COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

One Ashburton Place – Room 503
Boston, MA 02108
(617)727-2293

WILLIAM O'CONNELL,
Appellant

v.

CASE NO: D1-11-123

CITY OF ATTLEBORO,
Respondent

Appellant's Attorney:	Roger M. Ferris, Esq. 7 Peck Street P.O. Box 155 Attleboro, MA 02703
Appointing Authority's Attorney:	Janice Silverman, Esq. 77 Park Street Attleboro, MA 02703
Commissioner:	Paul M. Stein[1]

DECISION

The Appellant, William O'Connell, acting pursuant to G.L.c.31, §43 duly appealed a decision of the City of Attleboro ("Attleboro"), the Appointing Authority, to discharge him from his employment at the Department of Public Works ("DPW") as a Heavy Motor Equipment Operator/Laborer ("HMEO") due to the loss of his Commercial Driver's License as a result of his arrest for Operating Under the Influence of Liquor ("OUI"). A full hearing was held by the Civil Service Commission (the "Commission") on July 22, 2011. The hearing was declared private as no party requested a public hearing. Witnesses were sequestered at the request of the Appellant. Attleboro called two witnesses and the Appellant called two witnesses and testified on his own behalf. Thirty-one (31) exhibits were received into evidence. The hearing was digitally recorded. Both parties submitted post-hearing proposed decisions.

[1] The Commission acknowledges the assistance of Law Clerk Michael Chin in the drafting of this decision.

FINDINGS OF FACT

Giving appropriate weight to the exhibits, the testimony of the witnesses [Scott Lachance, Fire Chief, Attleboro; John Clover, Superintendent, Attleboro Department of Public Works; James Proulx, Union Stewart, Attleboro Department of Public Works; Employee C, former Heavy Equipment Operator, Attleboro Department of Public Works; and the Appellant], and inferences reasonably drawn from the evidence as I find credible, I make the findings of fact set forth below.

Background of Witnesses

1. The Appellant, William O'Connell, was hired by Attleboro as a HMEO for the DPW in August of 2006. Mr. O'Connell was a tenured civil service employee. *(Testimony of O'Connell and Clover)*

2. Scott Lachance has been the Attleboro Fire Chief for one year. Previously, he was an Attleboro Firefighter for eleven years. He is responsible for initial discipline in the Attleboro Fire Department. *(Testimony of Lachance)*

3. John Clover has been the Superintendent for the Attleboro DPW for seven years. Previously, he was a Junior Civil Engineer for sixteen years. He is responsible for initial discipline in the DPW. *(Testimony of Clover)*

4. James Proulx has been the Union Steward for the Attleboro DPW for six years. He is currently a Maintenance Craftsman/Hoisting Operator and has been employed by Attleboro since 1999. *(Testimony of Proulx)*

Background Facts

5. As a condition of employment, all HMEOs must maintain a valid Class B driver's license, also known as a Commercial Driver's License ("CDL"). Mr. O'Connell was made aware

of this fact when he applied for the position. When Mr. O'Connell was hired, he did not possess a CDL, but was given six months to obtain one. *(Testimony of O'Connell)*

6. Mr. O'Connell obtained a CDL within the six month requirement. *(Testimony of O'Connell)*

7. The Attleboro DPW now requires HMEO applicants to have their CDL at the time of hire because there are sufficient applicants available with CDL licenses and to save wear and tear on training vehicles. This policy also gives the DPW more flexibility in assigning work to employees. *(Testimony of Clover)*

8. Mr. O'Connell operated a snow plow and a sander in the winter and repaired or built catch basins, roads, sidewalks, and other structures in the other months. *(Testimony of O'Connell and Clover)*

9. The DPW's fleet is evenly split between CDL vehicles and Class D vehicles. However, several Class D vehicles are permanently assigned to certain employees. *(Testimony of Clover)*

10. Most snow plows require only a Class D license to operate, but all sanders require a CDL license to operate. Mr. O'Connell typically operated Class D vehicles during his employment and sanders were the only CDL vehicle Mr. O'Connell operated. *(Testimony of O'Connell)*

