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COMMONWEALTH OF MASSACHUSETTS

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SUPERIOR COURT
CIVIL ACTION
NO. 2016-01854-H
Office of Attorney General
Administrative Law Division

APR 24 2019

Notice sent 4/16/19

COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION, :
JASON MARCUS,

Plaintiff,

vs.

A. H. S.
S. G., P.C.
J. M. B.
R. L. Q.
E. C. C.
S. T.
C. W. F.

CIVIL SERVICE COMMISSION and CITY OF CHELSEA,
Defendants.

**MEMORANDUM OF DECISION AND ORDER ON
CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS**

(sc)

Pursuant to G. L. c. 30A, § 14, the plaintiff, Jason Marcus ("Marcus"), and defendant City of Chelsea ("City") appeal the unanimous decision (one commissioner not participating) dated May 12, 2016 ("Decision") of defendant Civil Service Commission (the "Commission"), upholding the City's decision to terminate Marcus as a police officer based on unfitness for office.¹ The Court heard oral argument on March 20, 2019. For the below reasons, Marcus's motion is **DENIED**, the City's motion is **ALLOWED**, and the Commission's decision is **AFFIRMED**.

RELEVANT FACTS AND PROCEEDINGS BELOW

Marcus began working as a police officer for the Chelsea Police Department ("Department") in 2008. AR 138.² He had previously worked as an officer for the Lynn Police Department. *Id.* Marcus developed a reputation as a diligent and competent officer who interacted well with the public. *Id.*

¹ The Commission is a nominal party and did not move for judgment on the pleadings.

² "AR" refers to the Administrative Record. "Tr." refers to transcripts of the Commission hearing.

In 2009, Marcus was stuck with a hypodermic needle while searching a vehicle. *Id.* at 139. As a result, he was treated at a hospital, prescribed anti-HIV medication and instructed to use precautions in sexual interactions. *Id.* This incident caused difficulties for Marcus and his wife, and resulted in Marcus having a period of depression. *Id.* After Marcus's primary care physician prescribed drugs for his depression, his condition worsened, and he experienced paranoia. *Id.* at 140. He was briefly hospitalized and stayed inpatient for one week at a psychiatric facility. *Id.* Marcus took a month long medical leave, and then returned to work. *Id.* He continued to receive treatment and take psychiatric medications through early 2014. *Id.*

In the months leading up to spring 2014, several officers voiced concern about Marcus's well-being. *Id.* at 141. He was observed working in the rain without a jacket, and walking home wearing only a light running jacket on a bitterly cold winter day. *Id.* This behavior concerned Marcus's supervisor Lieutenant Conley, who had been a police officer for roughly 20 years and had never seen or heard of similar instances in which police officers were not appropriately dressed. *Id.* One evening in spring 2014, Conley went into Marcus's office and found Marcus staring at his computer screen, with the lights off in his office and the door closed. *Id.* at 142. Marcus appeared to be disoriented. *Id.* When Conley asked Marcus if he was okay, Marcus became emotional and teary but said he was good. *Id.*

In the weeks preceding early July 2014, Marcus had talked to Conley several times about topics that had nothing to do with Conley, which further concerned Conley. *Id.* at 143, 141. On July 2, 2014, Conley received an email message from Marcus that

was incoherent to him. *Id.* at 142³. Conley forwarded the email to his supervisor Captain Dunn, who forwarded the email to Chief of Police Brian Kyes. *Id.* at 143.

On July 7, 2014, a Chelsea police sergeant notified Captain Dunn that Marcus appeared to be absent without leave. *Id.* at 144. When Dunn spoke to Marcus that day, Marcus reported that he had been in, but had things to deal with outside the building. Dunn asked Marcus, "Jason, what is going on with you?" Marcus became emotional, and stated he was having issues with his marriage, he was staying in his basement, and his father-in-law had cancer. *Id.* Marcus reported anxiety, ADHD, and bipolar disorder issues to Dunn. *Id.* The Department placed Marcus on paid administrative leave, with the requirement that he submit to a fitness-for-duty evaluation. *Id.* at 144-145.

