

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503

Boston, MA 02108

(617) 727-2293

JOVANY SALAZAR,

Appellant

v.

G1-15-89

DEDHAM FIRE DEPARTMENT,

Respondent

Appearance for Appellant:

Pro Se

Jovany Salazar

Appearance for Respondent:

John F. Dolan, Jr., Esq.

Lighthouse Legal Counsel, LLC

775 East Falmouth Hwy.

East Falmouth, MA 02536

Commissioner:

Paul M. Stein¹

DECISION

The Appellant, Jovany Salazar, acting pursuant to G.L.c.31, §2(b), appealed to the Civil Service Commission (Commission), from the decision of the Dedham Fire Department (DFD) to bypass him for original appointment as a firefighter. A prehearing conference was held at the offices of the Commission on June 9, 2015 and a full hearing was held at the same location on August 5, 2015.² The hearing was digitally recorded and each party received a copy of a CD of the hearing.³ Both parties thereafter filed post-hearing proposed decisions.

¹ The Commission acknowledges the assistance of Law Clerk Evan A. Johnson in the drafting of this decision.

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.01 et. seq. (formal rules) apply to adjudications before the Commission with G.L. Chapter 31, or any Commission rules, taking precedence.

³ 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 substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

Findings of Fact:

Eleven (11) exhibits were entered into evidence at the hearing. Based on these exhibits, the testimony of the following witnesses:

Called by the Fire Department:

- William F. Spillaine, Fire Chief, Town of Dedham
- Dr. Mark Schafer, Forensic Psychologist
- Dr. Jose Hidalgo, Psychiatrist

Called by the Appellant:

- Jovany Salazar, Appellant

and taking administrative notice of all matters filed in the case and pertinent rules, statutes, regulations, case law, policies, and reasonable inferences from the credible evidence; I make the following findings of fact:

1. The Appellant, Jovany Salazar is a thirty-two (32) year old resident in the Town of Dedham, Massachusetts. He is married with children. (Testimony of Mr. Salazar)
2. Mr. Salazar is a U.S. Marine Corps veteran who served multiple tours in Iraq. He received an Honorable Discharge in 2005. (Testimony of Mr. Salazar, Dr. Schaefer; Exhibit 8)
3. In June 2001, Mr. Salazar received a Certification as a Level 2 Open Water Diver. The current status of this certificate was not established. (Exhibit 11-ID)
4. . He has completed training as an EMT and paramedic. He trained to be a firefighter in Florida but he has not worked as a firefighter. The certificate he received from the State of Florida has expired. (Testimony of Mr. Salazar; Exhibit 10)
5. Between September 2013 and June 2014, while working in a prior temporary job, Mr. Salazar reported being repeatedly harassed by a work supervisor about his military

background, which triggered Mr. Salazar's post-traumatic stress disorder (PTSD) symptoms.

Mr. Salazar left that temporary position in June of 2014. (Testimony of Mr. Salazar)

6. In 2013, Mr. Salazar sought treatment at a Veterans Affairs (VA) hospital. He received a 60% percent service-related disability: 50% from PTSD and 10% from tinnitus. (Stipulated Facts; Testimony of Mr. Salazar)
7. On November 17, 2014, Mr. Salazar accepted his current job as a materials handler at a local Boston hospital. Taking the train to work in Boston made Mr. Salazar feel anxiety and claustrophobia relating to his PTSD. (Testimony of Mr. Salazar)
8. Since December of 2014, Mr. Salazar has treated with Dr. Jill P. Scott (Dr. Scott), a licensed clinical psychologist, for therapy at the Center for Returning Veterans at the VA Boston Healthcare System to manage his PTSD. Dr. Scott did not testify at the Commission hearing. Two letters from Dr. Scott were received in evidence, one dated March 30 2015 and one dated May 15, 2015, each addressed "To Whom It May Concern." (Exhibits 7 & 8)
9. Dr. Scott's May 15, 2015 letter includes, in part, the following statement:

