COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

JOHN WIELGUS,
Appellant

v.

D-05-138

CITY OF WESTFIELD,
Respondent

Attorney for the Appellant:

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AFSCME Council 93
8 Beacon Street
Boston, MA 02108

Attorney for the Respondent:

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Commissioner:

John E. Taylor

DECISION

Pursuant to G.L. c. 31 § 43, the Appellant John Wielgus (hereinafter "Wielgus" or "Appellant") appealed the decision of the City of Westfield (hereinafter "the City" or "the Appointing Authority") to discharge him as head treatment plant operator for being under the influence of alcohol while at work and for the operation of a city vehicle during work hours while under the influence of alcohol. The Civil Service Commission (hereinafter "Commission") held a hearing on May 28, 2008 at the Springfield State

Office Building in Springfield. Since no written notice was received from either party, the hearing was declared private but for the permitted presence of two non-witnesses, Alice Wielgus and Thomas Wielgus, Esq. The witnesses were not sequestered. Two (2) audiotapes were made of the hearing.

FINDINGS OF FACT

During the hearing, a total of twenty-two (22) exhibits were entered into evidence. Based upon the documents entered into evidence, stipulation of the parties relating to breath alcohol test results, and the testimony of:

For the Appointing Authority:

- David Billips – Water Resources Superintendent, former Superintendent of Sewerage and Wastewater Treatment
- Kenneth Guertin – Deputy Superintendent, former Treatment Plant Operator
- Helen Bowler – Westfield Public Schools Legal Counsel, former City Personnel Director

For the Appellant:

- John Wielgus, Appellant

I make the following findings of fact:

1. On January 14, 2005, the Appellant was a tenured civil service employee of the Sewerage and Wastewater Treatment Division of the Department of Public Works of the City. He held the job title Head Treatment Plant Operator, a position he had been employed in for the City since his permanent appointment to that title in 1983. (Testimony of Appellant)
2. As Head Treatment Plant Operator, the Appellant was responsible for the day-to-day operation of the treatment plant and overseeing the work of the other plant employees. His job required travel to various sanitary sewage pump stations

located throughout the city and the ability to respond promptly to after hours' events at the treatment plant or one of its pumping stations. (Testimony of Appellant)

3. The Appellant's position reported to the Superintendent of Sewerage and Wastewater Treatment, David Billips (hereinafter"Billips"). Billips had held the Superintendent's position since he began employment with the City in April, 2003. In January, 2005, Billips was the City appointing authority for the Head Treatment Plant Operator position. (Testimony of Billips)

4. As an employee who was required to utilize a Commercial Drivers License (CDL) in order to perform his job, Appellant participated in the City of Westfield U.S. Department of Transportation-mandated Drug and Alcohol Testing pool ("Drug and Alcohol Testing pool") at its inception in 1995. He received a copy of the "City of Westfield Policy Statement Regarding Compliance With Department of Transportation Mandated Drug and Alcohol Testing Requirements" ("City DOT policy") in October 1995. The City DOT policy prohibits the misuse of alcohol from any source. Misuse is defined therein as having a breath alcohol concentration of 0.04 or greater independent of the source. It states that testing may occur in circumstances that include "Reasonable Suspicion". Reasonable Suspicion testing occurs if, based on the observations of at least one supervisor or manager, there is reasonable suspicion to believe the employee is impaired while on duty based on alcohol misuse. (Exhibits 10 and 11)

5. The City DOT policy includes a statement of consequences for use of drugs and misuse of alcohol. The policy draws a distinction between an employee who fails a

random selection test and test failures which occur under different circumstances, stating that failure under any test circumstances other than random selection will result in consequences which are likely to be more severe than failure of a random selection test and that more severe consequences could include termination from City employment. (Exhibit 10)

6. The City Employee Manual sets forth its alcohol policy: reporting to work or working under the influence of alcohol is strictly prohibited, and any employee who reports to work under the influence of alcohol will be subject to discipline including suspension and termination. For "Reporting to Work Under the Influence of Alcohol or Drugs", the punishment for a first offense is a suspension and for a second offense is discharge. The Appellant received a copy of the employee manual in May 1992; the policy regarding alcohol use was unchanged from the date the Appellant received the manual through January 14, 2005. The policy does not replace any existing City policy regarding drug and alcohol use but is in addition to existing policies. (Exhibits 8 and 9, Testimony of Bowler)

7. The collective bargaining agreement between the City and AFSCME Council 93 applicable to the Appellant as Head Treatment Plant Operator provides that no employee shall report to work under the influence of alcohol nor shall an employee use an alcoholic beverage while on duty. The agreement provides that the City shall have the right to require an employee to undergo such physical or other job-related examinations at such times and places as the City may reasonably and lawfully require. (Exhibit 14)

8. Kenneth Guertin (hereinafter "Guertin"), a City treatment plant operator, testified that on the morning of January 14, 2005 he was at work in the laboratory of the sewage treatment plant when the Appellant arrived approximately ten minutes late. Guertin stated that when he left the laboratory he passed the Appellant in the hallway talking to coworkers. He testified credibly that Appellant appeared as though he had been drinking. His eyes were bloodshot and his speech was slurred.

