COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

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

LAMONT DAVIS,
Appellant

v.

D-06-256

CITY OF NEWTON,
Respondent

Appellant's Attorney: Charles A. Clifford, Esq.
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Charlestown, MA 02129
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Respondent's Attorney: Donnalyn Kahn, Esq.
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Commissioner: Christopher C. Bowman

DECISION

The Appellant, Lamont K. Davis (hereafter "Davis" or "Appellant"), pursuant to G.L. c. 31, § 43, filed a timely appeal with the Commission on October 4, 2006 claiming that the City of Newton (hereafter "City" or "Appointing Authority") did not have just cause to terminate him as a firefighter on September 25, 2006.

A pre-hearing was held on January 22, 2007 and a full hearing was conducted on June 4, 2007 at the offices of the Civil Service Commission. As no written notice was received

from either party, the hearing was declared private. All witnesses, with the exception of the Appellant, were sequestered.

Two (2) tapes were made of the hearing

FINDINGS OF FACT:

Eight (8) Exhibits were entered into evidence at the hearing. Based on the documents submitted and the testimony of the following witnesses:

For the Appointing Authority:

- Joseph LaCroix, Fire Chief, City of Newton;
- Lieutenant Kevin Foley, Milton Police Department;
- Trooper Kathleen Carney; Massachusetts State Police;

For the Appellant:

- Lamont Davis, Appellant;

I make the following findings of fact:

1. The Appellant, Lamont Davis, was a tenured civil service employee of the City of Newton serving as a firefighter for approximately eleven (11) years before he was terminated on September 25, 2006. He is a thirty-six (36) year old African American male and has two (2) teenage daughters. (Testimony of Appellant)

Prior Discipline and Last Chance Agreement

2. On October 31, 2004, the Appellant was arrested by the Newton Police Department and charged with Trafficking in Cocaine and Assault and Battery Aggravated, and arraigned at the Newton District Court on December 3, 2004. The charges were subsequently modified to Possession with Intent to Distribute Cocaine. (Testimony of Appellant and Exhibits 4 and 8)

3. On November 5, 2004, the City of Newton, after learning about the above referenced arrest, conducted a disciplinary hearing to determine if the Appellant should be disciplined for "conduct reflecting adversely on the department or its uniform" and "conducting unbecoming" a Newton firefighter. (Testimony of Chief LaCroix and Exhibit 1)
4. Chief LaCroix testified that the City did not conduct its own independent investigation regarding the above-referenced arrest and did not seek any testimony from the police officers involved in the arrest of Mr. Davis on October 31, 2004 as part of the City's disciplinary hearing. Rather, the City relied primarily on Exhibit 8, which is an incident report filed by a Newton police officer. (Testimony of Chief LaCroix and Exhibit 8)
5. The Appellant did not testify at the City's disciplinary hearing, but did make a statement "apologizing" for "putting myself in this situation". (Testimony of Appellant)
6. During his testimony before the Commission, the Appellant vehemently denied engaging in any criminal behavior on the night of October 31, 2004 and disputed the allegations outlined in the above-referenced police incident report regarding the night in question. (Testimony of Appellant)
7. On November 10, 2004, in lieu of findings and conclusions from the Appointing Authority, the City and the Appellant entered into a "Last Chance Agreement" which had eleven (11) sections and was signed by Chief LaCroix, the City's Human Resources Director, the City's Assistant City Solicitor; the Appellant and his union representative. (Exhibit 1)

