**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

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

MATTHEW CORCORAN,
*Appellant*

v.

G1-13-76

BOSTON FIRE DEPARTMENT,
*Respondent*

Appearance for Appellant:

Joseph G. Donnellan, Esq.
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Norwood, MA 02062

Appearance for Respondent:

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Boston City Hall, Room 624
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Appearance for HRD:

Michele Heffernan, Esq.
Deputy General Counsel
Human Resources Division
One Ashburton Place, 3rd
Boston, MA 02108

Commissioner:

Cynthia A. Ittleman, Esq.[1]

**DECISION**

On March 19, 2013, the Appellant, Matthew Corcoran ("Mr. Corcoran"), pursuant to G.L. c. 31, § 2(b), filed this appeal with the Civil Service Commission ("Commission"), contesting the decision of the Boston Fire Department ("Department") to bypass him for original appointment to the position of permanent, full-time Firefighter. A pre-hearing conference was held at the offices of the Commission on May 14, 2013 and a full hearing was held at the same location on

[1] The Commission acknowledges the assistance of Law Clerk Julie Muller in preparing this decision.

October 11, 2013. The hearing was digitally recorded and both parties were provided with a CD of the hearing. The parties submitted proposed decisions.

The record was re-opened on September 5, 2014, joining the state's Human Resources Division ("HRD") as a party to obtain information regarding the unique medical issues raised in this case relating to the application of provisions of HRD's Physician's Guide, Initial-Hire Medical Standards ("HRD Medical Standards")[2] and to obtain additional information regarding Mr. Corcoran's health risks since Dr. Gilbert, the Appellant's expert and treating physician, did not testify at the October 11, 2013 hearing and the Appellant submitted a transcript of Dr. Gilbert's deposition from an earlier date.

On October 3, 2014, Mr. Corcoran filed a Motion to Accept Deposition Transcript of Dr. Gilbert in lieu of live testimony at the October 11, 2013 hearing, assented to by the Department. This Motion was denied on October 9 as follows: "The parties failed to file a motion requesting that a deposition be held, that the transcript be admitted at the full hearing in lieu of live testimony, and that the witness' appearance at the hearing will cause a substantial hardship pursuant to 801 CMR 1.01(8)(c). In addition, the transcript would preclude [the hearing officer] from inquiring of Dr. Gilbert as may be needed and to assess his credibility." (Email messages dated October 3 and 9, 2014)

On October 7, 2014, the Department filed a Motion to Decide the Matter Based Upon the Existing Record ("Motion to Decide on the Record"). The Appellant filed an Opposition. The Motion to Decide on the Record was denied on October 27, 2014.

[2] According to the HRD Medical Standards, "Started (sic) in June 2003, HRD no longer adjudicates medical examination appeals. An examinee may appeal his or her failure of a subsequent re-examination directly to the Civil Service commission located at One Ashburton Place, Room 503, Boston, MA 02108. The website for the Commission is http://www.mass.gov/csc/." Id., p. 2.

On October 30, 2014, the Department filed a Motion to Make Transcription Part of the Official Record ("Motion for Transcript"). The Appellant indicated he had no objection and the Motion for Transcript was allowed on October 30, 2014.

Also on October 30, 2014, the Department filed a Motion to Dismiss the appeal. HRD filed a memorandum thereafter joining the Motion to Dismiss and the Appellant filed an opposition to the Motion to Dismiss. A hearing was held on the Motion to Dismiss on November 6, 2014. The hearing was digitally recorded and the parties were provided with a CD of the hearing. The Motion to Dismiss was denied on November 20, 2014.

On October 31, 2014, a hearing was convened at the Veterans Administration Medical Center at 1400 VFW Parkway, in West Roxbury, Massachusetts at which Dr. Gilbert testified.[3] The hearing was digitally recorded and the parties were provided with a CD of the hearing. The parties were given the opportunity to submit memoranda on Dr. Gilbert's testimony on October 31 but they did not do so.

At the hearing on the Motion to Dismiss, HRD was ordered to produce a medical report by December 19, 2014 regarding applicable HRD Medical Standards in this unique case. HRD produced the medical report on December 19, 2014. The parties were given the opportunity to submit memoranda on HRD's medical report by January 9, 2015 but they did not do so. For the reasons stated herein, the appeal is denied.

**FINDINGS OF FACT**

Eleven (11) exhibits were entered into evidence at the hearing on October 11, 2013, one (1) exhibit was entered into evidence thereafter[4], another exhibit[5] was entered into evidence at the

[3] HRD failed to appear at the October 31, 2014 hearing.
[4] This exhibit is the curriculum vitae of Dr. Kales for the Department, which was not assigned an exhibit number.
[5] Exhibit 12, The Efficacy of Imatinib Mesylate in Patients with FIP1L1-PDGFR x-Positive Hypereosinophilic syndrome. Results of a Multicenter Prospective Study, The Hematology Journal 2007- 92-(09), 1173-1179.

October 31, 2014 hearing, HRD's medical report was entered into evidence on December 19, 2014 and a transcription of the October 11, 2013 hearing was entered into the record on motion.[6] Based on these exhibits, the HRD medical report, the testimony of the following witnesses:

*Called by the Appointing Authority*:

- Robert Moran, Human Resources Director, Boston Fire Department
- Albert Francis Rielly, M.D., Medical Examiner, Boston Fire Department;

*Called by the Appellant:*

- Matthew Corcoran, Appellant;
- Gary E. Gilbert, M.D., Veterans Administration Medical Center, West Roxbury;

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

1. Mr. Corcoran is a thirty-one year old man residing in Boston, MA. (Testimony of Mr. Corcoran; Exhibit 3A)
2. Mr. Corcoran graduated from Boston Latin Academy in 2001. After high school, he attended Salem State University until he joined the United States Navy in 2006. (Testimony of Mr. Corcoran)

[6] Mr. Corcoran objected to the inclusion of Exhibits 3 and 3A into the record, asserting that the Department failed to obtain appropriate certification of hospital records and did not submit them ten days in advance, as required by G.L. c. 233, s. 79G. The Department argued that the documents were admissible pursuant to t G.L. c. 233, s. 76. The exhibits were admitted de bene, giving the Department one week within which to submit hospital certification. The Department did not submit the hospital certification. However, section 79G of G.L. c. 233 relates to hospital records involving an injured person, which is not the issue in this case. Section 76 of the same Chapter relates to documents of the Commonwealth, which is also not the issue here. Since Exhibit 3 is Dr. Okurowski's decision on HRD's form to fail Mr. Corcoran based on his medical condition, which is the same HRD form used by Dr. Kales and admitted into the record as Exhibit 4, Exhibit 3 is admitted into this record in full. Exhibit 3A is comprised of many pages of Mr. Corcoran's detailed examination by a Nurse Practitioner at the hospital where Dr. Okurowski is admitted as well as a copy of a letter that Mr. Corcoran's physician, Dr. Gilbert, sent to the Department in support of his candidacy. The Nurse Practitioner did not appear and testify and it is unclear the extent to which Dr. Okurowski relied on all of the information in Exhibit 3A as submitted at the Commission hearing. Based on the foregoing, the only page of Exhibit 3A that is included in this record is Dr. Gilbert's letter to the Department.