"Mr. Salazar has previously been diagnosed with Post Traumatic Stress Disorder (PTSD). When he began to see me, Mr. Salazar reported that he had recently noticed an exacerbation in symptoms following an ongoing situation at his former place of employment Mr. Salazar described being bothered by moderate symptoms of irritability and anxiety (mainly in the form of worry about current stressors and increased vigilance in public places, such as mass transit) and dreams with themes related to his combat deployment. We have focused on directly addressing these symptoms during our work in therapy. Since that time, Mr. Salazar has engaged very well . . . his symptoms have improved over time and any residual concerns are well-managed, with no significant impact to his functioning at home or at work. Currently he describes occasional mild anxiety related to life stress, which is not outside what would be expected of an average person. He endorses some hypervigilance (i.e., increased watchfulness) in crowded areas, but this has not interfered with his ability to engaged in social or vocational activities At this time, I have no concerns about his functioning that would preclude him from seeking or maintaining successful employment."

(Exhibit 8)

10. On April 25 2014 and June 11, 2014, Mr. Salazar took the civil service examination for firefighter and received a score of 96. (Stipulated Facts)
11. Early in February 2015, the DFD requisitioned a certification from the Massachusetts Human Resources Division (HRD) to fill a vacancy for one (1) firefighter.. HRD sent Requisition #02641 to the DFD on or around February 12, 2015. Of those who indicated their willingness to accept the position, Mr. Salazar was ranked first on Requisition #02641. Three other lower ranked applicants indicated they would accept the position. (Stipulated Facts)
12. Mr. Salazar received a conditional offer of employment from the DFD which required that Mr. Salazar submit to a medical and psychological evaluation. (Stipulated Facts)
13. On April 3, 2015, Mr. Salazar visited Dr. Mark Schaefer (Dr. Schaefer) to receive a psychological evaluation. (Stipulated Facts)
14. Dr. Schaefer is a licensed forensic psychologist in private practice with his Ph.D. in psychology. In his work as a psychological screener, Dr. Schaefer determines that approximately three (3) to five (5) percent of applicants do not satisfy the psychological qualifications for the position. (Testimony of Dr. Schaefer)
15. Dr. Schaefer submitted Mr. Salazar to two (2) psychological tests, the Minnesota Multiphasic Personality Inventory-2 Exam ("MMPI-2") and the Personality Assessment Inventory Exam ("PAI"). The tests take a total of two (2) hours to complete and are scored using a computer. Both tests identify if an applicant has a psychological profile that may prohibit them from performing the duties required of the position for which they are applying. (Exhibits 1 & 4; Testimony of Dr. Schaefer)
16. Significantly elevated scores on the MMPI-2 can be indicative of serious mental health issues. Mr. Salazar did not receive significantly elevated scores on the MMPI-2, but Dr.

Schaefer noted that Mr. Salazar's anxiety levels were slightly elevated. (Testimony of Dr. Schaefer)

17. The PAI is considered a more precise measure because it contains two sets of norms: one based on a set of persons generally and one based on a set of firefighters who were hired and passed their probationary period. (Testimony of Dr. Schaefer)
18. Mr. Salazar's scores on the PAI, when compared to the general set of persons, were within the normal range. When Mr. Salazar's scores were compared with the firefighter set, his scores showed several elevated scores. A rating system used by psychologists experienced in public safety indicated that Mr. Salazar's PAI test scores ranked him as a high-risk candidate for the position of firefighter. (Exhibits 1 & 4; Testimony of Dr. Schaefer)
19. Dr. Schaefer also conducted a personal interview with Mr. Salazar. During the interview Mr. Salazar disclosed his recent anxiety from riding the train to his current place of employment and that he had bad dreams relating to his military experience. Mr. Salazar reported that his anxiety was caused by the unknown of the train environment and the confined environment. Mr. Salazar disclosed that he was going to soon receive medication to treat these feelings. (Exhibit 1; Testimony of Dr. Schaefer)
20. After Dr. Schaefer's interview with Mr. Salazar, Dr. Schaefer obtained a release form from Mr. Salazar and spoke with Dr. Scott about Mr. Salazar's mental health. (Exhibit 1; Testimony of Dr. Schaefer)
21. Dr. Scott opined to Dr. Schaefer that Mr. Salazar's condition would not interfere with Mr. Salazar's performance as a firefighter. Dr. Schaefer disagreed with this assessment by Dr. Scott. (Testimony of Dr. Schaefer)

