COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

RYAN C. MUTH,
Appellant

v.

D1-10-109

CITY OF LEOMINSTER,
Respondent

Appellant's Representative:

Pro Se
Ryan Muth

Respondent's Representative:

Brian Maser, Esq.
Kopelman and Paige, P.C.
101 Arch Street
Boston, MA 02110

Commissioner:

Christopher C. Bowman

DECISION

The Appellant, Ryan C. Muth (hereafter "Muth" or "Appellant"), pursuant to G.L. c. 31 § 43, filed a timely appeal with the Civil Service Commission (hereafter "Commission") on August 17, 2010, claiming that the City of Leominster (hereafter "Respondent" or "Appointing Authority") did not have just cause to terminate him on August 12, 2010.

The Commission held a pre-hearing conference on September 7, 2010 and a full hearing was conducted on November 4, 2010. The hearing was declared private and all witnesses, with the exception of the Appellant, were sequestered. Two tapes were made of the hearing. Both parties submitted post-hearing filings.

FINDINGS OF FACT

Fifteen (15) exhibits were entered into evidence at the hearing. Based on the documents submitted and the testimony of the following witnesses:

For the Appointing Authority:

- Sean Ferguson, Police Officer, City of Leominster;
- Daniel Kirouac, Former Acting Fire Chief, City of Leominster;
- Jose Algarin, Police Officer, City of Leominster;
- Dean Mazzarella, Mayor, City of Leominster;
- Sandra Leach, Former HR Director, City of Leomister

For the Appellant:

- Ryan C. Muth, Appellant;

I make the following findings of fact:

1. The Appellant, Ryan C. Muth, was a tenured civil service employee of the City of Leominster. He is thirty-three years old and had been employed by the City for less than six years as a firefighter prior to his termination by letter dated August 9, 2010. (Exhibit 4)
2. Prior to his termination, the Appellant was involved in several incidents, on and off duty. These incidents involved the abuse of alcohol and prescription drugs. (Testimony of the Appellant and Mazzerella)

3. On July 9, 2009, while eating lunch, the Appellant combined alcohol with a prescription sleeping medication (Trazadone) and was involved in an off-duty car accident when he sideswiped another vehicle. (Testimony of Appellant)

4. Prior to the accident, the Appellant had been prescribed Trazadone for difficulty sleeping. The prescription information called for him to take the medication thirty minutes before going to bed.

5. Subsequently, at the urging of the President of the Leominster Firefighter's Union, the Appellant entered an alcohol treatment center. (Testimony of the Appellant)

6. The Appellant voluntarily entered a treatment program but left after less than twenty-four hours. (Testimony of the Appellant)

7. Less than a week after the car accident, the Appellant returned to full duty with the Fire Department. (Testimony of the Appellant)

8. Two days after his return, the Appellant injured his back while transporting a patient. (Testimony of the Appellant)

9. As a result of his back injury, the Appellant was out of work between July and November of 2009. (Testimony of the Appellant)

10. The Appellant worked his regular shift from November 20009 through the middle of December 2009 consisting of a twenty-four hour shift followed by three days off. (Testimony of the Appellant)

11. The Appellant was relieved of duty on December 21, 2009 by Deputy Chief Ralph Jackart after he was reported to be exhibiting strange behavior. During the shift, the Appellant was observed laboring to perform general work assignments, failing to perform properly, driving erratically and failing to follow proper

procedure with respect to patient care. The Appellant was observed attempting to back up his ambulance by closing one eye, experiencing difficulty putting food in his mouth, having difficulty answering simple questions and recognizing his co-workers (Exhibit 11)

12. The Appellant did not seek medical attention after he was relieved, nor did his colleagues feel any intervention was necessary. (Testimony of the Appellant, Exhibit 11)

13. On December 23, 2009, then-Fire Chief Ronald M. Pierce placed the Appellant on paid leave pending an investigation of his December 21, 2009 behavior and removal from duty. (Exhibit 13)

14. While the investigation was ongoing, the Appellant was involved in another off-duty incident involving alcohol and drugs. (Exhibit 14)

15. On January 4, 2010 Leominster Police responded to a call for service from Appellant's girl friend, Theresa Hietala. She reported that the Appellant consumed seven Vicodin pills and drank six beers, was "out of control" and "throwing things". (Exhibit 14)

16. After the police responded, the Appellant agreed to be transported to a hospital for evaluation.

17. The Appointing Authority placed the Appellant on unpaid administrative leave, as he was unavailable for duty due to his being in the hospital. He remained on leave through August 2010. (Exhibit 12)