3. Mr. Corcoran received an honorable discharge from the United States Navy in September, 2010. He served in Afghanistan for eight months. While shipboard, Mr. Corcoran's duties included performing the duties of a firefighter. (Testimony of Mr. Corcoran)
4. Mr. Corcoran, at the time of the October 11, 2013 hearing, was attending Salem State University and was in his last semester. He was majoring in history with a minor in marketing. (Testimony of Mr. Corcoran)
5. Mr. Corcoran took and passed the civil service examination for firefighter on April 24, 2010, scoring in the mid-nineties. (Stipulated Facts)
6. In August 2012, Mr. Corcoran's name appeared tied for 8th on Certification No. 00035 as a disabled veteran, from which the Department ultimately appointed fifty-three firefighters, approximately forty-one of whom were ranked below Mr. Corcoran. (Stipulated Facts; Testimony of Mr. Corcoran)
7. Mr. Corcoran completed an employment application, a drug test, and underwent a background investigation. After the background investigation, Mr. Corcoran had an interview. He was extended a conditional offer of employment, contingent on successfully passing a medical examination, the physical abilities test (PAT), and a psychological screening. (Testimony of Mr. Moran)

*Mr. Corcoran's Medical Diagnosis and Treatment*

8. In January 2011, Mr. Corcoran chose the Veterans Administration (VA) for his primary medical care and went to the VA Hospital in Jamaica Plain, MA, for a check-up examination, which included blood tests. When he returned a week later to receive the test results, the nurse told him they were concerned about his elevated

white blood cell count and referred him to Dr. Gary Gilbert. (Testimony of Mr. Corcoran; Exhibits 3 and 3A)

9. Dr. Gilbert is a staff physician and the Deputy Chief of Staff for Research and Development of the Boston Veterans Administration Medical Center ("West Roxbury VA") and is board certified in internal medicine, hematology and medical oncology.[7] He works with patients who have chronic diseases. He is an Associate Professor at Harvard Medical School, has instructed at other medical schools and is affiliated with Brigham and Women's Hospital. He has written and co-written many articles related to his certifications. (Testimony of Dr. Gilbert; Exhibit 10, pp. 7, 10 and exhibit 1 to Exhibit 10 (c.v.))

10. Dr. Gilbert is not involved in occupational medicine. He is not familiar with the specifics of exposures that firefighters face on the job; he does not know enough about the work of a firefighter to be able to state whether Mr. Corcoran would have an increased risk of cancer if he is employed as a firefighter. (Testimony of Dr. Gilbert)

11. Around February 2011, Mr. Corcoran had an appointment with Dr. Gilbert at which he underwent a number of tests including a bone marrow biopsy. After analyzing the test results and examining Mr. Corcoran, Dr. Gilbert diagnosed him with chronic eosinophilic leukemia ("CEL"), a rare malignant disease. (Testimony of Mr. Corcoran, Dr. Rielly and Dr. Gilbert; Exhibits 3A (letter from Dr. Gilbert) and 10) and HRD report provided December 19, 2014)(*infra*) Mr. Corcoran is the only patient with CEL being treated at the West Roxbury VA. (Testimony of Dr. Gilbert)

[7] This was Dr. Gilbert's title at West Roxbury VA Medical Center at the time of the October 11, 2013 hearing. As of the October 31, 2014 hearing, Dr. Gilbert's title was Acting Chief of Hematology at the West Roxbury VA.

12. Dr. Gilbert is involved in research and development at the West Roxbury VA but neither he nor anyone else at the West Roxbury VA is involved in research relating to CEL. Dr. Gilbert was last involved in CEL-related research approximately twenty years ago when he was a medical resident, which was long before the molecular defect that Mr. Corcoran has was known. However, because of his experience, Dr. Gilbert has more familiarity with CEL than the average hematologist. The last time he treated another patient for CEL was a number of years ago. (Testimony of Dr. Gilbert; Exhibit 10, pp. 7, 10 and exhibit 1 to Exhibit 10 (c.v.))

13. Dr. Gilbert prescribed Gleevec for Mr. Corcoran. Gleevec is a form of chemotherapy administered in pill form to inhibit white cell growth. There are treatments for other forms of cancer that can present a risk of additional cancers but Gleevec is not one of them. Gleevec is the only treatment Mr. Corcoran undergoes and he will take Gleevec or a similar medicine for the rest of his life. (Testimony of Mr. Corcoran and Dr. Gilbert; Exhibit 3A) Gleevec was designed for another type of cancer but works for CEL patients. Gleevec has only been approved as a medicine for CEL since 2006. (Testimony of Drs. Rielly and Gilbert)

14. Mr. Corcoran sees Dr. Gilbert every two to five months, at which time he undergoes blood tests and speaks with Dr. Gilbert, who reviews the test results to monitor Mr. Corcoran's condition and to check for side effects of Gleevec. Mr. Corcoran's CEL remains suppressed and he has had no side effects from taking Gleevec. (Testimony of Mr. Corcoran and Dr. Gilbert)

15. Although the disease is being suppressed and Mr. Corcoran is currently in remission, he is not cured of the disease.[8] (Testimony of Dr. Rielly and Dr. Gilbert; Exhibits 3A; 5, 10, p. 24). Dr. Gilbert estimated that there is a one in ten chance in five and ten years that Gleevec will no longer effectively suppress CEL in Mr. Corcoran. Even if Gleevec is no longer effectively suppressing CEL in Mr. Corcoran, there are two well-established medications similar to Gleevec that can be used instead. They are more potent than Gleevec and have worked well with patients who have Chronic Myelogenous Leukemia ("CML"), a form of leukemia that is analogous to CEL.[9] Dr. Gilbert is unaware of an elevated risk in general that Mr. Corcoran may have of developing another form of cancer because of CEL. (Testimony of Dr. Gilbert)
16. There is a low likelihood of side effects of Gleevec that would negatively impact Mr. Corcoran's abilities to work. The possible side effects of Gleevec involve an accumulation of fluid in the body in one of two ways. The first involves swelling in the legs, for example, which is not that serious. The second involves an accumulation of fluid inside the chest and/or abdomen, which is more serious and can affect the organs in the chest and/or abdomen. There is no standard treatment for these side effects but the options include giving the patient anti-inflammatory medication, such as prednisone, and continue to take Gleevec or take a break from Gleevec for a few weeks. Having one of these side effects on one occasion does not predict continuing side effects. Over a five to ten year period, approximately fifteen (15) percent of

[8] Dr. Gilbert, when deposed, stated that he has not represented that Mr. Corcoran is at no risk for recurrence of his disease. (Exhibit 10, p. 27) Though this matter is not litigated here, when asked if Mr. Corcoran would be eligible under G.L. c. 32, s. 94B for disability retirement based on the presumption that a fire fighter's cancer is deemed to have been contracted in the line of duty if she or he had passed a physical examination on entry into service, Mr. Corcoran's counsel suggested the presumption would not apply to Mr. Corcoran, given his CEL diagnosis at the time he took the entry physical examination.

