

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

ARIANN DIORIO
Appellant
v.

Docket No.: G1-13-231

CITY OF WORCESTER AND,
HUMAN RESOURCES DIVISION,
Respondents

Appearance for Appellant:

Pro Se
Ariann Diiorio

Appearance for Appointing Authority:

William R. Bagley, Esq.
City of Worcester
455 Main Street, Room 109
Worcester, MA 01608

Appearance for Human Resources Division

Andrew Levrault, Esq.
Human Resources Division
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Boston, MA 02108

Commissioner:

Cynthia Ittleman¹

DECISION ON MOTION TO DISMISS

On October 23, 2013, the Appellant, Ariann Diiorio (“Ms. Diiorio”), acting under to G.L. c. 31, § 2(b), filed this appeal with the Civil Service Commission (“Commission”), regarding the decision of the City of Worcester (“Worcester”) to rescind her conditional offer of employment for the position of permanent, full time, police officer.

A pre-hearing conference was held on November 19, 2013. The state Human Resources Division (“HRD”) filed a Motion to Dismiss Ms. Diiorio’s appeal on December 13, 2013. Worcester did not file an opposition to HRD’s Motion to Dismiss. The Commission held a

¹ The Commission acknowledges the assistance of Law Clerk Julie Muller in the drafting of this decision.

hearing on the Motion to Dismiss on January 29, 2014. Ms. Diiorio did not respond to HRD's Motion to Dismiss in writing but appeared at the motion hearing to oppose HRD's motion.

FINDINGS OF FACT

Giving appropriate weight to any and all documents submitted by the parties, the parties' arguments and stipulations, and the inferences reasonably drawn from the evidence, and in view of the applicable statutes, regulations, policies, and caselaw, I find the following:

1. Ms. Diiorio took and passed the civil service exam for Police Officer in April 2011, achieving a score of 96. (*Stipulated Facts*).
2. Ms. Diiorio was tied for last among the candidates who signed willing to accept appointment on Certification No. 00525 issued to Worcester by HRD on March 27, 2013. Worcester selected twenty-seven (27) applicants for appointment, none of whom were ranked below Ms. Diiorio.² (*Stipulated Facts*).
3. At some point, Worcester extended a conditional offer of employment to Ms. Diiorio and began Worcester's initial hiring process. This process includes undergoing a medical examination. (*HRD's Motion*).
4. The state HRD Physician's Guide, Initial-Hire Medical Standards, October 2007 ("Medical Standards")³ provides,

“...medical protocol for examining physicians for their assessment of candidates who are applying for initial-hire, municipal police officer and firefighter positions. ...” (*Medical Standards, p.1*)

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

² Worcester had originally requested a certification from which it could appoint twenty-five (25) police officers and later amended this request for two additional appointments. There were no candidates appointed who appeared below Ms. Diiorio, therefore, she was not bypassed. (*Stipulated Facts; HRD's Motion*).

³ HRD publishes a Physician's Guide, Initial-Hire Medical Standards advising physicians when they assess municipal police officer and firefighter candidates. HRD attached the Regulations for Initial Medical and Physical Fitness Standards Tests for Municipal Public Safety Personnel to its Motion to Dismiss as Attachment 7.

“...preclude an individual from performing the essential job functions of a municipal police officer, or present a significant risk to the safety and health of that individual or others.” (*Medical Standards, p.6; HRD’s Motion, Attachment 7, p.29*).

5. With regard to Section (b) Eyes and Vision medical conditions, the Medical Standards state,

“[t]he medical evaluation shall minimally include visual acuity (Snellen) and peripheral vision testing using a Titmus or Optec Vision Screener or other similar standardized testing device. Contact lenses are not permitted to meet the uncorrected standard. Xchrom contact lens use is not permitted to meet the color standard. When the candidate is being tested, he/she must present without wearing contact lenses for at least 24 hours, so that uncorrected vision can be accurately tested.” (*Medical Standards, p. 9; HRD’s Motion, Attachment 7, p.32*).

6. With regard to Section (b) Eyes and Vision medical conditions, the Medical Standards state Category A conditions “shall include,

- a. uncorrected vision worse than 20/100 in either eye
- b. corrected vision worse than 20/20 in the better eye UNLESS – the vision in the good eye alone is at least 20/25 AND the vision with both eyes together is 20/20 or better.
- c. peripheral vision of less than 70 degree temporally and 45 degrees nasally in either eye AND/OR any history of conditions limiting field of vision will necessitate additional assessment by an eye care professional who will use a Goldmann-type perimeter to determine if the binocular visual field is 140 degrees (at least 70 degrees temporally in each eye) with a III4e isopter.
- d. Testing by Ishihara or Richmond pseudo-isochromatic plates is required and if the candidate fails, testing by Farnsworth D-15 is required. Two or more major errors on the Farnsworth is a Category A condition. (*Medical Standards, p.9; HRD Motion, Attachment 7, p.32-33*).