8. As part of the above-referenced "Last Chance Agreement", the Appellant agreed to a 6-month suspension; completion of a "Fitness for Duty" evaluation prior to returning to work, including an alcohol and drug screening test; random alcohol or drug testing; and attendance at a Substance Abuse Program. Further, the "Last Chance Agreement" stated in relevant part that, "any additional acts involving drugs, alcohol or violence will result in immediate termination, pending a Civil Service hearing or grievance / arbitration". Finally, the "Last Chance Agreement" released the City from any liability and explicitly prevented the Appellant from filing any lawsuits regarding this matter, including an employment discrimination case against the City. (Exhibit 1)
9. Chief LaCroix testified before the Commission that he had only a limited role in the development of the "Last Chance Agreement" and had not made any decision regarding what the appropriate discipline would be prior to the execution of the "Last Chance Agreement". Asked during cross-examination if the "Last Chance Agreement" was signed under the threat of termination, the Chief answered, "no". (Testimony of Chief LaCroix)
10. The Appellant testified before the Commission that he was told by his union representative that he would be terminated unless he signed the "Last Chance Agreement". The Appellant did not ask the union representative who in management, if anyone, had made such a representation. (Testimony of Appellant)
11. The Appellant testified that he thought the "Last Chance Agreement" would "go away" if he was found not guilty of the criminal charges which resulted in the City's disciplinary hearing against him, but did not consult with an attorney prior to signing the agreement. (Testimony of Appellant)

12. During his suspension, the Appellant successfully complied with all terms of the "Last Chance Agreement", including 8 drug or alcohol tests and completion of the Substance Abuse Program. (Testimony of Chief LaCroix and Appellant)
13. On July 20, 2005, a trial was held, witnesses testified, and the Appellant was acquitted of both of the above-referenced criminal charges which had led to the City's November 5, 2004 disciplinary hearing. (Exhibit 4)
14. Sometime in July 2005, the Appellant returned to work as a Newton firefighter. (Testimony of Appellant)

September 2, 2006 Incident

15. On September 2, 2006, 14 months after returning to work as a firefighter, the Appellant, who was living in Roslindale at the time, went to a club named "Alex's" in Stoughton, MA, to attend a "bachelorette party" with his girlfriend. (Testimony of Appellant)
16. According to the Appellant, he consumed "two beers" while at the club in Stoughton, MA, although he later testified to only consuming "a drink". (Testimony of Appellant)
17. There is no dispute that during the early morning hours of September 2, 2006, the Massachusetts State Police, in conjunction with the Milton Police Department, were conducting a "sobriety checkpoint" on Route 138 near the Blue Hills ski area on the Milton / Canton town line. Milton Police Lieutenant Kevin Foley and State Trooper Kathleen Carney, two officers assigned to the checkpoint, testified before the Commission in addition to testifying at the City's disciplinary hearing regarding this matter. (Testimony of Foley and Carney)

18. Lieutenant Foley, who was a sergeant on September 2, 2006, was assigned to the "pit area" of the checkpoint. Foley described the "pit area" as an area that motorists are directed to if an officer serving as a "screener" suspects a stopped driver of operating under the influence of alcohol. (Testimony of Foley)
19. According to Lieutenant Foley, he observed the Appellant, the driver of a Yukon sport utility vehicle, drive into a section of the "pit area" that was different from the location where another officer was directing the Appellant to via shouted directions. Again according to Foley, the other officer, upon seeing the Appellant drive to the wrong section of the "pit area", shouted for the Appellant to stop his vehicle, back up, and pull over to the correct location, where Lieutenant Foley was stationed. Foley testified that the Appellant did indeed stop his vehicle at this point, back up and pull over to the correct area where Foley was stationed. (Testimony of Foley)
20. The Appellant testified that he received vague directions about what section of the parking lot he should drive toward and that bright halogen lights shining on the parking lot made the task more difficult. Once given clear directions, the Appellant testified that he promptly drove his vehicle to the correct location. (Testimony of Appellant)
21. Lieutenant Foley's role on the night in question was limited to asking the Appellant a few questions, making some observations of the Appellant and then instructing other "pit officers" to conduct a field sobriety test on the Appellant. (Testimony of Foley)
22. According to Lieutenant Foley, he had been told by another officer working the checkpoint that night that the Appellant was a Newton firefighter. As part of his brief questioning of the Appellant on the night in question, Lieutenant Foley asked the

Appellant if he had any identification to show that he was a Newton firefighter to which the Appellant stated he did not. At this point, Foley asked the Appellant, "Is there a reason why (you) do not have a Newton firefighter I.D. on (you) or did the City of Newton have that firefighter I.D.?" The Appellant responded by telling Foley that he didn't take it out with him that night. (Testimony of Foley)

