Decision mailed: 12/3/10
Civil Service Commission

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

KEVIN MCKEOWN,
Appellant

v.

TOWN OF BROOKLINE,
Respondent

Case No. D1-09-47

Appellant's Attorney:

Michael J. Maccaro, Atty.
AFSCME Council 93
8 Beacon Street, 7th Floor
Boston, MA 02108

Respondent's Attorney:

Brian Magner, Atty.
Deutsch, Williams, Brooks,
DeRensis & Holland, P.C.
One Design Center Place
Boston, MA 02210

Commissioner:

Daniel M. Henderson

DECISION

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, Kevin McKeown (hereinafter "Appellant") appealed the decision of the Respondent, Town of Brookline (hereinafter "Town" or "Appointing Authority") to terminate Appellant from the position as Motor Equipment Operator II / Parks Craftsperson in the Town's Department of Public Works, Parks and Open Space Division, on February 11, 2009. Appellant claims that this action taken against him was without just cause. The appeal was timely filed on February 20, 2009. The Town submitted a Motion to Dismiss on July 15, 2009 that was denied by the Commission on

August 6, 2009. A preliminary hearing was held on September 3, 2009 during which time the parties discussed and negotiated a proposed settlement agreement. The terms of that agreement were ultimately rejected by Appellant. A full hearing was held on December 9, 2009 at the offices of the Civil Service Commission. As no notice was received from either party, the hearing was declared private. The hearing was digitally recorded. The parties submitted post-hearing proposed decisions.

FINDINGS OF FACT

Based on the thirty-one (31) exhibits entered into evidence and the testimony of the following witnesses:

For the Appointing Authority:

- Mr. Andrew M. Bressi, Operations Manager, Parks and Open Space Division, Town of Brookline;
- Mr. Dominic Bennett, General Foreman, Parks and Open Space Division, Town of Brookline;
- Ms. Sandra DeBow, Director of Human Resources, Town of Brookline;

For the Appellant:

- Mr. Kevin McKeown, Appellant;

I make the following findings of fact:

1. Appellant was a tenured civil service employee who was originally hired as a Laborer in the Town's Department of Public Works ("DPW") on or about January, 1987. At the time of Appellant's termination on February 11, 2009, Appellant held the position of Motor Equipment Operator II, Parks Craftsperson (hereinafter "MEO II") in the Department of Public Works, Parks and Open Space Division. The suffix "Parks Craftsperson" is not an

approved functional title within the Civil Service Commission, however the relevant duties and responsibilities of the civil service title encompassed those of the Parks Craftsperson position. (Testimony of Appellant; Testimony of Bressi; Testimony of DeBow)

2. Appellant is a member of AFSCME 93 (hereinafter "Union"). The Union negotiated the duties, responsibilities, terms and conditions of Appellant's employment through its Collective Bargaining Agreement with the Town. The Union filed Appellant's appeal to the Commission. However, Appellant appeared in his individual capacity before the Commission. (Exhibits 1, 13, 27, 28 & 29; Testimony of DeBow)
3. Appellant's duties included driving assigned motor equipment in accordance with all applicable regulations, performing minor maintenance on assigned equipment, performing laboring and related work incidental to assigned tasks, and performing laborers duties while not performing other work. Appellant's normal work shift was from 7:00 A.M. to 3:00 P.M., Monday through Friday. (Exhibits 28 & 29; Testimony of Appellant; Testimony of Bressi).
4. All DPW employees within the Parks and Open Space division are required to be available to work overtime in the event of snow emergencies. The availability to work during snow emergencies is a condition of employment and prospective employees are informed of this requirement during initial employment interviews. The requirement to be available for overtime is also stated in the CBA and is common knowledge and practice throughout the division. (Exhibit 1; Testimony of Appellant; Testimony of Bennett; Testimony of Bressi; Testimony of DeBow)
5. Plowing and clearing the roads and public building areas is a critical to the Town's ability to ensure public services and public safety. (Testimony of Bennett; Testimony of Bressi; Testimony of DeBow)

