COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

MICHAEL WIGGLESWORTH,
Appellant

V. Docket No. D-02-707

CITY OF PITTSFIELD,
Respondent

Appellant's Attorney:
Michael J. DeGregorio, Esq.
George, DeGregorio,
Massimiano & McCarthy, P.C.
Berkshire Common
Pittsfield, MA. 01201

Respondent's Attorney:
Kathleen E. Degnan, Esq.
City of Pittsfield
Office of City Solicitor
City Hall – 70 Allen Street
Suite 201
Pittsfield, MA. 01201

Commissioner: John J. Guerin, Jr.

DECISION

Pursuant to the provisions of G.L. c. 31, s. 43, the Appellant, Michael Wigglesworth (hereinafter "Appellant"), is appealing the action taken by the Respondent, City of Pittsfield (hereinafter "City") as Appointing Authority, in discharging the Appellant because he: (a) violated a "Last Chance Agreement" when he tested positive for methadone; and (b) was listed by the City's insurance carrier as an un-insurable driver,

thereby precluding him from performing an essential function of his employment as a Highway Maintenance Craftsman. The appeal was timely filed. A full hearing was held at the offices of the Civil Service Commission on January 9, 2006. The hearing was continued on February 16, 2006 at Pittsfield City Hall. Three (3) tapes were made of the hearing. A written transcript was also prepared for the record. As no notice was received from either party, the hearing was declared private. Both parties submitted post-hearing briefs.

FINDINGS OF FACT:

Based upon the documents entered into evidence (Joint Exhibits 1-32), and the testimony of the Appellant, former City Personnel Director Kelly A. Reagan, and City Commissioner of Public Works Bruce Collingwood, I make the following findings of fact:

1. The City of Pittsfield is the employer and appointing authority. (Testimony and Exhibit 1).
2. The Appellant was hired as a laborer by the City on August 1, 1991. (Id.).
3. Thereafter, the Appellant was promoted to tenured, permanent Highway Maintenance Craftsman. (Exhibit 1).
4. The position of Highway Maintenance Craftsman requires maintaining a valid Class A Commercial Driver's License. (Testimony and Exhibit 2).
5. The position of Highway Maintenance Craftsman requires the ability to operate dump trucks, backhoes, loaders and heavy equipment. The position

requires the ability to perform such physical acts as climbing ladders and climbing into manholes. The position also requires that the employee must have the capability to drive throughout the duration of his/her employment. (Id.).

6. On December 20, 2001, the Appellant volunteered to then-Personnel Director, Kelly A. Reagan, the fact that he was "strung out", addicted to heroin and drug dependent. (Testimony and Exhibit 1).
7. Ms. Reagan set the Appellant up in a rehabilitation program with Mental Health and Substance Abuse of the Berkshires (hereinafter "MHSA"). (Id.).
8. The Appellant did not participate in the rehabilitation program set up by Ms. Reagan, but rather participated in a Section 35 court proceeding because a warrant had been issued for his arrest. (Testimony).
9. On January 19, 2002, the Appellant was discharged from inpatient treatment at MHSA/Keenan House, and was referred for outpatient counseling. (Testimony and Exhibits 1 & 7).
10. On January 24, 2002, the Appellant, seeking to return to work, executed a release allowing his substance abuse counselor to give the Department of Transportation the required information so that Berkshire Occupational Health could make a determination as to whether the Appellant could be certified for a return to his job. (Testimony and Exhibits 1 & 8).
11. On February 7, 2002, Berkshire Occupational Health reported that the Appellant was not fit to return to work. (Testimony and Exhibits 1 & 9).

12. On March 14, 2002, MHSA issued an opinion that the Appellant could return to work in a safety sensitive situation (which included driving vehicles for the City) and recommended "full panel" random drug testing for a one (1) year period (the "full panel" to include testing relative to alcohol, opiates, cocaine, marijuana, heroin, amphetamines and tranquilizers). (Testimony and Exhibits 1 & 12).
13. On March 14, 2002, the Appellant tested negative for the presence of all of the drugs included on the "full panel", and was deemed fit to return to work. (Testimony and Exhibits 1 & 13).
14. Methadone was among the panel of drugs tested for in the March 14, 2002 screening. (Exhibit 13).
15. The Appellant never objected to the inclusion of methadone in the panel of drugs screened in the March 14, 2002 testing. (Administrative Notice).
16. On March 19, 2002, the Appellant signed, with the approval of his union, a Return to Work and Last Chance Agreement ("Last Chance Agreement"). (Testimony and Exhibits 1 & 14).
17. The City's intent in asking the Appellant to execute the Last Chance Agreement was not to discipline the Appellant, but rather to ensure that the Appellant returned to work in a drug and alcohol-free state, thereby protecting the public safety. (Testimony and Exhibit 28).
18. The Appellant was advised by the City that if any of the drug tests revealed a positive result, he would be terminated from his employment in accordance with the Last Chance Agreement. (Testimony and Exhibit 14).