[9] Dr. Gilbert has prescribed these alternative medications to two patients with CML, one of whom takes care of his grandchildren and one of who is employed in construction. (Dr. Gilbert)

patients will develop side effects to the point where they need to be treated.[10] (Testimony of Dr. Gilbert)

17. At the time of the hearing, Mr. Corcoran had no limitations to his physical activities. (Testimony of Mr. Corcoran and Dr. Gilbert; Exhibits 3A and 10)

*Department's Medical Examinations of Appellant*

18. Mr. Corcoran reported for the preemployment medical examination at New England Baptist Hospital on October 26, 2012. He was examined by Dr. Lee Okurowski. Dr. Okurowski is board certified in occupational medicine and employed at New England Baptist Hospital.[11] (Exhibit 3)

19. Dr. Albert Rielly has been the Department Medical Examiner since approximately 2012. He is certified in internal, preventive and occupational medicine. He is a clinical instructor at Harvard Medical School. He has also written a number of articles, including an article he co-authored, "A Guide to the Recognition and Prevention of Occupational Heart Disease for the Fire and Emergency Medical Services," Washington, D.C.: International Association of Fire Fighters. Before his present position, Dr. Rielly performed medical evaluations of police and firefighter candidates in New York state. If he had patients with CML, he would refer them to oncologists or hematologists. (Testimony of Dr. Rielly, Exhibit 6)

20. Dr. Rielly spoke with Dr. Lee Okurowski, the doctor who performed the Department's initial medical examination of Mr. Corcoran, regarding a letter from Dr.

[10] There is insufficient evidence to indicate how soon CEL would no longer be suppressed if a patient taking Gleevec ceases taking it, for example, because side effects arose warranting temporary suspension of treatment with Gleevec.

[11] No curriculum vita was provided for Dr. Okurowski. I take administrative notice of additional information indicating Dr. Okurowski's status at New England Baptist Hospital at http://www.nebh.org/doctors/okurowski-lee-208066

Gilbert to Mr. Robert Moran, the Department Human Resources Director. Dr. Rielly also reviewed the medical information that the Department received concerning Mr. Corcoran. (Testimony of Dr. Rielly)

21. Dr. Gilbert's October 3, 2012 letter to Mr. Moran had stated,

> Mr. Corcoran asked me to write to you regarding his health. He has been my patient since March 2011. He has a diagnosis of chronic eosinophilic leukemia. He is currently on treatment with imatinib (Gleevec) and is in a complete remission. **Mr. Corcoran's medical condition is rare, thus there is less information on which to base predictions than is available for people with more common medical problems. Available information predicts that his leukemia is suppressed, rather than cured, by his medication. However, that information also predicts that his leukemia will remain suppressed for years, possibly decades, by this medicine. In the event the disease progresses on this medicine there is a good likelihood that another medicine will lead to its suppression again.** Thus, I believe that Mattew [sic] has a chronic medical condition that is adequately treated with medication. He has no side effects from his medication. There are no limitations to his physical activities. Thus, there is no medical or physical reason that Mathew [sic] cannot perform all the duties of a fire fighter. (Exhibit 3A)(emphasis added)

22. Dr. Gilbert had not seen the HRD Medical Standards when he sent the October 3, 2012 letter to the Department (Exhibit 3A) and he has not performed medical evaluations for public safety agencies (Exhibits 7 (HRD Medical Standards) and 10, pp. 28, 29).

23. G.L. c. 31, § 61A provides, in pertinent part,

> The administrator, with the secretary of public safety and the commissioner of public health shall establish initial health and physical fitness standards which shall be applicable to all police officers and firefighters when they are appointed to permanent, temporary, intermittent, or reserve positions in cities and towns or other governmental units. Such standards shall be established by regulations promulgated by the administrator after consultation with representatives of police and firefighter unions, and the Massachusetts Municipal Association. …
>
> No person appointed to a permanent, temporary or intermittent, or reserve police or firefighter position after November first, nineteen hundred and ninety-six shall perform the duties of such position until he shall have undergone initial medical and physical fitness examinations and shall have met such initial standards. The

> appointing board or officer shall provide initial medical and physical fitness examinations. If such person fails to pass an initial medical or physical fitness examination, he shall be eligible to undergo a reexamination within 16 weeks of the date of the failure of the initial examination. If he fails to pass the reexamination, his appointment shall be rescinded. No such person shall commence service or receive his regular compensation until such person passes the health examination or reexamination. …
> Id.

24. Pursuant to G.L. c. 31, § 61A, HRD promulgated the HRD Medical Standards, the 2007 edition of which was in effect at all pertinent times. The HRD Medical Standards are a:

> …medical protocol for examining physicians for their assessment of candidates who are applying for initial-hire, municipal police officer and firefighter positions. …
> (Exhibit 7, p.1)

The Medical Standards identify Category A medical conditions involving firefighter candidates as those conditions that,

> … **preclude an individual from performing the essential job functions** of a municipal fire fighter in a training or emergency operational environment, **or present a significant risk to the safety and health of that individual** or others.
> (Exhibit 7, p. 21)(emphasis added)

A Category B medical condition is one that,

> … **based on its severity or degree**, **may or may not preclude an individual from performing the essential job functions** of a municipal fire fighter in a training or emergency operations environment, **or present a significant risk to the safety and health of that individual** or others.
> (Id.)(emphasis added)

25. Dr. Okurowski performed the initial medical examination on Mr. Corcoran on October 26, 2012, at the request of the Department, and found Mr. Corcoran medically disqualified under Section (m), Hematopoietic and Lymphatic medical conditions, Category B, of the HRD Medical Standards. Dr. Okurowski wrote on the HRD Medical Examination Form, "[a]pplicant with chronic eosinophilic leukemia

treated with Gleevec. Firefighting **may** be associated with increased risk of leukemia." This form was returned to the Department after the medical examination. (Exhibit 3 (emphasis added); Testimony of Mr. Moran)

26. With regard to Section (m) Hematopoietic and Lymphatic medical conditions, the HRD Medical Standards state that Category B conditions shall include,

    a. anemia, leukopenia, or thrombocythemia or chronic anticoagulation therapy,
    b. polycythemia vera,
    c. splenomegaly,
    d. history of thromboembolic disease,
    e. any other hematological[12] condition that results in an individual not being able to perform as a firefighter.
    (Exhibit 7, p. 31)