6. The Town reminds employees of the requirement to work snow emergency overtime via an annual interoffice memorandum. Appellant received said memorandum for the two years prior to Appellant's termination. (Exhibit 11; Testimony of Bressi)
7. The Town, through its division supervisors and foremen, notify employees in person and via telephone when a snow emergency is anticipated. Employees are notified as soon as possible to be ready and able to work overtime during snow emergencies. Notwithstanding actual notice, employees, including Appellant, are aware of the requirement that they be available during winter / snow season months. (Testimony of Appellant; Testimony of Bennett; Testimony of Bressi)
8. Appellant has worked numerous snow emergency overtime shifts during his tenure with the Town and is fully familiar with the Town's respective policies. (Testimony of Appellant)
9. The Town uniformly enforces progressive discipline on employees who failed to meet their obligation to report on time for snow emergency overtime. The Town's application of progressive discipline was appropriately applied to Appellant. (Exhibits 14, 15, 16, 17, 18, 19 & 20; Testimony of Bressi; Testimony of DeBow)
10. Appellant does not dispute his disciplinary history between the commencement of his employment and January 28, 2008, at which time he entered into a Last Chance Agreement. Appellant's disciplinary history is reviewed in order to insure completeness of record. (Exhibit 9; Testimony of Appellant)
11. On January 8, 1997, Appellant reported to work for a normal shift at 7:00 A.M. but left early at 11:00 A.M. without permission from his immediate supervisor or any other supervisory staff. On February 7, 1997, Appellant failed to report to work and did not inform his supervisors of his intentions to be absent that day. (Exhibit 2)

12. On February 13, 1997, Appellant was notified by letter that the Town was contemplating taking disciplinary action due to Appellant's "flagrant abuse of sick leave" during the previous three years, as well as his unexcused absences on January 8 and February 7, 1997. Appellant was notified in writing that a hearing would be conducted on February 27, 1997, and that Appellant would be given an opportunity to explain his conduct and absences prior to the Town imposing discipline. The hearing was held on February 27, 1997, and Appellant was represented by Union President Robert Clark and Robert Nazzari, a Union Business Agent. After having considered all of the information presented, the Town suspended Appellant for a period of three (3) days without pay. The suspension was effective from March 5, 1997 to March 7, 1997. (Exhibit 2)
13. On April 18, 2000, Appellant was issued a Warning Notice for unexcused absences on April 12, 13 and 14, 2000. Appellant refused to sign his acknowledgement of receipt. Appellant's supervisors signed to attest that Appellant received the warning. (Exhibit 3)
14. On April 17, 2001, Appellant was issued a Warning Notice for leaving the work area early and without permission from supervisors. Appellant refused to sign his acknowledgement of receipt, however, Appellant's supervisors signed to attest that Appellant had received the warning. (Exhibit 4(a))
15. On April 19, 2001, Appellant was issued a Warning Notice for arriving to work fifteen (15) minutes late. Appellant did not call his supervisors to report his tardiness. Appellant's tardiness resulted in the entire work crew being delayed from starting work on time. Appellant refused to sign his acknowledgement of receipt, however, Appellant's supervisors signed to attest that Appellant had received the warning. (Exhibit 4(a))

16. On August 8, 2001, Appellant failed to report to work. Appellant called into work that morning and left a message on an answering machine to request a vacation day that same day. Appellant's request was denied based on not submitting a proper request in advance as stated in the Union contract. Appellant did not report to work after his request for the day off was denied. On August 9, 2001, Appellant was ten (10) minutes late and his tardiness delayed his work crew's timely start. On August 13, 2001, Appellant failed to report to work and did not call in absent. On August 17, 2001, Appellant was issued a Warning Notice regarding three unauthorized absences. Appellant refused to sign this warning and his supervisor signed to attest to his receipt. (Exhibit 4(b))
17. On August 20, 2001, Appellant was notified by letter that he would be suspended from work for one day without pay for his failure to call in his absence on August 13, 2001. Appellant was notified of his right to request a hearing within forty-eight (48) hours of the receipt of the notice. Appellant signed the notice to acknowledge receipt. (Exhibit 4(b))
18. As a mandatory condition of employment, all employees holding the MEO-2 title/position are required to posses a number of valid licenses, including **a valid Massachusetts Hoisting Engineer's License**. (2-BHoisting License) This requirement is clearly stated in the MEO-2 job description, which was negotiated and agreed upon by the Town and AFSCME in the early 2000s during the town-wide classification and pay plan review. (See Testimony of DeBow and Exhibits 28, 29).
19. In 2002, the Town reviewed the job descriptions and qualifications for all clerical and labor positions which included a review of Appellant's personnel record. During that review, it was determined that Appellant lacked a requirement for employment, namely that Appellant did not possess a current hoisting license. (Exhibits 10 & 28; Testimony of DeBow).

