

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

One Ashburton Place – Room 503
Boston, MA 02108
(617)727-2293

ROBERT POMEROY,
Appellant

v.

D1-16-151

CITY OF PITTSFIELD,
Respondent

Appearance for Appellant:

Marshall T. Moriarty, Esq.
Devin M. Moriarty, Esq.
Moriarty Law Firm Inc.
34 Mulberry Street
Springfield, MA 01105

Appearance for Respondent:

Fernand J. Dupere, Esq.
Dupere Law Offices
94 North Elm Street
Suite 307
Westfield, MA 01085

Commissioner:

Christopher C. Bowman

DECISION

On September 9, 2016, the Appellant, Robert Pomeroy (Mr. Pomeroy), pursuant to G.L. c. 31, § 43, filed this appeal with the Civil Service Commission, contesting the decision of the City of Pittsfield (City), to terminate his employment as a Highway Maintenance Craftsman. On October 12, 2016, I held a pre-hearing conference at the Springfield State Building in Springfield, MA. I conducted a full hearing at Pittsfield City Hall in Pittsfield on December 7, 2016.¹ The hearing was digitally recorded and the parties received a CD of the proceeding.² The

¹ The Standard Adjudicatory rules of Practice and Procedures, 810 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission, with G.L. Chapter 31, or any Commission rules, taking precedence.

² If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the

parties submitted post-hearing briefs on January 27, 2017. For the reasons stated herein, the appeal is allowed in part.

FINDINGS OF FACT

The City submitted documents that were marked as Exhibits 1 through 40. Mr. Pomeroy submitted documents that were marked as Exhibits A through S. Based on these exhibits, the testimony of the following witnesses:

Called by the City:

- Janis Anderson, Administrative Assistant, Department of Public Services;
- David Turocy, Commissioner of Public Services;
- Michael Taylor, Director of Personnel;
- Dr. Brian J. Quinn, Occupational Health, Berkshire Health Systems, Inc.;

Called by Mr. Pomeroy:

- Robert S. Pomeroy, Appellant;

and taking administrative notice of all matters filed in the case, pertinent statutes, regulations, policies, stipulations and reasonable inferences from the credible evidence, a preponderance of the evidence establishes the following:

1. Mr. Pomeroy reports that he was first hired by the City as a provisional custodian in 1992.

(Testimony of Mr. Pomeroy)³

2. Since 2003, Mr. Pomeroy was employed by the City as a Highway Maintenance Craftsman.

(Testimony of Mr. Pomeroy and Exhibit 1)

substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this CD should be used to transcribe the hearing.

³ The City did not stipulate to Mr. Pomeroy's initial date of hire. At the pre-hearing, the City stated that Mr. Pomeroy's date of hire with the City was 2003. Exhibit 7 appears to show that Mr. Pomeroy was first hired by the City on August 1, 1997. The actual date of hire is not relevant to this appeal.

3. At the time of his termination, Mr. Pomeroy was a permanent, tenured civil service employee in the position of Highway Maintenance Craftsman. (Stipulated Fact)
4. Among the duties and responsibilities of a Highway Maintenance Craftsman are:

“ ... operating heavy dump trucks, backhoes, loaders, specialized road construction and equipment, stripers and movers and other grounds or tree maintenance equipment in the performance of duties assigned, including street and highway construction and maintenance, utility construction and maintenance, snow and ice clearance, salting and sanding, bridge and culvert maintenance, relating building or structure maintenance, grounds maintenance and tree and brush trimming and removal and other related public works maintenance tasks.” (Exhibit 35)
5. Among the minimum qualifications and entrance requirements of a Highway Maintenance Craftsman are:

“Ability and agility to climb ladders and enter manholes, access ways & underground vaults; walk long distances over uneven terrain, lift 50 lbs from ground to chest height in a standing position, and work outdoors during all seasons.” (Exhibit 35)
6. On February 28, 2005, Mr. Pomeroy received a written warning for failure to meet work standards. (Exhibit 1)
7. On March 6, 2006, Mr. Pomeroy received a verbal warning for failure to meet work standards. (Exhibit 1)
8. On April 11, 2006, Mr. Pomeroy received a written warning for failure to meet work standards. (Exhibit 1)
9. Mr. Pomeroy reports that, sometime in 2006, he was assaulted and threatened by a co-worker which has caused him to have Post Traumatic Stress Syndrome (PTSD) for which he has taken Ativan on an as-needed basis. The co-worker was subsequently terminated.

(Testimony of Mr. Pomeroy)

10. Ativan causes sedation, slows reflexes and makes it difficult to make quick decisions.
Individuals taking Ativan should not operate commercial vehicles or heavy equipment.
(Testimony of Dr. Quinn)
11. On July 27, 2007, Mr. Pomeroy received a written reprimand for insubordination. (Exhibit 1)
12. On February 13, 2008, Mr. Pomeroy received a verbal warning for dereliction of duty and insubordination. (Exhibit 1)
13. On March 20, 2008, Mr. Pomeroy received a written reprimand for harassing behavior and dereliction of duty. (Exhibit 1)
14. On April 15, 2008, Mr. Pomeroy received a verbal warning for using a city vehicle for personal business during the work day. (Exhibit 1)
15. In October 2008, Mr. Pomeroy received a three (3)-day suspension for leaving his work area without permission after being informed that he could not drive a truck without a GPS. As part of a Commission decision related to that discipline, the Commission did not credit statements from Mr. Pomeroy that he left work to get pills at home after experiencing an anxiety attack. (Exhibit 1)
16. On February 23, 2010, Mr. Pomeroy began collecting accidental disability retirement.
(Testimony of Mr. Pomeroy & Exhibits 7 & 8)
17. On July 12, 2013, the state's Public Employee Retirement Administration Commission (PERAC) notified the City's Retirement Board that Mr. Pomeroy was now able to perform the duties of his former job. (Exhibit 2)
18. Also on July 12, 2013, the City's Retirement Board notified the City's Commissioner of Public Service of PERAC's decision, stating in part, that in accordance with G.L. c. 32, s. 8(2)(a):

