

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

JASON MARCUS,
Appellant

v.

Docket No.: D1-15-157

CITY OF CHELSEA,
Respondent

Appellant’s Attorney:

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Commissioner:

Cynthia A. Ittleman¹

DECISION

The Appellant, Jason Marcus (Mr. Marcus), acting pursuant to G.L. c. 31, §43, duly appealed the decision of the City of Chelsea Police Department (Department or CPD), to terminate his employment from the police force after finding him unfit for duty. A pre-trial conference was held by the Civil Service Commission (Commission) on August 25, 2015 and a full hearing was held on November 2, 2015 and November 16, 2015.² The hearing was declared private as no

¹ The Commission acknowledges the assistance of Law Clerk Brendan Rimetz in the drafting of this decision.

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

party requested a public hearing. All witnesses were sequestered, except for Mr. Marcus, and the parties' expert witnesses were allowed in the room to observe each other's testimony only.³

Exhibits 1 through 40 were received in evidence. The hearing was digitally recorded and copies of the recordings were mailed to the parties.⁴ Both parties submitted post-hearing briefs.

FINDINGS OF FACT

Based on Exhibits one (1) through forty (40)⁵, and the testimony of:

Called by Appointing Authority:

- Edward Conley, Lieutenant, CPD, Internal Affairs (IA) Unit
- Dr. Jose Hidalgo, Psychiatrist
- Captain Thomas Dunn, Commander, CPD, Professional Standards Division

Called by the Appellant:

- Dr. James Beck, Psychiatrist
- Mark O'Connor, Patrol Officer, CPD
- Jason Marcus, Appellant

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law⁶, and reasonable inferences from the credible evidence, a preponderance of the evidence establishes the following finding of facts:

Background

³ The Appellant requested that the experts be allowed to remain in the room to observe each other's testimony. The Respondent did not object. My practice is to sequester all witnesses (except the Appellant). A representative of the Respondent may remain in the hearing to inform counsel if the representative will not be testifying at the Commission hearing. If the representative will offer testify, he or she may remain in the hearing following his or her testimony.

⁴ If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

⁵ Exhibits 38-40 were produced post-hearing in response to my request at the hearing.

⁶ This includes the Massachusetts Human Resources Division 2014 Physician's Guide Initial-Hire Medical Standards.

1. Jason Marcus was a full-time police officer at the CPD, beginning his tenure there on January 1, 2008, following a voluntary transfer from the Lynn Police Department. (*Agreed Upon findings of Facts*) The Appellant served as a police officer in Lynn from on or about 2006 to 2007. Prior to becoming a police officer, Mr. Marcus had been an auxiliary police officer in Everett and worked as a security officer successfully at different security companies, receiving promotions. He is married and has two (2) small children. Over the years, he also earned an Associate's degree in business management. (*Testimony of Mr. Marcus*)

2. Mr. Marcus was a patrol officer from when he arrived at CPD until 2012, when he bid for, and was assigned to the CPD Crime Analysis Unit until he was placed on administrative leave in 2014. (*Testimony of Mr. Marcus*) In this Unit, Mr. Marcus identified trends, analyzed records, reviewed reports to identify where to deploy police resources and helped investigators identify problems. On July 8, 2014, the Respondent placed Mr. Marcus on Administrative Leave with pay pending a fitness for duty evaluation. (*Agreed Upon findings of Facts*) Mr. Martin was supervised directly by Sgt. Cowhig and, indirectly, by Capt. Dunn. (*Testimony of Capt. Dunn*)

3. Prior to his termination from the CPD, Mr. Marcus had never been disciplined and there were no complaints filed against him by the public. On multiple occasions, he received positive feedback from members of the community regarding his police work. (*Testimony of Mr. Marcus; Exhibits 30A and 30B*)

4. Officer Mark O'Connor has been a patrol officer at the CPD for approximately ten (10) years. He is President of the Patrolmen's Union for approximately one and one-half years. He and Mr. Marcus worked together on the same shift for approximately one (1) year in or about 2007 or 2008. Mr. Marcus was an excellent patrol officer, very diligent, and he worked great with the public, treating everyone in the community the same. Thereafter, when Mr. Marcus was

working indoors at the CPD, Officer O'Connor did not have direct contact with Mr. Marcus. Officer O'Connor did not recall Mr. Marcus having any problems with his supervisors when he worked with him and recalls that Mr. Marcus got along well with other officers. Officer O'Connor was not aware of any problems with Mr. Marcus until he heard that the CPD placed Mr. Marcus on administrative leave in the fall of 2014.

June 2009 Needle Prick Incident

5. On June 1, 2009, Mr. Marcus was stuck with a hypodermic needle while executing a search warrant on a vehicle. (*Testimony of Mr. Marcus; Exhibit 32*)

6. After being stuck with the needle, Mr. Marcus notified his supervisor and was taken to Massachusetts General Hospital (MGH) for treatment. He was at MGH for a few hours but returned to duty before the end of his shift. (*Testimony of Mr. Marcus; Exhibit 32*)

7. As a precaution, while at the hospital, Mr. Marcus was prescribed Truvada⁷ and was told to be cautious in his interactions with his wife and family in the event of infectious disease contamination. (*Exhibit 32*)

8. As a result of this incident, Mr. Marcus had to tell his wife that there was a risk that he could be infected. His wife was "petrified" and for a few months thereafter, she had to treat him as though he was infected. This led to a period of emotional detachment within their relationship. (*Testimony of Mr. Marcus*)

9. Following this incident, Mr. Marcus went through a period of depression and contacted his primary care doctor about it. Mr. Marcus's primary care doctor prescribed Zoloft and Risperdal for him. (*Testimony of Mr. Marcus*)(*see information regarding these medications in Dr. Hidalgo's report, infra*)

⁷ According to the website of Gilead Sciences, which apparently produces Truvada, it is a medication used to attempt to treat HIV and reduce the risk of HIV infection in people who may have been exposed to HIV. (*Administrative Notice: www.Truvada.com*)

10. While taking the two medications, Mr. Marcus felt irritable, his depression worsened and he experienced paranoia, to the point where he sought help at Melrose-Wakefield Hospital (Melrose-Wakefield) in August 2009. After being admitted at Melrose-Wakefield, the hospital facilitated a voluntary transfer of Mr. Marcus to Arbour Hospital⁸ (Arbour), where he remained for approximately one week. (*Testimony of Mr. Marcus*)

11. While at Arbour, Mr. Marcus was weaned off of Zoloft and Risperdal and he was prescribed Prozac and Geodon. (*Testimony of Mr. Marcus*)(*see information regarding these medications in Dr. Hidalgo's report, infra*)

12. Mr. Marcus was out of work for approximately one month in 2009, which includes his time at Arbour. The Department placed Mr. Marcus on sick/medical leave during that time. (*Testimony of Mr. Marcus*)

13. After his discharge from Arbour, Mr. Marcus participated in the hospital's outpatient treatment program, which required him to see both a psychiatrist and a therapist. Mr. Marcus participated in the program from his discharge in 2009 until February 2014, at which point he stopped because the therapist he was seeing was unavailable. (*Testimony of Mr. Marcus; Exhibit 37*)⁹ The outpatient Arbour counselling program diagnosed Mr. Marcus as having "Post Traumatic Stress Disorder and Depressive Disorder, NOS". (*Exhibit 37*)(*see Dr. Hidalgo's definition of "NOS", infra*) Mr. Marcus was not treated by another psychiatrist or therapist until July 2014, at which point the Department ordered him to undergo a Fitness for Duty Evaluation (fitness evaluation). However, from February 2014 until July 2014, Mr. Marcus continued to take Lamictal, Adderall and Prozac, as the Arbour outpatient treatment program had provided.

⁸ According to its website, Arbour Hospital is a private psychiatric facility that specializes in adult mental health treatment. (*Administrative Notice*)

⁹ See Fact 25.

Following the results of that evaluation, the CPD ordered Mr. Marcus to see a new therapist as part of his action plan. (*Exhibit 13; Testimony of Mr. Marcus*)

Events Leading Up to Fitness Evaluation

14. In the winter of 2013 or spring of 2014, a couple of members of the Department voiced their concern about Mr. Marcus's well-being after multiple instances in which he exhibited odd behaviors. Such behaviors included working a detail in the rain without a jacket in the spring and walking home wearing a light running jacket previously on a bitter cold winter day.¹⁰ (*Testimony of Lt. Conley and Capt. Dunn*) Officer Ohika saw Mr. Marcus walking home on the bitter cold winter day wearing a light jacket and offered Mr. Marcus a ride home but Mr. Marcus declined the ride. (*Testimony of Capt. Dunn and Appellant*)

15. Lt. Conley has been a police officer since the mid-1990s and has been in the IA Unit since approximately 2013. Lt. Conley knows Mr. Marcus; they have worked together at times since Mr. Marcus arrived at the CPD. Lt. Conley's office is across the hall from Mr. Marcus's office. Lt. Conley has referred officers for therapy, such as anger management, but he has not referred an officer for a fitness for duty evaluation prior to Mr. Marcus in 2014. At all times, officers must be able to make split-second decisions about a variety of matters, use force appropriately, follow orders and communicate clearly with the public and in court. In all the years that he has been a police officer, Lt. Conley has never heard of an officer not wearing appropriate weather clothing on a detail or walking home on a bitter cold winter wearing a light jacket. (*Testimony of Lt. Conley*)

¹⁰ No specific dates of these instances were provided, nor were the members of the CPD identified who told Lt. Conley about these events. (Administrative Notice) Officer Ohika offered Mr. Marcus a ride home the day that Mr. Marcus was wearing only a light jacket walking home on a bitter cold winter day but Mr. Marcus declined the ride. (*Testimony of Capt. Dunn and Appellant*)

16. On one particular evening¹¹ in the spring of 2014, Lt. Conley went into Mr. Marcus's office to obtain computer supplies that were stored there and he found Mr. Marcus staring at his computer screen, which was on, with the lights off in his office and the door closed. When Lt. Conley entered the office, Mr. Marcus looked at him and appeared to be disoriented. (*Testimony of Lt. Conley*)

17. Lt. Conley then sat down in Mr. Marcus's office and asked Mr. Marcus if he was ok, at which point Mr. Marcus became emotional and teary but said that he was good. (*Testimony of Lt. Conley*)

18. Mr. Marcus was facing difficulties at home at around that time because his father-in-law had been diagnosed with cancer.¹² Mr. Marcus's wife was very close to her father and her father and mother lived in the apartment above the one in which Mr. Marcus and his family live. This, in turn, took a toll on the relationship between Mr. Marcus and his wife. (*Testimony of Mr. Marcus*)

19. Mr. Marcus was very irritable in view of his father-in-law's serious disease and was depressed. (*Testimony of Mr. Marcus*)

20. On July 2, 2014, Lt. Conley received an email message from Mr. Marcus that was seemingly incoherent. The message stated, in full:

Lt. Conley,

The more we expose adults and children to violence through tv and social media it seems as though it has an affect (sic). I'm offering the thought that people become a product of their environment given the situation. What this means is if you grow up on a farm it seems as though you have the ability to handle a farm or by choice can move to a city. Last semester a student from CHS came up to me in [Market Basket] where we engaged in dialogue related to a gang movie about "MS 13" he was shown by one of the schools new teachers. This kid was top notch had a lot of potential but by talking to him I could tell it had him thinking. The school had

¹¹ A specific date as to when this incident occurred was not provided.

¹² No specific date was provided as to when Mr. Marcus's father-in-law was diagnosed.

never shown the movie before. I tell you this because I have been somewhat isolated to social media and computers, dealt with ‘mind games’ for a couple years now where I’ve had to adjust, and adapted utilizing a different approach to LESM instead of deluging the public and children with crime. This goes the same for emails related to crime. The more I read about the crime the more compelled I am to return though not realistic. I came from a similar environment but in a world without computers but was able to overcome it.

