

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

MARLENE BISTANY,
Appellant

v.

Case No. D1-11-273

CITY OF LAWRENCE,
Respondent

Appearance for Appellant:

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Appearances for Respondent:

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Commissioner:

Paul M. Stein¹

DECISION

Procedural History

Pursuant to G.L. c. 31, § 43, the Appellant, Ms. Marlene Bistany (“Appellant” or “Ms. Bistany”), filed a timely appeal with the Civil Service Commission (“Commission”) on September 8, 2011, contesting the decision of the City of Lawrence (hereinafter “City”) to terminate her employment as a police officer with the Lawrence Police Department (“LPD”) on

¹ The Commission acknowledges the assistance of Law Clerk Beverly J. Baker, Esq., in the drafting of this decision.

September 6, 2011. A pre-hearing conference was held on October 18, 2011, at the offices of the Commission. Three (3) days of full hearing were held at the same location on January 24, 2012, February 2, 2012, and February 22, 2012. Neither party requested a public hearing, so the hearing was deemed private. The witnesses were sequestered. The hearing was digitally recorded and the parties were provided with copies of the hearing. The parties submitted post-hearing briefs prior to May 1, 2012.

Summary

By a preponderance of evidence, the City has shown that it had just cause to terminate Ms. Bistany from her position as a police officer with the LPD for her failure to follow orders from Chief Romero.

FINDINGS OF FACT

Based on the exhibits entered into evidence, the stipulations of the parties, the testimony of:

Called by the City:

- Mr. John Romero, Chief of Police, LPD
- Ms. Sue Stevens, Claims Manager, Meditrol, Inc. (“Meditrol”)

Called by Ms. Bistany:

- Ms. Marlene Bistany, Appellant;

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

1. Ms. Marlene Bistany was employed as a police officer with the LPD and assigned to Lawrence High School as a school resource officer. On or about June 7, 2007, Ms. Bistany

was injured during a physical altercation with a female trespasser who entered the school.

Testimony of Ms. Bistany; Ex. 9

2. Meditrol is the third-party administrator for the LPD and handles medical claims.

Testimony of Ms. Stevens

3. Article XII, Section 4 of the collective bargaining agreement between the City and the Lawrence Patrolmen's Association ("Union") provides, in pertinent part: "Injured Leave. General Laws Chapter 41, section 111F shall be applied in cases of injury." Ex. 1

4. As the chief of police, Chief Romero's duties include protecting public safety, managing the department, and addressing budget concerns. It is also essential to the order and discipline of the department that his subordinates comply with Chief Romero's lawful orders.

Testimony of Chief Romero

5. Shortly after this incident occurred, Ms. Bistany saw her primary care physician, Dr. Kim, in Andover, Massachusetts. Ms. Bistany was prescribed medication and referred to Dr. Tahsin Ergin, an orthopedic surgeon at Essex Orthopedics in Andover, Massachusetts.

Testimony of Ms. Bistany

6. Following this incident, Ms. Bistany was placed on Injured in the Line of Duty ("ILD") status. Testimony of Chief Romero

7. On or about September 14, 2007, Ms. Bistany underwent an MRI as part of her treatment with Dr. Ergin. The MRI revealed that she had multiple herniated discs in her neck.

Testimony of Ms. Bistany, Chief Romero

8. On or about October 18, 2007, Ms. Bistany was seen by Dr. Peter Grillo, a neurologist at New England Neurological Associates in Lawrence, Massachusetts. Dr. Grillo referred her to Pain Management. Ex. 10; Testimony of Ms. Bistany

9. On or about November 6, 2007, Ms. Bistany began treatment with Dr. Elizardo Carandang, a pain specialist at New England Neurological Associates in Lawrence, Massachusetts. Dr. Carandang ordered various tests and also prescribed a physical therapy program. Ms. Bistany had several appointments with Dr. Carandang, but did not feel that she was making progress and discontinued her treatment with him after her appointment on or about August 26, 2008. Ex. 10; Testimony of Ms. Bistany
10. On or about January 9, 2009, Dr. Grillo responded to a letter sent by Chief Romero on or about November 24, 2008, requesting clarification of Ms. Bistany's work capacity. Dr. Grillo stated that the current diagnosis preventing Ms. Bistany from returning to duty was "chronic pain" likely related to the June 7, 2007 incident. Dr. Grillo had no recommendation regarding Ms. Bistany's current treatment plan and there were no follow-up appointments scheduled with him at that time. Dr. Grillo noted that "there are no permanent injuries" and, from his point of view, "[Ms. Bistany] would return and perform the full duties of a police officer." Ex. 10
11. On or about January 27, 2009, Chief Romero contacted Ms. Bistany in writing to inform her that he was in receipt of Dr. Grillo's response to his November 24, 2009 inquiry and that she was cleared for return to her duties. Chief Romero offered Ms. Bistany a return to a patrol assignment effective February 8, 2009. Ms. Bistany did not report for duty at that time. Ex. 10; Testimony of Ms. Bistany
12. On or about February 6, 2009, Ms. Bistany provided the LPD with a copy of a medical report, dated February 3, 2009, and generated by Dr. Robert Pennell, an orthopedic surgeon located in Lynn, Massachusetts. According to Dr. Pennell's report, Ms. Bistany remained