9. The Appellant testified that he arrived at work at 6:50 a.m on that day. However, he was unable to record his arrival time because the biometric scanner used to record an employee's time on-the-clock was not working. After a coworker came to his rescue, he was able to get the biometric scanner to work. He then proceeded to do his daily rounds. When he was done, the Appellant drove home in a City owned pick up truck and drove in order to pick up anxiety medication. He then drove back to the treatment plant and went to Billips' office to discuss the biometric scanner. (Testimony of Appellant)

10. Billips testified that shortly after the Appellant's arrival at the treatment plant, he received a call from ADT, a security service that monitors the alarm system for the City's sewage pumping stations. Billips then attempted to locate the Appellant in order to advise him that an alarm had come in. After learning that the Appellant had left the plant in a City vehicle, Billips left the plant in another City vehicle. He tried to reach the Appellant on the two-way radio, but no avail. Knowing that it was the Appellant's habit to get coffee from a nearby Dunkin Donuts, Billips drove there, but the Appellant was not there. Billips then went to the Appellant's residence. As he entered the Appellant's street, the Appellant drove by him in the opposite

direction. Billips returned to the treatment plant, arriving before the Appellant. (Testimony of Billips)

11. Billips was standing on a loading dock when the Appellant drove in and parked. Billips informed the Appellant he had been late and asked him where he had been. The Appellant pulled out an eyeglass case from his pocket and said he had gone home to retrieve his glasses. (Exhibit 1, Testimony of Billips)

12. Billips testified that several minutes later, at about 8:15 a.m, the Appellant entered Billips' office and told him he was not late, that he had had difficulty punching in. Billips noticed the Appellant was slurring his speech and had trouble keeping his balance. Billips believed he was under the influence of alcohol. Billips then telephoned Helen Bowler, the City Personnel Director (hereinafter "Bowler"), for guidance, but she was out of the office.

13. At approximately 8:30 a.m., Billips tried to find the Appellant. However, he had already left the treatment plant (in a City pick up truck) for the 9:00 safety meeting at City Hall. Billips stated that he had known about the meeting, but had not expected the Appellant to leave for it more than 30 minutes ahead of time.

14. Billips then drove the four miles to City Hall. He went to the Personnel Department and spoke with Bowler over the telephone. He told her what he had seen, and she gave him instructions as he had not had reasonable suspicion training. (Testimony of Billips)

15. Bowler testified that her duties as Personnel Director included administration of the City DOT policy as the City's Drug and Alcohol Program Manager. Bowler testified that she had undergone training in the applicable DOT regulations and

reasonable suspicion training. She further stated that she was responsible for advising appointing authorities concerning disciplinary matters (Testimony of Bowler)

16. After speaking with Bowler, Billips and an assistant from the Personnel Department went to the room in which the safety meeting was being held, and asked the Appellant to come with them. Billips drove the Appellant to Noble Hospital where he took a breath alcohol test. The test registered 0.102. The limit for intoxication under the City DOT policy is 0.04. The Appellant was given a second test. It registered 0.105. Billips then drove the Appellant home. (Testimony of Billips)

17. The parties have stipulated that the results of the breath alcohol test are accurate and that the breath alcohol technician properly followed the testing procedures.

18. Billips met with Bowler the afternoon of January 14, 2005. He gave her a memorandum setting forth his observations of the Appellant that morning and filled out the City's reasonable suspicion recording form. A letter was drafted, placing the Appellant on administrative leave with pay effective immediately. It was signed by Billips. (Exhibits 1, 2 and 3)

19. Bowler testified that on January 14, 2005, the Appellant was subject to three policies concerning alcohol misuse. Bowler was a professional, objective and knowledgeable witness. (Testimony, demeanor of Bowler)

20. On February 16, 2005, Bowler, Billips, two union representatives and the Appellant attended an investigative conference in Bowler's office. The results of the alcohol breath test were reviewed. At the hearing, Bowler testified that the Appellant had said he could not believe the test results because he had stopped drinking before