In 2014-2015, Marcus was given three fitness-for-duty examinations. The first was conducted in July 2014 by Dr. Robert Mullally, a psychologist who worked with the Department. *Id.* at 144. Mullally found that Marcus was not fit for duty and not able to return to work at that time. *Id.* at 145-148. After Marcus's first fitness-for-duty evaluation, Mullally spoke to Lieutenant Conley, and they developed an action plan for Marcus with the goal of having him return to work as a police officer. *Id.* at 149.

Dr. Mullally conducted a second fitness-for-duty evaluation of Marcus in August 2014. *Id.* at 150. Although Mullally saw some positive signs, he also saw several ongoing concerns and concluded that Marcus was not fit for duty and there was no likelihood that Marcus would be fit for duty in the foreseeable future. *Id.* at 152.

In November 2014, a psychiatrist, Dr. Van Wittenberg evaluated Marcus at the Department's request and found that Marcus was not mentally and emotionally fit to

³ The email is set forth on pages 142-143 of the Administrative Record.

perform the essential duties of a police officer. *Id.* at 155-156. Marcus received a more favorable assessment from a psychologist in December 2014, although the psychologist, Dr. Paul Laemmle, was not asked to evaluate Marcus's fitness for duty as a police officer. *Id.* at 157.

On May 19, 2015, the City moved to terminate Marcus's employment as a police officer on non-disciplinary grounds. *Id.* at 162. Chief Kyes stated that he had made the decision "with a heavy heart." *Id.* On May 29, 2015, the first day of the hearing, Marcus submitted a favorable report from Dr. James Beck, a psychiatrist who had been referred by Marcus's union attorney. *Id.* at 161, 163-165. Marcus and the City then agreed that Marcus would receive another fitness-for-duty evaluation by a physician selected by both Marcus and the Department. *Id.* at 165. The parties selected Dr. José Hidalgo, a psychiatrist. *Id.* Hidalgo met with Marcus, reviewed Marcus's inpatient and outpatient medical records, including his meetings with Dr. Mullally, Dr. Wittenberg, Dr. Laemmle and Dr. Beck, interviewed Lieutenant Conley, and prepared a detailed report. *Id.* at 166-167. In his report dated July 11, 2015, Hidalgo found that Marcus had a "recurrent mood disorder, likely of a bipolar spectrum type." He further found that Marcus was not fit to resume his duties. *Id.* at 170. Hidalgo noted Marcus' "severe depressive episode" in 2009, and recent symptoms "severe enough to interfere with his family and work obligations." *Id.* Hidalgo further stated that "[a]lthough at present Officer Marcus appears to be asymptomatic, free of depression,"

he seems to lack the insight into the nature and severity of his mental condition. He is therefore at risk for future relapses and judgment that go along with acute symptoms of his illness, such as the incidents that precipitated his administrative leave.

Id. at 170-171. After a two-day hearing, the City discharged Marcus by letter dated July 24, 2015, based primarily on Dr. Hidalgo's report. *Id.* at 173-175.

Marcus timely appealed his termination to the Commission. *Id.* at 176. At the Commission hearing, Dr. Hidalgo and Dr. Beck both testified. *Id.* at 137. Hidalgo testified that Marcus was not fit to serve as a police officer. See Hidalgo Tr. I:194-197. Beck disagreed with Hidalgo's diagnoses, and criticized various aspects of Hidalgo's report. See Beck Tr. I:172-173, 239-240, 249-250. Marcus, Captain Dunn, Lieutenant Conley and a patrol officer, Mark O'Connor, also testified. AR 137.