“ ... [Mr. Pomeroy] shall be returned to the position from which he [] retired or, if [he] is able to perform the essential duties of a similar job within the same department for which he is qualified , [Mr. Pomeroy] shall be returned to that position if it is vacant. If such similar position is not vacant, then the last person appointed to that rank or position will be reduced in rank or position, and shall be placed at the top of the list to fill such rank or position for a two-year period.”
(Exhibit 2)

19. On September 16, 2013, the City’s then-Director of Personnel notified what appears to be

Mr. Pomeroy’s then-counsel that: “We are going through the RIF process. The earliest that Mr. Pomeroy could assume his old position is October 1, 2013 ...” (Exhibit 3)

20. On September 20, 2013, the City notified Mr. Pomeroy that, “Effective October 1, 2013, you

are reinstated as Highway Maintenance Craftsman I in the Department of Public Works Highway Division.” (Exhibit 4)

21. On October 1, 2013, Mr. Pomeroy returned to work for the City as a Highway Maintenance

Craftsman. (Exhibit 7)

22. On December 10, 2013, a Working Foreman in the Department of Public Services sent an

email to the Commissioner of Public Services regarding lawn damage allegedly done by Mr. Pomeroy while he was plowing a residential street in the City. At some point, according to the email, the Working Foreman instructed Mr. Pomeroy to return to the street and clean the sod that had been thrown into the driveways on the street. The Working Foreman’s email states in part:

“Mr. Pomeroy came up to me, got into my truck, and asked if he was going to be written up. I replied that, ‘I don’t know.’ He [Pomeroy] stated, ‘That if he loses his job, he was going to kill himself.’ He also stated that he has nothing to live for. He started talking about things that are going on with his personal life. He stated that he’s doing the best he can, that he hasn’t been in a truck for 5 years, that he wanted to go work at the School Department, that life sucks, that he would be better off taking a bottle of pills and some whiskey ...”
(Exhibit 6)

23. On February 2, 2014, Mr. Pomeroy was admitted to Berkshire Medical Center (BMC). He was discharged on February 11, 2014. (Exhibit 9)

24. On February 13, 2014, the City's then-Director of Personnel sent an email to the City's counsel stating in relevant part:

"I sent you two previous emails this afternoon regarding Robert Pomeroy. He was admitted to BMC [] twice in the last two months. Today he returned to work after being released for treatment and received a reprimand ... regarding a previous incident. Shortly thereafter, he abandoned a city vehicle with the keys left inside in the parking lot at Berkshire Medical Center ... He is unreliable, unpredictable and I believe we need to address this as soon as possible."
(Exhibit 10)

25. Also on February 13, 2014, Mr. Pomeroy was evaluated at BMC for "for lumbar strain / sprain." A nurse practitioner at BMC penned a letter excusing Mr. Pomeroy from attending work until February 17, 2014. (Exhibit 11)

26. On July 2, 2014, Mr. Pomeroy sustained an injury at work lifting a lawnmower off a truck.
(Testimony of Mr. Pomeroy and Exhibits 12 & B2)

27. At some point subsequent to July 2, 2014, Mr. Pomeroy was approved for workers compensation. (Testimony of Mr. Pomeroy)

28. On May 13, 2015, the Medical Director at Occupational Health and Environmental Medicine, affiliated with Berkshire Health Systems, Inc., wrote to the City stating in part:

"Mr. Pomeroy suffered an occupational injury on 07/02/14. He has been followed by this office since that time. His diagnosis for this injury is Sacro-iliac joint derangement. He has failed to make much improvement in his condition. He has pre-existing spinal conditions which are not work-related. He also suffered a non-work related Motor vehicle accident while undergoing treatment for his original Work related injury. I just saw Mr. Pomeroy on January 22, 2015. At that time I stated that Mr. Pomeroy was at Maximum Medical Improvement and his condition will not change. He is Not Fit for Duty as a truck driver. This is considered a permanent condition." (Exhibit 13)

29. On June 22, 2015, a Board Certified Orthopedic Surgeon from The Orthopedic Center in North Adams, after conducting a clinical examination and a review of Mr. Pomeroy's medical records, authored a report which stated in part:

"There is no evidence of a substantial injury at the time of his motor vehicle accident on 02/21/2014. His injury on 07/02/2014, while at work, was a minor aggravation of an underlying preexisting condition. He is presently capable of working full-time in a medium-duty position. He should avoid pick and shovel work. He should avoid lifting beyond 30 lb, and avoid pushing, pulling and carrying beyond 30 lb, as well. I do not believe his work incident, in July, 2014, is a major cause of his ongoing, subjective back pain complaints. I agree with his other treating physicians that he can return immediately to work, under the above circumstances." (Exhibit B2)

30. On September 21, 2015, an Orthopedic Surgeon from a medical office by the name of Dane Street in Boston, authored a report regarding Mr. Pomeroy which stated in part:

"It is my medical opinion that he does have restrictions and limitations due to his chronic lumbar spine condition. He is unable to lift or carry any objects greater than 30 pounds. He needs to perform good body mechanics where he bends at his knees and not at this waist. He should consider wearing a lumbar spine support brace when performing heavy lifting. It is my medical opinion that he is permanently partially disabled with this restriction and limitations." (Exhibits 14 & A2)

31. On October 14, 2015, a physician from a medical office by the name of Pioneer Spine and Sports Physicians PC, authored a report regarding Mr. Pomeroy which stated in part:

"The patient wants to return to work in a custodian capacity. The patient states that this job involves mostly standing and that he could do this. Cannot tolerate sitting for long periods of time."