totally disabled from the June 7, 2007 incident and that her prognosis was “uncertain.” Ex. 10

13. During her appointment with Dr. Pennell, Ms. Bistany had a conversation with him regarding surgery and her prognosis. Dr. Pennell explained the surgery to Ms. Bistany and it was her understanding that the surgery would leave a scar on the front of her throat and she would most likely lose movement of two of her fingers on her left hand. In addition, Ms. Bistany learned that the worst case scenario would be paralysis from the neck down. As a result, Ms. Bistany had concerns about undergoing surgery. Testimony of Ms. Bistany
14. Ms. Bistany was removed from ILD status in February 2009 but did not return to duty. Instead, Ms. Bistany grieved her removal from ILD status and, by a Settlement Agreement with the City, was returned to ILD status effective November 18, 2009. Ex. 9; Testimony of Ms. Bistany
15. No medical bills were being paid by Meditrol or the City between approximately February 2009, when Ms. Bistany was ordered back to work, and March 2010, when the Settlement Agreement was entered into. Testimony of Chief Romero, Ms. Stevens, Ms. Bistany
16. Pursuant to the Settlement Agreement, Ms. Bistany was “to use her best efforts to secure an appointment with a physician of her choosing by January 15, 2010, and will, after consultation with her medical advisor(s), decide upon a course of treatment which in her best judgment, offers the best opportunity for her eventual restoration to active duty.” Ex. 3
17. The settlement agreement also provided: “The City shall have the right to have Officer Bistany examined by a physician of its choosing to determine her then current fitness for duty, said examination and determination to be made after January 15, 2010.” Ex. 3

18. The City never exercised its right under the settlement agreement to have Ms. Bistany submit to an independent medical examination. Testimony of Ms. Stevens
19. On or about March 10, 2009, Ms. Bistany began seeing Dr. Steven Freidberg, a neurosurgeon with the Lahey Clinic in Burlington, Massachusetts. In his notes following Ms. Bistany's first appointment, Dr. Freidberg states that Ms. Bistany's pain is now "dominating her life" and "she cannot work." Dr. Freidberg's notes also mention that at this time, Ms. Bistany's MRI was a year and a half old and "should be repeated prior to surgery." Testimony of Ms. Bistany; Ex. 11
20. On or about January 21, 2010, Ms. Bistany had her second appointment with Dr. Freidberg. His notes state Ms. Bistany has not had treatment in "the last year" and "had this issue in litigation." meaning the grievance Ms. Bistany filed and subsequent Settlement Agreement. Dr. Freidberg also notes that he will repeat Ms. Bistany's x-rays and MRI and will see her again in six weeks. Ex. 11
21. By agreement dated March 4, 2010, the period of February 2009 through November 18, 2009 was accepted as a period of ILD status for Ms. Bistany. Ex. 9
22. On or about June 24, 2010, Ms. Bistany had another appointment with Dr. Freidberg. In his notes from the appointment, Dr. Freidberg states: "My recommendation is for [Ms. Bistany] to have a current MRI, the previous one is 3 years old. She would prefer to treat with physical therapy. I will refer her to physical therapy and see her again in 2 months. If she is no better, she certainly should pursue this." Exs. 11 & 16
23. On or about July 21, 2010, Chief Romero sent a letter to Dr. Freidberg requesting information based on Dr. Friedberg's "best medical opinion" as to the "real probability" of Ms. Bistany being able to return to full active duty, taking into account several different

treatment scenarios. Included with this letter were two additional documents: a “Fair Summary of Facts” regarding Ms. Bistany and the Commonwealth of Massachusetts Police Officer Task List. This letter was drafted by Meditrol for Chief Romero. Ex. 10; Testimony of Ms. Stevens.

24. On or about July 22, 2010, Ms. Bistany was evaluated and began a physical therapy program at Northeast Rehabilitation Health Network – Haverhill Cedardale.