In a 50-page decision dated May 12, 2016, Commissioner Ittleman found that the City had "established by a preponderance of the evidence that it had just cause to terminate Mr. Marcus after it was determined that Mr. Marcus was not fit for duty as a police officer based on all (including the IME chosen by both parties) but one of the evaluations of Mr. Marcus." AR 181. The commissioners unanimously adopted the Decision, with one commissioner absent. *Id.* at 185.

Marcus timely filed this appeal.

DISCUSSION

A. The Legal Standards

1. Superior Court review of agency decisions

Pursuant to G.L. c. 30A, § 14(7), this Court may reverse, remand, or modify an agency decision only if the decision is "based on an error of law, unsupported by substantial evidence, unwarranted by facts found on the record as submitted, arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law."

Massachusetts Inst. of Tech. v. Department of Pub. Utils., 425 Mass. 856, 868 (1997).

Petitioner bears the burden of demonstrating the invalidity of the Commission's decision.

Merisme v. Board of Appeal on Motor Vehicle Liab. Policies and Bonds, 27 Mass. App.

Ct. 470, 474 (1989). In 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" by statute. G.L. c.

30A, § 14(7) (1997); see Flint v. Commissioner of Pub. Welfare, 412 Mass. 416, 420

(1992); Seagram Distillers Co. v. Alcoholic Beverages Control Comm'n, 401 Mass. 713,

721 (1988). The reviewing court may not substitute its judgment for that of the agency.

Southern Worcester County Regional Vocational Sch. v. Labor Relations Comm'n, 386

Mass. 414, 420-21 (1982), citing Olde Towne Liquor Store, Inc. v. Alcoholic Beverages

Control Comm'n, 372 Mass. 152, 154 (1977).

2. Civil Service Commission review of decisions by appointing authorities.

General Laws, c. 31, § 2(b), requires the [C]ommission to determine, on the basis of the evidence before it, whether the appointing authority sustained its burden of proving, by a preponderance of the evidence, that there was reasonable justification for the action taken by the appointing authority. Reasonable justification in this context means 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.

Brackett v. Civil Service Commission, 447 Mass. 233, 241 (2006) (quotations and additional citations omitted)

B. Application of the Legal Standards

Marcus makes four separate arguments in support of his motion for judgment on the pleadings. First, he argues that the evidence does not support the conclusions of Dr.

Hidalgo, the City's expert, and therefore it was error to credit his testimony over that of Marcus's expert, Dr. Beck. Brief at 13-16. Second, Marcus argues that lack of insight regarding one's own disorder is not a legitimate basis for finding unfitness, given the dispute in evidence over the nature of his disorder. *Id.* at 16. Third, Marcus argues that Dr. Hidalgo's predictions regarding Marcus's response to future symptoms has no support in the evidence. *Id.* at 17-18. Fourth, Marcus argues that his termination was tainted by the nature of the relationships between the City and some of the mental health professionals who treated him. *Id.* at 18-20. The Court has carefully considered and rejects each of these arguments.

Marcus's first three arguments are based on (1) evidence that contradicts some of Dr. Hidalgo's medical findings, (2) Hidalgo's specific finding that Marcus's lack of insight into his own medical condition has a negative influence on his fitness for duty, and (3) what Marcus argues is a speculative prediction of how he will respond to his psychiatric symptoms in the future. Brief at 13-18. However, the legal standard for Commission review of an appointing authority's decision, and Superior Court review of a Commission decision, is not whether there are viable grounds to question certain medical diagnoses and conclusions of the appointing authority's expert witness. The standard is whether there was "reasonable justification" for the action taken by the appointing authority, meaning "adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law." Brackett, 447 Mass. at 241. Broad swaths of evidence supported the decisions below, including the following: (1) of all the examinations of and reports on Marcus, Dr. Hidalgo's was the most thorough; (2) Dr. Hidalgo was selected by *both parties*; (3)

multiple other medical professionals who examined Marcus reached similar conclusions; (4) the City and the Commission had a strong basis for crediting Dr. Hidalgo's finding that Marcus's illness was "recurrent," based on Marcus's 2009 depression, hospitalization, and medical leave, and the testimony of Captain Dunn and Lieutenant Conley as to multiple instances of concerning behavior by Marcus in 2013-2014. This evidence provided a more than sufficient factual basis for the Commission to credit Dr. Hidalgo's testimony that Marcus was unfit to serve as a police officer at the time of his termination.