27. In a letter dated February 5, 2013, Mr. Corcoran was informed that he was bypassed for employment because he "failed the pre-employment physical." The letter was signed by Roderick J. Fraser, Jr., the then-Fire Commissioner at the Department. (Exhibit 2)

28. By letter dated February 5, 2013 from then Fire Commissioner Fraser to HRD, the Department informed HRD,

    Fire Fighter Candidate Matthew P. Corcoran was given the standard pre-employment physical and medical test on October 26, 2012, at the New England Baptist Hospital, 125 Parker Hill Avenue, Boston, MA. **Mr. Corcoran has been found medically unqualified for the position of Fire Fighter.**

    **Due to the physically demanding and hazardous nature of Fire Fighting it has been determined that Mr. Corcoran is medically unqualified for the position of Fire Fighting.**
    (Exhibit 1)(emphasis added)

[12] I take administrative notice that, according to the website MedicineNet.com (www.medterms.com/script/main/art.asp?articlekey=22594), the definition of "hematology" is: "The diagnosis, treatment, and prevention of diseases of the blood and bone marrow as well as the immunologic, hemostatic (blood clotting) and vascular systems. Because of the nature of blood, the science of hematology profoundly affects the understanding of many diseases." According to the same authority, the definition of "leukemia" is: "a cancer that starts in the tissue that forms blood. To understand cancer, it helps to know how normal blood cells form." Mr. Corcoran's physician, Dr. Gilbert relates the connection between hematology and oncology as follows, "Hematology is the field of blood disorders, and oncology is the –medical oncology is a field of malignancies. There's some overlap between the two diseases, such as leukemia and lymphoma." (Exhibit 10, p. 7)

29. Mr. Corcoran filed this appeal with the Commission on March 19, 2013. (Stipulated Facts).

30. At the prehearing conference at the Commission on May 14, 2013, Mr. Corcoran requested a medical reexamination pursuant to G.L. c. 31, s. 61A. The Department scheduled a reexamination for Mr. Corcoran for September 10, 2013 with Dr. Stefano Kales at Cambridge Health Alliance, Occupational Medical Clinic.[13] (Testimony of Mr. Moran; Exhibits 4 and 5)

31. Dr. Kales is certified in internal, occupational and preventive medicine and he has a Master's degree in Public Health. He is an Associate Professor at Harvard Medical School and at the School of Public Health, is an active staff physician at the Cambridge Hospital and Cambridge Health Alliance, has been involved in research related to his certifications and written (or co-written) a number of articles related to his certifications and co-authored an article with Dr. Rielly, "A Guide to the Recognition and Prevention of Occupational Heart Disease for the Fire and Emergency Medical Services," Washington, D.C.: International Association of Fire Fighters. Dr. Kales is one of Dr. Rielly's supervisors at Cambridge Health Alliance. (Dr. Kales' curriculum vitae was produced by the Department post-hearing at the Commission's request and included in the record but not numbered)

32. Dr. Kales performed the medical reexamination of Mr. Corcoran, reviewed Mr. Corcoran's initial medical examination and medical records from the West Roxbury VA and spoke with Dr. Gilbert, Mr. Corcoran's treating physician. Dr. Rielly was somewhat concerned about having Dr. Kales, one of his supervisors, perform Mr.

[13] Neither Dr. Kales nor Dr. Okurowksi, who conducted the Department's medical examinations in this case testified at the Commission hearing.

Corcoran's reexamination. For this reason, Dr. Rielly did not tell Dr. Kales about information that he (Dr. Reilly) researched in this case.[14] Thereafter, in his September 18, 2013 letter to the Department, Dr. Kales wrote,

> According to the HRD standard, '**The medical evaluation of any appointee with malignant disease which is newly diagnosed, untreated, or <u>currently being treated</u> shall be deferred until treatment has been completed.' Clearly, Mr. Corcoran continues to be treated based on the information provided. Therefore, it is my conclusion that he cannot pass the examination based on my reading of the section O.Tumors and Malignant Disease, because his treatment is continuous and has not been completed**.
> (Exhibit 5)(all emphasis in original); *see also* Exhibit 4)

33. With regard to Section (o), Tumors and Malignant Disease for firefighter candidates, the HRD Medical Standards indicate that there are no Category A conditions. (Exhibit 7, p. 31)

34. The Medical Standards state in Section (o), Tumors and Malignant Disease, that Category B medical conditions include,

- a. malignant disease which is newly diagnosed,
- untreated, or currently being treated. **The medical evaluation of any appointee with malignant disease which is newly diagnosed, untreated or currently being treated shall be deferred until treatment has been completed. Treated malignant disease shall be evaluated based on that individual's current physical condition and on the likelihood of that individual's disease to recur or progress.**
- b. any other tumor or malignancy that results in an individual not being able to perform as a fire fighter."

(Exhibit 7, p. 31)(emphasis added)(sic)[15]

35. Dr. Rielly, the Department Medical Examiner, agrees with Dr. Kales' assessment that Mr. Corcoran is disqualified more under Section (o), Tumors and Malignant Disease,

[14] Dr. Rielly testified that another doctor was considered to perform the reexamination but the other doctor was out of state at the pertinent time.

[15] Page 31 of the HRD Medical Standards, section (o), appears to have a typographical error that makes it appear as if there are three subsections (as written by Dr. Kales in Exhibit 5) when in fact there are only two.

Category B, than under Section (m), Hematopoietic and Lymphatic, Category B, because Section (o) is more specific than Section (m).[16] (Testimony of Dr. Rielly)

36. By email message dated November 7, 2014, the Commission wrote to the parties concerning a medical report to be produced by HRD ("HRD report") regarding interpretation of the pertinent provisions of the HRD Medical Standards. At a motion hearing the previous day, HRD indicated that Dr. L. Kristian Arnold would prepare the HRD report. Dr. Arnold is involved in determining the medical fitness of recruits applying to become Boston Police Department officers and he is well-acquainted with the Medical Standards.[17] (Administrative Notice)

37. The November 7, 2014 email message from the Commission states, in pertinent part:

> As indicated at the hearing yesterday, Dr. Arnold's medical report, due December 19, 2014, is to address the following:
> A. the following portion of the September 5, 2014 email message sent to the parties -
> 2.a. How does HRD read and interpret the Medical Standards in regard to Mr. Corcoran? Specifically, does Mr. Corcoran have a Category A disqualifying condition or a Category B condition that prevents him from performing the essential functions of the firefighter job pursuant to Medical Standards section (6)(m)("hematopoietic and lymphatic") and/or does Mr. Corcoran have a Category B[1] condition pursuant to Medical Standards section (6)(o)("tumors and malignant disease")? (*See* Medical Standards, pp. 30-31.)
> b. Medical Standards section (6)(o)2.a. provides that Category B medical conditions shall include:

[16] In the fall of 2014, HRD issued "Regulations for Initial Medical and Physical fitness Standards Tests for Municipal Public Safety Personnel," pursuant to G.L. c. 31, s. 61A, which apparently replaces the 2007 HRD Medical Standards. Under Exhibit B of the 2014 Regulations, Section 6.22.1, the text states, "Category A medical conditions shall include the following: (1) Malignant disease that is newly diagnose, untreated, or currently being treated, or under active surveillance due to the increased risk for reoccurrence[;] (2) Any tumor or similar condition that results in the candidate not being able to safely perform one or more of the essential job tasks[.]" Section 6.22.2 states, "Category B medical conditions shall be evaluated on the basis of an individual's current physical condition and on the staging and prognosis of the malignancy (i.e. likelihood that the disease will recur or progress), and include the following … (7) History of hematological malignancy[.]"