25. On or about July 22, 2010, Chief Romero sent a letter to Ms. Bistany stating that, “[b]ased on the recommendations of your doctor, you are directed to undergo a cervical spine MRI.” Ms. Bistany was also advised that she should make this appointment no later than August 6, 2010, and to inform Sergeant Picard of the date and time of the MRI appointment. Ex. 7a

26. Dr. Freidburg responded to Chief Romero’s letter (dated July 21, 2010) in a letter dated July 23, 2010 and electronically authenticated by Dr. Freidburg on August 2, 2010. In this letter, Dr. Freidburg states:

I would like not to answer your questions until I see Marlene Bistany again and have an MRI done. With that information and with the information in your letter, I will then be able to answer your questions with more accuracy and with more fairness, both to you and to Ms. Bistany.

Ex. 7b

27. On or about August 2, 2010, Ms. Bistany received a phone call from Chief Romero. During this conversation, Chief Romero informed Ms. Bistany that she had an MRI scheduled the following day and that “she had better be there.” Prior to this phone call, Ms. Bistany was not aware that she had an MRI scheduled. Ms. Bistany attempted to ask Chief Romero if she could postpone the MRI, but Chief Romero refused and ordered Ms. Bistany to attend the MRI appointment. Testimony of Ms. Bistany

28. Ms. Bistany said she had an additional medical issue around this time and was scheduled to see her gynecologist the following week. Testimony of Ms. Bistany
29. On or about August 3, 2010, Ms. Bistany went to get an MRI at Chelmsford MRI. When Ms. Bistany was completing the pre-screening questionnaire, she wrote that there was a possibility that she may be pregnant. While Ms. Bistany had not actually taken a pregnancy test at this time, contrary to her statements to the receptionist/intake staff at Chelmsford MRI, she was planning to have a blood test performed by her gynecologist on or about August 10, 2010, and believed that she might be pregnant. Testimony of Ms. Bistany
30. Due to the possibility of pregnancy, Ms. Bistany did not undergo an MRI on or about August 3, 2010. Testimony of Chief Romero, Ms. Bistany
31. Also on or about August 3, 2010, the intake staff asked Ms. Bistany if she had brought the prescription for the MRI. Ms. Bistany did not have a prescription and it does not appear that Dr. Freidberg's office ordered the MRI. Testimony of Ms. Bistany; Administrative Notice
32. The MRI was rescheduled to August 11, 2010, at Chelmsford MRI. Testimony of Ms. Bistany
33. In a letter dated August 5, 2010, addressed to Ms. Bistany from Chief Romero, Chief Romero ordered Ms. Bistany, *inter alia*, to provide him with her pregnancy status, in writing and signed by her doctor, no later than August 10, 2010. In this letter, Chief Romero also informs Ms. Bistany that if she is not pregnant, she is ordered to attend the MRI appointment on August 11, 2010. Chief Romero's letter also states:

Should you [Ms. Bistany] fail to provide me with the requested information or, if you are not pregnant, should you fail to go through with the MRI your continued Injured in the Line of Duty benefits may be affected and you may be subjected to disciplinary action up to and including termination of your employment with the Lawrence Police Department.

Ex. 7c

34. On or about August 10, 2010, Ms. Bistany's attorney, Mr. Richard Sullivan, sent a letter to Chief Romero in response to Chief Romero's letter to Ms. Bistany, dated August 5, 2010. In Mr. Sullivan's letter, he challenges the Chief's request for Ms. Bistany's pregnancy status and suggests that the Chief is acting "beyond [his] authority" with respect to his involvement in Ms. Bistany's medical treatment. Ex. 7d
35. Ms. Bistany did not attend her appointment for an MRI at Chelsford MRI on August 11, 2010. According to Ms. Bistany, she did not keep this appointment because she did not have a prescription for this procedure from her doctor. Testimony of Ms. Bistany
36. On or about August 18, 2010, Chief Romero sent a letter to Attorney Sullivan regarding Ms. Bistany. A copy of this letter was also sent to Ms. Bistany. In this letter, Chief Romero states that his letter to Ms. Bistany, dated August 5, 2010, was "based on [his] need to make informed and reasoned judgments for staffing and operational purposes" In the letter, Chief Romero "orders" Ms. Bistany to inform him no later than August 24, 2010, as to whether she is capable of undergoing an MRI or, if she is unable to have an MRI, to provide him with medical verification as to why she cannot. Ex. 7e
37. On or about August 19, 2010, Chief Romero suspended Ms. Bistany for five (5) days for "failure to follow [his] direct orders in connection to [her] injured on duty claim" and informed Ms. Bistany that she was "in violation of Chapter 28, Section O (neglect or disobedience of orders) of the Lawrence Police Department's manual." Ex.16
38. Ms. Bistany never received a hearing before the appointing authority and appealed her suspension with the Commission. The City rescinded the suspension. Testimony of Ms. Bistany

