

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
THOMAS FERRIS,

Complainants

v.

DOCKET NO. 17-BEM-00481

CITY OF LAWRENCE,

Respondent

Appearances: Michael J. Heiner, for Complainant
Robert D. Hillman for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On February 3, 2017, Complainant Thomas Ferris filed a complaint with this Commission alleging that his employer, the City of Lawrence, discriminated against him based on his disability, by refusing his request for an accommodation for disabling Crohn's disease and bronchial pneumonia, unfairly suspending him for not attending a City Council meeting when he was ill, refusing to return him to his job as the Superintendent of Bellevue Cemetery after an FMLA leave of absence, and ultimately terminating his employment. The Investigating Commissioner found probable cause to credit the allegations of the complaint and efforts at conciliation were unsuccessful. The matter was certified for a hearing and a hearing was held before me on October 22 and 23 and November 15, 2019. The parties submitted post-hearing

briefs on January 17, 2020. Having reviewed the record in this matter and the post-hearing submissions of the parties, I make the following Findings of Fact, Conclusions of Law and Order.

II. FINDINGS OF FACT

1. Complainant, Thomas Ferris, was hired by the Respondent, City of Lawrence, on October 27, 2008, as the Superintendent of Bellevue Cemetery. He remained in that position from 2008 until 2017 when his employment with Respondent was terminated. Complainant is 55 years of age and has an associate's degree in arbor culture and urban forestry. He is a certified arborist and in pesticide application and holds a commercial driver's license and a hoisting license. Complainant testified that the majority of his jobs have been in, or related to, the "green industry."

2. Respondent, City of Lawrence, is a municipality and an employer within the meaning of G.L. c. 151B. Bellevue Cemetery is owned and maintained by Respondent but the Cemetery is governed by an autonomous five-member Board of directors who are appointed by the Mayor and who supervise the operations of the Cemetery. Daniel Rivera was the Mayor of Lawrence at the time of the events at issue. Eileen Bernal was the Mayor's Chief of Staff and Frank Bonet was the Director of Respondent's Personnel Department. The City asserts that it has exclusive authority to hire, fire and transfer personnel employed at the Cemetery. The Cemetery Board cannot hire personnel without the Mayor's approval. (Testimony of Bonet and Rivera)

Complainant was interviewed and chosen for the position by the Board. He reported directly to the Board and two members of the Board conducted his performance reviews. Complainant testified that the Chair of the Board supervised operations at the Cemetery and he answered to

the Board on operational matters, embellishments, improvements and any problems that arose. Complainant attended monthly meetings of the Cemetery Board and reported to the Board on operations and financial matters. The Chair of the Board changed three times during his tenure as Superintendent. As an employee of the City and a department head, Complainant also reported to the Mayor and to the Director of the Personnel Department, Frank Bonet.

(Complainant testimony, Exs.1, 2 &11)

3. Complainant suffers from Crohn's disease which was diagnosed in 2001.

Complainant testified that Crohn's is a chronic auto-immune disease that is subject to periods of flare-up and for which there is no cure. During periods when his Crohn's disease is active, its symptoms can be debilitating, and it is difficult for Complainant to work. He suffers from pain, joint inflammation, and uveitis, which he described as an inflammation of the middle eye, causing pressure and blurry vision. Complainant testified that extreme stress and lack of sleep can exacerbate the ailment and cause flare-ups. He takes medication with the goal of remaining asymptomatic, which he has been for most of his tenure as Cemetery Superintendent.

(Complaint testimony, Ex. 6 & 8) Complainant informed the Chairwoman of the Cemetery Board of his Crohn's diagnosis shortly after he was hired but did not request any accommodation at that time because he did not require one. (Complainant testimony)

4. As Superintendent of the Bellevue Cemetery, Complainant was responsible for the overall management of the 112 acre facility, which he characterized as a multi-faceted job. His duties included arranging for burials with undertakers, mapping the locations of burials, requisitioning supplies, overseeing Cemetery maintenance, and performing administrative and office duties. As a Department Head, Complainant is also charged with creating a budget for the Cemetery and is required to attend Department Head Budget meetings. Complainant supervised

two maintenance workers, and an office clerk. According to Complainant, a private cemetery that borders Bellevue and is comparable in size had seven maintenance workers. Due to the small staffing of the Bellevue Cemetery, Complainant assisted with manual labor including mowing lawns, clearing weeds, assisting with burials, trimming trees, driving the dump truck, and hauling fill, all of which is physically demanding work. Complainant testified, and his 2015-16 performance evaluation reflected, that his job performance met or exceeded expectations.

(Complainant's testimony, Ex. 2)

5. One of Complainant's duties was to ensure that the Bellevue Cemetery was presentable for Memorial Day weekend each year. Memorial Day is the most significant day of the year at the Cemetery and the grounds require a great deal of preparation, particularly after a long winter. This includes mowing the lawns, cleaning up leaves from the fall, clearing brush, trimming trees, seeding and fertilizing, clearing more than 50,000 headstones, and making sure the water system is up and running. Complainant testified that the work involved in cleaning up headstones was very labor intensive and required approximately 400 man-hours to complete.

(Complainant testimony)

6. In January of 2016, a pressure washer was stolen from the Cemetery. In March of 2016, the Mayor sought to have security cameras installed and he charged Complainant with the purchase and installation of cameras. According to Complainant, this did not occur prior to the opening of the Cemetery because he was required to secure the approval of the Cemetery Board of Directors prior to any alterations or embellishments to the Cemetery. He raised the issue with the Cemetery Board at their next meeting, and, at the February Board meeting, he again sought approval for the purchase and installation of security cameras. This is reflected in the meeting minutes of the Board. (Complainant's testimony; Jt. Ex. 5) Complainant testified that the Board

did not act and tabled his request because they were “miffed” that the Mayor was usurping the Board’s authority by ordering the installation of cameras. He stated that he was unable to proceed with the purchase and installation of cameras without the Board’s approval. I credit Complainant’s testimony.