22. In particular, Dr. Schaefer was concerned that Mr. Salazar conveyed active symptoms of PTSD related to claustrophobia and anxiety in unpredictable situations. Given the unpredictable nature of firefighting, as well as the claustrophobic and stressful environments that firefighters find themselves, Dr. Schaefer opined these symptoms would interfere with Mr. Salazar's performance. Furthermore, treatment for Mr. Salazar's PTSD had only just begun and Dr. Schaefer opined that more time was needed to be medically certain that his PTSD was well-managed. (Testimony of Dr. Schaefer)
23. On April 7, 2015, Dr. Schaefer issued to DFD Fire Chief, William F. Spillaine (Chief Spillaine) a report indicating that Mr. Salazar's PTSD would interfere with his ability to perform the essential functions of a firefighter. (Exhibit 1; Stipulated Facts)
24. In accordance with the medical examination protocols, Mr. Salazar was sent to see Dr. Jose Hidalgo (Dr. Hidalgo) for a second screening which occurred on April 17, 2015. (Exhibits 1 & 3; Testimony of Dr. Schaefer and Dr. Hidalgo)
25. Dr. Hidalgo is a Board Certified Psychiatrist affiliated with the Massachusetts General Hospital and is licensed to practice psychiatry in Massachusetts. Dr. Hidalgo has taken a forensic fellowship and will take the forensic psychiatry boards in October 2015. Dr. Hidalgo has specialized psychiatric experience working with persons who have PTSD.(Exhibit 3; Testimony of Dr. Hidalgo)
26. During his meeting with Dr. Hidalgo, Mr. Salazar did not show any active PTSD symptoms. Dr. Hidalgo administered a structured interview assessment to assess PTSD which also indicated that Mr. Salazar was not then actively experiencing symptoms. (Exhibit 3; Testimony of Dr. Hidalgo)

27. Dr. Hidalgo evaluates candidates by integrating information from the testing, as well as both the evaluation that he conducts and the history of the individual. (Testimony of Dr. Hidalgo)
28. Dr. Hidalgo determined that Mr. Salazar's PTSD was a disqualifying condition based on Mr. Salazar's reported PTSD symptoms from two (2) weeks prior, the fact that Mr. Salazar's diagnosis of PTSD was new, and the fact that PTSD is a mental condition that is triggered and not experienced at all times. (Exhibit 3; Testimony of Dr. Hidalgo)
29. Dr. Hidalgo reported that Mr. Salazar's anxiety disorder prevented him from performing the duties of a firefighter and recommended that Mr. Salazar be bypassed. (Exhibit 3; Testimony of Dr. Hidalgo; Stipulated Facts)
30. Both Dr. Schaefer and Dr. Hidalgo concluded that Mr. Salazar could be able to perform the essential functions of a firefighter in the future, provided that sufficient additional time elapsed with no occurrence of PTSD symptoms. Dr. Hidalgo estimated that at least one year of remission, without symptoms, would be the minimum period that he believed could be sufficient. (Exhibits 3 & 4; Testimony of Dr. Schaefer and Dr. Hidalgo)
31. On May 6, 2015, Dr. Schaefer issued his final report to Chief Spillaine, with Dr. Hidalgo's report attached. Dr. Schaefer's report concluded that "at the present time, Mr. Salazar should be disqualified as a firefighter candidate for the Dedham Fire Department." Dr. Schaeffer's final report opined:
- "Mr. Salazar's aspiration to become a firefighter seemed quite genuine and he has pursued this goal for some time. He has been faithful in meeting with his therapist, and going forward, he will hopefully continue to incorporate suggestions for dealing with his anxiety and discomfort as it arises. He should certainly be reconsidered if he reapplies and there are indications that the symptoms of PTSD and anxiety have diminished."
- (Exhibit 4; Testimony of Dr. Schaefer)
32. Dr. Hidalgo's report opined:

