COMMONWEALTH OF MASSACHUSETTS

Civil Service Commission

Robert Noble,
Appellant

v. D-04-24

Brookline Department of Public Works,
Respondent

Appellant's Attorney:	Robert H. Clewell, Esq. Rossman & Rossman Marketplace Center Two Hundred State Street Boston, MA. 02109
Respondent's Attorney:	George F. Driscoll, Esq. Town of Brookline Office of Town Counsel 333 Washington Street Brookline, MA. 02445-6863
Commissioner:	John E. Taylor

DECISION

Pursuant to the provisions of G.L. c. 31, s. 43, the Appellant, Robert Noble (hereinafter "Appellant"), is appealing the decision of the Appointing Authority, Town of Brookline - Department of Public Works (hereinafter "Town"), in discharging him for violating the Town of Brookline Controlled Substances and Alcohol Use and Testing Policy Applicable to Holders of Commercial Driver's License and violation of the Town of Brookline Department of Public Works Alcohol and Drug Policy. The appeal was timely filed. A full hearing was held at the offices of the Civil Service Commission on March 7, 2006. Two tapes were made of the hearing. Both parties submitted post-hearing briefs.

As no notice was received from either party, the hearing was declared private. Twenty-one (21) joint exhibits were stipulated to by the parties and entered into the record.

FINDINGS OF FACT

Based upon the documents entered into evidence (Exhibits 1-21), and the testimony of the Appellant; Lester F. Gerry – Highway Director, Town of Brookline and Leslea Noble[1] – Director of Human Resources, Town of Brookline, I make the following findings of fact:

1. The Town of Brookline – Department of Public Works is the employer and appointing authority. (Testimony, Exhibit 1)
2. The Appellant was hired as a laborer by the Town of Brookline in 1985. (Testimony).
3. Appellant subsequently received a temporary promotion to Motor Equipment Operator Grade II and Laborer (hereinafter "MEO II"). Said temporary promotion expired August 12, 1993. (Exhibits 9, 10).
4. On August 13, 1993, the Commissioner of Public Works of the Town advised Appellant that he would not extend the temporary promotion to MEO II because Appellant's driving record "displayed a considerable number of accidents." (Exhibit 10).
5. On February 23, 1998, the Town's Personnel Director informed the Commissioner of Public Works for the Town that Appellant had undergone a pre-employment controlled substance test on February 10, 1998, and the results were negative; that Appellant "may be promoted to MEO II"; and that Appellant had been added to the "random test pool". The Town's Personnel Director further informed the Commissioner of Public Works that if he wished to promote Appellant, he needed to "forward a copy of his [Appellant's] CDL license" and schedule a mandatory training session. (Exhibits 11, 12).

[1] It is noted that although they share the same surname, Leslea Noble is not related to Appellant.

6. On February 24, 1998, the Town's Personnel Director requested that Brookline Medical Associates, P.C. add Appellant's name "to the commercial driver's license random drug and alcohol testing pool." (Exhibit 13).
7. Appellant held a commercial driver's license (hereinafter "CDL"). (Testimony).
8. Between 1995 and 1998, Appellant drove rubbish packers and other trucks for the Town. During this time, Appellant had several motor vehicle accidents. (Testimony).
9. On October 28, 1998, in settlement of a case before the Civil Service Commission, Appellant and the Town entered into an agreement (hereinafter "Settlement Agreement") whereby the parties agreed that, effective as of the date of the Settlement Agreement, Appellant would be designated and would hold the job title/classification of 'full time/temporary MEO II', and would continue to hold said position unless that job title/classification was changed as a result of promotion or disciplinary action. (Exhibit 14).
10. The Settlement Agreement further provided that if Appellant performed the duties of MEO II without disciplinary action being taken or initiated against him through December 31, 1999, and he passed an operator's drug test (as defined by the Town's Drug and Alcohol testing Policy for Commercial Drivers) in December 1999, he would be promoted to the permanent position of MEO II effective January 1, 2000. (Exhibit 14).
11. Appellant's 1999 "Employee Absence Record" described his classification for 1999 as "Laborer reinstated to MEO 2". (Exhibit 15).
12. On December 8, 1999, Appellant received an Employee Warning Notice for leaving his work area and failing to attend a class. The Employee Warning Notice was signed by Appellant, and listed his permanent job title as "MEO II". (Exhibit 16, Testimony).
13. On October 21, 2001, Appellant received an Employee Warning Notice for failing to wear a safety vest. The Employee Warning Notice was signed by Appellant and listed his permanent job title as "MEO II". (Exhibit 17, Testimony).