19. In accordance with the Last Chance Agreement, the Appellant submitted to random drug tests, which took place on April 3, 2002, April 29, 2002 and, May 29, 2002. (Exhibits 1, 14, 15, 17 & 18).

20. Methadone was among the panel of drugs tested for in the April 3, 2002, April 29, 2002 and, May 29, 2002 screenings. (Exhibits 1, 14, 15, 17 & 18).

21. The Appellant tested negative for all drugs listed on the testing conducted on April 3, 2002, April 29, 2002 and, May 29, 2002. (Testimony and Exhibits 1, 14, 15, 17 & 18).

22. The Appellant never objected to the inclusion of methadone in the panel of drugs screened in the testing performed on April 3, 2002, April 29, 2002 and, May 29, 2002. (Administrative Notice).

23. On June 27, 2002, Robert Tone, former purchasing agent for the City, faxed a list of all of the employees of the City to its insurance agent for the purpose of maintaining its insurance coverage. (Testimony and Exhibits 1 & 19).

24. On July 31, 2002, the Appellant tested positive for the presence of Methadone. No other drugs were reported positive in this test sample. (Testimony and Exhibits 1 & 20).

25. Methadone is a prescription medication. (Exhibit 4).

26. Prior to executing the Last Chance Agreement, the Appellant did not notify the City that he was taking methadone pursuant to a prescription. (Testimony and Exhibit 4).

27. Paragraph 6 of the Last Chance Agreement provides, in pertinent part:

> "Any failure on the part of the Employee to comply with the terms and conditions of this Agreement, including but not limited to a

positive drug or alcohol test or a refusal by the employee to submit to testing, will result in the Employee's immediate termination". (Exhibit 14).

28. During the hearing process, the Appellant gave the City a copy of a methadone prescription dated December 16, 2001. (Testimony and Exhibits 1 & 4).

29. On August 2, 2002, the City received notification from its insurer, Metroguard/Diplomax (hereinafter "Metroguard") that the Appellant was not an acceptable driver under its "driver selection criteria" and, in order to maintain insurance coverage, Metrogaurd required written confirmation that the Appellant would not be driving in his capacity as an employee of the City. (Testimony and Exhibits 1 & 21).

30. On August 6, 2002, Ms. Reagan informed Metroguard that the City did not wish to jeopardize its insurance coverage, and that as a result of the Appellant's "unacceptable" status, the Appellant would not be working in a driving capacity for the City. (Testimony and Exhibits 1 & 22).

31. On August 6, 2002, Bruce Collingwood, Commissioner of the City's Public Works Department, gave the Appellant notice pursuant to M.G.L. c. 31, s. 41, of a hearing scheduled for August 9, 2002[1] to determine whether the Appellant should be disciplined. (Testimony and Exhibits 1 & 23).

32. On August 12, 2002, Ms. Reagan and Mr. Collingwood advised the Appellant that Metroguard would not disclose to the City the problems it had with the Appellant's driving record because such information was confidential. In an

[1] This hearing was subsequently rescheduled for August 12, 2002, and thereafter continued on August 20, 2002.

attempt to clarify and potentially resolve the issue with Metroguard, they requested that the Appellant sign a release so that Metroguard would disclose the information to the City. (Testimony).

33. The Appellant refused to sign a release, and instead indicated that he knew what the problem was, and would resolve it himself. (Id.).

34. Thereafter, Mr. Collingwood gave the Appellant notice that he was being placed on administrative leave until a determination could be made as to the status of his commercial driver's license. (Testimony and Exhibit 1).

35. On August 19, 2002, Mr. Collingwood submitted to Metroguard information given to him by the Appellant regarding his (the Appellant's) driving record. (Testimony and Exhibit 29).

36. On August 20, 2002, Metroguard advised the City that "further information" was required before the Appellant could be classified as an "acceptable driver". (Testimony and Exhibit 30).

37. On August 20, 2002, Mr. Collingwood, by hand-delivery to the Appellant, issued his decision to terminate the Appellant's employment on the grounds that (a) the Appellant violated the terms of the Last Chance Agreement when he tested positive for methadone; and (b) the status of the Appellant's driver's record (such that the Appellant was uninsurable and could not drive vehicles for the City as required by his employment classification as a Highway Maintenance Craftsman). (Testimony and Exhibits 1 & 25).