“Although my evaluation revealed that Mr. Salazar was relatively asymptomatic, the psychological evaluation and testing reveal that Mr. Salazar has ongoing PTSD symptoms and is at risk of being rated a poorly suited for the job [of a firefighter]. . . .It is my opinion, therefore, that Mr. Salazar has a disqualifying medical condition, an anxiety disorder, and I recommend that he be bypassed. During future evaluations, should Mr. Salazar apply to the academy again, symptoms of anxiety and PTSD should be assessed to determine whether they are still present or not and how these may affect his work performance.”

(Exhibit 3: Testimony of Dr. Hidalgo)

33. By letter dated May 8, 2015, Chief Spillane notified Mr. Salazar that he was found to be unqualified for appointment as a firefighter due to the medical opinions concerning his PTSD symptoms. (Exhibits 5 & 6; Testimony of Chief Spillane)

34. Firefighting, by its nature, involves hazardous, chaotic, precarious and unpredictable environments, often in confined spaces, and interactions with strangers. The safety of firefighters and others on scene depend on the support and high level of performance of fellow firefighters. (Testimony of Chief Spillane and Dr. Schaefer; Administrative Notice [Municipal Firefighter Essential Functions, Massachusetts HRD Physician’s Guide, Initial Hire Medical Standards, at 37-43 (2014), <http://www.mass.gov/anf/employment-equal-access-disability/civil-serv-info/med-and-physical-fitness-stnds/med-stnds-info/>])

35. On May 15, 2015, Mr. Salazar duly filed this appeal to the Commission. (Stipulated Facts)

Legal Standard

This appeal involves a bypass of the Appellant for appointment to a permanent civil service position. This process is governed by G.L.c.31, Section 27, which provides:

“If an appointing authority makes an original or promotional appointment from certification of any qualified person other than the qualified person whose name appears highest [on the certification], and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file . . .a written statement of his reasons for appointing the person whose name was not highest.”

When a candidate appeals a bypass, the Commission's role is not to determine whether that candidate should have been bypassed. Rather, the Commission determines, by a preponderance of the evidence, whether the bypass decision of the appointing authority was made after a “thorough review” and upon a “reasonable justification” for the decision. Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Brackett v. Civil Service Comm’n, 447 Mass. 233, 241 (2006), citing G.L.c.31,§ 2(b); Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182, 187 (2010)

“Reasonable justification in this context means ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.’ ” Brackett v. Civil Service Comm’n, 447 Mass. 233, 543 (2006) and cases cited. See also Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971), citing Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). In determining whether the department has shown a reasonable justification for a bypass, the Commission's primary concern is to ensure that the department's action comports with “[b]asic merit principles,” as defined in G.L.c.31,§1. See Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001); Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321n.11, 326 (1991)

The “preponderance of the evidence test” requires the Commission to conclude that an appointing authority established, through substantial, credible evidence presented to the Commission, that the reasons assigned for the bypass were “more probably than not sound and sufficient.” Mayor of Revere v. Civil Service Comm’n, 31 Mass. App. Ct. 315, 321 (1991); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) (*emphasis added*)

Especially when it comes to selecting an applicant for a sensitive public safety position, “the commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was ‘reasonable justification’ shown Absent proof that the [appointing authority] acted unreasonably . . . the commission is bound to defer to the [appointing authority’s] exercise of its judgment” that “it was unwilling to bear the risk” of hiring the candidate for such a sensitive position. Beverly v. Civil Service Comm’n 78 Mass.App.Ct. 182, 190-91 (2010); City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (Commission must not substitute its judgment for a “valid” exercise of appointing authority discretion, but civil service law “gives the Commission some scope to evaluate the legal basis of the appointing authority’s action, even if based on a rational ground.”) See also Town of Reading v. Civil Service Comm’n, 78 Mass.App.Ct. 1106 (2010) (Rule 1:28 opinion); Burlington v. McCarthy, 60 Mass.App.Ct. 914 (2004) (rescript opinion); Massachusetts Dep’t of Corrections v. Anderson, Suffolk Sup. Ct. No. 2009SUCV0290 (Memorandum of Decision dated 2/10/10), reversing Anderson v. Department of Correction, 21 MCSR 647, 688 (2008).

