with the Appellant, Christopher Mason, chapter chair of the Union (hereinafter "Mason") and Robinson for March 5, 2009. (Testimony of Principal Larkin)
43. Mason had been employed as a custodian for twelve (12) years, and had been chapter chair for nine (9) years. (Testimony of Mason)

44. The Appellant asked to tape the grievance, as he had been allowed to do before. (Testimony of Appellant)
45. Robinson explained to the Appellant that because he had failed to provide the school administration with copies of recordings from previous meetings, he would not be allowed to tape this one. (Testimony of Principal Larkin)
46. At this point, the Appellant stuck the microphone into Robinson and Principal Larkin's faces, loudly repeating, "Who is talking now. Who is talking now." (Testimony of Principal Larkin)
47. The Appellant then refused to participate in the grievance procedure, so Principal Larkin and Mr. Robinson adjourned the meeting. (Testimony of Principal Larkin)
48. The Appellant did not ask anyone, including Mason, to take notes for him. Before the Commission, Mason testified that he had never attended a union procedure with an Appointing Authority where the employee was allowed to record the proceeding. (Testimony of Mason)
49. Based upon all of the evidence submitted, the Superintendent upheld the two (2) day suspension that was imposed in a letter dated March 13, 2009. Dr Conti stated that based on the information before him, he was inclined to believe Foley. (Exhibit 2) The July 2003 one (1) day suspension, rescinded by agreement of the parties, was not considered part of the Appellant's disciplinary history. (Testimony of Dr. Conti)
50. Larkin and Conti presented credible testimony before the Commission. They presented as professional educators, with no bias against the Appellant, but with a primary concern for the students. I find that there was no undue personal bias nor political considerations motivating their actions or testimony.

51. I also credit the testimony of Mason. As union president, he stood ready to assist the Appellant in his grievance procedure. His testimony was objective.
52. The Appellant filed an appeal with the Commission on March 24, 2009. (Exhibit 7)
53. Before the Commission, the Appellant testified that Foley had been upset with him earlier that day because a folding wall in the gym had malfunctioned. Because of the malfunction, about half of the gym floor space was unavailable for practice and the girls' gymnastic meet. (Testimony of Appellant)
54. The Appellant also testified before the Commission that after Foley left the gym for the first time after the meet, he heard boys and girls screaming in the gym. When he went to investigate, he found two boys wrestling. A student left the gym and flagged down Foley who was driving away. I do not credit his testimony. (Testimony of Appellant)
55. The Appellant admitted that he had not brought these facts to the Respondent's attention. (Testimony of Appellant, Testimony of Dr. Conti).
56. I find that the Appellant testimony in regard to the events of January 20, 2009 are not credible.

CONCLUSION

The role of the 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." Cambridge *v.* Civil Serv. Comm'n, 43 Mass. App. Ct. 300, 304 (1997). *See* Watertown *v.* Arria, 16 Mass. App. Ct. 331 (1983); McIsaac *v.* Civil Serv. Comm'n, 38 Mass. App. Ct. 473, 477 (1995); Police Dep't of Boston *v.* Collins, 48 Mass. App. Ct. 411 (2000); 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); Commissioner of Civ. Serv. *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 Comm. of Brockton *v.* Civil Serv. Comm'n, 43 Mass. App. Ct. 486, 488 (1997). The Appointing Authority's burden of proof is one of a preponderance of the evidence which 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). 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. Falmouth *v.* Civil Serv. Comm'n, 61 Mass. App. Ct. 796, 800 (2004).

The issue before 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 at 334. *See* Commissioners of Civ. Serv. *v.* Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster *v.* Stratton at 727-728.

The Appointing Authority was reasonably justified in disciplining the Appellant. The Appointing Authority's decision to discipline the Appellant was supported by adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law. *See* Leominster *v.* Stratton at 728.

I find that Foley, Conti, Mason and Baczewski presented credible testimony before the Commission. They testified that the Appellant was prone to unexpected outbursts. I find that by the time of the incident on January 20, 2009, the Respondent had put the Appellant on notice of his untoward conduct. Numerous times, through oral warnings and through letters, he was informed that his work performance and behavior was a problem. As recently as Fall 2008, he was warned about directly confronting students. In his December 2006 written reprimand, he was warned that his "continued behavioral outbursts will not be tolerated and another reoccurrence of this type of behavior will be grounds for dismissal." (Exhibit 4)

I did not find the Appellant to be a credible witness. The explanations offered for the first time – (1) that Foley was mad with him because the gym wall had malfunctioned, that (2) she had left the campus and was driving away while students remained, and (3) and that a student had to flag her down as she was driving away – are just not credible in light of his history with Foley and the Respondent. I am very concerned about the Appellant's behavior – beyond his work duties - on the high school campus. For example, in September 2006, he got into an incident with another custodian, leading the Respondent to find that he had created a hostile work environment. In December 2008, he threatened to call the police on students as they simply waited for rides home.

The Appellant's behavior is even more distressing in regard to young women. For example, the Appellant made an inappropriate comment to Conners' girlfriend in December 2000; in 2007 he brushed by Foley while she was on duty as the girls' varsity gymnastics coach (contact she reported to Gillis because she did not believe that it was accidental); female students complained to Bascewski about the Appellant's stares and how uncomfortable they felt in his presence; on one occasion in January 2009 Bascewski had to ask the Appellant to leave the gym while female students were there; and the Appellant had caused Foley and her students such discomfort that she asked him to stay away from the actual gym floor during meets.

The Respondent is responsible for the safety of the students in its care. Thus the Respondent requires a high standard of conduct of its employees due to their proximity to students. Adults in the school environment must conduct themselves in a professional manner. Students should not feel nervous because of the behavior of school employees.

The Respondent took its responsibility seriously and responded accordingly in this discipline of the Appellant. Although he has met with the Respondent often and has received many written and oral reprimands over a nine (9) year period, this is the Appellant's first suspension. Through the union grievance procedure, the Respondent found that the Appellant had behaved in an unacceptable manner to Foley on January 20, 2009. The Respondent disciplined the Appellant with a two (2) day suspension without pay, mandatory referral to the Employee Assistance Program, and removal from the overtime list for the period of one (1) month (to be restored to said list right away if he completed the requirements of the Employee Assistance Program in less than one month): based on the facts of the incident and the Appellant's disciplinary history. I

find that the July 2003 one (1) day suspension, later expunged from his record, was not considered part of the Appellant's disciplinary history.

Based on the above reasons, the Appointing Authority has demonstrated by a preponderance of the evidence that there was reasonable justification to discipline the Appellant. The Respondent's actions do not show "overtones of political control or objectives unrelated to merit standards or neutrally applied public policy." Collins at 413.

The Appellant's appeal filed under Docket No. D-09-163 is hereby *denied*.

Civil Service Commission

_____
Angela C. McConney, Esq.
General Counsel

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell and Stein, Commissioners) on July 1, 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:
Daniel W. Rice, Esq. (for the Appellant)
Darren R. Klein, Esq. (for the Appointing Authority)