

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

\*\*\*\*\*

In the Matter of the Arbitration Between: \*  
\*  
CITY OF LOWELL \*  
\*  
and \*  
\*  
LOWELL POLICE ASSOCIATION \*  
\*  
\*\*\*\*\*

Case No. ARB-18-6517

Arbitrator:

Jennifer Maldonado-Ong, Esq.

Appearances:

Adam LaGrassa, Esq. - Representing the City of Lowell  
Hannah Pappenheim, Esq.

Jordan Burke, Esq. - Representing the Lowell Police  
Association

The parties received a full opportunity to present testimony, exhibits and arguments, and to examine and cross-examine witnesses at a hearing. I have considered the issues and, having studied and weighed the evidence presented, conclude as follows:

**AWARD**

The City did not violate Section 1 of Article 9 of the parties' collective bargaining agreement when it removed Officer Thomas Tetreault, Jr. from M.G.L. c. 41, Section 111F and Section 100 status and maintained the removal of that status until his reinstatement to Section 111F status on or about May 17, 2018. Accordingly, the grievance is denied.

  
Jennifer Maldonado-Ong, Esq.  
Arbitrator  
August 23, 2018

**INTRODUCTION**

The Lowell Police Association (Association), seeking to resolve a dispute with the City of Lowell (Employer or City), filed a Petition to Initiate Grievance Arbitration on February 16, 2018 with the Department of Labor Relations (DLR), which docketed the matter as ARB-18-6517.

Under the provisions of M.G.L. Chapter 23, Section 9P, the DLR appointed Jennifer Maldonado-Ong, Esq. to act as a single neutral arbitrator with the full power of the DLR. The undersigned Arbitrator conducted a hearing at the DLR's Boston office on May 2, 2018, at which time both parties had the opportunity to present testimony, exhibits and arguments, and to examine and cross-examine witnesses. On May 30, 2018, the parties filed post-hearing briefs containing new relevant facts. In their respective post-hearing submissions, the Association and the City jointly agreed that a new Public Employee Retirement Administration Commission (PERAC) medical panel unanimously determined that Officer Thomas Tetreault, Jr. was permanently incapacitated from performing police officer duties and that the City reinstated him to Section 100 and Section 111F status on or about May 17, 2018.

On July 30, 2018, I sent the parties an email seeking clarification on the post-arbitration hearing developments referenced in their post-hearing briefs.

Specifically, I asked the following pertinent questions:

1. ...
  - a. Did the City actually reinstate Tetreault to Section 111F status going back to December 2017? Has he remained on Section 111F status since?
  - b. If the City did reinstate Tetreault to Section 111F status going back to December 2017, has the City also issued "back pay and lost accruals" going back to December 2017? If not, why not?

- ...
- d. What, if any, retroactive payment has the City issued Tetreault to date?
- e. If the City has not paid Tetreault "back pay and lost accruals," what is the total amount of "back pay and accruals" outstanding to date?

- ...
4. Does the City plan to reimburse/reinstate Tetreault with back pay and accruals owed? If so, when does the City plan to do so? If not, why not?
- ...

The Association and the City submitted separate responses to each of the questions on August 13, 2018. After careful review of the record evidence and in consideration of the parties' arguments, I make the following findings of fact and render the following opinion.

### **THE ISSUE**

At the arbitration hearing, the parties agreed on the following issue:

Did the City of Lowell violate Section 1 of Article 9 of the parties' collective bargaining agreement by removing Officer Thomas Tetreault, Jr. from M.G.L. c. 41, Section 111F and Section 100 status and maintaining the removal of that status? If so, what shall be the remedy?<sup>1</sup>

However, as noted above, the Association and the City jointly agreed on and submitted additional relevant facts in their post-hearing submissions. In addition, they agreed that the remaining issues to be decided is:

---

<sup>1</sup> In their respective May 30, 2018 post-hearing submissions, the Association and the City jointly agreed that a new PERAC medical panel unanimously determined that Tetreault was permanently incapacitated from performing police officer duties and that the City reinstated him to Section 100 and Section 111F status on or about May 17, 2018. Consequently, the Association and the City also agreed that the remaining issue to be resolved by this decision is whether Tetreault is entitled to the reimbursement of back pay and lost accruals between December 19, 2017 and the date of restoration.

Did the City violate Section 1 of Article 9 of the parties' collective bargaining agreement when it removed Officer Thomas Tetreault, Jr. from M.G.L. c. 41, Section 111F and Section 100 status and maintained the removal of that status until his reinstatement to Section 111F status on or about May 17, 2018,? If so, what shall be the remedy?

### **RELEVANT CONTRACT LANGUAGE**

The parties' Collective Bargaining Agreement (contract) contains the following provision:

**ARTICLE IX, Section 1.** An employee incapacitated from regular duty because of injury sustained in the performance of his/her duty, through no fault of his/her own, shall be granted leave without loss of pay, including base compensation and all direct and indirect economic fringe benefits, for the period of such incapacity pursuant to the practice of the City of Lowell for public safety employees, as interpreted and applied in the past by the Employer regarding members of the bargaining unit in this agreement and in accordance with the provisions of Mass. General Laws, Chapter 41, Section 111F.