When an Appointing Authority relies on scientific evidence provided through expert witnesses to support the justification for a by-pass decision, the Commission is mindful of the responsibility to ensure: (a) the scientific principles and methodology on which an expert's opinion is based are grounded on an adequate foundation, either by establishing "general acceptance in the scientific community" or by showing that the evidence is "reliable or valid" through an alternative means. E.g., Canavan's Case, 432 Mass. 304, 311 (2000) citing Commonwealth v. Lanigan, 419 Mass. 15, (1994); (b) the witness is qualified by "education, training, experience and familiarity" with special knowledge bearing on the subject matter of the

testimony. E.g., Letch v. Daniels, 401 Mass. 65, 69-69 (1987); and (c) the witness has sufficient knowledge of the particular facts from personal observation or other evidence. E.g., Sacco v. Roupenian, 409 Mass. 25, 28-29 (1990).

Experts' conclusions are not binding on the trier of fact, who may decline to adopt them in whole or in part. See Turners Falls Ltd. Partnership v. Board of Assessors, 54 Mass.App.Ct. 732, 737-38, rev.den., 437 Mass 1109 (2002). As a corollary, when presented with conflicting expert evidence, the fact-finder may accept or reject all or parts of the opinions offered. See Ward v. Commonwealth, 407 Mass. 434, 438 (1990). No specific degree of certitude is required for expert testimony and it may be accepted if the opinion is "reasonable" and expressed with sufficient firmness and clarity. See, Commonwealth v. Rodriguez, 437 Mass. 554, 562-63 (2002). So long as an expert's opinion is sufficiently grounded in the evidence, but certain facts were unknown or mistakes were made in some of the expert's assumptions, that generally goes to the weight of the evidence. See Commonwealth v. DelValle, 443 Mass. 782, 792 (2005).

Analysis

The DFD has shown by a preponderance of the evidence in the record that, after a reasonably thorough review, it had reasonable justification to bypass Mr. Salazar for original appointment as a firefighter. Experienced and credentialed mental health professionals conducted two independent evaluations and medically accepted written psychological tests. Both professionals formulated opinions in general conformity with the relevant medical standards. Their opinions were expressed with reference to Mr. Salazar's medical history and current self-reported condition. Both doctors stated "to a reasonable degree of medical certainty" that Mr. Salazar was presently unable to perform the essential functions of a firefighter due to his condition. Therefore, DFD reasonably relied upon the recommendations of those professionals.

The nature of Mr. Salazar's diagnosed condition is highly pertinent to whether he would be able to perform the essential functions of a DFD firefighter. Firefighters are routinely placed in unfamiliar, stressful situations that would elicit a feeling of claustrophobia and anxiety in many people. The fact that Mr. Salazar had recently experienced these symptoms in more ordinary and commonplace public and workplace settings further reinforces the medical conclusions that he poses an unreasonable risk of injury to himself, his peers and the public in the course of performing the duties of a firefighter in highly stressful situations on a regular basis.

Mr. Salazar argues that his disqualification because he carries a diagnosis of PTSD violates his rights as a disabled veteran under Title I of the Americans with Disability Act (ADA), 42 U.S.C. §12111 *et seq.*, and the Uniformed Services Employment and Re-employment Act (USERRA), 38 U.S.C. §4301 *et seq.* Mr. Salazar rightly points out that these federal laws are designed to prevent discrimination in employment because a person is disabled, has a history of being disabled or is perceived to have a disability, including, in particular, disabled veterans. He cites the federal EEOC Employers Guide that specifically notes:

“Each year, thousands of military personnel stationed around the world leave active duty and return to jobs they held before entering the service, or begin the search for new jobs. Recent veterans report high rates of service-connected disabilities (i.e., disabilities that were incurred in, or aggravated during, military service). About twenty-five percent of recent veterans report having a service-connected disability, as compared to about thirteen percent of all veterans. Common injuries incurred by these veterans include missing limbs, burns, spinal cord injuries, post-traumatic stress disorder (PTSD), hearing loss, traumatic brain injuries, and other impairments.

