JUN 13 2005

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

Gregory J. Ratta,
Appellant

D-02-85

Town of Watertown
Respondent

Appellant's Attorney	Paul H. Nugent Nugent & Nugent One Faneuil Hall Marketplace Boston, MA 02109
Respondent's Attorney	Joseph S. Fair Kopelman and Paige, P.C. 31 St. James Avenue Boston, MA 02116
Commissioner	John J. Guerin, Jr.

DECISION

Pursuant to M.G.L. c. 31, § 43, the Appellant Gregory J. Ratta, is appealing the decision of the Respondent, Town of Watertown, to discharge him from the position of Skilled Maintenance Craftsperson, DPW 3. The appeal was timely filed. A hearing was held on September 28, 2004, at the offices of the Civil Service Commission. Six (6) witnesses testified and three (3) audiotapes were made of the hearing. Post-hearing briefs were filed by both parties.

FINDINGS OF FACT

Based upon the documents entered into evidence (Exhibits 1-12), the testimony of the appellant, Gregory Ratta, Jr., Superintendent of Public Works for the Town of Watertown Gerald Mee, Jr., Assistant Superintendent of Utilities Jay Pellitier, and

Watertown Department of Public Works employees Daniel Melanson, Gary Pooler, and Peter Anastasi, I make the following findings of fact:

1. The Appellant was hired by the Town of Watertown (hereinafter, "the Town") as a laborer in its Department of Public Works (hereinafter, "DPW"), in August, 1987. (Stipulated Fact 1)

2. In 1989, Gerald Mee was hired by the Town as a DPW Carpentry Supervisor. Four years later, Mee assumed the position of Superintendent of the DPW. In that capacity, Mee oversees a department of nine divisions and approximately fifty-nine (59) employees. (Testimony of Mee)

3. Mee was under the impression that the laborer's position had been eliminated from the DPW by way of an agreement with the union some time in 1985 or 1986. (Testimony of Mee)

4. Appellant attained the level of Skilled Maintenance Craftsperson around 1991. (Stipulated Fact 2). Appellant was employed as a Skilled Maintenance Craftsperson until his discharge on January 29, 2002. Id. (Closing Brief of Appellant at p. 1)

5. Possession of a valid driver's license is a requirement for Appellant's position with the Town. (Stipulated Fact 8)

6. Since 1994, all new Town employees have been required to have, and continuously maintain, a valid Massachusetts Commercial Driver's License (hereinafter, "CDL"). (Exhibit 7 at p. 19)

7. All employees hired during Mee's tenure as Superintendent have been in the Motor Equipment Operator (hereinafter, "MEO") classification or higher. (Testimony of Mee)

8. A Skilled Maintenance Craftsperson is one level above an MEO. (Testimony of Mee)

9. In addition to a valid Massachusetts CDL, the Skilled Maintenance Craftsperson is required to possess a valid Class B license. (Exhibit 3 at p. 4).

10. At the time of Appellant's termination, Jay Pellitier was the Assistant Superintendent of the DPW's Water and Sewer Division and the Appellant's immediate supervisor. (Testimony of Pellitier)

11. At all relevant times to this matter, the Appellant was assigned to the DPW's Water and Sewer Division. (Testimony of Mee)

12. The Appellant's duties were assigned to him by Pellitier, and included the "everything" truck, Truck 60 (utility truck), and the Sewer Vactor truck, a CDL vehicle used for main line sewer or drain back-ups. (Testimony of Pellitier; Testimony of Mee)

13. Generally, two (2) employees were assigned to Truck 60 and they would take turns driving the vehicle. (Testimony of Pellitier; Testimony of Mee; Testimony of Appellant)

14. Employees assigned to Truck 60 respond to calls regarding such things as dead animals, glass or dislodged manhole covers in the street, and sewer backups. (Testimony of Pellitier)