23. Lieutenant Foley testified that based on his conversation with the Appellant on the night in question, "I formed an opinion that Mr. Davis was under the influence of alcohol; I could smell it on his person; I could smell it on his breath; his eyes were glassy." Based on this opinion, Foley directed the other pit officers to conduct a field sobriety test on the Appellant. (Testimony of Foley)
24. When asked the hypothetical question of whether an individual who "has a cocktail at lunch and then drives a car" is "breaking the law", Foley replied, "If I pull you over, and I smell it on your breath, you're probably going to be arrested; that's the law." (Testimony of Foley)
25. Kathleen Carney is a state trooper assigned to the state police barracks in Milton. She has been a state trooper for the past fourteen years and was a Falmouth police officer for approximately six years prior to that. (Testimony of Carney)
26. Trooper Carney testified that she was assigned to the "screening area" at the sobriety checkpoint in question on September 2, 2006. Trooper Carney indicated that she was teamed up with Milton Police Officer Jennifer Daukas. (Testimony of Carney) Ms. Daukas did not testify before the Commission nor did she testify at the City's disciplinary hearing.

27. Trooper Carney testified that part of her duties and responsibilities was to "engage … operators in a conversation (whom) had been directed…into the "pit" or "screening area". Trooper Carney testified that she was also responsible for operating the "portable breath test" in conjunction with another trooper. (Testimony of Carney)
28. Trooper Carney provided detailed testimony about how a "portable breath test" is "calibrated" on a monthly basis to make sure it is functioning properly. Asked during direct testimony when the "portable breath test" in use on the night in question had been calibrated, Trooper Carney stated, "I don't recall and I don't have that documentation." Asked specifically by this Commissioner if she knew whether or not the device had been calibrated within one month of the night in question, Trooper Carney stated, "I do not". (Trooper Carney)
29. While the Commission, a quasi-judicial board, has a more flexible standard for allowing testimony and evidence than a court of law, I nonetheless give no weight to any testimony and/or evidence related to the portable breathalyzer test that was in use on the night in question. The State Police trooper was unable to verify that the device was functioning properly as there is no evidence that it was calibrated within 30 days of its use.
30. Milton Police Officer Jennifer Daukas administered field sobriety tests to the Appellant on the night in question including the "alphabet test"; the "Nine Step Walk and Turn" test; and the "One Leg Stand Test." (Testimony of Carney)
31. As referenced above, Officer Daukas did not testify before the Commission nor did she testify at the City's disciplinary hearing on this matter.

32. Trooper Carney, who was "teamed up" with Officer Daukas, testified that she observed Officer Daukas administer the above-referenced field sobriety tests on the Appellant as it was Daukas's turn to engage the next driver. (Testimony of Carney)
33. Upon the Appellant exiting his vehicle on the night in question, Trooper Carney testified that she did not initially make any observations or conclusions about the Appellant. (Testimony of Carney)
34. Trooper Carney observed Officer Daukas administer the "alphabet test" to the Appellant. According to Trooper Carney, the Appellant recited the alphabet correctly thus successfully completing that portion of the field sobriety test. (Testimony of Carney)
35. Trooper Carney also observed Officer Daukas administer the "Nine Step Walk and Turn" test on the Appellant. Trooper Carney testified that the Appellant "did not complete the test as instructed." Specifically, Trooper Carney testified that the Appellant, "was instructed to walk in a heel-to-toe fashion with his heal touching his toe counting each step out loud. His steps were not in a heal-to-toe fashion. They were side-stepped to the left and to the right." (Testimony of Trooper Carney)
36. The Appellant testified that Officer Daukas, when administering this test, directed him to perform a physically impossible task, specifically "to put my left heel and my right heel together and take nine paces." According to the Appellant, Trooper Carney then walked over and corrected Officer Daukas. (Testimony of Appellant)
37. Trooper Carney also observed Officer Daukas administer the "One Leg Stand Test" on the Appellant. Trooper Carney testified that the Appellant was "not able to complete that test either." Specifically, Trooper Carney testified that, "he was not

able to maintain his balance on one leg for more than a few seconds; he had to put his foot down in order to regain his balance." Trooper Carney further testified that the Appellant did indicate on the night in question that he had a back problem, but that he informed Officer Daukas that he could still perform the test. (Testimony of Carney)