[17] HRD did not provide a curriculum vitae for Dr. Arnold but I take administrative notice that Commission decisions indicate that he performs medical evaluations for the Boston Police Department. *See, e.g.* Tran v. Boston Police Department, Docket No. G1-11-36 (appeal dismissed); D'Amato v. Boston Police Department, Docket No. G1-09-237 (appeal dismissed); and Lucas v. Boston Police Department, Docket No. G1-11-50 (appeal allowed).

[1] There are no Category A conditions under HRD Medical Standards section (6)(o)(Tumors and Malignant Disease) for firefighters.

malignant disease which is newly diagnosed, untreated, or currently being treated. The medical evaluation of any appointee with malignant disease which is newly diagnosed, untreated, or currently being treated shall be deferred until treatment has been completed. Treated malignant disease shall be evaluated based on that individual's current physical condition and on the likelihood of that individual's disease to recur or progress.
Thus, on one hand, it appears that, under the Medical Standards, the medical evaluation of a firefighter candidate, like Mr. Corcoran, who is receiving medication to suppress a malignant disease must be *deferred* until "treatment has been completed" but the next sentence states that someone with a malignant disease shall be evaluated on his or her *current* physical condition (and the likelihood of recurrence or progression). How are these two provisions reconciled with regard to Mr. Corcoran?

B. Whether the Boston Fire Department (and/or through the reports of Dr. Okurowski and Dr. Kales) correctly applied the HRD Medical Standards with reference to section (6)(m)("Hematopoietic and Lymphatic") and/or section (6)(o)("tumors and malignant disease") to Mr. Corcoran.

… any comments on Dr. Arnold's report are due January 9, 2015.[18]

Footnote 1: There are no Category A conditions under the HRD Medical Standards (2007 as applied to Mr. Corcoran) section (6)(o) for firefighters. … (Administrative Notice)

38. On December 19, 2014, the Commission received the HRD report, which states, in pertinent part,

… Since the development of imatinib, several other medications have been developed that exert the same effect. …
Over time, some leukemias being treated with imatinib can become resistant, usually through a new mutation of the FIP1L1-PDGFRα fusion gene. Some patients with leukemias that become resistant can be treated with one of the new medications with successful suppression of the FIP1L1-PDGFRα fusion gene containing cell lines. Virtually all persons with the FIP1L1-PDGFRα fusion gene who respond to imatinib will experience recurrence of overgrowth of the affected cell line if they stop the medication.
… One patient with chronic myelogenous leukemia with the FIP1L1-PDGFRα fusion gene, an allied form of leukemia to FIP1L1-PDGFRα fusion gene CEL, has been reported to have survived 15 years prior to dying. …
The occurrence of another mutation in a different gene also leads to resurgence of CEL in persons being treated with imatinib. As of the time of this writing, there are no specifically known causes of this mutation. …

[18] Neither the Appellant nor the Department filed comments on the HRD report.

> Imatinib treatment was begun at the time of [Mr. Corcoran's] diagnosis with excellent results in suppression of the cancerous cell reproduction including at the bone marrow level. Continued suppression of the cancerous cells, meaning Mr. Corcoran's survival, is dependent on, though not guaranteed by continued use of imatinib, or one of the newer, similar medications …
> Due to the rarity of FIP1L1-PDGFRα fusion gene positive CEL, reliable prediction of long term survival is impossible despite one un-published report of survival up to 15 years. …
> (HRD report, December 19, 2014)

39. A 2007 study entered into the record for the Appellant via testimony of Dr. Gilbert, The Efficacy of Imatinib Mesylate in Patients with FIP1L1-PDGFRα-Positive Hypereosiniophilic Syndrome (Results of a Multicenter Prospective Study), regarding twenty-seven (27) CEL male patients in Italy who were treated with imatinib found:

> Twenty-seven male patients carried the FIP1L1-PDGFRα rearrangement. All 27 achieved a complete hematologic remission (CHR) and became negative for the fusion transcripts …. With a median follow-up of 25 months (15-60 months) all 27 patients remain in CHR … and continue treatment at a dose of 100 to 400 mg daily. In three patients imatinib treatment was discontinued for few months, the fusion transcript became rapidly detectable, and then again undetectable upon treatment reassumption. …
> (Exhibit 12)[19]

40. A 2006 study, Cancer Risk Among Firefighters: A Review and Meta-Analysis of 32 Studies,[20] entered into the record for the Department via the testimony of Dr. Rielly, who does not appear to have been involved in the study, displays a table that is a graphic representation of the results of the meta-analysis, describing the cancer risk for twenty-one (21) types of cancer. (Exhibit 8, Table 5; exhibit provided by the

[19] The study was conducted jointly by a variety of Universities and medical institutions in Italy and is published by the Hematology Journal, 92(09), pp. 1173-1179 (2007).
[20] The study was written by the following authors: Grace K. LeMasters, PhD; Ash M. Genaidy, PhD; Paul Succop, PhD; James Deddens, PhD; Tarek Sobeih, MD, PhD; Heriberto Barriera-Viruet, PhD; Kari Dunning, PhD; and James Lockey, MD, MS and published by the Journal of Environmental Medicine at Vol. 48, No. 11 (Nov. 2006).