7. In the Spring of 2016, Complainant was diagnosed with bronchial pneumonia, which required him to take two rounds of antibiotics and caused him to suffer significant fatigue. In March of 2016, Complainant informed the Mayor’s Chief of Staff, Eileen Bernal, in a phone conversation and an email that he was suffering from pneumonia and taking antibiotics, was experiencing fatigue, and did not have the usual volunteers that he relied on each year to assist with the Cemetery clean-up and preparations for the holiday. He expressed concern that the Cemetery would not be ready in time for Memorial Day and asked for some additional assistance with mowing. Bernal responded that she would see what she could do. Complainant testified that, in the past, Department of Public Works crews had been sent to assist with grounds work. Ultimately, Bernal was not responsive to his request for assistance.

8. Complainant testified that by April 2016, his pneumonia was resolving and he exerted himself to perform manual labor. He testified that the stress from being ill with pneumonia and the pressure to prepare the Cemetery with insufficient help caused a flare-up of his Crohn’s disease. He began to suffer debilitating symptoms, including gastro-intestinal problems, abdominal pain, swollen joints, and blurry vision. At a Department Head meeting in April of 2016, which Chief of Staff Bernal attended, Complainant again expressed concern that Memorial Day was one month away and that he needed additional help to prepare the Cemetery. He requested that he be permitted to use funds allocated to the Bellevue Cemetery which had been frozen by the City to allow him to hire temporary workers and/or that the Department of Public

Works employees be assigned to assist his crew, as they had in the past. Bernal again was not responsive to his request. She testified that she could not recall any details from that meeting, and that she had no memory of Complainant being ill or requesting additional help either in a private meeting or at a Department Head meeting that spring. She did admit, however, that Complainant's union representative informed her of Complainant's Crohn's disease but that she did not inform the Mayor of this. (Bernal testimony) I credit Complainant's testimony that he requested assistance on three occasions from Bernal for reasons related to his health issues and received no response and no additional assistance.

9. According to Respondent, the City implements a spending freeze each year three months prior to the end of the fiscal year which is June 30th. During this period, the Mayor discourages department heads from spending funds beyond their department's budget. According to Bernal, in order to assure level service during the spending-freeze period, department heads may submit purchase orders prior to the commencement of the spending freeze. In addition, with the Mayor's approval, department heads are permitted to purchase necessities during the spending freeze. (Testimony of Bernal & Rivera) According to Respondent, there were sufficient funds in the Cemetery budget that were available to hire temporary workers or pay overtime, and Complainant could have sought permission to hire additional staff. (Bernal testimony, Jt. Ex. 24) Bernal testified that that there was a process for securing or hiring additional help which Complainant neglected to follow and that he was not proactive in anticipating the additional staff he would need and in securing approval to use funds to hire temporary help. Complainant testified that he had no way of anticipating that volunteers from prior years would not return to assist with Cemetery clean-up, nor could he have anticipated

his own debilitating health problems that spring which resulted in the Cemetery not being in the best condition for Memorial Day events and visitors.

10. Respondent asserted that Department Heads' attendance at budget meetings with the City Council in late May and early June of 2016, and at the public City Council meeting on June 8, 2016, was mandatory. (Bernal testimony) Bernal sent an email to all Department Heads on May 16, 2016 regarding attendance at these meetings. (Jt. Ex. 25) Although he was quite ill, Complainant attended his Department meeting with the City Council on June 6, 2016, and reviewed his budget. Complainant worked all day on June 8th, but did not attend the public City Council meeting that evening because he was too ill. He testified that he had never been required to attend City Council meetings in prior years and that he did not receive Bernal's May 16th email. The email is addressed to DeptHeads and cc'd to five named individuals.¹ Complainant claimed to be aware of four or five other department heads who did not attend the City Council meeting and suffered no consequence. At that meeting, a citizen asked a question regarding the upkeep of the Bellevue Cemetery and the Mayor sought out Complainant to respond to the question. The Mayor was upset that Complainant was not at the meeting and that he was unable to respond to a citizen's inquiry. He later sent a text to Complainant asking why he was not at the meeting and Complainant responded that he did not attend because he was too ill. I credit Complainant's testimony that he and the Mayor exchanged texts that evening, although the Mayor could not recall this exchange. (Complainant, Bernal, Rivera testimony)

11. On June 14, 2016, Complainant was called to a disciplinary meeting with the Mayor, Bernal and his union representative, Dan McCarthy, and was presented with a 3-day suspension without pay to be served on June 15, 16 and 17, 2016, for failure to attend the City Council

¹ Having no access to his work email account, Complainant could not independently verify if he had received the document. Complainant's attorney claimed he had never seen the email prior to the hearing, while Respondent's counsel claimed he provided the document in discovery.

meeting on June 8th and for failure to purchase and install security cameras in the Cemetery as previously directed by the Mayor in March and May of 2016. (Jt. Ex. 4, Rivera testimony)

Complainant testified that he was still quite ill and was very upset during the meeting, which, according to testimony, lasted about five minutes. He was also very angry at being suspended. He left the meeting abruptly without discussing his health issues, the steps he had taken to facilitate the purchase of cameras, or the Cemetery Board's failure to act on his requests.

Complainant grieved the suspension but it was denied for what he believed to be procedural reasons. He stated that because he subsequently was out of work on FMLA leave, and correspondence was sent to his work email, he did not have communication with the union after the grievance was denied. He does not believe the union pursued the matter further. The Mayor testified that the suspension was unrelated to Complainant's health and was for the reasons stated in the notice. He did not learn until sometime after the suspension that Complainant had taken FMLA leave. Respondent asserts that the three-day suspension was warranted pursuant to the progressive disciplinary policy prescribed by the collective bargaining agreement governing Complainant's employment. (Jt. Ex. 18) Respondent claimed that Complainant's failure to comply with the Mayor's directive to install cameras at the Cemetery in the spring of 2016, his inadequate management of the Cemetery and neglecting to attend the City Council meeting in June of 2016, merited the suspension in light of an earlier infraction.² (Rivera testimony) The Personnel Department and Bonet were not involved in Complainant's three-day suspension, but Bonet's office received notice of the discipline.