The report also states:

"In my professional opinion, he can work as a custodian with no restrictions. He will always be at some degree of risk of injury performing work related duties as well as with exercise. I see no reason why he cannot return to work."
(Exhibit 16)

32. On November 3, 2015, a psychotherapist in private practice penned a letter "to whom it may concern" which was date-stamped by the City Clerk as received on November 10, 2015. The letter stated in relevant part:

“I first evaluated Mr. Pomeroy in 2006. At that time Mr. Pomeroy had been the victim of a violent assault where a co worker first assaulted him and then slammed his car into Mr. Pomeroy’s vehicle when working for the City of Pittsfield Highway Department. In subsequent months the attacker made multiple threats to kill Mr. Pomeroy. The result of this incident and the threats was that he experienced multiple symptoms consistent with Post Traumatic Stress Syndrome (PTSD). I diagnosed him with PTSD then.

Several years later Mr. Pomeroy had another incident when working for the Highway Department where he was involved in a serious collision during a snowstorm. This added to and further intensified his PTSD symptoms.

He has been in weekly psychotherapy with me recently and it is clear that Mr. Pomeroy continues to have significant PTSD symptoms. He has periodic flashbacks and panic attacks triggered by relevant triggers to these incidents. In particular, being at the site of his attack (a location where he would be required to work at daily should he work for the highway department) triggers intense anxiety and panic. These symptoms are such that in my opinion working for the Highway Department would not be in his best interest.

In contrast, I see no reason why he could not successfully return to janitorial work as he has done previously. Other than the PTSD symptoms related to highway department related activities, Mr. Pomeroy is psychologically stable and physically healthy. I know him to be someone who is responsible and who is eager to return to work. It is very unlikely that janitorial work would trigger PTSD symptoms and I would expect him to be very successful working in that capacity.” (Exhibit B1)

33. On November 30, 2015, the City conducted a local hearing to determine if Mr. Pomeroy should be terminated. Mr. Pomeroy did not attend the hearing. (Exhibit 20)

34. A letter dated November 30, 2015, signed by the City’s then-Mayor and addressed to Mr. Pomeroy, accepts a City hearing officer’s report and stated that Mr. Pomeroy’s employment with the City was terminated, effectively immediately. The hearing officer’s report cites to the medical opinions which state that Mr. Pomeroy is permanently partially disabled and unable to lift or carry objects greater than 30 pounds, below the 50-pound threshold in the Highway Maintenance Craftsman job description. The hearing officer’s report also states:

“I would lastly note that Mr. Pomeroy is currently receiving Workers Compensation benefits ... in the event that he is able to physically return to work in the future, he would receive hiring preference provided a suitable job is available, as provided for in MGL, c. 152, s. 72A.” (Exhibit 17)

35. Shortly after November 30, 2015, Mr. Pomeroy's union representative notified the City that it was through a miscommunication that Mr. Pomeroy and others representing him did not attend the November 30th hearing. The City agreed to reschedule the hearing to be held on January 7, 2016. (Exhibit 20)
36. On December 15, 2015, a physician from Concentra Medical Centers in Springfield hand-wrote the following on a "Return to Work Evaluation Form":

"PT was involved MVA 2014 & involved in back injury lifting a lawnmower. Pt had a positive MRI. He was seen by ortho. He went through several months of PT. Pt wants to hold off on surgery. He doesn't note any residual nerve pain / deficits. He states he has been able to lift 50-70 lbs without difficulty. He is ready to go back to work as a custodian. Prolonged sitting can be aggravating. No paresthesias. Letter from PCP 10/18/15 shows OK to work as a custodian. From of spine = reflexes, pulses neg SLR. able to heel / toe walk. Able to lift 50 lbs without difficulty. RTW c/o restrictions." (Exhibit 19)
37. On December 17, 2015, the City's former Mayor (Daniel Bianchi) forwarded a notice to Mr. Pomeroy informing him of the January 7, 2016 hearing. (Exhibit 20)
38. On January 4, 2016, Linda Tyer was sworn in as the new Mayor of Pittsfield.
39. On January 6, 2016, counsel for Mr. Pomeroy forwarded a letter to Mayor Tyer asking that the January 7th hearing be canceled, citing legal concerns that the hearing cannot be conducted by a hearing officer appointed by the former Mayor, who is no longer the appointing authority. (Exhibit 20)
40. The hearing officer, citing the legal challenge by counsel for Mr. Pomeroy, decided not to go forward with the hearing on January 7th. (Exhibit 20)
41. On January 18, 2016, Mr. Pomeroy received notification from Dane Street that he was scheduled to attend an Independent Medical Examination (IME) on February 1, 2016. (Exhibit 21)

42. On February 2, 2016, an orthopedic surgeon from Dane Street, after conducting a clinical examination and reviewing medical records, completed a report regarding Mr. Pomeroy which stated in part:

“He has fully recovered from his lumbosacral strain syndrome, which occurred at work on 07/02/2014. He has rehabilitated himself to a point where he can now return to work as a custodian with no restrictions. I agree with others that he is capable of returning to work on a full-time basis. In my opinion, he has reached maximum medical improvement.” (Exhibit 21)

43. On February 9, 2016, the orthopedic surgeon from Dane Street completed an updated report stating:

“I have been asked to revisit my prior IME report on the above noted claimant Robert Pomeroy. I have been provided with additional materials and have been asked to provide an addendum. Please find my addendum below ... I have had the chance to review the Highway Worker, Highway Foreman Job Description. Mr. Pomeroy’s history of symptomatic spondylothesis, with spinal instability, precludes this type of work. Mr. Pomeroy would not be safely able to engage in the heavy lifting requirement on often uneven ground conditions.” (Exhibit 22)