Department via testimony of Dr. Rielly, who does not appear to have been involved in the study).[21] The study begins as follows:

> **Objective**: The objective of this study was to review 32 studies on firefighters and to quantitatively and qualitatively determine the cancer risk using a meta-analysis. **Methods**: A comprehensive search of computerized databased and bibliographies from identified article was performed. Three criteria used to assess the probable, possible, or unlikely risk for 21 cancers included pattern of meta-relative risks, study type, and heterogeneity testing. **Results**: The findings indicated that firefighters had a probable cancer risk for multiple myeloma with a summary risk estimate (SRE) of 1.53 and 95% confidence interval (CI) of 1.21-1.94, non-Hodgkin lymphoma (SRE= 1.51, 95% CI= 2.02, 95% CI= 1.30-1.73), and prostate (SRE= 1.28; 95% CI= 1.14-1.43. Testicular cancer was upgraded to probable because it had the highest summary risk estimate (SRE = 2.02; 95% CI= 1.30-3.13. Eight additional cancers were listed as having a 'possible' association with firefighting. Conclusions: Our results confirm previous findings of an elevated metarelative risk for multiple myeloma among firefighters. In addition, a probable association with non-Hodgkin lymphoma, prostate, and testicular cancer was demonstrated.
> (J. Occup. Environ. Med. 2006; 48: 1189-1202)(emphasis in original)

This study also states that firefighters have a "possible" (as opposed to "probable" or "unlikely") risk of contracting leukemia. (Id., Table 4)[22] Dr. Rielly concurs with this study results. (Testimony of Dr. Rielly)

41. According to the World Health Organization, International Agency for Research on Cancer, Monographs on the Evaluation of Carcinogenic Risk to Humans, specifically Volume 98 (2007)("WHO IARC Monograph 98"), regarding risks to Painters, Firefighters, and Certain Shiftwork, in Section 6.3 states that, "Occupational exposure as a firefighter is *possibly carcinogenic to humans* …." in view of the indications that fires emit a number of toxic and carcinogenic substances. (Exhibit 9 (section 6.3 and

[21] It appears that the Meta-Analysis refers to people who are healthy and not those who have a form of leukemia in remission.
[22] The comparison groups used in the thirty-two (32) studies included in the meta-analysis are internal, local workers, local general population, regional general population, national general population, and national employment database.

pp. 399-400)(exhibit provided by the Department via testimony of Dr. Rielly; Dr. Rielly does not appear to have been involved in this study)(emphasis in original))[23]

42. As to whether HRD Medical Standards Section (m), relating to Hematopoietic and Lymphatic medical conditions, or Section (o), relating to Tumors and Malignant Disease, is the prevailing and determinative provision of the HRD Medical Standards in this case, the HRD report concludes, in pertinent part,

> … Standard V.(6)(o) category B conditions include 'malignant disease which is newly diagnosed, untreated, or currently being treated.' This section states that 'the medical evaluation of any appointee with malignant disease which is newly diagnosed, untreated, or currently being treated shall be deferred until treatment has been completed.' It further states that 'treated malignant disease shall be evaluated based on that individual's current physical condition and on the likelihood of that individual's disease to recur or progress.'
> … The standard V.(6)(o) category B structure implies also a hierarchy of decision-making beginning with the first sentence in which it is stated that 'the medical evaluation of any appointee with malignant disease which is new diagnosed, untreated, or **currently being treated shall be deferred until treatment has been completed**.' Logically, then the second assessment standard follows that, for persons who have malignant disease that has been treated; that is, for which treatment has taken place and appeared to be successful to resolution of the malignancy, the evaluation should be based on the 'likelihood of that patient's disease to recur or progress.'
> The second assessment statement in Standard V.(6)(o)2.a. regarding recurrence may be confounded by different possible interpretations of the word 'treated.' Following on as it does from the first assessment statement and as the sentence is constructed, it would be most commonly medically interpreted to apply to persons who had been deemed cured following a course of treatment, such as chemotherapy or radiation, or a specific intervention, such as surgery or stem cell transplant, for the malignancy with which they had been diagnosed. On-going

[23] This Monograph also states, "A recent meta-analysis evaluated 32 studies and found that the risk for cancer in firefighters was significantly elevated for ten sites, four of which showed the strongest evidence of an association. Since that analysis, two more large epidemiological studies of cancer in firefighters have been reported. Therefore, another meta-analysis that included these two studies was performed by the Working Group for the four primary cancer sites. Three types of cancer showed significant summary risk estimates: the incidence of testicular cancer was ~ 50% in excess based on six studies and approximately 150 cases, that of prostatic cancer was ~in excess based on 17 studies and approximately 1800 cases, and that of non-Hodgkin lymphoma was ~20% in excess based on seven studies and more than 300 cases. … Although firefighters are exposed concurrently to a multitude of chemical compounds that include numerous carcinogens, human epidemiological studies at best used indirect (poor) measurements of exposure to such agents. Also, exposures of firefighters vary considerably depending on their job activities, and only crude measures of exposure, such as duration of employment and number of runs, have been used in these studies. Despite these limitations, increased risks for some cancers were found for firefighters in the metaanalysis." WHO IARC Monograph 98, p. 557.

> suppression of cancerous cells with medical treatment falls more in the domain of the prior assessment statement, 'current being treated,' cited in the previous paragraph. …
> … CEL is a malignant disease. It can be suppressed with imatinib, or another of the medications that have been developed to use if imatinib fails. It cannot be considered treated, as in cured, a state in which the disease has been eliminated from the patient without on-going treatment. …
> There are so few persons with [CEL] that no reliable statistics exist to predict the 'likelihood' of suppressed [CEL] to 'recur or progress.' …
> … it appears that standard V.(6)(o)2. would apply with [Mr. Corcoran] being classed as being under on-going treatment. According to that standard, he would not only be disqualified at the time of his two examinations … since he will need to remain under active on-going treatment with imatinib or a similar medication for the rest of his life.
> (HRD report, December 19, 2014, pp. 6, 7)(emphasis in original)

*Applicable Law*

Upon an appeal, the appointing authority has the burden of proving by a preponderance of the evidence that the reasons stated for the bypass are justified. Brackett v. Civil Serv. Comm'n, 447 Mass. 233, 241 (2006). Reasonable justification is established when such an action is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and correct rules of law." Comm'rs of Civil Serv. v. Mun. Ct., 359 Mass. 211, 214 (1971) (quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 485 (1928)).

An appointing authority may use any information it has obtained through an impartial and reasonably thorough independent review as a basis for bypass. *See* City of Beverly v. Civil Serv. Comm'n, 78 Mass.App.Ct. 182, 189 (2010). "In its review, the commission is to find the facts afresh, and in doing so, the commission is not limited to examining the evidence that was before the appointing authority." Id. at 187 (quoting City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, *rev. den.*, 440 Mass. 1108 (2003)). "The commission's task, however, is not to be accomplished on a wholly blank slate." Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823

(2006). Further, "[t]he commission does not act without regard to the previous decision of the appointing authority, but rather decides whether there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision." Id. at 824 (quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334, *rev. den.*, 390 Mass. 1102 (1983)).

In deciding an appeal, "the commission owes substantial deference to the appointing authority's exercise of judgment in determining whether there was reasonable justification" shown. Beverly at 188. An appointing authority "should be able to enjoy more freedom in deciding whether to appoint someone as a new… officer than in disciplining an existing tenured one." *See* City of Attleboro v. Mass. Civil Serv. Comm'n, C.A. BRCV2011-00734 (MacDonald, J.), citing Beverly at 191. The Commission is charged with ensuring that the system operates on "[b]asic merit principles." Mass. Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, at 259 (2001). "It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority." Id. (citing Sch. Comm'n of Salem v. Civil Serv. Comm'n, 348 Mass. 696, 698-99 (1965); Debnam v. Belmont, 388 Mass. 632, 635 (1983); Comm'r of Health & Hosps. of Bos. v. Civil Serv. Comm'n, 23 Mass.App.Ct. 410, 413 (1987)).