² The suspension letter also references a written warning issued to Complainant in September of 2015. The earlier matter was not discussed in detail at the hearing and seems to have centered on a political contretemps involving a funeral director whose irregular practices were questioned by Complainant, which may have resulted in the funeral director instigating a recall petition of the Mayor. Complainant had requested that the letter of reprimand be removed from his file but received no response from the City. Respondent asserts that irregularities arose from Complainant allowing a funeral director to obtain a blank book of burial certificates. (Jt. Ex. 12, Ex. R-1)

12. Complainant felt his suspension was unwarranted and that he had performed his job effectively under extremely difficult conditions while seriously ill and with minimal staffing and no support from the City. Given Complainant's medical condition, the additional stress and emotional upset from being suspended further exacerbated his Crohn's symptoms and rendered him unable to work. He did not return to work and applied for FMLA leave on June 21, 2016. (Jt. Ex. 6, Complainant testimony) Complainant's physician documented that he was suffering a flare-up of Crohn's, an inflammatory bowel disease, and that he was unable to work. His physician could not estimate the duration of the flare-up, but stated it could last up to four months. (Id.) Complainant was approved for twelve weeks of leave commencing June 27, 2016. He followed up regularly with his medical providers and was prescribed a six-week course of steroids to treat the symptoms of his Crohn's flare-up. (Jt. Exs. 7 & 8)

13. The Mayor was unaware of Complainant's Crohn's disease prior to his application for leave, but Bernal knew that Complainant was ill with Crohn's. While Complainant was on leave, the Mayor provisionally appointed another individual to be the Superintendent of Bellevue Cemetery. Mayor Rivera, Bonet, and Bernal testified that the City received positive feedback about the performance of Complainant's replacement including from two members of the Cemetery Board. The minutes of the June 27, 2016, Cemetery Board meeting note that Complainant had been sick for some time with a chronic illness, that he was on leave, and that the Mayor had not notified the Board of his suspension. The minutes also hint at the power struggle between the Mayor and the Board, noting that the Mayor may have already appointed a replacement for Complainant, acting in place of the Board due to its inaction. (Jt. Ex. 3)

14. Sometime prior to September 6, 2016, the Mayor, Bonet, and Bernal met to discuss Complainant's leave, his performance and the operational needs of the Cemetery. According to their testimony, they concluded that the Cemetery Superintendent position was not appropriate for Complainant given his perceived mismanagement and the improved condition of the Cemetery in his absence. Bonet recalled the Mayor saying that the Cemetery Board was not happy with Complainant's performance, but Bonet could not recall who those Board members were. The Mayor testified generally that there were some complaints. They also testified that some Board members were pleased with the performance of the interim supervisor. Bonet recalled that Bernal was upset that Complainant had called her office seeking assistance with getting chairs for the Memorial Day event at the Cemetery one week before the event. They also discussed an incident from the previous fall regarding a funeral director being given a book of blank death certificates.³ In response to the Mayor's concerns that he not violate the terms of Complainant's FMLA or the ADA, Bonet assured the Mayor that consistent with ADA guidelines, he could transfer an employee on FMLA leave to a similar position so long as salary and benefits remained the same.⁴ The Mayor expressed his desire to transfer Complainant to a position as Superintendent of Parks and Streets. (Bonet testimony) The position was responsible for the upkeep and maintenance of the City's streets and parks, including filling pot-holes, ice and snow removal, clean-up and maintenance of the City's parks, and trash removal. The position had greater responsibility than Cemetery Supervisor, required managing between 40 and 45 laborers, and involved potentially significant required overtime. Respondent claimed this job was appropriate for Complainant because it would eliminate the Department Head requirements and other managerial aspects of the Cemetery Superintendent position, which Respondent felt

³ There was conflicting testimony about the issue with the funeral director and who was at fault.

⁴ Respondent's brief cites 29 CFR s. 825.214 in support of this assertion.

Complainant had mishandled. There was no discussion of Complainant's professional capability or his physical ability to do this job. The reassignment to an entirely different job with greater responsibility was not discussed with the Complainant.

15. Complainant testified that his condition was improving by early September but that he experienced a recurrence of Crohn's symptoms when he was notified that the City was removing him from his job and unilaterally reassigning him. He attributed his relapse largely to the extreme stress caused by receipt of a letter from Bonet dated September 6, 2016, advising him that his leave was due to expire on September 12th, and directing him to contact the City no later than September 9th to discuss his return to work to a new position or be considered as having abandoned his job. Complainant did not receive the letter until September 13, 2016, four days after the stated deadline for contacting the City, when it was hand-delivered to his home by a constable.⁵ The letter informed Complainant that he was being removed from his job as Cemetery Supervisor and unilaterally reassigned to the position of Parks and Streets Supervisor with equivalent pay and benefits. (Jt. Ex. 9) Complainant testified that he was blind-sided by the receipt of this letter and very upset for a number of reasons. Most significantly, the Parks and Streets position is a more physically demanding job with greater responsibility for supervision and longer, more unpredictable hours. Given his health issues, Complainant had grave concerns about his ability to perform this job. Complainant also believed that pursuant to the terms stated in the letter, the City was not offering him the \$84,000 per year that the incumbent in the Streets and Parks position was paid, but only his then current salary of \$69,000.

⁵ The letter was hand-delivered by constable days 7 days later, because it had inadvertently been sent to Complainant's work address, admittedly an error of Bonet's. (Bonet testimony)

In addition, Complainant understood that his FMLA leave would not expire until September 26, 2016. (Complainant's testimony)⁶

16. Complainant went to Bonet's office on September 14, 2016, the day after receiving the letter. He told Bonet that his FMLA leave had not yet expired and he was not medically cleared to return to work. He also expressed how upset he was at being reassigned and tried to ascertain the reasons for the decision. He recalled that Bonet's response referenced something about "operational needs." Bonet testified that Complainant characterized the reassignment as a "personal attack." Bonet suggested that Complainant apply for some accommodation if he felt he needed an accommodation to permit him to return to work and tried to give Complainant the forms to request a reasonable accommodation but Complainant refused them stating he was not disabled. (Bonet testimony, Jt. Ex 20) It is understandable that Complainant rejected the notion of an accommodation because he had done the job of Cemetery Supervisor for eight years with his Crohn's disease remaining largely asymptomatic, had required no accommodation prior to 2016, and believed he could return to work full-time and perform the functions of Cemetery Supervisor once his Crohn's symptoms resolved.⁷ (Complainant testimony)