44. On April 28, 2016, a Board Certified Orthopedic Surgeon, after completing a clinical examination of Mr. Pomeroy and a review of medical records concluded that Mr. Pomeroy:

“ ... has recovered from the incident of July 2, 2014. It is my opinion that Mr. Pomeroy is able to return back to the Department of Public Works in the position described in the job description titled “Highway Maintenance Craftsman” which involves, among other duties, lifting up to 50 pounds from the ground to chest.” (Exhibit 25 and Exhibit C)

45. Sometime after April 28, 2016, the City’s current Personnel Director, Michael Taylor, received the above-referenced report. After consulting with the City’s counsel, Mr. Taylor called Mr. Pomeroy and told him that he could return to work on Monday, May 16, 2016. Mr. Taylor notified Highway Superintendent Dan Ostrander and Public Services Commissioner David Turocy that Mr. Pomeroy would be returning to work that day. (Testimony of Mr. Taylor)

46. On Monday, May 16th, Mr. Pomeroy reported to work at 7:31 A.M. and was assigned to clean up the yard at the Highway Department headquarters. (Testimony of Mr. Pomeroy & Exhibit E)
47. At or around 1:00 P.M. on May 16th, Mr. Pomeroy entered the Highway Department office and told Janis Anderson, the administrative assistant who coordinates payroll, that he was having an anxiety attack and needed to leave and see his doctor at BMC. (Testimony of Mr. Pomeroy and Ms. Anderson)
48. After Mr. Pomeroy left work on May 16th, Ms. Anderson and Commissioner Turocy contacted Mr. Taylor and conveyed what had occurred. Mr. Taylor instructed Ms. Anderson and Commissioner Turocy to obtain a medical note from Mr. Pomeroy to excuse his absence. (Testimony of Mr. Taylor)
49. On May 16th, Commissioner Turocy informed Superintendent Ostrander that, until this matter was resolved, Mr. Pomeroy was not to drive any large vehicles or heavy equipment. (Testimony of Commissioner Turocy)
50. On Tuesday, May 17, 2016, Mr. Pomeroy reported for work at 7:11 A.M. (Exhibit E)
51. Sometime during the mid-morning of May 17th, Mr. Taylor, Commissioner Turocy and Ms. Anderson reviewed an Emergency Department Progress Note from BMC regarding Mr. Pomeroy's visit to BMC the prior day. (Testimony of Mr. Taylor, Commissioner Turocy and Ms. Anderson & Exhibit 28)
52. Page 1 of the Emergency Department Progress Note states in part:
- “The patient, Robert Pomeroy, is a 54 year old male seen on May 16, 2016 for stated complaint of ? Overdose / Anxiety. The patient notes a history of anxiety and PTSD surrounding his job because he was in an accident with a plow several years ago, and he was also threatened by a coworker. He notes today was his first day back to work and felt like his boss was trying to ‘phase him out.’ He notes he got increasingly anxious, and had about 7 ativan 0.5 mg tablets today. He states that he was feeling like his heart was racing and he

was sweaty. Now that he is here, he states he feels back to normal, but very tired from all of the Ativan.” (Exhibit 28)

53. Page 3 of the Emergency Department Progress Note states in part:

“Excuse from: work. May return to work / school on: May 17, 2016.” (Exhibit 28)

54. Upon reviewing the Emergency Department Progress Note on May 17th, Commissioner Turocy spoke with Mr. Taylor and expressed his concern that: a) Mr. Pomeroy was taking Ativan to cope with PTSD; b) that Ativan may be on a federal DOT list of prohibited medicines regarding individuals operating vehicles that require a CDL; and c) this may be a permanent situation that will prevent Mr. Pomeroy from continuing to serve as a Highway Maintenance Craftsman. (Testimony of Commissioner Turocy)

55. Also on May 17th, Commissioner Turocy spoke with Superintendent Ostrander again and reminded him that Mr. Pomeroy was not to operate any vehicles that require a CDL and/or any heavy equipment. (Testimony of Commissioner Turocy)

56. Mr. Taylor, the City’s Personnel Director, shared Commissioner Turocy’s concerns about the Emergency Department Progress Note, particularly the references to Mr. Pomeroy taking 7 Ativan; the reference to PTSD; and the reference to anxiety / overdose. Based on his concerns, Mr. Taylor scheduled Mr. Pomeory for a fitness for duty evaluation with Dr. Brian Quinn at Occupational Health. (Testimony of Mr. Taylor)

57. In a letter dated May 18, 2016, Mr. Taylor informed Mr. Pomeroy that he was required to report for a fitness for duty evaluation with “the City’s physician, Dr. Quinn, at Berkshire Occupational Health. Your appointment is Thursday morning, May 19th at 8:30AM.” (Testimony of Mr. Taylor and Exhibit 29)

58. On May 19, 2016, Mr. Pomeroy reported to Dr. Quinn for a fitness for duty evaluation, which Dr. Quinn described during his testimony before the Commission as a “mental status examination.” (Testimony of Dr. Quinn)
59. During the examination, Mr. Pomeroy reported to Dr. Quinn that he often requires Ativan; that he was stressed on a daily basis at work; and that he would take Ativan at work if needed. (Testimony of Dr. Quinn)
60. Dr. Quinn concluded that Mr. Pomeroy should not be operating heavy equipment or driving commercial size trucks because Ativan has a sedative effect which slows reflexes and hampers an individual’s ability to make quick decisions. (Testimony of Dr. Quinn)
61. Dr. Quinn completed and provided the City with a template “fit for duty evaluation report” stating that Mr. Pomeroy was “Fit for duty with the following accommodations: should not be operating heavy equipment or driving commercial sized trucks.” (Exhibits 30 & K1)
62. When Mr. Taylor received Dr. Quinn’s report on May 19th, he was concerned because operating heavy equipment and driving commercial trucks are essential functions of a Highway Maintenance Craftsman. He contacted Commissioner Turocy who stated that this type of accommodation would be difficult and could only be on a short-term basis.

