

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
JOHN KEENAN,
Complainant

v.

DOCKET NO. 01-BEM-1598

TOWN OF WEYMOUTH FIRE DEPARTMENT
and CHARLES DEACON
Respondents

Appearances: David L. Hinds, Esq. for Complainant
Daniel G. Skrip, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On June 6, 2001, Complainant John Keenan, filed a complaint with this Commission against his employer, the Town of Weymouth Fire Department, and Fire Chief Charles Deacon, alleging discrimination on account of his disability in violation of G.L. c. 151B s. 4(16A). Specifically, Complainant alleged that he was passed over for promotion to Captain in December of 2000 and again in March of 2001. Complainant also alleged that he was denied the position of Training Officer in December of 2000. The Investigating Commissioner found probable cause to credit the allegations of the Complaint and the matter was certified to Public Hearing. A Hearing was held before the undersigned Hearing Officer on November 14, 16, 17, 18 and December 1, 2005. The parties submitted post-hearing briefs in March of 2006. Having carefully reviewed the record in

this matter and the post-hearing submissions of the parties, I make the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

1. The Complainant, John Keenan was employed by the Respondent, Weymouth Fire Department, from December of 1980 until his retirement in November of 2004. He served as firefighter from 1980 to 1993 when he was promoted to Lieutenant. Complainant testified that he retired from Respondent in 2004 due to his disability.
2. Respondent, Town of Weymouth Fire Department is an employer within the meaning of G.L. c. 151B. Respondent Charles Deacon began his employment with Respondent in 1976 and was promoted to Chief of the Fire Department in 2000. He retired from the Department in October of 2002 due to back injuries and resulting surgeries.
3. Complainant has an Associates Degree from Massasoit College in Fire Science. He enrolled in a Bachelor's Degree program in Fire Management at Empire State College, a correspondence school, but did not complete the program, receiving 108 of the required 126 credits. At the suggestion of Chief Deacon, in 2001 Complainant started, but did not complete an instructor Methodology Course. He took EMT classes in the early 1990's, but never became certified. He started a Masters Degree Program in Divinity at the Andover Theological Seminary, but did not complete the program.
4. Complainant injured his knee while on duty in 1985 and remained off duty for 2 ½ months. Chief Deacon was his supervisor at the time and signed his injury report. In 1988, Complainant dislocated his back and was off duty for 5 months. In 1989, Complainant underwent neck/disc surgery and was out of work for 6 months, returning to work later that same year. In 1991, Complainant again had surgery for removal of a disc

from his neck and after a leave of at least 6 months was welcomed back to work.

Complainant was on leave in 1991 for chronic pain and in 1995 for 4 to 5 months due to knee surgery. He suffered a compression fracture in 1996. Complainant testified that he left work in 1999 due to severe pain and did not return to work until the autumn of 2000. While on leave, he suffered a stroke in 2000. Complainant underwent heart surgery in 2004. For each period that Complainant was on leave due to work related injuries, he received his full pay.

5. Complainant testified that he continues to suffer from constant pain due to severe osteoarthritis in the facet joints of his neck. Over the years he has been prescribed morphine, percocet, and oxycontin for pain relief. He stated he was taking MS contin, a morphine sulfate, at the time of the hearing and testified that in 2000 he had been addicted to oxycontin.
6. At all relevant times, Respondent operated four fire stations. The Respondent's hierarchy was comprised at relevant times of the following positions: Chief, four Deputy Chiefs, four Fire Captains, seventeen Lieutenants and seventy-nine Firefighters. The current Chief, Robert Leary, has a standard 9-5 work day. The Deputy Chiefs, Captains, Lieutenants, and Firefighters work in 24 hour shifts. Each Captain is in charge of a station and each Lieutenant is in charge of his/her shift at a particular station.
7. A Captain has supervisory duty over one of four fire stations and the four crews that work within the station. He is in a leadership position and has responsibility for the day to day operations of his station. On an average of two months a year, Captains fill in for vacationing or sick Deputy Chiefs, and during those times are responsible for the entire shift consisting of 4 stations and over 20 firefighters. On rare occasions, a Captain will

be in charge of the entire Department. In contrast, a Lieutenant supervises only his crew and is prohibited by policy from ever being in charge of the entire department.

8. The position of Training Officer at Respondent involves training the entire Department from the Deputy Chiefs to the rookie firefighters. Current Fire Chief Robert Leary served as the Training Officer from 1995 to 2000, and was appointed Chief in 2002.