### **RELEVANT STATUTORY PROVISIONS**

#### **M.G.L. c. 41, § 111F**

Whenever a police officer or fire fighter of a city, town, or fire or water district is incapacitated for duty because of injury sustained in the performance of his duty without fault of his own, or a police officer or fire fighter assigned to special duty by his superior officer, whether or not he is paid for such special duty by the city or town, is so incapacitated because of injuries so sustained, he shall be granted leave without loss of pay for the period of such incapacity; provided, that no such leave shall be granted for any period after such police officer or fire fighter has been retired or pensioned in accordance with law or for any period after a physician designated by the board or officer authorized to appoint police officers or fire fighters in such city, town or district determines that such incapacity no longer exists. All amounts payable under this section shall be paid at the same times and in the same manner as, and for all purposes, shall be deemed to be, the regular compensation of such police officer or fire fighter.

#### **M.G.L. c. 41, § 100**

Under application by a fire fighter or police officer of a city, town or fire or water district, or in the event of the physical or mental incapacity or death of such fire

fighter or police officer, by someone in his behalf, the board or officer of such city, town or district authorized to appoint fire fighters or police officers, as the case may be, shall determine whether it is appropriate under all the circumstances for such city, town or district to indemnify such fire fighter or police officer for his reasonable hospital, medical, surgical, chiropractic, nursing, pharmaceutical, prosthetic and related expenses and reasonable charges for chiropody (podiatry) incurred as the natural and proximate result of an accident occurring or of undergoing a hazard peculiar to his employment, while acting in the performance and within the scope of his duty without fault of his own.

## FACTS

### Grievance History

On December 19, 2017, the City removed Officer Thomas Tetreault, Jr. (Tetreault) from M.G.L. c. 41, Section 100 and Section 111F (Section 111F or injury leave) status.<sup>2</sup> On December 22, 2017, the Association filed the instant grievance against the City on behalf of Tetreault on grounds that the City's decision to remove him from Section 111F status on the basis of a medical panel report that conflicted with reports made by the City's physician and Tetreault's own treating physician violated the parties' collective bargaining agreement and Section 111F.

### Background

Tetreault was employed by the City as a police patrol officer in its Police Department from February 18, 2000 until his retirement on June 23, 2018. Prior to the events of December 1, 2015, Tetreault had sustained three previous job-

---

<sup>2</sup> The parties explained at the arbitration hearing, and the City reiterated in its post-hearing brief, that M.G.L. c. 41, Section 100 requires the City to indemnify police and firefighter employees who become injured in the performance of their jobs duties for reasonable medical expenses, and that this provision therefore works in tandem with M.G.L. c. 41, Section 111F, which pertains to injury leave status. Therefore, throughout the rest of this decision, I will refer to both statutory provisions collectively as either "Section 111F" or "injury leave," and any reference to Section 111F correspondingly refers to Section 100.

related injuries to his neck, shoulder and back on December 3, 2005, in January 2006, and on October 12, 2011.

December 1, 2015 Incident

On December 1, 2015 and while on-duty, Tetreault sustained another injury while attempting to restrain a psychiatric patient who had become combative. During the incident, the patient landed atop Tetreault, which caused him to fall to the ground. Tetreault instantaneously developed pain across his neck, which proceeded to radiate down his right arm. Once Tetreault had completed the necessary tasks associated with the incident, he promptly sought medical care in the emergency department at Lowell General Hospital (Hospital).

While at the Hospital, Tetreault began to complain of sharp back pain in conjunction with the continuous neck and arm pain he had experienced immediately upon becoming injured. Hospital staff ultimately diagnosed Tetreault with cervical disc disorder with radiculopathy and strain of the neck muscle. As a result, Tetreault was prescribed medication and Hospital staff directed him to remain out of work while he pursued further medical treatment.

Medical Treatments and Evaluations, December 2015-December 2017

On or around December 15, 2015, the City approved Tetreault's request to receive benefits pursuant to Section 111F, retroactive to December 1, 2015. At least three medical providers have either examined or treated Tetreault following the December 1, 2015 incident, including the City's designated physician, Dr. Sarah E. Gilbert (Dr. Gilbert). As the City's designated physician, Dr. Gilbert typically renders determinations as to whether injured City employees, including

police officers, are physically able to perform their job duties, but she does not offer independent medical diagnoses. On or around December 14, 2015, Dr. Gilbert examined Tetreault and concurred with an opinion rendered by his treating physician, Dr. Lawrence Johnson (Dr. Johnson), that he should remain out of work and continue to receive follow up care.

Tetreault's ensuing medical treatments have encompassed a significant, lengthy regimen consisting of physical therapy, two surgical procedures and related post-operative treatment. In the meantime, Tetreault was also diagnosed with nerve-related damage, including lumbar disc herniation with radiculopathy. Throughout the course of treatment, Tetreault continued to suffer from neck spasms, pain and numbness in his left leg, and endured a variety of other related symptoms in varying degrees.