(Testimony of Mr. Taylor)
63. By letter dated May 20, 2016, Mr. Taylor informed Mr. Pomeroy in part that “based on the responsibilities encompassed in your position and staffing needs of the department, there is no accommodation that can be made based on your fit for duty examination. At this time, we cannot allow you to return to work until such restrictions have been removed. We’ll require that you participate in a second fit-for-duty examination within 30 days, if not sooner.”

(Exhibit 32)

64. By letter dated June 16, 2016, Mr. Taylor informed Mr. Pomeroy that he was scheduled for another fitness for duty evaluation with Dr. Quinn on June 23, 2016. (Testimony of Mr. Taylor and Exhibit 33)
65. Dr. Quinn wasn't quite sure why Mr. Pomeroy was being referred to him for a second time on June 23rd. During the June 23rd visit, Mr. Pomeroy handed Dr. Quinn the letter from his psychotherapist which states that he can perform the duties of a custodian. Mr. Pomeroy also told Dr. Quinn that he was using Ativan twice per day and that his individual dosage was 1mg, an increase from the .5 mg reported by Mr. Pomeroy on May 19th. Mr. Pomeroy reported to Dr. Quinn that he was still experiencing PTSD symptoms which trigger anxiety when he is at work. Dr. Quinn's major concerns about Mr. Pomeroy were his use of Ativan and the issues cited in the letter by the psychotherapist. (Testimony of Dr. Quinn)
66. On June 23, 2016, Dr. Quinn completed another template "fit for duty evaluation report" stating that Mr. Pomeroy was fit for duty with the same accommodations listed on the prior report ("should not be operating heavy equipment or driving commercial sized trucks"). Dr. Quinn added the following note: "Ok to use nonpowered tools and small (hand-held) power tools and to drive pick-up truck." (Exhibits 34 & K2)
67. In a letter to Mr. Taylor dated July 13, 2016, Dr. Quinn wrote:
- "I have been treating Mr. Pomeroy at Berkshire Occupational Health for the past several months. He has been given work restrictions – specifically that he should not be operating heavy equipment or driving commercial sized vehicles. It is my opinion that these restrictions are permanent. I do not anticipate that he will ever be cleared for full duty as a Highway Maintenance Craftsman." (Exhibit 35)
68. In a letter to Mr. Pomeroy dated August 9, 2016, Mayor Tyer wrote in relevant part:
- "This letter is being sent pursuant to the provisions of MGL c. 31. S. 39 of the City of Pittsfield's intent to terminate your employment because of medical incapacity.

On September 4, 2015, you were given an independent medical examination (IME) ... [which] states in part ‘He (Pomeroy) is unable to lift or carry objects greater than 30 pounds ... it is my medical opinion that he is permanently partially disabled with this (sic) restrictions and limitations.’

On July 13, 2016, we received a letter from Dr. Brian J. Quinn stating that your work restrictions are permanent and he does not anticipate that you will ever be cleared for full duty as a Highway Maintenance Craftsman I ...

Based on this I.M.E. and Dr. Quinn’s medical statement, you are permanently unable to meet the essential physical requirements of your position. There are currently no available positions under the authority of the City of Pittsfield that you have the ability to fill based on your qualifications and physical limitations. You have been out of work for a substantial period of time and it is my opinion that we can no longer hold your position. In the event that you are able to physically return to work in the future, you will be given hiring preference provided a suitable job is available, as provided for in MGL, c. 152, s. 72A.

In accordance with MGL c. 31, s. 41, I am appointing Denis Guyer as the hearing officer concerning this matter ...” (Exhibits 37 & I)

69. On August 18, 2016, Mr. Denis Guyer conducted a local hearing for the City. In attendance were: Mr. Pomeroy, his counsel, his union representative, Mr. Taylor and counsel for the City. (Exhibit 38)

70. On August 23, 2016, Mr. Guyer filed a report with the City’s Mayor stating in relevant part:

“On September 4, 2015, Mr. Pomeroy was given an independent medical examination (I.M.E.) ... [which] determined that Mr. Pomeroy was unable to lift or carry objects greater than 30 pounds. Mr. Pomeroy’s position as a Highway Maintenance Craftsman requires that he is able to lift 50 lbs. from ground to chest height in a standing position. [The medical report] stated, ‘It is my medical opinion that he is permanently partially disabled with this restriction and limitation.’

On July 13, 2016, the City received a statement from Dr. Brian J. Quinn stating that Mr. Pomeroy’s work restrictions are permanent, and does not anticipate that Mr. Pomeroy will be cleared for full duty as a Highway Maintenance Craftsman.

There was no medical statement presented at the hearing in dispute with either medical opinion. Based on the record information it is my determination that Mr. Pomeroy is permanently disabled from performing the requirements of his position. I am therefore recommending Mr. Pomeroy’s termination from employment for medical incapacity.

I would note that based on this determination Mr. Pomeroy may be eligible for voluntary accidental disability retirement. I believe that he may be submitting an application to the retirement board for this purpose.” (Exhibits 38 & J)

71. By letter dated August 23, 2016, the Mayor notified Mr. Pomeroy that she was accepting the recommendation of the hearing officer and that he was terminated, effective as of that date.