I think its (sic) important you know this.

Jason Marcus

(Exhibit 18)

21. In the weeks before Mr. Marcus sent the July 2, 2014 email message to Lt. Conley, Lt. Conley there were occasions in which Mr. Marcus would start talking to Lt. Conley about topics that had nothing to do with Lt. Conley, although Lt. Conley could not recall the number of times this occurred, an example of such a conversation or a topic of such conversations. *(Testimony of Lt. Conley)*
22. After receiving the July 2, 2014 email message, Lt. Conley forwarded it to Mr. Marcus’s supervisor, Capt. Dunn, who also forwarded the email to Chief of Police Brian Kyes (Chief Kyes). *(Testimony of Lt. Conley)*
23. Following an email message between Capt. Dunn, Chief Kyes, and Lt. Conley regarding Mr. Marcus’s behavior, Chief Kyes ordered Mr. Marcus to undergo a fitness evaluation. *(Testimony of Lt. Conley; Exhibit 18)*
24. On July 7, 2014, Capt. Dunn met with Mr. Marcus to discuss Mr. Marcus’s fitness and to offer to get him help. After this meeting, Capt. Dunn reported to Lt. Conley about his conversation with Mr. Marcus. *(Testimony of Lt. Conley; Exhibit 3)*
25. On July 7, 2014, following his meeting with Mr. Marcus, Capt. Dunn wrote a memo to Lt. Conley stating, in part,

“On July 7, 2014 I was notified by Sgt. Cowhig that Officer Marcus may be AWOL. I instructed Sgt. Cowhig to contact Officer Marcus and send him to my office. At approximately 3:00PM Sgt. Cowhig called me and stated that Officer Marcus had arrived and was on the way to my office. Apparently Officer Marcus told Sgt. Cowhig he had been in but had different things to deal with outside the building.

Officer Marcus came into my office and I instructed him to shut the office door and have a seat. Officer Marcus did so and I asked him ‘Jason, what is going on with you’? He began to get emotional and tear up. Officer Marcus stated he was having issues with his marriage. He stated he was staying usually in the basement and also stated his father-in-law has cancer.

I asked Officer Marcus if he was being medicated and he stated he was. He cited anxiety, ADHD and some bipolar issues. I asked when the last time he’s seen his physician and he stated months but he has been seen by a therapist. I asked when that was and he also stated months, adding he was transitioning from therapists.

I told Officer Marcus I wanted him to agree to go to a fitness for duty evaluation which he did. I also told him I would contact you to set that up and you’d be in touch with him. Through this conversation Officer Marcus continued to become emotional, tearing up when speaking. I asked if he felt depressed and if he was thinking of killing himself. Officer Marcus immediately stated that he was not and that he would never do that.

I contacted Sgt. Bevere to escort Officer Marcus to his residence. I told Jason to call me tomorrow later in the morning so we could come up with a plan for the future regarding his evaluation. I walked Officer Marcus down the rear stairwell and he stopped on the second floor stating he needed inside his locker. I walked in with him and he opened his locker and grabbed a gym style bag. I saw his issued firearm in the duty belt and reached in and took custody of the entire belt to include the firearm (Serial #xxxx[redacted]) ... My reasoning for taking the firearm is that it is my opinion that Officer Marcus, although prescribed medication may be self-medicating as he has not apparently been seen by his physician for as he described; months (sic). Although I do not feel at this time he is at risk, I feel it is safer to take custody of the firearm pending the fitness for duty evaluation. Finally, I have notified Chief Kyes of this situation and he is inclined to place Officer Marcus on administrative leave pending the fitness for duty evaluation.”

(Exhibit 19)

26. On July 8, 2014, Lt. Conley discussed concerns about Mr. Marcus with Dr. Robert

Mullaly, a psychologist who works with CPD.¹³ Dr. Mullaly recommended an immediate fitness

¹³ Dr. Mullaly did not appear and testify. Therefore, the record does not include, for example, information indicating how many police officers or police candidates he has evaluated and found to be fit or unfit. Lt. Conley believed that this is the first psychological evaluation Dr. Mullaly has performed for the CPD, although Dr. Mullaly has experience with police disability evaluations. Dr. Mullaly, like Dr. Van Wittenberghe’s name (*infra*) does not appear on the list of professionals to implement the Respondent’s psychological screening plan approved by HRD on January 16, 2015. (*Exhibit 28*) However, Dr. Mullaly’s name appears on a March 28, 2007 list of clinicians who had approved psychological screening plans for Massachusetts public safety departments, though they were not considered to be recommended by HRD. (*Exhibit 38*)

evaluation, which was scheduled for July 11, 2014. Mr. Marcus received a letter, dated July 8, 2014, in this regard, indicating that he had been placed on administrative leave with pay, describing what was expected of him while on administrative leave, including obtaining a fitness evaluation by Dr. Mullaly and treatment, in order to potentially return to the police force.

(Testimony of Lt. Conley; Exhibits 3 and 13)

27. The July 8, 2014 letter from Lt. Conley to Mr. Marcus indicated that Lt. Conley had received a memorandum from Capt. Dunn. Lt. Conley's July 8, 2014 letter wrote, in part,

“I am in receipt of a memorandum from Captain Thomas Dunn, dated July 7, 2014. His memorandum outlines shared concerns relative to your ability to perform the essential duties and tasks required to be a police officer. In general, the memo related concerns in terms of ongoing medical care which may be affecting decision making and job performance ...

This action is being taken to insure your continued health and wellbeing and to assist me in making a determination whether you are fit for the duties and responsibilities that are required by our position.

Also, I am placing you on paid administrative leave effective immediately (P.O. 14-21). I will evaluate that status after a report from the doctor is available. While on paid administrative leave, you will continue to work and (sic) administrative schedule, however, your hours of works (sic) shall be 7am-3pm. You are not authorized to act as a police officer and you will be required to be at your home during normal working hours unless you are approved to leave by a member of this administration. ...

Though this action is not disciplinary in nature, failure to comply with this order would result in disciplinary action up to and including my recommendation for termination ...”

(Exhibit 13)

First Evaluation by Dr. Mullaly

28. Mr. Marcus met with Dr. Mullaly on July 11, 2014 at Dr. Mullaly's office in Marblehead, MA. *(Exhibit 4)*

29. The fitness evaluation was conducted under the following guidelines and policies, which stated, in part:

“...The policy and procedures followed the format of an independent professional examination, in this case, a Fitness for Duty Evaluation, following the guidelines set forth by the International Association of Chiefs of Police and following the Ethical Guidelines of the American Psychological Association, especially those pertaining to forensic evaluations.”

(Exhibit 4)

30. In his evaluation report, Dr. Mullaly noted, in part, that Mr. Marcus understood why he was being evaluated and what the possible results could be:

“[Mr. Marcus] presented as a competent law enforcement professional, capable of understanding and appreciating the importance of the evaluation and the serious nature of the professional opinion to be rendered in this evaluation. He understood that he would be expected to present his personal view of his situation and his opinion would be respected, and then a professional opinion would be developed, with a reasonable degree of professional certainty, and this opinion would be provided in a written report to the police administration, the Chelsea Police Department.”

(Exhibit 4)

31. As part of the evaluation, Dr. Mullaly conducted a Mental Status Examination, during which numerous topics regarding Mr. Marcus’s personal life were discussed, including his childhood, his current family life, and stressful incidents throughout his life. *(Exhibit 4)*

32. Following this meeting with, and evaluation of Mr. Marcus, Dr. Mullaly wrote a report. It begins with an “abstract” of the cases, stating, in part,

“This is a complex case with a long history, starting at least to 2010. This history includes a psychiatric hospitalization and subsequent out-patient medical/psychiatric treatment, including specifically psychiatric medications. Consultation with the Office of Internal Affairs, Chelsea Police Department noted concerns regarding police officers (sic) behavior at work and raised the question as to his fitness for duty ... Based on the available evidence in this case, and on the results of the Fitness for Duty Evaluation, consisting of a clinical interview and a formal mental status examination, police officer was found not fit for duty and not able to return to work at this time. ... He presented as a competent law enforcement professional, capable of understanding and appreciating the importance of the evaluation and serious nature of the professional opinion to be rendered in this evaluation”

(Exhibit 4)

33. Dr. Mullaly's report noted the reason for referral stating, in part, "The present issues were the focus of the fitness for Duty Evaluation, with the past history serving to develop the professional opinion in this case, with a determination as to whether police officer is fit for duty at this time, and whether he is able to return to his usual and customary police duty and full time schedule." (*Id.*)

34. In the case history section of Dr. Mullaly's report, he wrote, in part,

"Problems were identified in 2010 resulting in an in-patient psychiatric hospitalization at the Arbor (sic) Hospital in Boston. Police officer noted he was 'seriously depressed.' He was prescribed Risperdal, but noted he felt 'it made me worse.' The medication was discontinued. He has been tried on other medications; Adderall and Prozac. ...

In summary, a review of this complex case history relying heavily on police officer's recollections, provided a perspective to be used in the development of this professional opinion, to be rendered with a reasonable degree of professional certainty based on all of the evidence in this case, and absent any contradictory information not available for review."

(*Id.*)(see descriptions of these medications in Dr. Hidalgo's report *infra*)

35. Dr. Mullaly's report further notes, in part,

"... Of the formal Mental Status Examination he noted that he is depressed. He also noted a history of anxiety and panic attacks, though not recently, explaining that he is mostly depressed. He was open and disclosing about his personal life and his problems in his marriage. He presented as a mature and devoted father ... but noted serious problems in his marriage, developing over the past three to four years and worsening. ... More could be learned, but the discovery of any past and significant history might take time and might require the protection of confidentiality provided in out-patient psychiatric care or psychotherapy. ...

[Mr. Marcus] was asked about his symptoms, especially his depression. He became tearful when talking about his marriage and his children. He fears the collapse of his marriage and the potential impact on his [children]... He noted that he lives in a two family home, and his in-laws live on one floor of this family home. He comments there is a lot of 'tension' in the family home. It seems that this marital situation and its complexity are contributing to his depression...

He directly denied any suicidal ideation ... There were no clear signs of risk to suggest he might pose a risk to self or others at this time as a direct result of his depression. ...

... time was spent reviewing his perception of the problems he has encountered. He did not seem to have much appreciation for the concerns of his department. He did not have much insight or understanding into the serious nature of the concerns, ...

... the results of the Mental Status Examination found support for the presence of a serious depression, reoccurring, worsening over the past four (4) years, presently exhibiting little improvement and few indications of any stability in mood, with evidence of marked depression, interfering with his ability to function safely and effectively as a police officer.

Stress Profile:

... He did not reveal much about his background and his history of stress though suggesting growing up in hi family was stressful. He noted he knew little to nothing about his biological father, being raised mostly by his step-father and mother. ... The impression formed was that he would need to address and resolve the marital issues for there to be any real improvement in his state of mind and in the treatment of his depression. ... He is not involved in any out-patient psychotherapy. The consideration of out-patient psychotherapy was discussed at some length. ...

... the results of the stress profile found clear indications at the present time of significant stress in his life contributing to his depression and interfering with his ability to function at his best in the performance of his duties as a police officer.

Professional Opinion:

... competent, capable of participating in the present assessment and finds that he is **not fit for duty** at this time due to his condition ...

Recommendations:

1. The primary recommendation is to provide immediate professional optional that police officer is not fit for duty ...
2. ... Additional recommendations will be developed and discussed in concert with the referring sources ...
3. A referral for services, in this case, a recommendation for out-patient psychotherapy services, perhaps offered and provided through the Employee Assistance Program, ... as this is a complex case, with an uncertain future, especially pertaining to improvement sufficient to warrant a future review ... a coordinated effort will be the to (sic) any future success to be attained ...
4. ... a 'second opinion' might be considered important both now and into the immediate future. The professional opinion of the [EAP] professional would be important, as there might also be a consideration for a 'medical opinion' with a specific reference to the psychiatric diagnosis and treatment ..."