38. The Appellant testified that when he informed Officer Daukas of his back problem, she questioned how he could be a firefighter with a bad back. According to the Appellant, he repeated that he had a back problem but, feeling that he was being challenged, he would make an attempt to perform the "One Leg Stand Test". (Testimony of Appellant)

39. On cross-examination, Trooper Carney testified that the reliability of the "One Leg Stand Test" and the "Nine Step Walk and Turn" was in the 60-70% range. (Testimony of Carney)

40. Trooper Carney testified that she made the following observations of the Appellant on the night in question: "his speech was thick; slurred; his eyes appeared to be bloodshot" and "when he spoke, the odor of alcohol intensified from his mouth." Trooper Carney further testified that, "he (the Appellant) was drunk". (Testimony of Carney)

41. On September 25, 2006, after a disciplinary hearing held by the City on the same day, the Appellant was terminated from his employment as a firefighter. Trooper Carney and Lt. Foley testified at that hearing, but Officer Daukas did not. The one-paragraph September 25, 2006 termination letter to the Appellant from the Fire Chief stated in relevant part, "As you are aware, on November 5, 2006, you signed a Last Chance Agreement regarding drugs, alcohol or violence. Based on the testimony presented

by Massachusetts State Trooper Carney and Milton Police Sergeant Foley and evidence presented at your Civil Service disciplinary hearing, I find that your conduct is contrary to the Newton Fire Department Rules and Regulations and in violation of your Last Chance Agreement. I regret to inform you that effective immediately, your position with the City of Newton is terminated." (Exhibit 6)

42. On November 27, 2006, after trial, the Appellant was acquitted of the charge of operating under the influence. (Exhibit 5) Officer Daukas, who administered the field sobriety tests on the Appellant on the night in question, did testify in that court proceeding; Trooper Carney and Lieutenant Foley did not testify at that court proceeding. (Testimony 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 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. 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, 727-728 (2003).

The Appellant was terminated from the Newton Fire Department after it was determined by the City that he violated the provisions of a Last Chance Agreement which

stated, in relevant part, that "any additional acts involving drugs, alcohol or violence will result in immediate termination, pending a Civil Service hearing…".

It is well-established that the Commission should give great weight to the provisions of a Last Chance Agreement, a voluntary agreement between an employer and employee, which, typically in lieu of immediate termination, effectively puts an employee on notice that any further discipline will result in his or her termination. The Commission does not make decisions in a vacuum, however, and it is appropriate to consider the circumstances that gave rise to this particular agreement.

This particular Last Chance Agreement came about after the Appellant was charged with two felonies, Assault and Battery and Possession with Intent to Distribute Cocaine. In response, the City conducted a brief disciplinary hearing to determine if, as a result of the charges, the Appellant should be disciplined for conduct unbecoming a Newton firefighter. The City called no witnesses at this hearing, but, rather, relied almost entirely on the charges themselves and a police incident report. Convinced that he would likely face termination if he didn't sign the agreement, the Appellant entered into the Last Chance Agreement in question, which among other things, required a six-month suspension, random drug testing, completion of a Substance Abuse Program, and the waiving of certain rights, including the filing of an employment discrimination suit against the City regarding the matter.

Several months later, the Appellant was found not guilty of the felony charges in question, the very charges which served as the underpinning of the City's prior disciplinary hearing and the subsequent Last Chance Agreement. Given that the City did not conduct its own independent investigation of the matter, including the most

rudimentary chore of interviewing even one percipient witness involved with the incident in question, the Last Chance Agreement, albeit beyond the Commission's scope to disturb, is given less weight in this proceeding than it would have been otherwise.