14. On September 15, 2003, Appellant filed a Step 1 grievance with the Town under the provisions of the applicable collective bargaining agreement in which he claimed that he had not received the full pay that he was entitled to as an MEO II. (Exhibit 19).
15. Over the signature of Appellant on the grievance form, Appellant's employee classification is listed as "MEO-2". (Exhibit 19).
16. After reviewing Appellant's grievance and the relevant payroll records, Leslea Noble, the Assistant Director of Human Resources for the Town, determined that Appellant had been underpaid by a total of twenty-three cents (23¢), and the grievance was settled on that basis. (Exhibit 19, Testimony).
17. In reviewing Appellant's payroll records, Ms. Noble determined that Appellant had been paid at the rate of an MEO II employee from at least January 1, 2000 until his discharge in 2003. (Testimony).
18. Lester Gerry, the Director of the Highway and Sanitation Division of the Town Brookline Department of Public Works, supervised Appellant from May 2002 until his discharge in 2003. (Testimony).
19. Mr. Gerry was responsible for overseeing the daily functions of the employees of the Town's Highway and Sanitation Division, including Appellant. (Testimony).
20. Appellant was assigned to work on rubbish packers, loading trash in the back. (Testimony).
21. Mr. Gerry testified that at all times while under his supervision, Appellant performed the duties of an MEO II, and held a CDL. (Testimony).
22. Pursuant to the collective bargaining agreement with the Appellant's union, all Town employees assigned to work on rubbish packers were required to be classified and paid as an MEO II, and were required to maintain a CDL. (Exhibit 7, Testimony).
23. While MEO II's may go for periods of time without actually driving the rubbish packer, the purpose behind requiring all employees working on a rubbish packer to be an MEO II is insure that any employee can drive the

rubbish packer if called upon to do so; as such Appellant could have been ordered to drive one at any time. (Testimony).

24. Appellant testified that in 2002 and 2003 he was ready to drive a rubbish packer and truck if he was asked and if he was paid for it. (Testimony).
25. Mr. Gerry always understood that Appellant was an MEO II and that he was paid at the rate of an MEO II. (Testimony).
26. Appellant's payroll records reflected that at all relevant times, he was paid either at the single rate of an MEO II or at the rate of a laborer plus an additional amount for working out of classification (which, together, equaled the pay rate of an MEO II) under the collective bargaining agreement. (Testimony, Exhibits 8, 19).
27. Appellant admitted that while he sometimes did not receive full MEO II payment in his check, the Town always corrected the error when he would bring it to the Town's attention. (Testimony).
28. Appellant accepted the MEO II pay without objection and never requested that his pay be reduced to that of a laborer. (Testimony).
29. The Town has a Controlled Substances and Alcohol Use and Testing Policy Applicable to Holders of Commercial Driver's License which has been in effect since 1995 (hereinafter "Town's Testing Policy"). (Exhibit 5)
30. The Town's Testing Policy is mandated by the provisions of the Omnibus Transportation Employees Testing Act of 19991 and the Rules of the Federal Highway Administration. (Exhibit 5).
31. The Town's Testing Policy is "applicable to all drivers who must hold a commercial driver's license to perform their work." (Exhibit 5).
32. Pursuant to the Town's Testing Policy, a "driver" is defined as:

> "any person who operates a commercial motor vehicle. This includes, but is not limited to, full time, regularly employed drivers; and casual, intermittent or occasional drivers. For purposes of pre-employment or pre-duty testing only, the term driver includes a person applying to drive a commercial motor vehicle."

