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ESSEX, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 2013-00726-A

MARLENE BISTANY,  
Plaintiff

vs.

CIVIL SERVICE COMMISSION and  
CITY OF LAWRENCE,  
Defendants

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**MEMORANDUM AND DECISION ON PLAINTIFF'S  
MOTION FOR JUDGMENT ON THE PLEADINGS**

**PROCEDURAL BACKGROUND**

This review of the final decision of an administrative agency is before the court on plaintiff's motion for judgment on the pleadings, pursuant to Mass. R. Civ. P. 12(c). [D. 10]. Plaintiff Marlene Bistany ("Bistany") seeks review under G. L. c. 30A of the April 4, 2013 final decision of the Civil Service Commission (the "Commission") finding that the City of Lawrence (the "City") had just cause to terminate Bistany from her employment with the Lawrence Police Department ("LPD").<sup>1</sup> The City, through its mayor (the "appointing authority"), terminated

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<sup>1</sup>Although Bistany's complaint seeks review under Chapter 30A, this court's authority to review a final decision of the Civil Service Commission is contained in G. L. c. 31, § 44. The mis-citation is meaningless and will be ignored. Although Chapter 31 authorizes this appeal, the standard

Bistany from her employment as a police officer on September 6, 2011. The termination decision was appealable to the Commission within ten days of receipt of written notice of the termination. G. L. c. 31, § 43. Bistany timely sought review before the Commission. The Commission heard evidence over the course of three days in January and February 2012, before issuing its written and final decision on April 4, 2013. [AR 561-583]. "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." G. L. c. 31, § 43. Reversal of the appointing authority's decision is required if: (1) the preponderance of the evidence fails to establish just cause; (2) there was a harmful procedural error; (3) there was a prejudicial error of law; or (4) the decision was not reasonably "related to the fitness of the employee to perform his/her position." G. L. c. 31, § 43. As noted above, the Commission affirmed the decision of the City terminating Bistany's employment. A subsequently filed motion for reconsideration was denied by the Commission on June 27, 2013 in a written decision. [AR 826-828].

A person aggrieved by a final decision of the Commission may institute proceedings for judicial review in the Superior Court within thirty days of receipt of

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of review is essentially identical to that which governs the more frequently filed Chapter 30A appeals.

the decision. G. L. c. 31, § 44. Bistany filed the complaint in this case on May 3, 2013, within the applicable appeal period. Although technically Bistany's appeal is filed under G. L. c. 31, § 44, the judicial review provided is the equivalent to that provided for judicial review of final decisions of administrative agencies under G. L. c. 30A, § 14. See G. L. c. 31, § 44 ("[a]ny proceedings in the superior court shall, insofar as applicable, be governed by the provisions of section fourteen of chapter thirty A"). Thus, the following deferential standard of review applies, at least with respect to non-legal errors.

#### **STANDARD OF REVIEW**

Judicial review of an appeal from an agency decision is limited to the administrative record. G. L. c. 30A, § 14(5); see also *Cohen v. Board of Registration in Pharm.*, 350 Mass. 246, 253 (1966). The party challenging the decision of the agency, here Bistany, bears the burden of demonstrating that the decision is invalid. *Merisme v. Board of Appeals on Motor Vehicle Liab. Policies & Bonds*, 27 Mass. App. Ct. 470, 474 (1989). The reviewing court's approach is "one of judicial deference and restraint, but not abdication." *Arnone v. Commissioner of Dep't of Soc. Servs.*, 43 Mass. App. Ct. 33, 34 (1997) (further citation omitted). When reviewing an agency decision, the court is required to give "due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the