15. After a sewer backup has been confirmed, the employees assigned to Truck 60 return to the DPW yard to retrieve the Vactor truck. One employee will drive Truck 60 back to the work site and the other will drive the Vactor truck. (Testimony of Appellant) The Vactor truck responds to an average of five (5) to ten (10) sewer backups in a given week. (Testimony of Mee; Testimony of Pellitier)

16. On May 9, 2001, the Appellant underwent a random drug test pursuant to the Town's Drug and Alcohol testing policy. (Stipulated Fact 3)

17. The Appellant's sample yielded a positive/abnormal result, and he was placed on paid administrative leave pending the results of a disciplinary hearing. (Stipulated Fact 4)

18. Following the disciplinary hearing, the Town Manager suspended the Appellant without pay for sixty (60) days for failing the drug test. The suspension was then appealed by the Appellant to arbitration where the suspension was upheld. (Stipulated Fact 5)

19. On Saturday, November 17, 2001, the Appellant was arrested in the Town of Belmont and charged with operating under the influence of alcohol (hereinafter, "OUI") and speeding. (Stipulated Fact 6)

20. At the Belmont Police Station and pursuant to his rights under the Massachusetts Constitution, the Appellant refused to undergo a breathalyzer test. (Stipulated Fact 7)

21. Appellant was issued a 15-day temporary driver's license, effective for the period November 17, 2001 through December 2, 2001. (Stipulated Fact 7; Exhibit 6)

22. Due to the computer being down at the Belmont Police Station, the Appellant did not immediately receive the temporary license. Instead, he picked it up on Sunday, November 18, 2001. (Testimony of Appellant)

23. In the Joint Pretrial Memorandum, the Appellant stipulated that following the November 17 arrest, he "pled guilty to sufficient facts regarding the operating under the influence of alcohol charge." (Stipulated Fact 7)[1]

24. In the days that followed his arrest, Appellant reported to work as usual and did not advise Mee or Pellitier of his arrest or the temporary status of his driver's license. (Testimony of Appellant)

25. On December 5, 2001, Mee asked Appellant if he possessed a valid driver's license. The Appellant stated that he did have a valid driver's license at that time, but that he may not by the end of the week. (Stipulated Fact 8)

26. Mee instructed the Appellant to let him know if the Appellant subsequently lost his driver's license. (Testimony of Mee)

27. Mee then advised Pellitier of his conversation with the Appellant. (Testimony of Mee; Testimony of Pellitier)

28. The Appellant worked on December 4, 5 and 7, 2001, without a valid driver's license. (Stipulated Fact 5; Exhibit 6; Exhibit 11 at p. 2; Testimony of Pellitier)

29. On Monday, December 10, 2001, the Appellant called work, claimed that he was sick, and met with his attorney regarding the OUI charge. (Testimony of Appellant)

30. On Tuesday, December 11, 2001, the Appellant reported to work for duty. At that time, he was approached by Pellitier, who inquired as to whether the Appellant had a valid driver's license. The Appellant responded that he did not and Pellitier sent him home. (Testimony of Pellitier; Testimony of Appellant)

31. Pellitier then advised Mee of the situation, who in turn informed the Town's Personnel Department. (Testimony of Pellitier; Testimony of Mee)

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[1] At the Appellant's trial for the operating under the influence and speeding charges, he pleaded "not guilty" to the charges in court. (Hearing Officer's Report at p. 3)

32. From December 10, 2001 through December 17, 2001, the Appellant was out of work on various forms of accrued paid leave. (Stipulated Fact 9)

33. On December 18, 2001, the Appellant was placed on paid administrative leave pending the outcome of an investigation of his actions. (Stipulated Fact 10)

34. By letter dated January 3, 2002, the Appellant was advised that the Town was contemplating disciplinary action against him, up to and including termination, for his operation of a motor vehicle while under the influence of alcohol and speeding, the resulting loss of his license, and his untruthfulness when asked by Mee as to whether he possessed a valid driver's license. (Stipulated Fact 11; Exhibit 1)

35. The letter further noted that the Appellant had recently received a sixty (60) day suspension for failing a random drug test while on duty. (Stipulated Fact 11; Exhibit 1)