(Exhibits 38 & J)

72. On September 9, 2016, Mr. Pomeroy filed an appeal with the Commission. (Stipulated Fact)

73. On October 12, 2016, I held a pre-hearing conference at the Springfield State Building in Springfield, MA, which was attended by Mr. Pomeroy, his counsel, counsel for the City and Mr. Taylor, the City’s Personnel Director. (Administrative Notice)

74. As part of that pre-hearing conference, the City argued that Mr. Pomeroy’s termination was justified based on two separate medical examinations which showed him as being permanently disabled from performing the requirements as a Highway Maintenance Craftsman. (City’s Pre-Hearing Conference Memorandum)

75. As part of the pre-hearing conference, the City referenced Mr. Pomeroy’s degenerative physical condition as part of the reason justifying the City’s decision to terminate him. (Administrative Notice)

76. At the conclusion of the pre-hearing, the parties mutually agreed to a full hearing date of December 7, 2016 at Pittsfield City Hall. (Administrative Notice)

77. In a letter from Dr. Quinn to Mr. Taylor dated November 30, 2016, Dr. Quinn wrote:

“I treated Mr. Pomeroy on several occasions at the Occupational Health clinic at 610 North Street in Pittsfield. On those occasions he had been seen here for fit for duty evaluations and each time was returned to limited duty for his job with the highway department. Even with these limitations, he had an episode in May 2016 that resulted in an emergency room visit, and yet another fit for duty examination here. It became clear that because of medical reasons, he was never going to be returned to his full duties at that job. He had reached a medical end result: it was anticipated that he would not make any significant improvement.

Prior to my treating Mr. Pomeroy here, he had been seen and evaluated at this office by [the Medical Director]. She had written a letter on May 15, 2015 stating, 'He is Not Fit for Duty as truck driver. This is a permanent condition.' That was a year before my determination of his work status, in which I stated 'he should not be operating heavy equipment or driving commercial sized vehicles,' and that these restrictions are permanent. My opinion, then, concurs with [the Medical Director].” (Exhibit 39)

78. The May 2015 report by the Medical Director referenced in Dr. Quinn’s letter related to the Medical Director’s diagnosis that Mr. Pomeroy suffered from Sacro-iliac joint derangement. The Medical Director’s letter made no reference to any mental health issues such as anxiety, PTSD and/or Mr. Pomeroy’s use of Ativan. (Exhibits 13 & 39)

Applicable Civil Service Law

G.L. c. 31, § 43, states:

“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, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority’s procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.”

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." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102, (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the

efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass.App.Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983)

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956).

"The commission's task...is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether 'there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision'", which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006). See Watertown v. Arria, 16 Mass.App.Ct. 331, 334, rev.den., 390 Mass. 1102 (1983) and cases cited.

Under Section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew." Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. The role of the Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102, (1997). See also Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev.den., 440 Mass. 1108, 799 N.E.2d 594 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den. (2000); McIsaac v. Civil Service Comm'n, 38 Mass App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331 (1983).

An appointing authority may terminate an employee who is medically incapable of performing his position. Rivera v. Dep't of Correction, 26 MCSR 502 (2013), *citing* Brckett v. Gloucester Housing Authority, 10 MCSR 127 (1997) (termination of maintenance worker who had stopped reporting to work because of back problems) and Hilton v. Dept. of Employment and Training, 10 MCSR 247 (1997) (termination of employee stopped working because of chronic fatigue.)

Analysis

There appears to have been considerable confusion here, both on the part of City officials and the doctor who testified for the City at the Commission hearing.

The City's August 23, 2016 termination letter to Mr. Pomeroy states that he is being terminated "because of medical incapacity." That same letter states that the "medical incapacity" is based on:

- 1) A September 4, 2015 medical examination which concluded that Mr. Pomeroy was unable to lift or carry objects more than 30 pounds; and
- 2) A July 13, 2016 written statement from Dr. Quinn stating that Mr. Pomeroy's work restrictions were permanent.

The August 23, 2016 termination notice stated that "there was no medical statement presented at the [City] hearing in dispute with either medical opinion."

The City's termination notice *omitted*, however, the following relevant undisputed facts:

- 1) Approximately seven (7) months *after* September 4, 2015, a Board Certified Orthopedic Surgeon, after examining Mr. Pomeroy, concluded, on April 28, 2016, that Mr. Pomeroy was fit for duty, specifically stating that he was now able to lift or carry objects weighing

50 pounds, a physical requirement of someone holding the position of Highway Maintenance Craftsman; and

- 2) The City received this April 28, 2016 medical report and relied on it to allow Mr. Pomeroy to return to work as a Highway Maintenance Craftsman on May 16, 2016.

At a minimum, the City's Personnel Director, who attended the August 18th hearing referenced in the termination letter, was aware that there was indeed a medical report that effectively superseded the September 4, 2015 report cited by the local hearing officer as it was the Personnel Director who relied on the subsequent April 28, 2016 medical report to return Mr. Pomeroy to duty as a Highway Maintenance Craftsman. Even if the local hearing officer was somehow unaware of that April 28, 2016 medical report, it is perplexing how the City's Mayor could have signed off on a termination letter omitting this available, relevant information which effectively contradicts one of the two reasons for termination. Even several weeks later, as part of the pre-hearing conference before the Commission, the City was still citing Mr. Pomeroy's "degenerative physical condition" to justify Mr. Pomeroy's termination as a Highway Maintenance Craftsman.

In short, the City has not proven, by a preponderance of the evidence, that Mr. Pomeroy is unfit to perform the duties of a Highway Maintenance Craftsman due to physical limitations (i.e. – ability to lift 50 pounds.) Rather, as stated above, the City relied on a medical report that concluded the opposite. Specifically, the subsequent medical report stated that Mr. Pomeroy could lift 50 pounds and that he was fit for duty as a Highway Maintenance Craftsman.