Chief Leary testified that the Training Officer is like the Chief's "right hand man" when it comes to tasks such as researching and purchasing new equipment, writing standard operating procedures and providing guidelines for training of all the firefighters. Leary also testified that the Training Officer requires a level of respect from fellow firefighters and effective communication throughout the Department. For these reasons he believed that the Training Officer position should be held by a Captain. I credit his testimony in this regard.

9. In May of 2000, Complainant was about to retire from the Fire Department for reasons related to his health, including his addiction to pain medication. Deacon who was Chief at the time, supported his decision to retire but later that summer encouraged

Complainant to return to the Department. Deacon testified that "part of the Chief's responsibility is to get people off sick and injury leave and get them back to work."

Complainant acknowledged that Deacon helped him along and gave him the drive to keep going and that Deacon was not deterred by Complainant's physical condition.

Complainant testified that Deacon told him in the Spring of 2000 that Deacon would have no issue with promoting Complainant and making him the Training Officer, so long as he got off all the drugs and got back to work and showed he could do the job. Deacon also encouraged Complainant, as well as others, to take the instructor Methodology Course.

Deacon testified that he had no recollection of discussing the Training Officer position with Complainant at that time. I find it likely that the two discussed the possibility of Complainant securing the Training Officer position, but I do not believe that Deacon promised the job to Complainant or told him he was a shoe-in for the position.

10. Complainant had received the second highest score on the civil service exam that pertained to promotions to Captain in December 2000 and March 2001. The highest scoring candidate was ineligible for promotion to Captain because he had been promoted previously. At that time, Lieutenants Jack Tuffy and Thomas Keefe, scored just below Complainant, respectively, on this exam.
11. The traditional practice within the Department was to promote the person with the highest score on the civil service exam. Despite the fact that the Union contract does not require adherence to this practice, the Union strongly endorsed this practice. The Union president, Kevin Dawskyba, testified that any Chief who did not adhere to the practice of promoting the top scorer would receive much resistance from the Union. Dawskyba urged Chief Deacon to adhere to past practice and to promote top down from the list. He testified that in his more than 25 years with the Department he could not recall anyone being by-passed on the civil service list for promotion.
12. In October of 2000, after returning from a lengthy disability leave, Complainant applied for the Training Officer Position which was posted. He interviewed for the position with Chief Deacon and the Town's Human Resource Director, Michael Kelliher. Complainant stated that after his interview he was informed that the Chief had decided that the Training Officer position should be held by a Captain, and Complainant would have to apply and interview for a Captain's position.

13. The Chief stated that after interviewing the Lieutenants and firefighters who applied for the Training Officer position, and giving a great deal of thought to the matter, he decided that the Training Officer Position should be held by a Captain. Although the Training Officer reports directly to the Chief, the position requires interaction with the entire department and Chief Deacon felt it was important for the Training Officer to be able to relate to both firefighters and management, and to command respect from both the lower and upper ranks of the organization. Having made that decision, his focus then shifted to finding the best candidate for a Captain's position, with a view toward serving the best interests of the Department. To that end, he again enlisted the assistance of Michael Kelliher, the Town's Human Resource Director, in preparing for and conducting the promotional interviews. He had sought Kelliher's expertise and assistance in the past for hiring interviews.
14. As the appointing officer for the department, Chief Deacon had the discretion to promote any of the top three candidates on the Civil Service list. He was not required to follow the same hiring or promotion protocol as the Chiefs before him, by selecting the first candidate on the Civil Service list. The Chief testified that his goal was to promote the best candidate from the top three on the list. He stated that as part of their many responsibilities Captain's are entrusted with the public safety of the Community and act as spokesmen for the Department. I credit his testimony that he chose to ignore precedent where he believed to do so would be in the best interests of the Department.
15. The Chief testified that he did not promote Complainant to Captain in 2000, because he believed that Lt. Tuffy was the best candidate. According to the Chief, who had worked directly with Lt. Tuffy, Tuffy was the best company fire officer on the ground that he had

ever encountered. Deacon stated that he led his crew effectively and efficiently and conducted himself well in the station. With 31 years on the force, Lt. Tuffy had more experience than Complainant and was EMT Certified, obtaining a re-certification later in his career. While having EMT certification is not a requirement of the job, Chief Deacon stated that this is a great asset because the future of fire service is in EMS. He was very impressed with Lt. Tuffy's attitude toward the job, his appreciation of the need to maintain and update his skills and his continued commitment to doing so over the years.