20. On January 9, 2002, Appellant was advised by Mr. Michael Quinn, Operations Manager, that Appellant must obtain a 2-B Hoisting License as a qualification for continued employment as an MEO II. Appellant was provided with all of the necessary information and registration information in order to obtain this license. (Exhibit 10).

21. Despite being advised to obtain a hoisting license, Appellant failed to do so. Appellant believed that he would be grandfathered in and did not need to obtain it. Appellant alleged that his shop steward, Mr. William Phillips, informed him of this grandfathering provision. Appellant did not follow up with Mr. Phillips to obtain a statement in writing to confirm his impression. In fact, neither Appellant nor any other employee was subject to any grandfather provision. On appeal, Appellant failed to produce Mr. Phillips or any other employees or supervisor who may have misinformed Appellant. (Testimony of Appellant; Testimony of Bressi; Testimony of DeBow)

22. On March 5, 2002, Appellant was issued a Warning Notice for failing to report to work and not calling in his absence on Friday, March 1, 2002. Additionally, Appellant did not return to work after being cleared by the Town's Occupational Health Nurse (hereinafter "Nurse") on Monday, March 4, 2002. Appellant refused to sign his acknowledgement of receipt, however, Appellant's supervisors signed to attest that Appellant had received the warning. Pursuant to that warning, Appellant was notified on March 7, 2002 that a disciplinary hearing would be held on March 13, 2002. (Exhibit 5)

23. A hearing was held on March 13, 2002 hearing. Pursuant to that hearing, Appellant, his Union and the Town entered into an Agreement. The parties agreed that Appellant would be suspended for five (5) days without pay, effective March 14, 2002. Additionally, the parties agreed that "In response to any further absences or medical issues that impact his

employment, [Appellant] will contact both his supervisor and the [Nurse]. [Appellant] will authorize the necessary medical information release forms, when requested to do so by the [Nurse]. In the event that [Appellant] continues his pattern of sick leave use, or in the event that he uses any sick leave that cannot be medically substantiated, he will be terminated from his employment with the [Town]." (Exhibit 5)

24. On January 24, 2005, Appellant was issued a Warning Notice for conduct that occurred on January 21, 2005. On that day, Appellant gave misleading information about filling out a personal vacation slip. Appellant failed to report to work and did not call in sick. Again, Appellant refused to sign the warning to acknowledge receipt but his supervisor signed to attest to his receipt. (Exhibit 6)

25. On February 13, 2006, Appellant was issued a notice of suspension without pay for one (1) day, to be served on February 15, 2006, for insubordination, failure to perform core duties of his job position, failure to meet work standards and failure to report to work. Appellant was notified of his right to request a hearing within forty-eight (48) hours of the receipt of the notice. (Exhibit 7)

26. On January 8, 2007, Appellant was issued a Warning Notice for leaving work early, at 11:00 A.M., on January 5, 2007, without requesting time off or notifying his supervisors. Appellant was docked four (4) hours pay. Appellant refused to sign the notice but his supervisor signed to attest to Appellant's receipt. (Exhibit 8)

27. In October, 2007, Appellant was notified by letter to attend a meeting on October 29, 2007 in order to discuss his alleged abuse of sick time and how to correct it. As of October 29, 2007, Appellant had twenty-three (23) unexcused absences from work. As a result of the meeting on October 29, 2007, Appellant entered into an agreement whereby he agreed to meet with

the Town's Nurse and provide her with permission to speak with Appellant's physician or counselor and review Appellant's medical records. This request was to help substantiate Appellant's time out sick. Additionally, Appellant was now required to provide written verification from a physician for each illness stating the reasons for his absence. This requirement was imposed pursuant to the Union Contract, Article XV, Section (h), which states that certificates must be given to the Operations Manager in person upon an employee's return to work. Appellant was also requested to correct his sick time record if there is any incorrect information. (Exhibit 9)

28. On October 31, 2007, the Town reminded all employees, including Appellant, via interoffice memorandum, of the overtime work requirements. Employees were reminded that working overtime is a fundamental requirement for employment with the Town. Especially during winter snow events, is critical that Town employees, including Appellant, be available and work overtime pursuant to the Collective Bargaining Agreement, and that any employee who fails to meet these responsibilities will be subject to discipline. (Exhibit 11)