That brings us to the only other reason cited in the hearing officer's report attached to the Mayor's August 23, 2016 termination letter. The fourth paragraph of the local hearing officer's report cites the July 13th letter from Dr. Quinn stating that Mr. Pomeroy's work "restrictions are

permanent.” The Mayor’s letter clearly leaves the impression that the permanent “work restrictions” refer back to the work restrictions cited in the preceding (third) paragraph of the Mayor’s letter (i.e. – the purported inability to lift more than 30 pounds.) It is entirely possible that the local hearing officer actually believed that was the case, as Dr. Quinn’s one-paragraph July 23rd letter only stated that:

“I have been treating Mr. Pomeroy at Berkshire Occupational Health for the past several months. He has been given work restrictions – specifically that he should not be operating heavy equipment or driving commercial sized vehicles. It is my opinion that these restrictions are permanent. I do not anticipate that he will ever be cleared for full duty as a Highway Maintenance Craftsman.”

It appears that the local hearing officer may have inadvertently conflated the two medical reports, one that dealt with whether Mr. Pomeroy could lift heavy objects due to a possible physical degenerative issue and another (Dr. Quinn’s) regarding whether Mr. Pomeroy’s PTSD and use of Ativan prevented him from operating heavy trucks and equipment.

I also infer that, due to this confusion, the City, after Mr. Pomeroy’s termination, and after the pre-hearing conference before the Commission on September 9, 2016, went back to Dr. Quinn to seek a written clarification.

Unfortunately, Dr. Quinn’s November 30, 2016 clarification letter inadvertently misstates certain relevant facts and, like the local hearing officer, appears to conflate two (2) separate issues. Specifically, the first paragraph of Dr. Quinn’s letter stated:

“I treated Mr. Pomeroy on several occasions at the Occupational Health clinic at 610 North Street in Pittsfield. On those occasions he had been seen here for fit for duty evaluations and each time was returned to limited duty for his job with the highway department. Even with these limitations, he had an episode in May 2016 that resulted in an emergency room visit, and yet another fit for duty examination here. It became clear that because of medical reasons, he was never going to be returned to his full duties at that job. He had reached a medical end result: it was anticipated that he would not make any significant improvement.”

The record before the Commission now provides a more accurate picture of what occurred here. Dr. Quinn did not treat Mr. Pomeroy on several occasions and then return him to duty each time with work restrictions, followed by an episode at work in May 2016. Rather, what actually occurred here is, that, *as a result of an episode at work in May 2016*, Mr. Pomeroy was referred to Dr. Quinn for a fitness for duty evaluation.

The second paragraph of Dr. Quinn's letter stated:

Prior to my treating Mr. Pomeroy here, he had been seen and evaluated at this office by [the Medical Director]. She had written a letter on May 15, 2015 stating, 'He is Not Fit for Duty as truck driver. This is a permanent condition.' That was a year before my determination of his work status, in which I stated 'he should not be operating heavy equipment or driving commercial sized vehicles,' and that these restrictions are permanent. My opinion, then, concurs with [the Medical Director]."

The May 2015 report by the Medical Director referenced in Dr. Quinn's letter related to the Medical Director's diagnosis that Mr. Pomeroy suffered from *Sacro-iliac joint derangement*. Dr. Quinn candidly acknowledged during his testimony before the Commission that he never undertook any examination of Mr. Pomeroy regarding back pain-related issues. Rather, according to his testimony before the Commission, Dr. Quinn's conclusion was based on Mr. Pomeroy's use of Ativan to treat ongoing effects related to PTSD, which is not even specifically referenced in Dr. Quinn's November 30, 2016 letter to the City. Similar to the local hearing officer, it appears that Dr. Quinn was unaware that: a) an April 28, 2016 medical report concluded that Mr. Pomeroy was able to lift 50 pounds and was fit for duty; and b) the City relied on this April 2016 medical report to return Mr. Pomeroy to work as a Highway Maintenance Craftsman on May 16, 2016, without restrictions.

Since Dr. Quinn's correspondence to the City does not even reference Mr. Pomeroy's use of Ativan to treat PTSD and how this makes him unfit for duty as a Highway Maintenance Craftsman, I have only Dr. Quinn's testimony before the Commission to determine whether the

City has met its burden of showing that Mr. Pomeroy is not fit for duty for this reason. (Dr. Quinn did not testify at the City's pre-termination hearing.)

During his first evaluation of Mr. Pomeroy on Thursday, May 19, 2016, Dr. Quinn was concerned that Mr. Pomeroy had reported taking 7, 0.5 mg of Ativan (for a total of 3.5 mg) on a day that week (Monday) that Mr. Pomeroy was working as a Highway Maintenance Craftsman. According to Dr. Quinn, even 1, 0.5 mg dose of Ativan could cause a person to have slow reflexes and hamper a person's ability to make quick decisions. In Dr. Quinn's opinion, a person taking Ativan should not be operating heavy equipment or driving large commercial vehicles, two (2) essential duties of a Highway Maintenance Craftsman. During that May 19th meeting, Mr. Pomeroy told Dr. Quinn that he had taken Ativan while at work, but did not state how long he had been taking Ativan.

During his second evaluation of Mr. Pomeroy on June 23, 2016, Mr. Pomeroy reported taking 2, 1mg doses twice per day. Mr. Pomeroy also provided Dr. Quinn with the November 2015 letter from a psychotherapist stating that Mr. Pomeroy suffered from PTSD due to an incident that had occurred at work years earlier.

According to Dr. Quinn, it was Mr. Pomeroy's use of Ativan which was the "main thing" in determining that Mr. Pomeroy was not able to perform the duties of a Highway Maintenance Craftsman. In short, Dr. Quinn concluded that a person taking Ativan could not operate heavy equipment or drive large commercial vehicles, thus making him unfit for duty as a Highway Maintenance Craftsman. Asked if his opinion would change if Mr. Pomeroy was no longer taking Ativan, Dr. Quinn stated he would need to examine Mr. Pomeroy again. If Mr. Pomeroy was "stable" and "symptom free" during a subsequent evaluation, Dr. Quinn stated that Mr. Pomeroy could possibly go back to work as a Highway Maintenance Craftsman, which is far

more equivocal than the November 30, 2016 correspondence from Dr. Quinn which stated that Mr. Pomeroy had “reached a medical end result: it was anticipated that he would not make any significant improvement.” It is clear, to me, that, consistent with the overall confusion that occurred here, Dr. Quinn’s *correspondence* was referring to a *prior* medical report (which had been superseded) regarding Mr. Pomeroy’s *back-related issues*, as opposed to Mr. Pomeroy’s use of Ativan to treat PTSD.