7. On August 27, 2013 Ms. Diiorio reported for a medical examination at Grove Medical Associates, PC. (*HRD’s Motion, Attachment 3*).

8. On October 7, 2013, John E. Kelly, MD, wrote a letter to Kathleen Johnson the Director of Human Resources for the City of Worcester, notifying her that Ms. Diiorio failed her pre-employment medical examination because she had uncorrected vision being worse

than 20/100 in either eye. This condition falls under Category A, Section (b) 1.a.

(HRD's Motion, Attachment 3).

9. Ms. Diiorio has no vision in her left eye as a result of retina cancer when she was born. It has been treated successfully but as a result, she has a prosthetic left eye and has no vision in that eye. *(Pre-hearing; HRD's Motion, Attachment 3).*

10. Ms. Diiorio admitted that she does not have any peripheral vision in her left eye but submits that her depth perception is not affected. She drives a car and was a star goalie in field hockey for her high school team. *(Appellant's argument at Motion Hearing).*

11. Ms. Diiorio has a Master's degree in criminal justice. *(Appellant's testimony at Motion Hearing).*

12. In an undated letter from the Dana-Farber/Boston Children's Cancer and Blood Disorders Center, Lynda Vrooman, MD, Associate Medical Director, and Lisa Diller, MD, Chief Medical Officer, advocate for Ms. Diiorio's career in law enforcement. They state, "[w]e strongly advocate on her behalf that her history of and prior treatment for retinoblastoma not limit her access to further training and opportunities within her chosen field."
(HRD's Motion, Attachment 6).

13. On October 8, 2013, a letter was sent to Ms. Diiorio that she did not meet the initial medical standards and that this indicates that she cannot perform the essential functions of a police officer and reasonable accommodation is not possible. She was informed of her right to a reexamination within sixteen (16) weeks of the date of the failure of the initial examination. *(HRD's Motion, Attachment 2).*

14. Ms. Diiorio did not request a reexamination. *(HRD's Motion p. 2-3).*

15. Ms. Diiorio filed this appeal on October 23, 2013.

DISCUSSION

The Legal Standard for Consideration of a Motion to Dismiss

After the ruling in Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 547 (2007), the Massachusetts Supreme Judicial Court held that an adjudicator cannot grant a motion to dismiss if the non-moving party's factual allegations are enough to raise a right to relief above the speculative level based on the assumption that all the allegations in the appeal are true, even if doubtful in fact. See Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008). At the Commission, the Standard Adjudicatory Rules of Practice and Procedure (hereinafter "Rules") govern administrative adjudication. 801 CMR 1.01, *et seq.* However, Commission policy provides that when such rules conflict with G.L. c. 31, the latter shall prevail; there appears to be no such conflict here. The Rules indicate that the Commission may dismiss an appeal for lack of jurisdiction or in the event the appeal fails to state a claim upon which relief can be granted. 801 CMR 1.01(7)(g)(3).

Relevant Civil Service Law

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. . . .

Additionally, the statute further explains,

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. . . .

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 fire fighters 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 clear that if the candidate fails to pass the reexamination, the conditional offer of appointment must be rescinded.

HRD's Argument in Favor of Motion to Dismiss

HRD first argues that Ms. Diiorio has not exhausted her administrative remedies before filing this appeal. G.L. c. 31, §61A provides a candidate with the right to have a reexamination within sixteen (16) weeks from the failure of the initial medical examination. Ms. Diiorio has not requested a reexamination. Therefore, she has not exhausted her administrative remedies provided to her.

Secondly, HRD asserts that the Commission lacks jurisdiction to hear Ms. Diiorio's appeal because she has no further rights to appeal the medical determination once she has failed the original medical examination and the reexamination. HRD asserts that because G.L. c. 31, §61A provides a candidate with two chances to meet the HRD medical Standards, the Legislature has created a procedure where, if the candidate wants to appeal the original determination, he or she can have a reexamination done by an independent examiner. If an appellant fails the reexamination, the offer is to be rescinded, per G.L. c. 31, §61A.

Third, HRD argues that there is no recourse through the Commission for candidates who fall into a Category A condition and that the HRD Medical Standards have the full force of law. The Commission cannot hear appeals litigating whether or not the Appellant's condition should constitute a Category A condition or the validity of the HRD medical standards.