17. Complainant testified that he was very upset that the City did not discuss or seek approval of his reassignment from the Cemetery Board, believing that only the Board could hire and fire employees, and remove him from his job. (Complainant testimony) In a letter to the Mayor dated September 22, 2016, the Cemetery Board noted that it had just received on September 21st prior to its monthly board meeting, a copy of the City's September 6th letter to

⁶ Bonet stated there was some confusion about the expiration date of Complainant's leave because he had been out of work on sick leave for a week prior to the commencement date on his FMLA application. When Bonet learned about this, he modified the expiration date of Complainant's leave and thought he sent Complainant a letter advising him of this, but there is no such letter in the record. (Bonet testimony)

⁷ It seems that Complainant did not at the time understand which job Bonet was suggesting he seek an accommodation for and that was not clear from the record.

Complainant regarding his leave status and reassignment. Prior to that time, the Board had received no other information from the City regarding Complainant's employment status. The Board also noted that it stood ready to hire a qualified replacement for Complainant were he not to return from his leave and expressed displeasure at the City's hiring of a replacement without the Board's action or approval. The letter stated that the authority to hire, fire and manage the cemetery rests with the Board, and essentially accused the Mayor of usurping the Board's authority with regard to management of the Cemetery. (Jt. Ex. 11)

18. Complainant's doctor's notes reflecting visits in September and October indicate that he experienced a set-back in his recovery and continued to suffer from Crohn's symptoms including gastro-intestinal distress. (Jt. Ex. 8) On October 11, 2016, Complainant wrote to Bonet in response to the September 6th letter and their subsequent meeting. (Jt. Ex. 12) Complainant's letter characterized the reassignment as "retribution" for exercising his right to take a medical leave due to his chronic medical condition and charged the Mayor with attempting to stack the Cemetery Board by appointing an individual who was against him. Complainant asserted that he had performed his job effectively under extremely difficult circumstances which included his illness and short-staffing, which required him to pitch-in and assist with all chores. He stated the belief that he had been unfairly scapegoated for the condition of the Cemetery and that his replacement was provided additional staff which was denied to him. He claimed that his suspension and reassignment were unwarranted and that he never received a decision on the appeal of his suspension. The letter notified the City that he was not able to perform the Parks and Streets Supervisor position because its additional responsibilities and stress, with unpredictable hours covering snow emergencies, were not suited to his medical condition. He also stated that he considered the reassignment a demotion because

he would no longer be a Department Head. Complainant advised the City that he was seeking his union's help with restoring him to his Cemetery position, and specifically requested restoration to his position, anticipating that he would be cleared to return to work in the next few weeks. (Id.) He indicated that he would be compelled to take legal action if he received no response. The City did not respond to his letter.

19. Complainant remained on leave after his FMLA expired and was permitted to use his earned contractual sick leave. On November 16, 2016, he received medical clearance to return to work. He attached his doctor's letter to an email sent to the City, including Bonet, the Mayor, and the Cemetery Board members, indicating he could return to work as Cemetery Supervisor on November 21, 2016. Upon receipt of that email, the City restricted Complainant's access to his work email account and in a letter from Bonet dated November 17, 2016, advised Complainant that he was required to undergo a fitness for duty examination performed by a physician designated by the City prior to his returning to work. The City asserted that this was its usual practice for employees returning from extended medical leaves, but Complainant disputed this. He testified that his union advised him that the City was making him "jump through hoops." The City's letter also stated that Complainant was expected to return to work in the position of Parks and Streets Supervisor per Bonet's letter of September 2016. (Jt. Ex. 13, Bonet testimony) ⁸ Complainant sought his union's assistance with negotiating the issue of reassignment and the medical exam. He was advised by the union to attend the fitness for duty exam as a show of good faith, but he not capitulate until receiving notice of the City's intent to terminate his employment. Throughout this time, the City deemed the delay to be a refusal by Complainant to submit to an exam.

⁸ The City asserts that at some point, the Personnel Department accepted that Complainant's condition was incompatible with the Parks and Streets Supervisor job, but this appears not to have occurred until many months later and after Complainant filed his MCAD complaint.

20. On December 9, 2016, the City sent Complainant a letter signed by the Mayor stating his intent to discharge Complainant from employment. (Jt. Ex. 14) The letter stressed that the City had approved Complainant's 12 weeks of FMLA and thereafter, allowed him to use contractual earned sick leave which was about to expire. It questioned Complainant's fitness for duty at that time raising a suspicion that after five months of being medically unfit to work, Complainant was seeking to return because his eligibility for sick leave pay was about to expire. The letter also noted that Complainant failed to respond to the Personnel Director's November 17, 2016, letter requesting that he contact the City to schedule an exam and charged Complainant with insubordination and abandonment of his job. (Id.) Only after receipt of this letter, did Complainant schedule an appointment with the City's doctor, which did not occur until December 30, 2016. (Complainant testimony)

21. The City mistakenly provided the independent medical examiner with the job description for the Cemetery Superintendent's job. As a result of this error, Complainant was medically cleared to return to work as the Cemetery Superintendent with no major changes to his job description. (Jt. Ex. 15) Between December 30, 2016, and February 3, 2017, this issue did not get resolved as the City and Complainant had no communication about his returning to work. His sick leave pay was exhausted as of February 3, 2017, which was his last day on Respondent's payroll. When his sick leave time expired and Complainant had heard nothing from the City about returning to his prior job, he considered his employment to be effectively terminated. He applied for unemployment compensation and was denied, but after an appeal received benefits.