discretionary authority conferred upon it.” G. L. c. 30A, § 14(7). The agency's decision must be supported by substantial evidence and not be arbitrary or capricious. *Id.* In assessing whether the underlying evidence is substantial, the court cannot displace an agency's decision between two fairly conflicting views, even though the court may have justifiably made a different decision. *Hotchkiss v. State Racing Comm'n*, 45 Mass. App. Ct. 684, 695-696 (1998). “Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion taking into account whatever in the record detracts from its weight.” *Lycurgus v. Director of Div. of Employment Sec.*, 391 Mass. 623, 627-628 (1984) (internal quotations omitted). A decision is arbitrary and capricious if it is unreasonable and is made willfully “without consideration and in disregard of facts and circumstances.” *Long v. Comm'r of Pub. Safety*, 26 Mass. App. Ct. 61, 65 (1988); see *Doe 151564 v. Sex Offender Registry Bd.*, 456 Mass. 612, 622-623 (2010). The court must consider the record as a whole, but as long as the agency's findings are properly supported, the decision will not be disturbed by a reviewing court. *Tri-County Youth Programs, Inc. v. Acting Deputy Dir. of the Div. of Employment & Training*, 54 Mass. App. Ct. 405, 408 (2002).

### **FACTUAL BACKGROUND**

The Commission made sixty-two findings of fact. [AR 562-575]. The court

will not repeat them verbatim herein, but does accept them as supported by substantial evidence and not arbitrary, capricious, or an abuse of discretion. Only a summary of events is needed for purposes of Bistany's motion for judgment on the pleadings.

Bistany was a full-time LPD officer when she was injured in the line of duty on June 7, 2007. Following significant injury to and multiple herniated discs in her neck, she was placed on "injured in the line of duty status ("ILD")." The City has never questioned that Bistany was seriously injured while in the line of duty. The hostilities between Bistany and the LPD that led to her termination arose because of questions the LPD had about Bistany's ability to return to active duty at any time. ILD pay for an LPD officer is equal to 100% of the injured employee's pay. It contemplates an eventual return to active duty, and requires that the LPD keep the officer's position open and available for him/her and pay other personnel to cover his/her shifts. A new employee cannot be appointed to replace an officer on ILD status. If return to active duty was not feasible, the LPD could initiate a retirement process that would pay Bistany 72% of her pay and permit the LPD to appoint a new officer to replace her on the force. Thus, Bistany and the LPD had different interests. Bistany had a financial incentive not to obtain a medical opinion that she was not expected to return to her active employment and face forced retirement at a lower rate

of pay. As long as her ILD duty status continued, she would receive 100% of her pay. On the other hand, to ease staffing and budget issues, the LPD had an interest in keeping Bistany on ILD status only for as long as there was a realistic likelihood of her recovering from her injuries and returning to active duty. Retirement would allow the LPD to pay Bistany less, appoint a new officer, and stop paying others (presumably at overtime rates) to cover her assignments.

The Commission final decision chronicles on a fact-by-fact basis the history of the LPD's attempts to bring closure to Bistany's ILD status by pushing for medical opinions about her prognosis and her eventual ability to return to active duty. As early as November 2008, the LPD was inquiring of Bistany's doctors about her work capacity/abilities. In February 2009, Bistany provided a doctor's report affirming her current total disability and disclosing that her prognosis was "uncertain." In March 2009, Bistany started seeing Dr. Freidberg, a neurosurgeon. Dr. Freidberg confirmed her current disability and repeatedly recommended an MRI, as her only previous MRI had been in September 2007. [AR 566, 572, 573]. The LPD inquired of Dr. Friedberg in July 2010, requesting his best medical opinion as to the real probability of Bistany being able to return to active duty. Dr. Friedberg promptly responded as follows: "I would like not to answer your questions until I see Marlene Bistany again and have an MRI done. With that information and with the information in your letter, I will

then be able to answer your questions with more accuracy and with more fairness, both to you and to Ms. Bistany.” [AR 567]. Thereafter, the LPD made efforts to have Bistany submit to an MRI, including several direct orders to that effect. Bistany made efforts to avoid having an MRI performed. Beginning no later than August 10, 2010, Bistany communicated with the LPD, at least at times, through her attorney.