#### 2016 Medical Procedures and Evaluations

On March 24, 2016, Tetreault submitted to a Cervical Spine Fusion, which was performed by his new treating physician, neurosurgeon Dr. Eric Carkner (Dr. Carkner).<sup>3</sup> On October 20, 2016, Tetreault underwent another surgical procedure known as a two-level Lumbar Spine Microdiscectomy and fusion, which Dr. Carkner also performed. In addition, Dr. Carkner performed a nerve root block

---

<sup>3</sup> The parties' Joint Exhibit 4 includes the City's Fair Summary of Facts, which is a portion of the Application for Involuntary Retirement that it filed on behalf of Tetreault. The Fair Summary of Facts indicates that Dr. Gilbert had recommended that Tetreault obtain a second opinion with a spine specialist, that the City proceeded to schedule an appointment for Tetreault to be seen by Dr. Carkner, and that the appointment took place on January 27, 2016.

procedure on Tetreault. Despite these and other extensive treatments, Tetreault's physical symptoms persisted.

After examining Tetreault on December 22, 2016, Dr. Gilbert noted in her records that she "discussed the possibility of never being able to heal well enough to resume the full duties of a police officer with him."

#### The City's 2017 Medical Evaluation

On February 23, 2017, Dr. Gilbert re-examined Tetreault for what would be the final time. During Tetreault's February 23 visit, Dr. Gilbert opined that, due to multiple work related spinal injuries, two spinal surgeries to date, numerous hours of physical therapy, the need for a future third surgery, and other ongoing symptoms, Tetreault would no longer be physically able to perform his duties as a Lowell Police Officer.

Dr. Gilbert told Tetreault that he would be a liability to his fellow officers and members of the public, due to the extent of the injuries he sustained. Dr. Gilbert also told Tetreault that she no longer needed to examine him and urged him to continue receiving care with his treating physician, Dr. Carkner, because he had not yet achieved maximum medical improvement. Finally, Dr. Gilbert informed Tetreault that he could expect to hear from the Lowell Retirement Board (Board) regarding its retirement procedure.

Following the examination of Tetreault, Dr. Gilbert noted in her records, that, due to persistent radiculopathy in his right leg, it was unlikely that Tetreault would develop enough mobility strength and resolution of his sensory symptoms to allow



him to return to full duty. Dr. Gilbert's written impressions continued in relevant part with the following:

[Tetreault] has definitely made improvement in recovering from both his cervical and lumbar surgeries, but with persistent radiculopathy in his left leg he will not be able to run, climb, lift, or carry according to the requirements of full duty for a Lowell Police Officer. He is one year status post cervical spine surgery, and four months post lumbar spine surgery, but it is concerning that he developed the left radiculopathy post operatively...I had a lengthy discussion with him that...it is very unlikely that he will develop enough mobility strength and resolution of his sensory symptoms to allow him to return to full duty. As such, I will recommend that we request the filing of an Accidental Disability Retirement.

The City's Involuntary Accidental Disability Retirement Application

On April 14, 2017, Superintendent William Taylor (Superintendent Taylor) of the Lowell Police Department filed an Involuntary Accidental Disability Retirement Application with the Lowell Retirement Board (Board) on behalf of Tetreault. On May 25, 2017, the Board unanimously voted to approve the retirement application. As a result, the Board advanced the retirement application to the Public Employee Retirement Administration Commission (PERAC), the next step in the process, which required of a review of the retirement application by an independent medical panel.

Accordingly, on November 29, 2017, three physicians constituting the PERAC medical panel conducted a joint examination of Tetreault and reviewed the retirement application filed on his behalf to determine whether he was permanently incapable of performing the essential duties of a police officer due to a work related injury. The PERAC medical panel's examination only lasted

approximately four minutes, and that the medical panel did not ask him about his symptoms.

The City's Removal of Tetreault from Section 111F Status

By hand-delivered letter dated December 19, 2017, the City notified Tetreault that the PERAC medical panel had determined that he was not "incapacitated from performing [his] police duties as the result of work related injury," and that he was no longer entitled to receive benefits under Section 111F.<sup>4</sup> The December 19 letter further stated that, due to the PERAC medical panel's findings, the City had removed Tetreault from Section 111F status effective immediately.<sup>5</sup>

Also on or about December 19, 2017, Tetreault received a letter from the Board. In that letter, the Board indicated that it had scheduled a meeting for January 31, 2018 to review the findings of the PERAC medical panel concerning the involuntary accidental disability retirement application submitted by the City on behalf of Tetreault.

---

<sup>4</sup> The City had also included the parties' Joint Exhibit 6, titled "PERAC Panel Examiners' Certification of Medical Panel Findings," as an attachment to its December 19 letter to Tetreault. According to this document, the PERAC medical panel had rendered a unanimous opinion with respect to Tetreault, indicating that the "panel reviewed the member's job description and medical records prior to the examination," and that "in regards to whether the member is mentally or physically incapable of performing the essential duties of their job as described in the current job description, my opinion is no."