29. As of January 11, 2008, Appellant was notified that he had failed to comply with the October 29, 2007 agreement. Appellant failed to contact the Nurses and had not returned any of her phone calls requesting a meeting. Appellant was notified that a hearing would be held on January 17, 2008, at which time the Town would contemplate terminating Appellant's employment. On January 25, 2008, after considering all of the information and medical documentation presented by Appellant, the Town and the Nurse determined that the medical documentation did not substantiate Appellant's use of sick leave and that Appellant's absences were unexcused. (Exhibit 9)

30. On January 25, 2008, in lieu of immediate termination, Appellant and the Town entered into a Last Chance Agreement (hereinafter "Agreement"), whereby Appellant acknowledged that he had engaged in the misconduct for which he was charged and that the Town presently had just cause to terminate his employment. Pursuant to the Agreement, Appellant was suspended for twenty (20) workdays without pay and agreed to abide by the terms of that agreement. (Exhibit 9)

31. Pursuant to the aforementioned Agreement, Appellant specifically agreed to provide doctor's certificates for each sick day he used, including family sick days. Appellant also agreed that "if at any time in the future, he engages in misconduct, fails to perform his assigned work, is absent without authorization, engages in insubordination and/or otherwise fails to meet work standards, the Town shall have just cause to discharge [Appellant] and he shall be subject to discharge and such discharge shall not be grievable, arbitratable, or subject to appeal at the Civil Service Commission pursuant to M.G.L. Ch. 31 or otherwise challenged in any other forum." (Exhibit 9)

32. The Town had agreed to similar suspension and last chance agreements with other DPW employees after their repeated failure to report to work mandatory snow emergency overtime. The Town applied a similar review to Appellant's conduct. (Exhibit 18, 19, 20, 21, 23; Testimony of Bressi; Testimony of DeBow)

33. On June 10, 2008, the Town reviewed Appellant's personnel file and noticed that he had not obtained a hoisting license since he was notified on January 9, 2002. A term of Appellant's employment as an MEO II requires that Appellant obtain and maintain a hoisting license. The Town notified Appellant by letter that he would be granted Appellant an additional six (6) weeks to obtain this license or that his employment status would be demoted or

terminated. Appellant was also instructed to obtain his license by Mr. Bennett and Mr. Bressi. (Exhibit 10; Testimony of Bennett; Testimony of Bressi).

34. On October 31, 2008, the Town notified all employees, including Appellant, via interoffice memorandum, of the overtime work requirements that employees are subject to under the Collective Bargaining Agreement. Specifically, that Town employees work overtime, especially during winter snow events where snow removal is vital to public safety. (Exhibit 11; Testimony of Bressi)
35. On December 19, 2008, Appellant failed to report to work during a snow event. (Exhibit 12)
36. On January 6, 2009, Mr. Bressi told the entire crew personally, including Appellant, that everyone had to report to work at 3:00 A.M. the following morning, January 7, 2009 because a snow storm was arriving that evening. The practice and usual starting time for OT shifts is either 11:00 P.M. or 3:00A.M (99.9%). (Testimony of Appellant; Testimony of Bressi)
37. On January 7, 2009, Appellant failed to show up to work at 3:00 A.M. but rather arrived late, around 5:30 A.M. Appellant offered Mr. Bressi no explanation for his failure to report on time for the mandatory overtime. Appellant was issued a Warning Notice for this absence. Appellant refused to sign the warning to acknowledge receipt; however his supervisor signed to attest to Appellant's receipt. Testifying before the Commission, Appellant alleged that he had spent the night at his girlfriend's house in Boston's North End and that he could not get his vehicle started in order to drive to work. Appellant alleged that he called the Town's automated answering service and left a message stating that he was having vehicle difficulty and would be late. No evidence or records were presented to the Commission to corroborate Appellant's claims. (Exhibit 12; Testimony of Appellant; Testimony of Bressi)

38. The following week, it was common knowledge amongst the DPW staff that a major snow storm would impact the Town the following weekend, Martin Luther King weekend. (Testimony of Appellant; Testimony of Bennett; Testimony of Bressi)

39. On Thursday, January 15, 2009, Appellant requested, and was approved for, one personal day off, that day being Friday, January 16, 2009. Despite knowing of the looming storm emergency, Appellant had decided to go ice fishing for the entire weekend in Wakefield, New Hampshire. Appellant was in New Hampshire all weekend and returned the following Monday. (Exhibit 25; Testimony of Appellant)