39. Ms. Bistany was never given a handbook for the LPD. To her knowledge, no one that Ms. Bistany knows has seen or been issued such a handbook or manual. Testimony of Ms. Bistany

40. On or about August 24, 2010, Attorney Sullivan sent a letter to Chief Romero informing him that Ms. Bistany “is capable of undergoing an open MRI.” The letter also states: “Whether or not an MRI is reasonable and medically necessary is a determination which ought be made by Bistany’s treating neurosurgeon, whom Bistany will be consulting within the next several weeks.” Ex. 7f

41. On or about August 24, 2010, Ms. Bistany responded to Chief Romero’s letter dated August 18, 2010. This letter was faxed to the LPD and delivered in person to an officer at the LPD. In this letter, Ms. Bistany states, *inter alia*:

I have an appointment scheduled with my attending physician to discuss my medical treatment and course of action. I am making every effort to comply with your requests, the agreement resulting from my arbitration hearing and the medical advice from my doctor. It was my understanding, I was to undergo physical therapy in effort to improve my physical condition in contemplation of return to duty. I have been attending therapy and am awaiting consultation with my physician to determine the status of the injury.

Ex. 24

42. In a letter dated August 25, 2010, from Chief Romero to Attorney Sullivan, Chief Romero ordered Ms. Bistany to contact his office and provide the name and address of her OB/GYN doctor so he could confirm whether she kept her appointment that was scheduled in or about early August 2010. In this letter, Chief Romero also states that if Ms. Bistany fails to obtain an MRI prior to her next appointment with Dr. Freidberg, he will be scheduling a discharge hearing based on Ms. Bistany’s “unacceptable conduct relative to her failure to

comply with reasonable directives from her Chief and failure to comply with reasonable diagnostic and treatment directives.” Ex. 7g

43. On or about September 2, 2010, Attorney Sullivan sent a letter to Chief Romero. In this letter, Attorney Sullivan states:

Tomorrow, Bistany will be meeting with her treating neurosurgeon to discuss whether she will ever be capable of performing the essential duties of her position as a police officer of the City. If Bistany will be unable to perform the essential duties of her position, there will be no purpose scheduling any diagnostic tests, including an MRI.

Ex. 7h

44. On or about September 3, 2010, Ms. Bistany had an appointment with Dr. Freidberg. According to his notes, Ms. Bistany had been receiving physical therapy and was feeling “somewhat better in terms of her strength and pain” and would like to continue her physical therapy for another month. Dr. Freidberg thought this was a “reasonable request.” At this time, Dr. Freidberg and Ms. Bistany had a long discussion about “the need to get on with her life.” Ex. 11; Testimony of Ms. Bistany

45. On or about September 21, 2010, Chief Romero sent a letter to Ms. Bistany. In this letter, Chief Romero informs Ms. Bistany that he is still awaiting the results of her appointment with Dr. Freidberg on or about September 3, 2010, as Attorney Sullivan had previously indicated that at this appointment, Ms. Bistany would discuss with her doctor whether she would ever be capable of performing the essential duties of a police officer again. In this letter, Chief Romero also ordered Ms. Bistany to return to Dr. Freidberg’s office and obtain notes from her September 3, 2010 office visit and deliver these notes and records to Chief Romero by October 1, 2010. Ex. 7i

46. On or about October 6, 2010, another letter was sent from Chief Romero to Dr. Freidberg regarding Ms. Bistany. In this letter, Chief Romero again requested Dr. Freidberg to

provide the LPD with his “best medical opinion as to the real probability of Officer Bistany being able to safely and regularly return to performing full regular duty of a police officer.” Chief Romero also enclosed a copy of the Commonwealth of Massachusetts Police Officer Task List. Ex. 7j

47. On or about October 18, 2010, Ms. Bistany had an appointment with Dr. Freidberg. His notes from the appointment state: “I would very much like to have an MRI done. She is reluctant and wants to continue physical therapy.” Ex. 11

48. On or about November 10, 2010, a letter was sent from Chief Romero to Ms. Bistany. In this letter, Chief Romero informed Ms. Bistany that Dr. Freidberg would not respond to his request for information without a signed authorization from Ms. Bistany. As a result, in this letter, Chief Romero also orders Ms. Bistany to sign the attached medical authorization forms and return one to Chief Romero and bring the other to Dr. Freidberg’s office by November 7, 2010. Ex. 7k