As noted above, G.L. c. 31, §61A requires HRD to develop initial health and physical fitness standards for all police officers and firefighters when they are appointed to permanent, temporary, intermittent or reserve positions. HRD promulgated medical standards pursuant to G.L. c. 31, §61A with the Legislature ratifying. *See* Carleton v. Commonwealth, 447 Mass. 791, 808. The statute makes it clear that police officers and firefighters cannot begin to perform their duties of their position until they have successfully taken an initial medical and physical fitness

examination and have met the initial medical standards. A reexamination is offered to a candidate if he or she fails the initial medical examination and must be requested within sixteen (16) weeks of the initial examination. The statute is also clear that if the candidate fails to pass the reexamination, the conditional offer of appointment must be rescinded.

*The Parties' Positions*

The Boston Fire Department asserts that the Commission must affirm the Department's bypass decision because Mr. Corcoran has a Category B medical condition that makes it unsafe for him to perform the essential functions of the job. Mr. Corcoran has chronic eosinophilic leukemia that is not cured and he is required to take Gleevec, a form of chemotherapy, or a similar medication for the rest of his life. In addition, at some unknown point in time, medication may no longer suppress Mr. Corcoran's CEL and/or he may experience serious side-effects from the medication. Since CEL is rare and the medication for it has only been prescribed for CEL for six or seven years, the Department asserts that there is no prognosis of the effectiveness and side-effects of the medication in the long-term. The Department also argues that firefighting activities are linked to an increased risk of cancer, including leukemia, and that Mr. Corcoran's health is at a substantial risk because he already has chronic eosinophilic leukemia, albeit in remission. Moreover, Drs. Okurowksi, Rielly and Kales all agreed that Mr. Corcoran should be disqualified from further consideration for appointment to the position of firefighter based on his CEL. Further, these three doctors are certified in occupational medicine and familiar with the applicable HRD Medical Standards whereas Dr. Gilbert is not. Consequently, the Department avers, Dr. Gilbert's testimony and deposition is outweighed by the statements of Drs. Okurowski, Rielly and Kales. Therefore, the Department argues, it had reasonable justification to bypass Mr. Corcoran.

Mr. Corcoran argues the Department bypassed him without any review of his ability to perform the essential functions of a fire fighter, as required under Category B conditions in the HRD Medical Standards. Mr. Corcoran asserts that the Department bypassed him based solely on his status as a person with chronic eosinophilic leukemia, resulting in Mr. Corcoran's "summary disqualification." In addition, Mr. Corcoran asserts that Dr. Rielly did not examine Mr. Corcoran; neither Dr. Okurowski nor Dr. Kales determined whether Mr. Corcoran could perform the functions of a firefighter and neither of them testified at the Commission hearing. Further, the Appellant avers, unlike Dr. Gilbert, neither Dr. Okurowski, Dr. Kales nor Dr. Rielly have specialties in oncology and hematology. Mr. Corcoran also argues that the Department is discriminating against him because the Department has not offered any evidence that Mr. Corcoran "would expose him or others to significant health and safety risks that do not apply to all firefighters or the general public" and is instead just fearful of his condition.[24] The Department, Mr. Corcoran alleges, is making a blanket assumption that he cannot be exposed to chemicals as a firefighter while other employees can decide whether or not they are willing to take the risk of exposure to such chemicals. Mr. Corcoran disputes that a daily dose of Gleevec constitutes on-going treatment under section (o) of the HRD Medical Standards and asserts that the same Standards do not indicate that a chance of relapse of a disease is a medical reason for bypass. He further asserts that the Department's determination constitutes an abuse of discretion, a misapplication of the cited provisions of HRD Medical Standards and it is contradictory to basic merit principles. He also denies that his performance of the job of a firefighter would negatively affect public safety since he can perform the functions of a

[24] To the Commission's knowledge, Mr. Corcoran has not filed a claim with the Massachusetts Commission Against Discrimination ("MCAD").

firefighter and the Department has failed to prove otherwise. Therefore, Mr. Corcoran argues, the Department did not provide sound and sufficient reasons to bypass him.

*Analysis*

The Department has established, by a preponderance of the evidence, that it had sound and sufficient reasons to bypass Mr. Corcoran. This determination is based on appropriate weight given to the documentary evidence admitted, as well as the testimonial evidence I find credible, as reflected in the findings of fact and conclusions of law herein. I found Mr. Corcoran credible in that his testimony was straightforward and responsive. He was, by all appearances, respectful, appropriate and sincere and he exhibited an honest and keen desire to be a firefighter at the Department in the city where he resides and was raised. Mr. Moran's testimony, limited largely to the process leading to Mr. Corcoran's medical examinations, was credible.

I found Dr. Rielly to be credible generally as his testimony was informed and responsive, although he should have disclosed his connection with Dr. Kales, who conducted Mr. Corcoran's reexamination, rather than having it revealed upon cross-examination. I note, however, that when asked, Dr. Rielly stated that an alternate appropriate physician to conduct the reexamination was out of state and he (Dr. Rielly) did not disclose to Dr. Kales research he had done regarding Mr. Corcoran's condition. Further, Dr. Rielly conceded that his determination did not indicate whether Mr. Corcoran could actually perform the functions of a firefighter.

Dr. Gilbert's testimony was credible in that his statements were knowledgeable, sincere, consistent and considered, admitting when he did not have answers to certain questions yet offering, in his own medical understanding and on behalf of patients like Mr. Corcoran, that people with chronic and treatable diseases should be given all due consideration for employment if they can perform the required functions.

The Department conformed to the HRD Medical Standards issued by HRD in its decision to bypass Mr. Corcoran. Specifically, the Department had reasonable justification to bypass Mr. Corcoran applying Section (o)2.a., Category B, of the HRD Medical Standards. A Category A medical condition generally is one "would preclude an individual from performing the essential job functions of a municipal fire fighter … or present a significant risk to the safety and health of that individual or others." Exhibit 7, p. 21. Under section (o), regarding tumors and malignant disease, there are no Category A conditions. A Category B condition generally is one that, "based on its severity or degree, may or may not preclude an individual from performing the essential job functions of a municipal fire fighter … or present a significant risk to the safety and health of that individual or others." Id. (emphasis added) Under section (o)2.a., a Category B medical condition is,

> malignant disease which is newly diagnosed, untreated, or currently being treated. The medical evaluation of any appointee with malignant disease which is newly diagnosed, untreated, or currently being treated shall be deferred until treatment has been completed. Treated malignant disease shall be evaluated based on that individual's current physical condition and on the likelihood of that individual's disease to recur or progress." Id., p. 31.

Section (o)2.b. states that a Category B medical condition also includes "any other tumor or malignancy that results in an individual not being able to perform as a firefighter. Id. However, the Department's focus appears to be section (o)2.a., not 2.b.