11. DPW employees are not driven to job sites. The DPW sends two employees in two separate trucks for all work done on roadways. The trucks are used to block the employees from traffic, a policy instituted after an Attleboro employee was killed on a roadway in 2009. *(Testimony of Clover)*

12. Attleboro uses a progressive form of discipline. *(Exhibit 3)*

Events Giving Rise to Discipline

13. On February 19, 2011, while off-duty, Mr. O'Connell was arrested driving a co-worker's vehicle and was charged with OUI and Negligent Operation. As a result, Mr. O'Connell's license was suspended for thirty days. *(Testimony of O'Connell and Clover)*

14. On February 19, 2011, Mr. O'Connell disclosed his arrest to his supervisors and was immediately suspended. *(Testimony of Clover)*

15. On February 22, 2011, Mr. O'Connell was formally suspended by Mr. Clover for five days without pay. The stated reason for the suspension was failure to maintain a valid CDL. *(Exhibit 5)*

16. On February 23, 2011, Mr. O'Connell timely requested a hearing on his suspension in accordance with G.L.c.31, §41. *(Exhibit 6)*

17. Approximately two weeks later, Attleboro offered a settlement in the form of a last chance agreement ("LCA") to Mr. O'Connell. *(Testimony of O'Connell)*

18. On March 17, 2011, Mr. O'Connell, represented by counsel, rejected the LCA. *(Testimony of O'Connell)*

19. On March, 22, 2011 Mr. O'Connell was notified of his proposed termination. Mr. O'Connell received a Notice of Hearing for his termination hearing and suspension appeal. The stated reason for both actions was failure to maintain a valid CDL. Mr. O'Connell was placed on paid administrative leave pending the outcome of the hearing. *(Exhibit 12)*

The Discipline Action

20. On March 30, 2011, Attleboro conducted the discipline hearing. The hearing officer rejected Mr. O'Connell's work accommodation request to be assigned non-driving tasks. The hearing officer affirmed the suspension, recommended termination on the grounds that Mr.

O'Connell could not perform the essential functions of his job without a CDL, and found that Mr. O'Connell did not suffer any disparate treatment. *(Exhibit 13)*

21. Mr. O'Connell's only prior discipline was a verbal warning for tardiness. *(Testimony of O'Connell and Clover)*

22. On March 21, 2011, Mr. O'Connell was eligible to have his CDL reinstated. However, Mr. O'Connell did not reinstate his CDL until May 9, 2011 because he could not afford to pay the reinstatement fee of $500. *(Exhibit 11 and Testimony of O'Connell)*

23. On April 16, 2011 Attleboro Mayor Kevin Dumas denied Mr. O'Connell's five-day suspension appeal and affirmed his termination. *(Exhibit 14)*

24. At the time of Mr. O'Connell's discipline hearing, his criminal case was still pending. First time OUI offenders are subject to a mandatory one-year CDL suspension. Second offenders are disqualified from operating a CDL rated motor vehicle for life. *(Testimony of O'Connell and G.L.c.90F §9)*

25. Mr. O'Connell received another CDL suspension notice from the Registry of Motor Vehicles on May 24, 2011 pursuant to a 1979 OUI charge.[2] *(Exhibit 28)*

26. Mr. O'Connell appealed this second suspension of his CDL to the Registry of Motor Vehicles and his CDL was reinstated without prejudice. *(Testimony of O'Connell)*

Allegation of Disparate Treatment

27. Employee A has been a member of the Attleboro Fire Department for fifteen years. *(Testimony of Lachance)*

28. In 2011, Employee A was charged with OUI, Leaving the Scene of Personal Injury, and Negligent Operation. *(Exhibit 21)*

[2] Conclusive evidence of the outcome of the 1979 OUI charge was not introduced.