<sup>5</sup> By email dated December 22, 2017 to the Association's legal counsel, Superintendent Taylor acknowledged receipt of the Association's grievance filed on behalf of Tetreault and indicated that Tetreault had neither shown up for duty that morning nor called in sick.

On January 10, 2018, Tetreault visited Dr. Carkner. Upon learning of the PERAC medical panel's findings, Dr. Carkner indicated to Tetreault that he disagreed with the report and issued Tetreault a note authorizing him to remain out of work until a Functional Capacity Evaluation could be performed. The Functional Capacity Evaluation, Dr. Carkner explained, would determine whether Tetreault was physically capable of returning to full and active duty. In addition to the Functional Capacity Evaluation, Dr. Carkner also ordered an MRI [Magnetic Resonance Imaging] of Tetreault's lumbar spine and submitted to the City his requests for authorization to proceed with those examinations. However, the City of Lowell did not respond to Dr. Carkner's requests.

January 31 Board Meeting and Review of PERAC Medical Panel Findings

On January 31, 2018, the Board unanimously voted to request a new medical panel from PERAC due to the Board's concerns that numerous inaccuracies existed regarding the examinations of Tetreault that took place. During the January 31 meeting, Tetreault testified that the PERAC medical panel's examination only lasted approximately four minutes and that the medical panel did not ask him about his symptoms.<sup>6</sup>

By letter dated February 2, 2018 to PERAC, the Board's legal counsel sent a formal request that Tetreault be examined by a new independent medical panel. In his letter, the Board's legal counsel cited the following concerns as grounds for its request:

---

<sup>6</sup> The medical panel indicated in its "PERAC Panel Examiners' Certification of Medical Panel Findings," contained in the parties' Joint Exhibit 6, that the exam began at 3:45 pm and was completed at 4:05 pm.

In reviewing the Panel's Certificate and narrative report, and taking Officer Tetreault's testimony, the Board has grave concerns regarding the Panel's deficient examination. While the Board is aware from time to time that a medical panel opinion will be completely at odds with the medical evidence in the case...In this case, all the diagnostic studies demonstrate that an acute injury occurred...and while he [Tetreault] has made some marginal improvement, he certainly has not made the "significant" improvement as the Panel stated in its narrative, nor is this statement contained in the City Physician Dr. Gilbert's report as the Panel referenced...The Board does not believe that clarification would be productive in this case.

On February 18, 2018, and while a new PERAC medical panel for Tetreault's retirement application was pending, the City removed him from its payroll because he had exhausted his available sick and vacation time. By March 22, 2018, Tetreault was no longer covered by health and dental insurance, which resulted in his inability to access medications or pursue further medical treatment on his own.

April 2018 Communications between the Association and the City

By email dated April 3, 2018 to Karen Gagnon (Gagnon), the City's Claims Agent & Investigator, Tetreault requested an appointment to be examined by Dr. Gilbert as soon as possible, and indicated that he had not been aware that he had to request seeing the City's physician, as he had presumed that the City would have already arranged an appointment to see her once the City had received the PERAC medical panel's findings in December 2017.

Also by email dated April 3, 2018 to the City's legal counsel, the Association's legal counsel stated that the Association is renewing its "request that Officer Tetreault be seen by Dr. Gilbert in order to determine his current work

capacity pursuant to 111[F]. This is the most fair and efficient means by which to address the issue.”

By email dated April 6, 2018 to the Association’s legal counsel, the City’s legal counsel responded with the following pertinent information:

Dr. Gilbert’s prior exam of Mr. Tetreault was reviewed by the City and prompted the current ADR [alternative dispute resolution] application. Her medical opinion was not adopted and was overruled by the original medical panel.

The City has no objection to the convening of a new medical panel. However, we do not see how another examination by Dr. Gilbert would in any way advance a resolution to this issue. If Dr. Gilbert were to again give an opinion disabling Mr. Tetreault, the City would be left with two contrary findings for which we would then need to secure an independent medical exam.

In an emailed response a short time later, the Association’s legal counsel wrote in pertinent part: “Again, Officer Tetreault is without pay, health insurance, medications, or the ability to see a doctor. And it’s not just Dr. Gilbert that opined he was incapacitated. Dr. Carkner had the same medical finding. Why the City refuses to allow him to see either doctor is still unclear. The ADR process is not designed to address 111[F] eligibility, yet the City is using them interchangeably. Again, we request that he be placed back on 111[F] status, or be allowed to see one of the prior doctors whose opinions formed the basis of his 111[F] eligibility.”

On March 28, 2018, PERAC allowed the Board’s February 18 request and agreed to convene a new medical panel to examine Tetreault. Consequently, Tetreault attended three separate medical panel examinations on April 18, 2018, April 21, 2018 and April 25, 2018.

Post-Hearing Developments and Tetreault's Reinstatement of Section 111F Status

On May 10, 2018, the new medical panel issued three separate reports. In each report, the reviewing physician concluded that Tetreault is permanently incapacitated, that the incapacity is causally related to his workplace injury and that he is unable to perform the duties of a police officer.