(Exhibit 4)(emphasis in original)

36. By letter dated July 15, 2014, Chief Kyes informed Mr. Marcus of the findings in Dr. Mullaly's July 11, 2014 fitness evaluation in a letter dated July 15, 2014. Chief Kyes's letter informed Mr. Marcus that his status, administrative leave with pay, was extended indefinitely and ordered Mr. Marcus to meet with clinical therapist John Murray, a

Licensed Independent Clinical Social Worker (LICSW). The letter further indicated that Mr. Marcus was to undergo a second fitness evaluation within thirty (30) days. (*Exhibit 5*)

37. While on administrative leave with pay, Mr. Marcus was also instructed, in part, as follows,

“...your duty hours shall be Monday through Friday (7-3). Should you wish to leave [Massachusetts] or take vacation within [Massachusetts] you are required to request time-off from Lt. Edward Conley. This may be done either by phone or email.

You are not to perform the duties of a police officer to include any administrative duties you may have been assigned. You are ineligible to work details or attend court while on leave.

It has been determined that both your License to Carry and FID card are expired. Therefore, you are hereby ordered to surrender ALL firearms and/or rifles and shotguns forthwith. You may make arrangements through the Office of Internal Affairs to have these weapon(s) stored at Chelsea Police Headquarters.”

(*Exhibit 5*)

38. When Mr. Marcus received Chief Kyes’ letter, he made an appointment with Mr. Murray and he attended therapy sessions with him through February 2015. (*Testimony of Mr. Marcus*)

39. Following Mr. Marcus’s first fitness evaluation, Dr. Mullaly also had a conversation with Lt. Conley where they developed an action plan for Mr. Marcus to provide Mr. Marcus the best opportunity to return to being a police officer. The plan included the following, in part,

1. “Officer Marcus was to remain on administrative leave with pay for a time to be determined. This leave would be reviewed after 30 days by the Chief.
2. [Mr. Marcus] was to meet with Chelsea Police contract psychotherapist John Murray at least twice a week.
3. [Mr. Marcus] would be evaluated by Dr. [Robert] Van Wittenberghe.
4. [Mr. Murray] would act as treatment coordinator and point of contact with Internal Affairs.
5. At the end of 30 days, a recommendation would be made whether to continue treatment, return to duty or return to duty.”

(Exhibit 13)

At his appointment with Mr. Murray on April 21, 2014, Mr. Marcus filled out a Mood Disorder Questionnaire with Mr. Murray. At the Commission hearing, Mr. Marcus stated that some of the answers to the questions were accurate, some were not, but that he did not recall Mr. Murray asking him some of the questions in the Questionnaire. *(Exhibit 33; Testimony of Mr. Marcus)*

Second Evaluation by Dr. Mullaly

40. Chief Kyes ordered Mr. Marcus to undergo a second evaluation by Dr. Mullaly. Dr. Mullaly conducted the second evaluation on August 24, 2014. *(Testimony of Lt. Conley; Exhibit 6)*

41. During the second evaluation, Dr. Mullaly noted, in part, that, Mr. Marcus, “... has sought and obtained the professional opinion and medical/psychiatric treatment of Dr. Robert Van Wittenberghe, and Mr. John Murray [LICSW]
... [was] much more relaxed than on the initial assessment
Noted his decision, at least his present decision, to live outside the marital/family home, and to live with a relative. This decision no doubt has reduced some of the immediate stress in his life, while perhaps creating additional stress for his future. ...”

(Exhibit 6)

42. In the second evaluation, Dr. Mullaly conducted another Mental Status Examination of Mr. Marcus, noting “... concerns were still raised with regard to his mood and mood stability. Variance was still noted, with depressive symptoms that have persisted. ...” *(Id.)* Further, he noted that being a police officer is “a position which brings inherent stress ... which when combined with the noted distress due to personal matters, argues that [Mr. Marcus] would not be able to cope successfully and consistently with the combined stress of personal and professional life ...” *(Id.)*

43. Dr. Mullaly also conducted a neurocognitive battery of tests from the Wechsler Adult Intelligence Scale and the Wechsler Memory Scale, Rorschach test and tests selected from the Minnesota Multiphasic Personality Inventory-2, as well as a clinical interview. Mr. Marcus scored average on some of the tests but his Processing Speed Index was slightly lower, which may be the result of Mr. Marcus's depression and medication. Dr. Mullaly noted that, however, "... speed of decision making in any law enforcement position can be a key factor in the outcome" (*Exhibit 6*) Mr. Marcus did not score well on the memory test, perhaps also because of his depression, variance in mood and medications. (*Id.*)

44. Based on the test results, Dr. Mullaly found, in part:

"The results of the neurocognitive tests again indicated [Mr. Marcus] is not functioning at his best, with marked variance across scores, from above Average to below Average, and reflecting a troubling degree of difficulty in concentration, focus and attention, as well as difficulty in performance requiring speed and accuracy. The test results contributed significantly to the development of the professional opinion in this case that police officer was **not fit for duty**. ...

... [in] the Restructured Clinical scales, there was as (sic) marked elevation on ... Ideas of Persecution. This is an impression of concern.

... marked elevation was the Interpersonal scale, Disaffiliativeness .. There was also an elevation on Social Avoidance. ...

There were two (2) more elevations on the PSY-5 scales, the scales more often revealing psychopathology, with the elevation on the Negative Emotion scale representing the area of most concern ...

Finally, there was a clinical interview ... responses from the Ideas of Persecution were reviewed with particular care and attention ... As noted, [this score] ... was the highest scale elevation in the protocol and directly addresses many of concern in this case and were areas of ongoing concern to Internal Affairs and the charges of this Fitness for Duty Evaluations (sic) ...

Noteworthy also was his openness in talking about his feelings and concerns. He seems to be developing some degree of insight into his present situation"

(*Exhibit 6*)(*emphasis in original*)

45. Dr. Mullaly also particularly noted Mr. Marcus's responses to the Rorschach test that Mr. Marcus's responses may hint at deeper psychological issues, writing, in part,

“The Rorschach protocol was absent any signs of serious mental illness and was generally positive and responsive while also seeming to reveal some underlying areas of concern regarding his state of mind and his capacity to function psychologically, the key issue in the Fitness for Duty Evaluation. ...

Further, there was no evidence .. to suggest that this police officer would in the foreseeable future be found suitable and acceptable for a return to full time duty as a sworn police officer. ...”

(Exhibit 6)

46. Dr. Mullaly recommended “to support [Mr. Marcus] in his ongoing efforts continuing with out-patient services of his psychiatrist, Dr. Van Wittenberghe, and this therapist, Mr. Murray ... The improvements noted and even expected for the future do not change the professional opinions finding [Mr. Marcus] ... is **not now fit for duty**, and ... would not be considered fit for duty as a police officer any time in the foreseeable future.” *(Id.) (emphasis in original)*

47. Lt. Conley shared Dr. Mullaly's second evaluation results with Mr. Marcus and talked with him about separating him from service. Mr. Marcus told Lt. Conley that he had no intent to resign. *(Testimony of Lt. Conley)*

48. On October 22, 2014, Chief Kyes sent a letter to Mr. Marcus referencing Mr. Marcus's prognosis and stating that the Department was considering terminating Mr. Marcus if he did not choose to resign, based upon Mr. Marcus's inability to perform the essential functions of a police officers. The letter also stated that Chief Kyes wanted Mr. Marcus to meet with Dr. Van Wittenberghe and to review both of Dr. Mullaly's fitness evaluations. In the alternative, the letter stated, the CPD would provide Mr. Marcus with an unpaid leave for up to six (6) months if, “and only if, your treating Psychiatrist feels that within that timeframe, if you were amendable

(sic) to clinically treatment (sic), your prognosis for a return to duty would be favorable. As such, depending on your choice below, I will be setting up an appointment for you with Dr. Wittenberghe for the purpose of reviewing Dr. Mullaly's FFDE's (sic) and evaluating you similarly from a psychiatric point of review, to learn as to if ... he concurs that you are not fit for duty and even with clinical treatment you won't be within the foreseeable future, or, to the contrary, if, you are unfit for duty currently, but have a reasonable probability of returning to duty if you obtain intense clinical treatment over the 6-months (sic). ...” (*Exhibit 8*)

49. In a reply letter dated October 23, 2014, Mr. Marcus made it clear that he intended to return to work and that he refused to resign. He requested a copy of Dr. Mullaly's report of September 23, 2014 and asked that the appointment with Dr. Van Wittenberghe be scheduled as soon as possible. (*Testimony of Lt. Conley; Exhibit 9*)

First Report by Dr. Van Wittenberghe

50. Mr. Marcus had an appointment with Dr. Van Wittenberghe, a psychiatrist, on July 24, 2014. (*Exhibit 35*) Dr. Van Wittenberghe has been a licensed physician in Massachusetts since 1976, he obtained an American Board of Psychiatry and Neurology Certificate in 1979, and he has been temporarily licensed in several other countries. He has been in general practice since the 1970s, been in private practice at one location for twenty (20) years and held appointments to several practices on the North Shore and to several hospitals on the North Shore, and instructed Boston University Medical School students in psychiatric rotation. He is affiliated with a number of hospitals also on the North Shore. His special interest and skills are working with patients who are developmentally disabled, geriatric, and in group and nursing homes (in English and Spanish). (*Exhibit 40*)¹⁴

¹⁴ Dr. Van Wittenberghe did not appear and testify. Therefore, the record does not include, for example, information indicating how many police officers or police candidates he has evaluated and found to be fit or unfit.

51. Dr. Van Wittenberghe conducted an Initial Psychiatric Evaluation of Mr. Marcus, addressing Mr. Marcus's family history, psychiatric history, job and education history, and his medical history. The evaluation took approximately one (1) hour. (*Exhibits 35 and 40; Testimony of Mr. Marcus*) During his appointment with Mr. Marcus, Dr. Van Wittenberghe found that Mr. Marcus was "hypomanic/manic," and he noted the following, in part,¹⁵

"... Hospitalized August 2010 at Arbor (sic) H. The Pt claiming he was 'miss Dx'd'¹⁶. Might have been suicidal. ?Put on Risperdal. Transferred to Arbor (sic) outpatient in Woburn in the care of psychiatrist Dr. McAllen ... who currently has him on Lamictal ?150 mg a day, Prozac 20mg a day, and Adderall ?SA 30 mg b.i.d. ...

According to referral by therapist, he has also been evaluated. ?Testing by Dr. Robert Mullaly, PhD, in Lynn. No report available. The Pt put on medical leave and found to be not fit for duty and put in the 'IT Department' where he also was hypomanic. ... Arbor (sic) Dx'd him with bipolar, ADD, and major depression. The Pt, himself, feels that his memory is impaired, that he has difficulty focusing, has some poor judgment whereby he was walking to work in the winter only with his shirt on ...

... was extremely hyper-talkative, clearly hypomanic/manic. Good eye contact. Fairly good sense of humor. Excited affect. No evidence of depression, suicidality, or HI. His denial of his psychiatric issues is of delusional proportions. At times became quite tangential, close to "word salad." His memory functions were difficult to assess... Otherwise average general fund of knowledge. No problems calculating, spelling words backwards, or abstracting. Insight and judgment are very poor.

Clearly hypomanic/manic. Suffering from bipolar I disorder. ... He has little, if any, understanding of the nature of his illness. Urged him to educate himself but this might be futile at this point.