38. I find that the testimony of the Appellant was vague and exhibited a suspect recall of the underlying events. The Appellant also modified his testimony

during the hearing. The Appellant initially testified that he was prescribed Methadone as a pain medication and denied that the prescription was to assist him in ending his drug dependence. However, on cross-examination, the Appellant changed his testimony and admitted he was prescribed Methadone to assist in ending his dependence on other drugs.

39. I further find that, in contrast to the Appellant, the testimony of the Town's witnesses, Kelly Reagan and Bruce Collingwood, was competent, consistent and highly credible. Neither added unfound facts nor did they contradict those already admitted. Neither volunteered unresponsive or self-serving testimony. Their demeanor was responsive, unhesitant and appropriate. Each person's testimony exuded the type of detail and clarity that was indicia of accuracy and reliability.

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. M.G.L. c. 31, §43.

It is the conclusion of this Commission that the Appointing Authority has satisfied its burden of proving reasonable justification for terminating the Appellant following his positive drug test in violation of the Last Chance Agreement. Specifically, the evidence proffered by the Appointing Authority is sufficiently reliable to warrant a reasonable mind to find that the Appellant committed the acts for which he was penalized.

In this case, the City, instead of immediately seeking to terminate the Appellant for his admitted drug addiction, instead sought to accommodate the Appellant, first by assisting him in locating a drug treatment facility, and then by reinstating his employment via a Last Chance Agreement (which incorporated the recommendations of his drug treatment counselor, and was reviewed and approved by the Appellant's union representative.)[2] Further, the uncontroverted evidence supports the finding that the City's intent in asking Appellant to execute the Last Chance Agreement was not to discipline Appellant but

[2] Undoubtedly, the City's accommodation efforts were in large part attributable to the Appellant's voluntary admission of his drug dependence and desire to receive treatment, for which he should be commended.

rather to ensure that the Appellant returned to work in a drug and alcohol free state, thereby protecting the public safety.

Notably, however, the Appellant never raised an objection to four (4) prior drug tests, each of which included methadone in the panel of drugs screened. It was only when he tested positive (which, in turn, violated the Last Chance Agreement), that the Appellant sought to object to the inclusion of Methadone in the drug panel. Further, the Appellant only advised the City that he was taking methadone after he tested positive for same during the July 31, 2002 drug screening.

Here, the Appellant was advised by the City that if any of the drug tests revealed a positive result, he would be terminated from his employment in accordance with the Last Chance Agreement. Nevertheless, even after violating the Last Chance Agreement, the City did not immediately terminate the Appellant. In the interim, the City also gave the Appellant an opportunity to resolve his driving record with its insurer, Metroguard (which rendered Appellant an "uninsurable driver", and thus, incapable of performing one of the essential functions of his job as a Highway Maintenance Craftsman). In this matter, the Appellant unwisely sought to resolve the issue with the insurer himself (in the process, rejecting the City's request that he sign a release, which may have cleared the path for the City to resolve this issue expediently).

The confluence of these two issues (the failed drug test and the Appellant's uninsurability as a driver) combined to create the significant public policy concerns

(promoting the health, safety and welfare of the public by reducing the likelihood of drug and alcohol related accidents) which led to the Appellant's termination. The Commission is compelled to note that, assuming *arguendo* that the insurance issue did not arise, Appellant's breach of the Last Chance Agreement alone constituted sufficient grounds for his termination.

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).

The Commission assigns little credibility to the testimony of Appellant, which was vague, and exhibited a suspect recall of the underlying events. The Appellant also modified his testimony during the hearing. For example, the Appellant initially testified that he was prescribed methadone as a pain medication and denied that the prescription was to assist him in ending his drug dependence. However, on cross-examination, the Appellant changed his testimony and, admitted he was in fact prescribed methadone to assist in ending his dependence on other drugs. Conversely, the Commission finds the testimony of the Town's witnesses, Kelly Reagan and Bruce Collingwood, to be highly credible, consistent and competent.

For all of the above stated reasons, it is found that the City of Pittsfield has established, by a preponderance of the reliable and credible evidence in the record, that it had just cause to discipline the Appellant for his misconduct. Therefore, the appeal on Docket No. D-02-707 is hereby ***dismissed***.

Civil Service Commission

_____
John J. Guerin, Jr.
Commissioner

By vote of the Civil Service Commission (Goldblatt, Chairman; Taylor, Guerin, Marquis and Bowman, 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 MGL ch. 30A sec. 14(1) for the purpose of tolling the time of appeal.

Pursuant to MGL ch. 31 sec. 44, any party aggrieved by a final decision or order of the Commonwealth may initiate proceedings for judicial review under MGL ch. 30A sec. 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:
Michael J. DeGregorio, Esq.
Kathleen E. Degnan, Esq.