16. Chief Deacon also testified that he considered input from Deputy Chiefs Davis and Leary whose opinions he valued highly. He stated that he valued Deputy Chief Davis' opinion above all others because of Davis' integrity, character, and experience. Davis wrote a very flattering letter enthusiastically supporting and recommending Lt. Tuffy for the Captain's position, stating, along with other high praise, that he was "well received by his peers," and that his promotion would be a "positive move" for the future of the Department. (Ex. R-20). In contrast, Deputy Chief Davis wrote a very brief, generic, letter on behalf of Complainant, that was short on praise and did not specifically recommend Complainant for the job. (Ex. R-21). The Chief noted the striking difference in the two letters and the fact that Davis considered Lt. Tuffy to be, by far, the more qualified and desirable candidate for the position. Indeed, Davis testified that he wrote the letter for Complainant merely as a courtesy because when a firefighter asks him for a letter he never refuses.

17. Deputy Chief Davis testified that he wrote an enthusiastic letter of reference for Lt. Tuffy, because he knew Tuffy worked well with subordinates and knew him to be highly regarded by his peers and a good leader. He stated that Tuffy had been on the job many

years and had been in a lot of incidents and his response was always calm, cool, and collected. He also respected the fact that Tuffy took the Lieutenant's exam a number of times and never gave up.

18. The Chief testified that he also had concerns about Complainant's behavior as a result of complaints from firefighters. Over the years Deacon had received numerous reports of behavior by Complainant around the station and in public that was referred to as "bizarre." He had significant concerns that Complainant lacked credibility and the respect of his peers. With regard to the Training Officer position Deacon felt strongly that Complainant would not bring the needed respect to the position. He also noted that during the interview for Training Officer, Complainant criticized the competition and his peers, and Deacon felt this was highly inappropriate. I credit this testimony and note that others had concerns about Complainant's behavior and general demeanor.
19. The Union President, Dawskyba, testified that a number of firefighters raised concerns with him about whether Complainant would be an effective Training Officer. These ranged from concerns about his being there to do the job, given his extensive injuries and time out of work and the fact that others were put-off by him and did not consider him an effective leader. Dawskyba testified that Complainant could rub people the wrong way and that he was blunt and to the point and that some were put-off by him.
20. Current Chief Leary stated that Complainant had the skills to be the Training Officer, but he did not have the "respect" of his fellow officers. The fact that Complainant did not command the respect of the firefighters was relayed to Leary by more than one officer. In addition, at least two firefighters commented to Leary that if Complainant were made the Training Officer, he would have them watching "Jerry Springer" all day. He testified

that Complainant was nicknamed Lt. “Dude” because he would yell “Yo Dude” or “Yo Citizen” from the fire truck to people passing on the street. Some firefighters felt that this behavior was sophomoric and inappropriate and that Complainant’s nickname was derogatory and reflected this sentiment. Leary testified that Chief Deacon asked him who he would recommend for the job of Training Officer and Leary recommended Lt. Tuffy.

21. In December of 2000, Complainant interviewed for promotion to Captain. Deacon testified that in this interview Complainant voiced opinions about how he would handle people that led the Chief to conclude he would cause more problems than he would solve. Deacon stated that the decision to promote Lt. Tuffy had absolutely nothing to do with Complainant’s physical condition, and that he had great sympathy for Complainant’s physical problems, because he, too, had suffered back injuries and significant pain. Lt. Tuffy, like Complainant had also had a series of injuries that had caused him to be on medical leave throughout his career. Lt. Tuffy was made the Training Officer after he was promoted to Captain.

22. Chief Deacon also testified that he did not believe Complainant to be disabled in December of 2000, as he had received medical clearance to return to work and had returned in October of that year. The Chief testified that after Complainant’s return, one of the Deputy Chiefs informed him that Complainant was working his day shifts, but was taking vacation time when he was scheduled to work night shifts. He stated that he had some concerns about this because it could indicate general dissatisfaction with the job. According to Complainant, the Chief asked him about this in the interview and he told the Chief he needed to use up vacation days. I find it likely that the Chief did ask about this. However, I do not believe that this was an indication that the Chief was concerned

about Complainant's physical ability to do the job, but rather his commitment to the job. I completely credit Chief Deacon's testimony in this regard. The Chief wrote a letter to the Civil Service Commission dated December 6, 2000, in which he outlined in detail the reasons for his by-pass of Complainant. (Ex. R-26).