49. Ms. Bistany went to the Lahey Clinic’s records department to fill out an authorization form and request her medical records shortly after receiving Chief Romero’s letter. Around this same time, in approximately early November 2010, Ms. Bistany first became aware of Chief Romero’s letter to Dr. Freidberg. Ms. Bistany told the doctor that if he wanted to answer Chief Romero’s letter, to “go ahead.” Dr. Freidberg stated, in sum and substance, that he did not work for the police chief or the City, and that he was there to treat Ms. Bistany as a patient. Testimony of Ms. Bistany

50. On or about November 17, 2010, Attorney Sullivan sent a letter to Chief Romero in response to the Chief’s letter to Ms. Bistany dated November 10, 2010. In this letter, Attorney Sullivan states, *inter alia*, that the medical authorization forms provided by Chief

Romero are “defective” and do not comply with the provisions of the Health Insurance Portability and Accountability Act of 1996 (“HIPPA”). Ex. 12

51. On or about December 7, 2010, Ms. Bistany returned to see Dr. Freidberg. According to his notes, Ms. Bistany had been doing “fairly rigorous physical therapy” and was seeing some improvement. Dr. Freidberg stated he would x-ray her shoulder and refer her to an orthopedic doctor. Ex. 11

52. On or about December 7, 2010, Ms. Bistany had an x-ray taken of her left shoulder. According to the Radiology Report’s findings, Ms. Bistany’s “[b]ones, joints and adjacent soft tissues are normal.” Ex. 11

53. On or about December 29, 2010, Ms. Bistany was seen by Dr. Brian Jolley, an orthopedic surgeon with the Lahey Clinic in Burlington, Massachusetts. Ms. Bistany was referred to Dr. Jolley by Dr. Freidberg. Dr. Jolley gave Ms. Bistany a prescription to take to her physical therapist to work on, along with a home program. Testimony of Ms. Bistany; Ex. 11

54. On or about January 13, 2011, Ms. Bistany had an appointment with Dr. Freidberg. In his notes, Dr. Freidberg states: “I believe that we must come to a resolution about [Ms. Bistany’s] cervical radiculopathy. I will order an MRI of her cervical spine and see her again in mid March. I will have the MRI done in the open magnet in our Peabody facility.” Ex. 11

55. On or about February 14, 2011, Ms. Bistany had a second appointment with Dr. Jolley. His notes state, *inter alia*:

[Ms. Bistany] is scheduled for an MRI scan of C-spine in March. I will try to get an MRI of her shoulder and spine We talked about possible glenohumeral space injection or subacromial space injection. [Ms. Bistany] wants to avoid those currently. I will have her get the MRI scan.

Ex. 11

56. Ms. Bistany's medical records from the Lahey Clinic contain an MR/CT Order Form indicating that Dr. Jolley ordered an MRI for Ms. Bistany on or about February 14, 2011, to be performed in early March. Ex. 11
57. On or about June 3, 2011, Ms. Bistany was served with notice of the City's intent to terminate her employment as a police officer with the LPD pursuant to G.L. c. 31, §§ 41-45. A copy of G.L. c. 31, §§ 41-45 was also enclosed with the letter. Exs. 4 & 9
58. On or about July 27, 2011, a hearing was held regarding Ms. Bistany's ILD status and the proposed termination of her employment. Ex. 9
59. By decision dated August 9, 2011, the hearing officer issued a decision that found the termination of her employment was justified because it was rationally related to the failure to cooperate and follow orders from her superior officer that was rationally related to ascertaining "the medical status of an employee who is out injured and when or whether the employee will or can return to work." Exs. 5 & 9
60. On or about September 6, 2011, based on the hearing officer's report, Mayor William Lantigua concluded that Ms. Bistany's failure to be examined by an MRI was "a reasonable and necessary treatment" that "involved no substantial danger to life or health" and "would have provided a significant benefit to all concerned relative to accomplishing a positive closure in this case." Accordingly, Mayor Lantigua issued a decision to terminate Ms. Bistany's ILD compensation under the provisions of M.G.L.c.41 on the basis of her failure to treat." In addition, Mayor Lantigua terminated Ms. Bistany's employment with the LPD for the reasons set forth in the hearing officer's letter, namely, that the City was not required to employ an individual who had not cooperated with reasonable requests by her employer

that were necessary to “making an informed and reasoned determination as to closure of your ongoing absence from duty.” Exs. 6 & 9