29. As a result, Employee A lost his Class D license for thirty days. During this period he did not work for the Fire Department and was placed on paid administrative leave. *(Testimony of Lachance)*

30. Maintenance of a Class D license is a condition of employment for Attleboro Firefighters. A firefighter without a Class D license can perform all duties except driving a vehicle. *(Testimony of Lachance)*

31. The minimum sentence for Leaving the Scene of Personal Injury is six months imprisonment. *(G.L.c. 90 §24(2)(a1/2)(1))*

32. Employee A had been verbally warned in the past about tardiness. *(Testimony of Lachance)*

33. In lieu of suspension or termination, Employee A signed a LCA which stipulated Employee A was to work sixteen 24-hour shifts of punishment duty without pay and enroll in an alcohol treatment program. The LCA resolved any and all discipline issues arising out of Employee A's OUI. *(Exhibit 20)*

34. Employee B was previously employed by the DPW as a HEO. The HEO position requires a Hoisting license and a CDL; Employee B held both licenses. *(Testimony of Clover)*

35. A Hoisting license requires a valid Class D license at all times. A suspension of a Class D license also suspends an otherwise valid Hoisting license. *(Testimony of Clover)*

36. Employee B was charged with OUI in 2009 and subsequently lost his CDL for one year. *(Exhibit 22)*

37. In lieu of suspension or termination, Employee B signed a LCA which stipulated he was to be evaluated for alcohol abuse and participate in the recommendations of the evaluator. The LCA also included a demotion to the position of Motor Equipment Operator. *(Exhibit 24)*

38. Employee B could perform most of his essential duties with only a Hoisting license. *(Testimony of Clover)*

39. Prior to his suspension, Employee B received a written warning and a two day suspension for attendance issues. *(Exhibit 26 and 27)*

40. Employee C, a former DPW HEO, was charged with OUI in 2005. Employee C lost his CDL and Class D license for forty-five days for the OUI and for six months for failure to take a breathalyzer. *(Testimony of Employee C)*

41. After his forty-five day license suspension, Employee C obtained a Class D hardship license which allowed him to operate Class D vehicles from 6:00 AM to 6:00 PM. This allowed Employee C to retain his Hoisting license and perform several essential functions of his job. However, after 6:00 PM Employee C worked in the DPW yard and could not operate any vehicle. *(Testimony of Employee C)*

42. Employee C did not receive any discipline from the DPW pursuant to his OUI. *(Testimony of Clover)*

CONCLUSION

Applicable Legal Standards

Under G.L.c.31, §43, a tenured civil service employee aggrieved by a disciplinary decision of an appointing authority made pursuant to G.L.c.31, §41, may appeal to the Commission. The Commission must determine, under a "preponderance of the evidence" test, whether the appointing authority met its burden of proof that "there was just cause" for the action taken. G.L.c.31, §43. See, e.g., Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823 (2006); Police Dep't of Boston v. Collins, 48 Mass. App. Ct. 411, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Serv. Comm'n, 38 Mass. App. Ct. 473, 477 (1995); Watertown v. Arria, 16 Mass. App. Ct. 331, 334, rev.den., 390 Mass. 1102 (1983).

The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Serv. Comm'n, 43 Mass. App. Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983). It is a basic tenet of the "merit principle" of civil service law that discipline must be remedial, not punitive, designed to "correct inadequate performance" and "separating employees whose inadequate performance cannot be corrected." G.L.c.31, §1.

An action is "justified" if "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law." Commissioners of Civil Serv. v. Municipal Ct., 359 Mass. 211, 214 (1971); Cambridge v. Civil Serv. Comm'n, 43 Mass. App Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). An appointing authority's burden of proof is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) The Commission must take account of all credible evidence in the record, including whatever may fairly detract from the weight of any particular evidence. See Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001).

It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. "[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance." E.g., Leominster v. Stratton, 58 Mass. App. Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic

Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003) (where live witnesses gave conflicting testimony, decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing).

In performing its appellate function,

> [T]he commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew. . . . [after] a hearing de novo upon all material evidence and . . . not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer. . . . For the commission, the question is . . . "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."

Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003) (quoting Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983) (emphasis added)). See also Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823; Cambridge v. Civil Serv. Comm'n, 43 Mass. App. Ct. 300, 303-05, rev.den., 428 Mass. 1102 (1997). See generally Villare v. North Reading, 8 MCSR 44, reconsidered, 8 MCSR 53 (1995) (discussing de novo fact finding by "disinterested" Commissioner in context of procedural due process).

Just Cause for Disciplining Mr. O'Connell

Applying these principles to the facts of this appeal, the Commission concludes that the Appointing Authority has met its burden – by a preponderance of the evidence – to establish just cause to discipline Mr. O'Connell. It is uncontroverted that Mr. O'Connell was arrested on February 19, 2011 for Operating Under the Influence of Liquor, and as a result, his CDL was suspended for thirty days.