40. The Appellant offered no documentary (sales, ATM, gasoline or toll receipts) evidence or any testimony from the people he allegedly traveled to NH with to prove that he was in northern NH that week-end. The Appellant's testimony is not believed on this excuse. Also see credibility finding on Appellant. (Testimony and Exhibits, testimony and demeanor of Appellant)

41. As widely predicted, a major snow storm impacted Brookline on Sunday, January 18, 2009. On Saturday, January 17, 2009, Mr. Bressi called the crews, including Appellant, to inform them of the time to report to work on Sunday. Appellant did not answer his phone or return Mr. Bressi's message. Supervision of snow removal operations were transferred from Mr. Bressi to Mr. Bennett on Sunday. Mr. Bennett made multiple attempts to contact Appellant Monday morning. Appellant has only a home telephone and no cell phone. Mr. Bennett called Appellant's home at 4:30 A.M. and the phone was abruptly hung up. Mr. Bennett continued calling other employees to report to work. He called Appellant again at 6:30 A.M. and left a voicemail message. Appellant did not return the message and failed to report to

work during the snow emergencies on January 18 and 19, 2009. (Exhibit 12; 24(c); 24(b); Testimony of Bennett; Testimony of Bressi)

42. On January 28, 2009, Appellant failed to report to work during another snow emergency as ordered by his supervisors. The medical documentation presented by Appellant was unacceptable to explain or excuse his absence. (Exhibit 12)

43. On February 3, 2009, Appellant was notified to attend a disciplinary hearing to be held on February 10, 2009. The Town was contemplating discipline due to Appellant's failure to report to work during the snow events on December 19, 2008, January 7, 2009, January 18, 2009, January 19, 2009, and January 28, 2009. Additionally, Appellant had failed to obtain a hoisting license as he was previously requested to do as a condition of continued employment. Town also cited to Appellant's failure to comply with the Last Chance Warning and previous documented Warning Notices. (Exhibit 12)

44. It is illegal for a person to operate a hoist to lift material without a current license. The hoisting license is also important for allowing sufficient flexibility for work assignments by the Town since the work load has increased and the Town's work force has been reduced for budgetary reasons since 2002. (Testimony of Bressi)

45. **At the February 10, 2009 Town disciplinary hearing the Appellant did not testify**. The Appellant, through his union representative, offered no excuse or defense for his failure to report to work on January 7, 2009. He offered no excuse for his failure to obtain a hoisting license as directed. Appellant's representative only offered Appellant's hypothetical excuse for his absence on January 18 and 19, 2009, that Appellant could have been in New Hampshire or Florida. Appellant's counsel was not suggesting that Appellant was literally in

Florida, rather that Appellant was allowed to be anywhere he wished to be while off duty on the weekend. (Exhibit 12; Testimony of Appellant; Testimony of Bressi and DeBow)

46. On February 11, 2009, after considering all the evidence presented by Appellant at the Town's disciplinary hearing, the Town decided to terminate Appellant's employment effective February 11, 2009. Appellant was given a letter informing him of the decision to terminate his employment as well as a copy of the Last Chance Agreement, his final paycheck, unemployment benefits information, and a copy of G.L. c. 31 § 41-45. (Exhibit 12; Testimony of Bressi)

47. The Town's witnesses: Andrew Bressi, Dominic Bennett and Sandra DeBow presented themselves as professional, direct and reliable witnesses. They did not equivocate, or modify their testimony on cross-examination. They only testified to their actual knowledge or experience without embellishment. Bressi and Bennett appeared to be easy going, yet confident in the accuracy of their testimony. Bressi and Bennett had many years experience working with the Appellant and Bennett going back to the Appellant's start of employment. However, neither Bressi nor Bennett exhibited any signs of bias or other impermissible motivation against the Appellant. DeBow is an experienced and exceptionally competent, confident and professional witness. She is very exact and sure in every detail. Cross-examination only strengthened her direct testimony. I find that Bressi, Bennett and DeBow are very reliable and credible witnesses. (Testimony and demeanor of Bressi, Bennett and DeBow)