There are several federal laws that provide important protections for veterans with disabilities who are looking for jobs or are already in the workplace. Two of those laws -- Title I of the **Americans with Disabilities Act (ADA)** and the **Uniformed Services Employment and Reemployment Rights Act (USERRA)** - protect veterans from employment discrimination. Title I of the ADA, which is enforced by the U.S. Equal Employment Opportunity Commission (EEOC), prohibits private and state and local government employers with 15 or more employees from discriminating against individuals on the basis of disability. USERRA has requirements for reemploying veterans with and without service-connected disabilities and is enforced by the U. S. Department of Labor (DOL) and the U.S. Department of Justice (DOJ).

...

Title I of the ADA prohibits an employer from treating an applicant or employee unfavorably in all aspects of employment -- including hiring, promotions, job assignments, training, termination, and any other terms, conditions, and privileges of employment -- because he has a disability, a history of having a disability, or because the employer regards him as having a disability. That means, for example, that it is illegal for an employer to refuse to hire a veteran because he has PTSD, because he was previously diagnosed with PTSD, or because the employer assumes he has PTSD. Similarly, an employer may not refuse to hire a veteran based on assumptions about a veteran's ability to do a job in light of the fact that the veteran has a disability rating from the U.S. Department of Veterans Affairs (VA). The ADA also limits the medical information employers may obtain and prohibits disability-based harassment and retaliation.

https://www.eeoc.gov/eeoc/publications/ada_veterans_employers.cfm

These statutes manifest an important and laudable public policy, wholly consistent with “basic merit principles” of Massachusetts civil service law, to ensure that persons with disabilities, real or perceived, and especially veterans whose service left them disabled, do not find themselves unreasonably shut out of the workplace simply because of their conditions. The law requires that care be taken to balance this right to be free from discrimination with an employer’s prerogative to establish appropriate physical and medical qualifications required to perform the essential functions of a particular job. Neither the ADA nor USERRA⁴, nor civil service basic merit principles, prohibit an employer from basing a decision that the employee cannot perform an essential function upon the person’s actual limitations, even when those limitations result from a physical or mental disability. *E.g.*, Calef v. Gillette Co., 322 F.3d 75, 86-87 (1st Cir. 2003) (essential function that manager handle stressful situations incompatible with diagnosis of ADHD); Equal Employment Opportunity Comm’n v. Amego, Inc., 110 F.3d 135 (1st Cir.1997) (diagnosed depression precluded employee from performing essential duties at

⁴ USERRA narrowly protects solely against discrimination on account of a person’s military service, and requires a showing that military status was the motivating or substantial factor in the employer’s action. “A PTSD injury alone is not enough to raise a cognizable discrimination claim under USERRA” and “the fact that an appellant’s injury occurred during his military service does not transform his allegations in to a USERRA claim.” See Holmes v. Department of Justice, 498 Fed.Appx.993 (Fed.Cir.2013). The recourse, if any, in such instances, remains with the ADA. See, e.g., Preda v. Nissho Iwai Amer. Corp., 128 F.3d 789792 (2d Cir.1997); Carroll v. Delaware River Port Auth., 89 F.Supp.3d 628 (D.N.J.2015); McBride v. United States Postal Service, 78 M.S.P.R 4111 (1998).