On or around May 16, 2018, the Board approved Tetreault's involuntary accidental disability retirement application and voted to send the new medical panel findings to PERAC for final application approval.<sup>7</sup> By email dated May 17, 2018, Gagnon notified Tetreault that the City had reinstated his Section 111F status "retroactive to the date of his removal from 111F status (12/19/2017)." Gagnon's email, which was also addressed to other City employees, further stated: "Please adjust his time accordingly." As a result of the City's reinstatement of Tetreault's Section 111F status, Tetreault began to receive regular wages again.

To date, the City has not issued Tetreault back pay and lost accruals for the period between December 19, 2017 and May 17, 2018.<sup>8</sup> Efforts to resolve the

---

<sup>7</sup> The Association and the City jointly agreed that the Board approved Tetreault's involuntary accidental disability and voted to send the new medical panel findings to PERAC for final application approval on or around May 16, 2018. The Association and the City also jointly agreed that, on or about May 17, 2018, the City reinstated Tetreault's Section 111F status retroactive to December 19, 2017. Consequently, the parties incorporated those facts into their respective post-hearing briefs.

<sup>8</sup> Although the Association and the City filed separate responses to the July 30 request for additional information and disagree about whether Tetreault is entitled to back pay and lost accruals, the parties concurred that the following amounts are at issue: \$15,584.58 in back pay and lost accruals of 118.22 hours sick leave; 106.99 hours vacation leave; 59.74 hours personal leave.

dispute ceased when the parties submitted post-hearing briefs on May 30, 2018. As of June 23, 2018, PERAC approved Tetreault's accidental disability retirement application and his retirement became effective on that date. Tetreault had received Section 111F benefits from May 17, 2018 until his retirement on June 23, 2018. Now, Tetreault receives compensation from the City pursuant to M.G.L. c. 32, Section 7(2).

### **ARGUMENTS**

#### **THE ASSOCIATION**

The Association argues that the City violated the provisions of the contract by wrongfully removing Tetreault from Section 111F status as a result of a PERAC medical panel examination of Tetreault. The Association argues that the ensuing PERAC medical report on which the City relies in support of its decision requiring Tetreault to return to full and active police duty has since been repudiated and rejected and is now defunct by the Board, which is evidenced by the fact that the Board granted Tetreault a new medical panel after it discovered inconsistencies and deficiencies in the original PERAC medical panel's findings. As the Association views it, the PERAC medical panel report is solely intended to address the involuntary accidental disability retirement application that the City submitted on behalf of Tetreault, and is inadequate to appropriately ascertain a police officer's true Section 111F status.

The Association also asserts that the City had wrongfully asked Tetreault to return to work in December 2017 because it knew at the time that the City's own physician had concluded that Tetreault was permanently incapacitated and that

ample evidence existed to support that conclusion. The Association further contends that it was standard practice for police officers to be seen and cleared by the City's designated physician before returning to full active duty, and that the City deviated from that longstanding practice by inexplicably refusing to allow Tetreault to be seen by Dr. Gilbert once the original PERAC medical panel issued its findings.

For the foregoing reasons, the Association requests that I sustain the grievance and order the City to grant Tetreault all back pay and lost accruals from the time he was removed from Section 111F status, December 19, 2017, until his reinstatement to 111F status in May 2018.

#### **THE CITY**

The City argues that it complied with Section 1 of Article 9 of the contract when it removed Tetreault from Section 111F status based on the unanimous opinion of the original PERAC medical panel that Tetreault was fully capable of performing police officer duties without limitation, and that it remained compliant with the contract when it maintained that status until receiving the new PERAC medical panel's findings in May 2018. In support of its contention, the City points out that Article 9 does not specifically elaborate on how to comply with this provision or with Section 111F, and therefore the City's reliance on the PERAC medical panel opinion was not improper. Rather, Article 9 merely requires compliance with Section 111F, which provides that a police officer's status under Section 111F may be terminated upon retirement, or alternatively, if the City determines that the officer's incapacity no longer exists. The City determined that



Tetreault's incapacity no longer existed in December 2017. Therefore, the City argues, the removal of Tetreault's Section 111F status was permissible under the contract and law.

The City does not dispute that Tetreault was injured in the course of performing his duties, or that the City's designated physician, Dr. Gilbert, recommended that the City apply for involuntary accidental retirement on behalf of Tetreault. However, the Employer disputes the Association's claim that the City physician specifically determined at any time that Tetreault was "permanently disabled."

Because the City's physician made no clear finding that Tetreault was permanently disabled, there was no basis for the City to continue to regard Tetreault as incapacitated when the three separate physicians that comprised the original PERAC medical panel determined that he was fully capable of performing his duties. The City further states that it cannot ignore the most recent opinion of the original PERAC medical panel in favor of other reports that, at the time, were at least eleven month old. Once it did receive the original PERAC medical panel report, the City claims that it was required to remove Tetreault from Section 111F status because there was no recent medical diagnosis to support the continuation of Tetreault's benefits under Section 111F.