Like Dr. Mullaly, Dr. Van Wittenberghe's name does not appear on the list of professional to implement the Respondent's psychological screening plan approved by HRD on January 16, 2015. (*Exhibit 28*). (*Exhibit 28*) At the Commission hearing, the Respondent requested to call Dr. Van Wittenberghe as a witness, to which the Appellant objected. The Respondent was permitted to submit Dr. Van Wittenberghe's affidavit addressing his evaluation process and whether substantive changes were made to his report. (*Exhibit 40*) His affidavit describes his evaluation process and states that there were no substantive changes to his report. At the Commission hearing, the Appellant was afforded the opportunity to submit an affidavit of Dr. Beck by November 30, 2015 in response, if any, to the affidavit of Dr. Van Wittenberghe but none was submitted.

¹⁵ I understand the abbreviations in this report as follows: "Pt"=patient; "bio"=biological; "FA"=father; "H"=hospital; "Dx'd"=diagnosed; "PCP"=primary care doctor; "ADD/ADHD"=attention deficit disorder/attention disorder hyperactive disorder; "Bip. Dis."=bipolar disorder'. The question marks in this report appear in the original.

¹⁶ I understand "DX'd" to mean "diagnosed". (*Administrative Notice*)

I am concerned that the Prozac as well as the Adderall might fuel his mania and he should be taken off both ASAP. He was not sure about the Lamictal dosage.

Suggested he try Latuda samples 20 mg to be gradually increased to 80 mg. The purpose, benefits, and risks of both meds were discussed ...

Diagnosing a bipolar Pt. with ADD or ADHD is unfortunately very common mistake since part of the symptoms clearly resemble (sic) each other. However, there are a few Bip. Dis. Who might have comorbid ADHD but if the 'hyperactivity' is due to hypomania, obviously stimulants can make this situation worse as well as antidepressants without adequate mood stabilizing coverage. Lamictal excellent for bipolar depression, but not necessarily efficacious for preventing manic episodes. All this was carefully explained to the Pt but unclear how much he understood or was willing to be compliant with. ...

The Pt given a list of PCPs which he should do ASAP, and next time will also order a Fasting Met. Prof.

A future session with his wife very important for data gathering and diagnostic purposes. ...”

(Exhibit 35)(see information regarding these medications in Dr. Hidalgo's report, infra)

52. At the conclusion of the evaluation, Dr. Van Wittenberghe also changed Mr. Marcus's prescriptions by discontinuing his use of Prozac and Adderall and continuing Mr. Marcus's Lamictal prescription, increasing the dosage. *(Exhibit 35)(see information regarding these medications in Dr. Hidalgo's report, infra)*

Second Report by Dr. Van Wittenberghe

53. On October 30, 2014, Lt. Conley sent a letter to Dr. Van Wittenberghe asking for him to meet with Mr. Marcus for his professional opinion as to whether Mr. Marcus will ever be able to return to the Department.¹⁷ In the October 30, 2014 letter, Lt. Conley provided certain information about Dr. Mullaly's findings and asked Dr. Van Wittenberghe to answer these questions:

¹⁷ The Department requested that Dr. Van Wittenberghe evaluate Mr. Marcus because the Department was advised to do so by Metrol, Chelsea's third-party worker's compensation consultant. *(Testimony of Lt. Conley, Exhibit 10)*

1. In your best medical opinion, is Officer Marcus mentally/emotionally/psychiatrically fit to perform the essential duties of a Police Officer?
2. If your response is yes, that he is mentally/emotionally/psychiatrically fit to perform the essential duties of a Police Officer, when can he resume his duties?
3. If your response is no to 1 above, is it your best medical opinion that despite any future therapy/treatment, Officer Marcus will likely never be able to return to his duties as a Police Officer?
4. If your response to 1 above is no, not at this time, is it your medical opinion that with appropriate therapy/treatment, Officer Marcus will likely be able to return to his duties as a Police Officer within a reasonable period of time within the foreseeable future, ie., (sic) the next 6 to 12 months?
5. If it is your best medical opinion that Officer Marcus is not able to resume his career as a Police Officer due to this mental/emotional/psychiatric medical condition, is this prognosis likely to remain in effect even though he may, at some remote, unknown time in the future, health to the point where he may be able to once again resume his duties?

(Exhibit 10)

54. By letter dated November 14, 2014, Dr. Van Wittenberghe responded to the questions he received from the CPD in Lt. Conley's letter of October 30, 2014. Dr. Van Wittenberghe wrote, in part,

“At the time of the first evaluation he had just suffered a manic episode requiring him to be taken off the roster as a police officer for the City of Chelsea. He has also continued to see Psychotherapist John Murray, LICSW, and has been evaluated by Psychologist Robert Mullaly, PhD, who repeatedly found that Mr. Marcus was no longer fit for duty now and at any time in the foreseeable future.

... [there is] clear improvement of his condition and good response to his medication regimen. I have also carefully reviewed his extensive job description.

1. Answer [to CPD Question #1]: No, mostly based on the fact that he has to carry a gun, deal directly with the public, having to make split-second decisions, and having to use sound, common-sense judgment at all times.
2. Answer: Not applicable.
3. Answer: No, unfortunately his illness is of a chronic, cyclical, unpredictable nature even with the proper medication regimen and psychotherapy.
4. Answer: See above. This is a chronic condition and its consequences are life-long.
5. Answer: Based on current medical research and progress made in treatment, his current unpredictable prognosis will remain in effect unless research advances come

up with a ‘foolproof-type’ of mood stabilizer. Note: However, undersigned does not see any major issues for Mr. Marcus to work in the capacity of an IT-type of desk job which he tells me he has all the qualifications for and has performed this without issues in the past and for which he is seeking ongoing online training. ...

With treatment, the frequency and severity of his episodes should be significantly decreased. However, the risk for another decompensation cannot be eliminated. ...

Hopefully some type of accommodation can be provided to this deserving patient, but not in the capacity of a police officer.”

(Exhibit 11)

Termination of Mr. Marcus

55. On December 2, 2014, Chief Kyes sent a letter to Mr. Marcus informing him of Dr. Van Wittenberghe’s responses to the five (5) questions it had asked him about Mr. Marcus’s fitness formally. This letter also asked that Mr. Marcus resign, saying that if he chose not to resign, Chief Kyes would proceed with a non-disciplinary termination procedure. Chief Kyes gave Mr. Marcus until December 8, 2014 to respond. *(Exhibit 12)* Mr. Marcus indicated that he would not resign. *(Testimony of Lt. Conley)*

56. On December 6, 2014, Mr. Marcus was evaluated by Dr. Paul Laemmle (Dr. Laemmle), a psychologist, to whom Mr. Marcus was referred by the CPD Employee Assistance Program (EAP)¹⁸. *(Exhibits 4 and 14)*

57. At the December 6, 2014 appointment, Dr. Laemmle interviewed Mr. Marcus and administered the MMPI-2 test and the Myers-Briggs Type Indicator Form G test. *(Exhibit 14)* He did not assess Mr. Marcus’s fitness to perform the essential functions of a police officer. *(Administrative Notice)*

¹⁸Dr. Laemmle did not attend and testify at the Commission hearing and there is no curriculum vitae for Dr. Laemmle in the record. He is not listed in HRD’s January 16, 2015 approval of the Respondent’s psychological screening plan with a list of professionals to implement the plan, nor is he listed in the 2007 list of clinicians who had approved psychological screening plans for Massachusetts public safety departments. *(Exhibits 28 and 38)*

58. Dr. Laemmle found that Mr. Marcus maintained a “cooperative attitude” at the appointment. Dr. Laemmle obtained a detailed personal, family and some employment history of Mr. Marcus. He noted further, in part,

“Mr. Marcus was stuck by a needle in 2010 (sic) and received six months of precautionary treatment. He was treated for depression and was taking respiridol, which caused a bad reaction. He was hospitalized in Arbor (sic) Hospital in Jamaica Plain for a week and then released. He indicated that he had struggled with a bout of depression, which was exacerbated by his ailing father-in-law, marital difficulties and financial problems. He indicated that he was not suicidal but was suffering from situational stress. He has received counseling which has helped tremendously according to Mr. Marcus. ...

Mr. Marcus responded to the MMPI-2 items by claiming to be unrealistically virtuous. This performance weakens the validity of the test results and indicates an unwillingness or inability to disclose personal information. The resulting MMPI-2 profile is less likely to provide much useful information about the subject. Many reasons may be found for this pattern of uncooperativeness: conscious distortion of the answers to present himself in a favorable light, lack of psychological sophistication, or rigid adjustment. ...

... He reports experiencing a number of fears and he admits to having generalized tension and worry at times. He is probably experiencing phobias. ... He denies that he is having any problems interacting with other people. ...

... He reports that his home life was positive, pleasant, and problem-free. ... Mr. Marcus’ relatively low-MMPI-2 clinical profile suggests the absence of significant psychological problems measured by the se scales. However, elevations on the supplementary scales suggest that further appraisal of some of the attitudes he reports is needed before conclusions about his adaptive potential are drawn. Individuals with this profile are typically representing the impression that they are well adjusted, manage psychological and interpersonal conflicts well, and are highly motivated to work. ... “
(Exhibit 14)

59. Dr. Laemmle’s report concludes in summary as follows, in full,

“Mr. Marcus has experienced stressful life situations including: a needle stick at work, a dying father-in-law, marital difficulties, and financial problems. Consequently he has experienced depression and anxiety issues. He has received psychological treatment as well as medication to assist his recovery. Mr. Marcus now appears to be well adjusted and he is not experiencing symptoms of depression or anxiety.”

(Exhibit 14)

60. On December 9, 2014, Mr. Marcus sent an email to Chief Kyes stating that he did not want to resign at that time and that he wanted to continue working towards returning to the CPD. *(Exhibit 13, pg. 8)*

61. By memorandum dated May 18, 2015, Lt. Conley transmitted to Chief Kyes his investigation report regarding Mr. Marcus. This report indicated that from March to July 2014, he received confidential reports about Mr. Marcus's behavior. On July 7, 2014, Capt. Dunn reported receiving an incoherent email from Mr. Marcus, noted unusual behavior by Mr. Marcus, including showing up to a paid detail without a cruiser and "not dressed properly for inclement weather, sleeping in his office during off-duty hours", and a meeting with Officer Marcus in which Mr. Marcus was very upset, tearing up, stating he was having issues with his marriage, his father-in-law had cancer, that he [Mr. Marcus] was being medicated, he was having anxiety, ADHD and some bipolar issues, and that he agreed to be assessed for fitness for duty. Lt. Conley had secured Mr. Marcus's firearm and placed him on administrative leave with pay pending further investigation and sent him a memorandum on July 8 in these regards. *(Exhibit 13)*

62. In his investigation report, Lt. Conley wrote further that he made an appointment for Mr. Marcus with Dr. Mullaly for a fitness for duty evaluation on July 11, 2014 and then received Dr. Mullaly's report on July 14, 2014 stating the Mr. Marcus was not fit for duty. Lt. Conley discussed the matter with Dr. Mullaly, developing a plan to have Mr. Marcus attend therapy with Mr. John Murray (LICSW), be evaluated by Dr. Van Wittenberghe, and then make a recommendation whether to continue treatment or return to duty. Lt. Conley informed Mr. Marcus of these matters in a July 15, 2014 order that concluded, "I recognized this must be a very difficult time for you and your family. I am confident that with the right support and clinical treatment you will successfully return to duty. ..." *(Exhibit 13)*

63. Lt. Conley further added in his report that he had received bi-weekly updates from Mr. Murray saying that Mr. Marcus was making some progress, that Dr. Van Wittenberghe said Mr. Marcus's "present medication was improperly prescribed and required substantial adjustment." (*Id.*) Of concern to Mr. Murray, however, was Jason's disclosure that he has a difficult time interacting with other people. He opined (sic) that [Mr. Marcus] may require employment which was more in line with his strengths, particularly his computer skills which require minimal social interaction ..." (*Id.*)

64. Lt. Conley wrote in his report that on August 8, 2014, he received an email message from Dr. Mullaly that stated that Dr. Mullaly spoke to John Murray and that Dr. Van Wittenberghe changed Mr. Marcus's medications and "I still think the long range goal is to remove him from the 'police' roster." (*Id.*)

65. Lt. Conley was surprised to learn about Mr. Marcus's diagnoses and the duration of Mr. Marcus's illness. Also, he did not know, and found no record at the CPD indicating, that Mr. Marcus had been in a psychiatric hospital in 2009. (*Testimony of Lt. Conley*)

66. On August 20, 2014, Chief Kyes reviewed matters and agreed to consider Mr. Marcus returning to work in a limited capacity. Lt. Conley updated Chief Kyes and Capt. Dunn. Lt. Conley received a report from Dr. Mullaly, which was forwarded to Chief Kyes.