61. Dr. Freidberg did not testify at the Commission hearing. The Appellant submitted an affidavit that he had written on or about January 17, 2012, a week prior to the commencement of the Commission hearing, which stated: “[Ms. Bistany] remains disabled from police work. Currently she is permanently disabled from performing her usual and regular duties as a police officer.” Dr. Freidberg’s also states in his affidavit: “I am advised that police work is of a very acute physical nature which I, from a reasonable degree of medical certainty, state [Ms. Bistany] cannot do, and based on my current findings she shall never be able to perform.” Ex. 8 (emphasis added)

62. In order to cover the duties that Ms. Bistany was performing, so long as she remained on ILD status, the City was required to pay other personnel overtime and had no means to appoint a new officer. Testimony of Chief Romero

LEGAL STANDARD

Pursuant to G.L. c. 31, § 43, a “person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, appeal in writing to the commission” The statute provides, in pertinent part:

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 the 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 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.

G.L. c. 31, § 43.

An action is “justified” if it is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law.” *Cambridge v. Civil Serv. Comm’n*, 43 Mass. App. Ct. 300, 304, *rev. den.*, 426 Mass. 1102 (1997); *Comm’rs of Civil Serv. v. Mun. Ct. of Bos.*, 359 Mass. 211, 214 (1971); *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. of Brockton v. Civil Serv. Comm’n*, 43 Mass. App. Ct. 486, 488 (*citing 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).

While the Commission makes *de novo* findings of fact, “the Commission’s task, however, is not to be accomplished on a wholly blank slate.” *Town of Falmouth v. Civil Serv. Comm’n*, 447 Mass. 814, 823; 857 N.E.2d 1053, 1059 (2006). “Here the Commission does not act without regard to the previous decision of the town, 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.’” *Id.* (*citing Watertown v. Arria*, 16 Mass. App. Ct. 331, 334, *rev. den.*, 390 Mass. 1102 (1983)). The role of the Commission is to determine “whether the appointing authority sustained its burden

of proving there was reasonable justification for the action taken by the appointing authority.” *Cambridge v. Civil Serv. Comm’n*, 43 Mass. App. Ct. 300, 304, *rev. den.*, 426 Mass. 1102 (1997).

Absent significant differences between the Commission’s findings of fact and those found by the appointing authority, or a substantially different interpretation of the relevant law, “the commission is not free to modify the penalty imposed by the town on the basis of essentially similar fact finding without an adequate explanation.” *Town of Falmouth*, 447 Mass. 814 at 824 (*citing Police Comm’r of Bos. v. Civil Serv. Comm’n*, 39 Mass. App. Ct. 594, 600 (1996)).

ANALYSIS

On or about September 6, 2011, the City undertook two (2) actions against Ms. Bistany: first, the City terminated Ms. Bistany’s ILD benefits for “failure to treat;” and second, the City terminated Ms. Bistany’s employment status with the LPD for her “failure to cooperate and follow reasonable orders from [her] Supervisor relative to making an informed and reasoned determination as to closure in [her] ongoing absence from duty.”

To begin, we will address the termination of Ms. Bistany’s ILD benefits. The award and termination of ILD benefits does not fall within the purview of the Civil Service Law, but is governed by a separate statute, Section 111F of G.L. c. 41, which states, in pertinent part:

Whenever a police officer or fire fighter of a city, town, or fire or water district is incapacitated for duty because of injury sustained in the performance of his duty without fault of his own . . . he shall be granted leave without loss of pay for the period of such incapacity; provided, that no such leave shall be granted for any period after such police officer or fire fighter has been retired or pensioned in accordance with law or for any period after a physician designated by the board or officer authorized to appoint police officers or fire fighters in such city, town or district determines that such incapacity no longer exists.

The language of G.L. c. 41, § 111F, provides three conditions that will cause a termination of benefits: retirement; pensioning; or a medical determination of fitness. However, these events should not be considered conditions precedent to the termination of benefits under G.L. c. 41, § 111F, though the occurrence of any one of them will require the termination of benefits. *Hennessey v. Town of Bridgewater*, 388 Mass. 219, 226 (1983). “We think that the Legislature, in proscribing benefits after the occurrence of retirement, pensioning, or a medical determination of fitness, evinced the natural and reasonable intention that an employee should not receive double benefits or be granted a windfall.” *Id.* In addition, “[w]e do not believe it was the Legislature’s intention, in seeking to avoid such a result, to bind cities and towns to indefinite payment of wages to persons lawfully separated from employment by methods other than those delineated in Section 111F.” *Id.*