23. When Chief Deacon contacted Complainant the day after his interview to inform him that he had decided to promote Lt. Tuffy to Captain, Complainant stated that he would sue the Chief. The Chief advised Complainant that he had an option to appeal the decision to the Civil Service Commission, but Complainant did not do so. Nor did he accept the Chief's invitation to come and speak with him, because, according to Complainant, he felt "humiliated." Complainant did not return to work after he was rejected for the Captain's promotion. He testified that he was so upset at not getting the promotion that he was treated by a psychiatrist for anxiety and stated that he could not function. The Chief denied Complainant pay pursuant to G.L. c. 111F, for job related injury, and testified this was because he did not believe that being by-passed for promotion was a fire-fighting injury. Complainant grieved this denial through the Union and won at arbitration. He remained out of work until April of 2001.

24. In March of 2001, Complainant was again by-passed for promotion to Captain in favor of Lt. Thomas Keefe. Chief Deacon was out of work on a medical leave at the time. The decision to promote Lt. Keefe was made in consultation with acting Chief Davis, who conducted the interviews for Chief Deacon. Chief Deacon testified that Complainant had been out of work for several months after not getting the first Captain's position and indicated no desire to return to work until he received a notice from the Civil Service Commission regarding another Captain's promotional opportunity. As a result of this,

Deacon questioned Complainant's sincerity about returning to work. He indicated this to Complainant in a letter dated April 11, 2001. (Ex. R-29). Despite this feeling, the Chief testified that he believed Keefe was the better candidate for the job and he based his decision on what he felt was the best interest of the Department. Chief Deacon stated that no one was more respected for his character and integrity than Lt. Keefe. I credit his testimony.

25. Michael Kelleher, who was the Director of Human Resources for the Town of Weymouth in 2000 and 2001 was present for Complainant's interviews for Training Officer in 2000 and Captain in 2001. He testified that he was not impressed with Complainant in either interview and felt that a number of his comments were inappropriate and showed lack of leadership ability. He specifically recalled that Complainant referred to a fellow officer by name referring to him as "dead wood" and discussed getting rid of the "public welfare situation" in the department. He felt these comments were inappropriate and unprofessional. He also believed the Complainant's record showed a lack of follow-through. Kelliher recommended Lt. Tuffy for the Training Officer job because he believed him to be the better candidate. He was impressed with Tuffy's years of service, his EMT certification, and the manner in which he communicated his leadership abilities in the interview and specifically discussing how he took charge of a fire scene. Regarding the second interview for Captain in March of 2001, Kelliher remembered that Complainant was much less enthusiastic and "rude from the get go." He testified that at neither interview were any references made, or questions asked, about Complainant's disabilities, except by Complainant. He remembered Complainant asking if his physical disabilities would be held against him and Kelliher did not know what he was referring

to. In contrast to Complainant, Kelliher thought Keefe demonstrated leadership ability and an interest in building relationships with the employees. I credit his testimony.

26. Deputy Chief Davis, who was Acting Chief during the second promotional round for Captain, testified that he oversaw the promotional process in March of 2001 and held the interviews with Michael Kelliher from Human Resources. After the interviews, he assessed the candidates and reported on the interviews to Chief Deacon, but the Chief made the final decision. Davis testified that the qualifications he was looking for were length of service, management skills, rapport with firefighters and officers, and commendations. Davis was unimpressed by Complainant's interview. He stated that Complainant started out his interview by making a derogatory remark to Kelliher about his weight and gave long winded answers to some questions and vague answers to others. In contrast, Lt. Keefe's demeanor was respectful and his responses were direct and to the point. Ultimately he recommended Lt. Keefe for the position because he believed him to be the better candidate. Keefe had 38 years of experience on the job, 17 more than Complainant, extensive experience working out of grade as a Captain, and worked well with subordinates and superiors. In contrast, Complainant did not have the same rapport with his peers and superiors. Davis testified that he received complaints from firefighters about Complainant's inappropriate language and questions about others' personal matters, including their sexual habits, mocking a firefighter's wife, and using a racial epithet. There was testimony that all the firefighters joked and made fun of each other, but that Complainant's behavior often went beyond what was viewed as normal and acceptable. Davis testified that Complainant was still out on a disability leave when he interviewed for the Captain's position, but that this was not a factor in his

recommendation, because he knew, about that time, that Complainant was intending to return to work.