The Appellant's Opposition to HRD's Motion

Ms. Diiorio argues that despite only having one eye, she can still perform all of the essential functions and duties of a police officer. She has had this condition since she was an infant and, therefore, she is acclimated to function fully and effectively with one eye. Further, she contends that she has been stripped of the opportunity to prove she can perform the duties adequately because she failed the vision test and was not able to proceed through the hiring process. She argues that the Medical Standards should be revised. She does not understand how reading an eye chart in a doctor's office pertains to her ability to perform the duties of a police officer.

Conclusion

Ms. Diiorio has a prosthetic left eye and does not have any vision in that eye. A Category A condition includes a condition under which uncorrected vision in one eye is below 20/100, pursuant to the Eyes and Vision section of the HRD Medical Standards. Ms. Diiorio's argument, however, centers on the fact that despite not having vision in her left eye, she can still perform the essential functions and duties of a police officer. At the motion hearing, Ms. Diiorio acknowledged that she does not have any peripheral vision in her left eye but that her depth perception is not affected. In fact, she was a star goalie in field hockey for her high school team, supporting the fact that her depth perception is adequate. She also drives a car. She has a Master's degree in criminal justice, which would make her well-prepared for a career in law

enforcement and both of her own doctors' assert that she is capable of performing as a law enforcement officer.⁴ She has not had any vision in her left eye since she was born and has learned to adjust accordingly. Ms. Diiorio believes she can perform all the functions of a police officer but is not allowed to prove it because she was screened out of the hiring process when she failed the vision test. She does not see a connection between the vision test and adequately performing as a police officer.

The Medical Standards were promulgated by HRD in accordance with G.L. c. 31, §61A and approved by the Legislature. See Carleton v. Commonwealth, 447 Mass. 791, 808 (2006); HRD's Motion, Attachment 7, p. 1-4. The Medical Standards divide medical conditions into two categories, Category A and Category B. Category A conditions are considered automatic disqualifiers to becoming a municipal police officer or fire fighter. Ms. Diiorio was found to have a Category A condition under Eyes and Vision, Subsection (a), which includes, "uncorrected vision worse than 20/100 in either eye. (Medical Standards, p. 32; HRD Motion, Attachment 8). Ms. Diiorio did not opt to have a reexamination because, she said, she will never be able to have uncorrected vision better than 20/100 in her left eye.

Unfortunately for Ms. Diiorio, although she may have good reason to be frustrated by the Medical Standards and believe that they are prohibiting her from proving that she can be a great police officer, the Commission is not the venue to protest the Medical Standards as they are currently written. But for the lack of vision in one eye, Ms. Diiorio may have the attributes of a successful police officer. However, Worcester must adhere to the Medical Standards. HRD created these standards in accordance with G.L. c. 31, §61A and with approval by the Legislature. "HRD must abide by legislative mandates and the Commission has no choice but to

⁴ There is no indication that Ms. Diiorio's doctors considered the tasks of a police officer, as indicated in the Medical Standards.

affirm decisions which are made adherent to those mandates.” See Granlund v. Human Resources Division, 19 MCSR 268 (2006). “According to the legislatively promulgated and binding . . . Medical Standards,” Ms. Diiorio has a Category A medical condition and therefore does not meet the initial medical standards. See Id. G.L. c. 31, §61A makes it clear that a candidate cannot become a police officer or a fire fighter unless he or she meets initial medical standards. According to G.L. c. 31, § 61A, Worcester’s conditional offer of employment to Ms. Diiorio must be rescinded. Ms. Diiorio’s recourse under G.L. c. 31, §61A was to be reexamined. However, as she acknowledged, the reexamination result would not be any different and, as a result, she did not take a reexamination. Unfortunately, there is no recourse through the Commission for Ms. Diiorio, who has a Category A condition. See id. There is no indication that the test was flawed or performed inaccurately. In addition, there is no indication of bias or other inappropriate motive here. For these reasons, the Commission lacks jurisdiction to hear Ms. Diiorio’s appeal.

Conclusion

Based on the facts and the law herein, the Respondent’s Motion is ***granted*** and the Appellant’s appeal under Docket No. G1-13-231 is hereby ***dismissed***.

Civil Service Commission

Cynthia A. Ittleman, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on July 10, 2014.

A true record. Attest:

Commissioner

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)(1), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty (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:

Ariann Diorio (Appellant)
William R. Bagley (for Appointing Authority)
Andrew Levrault, Esq. (for HRD)
John Marra, Esq. (HRD)