22. On February 6, 2017, Complainant filed a discrimination complaint with this Commission. On March 8, 2017, Complainant had a meeting with Bonet, the City Attorney, and his union representative. At that meeting, the City offered Complainant the position of Storekeeper, which Respondent characterizes as a desk job with fewer physical requirements than the Cemetery Superintendent, and one that Complainant could perform. Complainant testified that the Storekeeper position was a very different job in a different union and he had concerns about accepting the position. The City and Complainant did not discuss his ability to perform this job at the meeting. Respondent asserts that Complainant would have retained his Cemetery Superintendent salary although the Storekeeper position paid only \$48,000. Complainant rejected the position stating that both his and the City's physicians had cleared him to return to work only at his Cemetery Superintendent job. According to Complainant, the parties reached no resolution and Bonet was very angry and stormed out of the meeting.

23. On March 17, 2017, the City sent Complainant a letter directing him to return to work in the position of Storekeeper in the Department of Public Works on Monday, March 20, 2017, and to report to the Building Facilities Manager at the Department of Public Works. (Jt. Ex. 19) Complainant did not report to work to the Storekeeper position on March 20, 2017.

24. Complainant's employment with Respondent was terminated by a letter from Mayor Rivera dated April 10, 2017, stating that he had abandoned his job. Complainant grieved his termination, and an arbitrator upheld the termination, finding that he had abandoned his job. (Jt. Ex. 22) Complainant testified that the events leading up to his termination and losing his job caused him great anxiety and exacerbated his illness. He stated that he had never been fired from a job in 40 years and it hit him hard. The stress resulting from the financial reality of having no income negatively affected his relationship with his wife and family and the loss of income

caused Complainant to question his self-worth. He worried about finding another job at age 52. Complainant discussed his emotional state with his physician and was prescribed Celexa for anxiety and depression. He testified that the medication has helped but depression is an ongoing struggle for him and that such feelings can last for weeks or months. Being out of work for a long period of time allowed him to ruminate about how things went downhill.

25. Complainant was hired by the Town of Reading as the Director of Parks, Forestry and Cemetery at \$62,000 per year on March 9, 2017. He began working for Reading on April 10, 2017. Complainant testified that he applied for this job in anticipation of his termination from Respondent. The job in Reading was very demanding, began to encompass additional responsibilities, required significant overtime, and became too physically demanding for Complainant. The duties were inconsistent with his Crohn's limitations and he began to experience health problems again. He resigned the position after four months on the job. Complainant has searched for other jobs in his field and most recently found part-time seasonal work as an arborist at a local golf course for \$15 per hour.

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B, §4(16) prohibits discrimination in employment based on disability. In order to establish a claim of disability discrimination under G.L. c. 151B § 4(16), Complainant must demonstrate that he suffered from a condition that impaired a major life function or was perceived as disabled, that he was capable of performing the essential functions of the job with a reasonable accommodation, and that he suffered an adverse job action because of his disability or was refused a reasonable accommodation. Godfrey v. Globe Newspaper Co., 457 Mass. 113, 120 (2010) see also City of New Bedford v. Massachusetts

Comm'n Against Discrimination, 440 Mass. 461-462 (2003). A medical leave of absence may constitute a reasonable accommodation. Russell v. Cooley Dickenson Hospital, Inc. et al. 437 Mass. 443, 455, (2002); MCAD Handicap Guidelines 2 II. (C)(9) Definitions-Reasonable Accommodation, X. (B) Absenteeism/Leaves of Absence for Handicapped Persons (1998).

In a disparate treatment disability claim the employee claims that he suffered an adverse action because of his disability, and the employer denies that the action was motivated by the employee's disability, but instead, was based on other factors unrelated to the disability, such as poor performance. See Tate v. Department of Mental Health, 419 Mass. 356, 661 (1995). In such cases, the appropriate analysis is the three-stage burden shifting paradigm set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) and adopted by the SJC in Wheelock College v. MCAD, 371 Mass. 130 (1976). Pursuant to that analysis, if Complainant establishes a prima facie case, and Respondent articulates a legitimate non-discriminatory reason for the adverse action taken, Complainant must prove that the reason or reasons advanced are a pretext for discrimination. Lipchitz v. Raytheon, 434 Mass. 493 (2001).

Complainant alleges that (1) Respondent failed to accommodate his disability when it denied him assistance in the spring of 2016, (2) suspended him for three days for reasons related to his illness, (3) refused to allow him to remain in his job as Cemetery Supervisor, unilaterally ordering his reassignment to a more difficult and demanding job for reasons related to his disability and his taking a medical leave of absence, and (3) terminated his employment for the same reasons. Respondent denies that Complainant requested an accommodation for a disability in the spring of 2016 and asserts that he was suspended and not returned to his job due to Respondent's dissatisfaction with his performance as a manager. Respondent asserts it decided to transfer Complainant to a job that was a better fit and because it did not encompass

Department Head responsibilities. It argues that Complainant's refusal to return to work to either reassigned position after almost nine months constituted abandonment of his job, a finding upheld by an arbitrator. I will address the issue of disability and the disparate treatment aspect of Complainant's claim first.

As regards the threshold question of disability, G.L. c. 151B is to be construed broadly to cover a wide range of people with mental and physical impairments. See Dahill v. Police Dept. of Boston, 434 Mass. 233, 240-241 (2001) Likewise, the regulations interpreting the ADA specifically provide that "the term 'substantially limits' shall be construed broadly in favor of expansive coverage...[and] is not meant to be a demanding standard." 29 C.F.R. § 1630.2

(j)(1)(i). Complainant has demonstrated that the flare-up of his Crohn's disease following on the heels of a severe case of bronchial pneumonia rendered him disabled in the spring, summer, and fall of 2016. The disease affected his gastro-intestinal functions, his joints and his eye-sight and caused him significant fatigue. Initially, Complainant was unable to perform some of the duties he usually performed as Cemetery supervisor, primarily those involving manual labor, but eventually was disabled from working at all for a period of several months. I conclude that Complainant was impaired in major life functions as a result of his Crohn's flare-up and was disabled within the meaning of the law.

Having established that he was disabled, Complainant suffered several adverse actions from suspension to reassignment to termination of his employment. The City contends that Complainant's poor performance and failure to comply with the Mayor's directives were legitimate non-discriminatory reasons for his discipline and reassignment. The evidence establishes that Complainant did not accomplish the installation of cameras at the Cemetery and failed to attend an important City Council meeting in June of 2016. Complainant argues the

condition of the Cemetery was directly related to his poor health and City's failure to provide him with additional assistance.