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B §4 (16) makes it an unlawful practice for an employer to refuse to advance in employment any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position with a reasonable accommodation, because of his handicap. In this case, Complainant alleges that he was denied promotions to Captain in December of 2000 and March of 2001 and rejected for the position of Training Officer, because of his physical disabilities and his having taken lengthy leaves of absence from his job as a firefighter.

An employee may prove a claim of discrimination on the basis of handicap by presenting credible evidence that (1) he is handicapped within the meaning of the statute; (2) he is qualified to perform the essential functions of the job with or without a reasonable accommodation; (3) he was subject to an adverse action (in this case denial of promotion) by his employer; and (4) the adverse action was taken on account of his handicap. Russell v. Cooley Dickenson Hosp., 437 Mass. 443, 449 (2002); citing Dartt v. Browning-Ferris Industries, Inc. 427 Mass 1 (1998).

Complainant may prove discrimination by direct evidence or in the absence of direct evidence, by employing the burden shifting analysis initially established in McDonnell Douglas v. Green, 411 U.S. 792, 802, 803 (1973), and adopted by our Supreme Judicial Court in Wheelock College v. MCAD, 371 Mass. 130 (1976). Pursuant to this burden shifting analysis, once Complainant has established a prima facie case of discrimination, the burden of production rests with the employer to answer the prima facie case by

articulating a legitimate non-discriminatory reason for its actions, supported by some credible evidence. If it does so, the employee bears the burden of proof that the employer acted with a discriminatory intent, motive or state of mind. Abramian v. President and Fellows of Harvard College, 432 Mass. 107 (2000); Lipchitz v. Raytheon, 434 Mass. 493 (2001).

Complainant has established that he was a handicapped individual within the meaning of the statute. G.L. c. 151B §1 (17) defines a handicap as (a) a physical or mental impairment which substantially limits one or more major life activities of a person; (b) a record of having such impairment; or (c) being regarded as having such impairment. Respondent would have me find that Complainant did not establish that he was handicapped because he did not submit medical documentation of his disabilities. However, Complainant and others testified that Complainant had a history of serious injuries, including disc injuries to his neck, that kept him from being able to work for significant periods of time, and that he suffered from chronic and acute pain that had caused him to become addicted to prescription pain killers. Complainant's testimony that he continued to take a morphine derivative for pain at the time of the hearing was credible. While Complainant may not have been impaired in a major life function in the fall of 2000, when he returned to work, and in March of 2001 when he actively sought his doctor's clearance to return to work, he clearly had a record of impairment and could very likely have been regarded as handicapped on account of his several extended absences from work and his prior addiction to pain killers.

Having established that he was handicapped within the meaning of the statute, I conclude that Complainant was a qualified handicapped individual because during the

time period of both promotional opportunities, he was at work or about to return to work and was capable of performing the essential functions of the job. Complainant did not seek an accommodation as a condition of returning to work and there was no assertion by him, or his superiors, that he would have been physically incapable of performing the duties of a Captain or the Training Officer.

Complainant was not selected for the promotion to Captain on both occasions despite the fact that he was number one on the Civil Service list for promotion. Consequently, he was also rejected for the Training Officer job when the Chief determined that a Captain should hold this position. Notwithstanding the Department's past practice of choosing the top person on the list, the Chief determined that Complainant was not the best person for the job. Respondents justified their selection in both instances by articulating examples of why they believed Lts. Tuffy and Keefe to be the superior candidates. Respondents' witnesses discussed the candidates' performance in the interviews, their experience as firefighters, their leadership and follow-through, their commitment to the job and continuing education, their ability to command the respect of subordinates and superior officers, and finally their rapport with their peers. In addition to noting the reasons for choosing Lts. Tuffy and Keefe, Respondent's witnesses specifically articulated reasons for not choosing Complainant. Chief Deacon, Chief Leary and Deputy Chief Davis all testified that, in their view, Complainant did not command the respect of his fellow officers and lacked sufficient rapport with the other firefighters. They gave specific examples of what caused their concerns, specifically noting Complainant's sophomoric and inappropriate behavior and complaints that had been made to them about the manner in which he comported himself with the public and

fellow officers while on duty. A number of firefighters and officers believed his conduct to be immature and unprofessional. The Union President stated that Complainant could “rub people the wrong way.” A number of witnesses testified on Respondent’s behalf regarding these short-comings and I found their testimony to be extremely credible. In short, Respondent articulated legitimate non-discriminatory reasons for not selecting Complainant for any of the three positions and supported those reasons with credible testimony from the decision makers and those who had input into the decision.