18. On January 6, 2010, the Appointing Authority notified the Appellant that the Mayor intended to convene a disciplinary hearing to consider whether to

discipline him for his December 21, 2009 and January 4, 2010 behavior. (Exhibit 1)

19. At the hearing, the Appellant contended that his behavior on December 21, 2009 and January 4, 2010 were not caused by alcoholism. (Testimony of Appellant)

20. At the conclusion of the hearing, the Appointing Authority requested the Appellant provide additional information in support of his assertions. (Testimony of Appellant)

21. The Appellant provided a letter from Daniel J. O'Leary, MD that explained that the Appellant's conduct might have been caused by hypoglycemia. (Exhibit 8)

22. The Appointing Authority did not credit the note from the Appellant's physician. Instead of formal discipline the Appointing Authority presented the Appellant with a Last Chance Agreement. (Exhibit 2)

23. The Appellant signed the agreement on April 16, 2010. (Exhibit 2)

24. The last chance agreement required certification of the Appellant's ability to safely perform the essential functions of his position, his passing a alcohol and drug test, his following recommendations made by a substance abuse counselor, subjecting himself to random drug and alcohol testing for a period of eighteen months, and agreeing "not to engage in the same or similar conduct that resulted in his hearing before the Mayor." The agreement states that should he do so, he may be terminated with no right to contest the termination. (Exhibit 2)

25. Less than three weeks after the Appellant signed the last chance agreement, he was arrested for negligent operation of a motor vehicle and operating under the influence of drugs. (Testimony of Ferguson, Testimony of the Appellant)

26. On May 2, 2010 Officer Sean Ferguson of the Leominster Police Department responded to a call at AllianceHealth Hospital in Leominster Massachusetts. (Testimony of Ferguson)

27. Upon his arrival at the scene, Officer Ferguson was advised that the Appellant struck a traffic sign, almost hit three people in the parking lot and struck three cars causing minor damage. He was further reported to have been observed stumbling and almost falling down. (Exhibit 3)

28. Officer Ferguson observed that the Appellant was unsteady on his feet and had pinpointed eyes. The Appellant did not smell like he had been drinking and denied hitting anything. (Testimony of Ferguson)

29. After investigating the scene and observing the Appellant, Officer Ferguson asked the Appellant to perform field sobriety tests. The Appellant agreed.

30. The Appellant performed the one-legged stand test and the nine-step walk and turn test. He failed both of these tests. (Exhibit 3 and Testimony of Ferguson)

31. After the tests were administered, the Appellant requested that Leominster Police Officer Jose Algarin respond to the scene. (Testimony of Algarin)

32. Officer Algarin observed that the Appellant's eyes were glassy and pinpointed. The Appellant asked Officer Algarin to "help him out" and said that if he were arrested he would lose his job. (Testimony of Algarin)

33. Officer Algarin told the Appellant he could not help him and Officer Ferguson place the Appellant under arrest for driving under the influence of drugs and negligent operation of a motor vehicle. (Testimony of Algarin)

34. On May 7, 2010, the Appointing Authority held a disciplinary hearing to determine if there was just cause to terminate the Appellant's employment. Despite being notified that the Appellant was unable to attend the hearing as he was hospitalized, the Appointing Authority proceeded with the hearing. The Appointing Authority determined that just cause existed and terminated him. (Brief of the Appellant, Brief of the Appointing Authority)

35. The Appellant filed a timely appeal alleging a violation of G.L. c. 31§ 42 claiming that he was prejudiced when the Appointing Authority proceeded with a disciplinary hearing in his absence. After a hearing before the Commission concerning the alleged § 42 violation, the Appointing Authority agreed to reinstate the Appellant to his employment status prior to the May 7, 2010 hearing and reconvene the disciplinary hearing. (Brief of the Appointing Authority)

36. On July 29, 2010 the Commission dismissed the Appellant's allegations without prejudice.

37. The Appointing Authority reconvened its hearing on August 9, 2010 to determine whether just cause existed to terminate the Appellant's employment based on his May 2, 2010 incident. (Brief of the Appointing Authority)

38. At the conclusion of the hearing, the Appointing Authority determined that just cause to terminate the Appellant did exist and notified him of its decision by letter dated August 9, 2010. (Exhibit 4)

39. Pursuant to the terms of dismissal, the Appellant filed a timely appeal of the Appointing Authority's actions before this Commission

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). *See* 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." Id. 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 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. Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997). The Appointing Authority's burden of proof is one of a 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). 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. Town of Falmouth v. Civil Service Commission, 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, 16 Mass. App. Ct. 331, 334 (1983). *See* Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

Applying these principles to this appeal, I conclude that the Appointing Authority has met its burden of proof and had just cause to terminate the Appellant. The preponderance of the evidence establishes that the Appellant has a history of dependence on alcohol and prescription drugs and that that dependence affected his work as a firefighter such that the Appointing Authority could no longer retain him.