Mr. Pomeroy acknowledges that he has been taking Ativan “as needed” for “roughly ten years” including “2-3 pills per day”, including periods of time that he was employed as a Highway Maintenance Craftsman. Mr. Pomeroy stopped taking Ativan on July 1st, several weeks after he was most recently relieved from his duties as a Highway Maintenance Craftsman. When asked if he could return to work as a Highway Maintenance Craftsman, Mr. Pomeroy stated that he was “not sure” and that he would need Ativan or “something else” to deal with the effects of PTSD, which he claims is triggered by returning to work in the same department where a co-worker allegedly assaulted him many years ago. Mr. Pomeroy testified that he has taken no action, such as consulting with medical professionals, to determine if his PTSD could be treated with the use of some other medication that does not produce the same side effects as Ativan.

While much of the confusion previously referenced can be attributed to miscommunication among City officials, Mr. Pomeroy also played a role in this confusion. He has, at almost every step, sought to be transferred to another position that is more desirable to him (custodian / janitor). He managed to convince medical professionals, some of whom were never asked to weigh in on this issue, to issue reports referencing that Mr. Pomeroy is fit for duty as a custodian / janitor, as opposed to Highway Maintenance Craftsman, a position, in my opinion, that he has

no desire to return to. Both parties add to the confusion on this front by referencing Section 39 of the civil service law which is not applicable here.

G.L. c. 31, § 39 states in relevant part:

“If a permanent employee who has become separated from his position because of disability *shall be subsequently capable of employment as determined pursuant to section eight of chapter thirty-two by the retirement board*, as defined in section one of chapter thirty-two, such employee shall be placed in a position in the same or similar title in the department from which he was separated or any other department prior to the appointment from any civil service list ...”

As outlined in the findings, Mr. Pomeroy had *previously*: a) been separated from his position because of disability; b) subsequently deemed capable of returning to employment by the retirement board; and c) reinstated by the City to his position of Highway Maintenance Craftsman. What is before the Commission *today* is not a retirement board-related issue.

Rather, the issue now before the Commission, applying Section 43 of the civil service law, is whether, the City, by a preponderance of the evidence, has shown just cause for terminating Mr. Pomeroy on *August 26, 2016*. Put another way, have they proven that he is unfit for duty? They have not.

As referenced above, the evidence actually *disproves* the first of two reasons cited by the City to show that Mr. Pomeroy was not fit for duty. He was not, as the City argued in the termination letter, unfit for duty because of an inability to lift 50 pounds. Contrary to the City’s termination letter, the City had received and accepted a medical report which concluded that Mr. Pomeroy could lift more than 50 pounds and that he was fit for duty as a Highway Maintenance Craftsman. The City’s Mayor either omitted this information or was simply not aware of it.

Even if I am to accept the City’s assertion that the *second* reason, which was never even explicitly spelled out in Dr. Quinn’s letters, related to Mr. Pomeroy’s use of Ativan to treat PTSD, the City has not proven, by a preponderance of the evidence, as they have argued, that

Mr. Pomeroy was unfit for duty for this reason and that his condition was permanent. Rather, at the time, the City relied on two scant template-like “reports” filed by a medical professional whose evaluations of Mr. Pomeroy were brief *and* conducted amid much confusion regarding the very purpose of the evaluation. This is not the type of evidence the Commission can rely on to conclude that there is just cause to terminate a civil service employee, even when that employee has an eyebrow-raising disciplinary history calling into question whether he is well-suited for public employment in the first place.

Similar to the Commission’s decision in Rivera, however, while I have concluded that the City lacked reasonable justification to terminate Mr. Pomeroy as being unfit for duty. I am not, however, directing the City to return him to duty at this time. Rather, as in Rivera, the City shall have the opportunity to, forthwith, conduct a comprehensive fitness for duty evaluation to determine whether Mr. Pomeroy is fit for duty as a Highway Maintenance Craftsman. Said evaluation shall be completed no later than sixty (60) days from the issuance of this decision. Should Mr. Pomeroy be determined fit for duty, he shall be returned to his position as Highway Maintenance Craftsman, effective as of the date of the completion of the fitness for duty evaluation. Should Mr. Pomeroy be determined to be unfit for duty, the City shall provide Mr. Pomeroy with all of his rights pursuant to G.L. c. 31, §§ 41-45. During the pendency of this comprehensive fitness for duty evaluation, Mr. Pomeroy shall continue to be on unpaid leave and not entitled to any pay or benefits. Effectively, the Commission, pursuant to its authority under Section 43, is modifying the discipline issued here from termination to unpaid leave (or suspension) pending the completion of the comprehensive fitness for duty evaluation. I believe that exercising that discretion here is appropriate when considering all of the facts, including, but not limited to, the role that Mr. Pomeroy has played in undermining the City’s ability to conduct

a fitness for duty evaluation regarding whether he can perform the duties and responsibilities of Highway Maintenance Craftsman, as opposed to custodian / janitor; and his failure to consult with any medical professionals to determine if a medicine other than Ativan, which may not have the same troubling side effects, can be used to treat his PTSD.

For all of the above reasons, Mr. Pomeroy's appeal under Docket No. D1-16-151 is *allowed in part* consistent with the above-referenced orders.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on May 25, 2017.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d)

Notice to:
Marshall Moriarty, Esq. (for Appellant)
Devin Moriarty, Esq. (for Appellant)
Fernand Dupere, Esq. (for Respondent)