Complainant's suspension in June of 2016 was for his failure to attend a public City Council meeting and purportedly for his failure to facilitate the installation of cameras at the Cemetery after having been directed to do so by the Mayor in March of 2016.⁹ This discipline was initiated by the Mayor's Office after a constituent posed a question about the condition of the Bellevue Cemetery at a public City Council meeting in early June. The Mayor called upon Complainant to answer the question as the Superintendent of the Cemetery, but Complainant was not at the meeting. The Mayor was embarrassed and angry that a Department Head was not present to respond to a constituent's concerns at a public meeting. Bernal testified that she had sent an email to all Department Heads requiring their attendance at the meeting but Complainant asserted he never received this email. Complainant testified that he had never previously been required to attend City Council meetings and was very ill that night. He texted the Mayor that he was not at the meeting because he was ill but the Mayor had no recollection of that communication.

At a disciplinary meeting on June 14, 2006, which lasted a matter of minutes, Complainant was suspended for failure to attend the meeting and for failure to install cameras at the Cemetery. Complainant was shocked and angry that he was being disciplined and did not speak to the issue of his illness and did not inform the Mayor that he had sought assistance with the Cemetery clean-up due to his medical condition. Complainant also did not discuss his efforts to get approval from the Cemetery Board for the installation of cameras and his attempts to be responsive to both the Mayor's Office and the Cemetery Board, two entities that were clearly in

⁹ The installation of cameras is addressed *infra*, p. 21 at ft. note 10.

conflict. Mayor Rivera's testimony that he was not aware of Complainant's disability at the time he imposed the three-day suspension was credible. The Mayor was justifiably angry and embarrassed because he was unable to respond to a citizen's concerns and he disciplined Complainant for not being present at the public City Council meeting. Respondent has articulated a legitimate non-discriminatory reason for the suspension and the evidence does not support a conclusion that this was a pretext for discrimination based on Complainant's disability. Nonetheless, I conclude that Complainant's failure to install cameras was more of a red herring than a legitimate reason for suspension.¹⁰

While Complainant was on medical leave, the Mayor appointed an interim Supervisor of the Bellevue Cemetery. In August of 2016, some two months into Complainant's leave, the City made a unilateral decision to remove Complainant from the position of Cemetery Superintendent, a position he had held for eight years, and reassign him to a more physically demanding and stressful job with no department head responsibilities. Complainant alleges that Respondent's unilateral decision to reassign him, purportedly for poor performance, was as an additional adverse action based on his disability and his taking a medical leave of absence.¹¹ Respondent asserts that the City received compliments about the condition of the Cemetery under the interim Superintendent and was happy with his performance. Respondent also claims

¹⁰ Complainant testified that he was required to obtain the approval of the Cemetery Board prior to installing cameras. He was conveniently scapegoated for the Cemetery Board's inaction and its apparent political conflict with the Mayor regarding authority over Cemetery operations. While Bernal insisted that Complainant should have moved proactively to install the cameras, despite the Board's intransigence, Complainant testified credibly, and I believe City officials understood, that to ignore the Board on an operations issue would have resulted in Complainant incurring the Board's wrath and possibly discipline. He was between the proverbial "rock and a hard place."

¹¹ The City argues that the transfer was not an adverse action, because it was a similar job with the same salary and benefits, but for all the reasons stated herein, I have concluded otherwise. See Yee v. Massachusetts State Police, 481 Mass. 290 (2019)

to have received after-the-fact complaints about the condition of the Cemetery in the spring. Testimony about the latter was sufficiently vague as to be questionable and not credible.¹²

Prior to the notice of reassignment, Complainant was given no opportunity to respond to any complaints about the condition of the Cemetery or to challenge allegations of his poor performance. Despite his eight-year track record, Respondent did not consider that his ill health was a potential significant factor affecting his performance. Respondent did not discuss the matter with Complainant prior to deciding to remove him, nor did it consider placing him on a performance improvement plan, a much less harsh and reasonable alternative to reassignment, given its stated concerns. The choice to remove Complainant from the job with no advance notice was sufficiently draconian as to support a conclusion of pretext and strongly suggests that the decision was punitive and directly related to his leave of absence. I am persuaded that had Complainant accepted his suspension and returned to work, in lieu of applying for a medical leave, the City would not have taken such stringent action.¹³ It is reasonable to conclude that but for his taking a medical leave upon the heels of his suspension, Complainant would not have been removed from his Cemetery Supervisor position and reassigned.

G.L. c. 151B § 4(16) requires employers to provide reasonable accommodation to disabled employees who are capable of performing the essential functions of the job. A second type of disability discrimination claim arises where an employer fails to meet its obligations in this regard.

¹² The Mayor did not testify about specific complaints. Bonet recalled the Mayor telling him Board members complained but did recall who they were or the substance of their complaints. Bonet could not recall any complaints or negative comments about Complainant, but recalled positive comments from two Board members about the Cemetery's condition in the summer.

¹³ The evidence permits a reasonable inference that some City officials may have harbored the mistaken view that Complainant was "milking" his disability because he was unhappy at having been disciplined, an occurrence that is not always uncommon in such situations.

Complainant alleges that Respondent's actions in several instances constituted a failure to grant him reasonable accommodations. In the spring of 2016, Complainant initially sought an accommodation from the City, both formally and informally in conversations and in an email to Bernal, for reasons related to his medical condition. Requests for accommodation do not need to be stated in a formulaic manner or even using the words "reasonable accommodation."