67. On Sept. 17, 2014, Lt. Conley's report indicates, Chief Kyes told Lt. Conley that, in view of Dr. Mullaly's report, he wanted to separate Mr. Marcus from service for non-disciplinary reasons. Lt. Conley called Mr. Marcus that day and informed him of Chief Kyes' decision "with deep sorrow". (*Id.*)

68. The investigation report further indicates that CPD sent information about Mr. Marcus to Meditrol, the CPD workers' compensation provider, which recommended that the matter be

referred to a physician for review. On October 14, 2014, the patrol officers' union provided a draft letter to send to Mr. Marcus that would have had the Respondent pay for a third fitness evaluation to be provided by Mr. Marcus's treating psychiatrist, Dr. Van Wittenberghe and offering six (6) months of unpaid leave if Dr. Van Wittenberghe "provides an opinion that medication may remediate condition to allow a full return to work." (*Id.*) A letter was sent to Mr. Marcus in this regard and a letter was sent to Dr. Van Wittenberghe with five (5) questions for him to answer about Mr. Marcus's situation. (*Id.*)

69. On November 14, 2014, Lt. Conley received Dr. Van Wittenberghe's report. On December 9, 2014, Mr. Marcus sent an email message to Chief Kyes stating that he did not want to resign at that time and referred questions to his attorney. (*Id.*)

70. On May 6, 2015, the Respondent's Solicitor issued a separation agreement and release of claims document for Mr. Marcus to his union. The offer would expire May 18. On May 16, 2015, Mr. Marcus informed Lt. Conley that he would not resign. After reviewing this information, Lt. Conley recommended that Mr. Marcus be separated from service or by mutual agreement. (*Id.*)

71. On May 18, 2015, Mr. Marcus met with Dr. James Beck¹⁹, a psychiatrist, for a psychiatric evaluation pursuant to a referral from Mr. Marcus's union attorney. Dr. Beck obtained his medical license in 1965 and soon thereafter obtained a Board of Psychiatry and Neurology, Psychiatry Certification, a psychologist license and certification from the American board of Forensic Psychiatry, although he is no longer a licensed psychologist. He is currently a Professor of Psychiatry at Harvard Medical School, works in palliative care psychiatry at Spaulding Rehabilitation Hospital in Cambridge, is a member of the Ethics Committee at

¹⁹In HRD's January 26, 2015 letter to the Respondent approving the Respondent's psychological screening plan, it states that this plan would be implemented by a list of clinicians, which list includes Dr. Beck. (*Exhibit 28*)

Cambridge Health Alliance and he is on the editorial board of the Journal of American Academy Psychiatry and Law. At one point in his career, Dr. Beck supervised Dr. Hidalgo. Dr. Beck has authored and/or co-authored numerous publications and received numerous hospital and other appointments. He has been an expert witness in civil and criminal cases, with more than five hundred (500) cases involving malpractice and at least two (2) dozen police disability cases in which he represented mostly the police officers. (*Exhibit 17; Testimony of Dr. Beck*) He has been retained as an expert for appellants in approximately twelve (12) appeals involving law enforcement candidates who were bypassed because they were found to be not fit psychologically.²⁰ Dr. Beck has also assisted a consultant in an update of the state's Human Resources Division (HRD) Medical Standards regarding psychological disorders. (*Testimony of Dr. Beck*)

72. By a memorandum dated May 19, 2015 from Chief Kyes to Interim City Manager Ned Keefe²¹, the Appointing Authority, Chief Kyes informed the Respondent that he had reviewed the May 18, 2015 investigation report of Lt. Conley, which indicated that the evaluations of Dr. Mullaly and Dr. Van Wittenberghe determined that Mr. Marcus was unfit for duty in that Mr. Marcus is “unable to perform the essential functions of a police officer” and that Mr. Marcus “would not be expect (sic) to be found fit for duty in the future due to a psychological illness”. (*Exhibit 2*) This memorandum stated further, “Accordingly, with a heavy heart, I am requesting a MGL Chapter 31 § 41 non-disciplinary termination hearing ... for the purpose of removing Officer Jason Marcus from employment” (*Id.*)

²⁰ Dr. Beck added that Mr. Marcus's current counsel's law firm has sent him many clients. (*Testimony of Dr. Beck*)

²¹ In December 14, 2014, the then-City Manager left. An acting City Manager was in place for several months. In July, 2015, the current City Manager was appointed. (*Testimony of Lt. Conley*)

73. On May 21, 2015, the Respondent notified Mr. Marcus of its intent to proceed forward with a non-disciplinary termination on the basis that he was unfit to perform the essential functions of a police officer. (*Agreed Upon Findings of Facts*) The letter indicated that a hearing would be held in this regard on May 29, 2015. (*Exhibits 1 and 25*)

74. On May 27, 2015, Dr. Beck sent his report on Mr. Marcus to Mr. Marcus's attorney. Dr. Beck's report stated, in part, that he interviewed Mr. Marcus on May 18, 2015, further evaluated Mr. Marcus via telephone on May 23, 2015 and interviewed Mr. Marcus's wife by telephone on May 24, 2015. Dr. Beck also reviewed Mr. Marcus's personnel file, the reports of Dr. Paul Laemmle, Dr. Van Wittenberghe, a letter from Officer Marcus dated June 15, 2015 alleging that Dr. Van Wittenberghe's initial evaluation contained inaccuracies, and a letter from Arbour Counseling Services dated February 16, 2015 stating that he was diagnosed with Post Traumatic Stress Disorder and Depressive Disorder. (*Exhibit 15*) Dr. Beck added, in part, "[i]ncluded in the interview is a set of questions that represent a systematic assessment of the symptoms of mental disorder. The questions are drawn from the Structured Clinical Interview for Diagnosis, and from the Present State Exam ...". (*Id.*) Thereafter, Dr. Beck wrote, in part,

"I find no evidence that Officer Marcus has any mental disorder **at the present time**. There was a period when he was depressed, but that depression has passed and he described his mood as good. There is **no evidence that Officer Marcus had a manic episode at any time in his life and I can find no evidence to support a diagnosis of bipolar disorder**. **At the present time**, Officer Marcus is without mental disorder and, in fact, he appears to be a mentally healthy, capable adult. There is **nothing to support an assertion that he is at present unfit** for duty as a result of some psychiatric problem. ...

... I found nothing in the record to explain why the department referred Officer Marcus for a psychological evaluation in July 2014.

Ofc. Marcus reports that he met with the captain in July 2014. He told the Capt. that he had been depressed since a needle stick that occurred in 2009, that he was somewhat irritable at the present time, that his father-in-law had recently been diagnosed with cancer, and that he and his wife were having some difficulties ...

... He also denies any problems with substance abuse or with alcohol, or of a financial nature ...

Following the needle stick he became anxious and depressed and his primary care physician placed him on Risperdal in 2010. He had a bad reaction to this medication, had some thoughts of killing himself and was hospitalized for a week. The Risperdal was stopped in the hospital. His suicidal thinking cleared and he was discharged ... At that time he was placed on Prozac, Adderall, and Lamictal. The Adderall helped his concentration but it also made him more irritable.

Officer Marcus reports that he has been seeing an outpatient counselor at the Arbour approximately once a month since 2009....

Currently, Dr. Van Wittenberghe has treated the patient with Prozac and Latuda ... “

(Exhibit 15)

75. On May 28, 2015, Dr. Beck submitted a “supplementary report” on Mr. Marcus to Mr. Marcus’ attorney, “in response to your request that I review the psychological report by Dr. Mullaly.” *(Exhibit 16)* Dr. Beck wrote that Dr. Mullaly’s report is flawed in that it relied “almost entirely” on the reading of psychological tests, that Dr. Mullaly reports that one of the test results is flawed because Mr. Marcus’s responses were not forthcoming, that Mr. Marcus and his wife report that they are “doing fine”, that Dr. Laemmle reported no evidence of depression, that “the only clinical evidence for any mental disorder that Dr. Mullaly documents is for a depression that has long since resolved.” (*Id.*) Dr. Beck did not obtain and review the Arbour records. He did not speak to Lt. Conley, or anyone else at the CPD, concerning Mr. Marcus’s behavior, although he read the July 2014 email message to Lt. Conley, part of which, he opines, “showed deterioration”. (*Testimony of Dr. Beck*) Dr. Beck “strongly urge[d] that the city have [Dr. Mullaly’s] testing reviewed by an independent clinical psychologist” named Dr. Mark Schaefer. *(Exhibit 16)* It is Dr. Beck’s opinion that Mr. Marcus is situationally depressed,

which does not preclude him from working; if Mr. Marcus has a relapse, Dr. Beck testified, he should receive treatment, get better and return to work. (*Testimony of Dr. Beck*)

76. On May 29, 2015, the Respondent's City Solicitor, Attorney Cheryl Watson Fisher²², conducted the first day of the local hearing at which the Appellant submitted Dr. Beck's reports. Both parties requested a continuance of the hearing and an independent evaluation (IME) of Mr. Marcus. (*Exhibits 1, 20, 21, 24, 28*)

77. Dr. Jose Hidalgo was engaged to conduct the IME. Like Dr. Beck, Dr. Hidalgo is among the list of clinicians HRD identified to implement the Respondent's approved psychological screening plan and he testified at the Commission hearing. (*Exhibits 20, 21, 23 and 28; Testimony of Dr. Beck and Dr. Hidalgo*)

78. Dr. Hidalgo obtained his medical license in 1991 and Board Certification from the American Board of Psychiatry and Neurology thereafter. He obtained post-doctoral training in general psychiatry at MGH and Boston University Medical Center, and been a forensic psychiatry fellow at MGH. He currently has a private practice, is an instructor in psychiatry at Harvard Medical School and been an instructor or clinical fellow also at Harvard Medical School. He has been appointed as a consultant, teaching associate, clinical fellow and staff psychiatrist (e.g. to Arbour Hospital²³), *inter alia*, to many hospitals and other entities. He has been an invited teacher and/or presenter to more than twenty (20) regional, national and international conferences. Much of his professional experience, research and writing addresses victims of trauma. He has authored or co-authored a handful of publications. (*Exhibit 21*) Dr. Hidalgo has performed seven (7) psychological fitness for duty evaluations: three (3) for police

²² City Solicitor Cheryl Watson Fisher supervises Assistant Solicitor Amy Lindquist, who is representing the Respondent in this appeal.