Once Respondent has met its burden of production, Complainant must prove that the purported legitimate reasons were a pretext for unlawful discrimination. To do so he must show that Respondent acted with discriminatory intent. This element may be satisfied by circumstantial evidence, such as an inference of discriminatory animus that may be drawn from proof that one or more of the Respondent’s articulated reasons is false. Lipchitz, supra. at 504.

Complainant would have me find that a number of facts suggest that Respondents’ reasons for not promoting him were false or not the real reasons. First he claims that the Chief led him to believe that the Training Officer job was his. He asserts that this, in conjunction with the Chief’s failure to follow the past practice of always selecting the top candidate from the Civil Service list, points to pretext. In addition he asserts that the Chief asked him questions in the Training Officer interview about why he was not working night shifts, suggesting that the Chief had concerns about his ability to do the job. Finally, he asserts that the Chief’s denial of his c. 111 pay from December 2000 through April 2001, in addition to the Chief’s comment, that if he had come back to work after being denied the first promotion, his second application would have received more

favorable consideration, demonstrate that the Chief was motivated by improper focus on his disabilities and refused to promote him for this reason. Complainant also asserts that his qualifications were as good as, or superior to, those of the candidates chosen to be Training Officer and Captain. I do not concur and conclude that Complainant has failed to prove pretext for the following reasons.

There is no credible evidence that the Chief promised the Training Officer job to Complainant. I believe they discussed Complainant's applying for the job and the Chief encouraged him to take more courses to enhance his opportunities in that regard. The Chief testified credibly that he encouraged all his officers to get as much training as possible. Furthermore, notwithstanding the past practice in the Department, the Chief was not required to choose the top candidate from the Civil Service list, and Complainant did not appeal the decision, despite the Chief's counsel that he do so. The Chief justified his by-pass of Complainant with credible reasons that were completely unrelated to Complainant's history of disability. Moreover, the Chief testified credibly that in the dangerous profession of firefighting, on-the-job injuries, which can cause disability and often result in extended medical leaves of absence are a frequent occurrence. The Chief, himself, had a history of injuries and a record of disability and medical leaves. I credited his testimony that other candidates had taken leaves for job related injuries and that this is not something that would prejudice his choice of a candidate for promotion.

Furthermore, I found that the Chief Deacon's questioning Complainant's frequent absence on the night shift after his return to work in the Fall of 2000 was legitimate and based on his concerns about Complainant's commitment to the job. Likewise, his statement to Complainant after the second Captain's promotion that he might have

received more favorable consideration had he not taken a four month leave of absence after being rejected for the first position, evidenced the Chief's serious concerns about Complainant's commitment to the job and the Department, and not a bias against him related to disability. Chief Deacon's assertion that he denied Complainant c. 111 pay because he did not believe that Complainant's depression at not being promoted arose from an on-the-job injury was sincere and highly credible.

Finally, I am not persuaded that Complainant's experience and qualifications were superior to those of the successful candidates. Chief Deacon and others testified credibly about the qualifications they sought in a Training Officer and Captain and the pre-eminent importance of leadership abilities, respect of your peers and rapport with your peers. They testified credibly that they had serious concerns about Complainant's strengths in these areas. I do not believe that these concerns were fabricated or exaggerated or that they were a pretext for unlawful handicap discrimination.

In light of the above, Complainant has not proved a claim of discrimination based on disability and I conclude that Respondents did not violate G.L. c. 151B in refusing to select Complainant for promotion to Captain on two occasions, or in not selecting him for the Training Officer position.

IV. ORDER

Based upon the foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission in G.L. c. 151B, section 5, I hereby Order that the Complaint in this matter be dismissed.

This constitutes the final order of the Hearing Commissioner. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten (10) days of receipt of this order and a Petition for Review to the Full Commission within thirty (30) days of receipt of this Order.

So Ordered this 31st day of October, 2006.

Eugenia M. Guastaferr
Hearing Officer