Anderson v. United Parcel Service, 35 MDLR 45, 50-51, (2010); Duso v. Roadway Express, 32 MDLR 131 (2010) I credit Complainant's testimony that he informed the Mayor's Chief of staff about his severe case of bronchial pneumonia and his Crohn's flare-up and, on at least two, and perhaps three occasions, requested additional help from the City with preparing the Bellevue Cemetery for Memorial Day. He requested the additional support because his illnesses were impacting his ability to work generally, and particularly, his ability to assist with the manual labor related to clean-up, as he normally did. Complainant's calls for additional help are reasonably viewed as requests for an accommodation by a disabled employee which went unheeded. This ultimately resulted in the Cemetery not being in the best of conditions for Memorial Day ceremonies and visitors. I credit Bonet's testimony that Bernal was upset with Complainant because her office was contacted on short notice to provide assistance with setting up chairs for the Memorial Day event. It is clear from Bernal's testimony that she viewed Complainant as shirking his obligations and failing to utilize the budget process to plan appropriately prior to the 4th quarter hiring freeze. Given Bonet's testimony and Bernal's overt criticism of Complainant, I draw the reasonable inference that Bernal likely communicated her views to the Mayor and was instrumental in the decision to reassign Complainant. Bernal's criticisms of Complainant's performance conveniently ignore the fact that she was not responsive to his initial requests for help. They also fail to take into account the fact that

Complainant did not anticipate his Crohn's flare-up and the severity of his illnesses, or that usual volunteers did not show up to assist, as they had in prior years. He requested that DPW employees be made available to help, as had they had in the past. That Bernal was not responsive to Complainant's requests for help was a failure on the City's part to consider and provide a request for a reasonable accommodation to a disabled employee.

Complainant next alleges that Respondent's unilaterally removing him from his job and reassigning him to a more difficult job was also a failure to provide reasonable accommodation. Once Respondent was on notice of Complainant's disability and approved his FMLA leave, it had a duty to inquire and consider, as part of an interactive process, how his medical condition had impacted his ability to do the job. The Commission and the courts have held that where reasonable accommodation becomes an issue, the parties should engage in an interactive process that includes an open and constructive dialogue. Both the employer and the employee must approach the accommodation process in good faith. See, Russell v. Cooley Dickinson Hosp., Inc., 437 Mass. 443, 457 (2002). Engaging in an interactive process requires a good faith effort to explore options that are feasible. See Massachusetts Bay Transportation Authority v. Massachusetts Comm'n Against Discrimination, 450 Mass. 327, (2008) (discussing reasonable accommodation in the context of religious discrimination)

In the late summer of 2016, while Complainant was on leave, the City unilaterally decided to remove him from the position of Cemetery Superintendent and reassign him to a more physically demanding and stressful job with increased supervision duties and longer, unpredictable hours. The decision was made without input from, or advance notice to, Complainant. Just prior to his anticipated return to work, Complainant was informed by letter that his reassignment to the job of Supervisor of Parks and Streets was a *fait accompli*.

Respondent never discussed removal or alternative jobs with Complainant. There was no discussion of Complainant's past performance, no opportunity for him to address complaints or deficiencies, and no suggestion of Respondent's expectations for future performance.

Complainant's physical ability to perform the new job was not considered by Respondent. The Commission and the courts have repeatedly stressed the importance of an inter-active dialogue and that granting accommodations to disabled employees involves a process involving both parties. Ocean Spray Cranberries, Inc. v. MCAD, 441 Mass. 632, 644 (2004); Hall v. Laidlaw Transit, Inc., 25 MDLR 207, 217, aff'd, 26 MDLR 2016 (2004) ("an employer is required to engage in an open and ongoing dialogue or "interactive process" with a qualified handicapped individual about providing a reasonable accommodation."); See Sabella v. Boston Public Schools, 27 MDLR 90, aff'd, 28 MDLR 93 (2005) (unilateral refusal to consider requested accommodation of job-sharing, revocation of an accommodation, and unwillingness to investigate possible reasonable accommodations is contrary to Respondent's lawful obligation to engage in an interactive dialogue with Complainant). The City failed to engage Complainant in an interactive process regarding his past performance and the terms of his return to work.

Precisely because Complainant's disability directly impacted his ability to perform the job, his removal and reassignment during the pendency of his medical leave implicate Respondent's obligations pertaining to reasonable accommodation. Respondent failed to recognize that removing Complainant from his job implicated those obligations for precisely that reason. If an employer grants FMLA or a medical leave as an accommodation to a disabled individual, and then imposes unfavorable conditions upon the employee's return, such adverse action may significantly devalue the benefit of the accommodation. Here, Respondent approved Complainant's medical leave for recovery from an acute episode of a chronic illness, but did not

consider that its subsequent adverse action negated the value of the medical leave in safeguarding Complainant's right to retain his job while ill and his right to a reasonable accommodation for his disability.¹⁴ While Respondent would argue that it did not intend reassignment to be a reasonable accommodation because it was essentially disciplinary in nature, this conveniently ignores the fact that Complainant's disability was a significant underlying factor affecting his performance in the spring of 2016. The failure to engage in an interactive process surrounding this decision is properly viewed as a violation of the duty to accommodate Complainant's disability.¹⁵

The unilateral decision to remove Complainant from a job he had held for eight years came as complete surprise to him, was a crushing blow, and significantly diminished the value of a medical leave of absence as a legally protected benefit. Complainant had grave concerns about his physical ability to perform the new job which was more difficult and stressful. The Personnel Department eventually came to accept the view that the duties of that job were not compatible with this medical condition. Given these circumstances, I conclude that Complainant's refusal to accept the Parks and Streets position was not unreasonable. Respondent's decision to unilaterally reassign Complainant with no advance notice, caused him significant stress and emotional upset that resulted in a relapse of his Crohn's symptoms, set his recovery back by almost two months and resulted in him taking additional medical leave. The additional leave time was medically indicated and the City extended this accommodation in recognition of the fact that Complainant remained disabled from working. Although an

¹⁴ I do not specifically address whether the FMLA extends protections from retaliation.

¹⁵ Although the City made much of the fact that Complainant denied that he was disabled, stated he did not need an accommodation because he could perform the essential functions of the Cemetery job, and refused to formally request a reasonable accommodation, Complainant remained unable to work and on leave for up to two more months. The City's argument that Complainant's rejection of the notion that he was disabled absolves it of need to have a dialogue and to engage in an inter-active process is not persuasive.

employer is not required to extend an employee's leave indefinitely as an accommodation, "[a] request for a limited extension, setting a more definite time for the employee's return to work, may, however, constitute a reasonable accommodation, under the ADA as well as G. L. c. 151B, § 4 (16), based on the circumstances." Russell, *supra*. at 455-456. The City allowed Complainant to remain on leave and to be paid with sick leave time he had accrued.