(Exhibit 5)

33. Pursuant to the Town's Testing Policy, a "commercial motor vehicle" is defined as a truck that has a gross vehicle weight of at least 26,001 pounds. (Exhibit 5).
34. Town of Brookline rubbish packers have a gross vehicle weight of 75,000 to 80,000 pounds; as such, they are "commercial motor vehicles". (Testimony)
35. In the Town's Highway and Sanitation Division, the essential duties and responsibilities of an MEO II include, but are not limited to:

    -operating "dump truck, front-end loaders, street sweepers, packers and other equipment";

    -conducting "safety inspections of vehicles to ensure they are clean and operating properly"; and

    -[d]uring snow and ice emergencies, drive sanders, plows and front-end loaders, remove snow and ice, and sand streets."

    (Exhibit 3).
36. Pursuant to the Town's Testing Policy, "Performing a Safety Sensitive Function" means that a "driver" is considered to be performing a safety sensitive function during any period in which he or she is actually performing, ready to perform, or immediately available to perform any safety sensitive function." (Exhibit 5)
37. Pursuant to the Town's Testing Policy, "Performing a Safety Sensitive Function" includes the following:

    -all time on Town property, public property, or other property waiting to be dispatched or drive;

    -all time inspecting, servicing or conditioning any commercial motor vehicle at any time;

    -all driving time;

    -all time loading or unloading a vehicle, supervising, or assisting in the loading or unloading, attending a vehicle being loaded or unloaded, remaining in readiness to operate the vehicle, or in giving receipts for shipment loaded or unloaded;

-all time spent performing driver requirements relating to accidents; and

-all time repairing, obtaining assistance, or remaining in attendance on a disabled vehicle.

(Exhibit 5).

38. Appendix 1 of the Town's Testing Policy sets forth the employee classifications that have been determined to meet the definition "driver" and that are included in the "Controlled Substances and Alcohol Use Testing Policy". (Exhibit 5).
39. In Appendix 1, setting forth the "Controlled Substances and Alcohol Use Testing Pool", the Town's Testing Policy mandates that "[a]ll employees with permanent, temporary or intermittent appointments in any of the following classifications are subject to the Controlled Substances and Alcohol Use Testing Policy:

Motor Equipment Operator, Grade 2, and Laborer…"

(Exhibit 5).

40. Under the Town's Testing Policy, marijuana (THC) is considered a controlled substance. (Exhibit 5).
41. Under the Town's Testing Policy, "[n]o driver shall report for duty, remain on duty or perform a safety sensitive function, if the driver tests positive for controlled substances. No supervisor having actual knowledge that a driver has tested positive for controlled substances shall permit the driver to perform or continue to perform safety sensitive functions." (Exhibit 5).
42. The Town's Testing Policy authorizes random, controlled substance testing. (Exhibit 5).
43. The Town's Testing Policy authorizes unannounced, follow-up controlled substance testing after a driver has tested positive for controlled substances. (Exhibit 5).
44. The Town's Testing Policy mandates that "[n]o driver shall perform safety-sensitive functions, including driving a commercial motor vehicle, if the driver has engaged in conduct prohibited by this policy" and that "no driver

who has engaged in conduct prohibited by this policy shall perform safety-sensitive functions, including driving a commercial motor vehicle, unless the driver has met the requirements of the Referral, Evaluation and Treatment section of this policy." (Exhibit 5).

45. On December 30, 2002, the Town gave Appellant a twenty (20) day suspension based upon the following charges:

> -Positive drug test on December 12, 2002, evidencing the use of Controlled Substances;
>
> -Violation of Town of Brookline Controlled Substances and Alcohol Use and Testing Policy Applicable to Holders of Commercial Driver's License; and
>
> -Violation of the Town of Brookline Department of Public Works Alcohol and Drug Policy.

(Exhibit 18).

46. In his twenty (20) day suspension notice, the Town warned Appellant that:

> "[p]ursuant to federal requirements and under the Town of Brookline Controlled Substances and Alcohol Use and Testing Policy, you are subject to unannounced follow-up controlled substances and alcohol testing for up to sixty (60) months, including at least six (6) tests in the first twelve (12) month period following your return to duty. You are also subject to random testing. You are hereby warned that you shall be subject to further discipline, including immediate discharge, if the results of any controlled substances or alcohol test indicate use of a controlled substance or misuse of alcohol."