The lack of cooperation and the failure to follow orders regarding the recommended MRI were at the heart of the City’s termination of Bistany. At the internal hearing on the City’s intent to terminate Bistany’s employment as an LPD officer, a hearing officer issued a decision that found that the termination of her employment was justified because it was rationally related to the failure to cooperate and follow orders from her superior officer that was rationally related to ascertaining the medical status of an employee who is out injured and when or whether the employee will or can return to work. [AR 574]. In the letter terminating Bistany’s employment, the City (through its mayor) concluded that the ordered MRI was a reasonable and necessary treatment that involved no substantial danger to life or health and would have provided a significant benefit to all concerned relative to accomplishing a positive closure to this case. [AR 574]. The termination decision was based on the hearing officer’s report, that is, that the City was not required to employ an individual who had not cooperated with reasonable requests by her

employer that were necessary to making an informed and reasoned determination as to closure of [her] ongoing absence from duty. [AR 575].

### **DISCUSSION**

The primary issue for the Commission was whether the appointing authority showed by a preponderance of the evidence “just cause” for Bistany’s termination. 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.” *Cambridge v. Civil Service Comm’n*, 43 Mass. App. Ct. 300, 304 (1997). Although the Commission makes *de novo* findings of fact, the role of the Commission is to determine “whether the appointing authority sustained its burden of proving there was reasonable justification for the action taken by the appointing authority.” *Id.*

Bistany’s first challenge to the Commission’s final decision alleges an error of law in refusing to consider, along with the employment termination decision, the City’s simultaneous decision to terminate Bistany’s ILD status. The court agrees with the Commission, for reasons stated in its final decision [AR 578-579], that the Commission lacks jurisdiction over a dispute about the termination of ILD benefits/status. Thus, no error of law occurred.

Bistany further challenge whether the LPD’s orders requiring Bistany to have



an MRI were lawful orders. Bistany argues that the LPD had no right to dictate her medical care and treatment. The court agrees with the Commission that the LPD's orders regarding an MRI, and related issues, were lawful orders. See *Nolan v. Police Comm'r of Bos.*, 383 Mass. 625, 603 (1981); *Broderick v. Police Comm'r of Bos.*, 368 Mass. 33, 41-43 (1975) . [AR 581]. First, having an MRI is a diagnostic test, and there is no claim that Bistany would have been exposed to any harmful effects of the test, which is now universally used for orthopaedic/neurological injuries. The LPD was not overruling her desire to treat her injuries with physical therapy, rather than surgery. The court agrees with the Commission that although the LPD does not have authority to dictate an officer's medical care, the LPD has the right, in order to properly manage its personnel and budget, reasonably to require certain information necessary to enable it to evaluate Bistany's future employment status. As noted above, Bistany had a financial incentive to delay the inevitable forced retirement and prolong for as long as possible the receipt of 100% of her pay under her ILD status.<sup>2</sup> The court agrees with the Commission's conclusion that the LPD's orders were not meant to dictate her medical treatment and that the LPD's orders were reasonably

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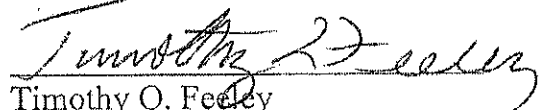
<sup>2</sup>At the internal hearing on the City's intent to terminate Bistany, she submitted the affidavit of Dr. Friedberg that reflected his opinion that she is currently permanently disabled from performing the duties of a police officer and, based on his current findings, she will never be able to perform those functions.

based on information received from Dr. Friedberg that an MRI was a necessary diagnostic tool that he required in order to provide the LPD the information needed to ascertain Bistany's ability to return to duty as a police officer. [AR 580]. The court also agrees with the Commission's determination that given the amount of time Bistany was on ILD status and the burden that her continued and extended uncertain status placed on the LPD's budget and operations, it was essential for the LPD to be able to make a definitive determination about Bistany's ability to return to work that would bring closure to that matter (one way or the other). [AR 581].

In summary, this court detects no errors of law by the Commission in affirming Bistany's termination from her employment as a LPD officer. The Commission's findings supporting its final decision are supported by substantial evidence in the record, and are not arbitrary, capricious, or an abuse of discretion. The Commission's denial of Bistany's motion for reconsideration is amply supported by the record.

#### **ORDER**

Bistany's motion for judgment on the pleadings [D. 10] is **DENIED**, and the final decision of the Commission is affirmed. Judgment of dismissal shall enter.

  
Timothy Q. Feeley  
Associate Justice of the Superior Court

February 6, 2014