36. On January 15, 2002, a hearing on the disciplinary charges was conducted before a hearing officer designated by the Town Manager. (Stipulated Fact 12)

37. The Hearing Officer issued her decision on the matter on January 22, 2002. In her report, the Hearing Officer found that the Appellant did not dispute the charges of driving while intoxicated or speeding, which resulted in the loss of his license. The Hearing Officer also found that the Appellant was untruthful with Superintendent Mee, when he stated on December 5, 2001, that he possessed a valid driver's license. (Stipulated Fact 13; Exhibit 2)

38. As a result of those findings and the Appellant's recent sixty (60) day suspension for failing a random drug test while on duty, the Hearing Officer recommended the termination of the Appellant's employment with the Town. (Stipulated Fact 13; Exhibit 2)

39. By letter dated January 29, 2002, the Town Manager advised the Appellant that he had adopted the Hearing Officer's report and recommendation and was terminating Appellant's employment with the Town effective that day. (Stipulated Fact 14; Exhibit 2)

40. At the time of the Appellant's termination, the Town did not employ anyone in the position of laborer and no laborer vacancies existed within the DPW. The Town could not employ the Appellant in a lower, non-driving capacity. (Testimony of Mee)

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). 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 must affirm the action of the appointing authority. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 800 (2004). Absent such a finding, the Commission shall reverse such action; otherwise, any penalty imposed by the appointing authority may also be modified. Id.

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); Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003). While the Commission does possess the authority to modify a penalty imposed by an appointing authority, the courts have held that such power "must not be confused with the power to impose penalties ab initio, which is a power accorded to the appointing authority." Police Comm'r of Boston v. Civil Serv. Comm'n., 39 Mass. App. Ct. 594, 600 (1996).

The appellate courts have provided guidance for determining when an action of an appointing authority is not reasonably justified and therefore, should be reversed or modified by the commission.

> In making that analysis, the commission must focus on the fundamental purposes of the civil service system – to guard against political considerations, favoritism, and bias in governmental employment decisions. . . . When there are, in connection with personnel decisions, overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission. It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.

Town of Falmouth, 61 Mass. App. Ct. at 800, quoting City of Cambridge, 43 Mass. App. Ct. at 304.

There was just cause for the Appellant's termination as it was determined that the charges against the Appellant, upon which his termination rests, were proven by the Town by a preponderance of the evidence. The General Laws, Chapter 31, section 43 provides:

> If the civil service commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensations or other rights; provided, however, if the employee, by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained.

By letter dated January 29, 2002, the Town Manager expressed to the Appellant that he was terminating his employment with the Town effective that day. The Town Manager's decision was based on the report and recommendation of the Hearing Officer who presided over the Appellant's pre-disciplinary hearing on January 15, 2002. The Hearing Officer recommended terminating the Appellant's employment with the Town, because: (1) he operated a motor vehicle under the influence of alcohol, resulting in the loss of his license to operate a motor vehicle, thereby preventing him from performing the essential functions of his position as a Skilled Craftsperson; (2) he was untruthful and not forthcoming when specifically questioned by Superintendent Mee about whether he possessed a valid driver's license; and (3) he recently served a sixty (60) day suspension for failing a random drug test while on duty. (Exhibit 2).

The Appellant contends that the loss of his license would not prevent him from performing the essential duties of his position as a Skilled Maintenance Craftsperson. According to the Appellant, the operation of a motor vehicle is a secondary function within the DPW, and the loss of his license was amenable to accommodation. The Appellant further maintains that he was truthful and forthcoming when Superintendent Mee asked whether Appellant had a valid driver's license. Finally, Appellant argues that

the punishment imposed was not proportionate to that received by other employees, similarly situated, who were allowed to continue working without proper motor vehicle licenses.