(Exhibit 18)

47. Appellant did not challenge the twenty (20) day suspension; did not file a grievance to challenge his inclusion in the drug testing pool which resulted in the suspension; and did not object to the test itself. Instead, Appellant accepted, in writing, the twenty (20) day suspension, and purportedly waived his hearing and appeal rights. (Exhibit 18, Testimony)

48. On October 29, 2003, Appellant again tested positive for a controlled substance (marijuana) in a follow-up drug test. (Exhibits 1, 21; Testimony).
49. The specimen sample that resulted in the October 29, 2003 positive drug test was collected during working hours after the foreman came and picked up Appellant while he was working on a rubbish packer. (Testimony).
50. By letter dated October 30, 2003, the Town gave Appellant a five (5) day suspension based upon the following charges:

    -Positive drug test on October 29, 2003, evidencing the use of Controlled Substances;

    -Violation of Town of Brookline Controlled Substances and Alcohol Use and Testing Policy Applicable to Holders of Commercial Driver's License;

    -Violation of the Town of Brookline Department of Public Works Alcohol and Drug Policy; and

    - Prior violation on December 12, 2002, evidencing the use of Controlled Substances;.

    (Exhibit 1).
51. After hearing on November 5, 2003, the Town discharged Appellant for the same reasons stated in the October 30, 2003 notice of suspension. (Exhibit 1).
52. The stated purpose of the Town's Testing Policy is to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers. (Exhibit 5).
53. The testing requirements under the Town's Testing Policy are necessary to ensure that the prohibitions against drug use and alcohol use on the job are enforced in order to help prevent accidents and injuries. (Exhibit 5).
54. The appellant filed a timely notice of appeal of his termination with the Civil Service Commission. (Exhibit 2).
55. At the time of his termination from the Town of Brookline, the Appellant was listed on the personnel action form as a "Laborer". (Exhibit 20).
56. "Laborers" are not within the job titles subject to drug testing under the Town's Testing Policy. (Exhibit 5).

57. There was no contention in this case by the Town that the Appellant performed the duties assigned to him in an unsatisfactory manner.
58. The testimony of Appellant was vague, and exhibited a suspect recall of the underlying events. Conversely, the testimony of the Town's witnesses, Leslea Noble and Lester Gerry, was competent and highly credible.

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). 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." City of Cambridge 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 proper inquiry for determining if an action was justified is, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of the 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). This burden must be met by a preponderance of the evidence. G.L. c. 31, §43.

It is the conclusion of this Commission that the Respondent has satisfied its burden of proving reasonable justification for terminating the Appellant following his second positive drug test in a one year period. Specifically, the evidence proffered by the Department is sufficiently reliable to warrant a reasonable mind to find that the Appellant committed the acts for which he was penalized.

Here, Appellant admitted his violation of the Town's Drug and Alcohol policy in connection with his positive drug test on December 12, 2002. Appellant did not challenge the twenty (20) day suspension; did not file a grievance to challenge his inclusion in the drug testing pool which resulted in the suspension; and did not object to the test itself. Instead, Appellant accepted, in writing, the twenty (20) day suspension, and purportedly waived his hearing and appeal rights. Thereafter, on October 29, 2003 (a date within one (1) year of his December 12, 2002 positive drug test), Appellant again tested positive for controlled substances (marijuana).

However, after agreeing to be tested, Appellant belatedly seeks to challenge the Town's classification of his employment as an "MEO II"; and, attendant to such classification, his inclusion in the drug testing pool. However, the undisputed evidence clearly weighs against such a finding. First, Appellant, did not object and/or appeal the initial December 12, 2002 suspension (which was likewise based on Appellant's classification as an MEO II and inclusion in the drug testing pool). Second, although Appellant was identified as a "Laborer" on his Personnel Action Form (which form was prepared in November 2003 when the decision was made to terminate his employment), it is evident that such identification was a mere misidentification. To the contrary, the evidence established that:

-Pursuant to the October 28, 1998 "Settlement Agreement", the parties agreed that Appellant would be designated and would hold the job title/classification of 'full time/temporary MEO II', and would continue to hold said position unless that job title/classification was changed as a result of promotion or disciplinary action;