Lastly, the City posits that, by advancing the grievance to arbitration, the Association has challenged the way in which the City has interpreted and applied the provisions of Section 111F. This, the City argues, would necessarily require a statutory interpretation which makes court action, not arbitration, the more

appropriate remedy, because the interpretation of a statute is not a permissible topic for grievance arbitration.

For all the foregoing reasons, the City requests that I find that it complied with Section 1 of Article 9 of the contract at all times and deny the grievance.

### OPINION

As the City and the Association noted in their respective post-hearing briefs after the May 2, 2018 hearing, the City reinstated Tetreault to Section 111F status on or around May 17, 2018. Thus, the issue that I must now decide is whether the City violated Section 1 of Article 9 of the parties' collective bargaining agreement when it removed Tetreault from M.G.L. c. 41, Section 111F and Section 100 status and maintained the removal of that status until his reinstatement to Section 111F status on or about May 17, 2018, and, if so, what the remedy will be.

Notably, the collective bargaining agreement does not provide a definitive timeframe, nor does it enumerate any criteria or describe a procedure by which the City may evaluate whether a police officer should be removed from Section 111F status and ordered to return to duty. Section 1 of Article 9, however, provides the following:

An employee incapacitated from regular duty because of injury sustained...shall be granted leave without loss of pay, including base compensation and all direct and indirect economic fringe benefits, for the period of such incapacity...***as interpreted and applied in the past by the Employer regarding members of the bargaining unit in this agreement*** and in accordance with the provisions of Mass. General Laws, Chapter 41, Section 111F. (Emphasis added).

Thus, a plain reading of the language indicates that the parties have expressly acknowledged that the City has previously interpreted and applied

Article 9 in conjunction with the terms of Section 111F and that, by virtue of that provision, the parties had also agreed to be contractually bound by the City's past interpretation and application of the statute.

For a past practice to be binding on both parties, however, it must be (1) unequivocal, (2) clearly enunciated and acted upon, and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.

I am not persuaded by the Association's argument that a past practice exists that dictates the manner in which the City determines whether injured police officers should remain in Section 111F status or be removed from that status and directed to return to work. The Association did not present sufficient evidence to establish that, prior to December 2017, the City regularly and unequivocally permitted officers who were deemed to no longer be incapacitated additional opportunities to be seen and medically cleared by the City's physician before the City could require them to return to full active duty.

The City's Reliance on the Original PERAC Medical Panel Report in its Decision to Remove Tetreault from Section 111F Status was not Improper under the Contract or Statute

Similarly, the Association did not present sufficient evidence to establish that it was improper for the City to consider the original PERAC medical panel's findings in its decision to remove Tetreault from Section 111F status and maintain that status until a new PERAC medical panel evaluated Tetreault and issued its own findings. In furtherance of its position, the Association elicited witness testimony from Tetreault and Gagnon, which the City did not dispute, that the City

refused to allow Tetreault to be seen by the City's physician since he was asked to return to duty, and did not otherwise seek a confirming medical opinion from either Dr. Gilbert or Dr. Carkner. The Association argues that the City's conduct, as established by witness testimony, has been contrary to its alleged past conduct.

In an effort to demonstrate that the City's conduct was improper and a deviation from its past practice with respect to Section 111F evaluations, the Association points to McLaughlin v. City of Lowell, 84 Mass. App. Ct. 45 (2013). In McLaughlin, a fire captain who had been granted accidental disability retirement subsequently filed an application for reinstatement to his former position, and the City petitioned PERAC for clarification on a medical panel's findings that McLaughlin could perform the essential duties of the job. When PERAC rejected the City's petition for clarification, the City petitioned for, and received, a hearing at the Division of Administrative Law Appeals to resolve the dispute. According to the Association, this case shows that the City has previously sought clarification on a PERAC medical panel report before taking any affirmative action with respect to an injured officer.

However, I do not consider the facts of McLaughlin to be analogous to those of the instant matter. McLaughlin involved a firefighter who was already retired, as opposed to a police officer who was on Section 111F status seeking retirement. Also, McLaughlin's disability had resulted from a "permanent diagnosis," which makes the case distinguishable from the facts presented in this case. Here, none of the medical opinions rendered for Tetreault prior to May 2018 contained the words "permanently disabled" when describing Tetreault's medical condition.

To the extent that the Association advances the factual background and procedural history of McLaughlin to suggest that the City has established a past practice by seeking clarification from PERAC and an administrative body, the Association's argument fails. At best, McLaughlin demonstrates a singular instance in which the City took the initiative to obtain clarification on a medical panel report that it had received. In the absence of any evidence showing that the City has consistently engaged in similar conduct when faced with similar situations, this one instance does not establish any past practice upon which the Association may rely. Further, nothing in McLaughlin points to any ruling by a court or a legislative mandate that compels the City to seek clarification whenever it receives a PERAC medical panel report and seeks to rely on it for the purpose of evaluating an officer's Section 111F status. Therefore, the Association has not demonstrated that the City's reliance on the original PERAC medical panel to remove Tetreault from Section 111F was a deviation from any past practice and or that the City's decision violated Section 1 of Article 9 of the contract.