The Appointing Authority presented compelling evidence that the Appellant's behavior over several years was escalating in severity. According to the evidence presented, the Appellant engaged in several incidents of concerning behavior leading up to the establishment of a last chance agreement.

The Appellant was removed from duty in December 2009 after he was observed to be acting strangely during his shift and was unresponsive to basic questions. Other officers reported that the Appellant appeared to have difficulty eating his food and recognizing his supervisors. In January, 2010 the Appellant's girlfriend called police to report that he

had been drinking and taking pills and was "out of control". The police responded and the Appellant consented to being taken to a hospital for observation.

In response to these incidents the Appointing Authority held a disciplinary hearing. Rather than terminate the Appellant, he was offered a Last Chance Agreement, which, among other conditions, prohibited the Appellant from engaging in "the same or substantially similar conduct that resulted in his hearing before the Mayor."

On May 2, 2010, less than three weeks after the date he signed the last chance agreement, the Appellant was arrested for operating a motor vehicle under the influence of drugs and negligent operation of a motor vehicle after another car accident. Based on their own observation, the police determined the Appellant to be in an altered state and conducted several standard field sobriety tests, each of which he failed.

The Appointing Authority subsequently convened a disciplinary hearing and determined that just cause existed to terminate the Appellant's employment.

The Appellant has offered several arguments in support of his appeal. He contends that his December 21, 2009 actions were the result of a medical condition, that his May 2, 2010 car accident was not drug related, and that the restrictions on his behavior to which he agreed in the last chance agreement applied to conduct which occurred after his reinstatement.

I find Appellant's explanation of a medical condition unconvincing, as he has taken none of the actions one would normally expect of a person with such a disabling condition. Despite his exhibiting altered behavior during his December 21, 2009 shift, including not being able to feed himself and not recognizing his co-workers, even when it was brought to his attention that he was unable to perform the duties of his position he

did not seek medical attention. Even if, as he alleges, he was in an altered state and unable to recognize the symptoms of low blood sugar, none of the medical professionals with whom he worked recognized his symptoms as a medical problem requiring treatment.

His contentions with respect to his May 2, 2010 accident are inconsistent with the other evidence in this case. The Appellant's claims that, rather than the result of improper use of prescription medication, the sun was in his eyes and caused him to hit several parked cars, or that he has poor balance are not noted in the police report. The Appellant's actions at the scene cast further doubt on his explanation. His statements to Officer Algarin, that he would lose his job if he did nothing demonstrate that the Appellant recognized the impact the accident might have on his employment and his request to help him out weighs against the credibility of his statements that he was not under the influence. Aware of the precarious nature of his employment, a reasonable person in the Appellant's position with a reasonable explanation for both the accident and his poor performance on the field sobriety tests would likely make an explanation on the record. Appellant however, did not contest the arrest despite these alleged explanations.

Finally, Appellant's argument that that the condition in the last chance agreement authorizing termination for his engaging in conduct similar to that which brought him to a disciplinary hearing only applies to conduct occurring after his reinstatement, an event which had not yet occurred at the time of the May 2010 accident is unconvincing. Based on the evidence set out in this matter, I am convinced that the Appellant has some form of drug or alcohol addiction. While the Appellant appeared contrite and I am sympathetic to his situation, I am concerned for the safety of the public should he be allowed back on

duty. Had he been driving a fire truck the damage from the May 2, 2010 accident could have been much greater. The Civil Service Commission cannot reinstate someone to a position where they will be a danger to themselves and the public as is likely to happen with the Appellant. I reach this decision with the knowledge that, while people have the right to rehabilitate themselves, given the Appellant's clear and consistent difficulty with alcohol and drugs, even while on duty, it is the right thing to do. Further, "no person habitually using intoxicating liquors to excess shall be appointed to or employed or retained in any civil service position …" G.L. c. 31, § 50.

The Appointing Authority has shown through a preponderance of the evidence that they had just cause to terminate the Appellant.

The appeal under Docket No. D1-10-109 is hereby ***dismissed***.

Civil Service Commission

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Christopher Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell and Stein Commissioners) on June 30, 2011.

A true record. Attest:

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Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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 to:
Ryan Muth (Appellant)
Brian Maser, Esq. (for Appointing Authority)