In *Norton v. City of Melrose*, 21 MCSR 530 (2008), the Appellant sought review of the appointing authority’s decision to deny his request for benefits under G.L. c. 41, § 111F. The Commission dismissed the appeal for lack of jurisdiction, stating:

A dispute over denial of LWP benefits under G.L. c. 41, § 111F would seem to turn on expert medical opinions about the nature of the employee’s injuries and whether the injuries are ‘work-related’ or not. This type of dispute does not fit the normal profile of a civil service appeal typically brought before the Commission. The Commission can appreciate that an employee aggrieved by a denial of LWP benefits might well prefer having an administrative remedy to the Commission, which is generally less expensive and quicker to resolution than either a civil action or arbitration proceeding. However, on balance, the Commission does not read any clear mandate from any relevant statutory language that indicates a legislative intent to confer jurisdiction of LWP disputes upon the Commission. The long-standing practice of appointing authorities, unions and employees under this law, which has been on the books for decades, appears to confirm that general understanding. Indeed, if the legislature had thought an administrative remedy necessary, there are other agencies, such as the Division of Industrial Accidents, that appear to have greater expertise in the adjudication of the factual and legal issues involved and would be a more logical fit.

Norton, 21 MCSR at 531.

As the Commission stated in *Nolan v. City of Melrose*, discussed above, the Commission lacks jurisdiction over ILD benefit disputes. As the provisions of G.L. c. 41, § 111F, were incorporated into the collective bargaining agreement between the Union and the City, any challenge with respect to the termination of Ms. Bistany's ILD benefits is a matter for exclusive adjudication through the grievance and arbitration process set forth in the collective bargaining agreement.² Thus, the Commission cannot review the determination that Ms. Bistany failed to undertake "reasonable or necessary treatment," which authorized the termination of her ILD benefits.

Therefore, the sole issues before the Commission are whether Chief Romero's orders to Ms. Bistany regarding her medical treatment were, in fact, lawful orders and whether her failure to comply justified her termination from employment. Chief Romero issued several orders to Ms. Bistany while she was on ILD status. Specifically, Chief Romero ordered Ms. Bistany, on numerous occasions, to submit to an MRI or to provide medical documentation indicating why she was unable to do so. In addition, Chief Romero ordered Ms. Bistany to provide him with her "pregnancy status" and to give him the name and contact information of her gynecologist.

As the chief of police, Chief Romero's duties include protecting public safety, managing the department, and addressing budget concerns. It is also essential to the operation of the department that his lawful orders be complied with. At the Commission's hearing, Chief Romero acknowledged that he does not have the authority to dictate an officer's medical care. However, in order to properly perform his managerial duties, Chief Romero could reasonably require certain information necessary to enable him to evaluate Ms. Bistany future employment status. In the letter that Chief Romero received from Dr. Freidberg, on or about July 23, 2010,

² So far as it appears, for reasons that were not explained, Ms. Bistany's union did not pursue a new grievance under the collective bargaining agreement as it had done with respect to the 2009 termination of ILD benefits which had resulted in the March 4, 2010 Settlement Agreement (*Exs. 2 & 3*)

Dr. Freidberg declined to answer Chief Romero's questions or offer his medical opinion on the possibility of Ms. Bistany returning to work until he was able to see her again and have an MRI done. Since Dr. Freidberg first began treating Ms. Bistany, his notes make frequent reference to having an updated MRI done. In addition, Attorney Sullivan acknowledged that Ms. Bistany was capable of undergoing an MRI in his letter to Chief Romero, dated August 24, 2010. Chief Romero's orders to Ms. Bistany were not meant to dictate her medical treatment. Rather, Chief Romero's orders were based on the information he had received from Ms. Bistany's own doctor that the MRI was a necessary diagnostic tool that doctor required to provide Chief Romero the information he needed to ascertain Ms. Bistany's ability to return to duty with the LPD.

It is apparent that Chief Romero and Meditrol did not necessarily take the best approach possible in attempting to ascertain information regarding Ms. Bistany's chances of returning to duty. I have not overlooked the fact that the letters drafted for Chief Romero by Meditrol contain some misinformation. There appears to have been a serious lack of communication not only between Ms. Bistany's doctors, the LPD and Meditrol, but between Ms. Bistany and her treating physicians as well. When the City/Meditrol stopped paying Ms. Bistany's medical bills for a period of time, it further complicated matters. Under the circumstances, perhaps it would have behooved the City to arrange for Ms. Bistany to submit to an independent medical evaluation to cut through the logjam and make a determination of her ability to return to duty, as the City was entitled to do under the 2010 Settlement Agreement. However, it was understandable; as Ms. Stevens testified at the Commission's hearing, that Meditrol prefers to work with the treating physicians, as they tend to have more extensive knowledge of the case and the individual. The Commission is not in a position to second-guess the approach that was

taken here. At bottom, it must be Ms. Bistany, not the City, who bears the consequences of the breakdown between the City and her chosen legal and treating medical counselors.