a residential care facility without risk of harm to others); Siederbaum v. New York City Transit Auth., 309 F.Supp.2d 618 (2004 S.D.N.Y.2004), aff'd, 121 Fed.Appx. 435 (2nd Cir.2005) (applicant with bipolar disorder precluded from employment as bus driver by medical standards) See also, G.L.c.31, §26 (preference for veterans and disabled veterans); Hutcheson v. Director of Civil Service, 281 N.E.2d 53 (1972) (interpreting §26 to require disabled veteran must be “qualified” for position), Commissioner of Metropolitan District Commission v. Director of Civil Service, 203 N.E.2d 95 (1964) (same); Younie v. Doyle, 306 Mass. 567 (1940) (disabled veterans must still complete the statutory probation period) See generally, COMMONWEALTH OF MASSACHUSETTS, HRD PHYSICIAN’S GUIDE – INITIAL HIRE MEDICAL STANDARDS (2014), <http://www.mass.gov/anf/employment-equal-access-disability/civil-serv-info/med-and-physical-fitness-stnds/med-stnds-info/>

In particular, the ADA specifies that consideration “be given to the employer’s judgment as to what functions of a job are essential.” 42 U.S.C.§12111(8). Absent evidence of discriminatory animus, differential treatment or stereotyping, an employer’s determination that a person cannot safely perform his job function depends on the “objective reasonableness of the [employer’s] actions.” Michael v. City of Troy Police Dep’t, 808 F.3d 304 (2015) citing Bragdon v. Abbott, 524 U.S. 624, 650 (1998) (police officer suffering neurological deficits following brain surgery) Such a determination is “objectively reasonable” when the employer relies upon a “testimonial evidence” and/or a medical opinion that is itself objectively reasonable, even one that may conflict with other medical opinions. Id. See also Hoback v. City of Chattanooga, 2012 WL 3834828 (E.D.Tenn.2012), aff’d, 550 Fed.Appx. 257 (6th Cir. 2013) (jury permitted to weigh conflicting evidence that police officer’s PTSD did or did not render him unfit for duty).

Thus, the Commission's role here is not to decide whether Mr. Salazar is medically fit to become a firefighter or whether DFD unlawfully discriminated against him because of his disability. Rather, the Commission must evaluate whether the DFD had reasonable justification, based on a thorough review, to conclude that, at the time of the bypass decision, to conclude that Mr. Salazar posed a reasonably objective risk that he could not safely perform the essential functions of a firefighter, as defined by the applicable medical standards prescribed for such a civil service public safety position. I have no doubt that Mr. Salazar holds an honest belief that he is qualified, that he has made significant progress through his treatment program to manage his PTSD, and that both he and Dr. Scott, his therapist, believe he is capable of engaging in a variety of satisfactory social and vocational activity. Those considerations, however, do not permit the Commission to overturn the good-faith conclusion by the DFD here, grounded on two credible, reasonably supported medical opinions, that Mr. Salazar's diagnosis of PTSD and recent episodes of symptomatic behavior are incompatible with a present conclusion that he can safely perform the essential functions of a municipal firefighter. DFD is fully entitled to rely on these credible medical professionals. Dr. Scott well may hold a somewhat different view, but the DFD is not obliged to adopt her unsworn opinions (nor is this Commission), especially when they do not clearly address whether she specifically knows of, and considered, the duties of a firefighter in reaching her opinions.

I found Mr. Salazar to be an intelligent and amiable individual who clearly holds a sincere and highly motivated desire to become a Dedham firefighter. His personal history and military record demonstrates that he possesses many of the qualities that would serve him well in that vocation. Although the DFD's decision to bypass him on this occasion must be upheld, neither the DFD nor any of the medical professionals who examined him, doubted that, at some future

time, Mr. Salazar will be able to demonstrate with medical certainty that his mental health issues are no longer the impediment that they once represented, now more than a year ago. Although the decision will always remain within the sound discretion of the appointing authority, as both Dr. Hidalgo and Dr. Schaefer suggested, any future assessment of Mr. Salazar's candidacy deserves, and I expect it is likely to receive, de novo and serious consideration.

For the reasons stated, Mr. Salazar's appeal under Docket No. G1-15-89 is hereby *denied*.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein
Commissioner

By 4-0 vote of the Civil Service Commission (Bowman, Chairman [Absent]; Camuso, Ittleman, Stein and Tivnan, Commissioners) on May 12, 2016.

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)(1), 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:

Jovany Salazar (Appellant)

John F. Dolan, Jr., Esq. (for Respondent)