48. The Appellant is not a believable witness. He provided very general, vague or indefinite answers to questions which required specificity, regarding facts and circumstances likely to be etched in memory. This is especially true for the Appellant given his circumstances of past

discipline and last chance agreement. He changed words in his answers when he realized they were mistaken, due to inconsistency, implausibility or contradiction. He exhibited the realization of the mistake in his voice and facial expression. He seemed almost cavalier in his responses, as if he could say almost anything and have it believed. For example: "I did my obligation". His explanation of being at his girlfriend's house in the North End of Boston during the snow storm of 1/06/09-1/07/09 and calling the Brookline yard leaving a message from an unidentifiable pay phone since he did not have a cell phone with him; parking his car on an unknown street and not worrying about being towed (snow storm); and looking around for help eventually getting his car started by getting a jump start from an unknown person is not believable. He was asked, yet failed to explain why he did not take a **taxi cab ride** to be at work on time. He made no effort to document or to identify any of this string of unusual events, despite his dire and consequential circumstances. The Appellant was admonished by this hearing officer for failing to act prudently, cautiously and responsibly under the circumstances of enhanced jeopardy associated with a "last chance agreement". His response for failing to have a cell phone available under these foreseeable circumstances-**"I'm old fashioned"**- is unacceptable. **The Appellant is not a credible witness**. The Appellant's testimony on the substantive contested issues is given no weight and therefore is disregarded. (Testimony and demeanor of Appellant)

49. At the hearing before the Civil Service Commission, Appellant produced letters from doctors regarding medical procedures and necessary periods of absence or restrictions related to Appellant's employment. It is unclear if these letters were provided to the Town immediately subsequent to Appellant's absences. However, it is clear that Appellant did not produce to the

Commission doctor's letters to excuse each of his absences subsequent to the Last Chance Agreement. (Collectively, Exhibit 31), the following:

(1) A letter from Longwood Plastic Surgery, P.C. stating that Appellant was scheduled for minor surgery on May 5, 2008 at 9:15 A.M. Also provided was a letter stating that Appellant should be excused from work from May 5, 2008 to May 12, 2008.

(2) A letter from Beth Israel Deaconess HealthCare (hereinafter "Beth Israel") stating that Appellant was seen on June 5, 2008 for evaluation of a medical condition. The letter stated that Appellant was cleared to return to work on June 10, 2008.

(3) A letter from Beth Israel stating that Appellant had a surgical procedure on September 30, 2008 and that Appellant would need to be out of work for seven (7) days after the procedure. The letter further stated that Appellant's physical activity should be restricted for an additional six (6) days after returning to work.

(4) A letter from Beth Israel that Appellant was seen on November 6, 2008 and "diagnosed with diarrhea/viral illness." That letter recommended that Appellant not work until his diarrhea resolves.

(5) Discharge instructions and follow up information letter from Beth Israel dated November 28, 2008. On that day Appellant was seen in the emergency room for apparent shoulder strain. Appellant's shoulder was examined and appeared normal and there were no concerning findings. The discharge instructions recommended that Appellant remain out of work until receiving a follow up evaluation by his doctor or occupational health doctor.

(6) A letter from Beth Israel, written at the request of Appellant, that Appellant was seen on December 22, 2008 for a viral illness. The letter recommended that Appellant remain

home from work until he feels better. The letter also opined "this illness started 3 days ago, requiring you to miss work on Friday."

(7) A note from Beth Israel stating that Appellant was seen on January 27, 2009 for a medical appointment and that Appellant may return to work on January 29, 2009. Appellant provided a follow-up letter from Beth Israel, dated February 3, 2009, stating that there was no signs of infection based on the lab tests taken on January 27, 2009, and that no further treatment was needed at that time.

CONCLUSION

A person aggrieved by disciplinary action of an appointing authority made pursuant to G.L. c. 31, § 41 may appeal to the Commission under G.L. c. 31, § 43. Under Section 43, the Commission must "conduct a de novo hearing for the purpose of finding the facts anew." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. 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." City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). *See also* City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev.den., 440 Mass. 1108 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 408, 411, rev.den., 726 N.E.2d 413 (2000); McIsaac v. Civil Service Comm'n, 38 Mass App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, rev.den., 390 Mass. 1102 (1983).

An action is "justified" if 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." Commissioners of Civil Service v. Municipal Ct. of Boston, 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.