The parties have stipulated that the Appellant was employed as a Skilled Maintenance Craftsperson at the time of his termination and that the possession of a valid driver's license was a requirement of that position. (Stipulated Fact 2; Stipulated Fact 8). At the time of his termination, the Appellant was not in possession of a valid driver's license. Moreover, the job description applicable to the Skilled Maintenance Craftsperson position specifically requires the possession of a valid Massachusetts CDL, Class B license. (Exhibit 3 at p. 4). That Appellant was unable to satisfy this requirement at the time of his termination is further evidence that he was unable to perform the essential functions of a Skilled Maintenance Craftsperson.

The Appellant contends that, notwithstanding the parties' stipulation, the above-mentioned infraction would not prevent him from performing the essential duties of his position as a Skilled Maintenance Craftsperson. The detailed testimony of the Appellant's direct supervisor, Assistant Superintendent Jay Pellitier, refutes the Appellant's contention that the loss of his license would be amenable to accommodation.

Pellitier is responsible for the day-to-day operations of the Water and Sewer Division. (Testimony of Pellitier). As part of his job, Pellitier records the tasks assigned to each employee in a daily logbook. (Testimony of Pellitier). According to Pellitier, the Appellant was usually assigned to Truck 60, the Town's "everything" maintenance truck. (Testimony of Pellitier). When staffing allowed for the assignment of another employee to work Truck 60, the Appellant and his coworker would alternate driving that vehicle. (Testimony of Pellitier; Testimony of Appellant). Among the primary tasks performed by the Appellant when assigned to Truck 60 was responding to reports of sewer backups. (Testimony of Pellitier). Upon confirmation of a backup, the Appellant and his partner would return to the DPW yard and retrieve the Town's Vactor truck. (Testimony of Pellitier). The Appellant would then drive either Truck 60 or the Vactor truck back to the job site and his partner would return in the other vehicle. (Testimony of Appellant). Truck 60 responds to approximately five (5) to ten (10) sewer backups in a given week. (Testimony of Mee; Testimony of Pellitier). Accordingly, even when the Appellant was

assigned to Truck 60 with another employee, his duties still required him to drive a vehicle a minimum of once or twice a day. The testimony of Mee and Pellitier rebuts the Appellant's contention that he only drove about once per week on Truck 60. (Testimony of Appellant).

That the Appellant lost his license on the brink of the winter season further exacerbates his obstructive effect on the DPW. The duties assigned to a Skilled Maintenance Craftsperson include operating a snowplow on an assigned route and plowing roads and sidewalks using trucks and tracked vehicles. (Exhibit 3 at p. 2). In addition, according to the Appellant's job description, the Skilled Maintenance Craftsperson, "Operates a variety of vehicles . . . including, but not limited to: assorted trucks with plows, [and] various GVW [gross vehicle weight] motorized automobiles." (Exhibit 3 at p. 1). Superintendent Mee testified that payroll records would show that the Appellant had been called in to work snow and ice duty, operations in which there are no non-driving duties. (Testimony of Mee). The Appellant further concedes that during snowstorms he usually worked Truck 60 driving around Town looking for manhole covers that had been dislodged by the plow trucks and repositioning them. (Testimony of Appellant). A driver's license is an obvious requirement for this aspect of the Appellant's job.

The Appellant asserts that the job description pertaining to the Skilled Maintenance Craftsperson position contains nearly two and a half (2 ½) pages of specific non-driving duties that were required of the Appellant. (Exhibit 3 at ps. 2-4). Even if we are to accept the Appellant's contention that the number of those duties "far outweighs" those requiring a driver's license, the Appellant fails to explain how he would transport himself to the various locations in Town that provided suitable tasks for him to perform.

According to the Hearing Officer at the Appellant's pre-disciplinary hearing, the Appellant was untruthful and not forthcoming with Superintendent Mee, when he spoke with him on December 5, 2001, as to whether he possessed a valid driver's license. (Stipulated Fact 8). The Appellant's permanent driver's license was suspended for 120 days on November 20, 2001 and his temporary driver's license expired on December 3, 2001. The Appellant did not admit that he did not possess a valid license until his immediate supervisor, Assistant Superintendent Pellitier, asked him on December 10,

2001, at which point the Appellant had already worked for three (3) days without a valid license.

