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COMMONWEALTH OF MASS  
CIVIL SERVICE COMMISSION

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MARLENE BISTANY vs. CIVIL SERVICE COMMISSION & another.<sup>1</sup>

1 City of Lawrence.

14-P-849

## APPEALS COURT OF MASSACHUSETTS

2015 Mass. App. Unpub. LEXIS 906

September 10, 2015, Entered

**NOTICE:** SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS *RULE 1:28, AS AMENDED BY 73 MASS. APP. CT. 1001 (2009)*, ARE PRIMARILY DIRECTED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, SUCH DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO *RULE 1:28* ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT. SEE *CHACE V. CURRAN*, 71 MASS. APP. CT. 258, 260 N.4 (2008).

**JUDGES:** Cypher, Vuono & Grainger, JJ.<sup>5</sup>

5 The panelists are listed in order of seniority.

**OPINION****MEMORANDUM AND ORDER PURSUANT TO RULE 1:28**

Marlene Bistany, a former police officer with the Lawrence police department (department), was injured in the line of duty in 2007. In September, 2011, the mayor of the city of Lawrence (city), as the appointing authority, terminated Bistany's employment with the department after Bistany failed to obey a direct order of the police chief (chief) to undergo a diagnostic procedure relevant

to determining her fitness for duty. Bistany appealed to the Civil Service Commission (commission), which upheld the termination. A judge of the Superior Court affirmed the commission's decision and this appeal followed. We affirm.

1. *Background.* After her injury, Bistany was placed on injured in the line of duty (ILD) status with full pay. See *G. L. c. 41, § 111F*. On September 14, 2007, Bistany had a magnetic resonance imaging (MRI) study completed, which revealed that she had multiple herniated discs in her neck. Under the supervision of her treating physicians, Bistany first treated her neck injury with physical therapy and chronic pain management. When those treatments proved unsatisfactory, Bistany began to explore surgical options, but ultimately declined to pursue them in favor of more physical therapy.

During this period, in January, 2009, the chief communicated with one of Bistany's physicians, who indicated that Bistany's injuries were not permanent, and that she could return to her duties as a police officer. The chief offered Bistany a return to a patrol assignment the next month, but she did not report for duty. Instead, she provided the department with a copy of a medical report indicating that she remained totally disabled. Also, in February, 2009, Bistany was removed from ILD status. She filed a grievance and, after arbitration, was returned to ILD status on November 18, 2009, pursuant to a settlement agreement with the city.

In March of 2009, one of Bistany's physicians, Dr. Friedberg, recommended that she have a new MRI completed. In July, 2010, the chief communicated with Dr. Friedberg, seeking an opinion about Bistany's ability to

return to active duty. Dr. Friedberg replied that he could not answer the chief's questions without an updated MRI. Thereafter, between August and October, 2010, the chief directly ordered Bistany to undergo an MRI, "based on [his] need to make informed and reasoned judgments for staffing and operational purposes." Despite multiple appointments and ample opportunity, Bistany never received an updated MRI.

In June, 2011, the city's mayor sent Bistany a notice of contemplated termination. A hearing was held, and by letter dated September 6, 2011, Bistany was informed that her employment had been terminated. She appealed to the commission, which upheld the termination, concluding that the chief's orders were lawful and reasonably related to determining Bistany's fitness for duty. A judge of the Superior Court affirmed the commission's decision.<sup>2</sup>

2 Bistany filed a motion for reconsideration following the entry of judgment in the Superior Court. The order denying that motion is not before us on appeal.

2. *Discussion.* A tenured civil service employee who is aggrieved by a disciplinary decision of an appointing authority may appeal to the commission. See *G. L. c. 31, § 41*. After finding facts anew, the commission then must determine, by a preponderance of the evidence, whether the appointing authority met its burden of proof that there was just cause for the action taken. See *Massachusetts Assn. of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 260 (2001); *Falmouth v. Civil Serv. Commn.*, 447 Mass. 814, 823-824 (2006). We, in turn, need only inquire whether the commission's decision was "legally tenable," accepting the commission's factual determinations unless they are unsupported by substantial evidence on the record as a whole. *Commissioner of Health & Hosps. of Boston v. Civil Serv. Commn.*, 23 Mass. App. Ct. 410, 411 (1987). See *Andrews v. Civil Serv. Commn.*, 446 Mass. 611, 615-616 (2006).

We agree with the commission that the chief's order that Bistany obtain an MRI<sup>3</sup> was directly related to his

need to determine whether she could return to active duty. Such a determination is both reasonable and lawful. See *Nolan v. Police Commr. of Boston*, 383 Mass. 625, 630 (1981) (police department head "has the authority and duty to determine a police officer's fitness to perform his duties or to return to full working status"). Here, several years had elapsed between the injury and the order at issue, during which, according to the chief's credible testimony at the hearing before the commission, Bistany's shifts were covered by the other officers in the department at overtime rates because he was unable to hire an additional officer to replace Bistany while she was on ILD status. Given those circumstances, the chief's order was an entirely reasonable step for him to take in seeking a resolution to Bistany's case. In violating the order, Bistany subjected herself to discipline and, ultimately, termination.

3 We agree with the commission that an MRI is a diagnostic tool, and not medical treatment, as Bistany suggests on appeal.

On appeal, Bistany argues at length that under her settlement agreement with the city, the city forfeited its ability to dictate her medical treatment or to direct her to undergo certain procedures. Regardless of whether an MRI constitutes medical treatment, the terms of the settlement agreement relate only to Bistany's ILD status, and have no bearing on her obligation to follow the direct and lawful orders of her superiors.<sup>4</sup>

4 On appeal, several of Bistany's claims were not raised in her appeal before the commission, nor were they raised in the Superior Court. They are accordingly waived. *Springfield v. Civil Serv. Commn.*, 469 Mass. 370, 382-383 (2014).

*Judgment affirmed.*

By the Court (Cypher, Vuono & Grainger, JJ.'s),

5 The panelists are listed in order of seniority.

Entered: September 10, 2015.