Although the conduct in question took place while Mr. O'Connell was off-duty, the conduct bears a sufficient nexus to his employment. Mr. O'Connell is trusted to safely operate heavy equipment and the OUI charge calls into question his ability to do such. If an employee cannot safely operate heavy equipment, then the efficiency of public service is impaired. For the aforementioned reason, Attleboro had just cause to discipline Mr. O'Connell. Such conduct warrants discipline in line with the basic tenets of the "merit principle" of civil service law. However, Mr. O'Connell's contentions have merit that similarly situated employees within his bargaining unit were not suspended or terminated for similar conduct and the discipline will be modified to a 90-day suspension.

Support for Modification of Discipline

G.L.c.31, section 43 vests the Commission with the authority to modify the penalty imposed by the appointing authority and the Commission must provide a rational explanation for how it has arrived at its decision to do such. Police Comm'r v. Civil Serv. Comm'n, 39 Mass. App. Ct. 594, 600 (1996). The Commission may not "modify a penalty on the basis of essentially similar fact finding without an adequate explanation." Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823 (2006) and cases cited. The Commission considers "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across appointing authorities]" as well as "the underlying purpose of the civil service system [which is] 'to guard against political considerations, favoritism and bias in governmental employment decisions.'" Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited.

The evidence warrants a finding that Mr. O'Connell has suffered disparate treatment.

First, several other Attleboro employees have been charged with OUI and retained their employment.[3] Employee A was charged with OUI, Negligent Operation, and Leaving the Scene of Personal Injury and was subject to a minimum of six months incarceration if convicted. As a result, Employee A lost his Class D license for thirty days, a requirement for all Attleboro Firefighters. Employee B was charged with OUI and lost his CDL license for one year, a requirement for all Attleboro HEOs. Employee C was charged with OUI and lost both his Class D license for forty-five days and his CDL for six months. The evidence shows that Mr. O'Connell had no CDL from February 19, 2011 until May 9, 2011 (seventy-nine days).[4] Attleboro asserts that Mr. O'Connell would not be able to perform the essential functions of his job without a CDL. However, Mr. O'Connell and Mr. Clover both testified that Mr. O'Connell primarily was a laborer during the non-winter months. At least temporarily, Mr. O'Connell could have performed some of the essential functions of his job without his license. In the alternative, Mr. O'Connell could have been suspended or placed on leave until he possessed a valid CDL. Employee A, for example, was placed on paid administrative leave for the thirty days his license was suspended as a result of his OUI.

Second, the other similarly situated employees were allowed to keep their position or were given positions which did not require a valid license. Employee A did not work until his license was reinstated and Employee B and Employee C were allowed to work modified duties when they returned to work. During the winter Mr. O'Connell operated sanding vehicles, primarily the only CDL vehicles he operated. In light of the accommodations Attleboro made for its other employees, temporarily modifying Mr. O'Connell's duties would not be a hardship on the DPW.

[3] While Attleboro offered Mr. O'Connell a last chance agreement like it did for the other similarly situated employees, Mr. O'Connell should not be penalized because the parties failed to mutually assent to such an agreement and he chose to appeal his termination to the Commission.

[4] Mr. O'Connell did not possess a CDL for thirty-nine days when he was terminated (February 19, 2011 – March 30, 2011).

To be clear, it is not unreasonable for Attleboro to require a CDL as a condition of Mr. O'Connell's employment. While Mr. O'Connell did not possess a CDL at the time of his termination hearing, Attleboro had no reasonable basis to believe that Mr. O'Connell could not get his CDL reinstated or would be without a CDL on a long-term basis.

Third, when comparing the situation of Employee A to that of Mr. O'Connell, the potential for bias and/or favoritism in the two governmental employment decisions cannot be ignored. Pursuant to his OUI, Mr. O'Connell was both suspended for five days and terminated. Attleboro stated Mr. O'Connell was terminated because he could not perform his essential job functions without a CDL. In contrast, Employee A – whose father was an Attleboro employee – faced six months imprisonment and did not receive even a suspension. Employee A's last chance agreement was signed before his criminal case was disposed of and barred Attleboro from taking any further employment action against him pursuant to his OUI, even if he was imprisoned. Therefore, Employee A could have been imprisoned and unable perform any job functions for six months and still would have kept his position.