Similarly, the Appellant's assertion about the duration of his temporary license strains credulity. The Appellant was issued a 15-day temporary driver's license, at 3:54 p.m. on November 17, 2001, effective for the period November 17, 2001 through December 2, 2001. (Stipulation of Fact 7; Exhibit 6). The first paragraph of the temporary license clearly stated the following: "This temporary Driver's License is issued in lieu of a photo license under M.G.L. Ch. 90, Sec. 24. It is not valid until twelve hours after the above date and time of issue. It will expire at the end of the fifteenth (15) day after the date of issuance." (Exhibit 6). The document states, in no uncertain terms, that the Appellant's temporary license would expire "at the end of the fifteenth (15) day" after it was issued. Despite this unambiguous language, the Appellant claimed that he "assumed" the license was valid for fifteen working days as opposed to calendar days. However, the Appellant offers no explanation for how he arrived at such an erroneous conclusion. His asserted ignorance regarding the license's proper expiration date in the face of the explicit information contained in the license itself is simply not believable.

In addition to the Appellant's explanation being implausible, his attempts to conceal the truth regarding his arrest and subsequent loss of license further serve to discredit his defense. For example, on November 19, 2001, prior to the Town learning that he had been arrested, the Appellant called the DPW and falsely claimed to be sick so that he could attend a court appearance related to the OUI charge. (Testimony of Appellant). Thereafter, the Appellant reported to work over the ensuing weeks without ever advising the Town that he would soon be without a license, or even that he was operating with a temporary one. It was not until Superintendent Mee called the Appellant into his office to discuss an unrelated matter that the subject of the Appellant's temporary license was broached. That conversation, initiated by Mee, occurred on December 5th, more than two weeks after the Appellant had been arrested. The Appellant told Mee that he had a license, but that he may not have one by the end of the week. (Stipulated Fact 8). Obviously interested in the status of the Appellant's license, Superintendent Mee responded: "Make sure you let me know." (Testimony of Mee). If the Appellant truly believed that his temporary license was valid for fifteen working days, he would not have

told Mee that he "may" not have a license by the end of the week. Instead, he would have stated unequivocally that he would not have a license by the end of the week, as his temporary license would expire on Friday, December 7. (Testimony of Appellant).

That the Appellant was not fully honest about his lack of a valid license when he spoke with Superintendent Mee on December 5th is further buttressed by the events that occurred the next day. The record shows that the Appellant reported to work on December 6 and was assigned to Truck 60, along with another employee. (Exhibit 11 at p. 4; Testimony of Pellitier). At 11:05 a.m., a call came into the DPW for a sewer backup for which the Vactor truck needed to be used to solve the problem. (Exhibit 12; Testimony of Pellitier). In such cases, the usual practice called for the Appellant and his partner to drive to the site, confirm the backup, retrieve the Vactor truck from the DPW yard, and finally, return to the site with both the Vactor truck and Truck 60, thereby requiring the Appellant to drive. The Appellant did not respond to the 11:05 a.m. call. Instead, Assistant Superintendent Pellitier's records indicate that the Appellant took the second half of the day off because he was sick. (Exhibit 11 at p. 4). However, in testimony at the Civil Service Commission, the Appellant stated that he did not respond to the call because he had to go to the dentist. (Testimony of Appellant).

The circumstances surrounding the present matter stem from the discipline imposed upon the Appellant by the Hearing Officer's consideration of the following charges:

1. Operating a motor vehicle under the influence and speeding on November 17, 2001 that resulted in the loss of his license to operate a motor vehicle, preventing him from performing the essential functions of his position.

2. Being untruthful and not forthcoming to Public Works Superintendent Mee on December 5, 2001, when asked specifically about his possession of a valid driver's license.