11:00 p.m. the previous evening. He also said he had consumed eight beers between the hours of 4:00 p.m. and 11:00 p.m. The Appellant also said that he had sought treatment for his alcohol abuse, had been admitted to the Carlson Center for alcohol treatment after the January 14, 2005 incident and had applied to receive treatment at the Mountainside Treatment Center. (Exhibits 15 and 21, Testimony of Bowler)

21. The Appellant testified that he had worked at the treatment plant on January 13, 2005. After he got home that evening, he consumed eight beers or so –he could not recall the exact number, but he is certain that he did not consume any alcohol after 11:00 - 11:30 p.m. Billips, however, testified that the Appellant did not work at all on January 13, 2005, he called in sick day that day. (Testimony of Appellant)

22. The Appellant was not a credible witness, and was often forgetful during his testimony. (Testimony, demeanor of Appellant)

23. Billips was a credible and truthful witness. (Testimony, demeanor of Billips)

24. In a letter dated February 16, 2005, Bowler provided the Appellant with a written summary of the status of his employment, writing that because he had voluntarily enrolled in an alcohol treatment program his administrative leave had been converted to paid sick leave. He was informed that his positive test result required that he complete a program with a certified Drug and Alcohol Counselor at his own expense. He was informed that he would not be eligible to return to work until those steps were completed. Bowler also wrote, “Of greater concern is the fact that not only were you determined to be under the influence of alcohol, but you were operating a City vehicle while under the influence and it was at a level that exceeded the legal limit, putting both you and the Department at risk.” She

followed that sentence with "As such, we will be scheduling a hearing pursuant to G.L. c. 31 § 41 to determine your continued employment with the City of Westfield. (Exhibit 16, Testimony of Bowler)

25. By letter dated February 28, 2005, Billips informed the Appellant that a hearing would be held on March 24, 2005.

26. On March 23, 2005 Longview Employee Services sent Bowler a DOT/SAP Compliance Letter stating that the Appellant had complied with his service plan by attending a 21 day program at the Mountainside Treatment Center. The letter also stated that the Appellant would be required to participate in a return to duty alcohol test. (Exhibit 19)

27. In a letter dated March 25, 2005, Billips informed the Appellant that he was being discharged from his employment based on reasoning that he was "under the influence of alcohol while at work and the operation of a city vehicle while under the influence." Billips also wrote that, "of particular concern were your continued statements that you had imbibed no alcohol from 11:00 pm the evening before until your test at 11:00 am the following morning and accepted no responsibility for your condition." (Exhibit 5)

28. The Appellant filed his appeal with the Commission on April 4, 2005.

29. The Appellant submitted an April 26, 2005 letter from his physician who diagnosed the Appellant as an alcoholic who has been alcohol-free for 100 days as of April 28, 2005. (Exhibit 20)

30. The Appellant stated that during most of his career with the City, Alan Pierce ("Pierce") had been Superintendent of Sewerage and Wastewater Treatment and

that he and Pierce had a good relationship. He testified that Billips was appointed as Pierce's successor in April, 2003 and that he had problems with Billips since September 2004. (Testimony of Appellant)

31. The Appellant's prior discipline includes a written warning of October 29, 2004 and a three (3) day suspension without pay on December 29, 2004. Neither the written warning nor the three (3) day suspension involved alcohol abuse. (Exhibits 6 and 7)

32. Bowler testified that on December 9, 2004 she provided information to the Appellant in regard to the new confidential City-sponsored employee assistance plan ("EAP"). She did not learn that he had chosen to contact the EAP until the February, 2005 investigatory conference.

33. Bowler testified that in considering an employee's discharge, the City looks at proof of misconduct, the employee's work history, the severity of the offense, the length of service, disciplinary record, prior notice of consequences, job performance and the defense presented. She testified that based on these factors, Billips decided to discharge the Appellant. She approved the decision.

34. The Appellant filed a timely appeal with the Commission on April 4, 2005.

CONCLUSION

The role of the Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge v. Civ. Serv. Commis'n, 43 Mass. App. Ct. 300, 304 (1997). *See* Watertown v. Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civ. Serv. Comm'n, 38 Mass. App. Ct. 473, 477 (1995); Police Dep't of Boston v. Collins, 48

Mass. App. Ct. 411 (2000); Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is "justified" when it is done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law". Id. at 304, quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civ. Serv. v. Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service". Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Committee of Brockton v. Civ. Serv. Comm'n, 43 Mass. App. Ct. 486, 488 (1997).