The Association has also failed to demonstrate that the City's reliance on the original PERAC medical panel was improper under Section 111F. The statutory provision does not contain any language stating that only a City physician is authorized to determine whether an injured officer was permanently incapacitated. The relevant provision of Section 111F states that an injured officer "shall be granted leave without loss of pay for the period of such incapacity... provided, that no such leave shall be granted ...for any period after a physician designated by the board or officer authorized to appoint police officers or fire fighters in such city,

town or district determines that such incapacity no longer exists.” Nothing in the statute’s language suggests that decision-making authority is exclusively confined to the role of City physician, or that some other appointed designee by the City could not serve as that decision-maker to satisfy the terms of Section 111F.

Further, the notion that the City may rely on the original PERAC medical panel report is reinforced by Hayes v. City of Revere, 24 Mass. App. Ct. 671 (1987). In Hayes, a police officer seeking the continuation of Section 111F benefits while pursuing accidental disability retirement claimed that he had not recovered from a work related injury. To that end, Hayes brought legal action against the City of Revere when its Chief of Police ordered him to return to work after receiving a PERAC medical panel report finding that his injury was not work-related. Hayes, 24 Mass. App. Ct. at 672.

The Hayes court held that the City of Revere could rely upon the PERAC medical panel’s report and that, because of the findings contained in that report, the plaintiff police officer was not entitled to sick leave benefits under Section 111F. Id. The court explained that the City of Revere “could rely upon the report of the medical panel to satisfy their obligations under ... c. 41, Section 111F. The determinations to be made in considering the plaintiff’s applications for sick-leave benefits under c. 41, Section 111F, and for an accidental disability retirement under G.L. c. 32, Section 7(1) are substantially the same, if not identical. Id. at 675-676; see also Id. at 678.

The Hayes court went even further by addressing the police union’s argument in support of Hayes that Jones v. Wayland, 380 Mass. 110 (1980)

required a specially designated physician to answer the question of whether an injured officer is no longer incapacitated under Section 111F. The court explained that it did not read the Jones decision as precluding the City of Revere from relying upon the PERAC medical panel report, especially because the City physician appointed under Section 111F never diagnosed the officer's condition causing the incapacity and that it was the officer's own physicians and the medical panelists who did. Id. at 677.

I find Hayes to be persuasive and more analogous to the facts presented in this case than McLaughlin. Here, as in Hayes, the City physician was not charged with rendering a formal medical opinion on injured officers, and the City relied on the most recent medical opinions in its possession in deciding to remove Tetreault from Section 111F benefits. As articulated by the Hayes court, the relevant medical inquiry for accidental disability retirement and continued eligibility for Section 111F benefits is identical. Applying that holding to this case, I find that the City's removal of Tetreault from Section 111F status did not violate Section 111F, because the original PERAC medical panel had concluded that Tetreault was no longer incapacitated from performing police officer duties and provided a basis for that determination.

In addition, the Association argues that the original PERAC medical panel misconstrued the medical documents before it, which resulted in the panel's erroneous determination that Tetreault was not permanently incapacitated and able to work as a Lowell police officer. While that is possible, the Association did not demonstrate that the City should have known that the medical panel's findings

were in any way deficient when it decided to remove Tetreault from Section 111F benefits. The original PERAC medical panel's findings represented the most recent medical opinions of three separate physicians concerning Tetreault's condition, as opposed to information that was several months old when the original PERAC medical panel issued its findings.

Along a similar vein, the Association also asserts that the City should have investigated the medical panel's findings further before removing Tetreault from Section 111F status. While further investigation into the findings may have been prudent, no contractual or statutory obligation compelled the City to take such action. Although the Association has frequently characterized the original PERAC medical panel report as "repudiated," and "defunct," the Association did not present any evidence showing that the original PERAC medical panel report was affirmatively overturned.

As stated earlier, the Association did not provide any basis for its claim that the original PERAC report should not have been used by the City in December 2017 in determining whether Tetreault was still incapacitated from duty. Even if the findings of the new PERAC panel had affirmatively disregarded the findings of the original PERAC medical panel (which it did not), such was not the case when the City first received the original medical panel report. Lastly, while the Association has insisted that the City physician has always made such determinations in the past, rendering the original PERAC medical panel findings unnecessary to the question of Section 111F status, nothing in the record establishes that this is so.



The City's Reliance on the Original PERAC Medical Panel Report to Maintain Tetreault's Removal from Section 111F Status was not Improper under the Contract or Statute

As noted, nothing in the Board's or City's communications indicated that the original PERAC medical panel report was overturned or invalidated at any point, even after the new PERAC medical panel issued its findings reaching a contrary conclusion. The Association has presented no evidence to establish that the City should have restored Tetreault to Section 111F status at any time prior to the new PERAC medical panel's findings. Although the Association points to McLaughlin in support of its position, nothing in that decision requires the City to take those same steps in making future determinations. In addition, McLaughlin does not resolve questions relating to provisions of collective bargaining agreements as they relate to Section 111F.