3. A disciplinary history that includes a recent sixty (60) day suspension for failing a random drug test while on duty.

At the time of the drunken driving charge, the Appellant was facing a minimum of a 120-day suspension of his license as a result of his refusal to take a breathalyzer test.[2] (Exhibit 5 at p. 1). This infraction occurred less than four (4) months after the Appellant had finished serving a sixty (60) day unpaid suspension for failing a random drug test while on duty.[3] Thus, in a relatively short time frame, the Appellant had been involved in two (2) significant disciplinary incidents, both of which involved substance abuse and rendered him unable to perform many of the essential functions of his job. Either of these transgressions alone would give an employer pause when considering the ability of an employee to operate a company vehicle. However, the two transgressions having occurred in such close proximity, made continued employment of the Appellant with the DPW untenable.

As discussed above, the Appellant's misconduct and subsequent loss of his license left him unable to perform a number of the essential functions of his job. The Appellant argued that the Town could have allowed him to work without a driver's license as a laborer. However, that was not the job the Appellant was being paid to do. He was employed as a Skilled Maintenance Craftsperson and the essential functions of that job required a valid driver's license. Furthermore, at no time during Superintendent Mee's tenure, dating back to 1993, has anyone been hired as a laborer. In fact, Superintendent Mee was under the impression, all be it a mistaken one, that the laborer position had been eliminated sometime around 1985. Thus, for the Town to accommodate the Appellant and employ him as a laborer, it would be forced to leave his current Skilled Maintenance Craftsperson position open indefinitely and employ him in a

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[2] The Notice of Suspension for a Chemical Test Refusal states in relevant part as follows: "This is your formal notice of the intent to suspend your license or right to operate under M.G.L. Ch 90, Sec 24(1)(f)(1). The suspension for this refusal will be for a period of not less than 120 days and not more than one year." Exhibit 5 at p. 1.

[3] As the record indicates, the Appellant appealed this disciplinary action to arbitration where the Arbitrator held that the Town had just cause to issue the sixty (60) day suspension. Exhibit 9 at p. 2. At the hearing in the instant matter, Appellant argued that evidence of the suspension should not be considered by the Commission since the time for filing a suit to vacate the Arbitrator's decision had not yet expired and therefore, the decision was not final. The Appellant has offered no evidence, however, to demonstrate that such an appeal has actually been filed and the statutory period for doing so has now long since expired. *See* G.L. c. 150C, § 11(b); *See also Greene v. Mari & Sons Flooring Co., Inc.*, 362 Mass. 560, 562 (1972) (holding that actions to vacate an arbitration award must be initiated within thirty (30) days of receipt of the Arbitrator's decision).

job classification unfilled since at least 1993. The Appointing Authority is not required under these circumstances to provide such an extraordinary accommodation.

The Appellant asserts that the discipline imposed by the Town is constrained by the requirements of the United States Constitution and Massachusetts Declaration of Rights requiring equal protection under the law for all. The Appellant argues that the Town did not meet its obligation in this regard. At his hearing before the Commission, the experience of two other employees were offered on the Appellant's behalf to demonstrate that he was treated in a disparate manner in relation to co-workers who were similarly situated. Gary Pooler, a DPW employee since July, 1987, was involved in an accident with a Town vehicle during his initial six month probationary period. (Testimony of Pooler). However, Pooler testified on cross-examination that no criminal charges stemming from that accident were ever brought against him, nor did he lose his license because of it. Id. Instead, Pooler admitted that he had a substance abuse problem and voluntarily checked himself into a rehabilitation program. Id. Subsequently, Pooler was involved in a domestic abuse incident with his wife. Id. The Town initially placed Pooler on paid administrative leave because of the incident. However, following an investigation, the Town concluded that it did not have sufficient cause to discipline him further for the conduct at issue. Id. In addition, the domestic abuse incident did not affect Pooler's license to operate a motor vehicle. In 2002, Pooler was involved in an off-duty accident in which he received a traffic citation. (Testimony of Pooler). Following the accident, Pooler used two weeks of vacation time to recover from the injuries he sustained in the accident. Id. Thereafter, Pooler received a summons in the mail indicating that he was being charged with OUI. Id. Upon returning to work from his absence, Pooler voluntarily informed his immediate supervisor, Ed Baptista, that he had been involved in an accident and was being charged with OUI. Id. Pooler's license to drive remained valid during the pendency of the charges. Id. It was not until the charges were resolved in court that he lost his license for a period of forty-five (45) days. (Testimony of Pooler). A hearing was held by the Town to determine whether disciplinary action should be imposed upon Pooler for the loss of his license and subsequent inability to perform the essential functions of his job. Id. (Exhibit 10 at p. 2).