The Appointing Authority's burden of proof is one of preponderance of the evidence which is established "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there". Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956). In reviewing an appeal under G.L. c. 31 § 43, if the Commission finds by a preponderance of the evidence that there was just cause for an action taken against an Appellant, the Commission shall affirm the action of the Appointing Authority, Falmouth v. Civ. Serv. Comm'n, 61 Mass. App. Ct. 796, 800 (2004).

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority

made its decision". Watertown v. Arria at 334 (1983). *See* Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton at 727.

In the present case, the Appointing Authority has demonstrated that the decision to discharge the Appellant was justified. Evidence showed that the Appellant was subject to three City policies concerning alcohol misuse as of January 14, 2005. Through participation in the Drug and Alcohol Testing pool, he had received training regarding alcohol misuse and its consequences. He had received copies of the City DOT policy and the City employee manual, both of which show a policy against misuse of alcohol at work. He was also subject to a collective bargaining unit that prohibited alcohol in the workplace.

Testimony and documentary evidence show that on January 14, 2005, shortly after reporting to work, Billips observed that the Appellant had slurred speech and was having trouble keeping his balance. Billips' observation is corroborated by Guertin's testimony that he also observed the Appellant's glassy eyes and slurred speech. That same morning, the Appellant left Billips' office, and drove in a City owned vehicle to a meeting in City Hall. Billips then sought out Bowler, the City's Personnel Director and the DOT Drug and Alcohol Program manager, and reported his suspicions about the Appellant's lack of sobriety. Bowler had received reasonable suspicion training, and was responsible for administering the City's drug and alcohol testing program, in addition to advising the City on disciplinary matters.

After he was tracked down, the Appellant took and failed a breath alcohol test, in excess of the 0.04 limit as allowed by the City DOT policy and the 0.08 limit as adopted by the Commonwealth as the basis for operating under the influence of alcohol.

The Appellant argues that he should not have been discharged based on the above incident. He asserts that the City has a stated policy – as stated in the Employee Manual - which sets forth the penalty for the conduct in which the Appellant was engaged and that the penalty for a first offense is suspension, not a discharge. The Employee Manual provides a list of offenses and the punishment to be meted out for each. The Appellant points out the offense of, "Reporting for work under the influence of alcohol or drugs" with the penalty for a first offense stated as "suspension." However, he was discharged for (1) being under the influence of alcohol while at work and (2) *operation* of a city vehicle during work hours while under the influence of alcohol. Neither of these reasons for discharge is addressed specifically in the disciplinary matrix, although the first is similar to the reporting for work under the influence. As both Billips and Bowler wrote to the Appellant: "Of greater concern is the fact that not only were you determined to be under the influence of alcohol, but you were operating a City vehicle while under the influence and it was at a level that exceeded the legal limit, putting both you and the Department at risk." Their concern was well placed: the Appellant's misconduct, driving a City vehicle under the influence, adversely affects the public interest by impairing the efficiency of the public service.

The City DOT policy specifies in detail when and under what circumstances an employee such as the Appellant is subject to breath alcohol testing. The section entitled "Consequences for Use of Drugs and Misuse of Alcohol Including Financial Issues for the Safety Sensitive Employee" provides that an employee who fails a random selection test for the first time will be suspended. However, it also states that a failure of any other testing scheme may result in greater consequences, up to and including termination. The

Appellant was tested because he appeared to be impaired. Given the appearance of the Appellant's impairment, the handling and subsequent penalty for his situation were outside the scope of a random test failure and required an analysis of the circumstances.

The Appellant failed to present evidence that the City's actions had overtones of political control or objectives unrelated to merit standards or neutrally applied public policy. The Appellant's argument that Billips was prejudiced against him is not persuasive. Billips was hired in April, 2003, and had served as the Appellant's supervisor for over a year prior before this incident. The Appellant's argument that he understood that he could be returned to duty if he attended substance abuse counseling sessions and presented an acceptable breath alcohol testing result is not supported by testimony or any documentation.

For all the above reasons, the Appointing Authority has demonstrated by a preponderance of the evidence that there was reasonable justification for the termination of the Appellant. There was no evidence of inappropriate motivations or objectives that would warrant the Commission overturning his discharge.

For all of the above reasons, the Appellant's appeal filed under D-05-138 is ***dismissed***.

Civil Service Commission

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John E. Taylor, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on October 9, 2008.

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. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice:
Joseph L. DeLorey, Esq. (for Appellant)
Peter H. Martin, Esq. (for Appointing Authority)