The Appointing Authority's burden of proof by a preponderance of the evidence 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). The Commission must take account of all credible evidence in the administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. *See, e.g.*, Massachusetts Ass'n of Minority Law Enforcement Offices v. Abban, 434 Mass 256, 264-65 (2001). It is the function of the hearing officer to determine the credibility of evidence and to resolve conflicting testimony presented through witnesses who appear before the Commission. *See* Covell v. Department of Social Svcs, 439 Mass 766, 787 (2003); Doherty v. Retirement Bd., 425 Mass. 130, 141 (1997); Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988).

"The commission's task, however, is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether '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.'" Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006). *See* Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 334 rev.den., 390 Mass. 1102 (1983) and cases cited.

"Likewise, the 'power accorded the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded the appointing authority.'" Town of 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 (1996). Unless the Commission's findings of fact differ significantly from those reported by 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." E.g., Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006).

In the instant matter, the Appointing Authority was reasonably justified in terminating the Appellant's employment. Appellant had been employed with the Town for twenty-three years and has worked as a MEO II / Parks Craftsperson for over a decade. Appellant is very familiar with the rules, regulations and job requirements of that position. Appellant is aware of the requirements that he must be available to work overtime during snow emergencies. Appellant acknowledged this requirement when he entered into the Last Chance Agreement with the Town.

Appellant's contention that his weekend and time off is his to do with as he pleases flies in the face of logic, Town's policy and Appellant's actual knowledge and admitted past practice. During Appellant's employment with the Town, Appellant had been called in to work snow emergencies on the weekends. Appellant was fully aware that when a storm is looming that he must remain available to respond to work. This is a fundamental requirement of his employment and he had been disciplined on previous occasions for failing to respond to snow emergencies.

Appellant offered no excuse or explanation for his failure to report to work mandatory overtime for the snow emergency on Friday, December 19, 2008. Appellant visited Beth Israel the following Monday, December 22, 2008 and obtained a doctor's note for having been seen for a viral illness. That two-sentence note did not explain or excuse Appellant's absence the previous Friday. It was written three days after the unexcused absence and contained no substance other then a recitation that "the illness started 3 days ago, requiring you to miss work on Friday." This note was unpersuasive to the Appointing Authority. Appellant did not elaborate or provide supporting documentation to the Commission. The note is equally unpersuasive to the Commission as to excuse Appellant's absence the previous Friday.

Furthermore, Appellant exercised poor judgment by failing to report to work on time for the snow emergency on January 7, 2009. Despite having been notified on January 6, 2009 that he would be required to work at 3:30 A.M. the following morning, Appellant chose to spend the night at his girlfriend's in Boston's North End. Appellant, who lives in Brookline, about a mile from his work station, elected to stay farther away. Appellant alleged that when he woke up around 2:30 A.M. to report to work that his vehicle would not start. Appellant spent an unknown amount of time allegedly scouring the North End neighborhood to find a vehicle to give his car's battery an electric jump start. When he realized that he would be late, Appellant alleged to have

found a pay phone and left a voice message at work inform them of his tardiness. No such message was received at work or relayed to Appellant's supervisors. A reasonable person, knowing that their employment is subject to a Last Chance Agreement, would have used that pay phone to call a cab and rushed to be at work on time. Rather, Appellant continued to wait until an alleged vehicle was finally able to jump-start his vehicle and Appellant arrived at work over two hours late. Appellant's course of action and choices demonstrated a disregard for his employment and terms of his Last Chance Agreement.

Appellant's failure to report during the Martin Luther King weekend snow emergency also violated the Last Chance Agreement. Appellant's contention that by taking a personal day off from work on Friday, January 16, 2009, he was excused from his duty to be available for the following weekend is unpersuasive. Appellant had been notified in writing and verbally by his supervisors prior to taking his day off that a major storm was going to impact Brookline on the weekend of January 17, 18 and 19, 2009. Appellant knew that he would be required to work overtime. Despite this, Appellant elected to leave the state for the entire weekend to go ice fishing in New Hampshire. Appellant did not inform his supervisors or obtain their permission to be excused from working that snow emergency. Appellant did not check in at work while gone and did not check his home voicemail messages. Appellant's conduct contravened what he knew to be his employment obligation and was in direct violation of the Last Chance Agreement.