That leads to the incident which the City concluded was a violation of the above-referenced Last Chance Agreement, specifically, the Appellant's arrest on September 2, 2006 for Operating Under the Influence. Unlike the prior disciplinary hearing, the City did indeed hear testimony from two percipient witnesses involved with this incident: two law enforcement officers who were working a sobriety check point on September 2, 2006. These two individuals also testified before the Commission.

Unfortunately, one of the witnesses who testified, Lieutenant Foley of the Milton Police Department, had minimal interaction with the Appellant on the night in question. Further, his testimony, while credible, did nothing to persuade this Commissioner one way or another regarding the Appellant's sobriety when he was stopped in conjunction with the sobriety checkpoint. Specifically, much of Lieutenant Foley's limited testimony focused on his conclusion that the Appellant drove to the wrong section of the parking lot being used for the checkpoint, allegedly in contradiction of directions being given by another police officer. Put simply, Lieutenant Foley appeared to be overreaching on this point. There is no dispute that the Appellant complied with the orders to pull his vehicle into the parking lot that night, a lot in which every automobile driving down Route 138 that evening was being directed into, and which was surrounded by glaring halogen lights. Even Lieutenant Foley acknowledged that once the Appellant was told he had driven to the wrong section of the parking lot, he stopped his vehicle, backed up, and successfully drove to the proper location where Lieutenant was standing. Moreover,

Foley had absolutely no role in administering the field sobriety tests on the Appellant and, therefore, I give little weight to his testimony.

Further, the City failed to produce as a witness, either during their own disciplinary hearing, or before the Commission, the Milton police officer who did indeed administer the field sobriety test to the Appellant on the night in question. Rather, the City relied on State Trooper Kathleen Carney, who testified that she *observed* Milton Police Officer Jennifer Daukas administer the sobriety tests on the night in question.

The Commission holds its hearings regarding disciplinary matters on a de novo basis, upon which it makes its own findings of fact. Sullivan *v.* Municipal Ct. of Roxbury, 322 Mass. 566, 569 (1948). Watertown *v.* Arria, 16 Mass. App. Ct. 331, 334 (1983). City of Leominster *v.* Stratton, 58 Mass. App. 726, 727-728 (2003).

Trooper Carney's testimony, while credible, did not help to establish the preponderance of evidence required for the Commission to uphold the Appointing Authority's decision to terminate the Appellant for the reasons discussed below. Trooper Carney was responsible for administering a portable breathalyzer test at the sobriety checkpoint in question. She candidly acknowledged during her testimony before the Commission that she could not verify if the device had been properly calibrated, thus calling into question whether or not it was functioning properly. I gave no weight to any testimony or exhibits related to the portable breathalyzer test.

One of the field sobriety tests administered to the Appellant on the night in question was the "alphabet test". There is no dispute that that the Appellant successfully completed this particular sobriety test. That leaves two remaining sobriety tests which were administered to the Appellant by Officer Daukas on September 2, 2006, each of

which, according to Trooper Carney, are reliable only 60-70% of the time. According to the unrefuted testimony of the Appellant, Officer Daukas botched the directions to at least one of these tests, initially instructing the Appellant to perform the physically impossible task of putting his feet heel-to-heel and then walking forward. Officer Daukas, the officer who did not appear at the City's disciplinary hearing or before the Commission, did indeed testify as part of a court proceeding on the OUI charges brought against the Appellant. The Appellant was found not guilty of this criminal charge at the conclusion of the trial.

For all of the above reasons, the City of Newton has failed to show by a preponderance of the evidence that it had reasonable justification to terminate Lamont Davis as a firefighter. Therefore, his appeal is hereby ***allowed*** and he is to be reinstated to his position without any loss of pay or benefits.

Civil Service Commission

_____
Christopher C. Bowman, Commissioner

By vote of the Civil Service Commission (Henderson, Chairman; Bowman, Guerin, Taylor, Marquis, Commissioners) on June 28, 2007.

A true record. Attest:

_____
Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. 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:
Charles A. Clifford, Esq. (for Appellant)
Donnalyn Kahn, Esq. (for Appointing Authority)