As Chief Romero's orders were reasonably related to determining Ms. Bistany's fitness to perform her duties and return to full working status, the Commission is of the opinion that these were lawful orders. In *Nolan v. Police Comm'r of Bos.*, 383 Mass. 625 (1981), the Massachusetts Supreme Judicial Court stated: "There is no doubt that the Commissioner has a public duty to oversee the performance of police officers A fortiori, the Commissioner has the authority and duty to determine a police officer's fitness to perform his duties or to return to full working status." *Nolan*, 383 Mass. at 630 (citing *Bos. v. Bos. Police Patrolmen's Ass'n*, 8 Mass. App. Ct. 200, 225-27 (1979); *Broderick v. Police Comm'r of Bos.*, 368 Mass. 33, 41-43 (1975), *cert. den.*, 423 U.S. 1048 (1976)).

In *Broderick v. Police Comm'r of Bos.*, the Massachusetts Supreme Judicial Court stated that "an inquiry into private affairs must bear a sufficiently rational connection to the officer's position in the governmental service, in the sense that the question must be reasonably related to the officer's ability and fitness to perform his official duties." 368 Mass. 33, 42-43 (1975), *cert. den.*, 423 U.S. 1048 (1976).

Given the amount of time Ms. Bistany was on ILD status and the burden that her continued and extended uncertain status placed on the LPD's budget and operations, it was essential for Chief Romero to be able to make a definitive determination about Ms. Bistany's ability to return to work that would bring closure to that matter (one way or the other). By disobeying direct orders from Chief Romero that were reasonably related to that determination, Ms. Bistany's actions frustrated Chief Romero's ability to manage the LPD in the manner to which he reasonably was entitled. Chief Romero had good reason to expect Ms. Bistany's

compliance with his lawful orders. Chief Romero made numerous attempts to accommodate Ms. Bistany and secure compliance; however, he was not required to accommodate her indefinitely, and discipline was clearly appropriate.

Having determined that it was appropriate to discipline Ms. Bistany, the Commission must determine if the City was justified in the level of discipline imposed, which, in this case is termination of her employment as a police officer with the LPD. In refusing to comply with Chief Romero's orders, Ms. Bistany was insubordinate. The only prior discipline imposed by the City against Ms. Bistany was a five (5) day suspension, which was later rescinded. A lack of prior discipline is a factor that the City could have taken into consideration when reaching its decision, but this factor did not compel the City to issue a lesser punishment. *See Higgins v. Plymouth Police Dept.*, 17 MCSR 110, 112 (2004); *McIsaac v. Civil Serv. Comm'n*, 38 Mass. App. Ct. 473, 476 (1995).

After considering all of the circumstances, the Commission is not warranted to exercise its discretion to modify the discipline imposed on Ms. Bistany by the City and reduce the discipline to some form of a suspension. The Commission's findings of fact do not differ significantly from those reported by the City, nor does the Commission interpret the law differently than the City has in this case. In addition, there is no evidence of disparate treatment in regard to the penalty imposed nor has there been evidence of any ulterior motives that would warrant the Commission's intervention in regard to the penalty imposed. Furthermore, even if the Commission chose to modify the discipline, the Commission lacks the jurisdiction to review the termination of her ILD benefits under G.L. c. 41, § 111F, for failure to treat, which has not been challenged. As of the Commission hearing, her physician was unable to certify her as fit for duty and, indeed, it was his opinion that she would never be able to return to duty. Ms.

Bistany may have had other remedies that she might have pursued or could now pursue as a result of her apparent (and possibly permanent) disability, but those remedies fall outside of the purview of the Civil Service Law. The Commission, however, will not interfere with the reasonable judgment of the City that it could not continue to fill a position with overtime assignments indefinitely and could no longer employ an officer who was unable to demonstrate an ability to return to duty at any foreseeable time in the future.

For the reasons stated herein, the City had just cause to terminate Ms. Bistany from her employment with the LPD. Therefore, Ms. Bistany's appeal filed under Docket Number D1-11-273 is hereby *dismissed*.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell, and Stein, Commissioners) on April 4, 2013.

A True Record. Attest:

Commissioner

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.

Notice:

Robert H. Minasian, Esq. (for the Appellant)

Anne Randazzo, Esq. and Albert R. Mason, Esq. (for the Respondent)