The Association's April 2018 correspondence with the City's attorneys and Gagnon's testimony, the City's sole witness, shows that there was no past practice regarding Section 111F. The April 2018 communications entailed discussions and inquiry by the Association as to why the City had elected not to conduct one more exam of Tetreault before deciding to remove Tetreault from Section 111F status. Instead of establishing evidence that such a practice actually existed, however, the Association's correspondence appeared to propose a new practice for making Section 111F determinations.

On cross-examination, Gagnon testified that the "City has never undermined a medical panel before." The City's decision to rely on the findings of the original medical panel, therefore, could be seen as a past practice. Gagnon

also testified that the City eventually removed Tetreault from its payroll because three separate doctors stated that his incapacity no longer existed. When the Association asked if it was commonplace for a new medical panel to be convened, Gagnon responded, more than once, "at times."

Notwithstanding, the Association did not provide evidence that contradicted the City's testimony on these points and showed that a past practice existed or that the City interpreted Section 111F differently in this case than it had in the past. The Association also did not provide evidence that the City: 1) has ever automatically reinstated an officer to Section 111F status when it received notice that a new medical panel was pending; or 2) kept an officer on Section 111F status because challenges were likely to be filed by the Association or the officer aggrieved by the City's decision to remove him or her from Section 111F status.

The Association also argued that the City's refusal to acknowledge or approve Dr. Carkner's subsequent requests for additional exams since terminating Tetreault's Section 111F benefits amounts to further evidence that the City departed from a past practice.<sup>9</sup> Although the Association contended that it was standard practice for officers to be seen and cleared by the City's assigned physician before returning to full and active duty, the Association did not establish this with evidence. Instead, the evidence was focused on the factual timeline of events and included a series of medical doctors' reports and impressions.

---

<sup>9</sup> When the Association asked Gagnon if she has ever sent someone for an independent medical examination for a determination by the City, she stated that, while she has, this typically occurs more often for workers' compensation claims under M.G.L. c. 152, and not necessarily for public safety officers.

However, nothing in the record substantiates the Association's claim that this practice existed, or that the City's refusal of Tetreault's requests to see the City physician represented a departure from its conduct in similar situations.

In its post-hearing brief, the Association opined that the City "clearly should have fairly addressed the matter by allowing further imaging, testing, or medical opinion review as requested." Even though the Association made numerous appeals for equity in this situation, this does not show that the City violated Section 1 of Article 9 of the contract or Section 111F.<sup>10</sup>

However, the manner in which the City determined that Tetreault should be removed from Section 111F status is not a violation of the contract. There is nothing in the contract that prohibits the City from taking this action, and the City was therefore not contractually obligated to disregard the original medical panel's findings, investigate further, or reinstate Tetreault's Section 111F status pending a new medical panel report.

### Conclusion

The Association did not establish that there was any practice that was clearly stated and understood, maintained over a reasonable time, and accepted by both parties. Having found no evidence of a past practice, I find that the City did not violate Section 1 of Article 9 of the contract when it relied on the original PERAC

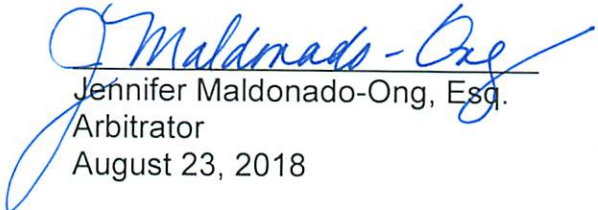
---

<sup>10</sup> In addition, the Association appears to have raised in its brief, for the first time, that the "City continued to show apparent bias and unfair treatment as it learned of the new panel's findings," which tacitly suggests that the City had engaged in "bias and unfair treatment" prior to receiving the new PERAC medical panel's findings. However, the Association has presented no evidence in support of this contention.

medical panel's findings in its decision to remove Tetreault from Section 111F status and continued to rely on those findings to maintain that status while PERAC convened a new medical panel. For the reasons stated above, I find that the City did not violate the parties' contract by continuing to rely on the original PERAC medical panel findings for removing Tetreault from Section 111F status.<sup>11</sup>

### AWARD

The City did not violate Section 1 of Article 9 of the parties' collective bargaining agreement when it removed Officer Thomas Tetreault, Jr. from M.G.L. c. 41, Section 111F and Section 100 status and maintained the removal of that status until his reinstatement to Section 111F status on or about May 17, 2018. Accordingly, the grievance is denied.

  
Jennifer Maldonado-Ong, Esq.  
Arbitrator  
August 23, 2018

---

<sup>11</sup> Although I find that the City is not contractually obligated to reinstate Tetreault with back pay and lost accruals for the time period covering December 19, 2017 and May 17, 2018, such action would be consistent with the City's act of reinstating Tetreault to Section 111F status as of May 17, 2018. Reinstating Tetreault with back pay and lost accruals may yield the equitable result sought by the Association and facilitate labor relations between the parties, especially because Tetreault's removal from Section 111F status was due to no fault of his own and had occurred as a result of latent ambiguities in the relevant contract and statutory language.