²³ Dr. Hidalgo was a Staff Psychiatrist at Arbour Hospital from August 1992 to July of 1994, approximately fifteen (15) years prior to Mr. Marcus's treatment by Arbour beginning in 2009. (*Exhibit 21*)

candidates, three (3) for firefighter candidates, and one (1) for an attorney. Of the police evaluations, he has found less than 50% of them unfit. (*Testimony of Dr. Hidalgo*)

79. On June 15, 2015, Mr. Marcus sent Dr. Hidalgo a list of items in Dr. Van Wittenberghe's report that he said were inaccurate and/or inconsistent.²⁴ This includes that his mother was not diagnosed as Bipolar and hospitalized therefor, that he is in contact with all of his siblings, that he was not hospitalized when he was twenty (20) years old, that he was hospitalized for a week in 2009 at Arbour Hospital (not a month), that Arbour did not diagnose him as Bipolar, and that there were no incidents of odd behavior prior to 2009. (Exhibit 34)

80. On June 20, 2015, Mr. Marcus met Dr. Hidalgo, who conducted a general psychiatric interview with Mr. Marcus that took about two (2) hours. In addition to interviewing Mr. Marcus, Dr. Hidalgo reviewed the following documents and conducted the following interviews,

- “Memo by Lt. Conley dated July 7, 2014
- First fitness evaluation conducted by Dr. Mullaly on July 14, 2014
- Second fitness evaluation conducted by Dr. Mullaly on August 24, 2014
- Initial psychiatric evaluation conducted by Dr. Van Wittenberghe on July 24, 2014
- Memo by Dr. Van Wittenberghe addressed to Lt. Conley dated November 14, 2014
- Psychological screening performed by Dr. Laemmle on December 6, 2014
- Psychiatric evaluation conducted by Dr. Beck on May 27, 2015
- Supplementary report by Dr. Beck, dated May 28, 2015
- Mr. Marcus' personnel file with the CPD
- Arbour counseling letter verifying that Mr. Marcus was treated by Arbour Counseling Service from September 4, 2009 through July 11, 2014
- Arbour discharge summary
- June 15, 2015 letter sent by Mr. Marcus to Dr. Hidalgo that clarified “inaccurate and inconsistent” comments in Dr. Van Wittenberghe's initial psychiatric evaluation
- Office notes by Mr. Murray, dated July 14, 2014 through February 23, 2015²⁵
- Dr. Hidalgo's notes of his telephone interview with Lt. Conley on July 2, 2015”^{26, 27}.

²⁴ Mr. Marcus's letter states that he attached medical records but they are not in this record. (*Exhibit 34*)

²⁵ Mr. Marcus was in contact with Mr. Murray on June 23 and 25, 2015 to obtain a copy of Mr. Murray's record, not having received them previously. (*Exhibit 39*)

(Exhibit 20; Testimony of Dr. Hidalgo)

81. Upon review of the information and after interviewing Mr. Marcus, Dr. Hidalgo produced an IME report on July 11, 2015. The lengthy, detailed IME report states, in part,

“ ... I interviewed Officer Marcus on June 20, 2015 for approximately 120 minutes and performed a general psychiatric interview. Included in the interview is a set of questions that represent a systematic assessment of the symptoms of mental disorder, with a focus on his past and current history of mood disorder. ...

... Officer Marcus is a patrol officer who has been assigned to the crime analyst (sic) unit, where he has had primarily administrative duties in social media and computer related work. According to Lt. Conley, Officer Marcus, however, could be assigned patrol duties at anytime (sic). ...

Officer Marcus stated that prior to 2009 he did not have any psychiatric problems or psychiatric hospital admissions. He indicated that sometime around the summer of 2009 he accidentally got stuck with a needle while performing a routine search of a car, the needle punctured his skin. ... He reported becoming very anxious about the possibility of having some type of illness from the needle stick. He did not however, endorse symptoms of Post Traumatic Stress Disorder from this incident, e.g., flashbacks or nightmares.

Over the ensuing months, Officer Marcus indicated that he became depressed. He noted that he ‘shut down,’ that he lost interest in doing things that he usually enjoyed and that he developed ‘paranoid thinking.’ He reported that he and his wife got help from his primary care doctor and was treated with Risperdal, which he stated made him worse. He stated that the paranoia got worse and he ended up being hospitalized at the Arbour Hospital. Officer Marcus reported that at the time of his admission to the Arbour Hospital in 2009 he had problems with sleep, energy, excessive guilt, concentration and appetite. He was treated with Prozac, an antidepressant, and Geodon, an antipsychotic medication.

Following the discharge from the Arbour Hospital, Officer Marcus indicated that he was referred to the Arbour Counseling Outpatient Department, where he received psychotherapy and was prescribed psychiatric medications from 2009 to 2014. ... He noted ... that his most consistent care was at Malden Arbour Counseling Center with Dr. McAllen.

²⁶ Dr. Hidalgo’s July 11, 2015 report states that his telephone interview with Lt. Conley occurred on July 2, 2014. However, since Dr. Hidalgo does not appear to have been involved with this matter until the summer of 2015, it is more likely than not that the interview occurred in 2015.

²⁷ The record here does not include the Arbour discharge summary, Mr. Murray’s office notes, or Dr. Hidalgo’s notes of his telephone interview with Lt. Conley on July 2, 2014.

Officer Marcus stated that in general he 'feels down' in the winter, but not 'to the degree of a depression,' and that he is able to cope with his moods by exercising. Sometime around the winter of 2013, he indicated he began to have problems with irritability and distraction; 'irritability was a major issue.' ...

When asked to explain the irritability, Officer Marcus indicated that he would get irritable at anything; 'any hope of commotion.' For example, he indicated that he would become irritable if other people were talking in the same room while he was working, if his wife told him to do things, or if the kids made too much noise. He stated that this caused conflict with his wife. By the spring and summer of 2014, Officer Marcus stated that he realized it was a problem. ... at around this time he was prescribed Prozac, an antidepressant used to treat Depression and Anxiety; Lamictal, a mood stabilizer used to treat Bipolar Depression; and Adderall, a stimulant used to treat attention problems. ... [the irritability] led to a brief separation from his wife and family. He added that during the separation his psychiatric medications were changed to Prozac and Latuda, an antipsychotic medication used to treat Psychosis and Bipolar Disorder. Officer Marcus stated that following the medication changes his irritability improved and he was better able to cope ... and returned to live with his family.

With regard to the problems that led to his administrative leave and the determination that he was not fit for duty ... Officer Marcus indicated that a lot of the problems ... had to do with irritability and that the irritability might have been a side effect of the medication Adderall. ... he was also under a lot of stress because his father-in-law was diagnosed with Cancer. Officer Marcus stated that 'he broke down emotionally' at work and confided in Captain Dunn about his personal difficulties.

When asked about the specific concerns regarding his behaviors such as not wearing appropriate clothing during winter months and sending e-mails that did not make sense, Officer Marcus stated that, forgetting his hat and gloves was normal forgetfulness and that perhaps he did not make 'the right decisions.' .. With regard to the e-mails, he indicated that they were 'inconclusive' ... Lastly, Officer Marcus indicated that concerns about his behavior don't have a direct connection to his work as a police officer and that, moreover, the behaviors likely had to do with medication side effects.

... As indicated above, Officer Marcus has been receiving outpatient psychiatric treatment at Arbour Counseling Services since 2009 (no medical records of these treatments were available for review). He stated that he has been treated for Depression, attention problems, panic attacks, and Post-Traumatic Stress Disorder. His current medications include Prozac 60mg per day and Latuda 60 mg. ...

... During the telephone interview, Lt. Conley indicated that Officer Marcus is well liked in the police department and that he is personable. ... when asked

about Officer Marcus's behavior of concern, Lt. Conley mentioned a number of behaviors including: 1) On multiple occasions Officer Marcus was noted not to be wearing appropriate winter clothing and when offered a ride home Officer Marcus refused. 2) On two occasions Officer Marcus was noted to be in his office with the lights off, the door closed and another officer walked into the office, Officer Marcus started in a way that caused concern on the part of the other officers, including Lt. Conley. 3) Officer Marcus sent e-mails to Lt. Conley that did not make sense in terms of content and context. For example, Lt. Conley indicated that an e-mail sent to him from Officer Marcus came out of the blue ... Lt. Conley further noted that the context of the e-mail did not make sense as it contained a string of thoughts that were not logically connected. ...

... The Arbour Hospital discharge summary dated September 1, 2009 lists Officer Marcus's psychiatric diagnosis as Mood Disorder, NOS, Not Otherwise Specified. The same report indicates that the reason for his psychiatric admission was due to:

The patient was brought to the ER by his wife after 1 week of sleeplessness, irritability and paranoia. Patient states that he has been increasingly depressed for 8 – 9 months. Patient states that he feels that people are watching him and are out to get him and that his wife is trying to set him up.

The discharge summary further indicates that:

Patient and wife felt strongly that the paranoia was brought on after the first dose of Zoloft 25mg which was prescribed by his PCP ... and was made worse as the PCP put him on Risperdal, an antipsychotic medication, the next day.

According to the same report Officer Marcus was stable at the time of discharge from the hospital and was prescribed Geodon, an antipsychotic medication, 80 mg twice per day and Prozac 20 mg per day.

According to the Initial Clinical Evaluation from Arbour Counseling Services ..., dated September 4, 2009, Mr. Marcus reported that 'depression has been on-going for a couple of years.'

... Officer Marcus was apprehensive throughout the interview but was able to engage in the interview appropriately. He was, however, guarded, particularly regarding questions about his past psychiatric history. For example, when I asked him to sign a release so that I could get the records from the outpatient Arbour Counseling Center, he stated, 'there are no notes' in a stern fashion several times and initially did not agree to sign a release ... Officer Marcus stated that he had the records from Arbour Hospital and that he would send me a copy ... Sometime later, he sent me several pages from the Arbour medical records,

however, the records he sent contained very little clinical information. I then called him ... and I asked him to please return to my office to sign a release so that I could request the medical records directly. He promptly complied ...

... I administered the Montreal Cognitive Assessment (MOCA), his score was 27. The MOCA is a cognitive screening instrument and a score of 26 or above suggests no significant problems with cognitive functions such as orientation, memory, concentration, and abstract reasoning. In terms of insight, Officer Marcus does not believe he has mood disorder and that his main problem was irritability, due to effects of the Adderall. He stated that he believes he could manage his mood symptoms with exercise and would eventually like to be off medications.

... [i]t is my opinion, with a reasonable degree of medical certainty, that Officer Marcus has a recurrent mood disorder, very likely of a bipolar spectrum type. Evidence to support this includes:

- History of recurrent depressive episodes, for example, the medical records and Officer Marcus's account indicate he had a severe depressive episode in 2009. In addition, the outpatient psychiatric evaluations and progress notes document recurrent depressive episodes and symptoms. More recently, during the winter of 2014, Officer Marcus appears to have developed another severe depressive episode.
- Officer Marcus appears to have had at least one manic episode. The episode that led to the admission to Arbour Hospital in 2009 is consistent with the symptoms of a manic episode, sleeplessness, irritability, and paranoia. According to the Arbour Hospital discharge summary, what appears to have begun as a depressive episode resulted in a manic episode after treatment with Zoloft... **Switching from Depression to Mania is an expected risk of treatment with antidepressants in patients with an underlying bipolar vulnerability.**
- **Officer Marcus describes irritability as his primary symptom during the winter of 2014. This symptom was severe enough to interfere with his family and work obligations, indicating a clinically significant symptom. Irritability can be a hallmark symptom of Bipolar disorder.** ... Records are not available to establish the causal link between his symptoms of irritability and treatment with Adderall.
- **Officer Marcus has been prescribed Lamictal, a mood stabilizer used to treat Bipolar Depression on an ongoing basis ...**
- Dr. Van Wittenberghe documents Hypomanic/Manic symptoms in his mental status exam.