In November of 2016, Complainant's physician cleared him to return to his position as Cemetery Supervisor and he notified Respondents of his intent to return to his former position. Complainant's access to his work email was discontinued the next day. Despite no agreement on Complainant returning to his job, the City notified Complainant that he was required to obtain a fitness for duty exam prior to his return. Complainant resisted at first, but relented after a month upon advice from his union and after receiving notice of the City's intent to terminate his employment. Due to the City's error and further complicating matters, he was cleared to return to his Cemetery Superintendent position as of the end of December 2016. Since the City had already made it quite clear it would not sanction his return to that job, the stalemate continued and there were no further meetings to discuss the issue.

Once Complainant received medical clearance from his physician to return to work in mid-November of 2016, it seems apparent that his debilitating Crohn's symptoms had subsided. Thereafter Complainant relied on his union to negotiate a resolution of the stalemate with Respondent over his return to work. There is no evidence in the record regarding any communication between the City and the union, but the dispute remained unresolved. Notwithstanding, Complainant remained an employee of the City receiving sick leave pay until his accrued sick leave expired in February of 2017, at which time he filed a complaint with this Commission. Thereafter the City offered him another position as Storekeeper, primarily an

administrative desk job that did not encompass manual labor or supervisory duties. Complainant insisted he would not accept reassignment to a different job in a different department outside his area of expertise. While it is understandable that Complainant would not wish to take on an entirely new job unrelated to his field in his mid-50's and after eight years working as Cemetery Supervisor, there was no evidence to suggest that he was unable to perform the functions of the Storekeeper position. I conclude that the City's offer of Storekeeper was a reasonable last-ditch effort to retain Complainant as an employee of the City, given the many conflicts and months-long stalemate that had ensued. The offer was a practical attempt to resolve the seemingly intractable dispute between two parties who both exhibited unreasonable intransigence at various times. Considering the timing of the offer, it was likely an attempt to forestall further litigation, but could be viewed as an offer of reasonable accommodation, albeit somewhat late. Complainant had already sought alternative employment and did not contact the City between the time he rejected the Storekeeper position and the date on which he was terminated. Complainant's refusal to consider the Storekeeper assignment as a condition of retaining his employment resulted in his termination from Respondent in April of 2017. At the time, he had already accepted an offer from another town in his field of expertise. I conclude that given the duration of Complainant's leave and the contentious intervening events, the termination was not a violation of G.L. c. 151B.

IV. REMEDY

Upon a finding that Respondent has committed an unlawful act prohibited by the statute, the Commission is authorized to award damages to make the victim whole. See G.L. c. 151B §5. In addition to damages for lost wages and benefits, if warranted, the Commission is also

authorized to award damages for emotional distress resulting from Respondent's unlawful conduct. Stonehill College v. MCAD, 441 Mass 549 (2004). Awards for emotional distress "should be fair and reasonable, and proportionate to the distress suffered." Id. at 576. Some of the factors to be considered are: "(1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the Complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm..." Id. The Complainant "must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress." Id.

For the vast majority of time that Complainant was on leave from Respondent, he received his full pay in the nature of sick leave time that he had accrued. He testified that he also received unemployment benefits. His sick leave time ran out on February 3, 2017, and he began working at a new job on April 10, 2017. Had Complainant accepted Respondent's offer of the Storekeeper position on March 8, 2017, and returned to work for the City, he would have lost approximately one month of salary. I conclude that he is entitled to one month's salary or \$5,750. Once Complainant rejected the position of Storekeeper and made the decision to accept a position elsewhere, the Respondent is no longer liable for lost wages. Complainant's inability to perform his subsequent job at a new employer four months later does not resurrect any liability for back pay on the part of Respondent.

Complainant is, however, entitled to damages for the emotional distress for the City's failure to accommodate his disability as discussed above. The fact that the City was unresponsive to his initial pleas for assistance as he struggled to prepare the Cemetery while seriously ill, caused him great worry and distress. The stress of being ill and short-staffed exacerbated his condition and caused him to seek a medical leave of absence. As stated earlier,

the notice of removal from his job and unilateral reassignment with no advance warning was an entirely unexpected blow that caused him significant emotional distress and anxiety, resulting in a relapse of his Crohn's symptoms, which set his recovery back by almost two months and required him to take additional medical leave. The subsequent months spent in limbo worrying about the status of his employment and City's intransigence regarding his transfer to a more physically demanding position caused him additional anxiety and stress. While much of Complainant's testimony about emotional distress was related to the termination of his employment, the evidence, nonetheless, supports a conclusion that Respondent's actions in the many months leading up to his termination, which I found unlawful, also adversely affected his emotional well-being and caused him great upset. I conclude that he is entitled to damages for emotional distress in the amount of \$70,000 resulting from Respondents' initial failure to reasonably accommodate his disability and for the discriminatory removal from his job and unilateral reassignment.

V. ORDER


Based on the forgoing Findings of Fact and Conclusions of Law, Respondent is hereby Ordered:

- 1) To cease and desist from any acts of discrimination based upon disability and failure to accommodate disabled employees.
- 2) To pay to Complainant, Thomas Ferris, the sum of \$5,750 in damages for lost wages with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this Order is reduced to a Court judgment and post-judgment interest begins to accrue.

- 3) To pay to Complainant, Thomas Ferris, the sum of \$70,000 in damages for emotional distress with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this Order is reduced to a Court judgment and post-judgment interest begins to accrue.
- 4) To take affirmative measures to ensure that its Personnel Department is fully trained in issues relating to disability discrimination and the inter-active process required in the provision of reasonable accommodations to disabled employees and to inform the Commission within three months of the issuance of this decision as to when and how such training is accomplished.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission pursuant to 804 CMR 1.23. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order. Pursuant to § 5 of c. 151B, Complainant may file a Petition for attorney's fees.

So Ordered this 26th day of February, 2020.


Eugenia M. Guastaferrri
Hearing Officer