During the period of time Pooler did not have a license, the Town did not allow him to work. (Testimony of Pooler).

Ultimately, a last chance settlement agreement was entered into between Pooler and the Town. (Testimony of Pooler; Exhibit 10). Pursuant to that agreement, Pooler would serve an additional forty-five (45) day suspension (on top of the 45 days he was already suspended because he did not have a license). (Exhibit 10 at p. 2). Pooler was also required to complete a sixteen (16) week alcohol education program, a recovery and prevention program, and attend weekly Alcoholics Anonymous meetings. Id. at 2-3. In addition, he agreed to participate in random drug and alcohol testing for a period of twelve (12) months. Id. at 3. The agreement further contained a provision specifying that any similar incidents in the future would result in Pooler's immediate termination. Id. Pooler was out of work without pay for a total of ninety (90) days as a result of his misconduct. (Testimony of Pooler).

Pooler's case was not treated lightly by the Town and is distinguishable from the instant matter. Although Pooler was not terminated, there was no evidence that he had been untruthful with the Town about his arrest and loss of license. In contrast, the Appellant was neither forthcoming nor honest with the Town or Superintendent Mee when questioned about whether he possessed a valid driver's license. In addition, where Pooler had an earlier substance abuse infraction that occurred more than ten (10) years before his more recent transgression, the Appellant's OUI charge came on the heels of his sixty-day suspension for a positive drug test. Since the punishment imposed upon Pooler was only one step removed from termination, the presence of the failed drug test and other aggravating factors in the Appellant's case justified his being treated more harshly than Pooler. Finally, had the Appellant been forthright in his dealings with the Town and with Mee, perhaps a last chance agreement would have been warranted. However, even Mee, who testified that he had been satisfied with the Appellant's work, veracity and truthfulness, up until the Appellant's positive drug test, now recommended that he be terminated.

Another employee witness the Appellant called to testify to indicate that the Appellant had been treated unfairly failed to prove that point. Daniel Melanson was arrested and convicted for OUI and subsequently lost his license for a period of time in

1987. (Testimony of Melanson). At that time, Melanson was employed as a Motor Equipment Operator. Id. He did not have any prior disciplinary history and voluntarily informed then DPW Superintendent James Clark that he had been arrested the day after it occurred. Id. Melanson was allowed to continue working, but was prohibited from operating a Town motor vehicle since he was without a valid license. Id. That Melanson's incident occurred approximately fifteen (15) years prior to the incident at hand and did not occur on the heels of a positive drug test is reason alone to give it little or no consideration. Since 1987, the Massachusetts Legislature has toughened the law regarding alcohol related driving offenses by lowering the legal limit of intoxication to .08 Blood Alcohol Content. The more stringent discipline imposed by the Town in Pooler's and the Appellant's cases reflect this change in societal and legal values since 1987.

For all of the foregoing reasons, the Town satisfied its burden of proving that just cause existed for the termination of the Appellant's employment. Therefore, the ***appeal is dismissed.***

Civil Service Commission

John J. Guerin, Jr.
Commissioner

By vote of the Civil Service Commission (Chairman Goldblatt, Henderson, Taylor, Guerin and Marquis, Commissioners) on May 26, 2005.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten (10) days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with Mass. General Laws Chapter 30A, section 14(1) for the purpose of tolling the time of appeal.

Pursuant to Mass. General Laws Chapter 31, section 44, any party aggrieved by a final decision or order of the Commonwealth may initiate proceedings for judicial review under Mass. General Laws Chapter 30A, section 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:
Paul H. Nugent, Esq.
Joseph S. Fair, Esq.