... Officer Marcus is not fit to resume his duties ... **Although at present Officer Marcus appears to be asymptomatic, free of depression, he seems to lack the**

insight into the nature and severity of his mental condition. He is therefore at risk for future relapses and lapses in judgment that go along with acute symptoms of his illness, such as the incidents that precipitated his administrative leave. It is conceivable that at some future date Officer Marcus may be able to resume his duties ... but he would have to have an appreciation of the nature and severity of his mental condition and a solid treatment tea and plan, e.g., stable on medications, full understanding of signs and symptoms, effective coping strategies to manage stress and a commitment to seek help when symptomatic. ...”

(Exhibit 20)

Dr. Hidalgo did not give much weight to the results of the written psychological tests of Mr. Marcus because the scores indicated that Mr. Marcus was trying to paint himself in a more favorable light than was accurate. *(Testimony of Dr. Hidalgo)*

82. At the Commission hearing, Dr. Hidalgo was asked whether Mr. Marcus’s illness constituted a Category A or Category B disorder under the HRD Initial-Hire Medical Standards Physician’s Guide (HRD Initial-Hire Standards) for law enforcement candidates.²⁸ The HRD Initial-Hire Standards provides the following about Category A and Category B Medical Conditions generally,

- (a) “A Category A Medical Condition is a medical condition that would preclude an individual from performing the essential job functions of a municipal police officer, or present a significant risk to the safety and health of that individual or others.
- (b) A Category B Medical Condition is a medical condition that, based on its severity or degree, mayor may not preclude an individual from performing the essential job functions of a municipal police officer, or present a significant risk to the safety and health of that individual or others.”

(Administrative Notice: HRD Initial-Hire Standards, p. 5 (2014))

²⁸ As the title of the Standards indicates, they apply to police candidates. There is no evidence that these Standards are to be applied to police employees.

83. Section (o), regarding psychiatric conditions, in the HRD Initial-Hire Standards, provides,

“1. Category A medical conditions include current or past diagnoses of:

- a. disorders of behavior,
- b. anxiety disorder,
- c. disorders of thought,
- d. disorders of mood
- e. disorders of personality.

2. Category B medical conditions shall include:

- a. a history of any psychiatric condition, behavior disorder, or substance abuse problem not covered in Category A. Such history shall be evaluated based on that individual’s history, current status, prognosis, and ability to respond to the stressors of the job,
- b. any other psychiatric condition that results in an individual not being able to safely and effectively perform the job of police officer.”

(Id.)

84. Dr. Hidalgo opined that if applying the HRD Medical Standards, Mr. Marcus has a type A condition, due to the severity of the diagnosis, his lack of insight into it, and the concern about what would happen at work on a relapse since his illness is recurrent. While Mr. Marcus may be stable now and it may be possible that within six (6) months to one year he will continue to be stable, there is enough evidence to show that Mr. Marcus’s mood disorder and depression are recurring illnesses requiring maintenance treatment and monitoring. In addition, prescriptions can have side effects that could affect his performance as a police officer. Dr. Marcus was concerned that Mr. Marcus wanted to stop treatment, treating it with exercise. *(Testimony of Dr. Hidalgo)*

85. On July 13, 2015, Dr. Beck sent a letter to Mr. Marcus commenting on Dr. Hidalgo’s report, stating, in part,

“1) I have reviewed Dr. Hidalgo’s report. While I do not agree with the conclusion I think it is an excellent report. As far as treatment for bipolar spectrum disorder, any good psychiatrist should be able to prescribe appropriate medicine. My own opinion is that, in the absence of clinically significant signs or symptoms, medication is not indicated. I would be interested in Dr. Hidalgo’s

opinion on this point, and specifically if he thinks medication is indicate: what medication and what is he treating.

2) On the subject of treatment ... most insurance will only pay a psychiatrist to prescribe medicine, and so you would need a separate referral to a psychologist or social worker for some kind of psychotherapy related to your situation.

3) I would be interested in Dr. Hidalgo's opinion about whether fitness for duty requires that you accept the diagnosis of bipolar spectrum disorder. Specifically I would ask whether, if you remain clinically well over some period of time, would Dt. (sic) Hidalgo consider that this fact alone is sufficient to approve you for a return to duty, and, if so, how long a period would he consider to be necessary. ..."

(Exhibit 22)

86. Dr. Beck opined that under the HRD Medical Standards, Mr. Marcus had a type B condition, that episodes of depression related to life stresses and a significant episode of irritability are not "predictive", that if Mr. Marcus relapses, he may be treated, recover and return to work. Further, he opined, at the Commission hearing, Mr. Marcus had not taken medication for two (2) months and Mr. Marcus appeared to be well. Dr. Beck suggested that it takes four (4) to six (6) months after ending medication to assess the results and that if there was no recurrence, the Respondent should retain Mr. Marcus.

(Testimony of Dr. Beck)

87. On July 15, 2015, the Respondent's Solicitor conducted the second day of the local hearing, at which Dr. Hidalgo's report and Dr. Beck's response letter were submitted and Mr. Marcus testified. *(Exhibit 24; Agreed Upon Findings of Fact)*

88. On July 17, 2015, Solicitor Watson Fisher submitted her Report of Hearing Officer (Hearing Officer Report) following the two (2)-day hearing and recommended that the Respondent terminate Mr. Marcus's employment. The Hearing Officer Report reviews the history of pertinent events since 2014 leading to a fitness evaluation of Mr.

Marcus and the CPD putting him on paid administrative leave. The Hearing Officer Report further states that on July 14, 2014, the CPD received a fitness report from Dr. Mullaly and that, [a]t this time, the CPD learned of a psychiatric hospitalization of Officer Marcus while employed as a Chelsea Police Officer.” (*Exhibit 24*)

89. The Hearing Officer Report addresses the reports the Respondent received from the psychologists and psychiatrists concerning Mr. Marcus’s fitness, treatment and medications, adding that the CPD “was not involved with the hiring or screening by Dr. Laemmle.” (*Id.*)

90. Further, the Hearing Officer Report indicates, “After months of discussions as to the situation with Officer Marcus, the IA Officer Lt. Conley issued his report on May 18, 2015. Lt. Conley found that there was sufficient evidence to support a finding that Officer Marcus could not perform the essential functions of a Chelsea Police Officer[]”, that Chief Kyes recommended termination of Mr. Marcus for non-disciplinary reasons, that Mr. Marcus submitted the assessments of Dr. Beck at the local hearing, that the parties requested a continuance of the hearing and an independent evaluation, and agreed to have Dr. Hidalgo perform the IME. (*Id.*)

91. The Hearing Officer Report also noted, in part, that,

“Officer Marcus submitted that he has at all times cooperated with the Chief’s orders and is currently in treatment and on ‘anti-psychotic’ medication. He further understood the city’s positions and believes in the future he could resume his duties and asks for compassion at this time. He asserts that the behaviors as described by the CPD are normal for someone undergoing stress in his home life and depressed. He further states he is no longer depressed. He offers as a resolution to be in a position such as the one he was performing which required him to be in the station and more administrative.”

(*Id.*)

92. The Hearing Officer Report concludes, in part,

“Unfortunately, it is clear that Officer Marcus is not fit for duty today or in the near future. Several medical provides including an independent evaluator and one hired by Officer Marcus have determined that he cannot today function as a police officer. ... Officer Marcus himself admits he is in treatment and on medication ...

It should be noted that the Chief and the Department have been extremely patience (sic) and compassionate in granting Officer Marcus time to undergo evaluations and a treatment plan so he could return to full duty. The treatment has been now over a year.

I recommend upholding the Chef’s decision and the termination of Officer Jason Marcus because he is currently unfit to perform the essential functions of a police officer for the City of Chelsea and that there is no expectation that he will be able to perform those functions in the near future.”

(Exhibit 24)

93. The Hearing Officer Report notes, in part, that,

“Dr. Hidalgo opined that with a reasonable degree of medical certainty that Officer Marcus has a ‘recurrent mood disorder, very likely of a bipolar spectrum type’ and that Officer Marcus ‘is not fit to resume the duties as a police officer due to his mental illness’. He further concluded that Officer Marcus appears to be free of depression backs insight into lapses in judgment and relapses that go along with his illness. Officer Marcus submitted Dr. Beck’s review of Dr. Hidalgo’s evaluation and while he disagreed with the conclusions he found it to be an excellent report.”

(Exhibit 24)

94. Mr. Marcus received notice of his termination on July 24, 2015. *(Stipulation)*

95. At or about this time, Mr. Marcus saw both a licensed therapist, Mr. or Ms. Smith in Winchester and Des Christina, a psychiatric nurse practitioner²⁹ for approximately two (2) months, until his insurance ended.³⁰ Ms. Christina prescribed Latuda and Prozac for Mr. Marcus, as Dr. Van Wittenberghe had recommended. *(Testimony of Mr. Marcus)*

²⁹ Public records indicate Ms. Christina’s licensure. *(Administrative Notice)*

³⁰ There are no documents in the record of treatment and/or diagnoses by these professionals, or indicating that the Respondent and the various evaluators here had any information in this regard.

96. On July 30, 2015, Mr. Marcus filed an appeal of the termination decision with the Commission. (*Administrative Notice*) He did not grieve the termination. (*Testimony of Mr. Marcus*)

97. At the time of the Commission hearing, Mr. Marcus was working as a contract consultant at an information technology company and had not seen a therapist or taken medication for approximately two and one-half months, although he had regained health insurance effective November 1, 2015. (*Testimony of Appellant*)

98. Some officers have been allowed to stay out on leave while they recover from injuries and return to work when they are able. (Testimony of Lt. Conley and Officer O'Connor) If injured officers are unable to return to work, they pursue disability retirement. Mr. Marcus did not have the requisite service to pursue a disability retirement claim. (*Testimony of Lt. Conley*)

Legal Standard

A person aggrieved by disciplinary action of an appointing authority made pursuant to G.L. c. 31, §41 may appeal to the Commission under G.L. c. 31, §43, which provides:

“If the 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 compensation 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, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.”

Under section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew.” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823

(2006) and cases cited. 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.” City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, *rev.den.*, 426 Mass. 1102 (1997). *See also* City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, *rev.den.*, 440 Mass. 1108 (2003); Police Dep’t of Boston v. Collins, 48 Mass.App.Ct. 411, *rev.den.*, 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm’n, 38 Mass.App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, *rev.den.*, 390 Mass. 1102 (1983).

An action is “justified” if 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.” Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971); City of Cambridge v. Civil Service 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, 160 N.E. 427 (1928).

The Appointing Authority's burden of proof by a preponderance of the evidence 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). *See also* 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 entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. *See, e.g.*, Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001). The Commission is guided by, but is not obliged to follow strictly, the rules of evidence applied in a

judicial proceeding, and may credit, in its sound discretion, reliable hearsay evidence that would be inadmissible in a court of law. *See Doe v. Sex Offender Registry Board*, 459 Mass. 603 (2011); *Costa v. Fall River Housing Auth.*, 453 Mass. 614, 627 (2009).

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 at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing).

G.L. c. 31, § 43 also vests the Commission with authority to affirm, vacate or modify the penalty imposed by an appointing authority. The Commission has been delegated with “considerable discretion,” albeit “not without bounds,” to modify a penalty imposed by the appointing authority, so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. *See, e.g., Police Comm’r v. Civil Service Comm’n*, 39 Mass.App.Ct. 594,600 (1996) and cases cited. *See Faria v. Third Bristol Div.*, 14 Mass.App.Ct. 985, 987 (1982)(no findings to support modification).