This Court recognizes that the Analysis section of the Decision is succinct, and does not include a detailed medical analysis of the varying diagnoses offered by Dr. Hidalgo and Dr. Beck. See AR 181-183. However, as noted above, such an analysis would far exceed the requirements of Commission review. See *supra* at 6.

Commissioner Ittleman credited Dr. Hidalgo over Dr. Beck because Dr. Hidalgo had reviewed the most information, he had spoken to Dunn and Conley, and his conclusion that Marcus's illness and symptoms were "recurrent" struck her as more credible than Beck's conclusion that they were "passing episodes." AR at 182-183. Matters of credibility are for the agency, not this Court, to resolve. Greater Media, Inc. v. Department of Public Utilities, 415 Mass. 409, 417 (1993).

Marcus's fourth and final argument is that his termination was tainted by the nature of the relationships between the City and some of the mental health professionals who treated him. This argument has no legal or factual support. Legally, Marcus cites no case in which a connection between the appointing authority and one or more of the medical experts who treated or evaluated the employee provided a basis for reversing the

Commission's decision. Factually, Marcus ignores the entire sequence of events leading to his termination. After his police officer colleagues and supervisors noticed highly concerning behavior by Marcus, Marcus was placed on paid administrative leave pending a psychological fitness-for-duty evaluation. After Marcus was found psychologically unfit for duty, the City gave him time to undergo counseling and treatment, pending a second fitness-for-duty evaluation. He was then again found psychologically unfit for duty. Only after several additional medical evaluations did the City proceed to a termination hearing. See *supra* at 4. There is no evidence whatever that the City's decision was in any way based on use of medical professionals in any improper way.

The Court understands Marcus's perspective that he was a good police officer who had never engaged in misconduct and was addressing his mental health issues. Indeed, it seems that everyone involved in this proceedings understood this. See AR 174-175. Chief Kyes commenced termination proceedings "with a heavy heart."

However, as Commissioner Ittleman observed, Marcus's job was unique in its stress and responsibility:

Police officers must be able to respond to stressors in a split-second, deciding when and how to use force, including a gun, when their decisions can sometimes be the difference between life and death. Police officers must also communicate promptly and effectively to supervisors, the public, write reports and testify in court. For these reasons, it is within the Respondent's discretion and exercise of good judgment to determine that retaining Mr. Marcus as a police officer is not a risk it chooses, or can afford to take, in the interest of public safety and the safety of other officers.

AR 183.

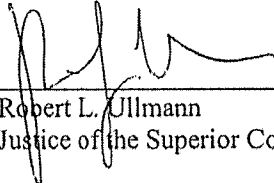
The Commission conducted two entire days of hearings. Each party called three witnesses; there are more than 470 pages of transcripts. A total of 40 exhibits were

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admitted in evidence. Commissioner Ittleman wrote an extremely thorough, 50-page (sc)
Decision including 98 separate factual findings. The Commission unanimously approved
the Decision with one commissioner not participating. There are no grounds for this
Court to reverse the Commission's decision.

CONCLUSION AND ORDER

Plaintiff's Motion for Judgment on the Pleadings (Docket # 13) is **DENIED**. The
City of Chelsea's Cross-Motion for Judgment on the Pleadings (part of Docket # 14) is
ALLOWED. The Civil Service Commission's May 12, 2016 decision is **AFFIRMED**.
The case shall be closed.



Robert L. Jilman
Justice of the Superior Court

Date: April 12, 2019