There is no dispute that Mr. Corcoran has CEL and that it is a rare, malignant disease. Dr. Gilbert has prescribed, and Mr. Corcoran has been taking Gleevec, a pill form of chemotherapy for approximately three years, which suppresses but does not cure his CEL. Gleevec has been used for treatment of CEL since 2006. Mr. Corcoran will need to take Gleevec, or a similar medication, for the rest of his life. He is monitored by Dr. Gilbert quarterly to assess Mr. Corcoran's condition and whether Mr. Corcoran is experiencing any side-effects.

Therefore, under section (o)2.a. of the HRD Medical Standards, Mr. Corcoran has a malignant disease that is currently being treated. Since his treatment is on-going, it has not been "completed" and the Department cannot now medically evaluate him for consideration for the job of firefighter, as required by law, and the Department may disqualify and bypass him. The Department's decision to disqualify Mr. Corcoran under section (o)2.a. is supported by the HRD report based on Dr. Arnold's analysis.[25] Specifically, Dr. Arnold found that, based on a medical and grammatical understanding of section (o)2.a., the second reference to a "treated" malignant disease is a reference to a person who has had a malignant disease and who has successfully completed treatment, unlike Mr. Corcoran, whose treatment is ongoing.

As a result of this conclusion, I do not reach the two-fold inquiry of a Category B medical condition, involving the effect of a medical condition on a person's ability to perform the job or whether there is a "significant risk" to the person's safety and health. I note, however, that there appears to have been insufficient evidence to prove either that Mr. Corcoran's medical condition precluded him from performing the functions of a firefighter or that there was a "significant risk" to Mr. Corcoran's health if he were appointed to be a firefighter. With regard to the risk to Mr. Corcoran, Dr. Okurowski's medical report stated that firefighting "may be associated with increased risk of leukemia" and Exhibit 8 (the "Meta Analysis" relied upon by the Department) states that firefighters have a probable increased risk of being diagnosed with certain cancers and a possible increased risk of being diagnose with others. Dr. Rielly testified that a candidate who has a form of leukemia, like Mr. Corcoran, has a greater health risk as a firefighter but his assertion was not supported by the evidence. It is not clear that such assessments constitute the "significant risk" standard for a disqualification based on a Category B condition. In addition,

[25] I do not adopt that part of Dr. Arnold's written statement that Mr. Corcoran is also permanently disqualified since medical treatments of CEL may improve sufficiently to warrant reconsideration of candidates with such medical conditions.

because CEL is rare, there is minimal and only short-term information based upon which the Department could determine Mr. Corcoran's long-term longevity with CEL treated by Gleevec or similar medications.

The Department also averred that it had reasonable justification to disqualify Mr. Corcoran based on Dr. Okurowski's determination under section (m), regarding hematopoietic and lymphatic medical conditions, Category B, of the HRD Medical Standards. Exhibit 3. Dr. Okurowski also wrote in his determination, "[a]pplicant with chronic eosinophilic leukemia treated with Gleevec. Firefighting **may** be associated with increased risk of leukemia." Id. There is no additional documentation in the record explaining Dr. Okurowski's determination in this regard and he did not testify. There are five section (m) Category B medical conditions, four of which are diseases which Mr. Corcoran does not have. The fifth condition in section (m), Category B, is, "any other hematological condition that results in any individual not being able to perform as a firefighter." Exhibit 7, p. 30. Thus, it would appear that Dr. Okurowski's determination was based on the fifth condition. However, as noted in reference to section (o)2.a. above, Dr. Arnold's conclusion in the HRD report noted above, there appears to have been insufficient evidence that Mr. Corcoran's condition precluded him from performing the job of a firefighter or that there is a "significant risk" to his health if he were appointed to the position of firefighter. Further, as noted by Dr. Kales and Dr. Arnold, the provisions of section (o)2.a. are directed more specifically to Mr. Corcoran's medical condition than the provisions of section (m), Category B. Therefore, the Department did not have reasonable justification to disqualify Mr. Corcoran based on section (m), Category B of the HRD Medical Standards.

Since Mr. Corcoran has a rare, malignant disease that is being continuously treated, the Department had reasonable justification to bypass Mr. Corcoran. There is no indication that the

assessments of Mr. Corcoran were conducted improperly. Nor is there indication of bias or other inappropriate motives here. Rather, the Department's decision reflects a valid exercise of its discretion, meriting appropriate deference. Finally, any claim of discrimination pursuant to G.L. c. 150B in this regard would not lay with this Commission.

## Conclusion

For the above reasons, Mr. Corcoran's appeal under Docket No. G1-13-76 is hereby ***denied.***

Civil Service Commission

*/s/ Cynthia A. Ittleman*
Cynthia A. Ittleman, Esq., Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on February 5, 2015.

Either party may file a motion for reconsideration within ten (10) 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 (30) 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:
Joseph Donnellan, Esq. (for Appellant)
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**COMMONWEALTH OF MASSACHUSETTS**

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MATTHEW CORCORAN,
*Appellant*

v. G1-13-76

BOSTON FIRE DEPARTMENT,
*Respondent*

Concurring Opinion of Commissioner Stein

The Commission's decision here, in effect, upholds Mr. Corcoran's disqualification for appointment as a Boston firefighter, not because he has been found unable currently to perform any of the duties of a firefighter, but solely because he remains in "treatment" for a medical condition – CEL, a rare form of leukemia – and, while that treatment has been totally effective to date to keep the disease in "complete remission", his prognosis is too inconclusively understood or studied to know with reasonable medical certainty whether or not his condition may, at some unknown future time, prevent him from safely performing such duties.

I must, reluctantly concur, as the plain language of the HRD Medical Standards, as written (both in their 2007 and 2014 versions) impel this conclusion and, having been ratified by the legislature, must be given the force and effect of law which the Commission cannot override.. See Carleton v. Commonwealth, 447 Mass. 791 (2006) I remain skeptical, however, that Mr. Corcoran's situation can be distinguished from other chronic medical conditions that, with proof of effective on-going treatment, are not automatically disqualifying unless they can be shown to prevent the candidate from actually performing the duties of the position – e.g., diabetes, anemia, arthritis, epilepsy. Nevertheless, as Carleton teaches, whether such distinction lacks any

"rational" medical basis or otherwise amounts to unlawful discrimination at the level of speculation on the basis of an increased risk due to a "perception of a disability" are matters that legislative ratification of the HRD Medical Standards precludes the Commission from considering and can only be addressed, if at all, in another forum. I trust that, if and when the body of medical science accumulates better knowledge about CEL to warrant revisiting this issue, the HRD Medical Standards, may eventually come to make further changes to the standards that provide accommodation for this type of condition, so that it is not an automatic disqualifier as it now is, in effect.

*/s/ Paul M.Stein*_____

Paul M. Stein, Commissioner