In deciding to exercise discretion to modify a penalty, the commission’s task “is not to be accomplished on a wholly blank slate.” *Town of Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823 (2006), quoting *Watertown v. Arria*, 16 Mass.App.Ct. 331, 334 (1983). Further,

“[a]fter making its de novo findings of fact, the commission must pass judgment on the penalty imposed, a role to which the statute speaks directly. G.L. c.31,§43. . . . Here, the

commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether “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.’ ”

Id. See also Town of Falmouth v. Civil Service Comm’n, 61 Mass.App.Ct. 796, 800 (2004) quoting Police Comm’r v. Civil Service Comm’n, 39 Mass.App.Ct. 594, 600 (1996). (“The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded to the appointing authority.”) Thus, when it comes to the review of the penalty, unless the Commission’s findings of fact differ materially and significantly from those of the appointing authority or interpret the relevant law in a substantially different way, the commission is not free to “substitute its judgment” for that of the appointing authority, and “cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation.” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited, *cf.* School Committee v. Civil Service Comm’n, 43 Mass.App.Ct. 486, *rev.den.*, 426 Mass. 1104 (1997) (modification of discharge to one-year suspension upheld); Dedham v. Civil Service Comm’n, 21 Mass.App.Ct. 904 (1985)(modification of discharge to 18-months suspension upheld); Trustees of the State Library v. Civil Service Comm’n, 3 Mass.App.Ct. 724 (1975)(modification of discharge to 4-month suspension upheld).

In conducting its inquiry, the Commission “finds the facts afresh”, and is not limited to the evidence that was before the appointing authority. Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012), citing Beverly v. Civil Serv. Comm’n, 78 Mass.App.Ct. 182, 187 (2010); Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-28 (2003); Tuohey v. Massachusetts Bay Transp. Auth., 19 MCSR 53 (2006); Borelli v. MBTA, 1 MCSR 6 (1988). The Commission provides due deference to the appointing authority’s exercise of judgement. Beverly at 188. Experts’ conclusions are not binding on the trier of fact, who may decline to adopt them in whole

or in part. *See, e.g.,* Police Dep't of Boston v. Kavaleski, 463 Mass. 680, 694-95 (2012); Turners Falls Ltd. Partnership v. Board of Assessors, 54 Mass.App.Ct. 732, 737-38, *rev. den.*, 437 Mass. 1109 (2002). As a corollary, when presented with conflicting expert evidence, the Commission may accept or reject all or parts of the opinions offered. *See, e.g.,* Ward v. Commonwealth, 407 Mass. 434, 438 (1990); New Boston Garden Corp. v. Board of Assessors, 383 Mass. 456, 467-73 (1981); Dewan v. Dewan, 30 Mass.App.Ct. 133, 135, *rev. den.*, 409 Mass. 1104 (1991). No specific degree of certitude is required and an expert opinion may be accepted if it is "reasonable" and expressed with sufficient firmness and clarity. *See, e.g.,* Commonwealth v. Rodriguez, 437 Mass. 554, 562-63 (2002); Bailey v. Cataldo Ambulance Service, Inc., 64 Mass.App.Ct. 228 (2005); Resendes v. Boston Edison Co., 38 Mass.App.Ct. 344, 352, *rev. den.*, 420 Mass. 1106 (1995). So long as the expert's opinion is sufficiently grounded in the evidence, but certain facts were unknown or mistakes were made in some of the expert's assumptions, that generally goes to the weight of the evidence. Commonwealth v. DelValle, 443 Mass. 782, 792 (2005); Sullivan v. First Mass. Fin. Corp., 409 Mass. 783, 79-92 (1991).

An appointing authority, such as a Police Department, may require an employee to undergo a fitness for duty evaluation. The Supreme Judicial Court has found that a Police Commissioner has a public duty to oversee the performance of police officers. Nolan v. Police Commissioner of Boston, 383 Mass. 625, 630 (1981); *see also* City of Boston v. Boston Police Patrolmen's Association, Inc. 8 Mass.App.Ct. 220 (1979). The Commission has upheld the authority of Police Departments to evaluate police officers and terminate their employment based on the evaluations under appropriate circumstances. *See, e.g.,* Dalrymple v. Town of Winthrop, D-08-13; Melchionno v. Somerville Police Department, D-03-195; Perry v. Town of Plymouth, D-4498 (1993); Freeman v. City of Cambridge, D-4717 (1993). There is no question that police

officers are held to a higher standard than others. McIsaac v. Town of Pembroke, D-4354 (1992). G.L. c. 31, § 61A establishes fitness standards for police officers appointed after November 1, 1996.

Analysis

The Respondent has established by a preponderance of the evidence that it had just cause to terminate Mr. Marcus after it was determined that Mr. Marcus was not fit for duty as a police officer based on all (including the IME chosen by both parties) but one of the evaluations of Mr. Marcus. Beginning in July 2014, after receiving multiple reports of concerning behavior, the CPD engaged Mr. Marcus by seeking his evaluation and treatment. In this process, the CPD learned that Mr. Marcus had been admitted to a psychiatric hospital five (5) years earlier and had been treated on an outpatient basis with therapy and medications for most of the intervening five (5) years or so. The CPD did not terminate Mr. Marcus' employment until one (1) year after it became concerned about Mr. Marcus in July 2014, and then only after it received a number of psychological reports and evaluations, including an IME agreed to by the parties at the first day of the local hearing, a supplemental response thereafter by Dr. Beck, Mr. Marcus' expert witness, and months of additional therapy and medication.

Mr. Marcus had ended therapy in February 2014, stating that he was being transferred to another therapist, although he continued taking the prescribed medication. The CPD began to notice signs of Mr. Marcus's illness in or about the winter of 2013 and spring of 2014. This included working on a detail in the rain without a cruiser and rain gear, walking home from Chelsea to Malden in bitter cold weather wearing only a light jacket, having odd conversations with his superiors, and sending an email message that was incoherent. The CPD placed Mr. Marcus on administrative leave and its initial efforts were to find out what was going on with

Mr. Marcus and to see if treatment would be appropriate and effective, enabling him to return to work. Over the following months, the CPD engaged a series of psychologists and psychiatrists (one of whom was an IME on whom the parties agreed) and Mr. Marcus engaged his own professionals, to treat and evaluate Mr. Marcus. The various professionals' reports vary in some aspects; not all of them reviewed the information obtained by Dr. Hidalgo, including talking to someone at the CPD to find out more about the reported events. Although their reports vary in some aspects, the consensus was that Mr. Marcus was not fit at that time.

Since the only evaluators of Mr. Marcus who testified at the Commission were Dr. Hidalgo, the IME, and Dr. Beck, I did not have the opportunity to assess the credibility of the other professionals who evaluated Mr. Marcus, determine the depth of their experience performing such evaluations, or whether they have found officers to be unfit more often than not, and I give them less weight than is given to the reports of Dr. Hidalgo and Dr. Beck. However, as stated above, I note that the multiple reports of the professionals who did not testify at the Commission, found that Mr. Marcus was unfit.³¹ In addition, I find that Dr. Hidalgo's report was the most thorough evaluation conducted, having relied upon information from more sources than the other evaluators.

There is no doubt that Dr. Beck has several decades of highly valuable professional experience with many laudatory medical and teaching appointments. It is also clear that Dr. Beck has been most active in litigation on behalf of appellants. Dr. Hidalgo, whom, at one point was supervised by Dr. Beck, has only a couple of decades of experience but his credentials are also impressive. Of the law enforcement psychological evaluations he has performed, he has found approximately fifty percent of the individuals unfit. The point of departure between Dr.

³¹ While Dr. Van Wittenberghé's comments appear to be rather strident and some of his assumptions (e.g. that Mr. Marcus had been admitted to a psychiatric hospital in 2009 for a month, instead of a week, and that he had been admitted on a second occasion long ago), his prescription recommendations were followed by subsequent providers.

Hidalgo, who found that Mr. Marcus had bipolar (spectrum) disorder and that he suffers from depression, and Dr. Beck, who found that Mr. Marcus had suffered some episodes, was that Dr. Hidalgo found that Mr. Marcus's illness was recurrent whereas Dr. Beck found that that the episodes had passed and there was no sign of current illness, that prior episodes are not predictive. Indeed, Dr. Beck suggests that the CPD wait four (4) to six (6) months to see how Mr. Marcus fairs while not taking medication to see if he has any further problems. However, the events giving the CPD concern in July 2014 were not isolated events. To the contrary, they follow years of treatment and medication of Mr. Marcus, following a previous psychiatric hospitalization, of which the CPD was previously unaware.

In view of the repeated occurrences of depression and the diagnosis of bipolar disorder repeated in a number of the reports considered by the CPD, as well as the one (1) year between the CPD's pursuit of treatment and evaluation of Mr. Marcus and its decision to terminate Mr. Marcus's employment, the Respondent has provided ample time and repeated opportunities for Mr. Marcus to demonstrate his fitness. The Appellant showed some improvement during treatment. However, for all the detailed analyses of Mr. Marcus's fitness for duty, no one can predict with any certainty how long it will be until Mr. Marcus's next episodes, which involved a variety of stressors. Police officers must be able to respond to stressors in a split-second, deciding when and how to use force, including a gun, when their decisions can sometimes be the difference between life and death. Police officers must also communicate promptly and effectively to superiors, the public, write reports and testify in court. For these reasons, it is within the Respondent's discretion and exercise of good judgement to determine that retaining Mr. Marcus as a police officer is not a risk it chooses, or can afford to take, in the interest of public safety and the safety of other officers. The Respondent need not wait for event to occur

on the job as a result of the diagnosis before taking action when, as here, it took many steps before then to treat and evaluate the officer. The testimony of Capt. Dunn and Lt. Conley at the Commission hearing supported the Respondent's determinations. Both members of the CPD testified responsively, consistently, and in a straightforward matter. They did not hesitate to state if they could not recall certain details of events, a number of which occurred a year or more prior to the Commission hearing.

This decision should not be deemed disciplinary. To the contrary, Mr. Marcus was a well-liked officer within the CPD, he had no record of discipline and there were no civilian complaints filed against him. In addition, he received several civilian letters of support for his performance previously. In addition, he complied with the CPD's requirements for him to be tested, evaluated and treated. However, as noted, Mr. Marcus has been diagnosed with recurrent depression and bipolar (spectrum) disorder. Someone with these diagnoses cannot perform the essential functions of a police officer, who must often make immediate decisions that may be the difference between life and death, unlike civilian professions. In addition, Mr. Marcus lacks insight into his diagnoses, which inhibits his ability to control the illness and to know when to seek help.

Mr. Marcus's lack of insight was reflected in his attempts to explain away the various matters of concern noted by the CPD and that led to his placement on administrative leave. With regard to each such event, Mr. Marcus denied that there was anything wrong in the behavior or that his actions were not as reported by others. For example, with regard to the day that he was found walking home in bitter cold wearing only a light jacket, Mr. Marcus said he was he was exercising and, in fact, he would later prepare to run a half-marathon. With regard to his irritability and depression, he said it was in response to various life stressors, such his father-in-

law's cancer diagnosis and/or a medication prescribed for him. While such events, no doubt, weigh heavily on anyone experiencing them, they were reflected in his own diagnoses. In addition, he denied telling his superior his diagnoses, asserting instead that he only told the superior officer the names of the medications he was taking, which I find unlikely since the superior would not likely know what the medications were for. Therefore, the Respondent has established by a preponderance of the evidence that Mr. Marcus is unfit to perform the essential functions of a police officer. I find no bias or other inappropriate motive in the Respondent's determination warranting a different result.

Conclusion

For the reasons stated above, the termination appeal of the Appellant, Jason Marcus, docketed D1-15-157, is hereby *dismissed*.

Civil Service Commission

/s/ Cynthia A. Ittleman
Cynthia A. Ittleman
Commissioner

By vote of the Civil Service Commission (Camuso, Ittleman, Stein, and Tivnan, Commissioners)(Bowman, Chairman - Absent) on May 12, 2016.

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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d)

Notice to:
Alan Shapiro, Esq. and Thomas Horgan, Esq. (Appellant)
Amy Lindquist, Esq. (Appointing Authority)
John Marra, Esq. (HRD)