Regarding Appellant not obtaining a hoisting license, Appellant offers no reasonable or persuasive excuse for his failure to act. Appellant acknowledges receiving a letter and application packet from his supervisor, Mr. Michael Quinn, in 2002 and that he was instructed to obtain a hoisting license. Appellant alleges that he subsequently visited the shop steward, Mr. William Phillips, who informed Appellant and another employee to disregard the application

because they would be grandfathered past the requirement. Appellant allegedly relied on Mr. Phillips assurances and failed to apply for a hoisting license. Appellant subsequently flew under the radar of supervisors until June, 2008, at which time Mr. Bressi noticed Appellant had still not obtained a hoisting license. Appellant was informed again to obtain his license by Mr. Bressi. Mr. Bennett also informed Appellant to at least make an attempt at obtaining the license. Again, Appellant sought out a second opinion, this time from Mr. Mark Bernard, a Union business representative, who allegedly informed Appellant that he would look into it. Appellant did not request a letter from any of his contacts who alleged to have told him that he would be grandfathered or otherwise excused from obtaining a hoisting license. Appellant also did not produce these individuals to testify before the Commission. The preponderance of the evidence and testimony received by the Commission supports the fact that Appellant knew or should have known that he was required to obtain his hoisting license but elected not to act.

The Commission has also reviewed the evidence to determine whether there is just cause to support the level of discipline, i.e., to terminate whether termination of Appellant, or whether modification of the discipline is warranted in the exercise of the Commission's discretion. Under "basic merit principles," the purpose of discipline is focused on "retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected..." G.L. c. 31, § 1. 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. "The 'power accorded the commission to

modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded the appointing authority'". Town of 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). Unless the Commission's findings of fact differ significantly from those reported by 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. E.g. Town of Famouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006).

With regard to Appellant's excessive tardiness and failure to report to work overtime during mandatory snow emergencies, there is just cause to support the Appointing Authority's decision to terminate Appellant rather than impose further progressive discipline. Appellant acknowledges his long history of progressive discipline and that the Appointing Authority had just cause to terminate him on January 25, 2008. Rather than terminating Appellant on that date, he was afforded a second chance and signed a Last Chance Agreement. Appellant has subsequently failed to conform his conduct to that agreement and has offered no reasonable excuse for his failure. Rather, Appellant, by his continued misconduct, has demonstrated a continual disregard for the fundamental requirement of his employment that he report to work on time for mandatory snow emergencies. These snow emergencies are difficult to predict and schedule for and therefore the cooperation of all employees is required to adequately prepare for and perform the vital services required. Public safety is paramount and this interest of the taxpaying public deserves priority and proper deference, at the expense of employee convenience. The Appellant's attitude was cavalier and uncooperative, if not defiant and

deceitful in response to meeting his basic employment obligations; especially considering his past disciplinary history and the last chance agreement. Based on the terms of Appellant's Last Chance Agreement and Appellant's subsequent actions and inactions, the Appointing Authority had just cause to terminate Appellant's employment.

Appellant's repeated failure to obtain a hoisting license further supports the Appointing Authority's decision to terminate his employment. Appellant was informed on multiple occasions that he must obtain a hoisting license to maintain his employment as a MEO II / Parks Craftsperson. Appellant's excuse for inaction, that he believed that he would be grandfathered past the requirement, is not supported by evidence or testimony. None of the Appointing Authority's witnesses had any knowledge of a grandfathering provision. Rather, it was well understood and established that obtaining a hoisting license was a requirement for his position. Appellant failed to provide evidence or witnesses to support his contention otherwise. Appellant's failure to obtain his hoisting license further supports the Appointing Authority's decision to terminate his employment. That being said, the evidence and testimony before the Commission clearly indicates that the Appellant's excessive tardiness and unexcused absences provided the Appointing Authority sufficient just cause to terminate Appellant's employment without consideration for his failure to obtain a hoisting license. Sill, Appellant's failure to obtain a hoisting license demonstrates Appellant's further disregard for the Town's or the Public's interest, pursuant to the Town's repeated reasonable requests. Therefore, the Appointing Authority had just cause to terminate Appellant pursuant to the Last Chance Agreement, rather than continue progressive discipline which had failed to correct his behavior.

For all the above reasons, the Appellant's appeal under Docket No. D1-09-47 is hereby ***dismissed.***

Civil Service Commission,

Daniel M. Henderson
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, McDowell, Stein and Marquis, Commissioners) on December 2, 2010.

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:
Brian Magner, Atty.
Michael J. Maccaro, Atty.