Fourth, the Attleboro Employee Handbook states that Attleboro uses a progressive form of discipline. During his six years of employment, Mr. O'Connell had no discipline history other than a verbal warning for tardiness. In contrast, Employee B received a written warning and a two day suspension before his OUI. Despite this, he was not suspended or terminated for his OUI and loss of license. Employee A was also verbally warned about his tardiness, but did not receive a suspension or termination as a result of his OUI. Whereas Mr. O'Connell was both suspended and terminated for his OUI – a much harsher punishment than any of his similarly situated peers.

After carefully considering all of the circumstances, I conclude that the termination of Mr. O'Connell was unreasonable. All three of the other similarly situated employees retained their

employment and none of the three were suspended as a result of their arrest and/or subsequent loss of license. The treatment of Mr. O'Connell does not comport with either the principle of uniformity or the equitable treatment of similarly situated individuals. For the aforementioned reasons, it is appropriate to exercise discretion and modify Mr. O'Connell's discipline. A ninety-day suspension and reinstatement (provided he still holds his CDL license) would remove any disparate treatment and situate Mr. O'Connell similarly to his colleagues.

For the reasons stated above, the appeal of the Appellant, William O'Connell, is hereby ***allowed, in part.*** Mr. O'Connell's termination is modified to a ninety-day suspension, and, provided that his CDL license remains currently valid and in effect as of the date of this Decision, he shall be entitled to be restored to his position without loss of any other benefits. Nothing in this Decision shall preclude Attleboro from taking appropriate action against the Appellant, including but not limited to termination as of the date of a permanent subsequent loss of CDL license, if any, in a manner consistent with the requirements of civil service law and rules.

Civil Service Commission

Paul M. Stein
Commissioner

By a 3-1 vote of the Civil Service Commission (Stein, Commissioner – Yes; Ittleman, Commissioner – Yes; McDowell-Commissioner – Yes; Bowman, Chairman – No [Marquis – Absent])on July 26, 2012.

A true record. Attest:

_____
Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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 this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

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

Notice:
Roger M. Ferris, Esq. (for Appellant)
Janice Silverman, Esq. (for Attleboro)

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CONCURRING OPINION OF ELLAINA McDOWELL

I concur with the majority that modification of the penalty here is warranted. Further, however, I think that a ninety (90)-day penalty is too harsh and is not consistent with the principles of progressive discipline. For this reason, I believe a suspension of no more than thirty (30) days is justified.

COMMONWEALTH OF MASSACHUSETTS
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DISSENT OF CHRISTOPHER BOWMAN

I respectfully dissent.

As part of his job duties, the Appellant was required to operate heavy equipment and drive large trucks, including those used to plow and sand the City's streets during dangerous winter storms.

During the Presidents' Day weekend in 2011, the Appellant was arrested for operating his private vehicle under the influence of alcohol. He took a breathalyzer test and recorded a .24.

As a result of his arrest, his regular drivers license and his Commercial Drivers License (CDL), which is required to operate certain city trucks, were suspended. The City then proceeded to suspend the Appellant for failing to possess a CDL.

Rather than terminate the Appellant, however, the City gave him the option of signing a Last Chance Agreement, the same course of action it took in recent years regarding two (2) other City employees. That Last Chance Agreement, as initially drafted, would have allowed the Appellant to return to work upon reinstatement of his CDL, an agreement to refrain from alcohol use and be subject to random testing for alcohol.

The two (2) other employees negotiated and signed a somewhat less restrictive Last Chance Agreement in lieu of facing possible termination. The Appellant rejected the conditions of the Last Chance Agreement. Thus, the City moved forward with the termination hearing and terminated him for not having the required CDL at the time.

These facts do <u>not</u> show disparate treatment. Rather, they show employees committing similar offenses being treated in a similar manner. Moreover, they show a City meeting its fiduciary responsibility to ensure that its fleet of trucks are driven in a safe and responsible manner.

For these reasons, I dissent.

Civil Service Commission.

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Christopher Bowman, Chairman