-Pursuant to the Settlement Agreement, provided Appellant performed the duties of MEO II without disciplinary action being taken or initiated against him through December 31, 1999, and he passed an operator's drug test (as defined by the Town's Drug and Alcohol testing Policy for Commercial Drivers) in December 1999, he would promoted to the permanent position of MEO II effective January 1, 2000;

-Appellant's 1999 "Employee Absence Record" described his classification for 1999 as "Laborer reinstated to MEO 2";

-On December 8, 1999, Appellant received an Employee Warning Notice for leaving his work area and failing to attend a class. The Employee Warning Notice was signed by Appellant, and listed his permanent job title as "MEO II";

-On October 21, 2001, Appellant received an Employee Warning Notice for failing to wear a safety vest. The Employee Warning Notice was signed by Appellant, and listed his permanent job title as "MEO II";

-On September 15, 2003, Appellant filed a Step 1 grievance with the Town under the provisions of the applicable collective bargaining agreement in which he claimed that he had not received the full pay that he was entitled to as an MEO II;

-Over the signature of Appellant on the grievance form, Appellant's employee classification is listed as "MEO-2";

-In reviewing Appellant's payroll records, Ms. Noble determined that Appellant had been paid at the rate of an MEO II employee from at least January 1, 2000 until his discharge in 2003;

-Appellant's direct supervisor testified that at all times while under his supervision, Appellant performed the duties of an MEO II and held a CDL;

-Pursuant to the collective bargaining agreement with the Appellant's union, all Town employees assigned to work on rubbish packers were required to be classified and paid as an MEO II and were required to maintain a CDL;

-While MEO II's may go for periods of time without actually driving the rubbish packer, the purpose behind requiring all employees working on a rubbish packer to be an MEO II is insure that any employee can drive the rubbish packer if called upon to do so; as such Appellant could have been ordered to drive one at any time; and

-Appellant testified that in 2002 and 2003 he was ready to drive a rubbish packer and truck if he was asked and if he was paid for it. (Testimony).

The Appellant was entitled to enjoy the benefits of MEO II classification (including a higher pay scale and benefits for several years) but, in that title, he also assumed the corresponding burdens (inclusion in the drug testing pool). Finally, the public policy concerns underlying the Town's Testing Policy (promoting the health, safety and welfare of the public by reducing the likelihood of drug- and alcohol-related accidents) clearly weighs in favor of a determination that Appellant (who was obligated to remain "ready, willing and able" to operate a commercial motor vehicle in connection with his employment by the Town) was subject to inclusion in the drug testing pool.

It is the function of the agency hearing the matter to determine what degree of credibility should be attached to a witness' testimony. School Committee of Wellesley v. Labor Relations Commission, 376 Mass. 112, 120 (1978). Doherty v. Retirement Board of Medicine, 425 Mass. 130, 141 (1997). The hearing officer must provide an analysis as to how credibility is proportioned amongst witnesses. Herridge v, Board of Registration in Medicine, 420 Mass. 154, 165 (1995).

Here, the Commission assigns little credibility to the testimony of Appellant, whose testimony was vague and whose memory of the underlying facts was suspect. Conversely, the Commission finds the testimony of the Town's witnesses, Leslea Noble and Lester Gerry, to be highly credible and competent.

For all of the above stated reasons, it is found that the Town of Brookline Department of Public Works has conclusively established by a preponderance of the reliable and credible evidence in the record that it had just cause to discipline the Appellant in the manner that it did. Therefore this appeal (Docket No. D-04-24) is ***dismissed***.

Civil Service Commission

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John E. Taylor

Commissioner

By vote of the Civil Service Commission (Goldblatt; Chairman, Taylor, Guerin, Bowman and Marquis; Commissioners) on January 25, 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. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A s. 14(1) for the purpose of tolling the time of appeal.
Pursuant to G.L. c. 31, s. 44, any party aggrieved by a final decision or order of the Commonwealth may initiate proceedings for judicial review under G.L. c. 30A, s. 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:
Robert H. Clewell, Esq.
George F. Driscoll, Esq.