

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

MICHAEL GRIFFIN
Appellant
v.

Docket No.: G1-13-201

SALEM POLICE DEPARTMENT AND
HUMAN RESOURCES DIVISION,
Respondents

Appearance for Appellant:

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Appearance for Appointing Authority:

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Appearance for the Human Resources Division

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Commissioner:

Cynthia Ittleman¹

DECISION ON MOTION TO DISMISS

On September 12, 2013, the Appellant, Michael Griffin (“Mr. Griffin”), pursuant to G.L. c. 31, § 2(b), filed this appeal with the Civil Service Commission (“Commission”), regarding the decision of the Salem Police Department (“Department”) to bypass him for appointment to the position of reserve police officer.

A pre-hearing conference was held on October 1, 2013. The state’s Human Resources Division (“HRD”) filed a Motion to Dismiss Mr. Griffin’s appeal on October 24, 2013. Mr.

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

Griffin filed an opposition to HRD's Motion to Dismiss on November 7, 2013. The Department sent a letter in support of Mr. Griffin but they did not file an opposition to HRD's Motion to Dismiss. The Commission held a hearing on the Motion to Dismiss on December 3, 2013.

FINDINGS OF FACT

Giving appropriate weight to the documents submitted by the parties, the parties' arguments, and the inferences reasonably drawn from the evidence, including without limitation the Farnsworth D-15 and Lanthony Test document produced by HRD at the full hearing, and in view of the applicable statutes, regulations, policies, and caselaw, I find the following facts were established by a preponderance of the evidence:

1. Mr. Griffin took and passed a civil service examination for original appointment as a police officer. He is currently a civilian dispatcher for the Department and also is a regional Incident Management Assessment Team member in emergency communications for the North Eastern Massachusetts Law Enforcement Council ("NEMLEC") response team. (*HRD's Motion; Department Letter to the Commission, Dated December 3, 2013*).
2. Mr. Griffin ranked 19th among the candidates who signed willing to accept appointment on Certification No. 00348 issued to the Salem Police Department by HRD on December 4, 2012. Salem selected 19 applicants for appointment, 10 of whom were ranked below Mr. Griffin. (*HRD's Motion and Pre-Hearing Submission*).
3. Mr. Griffin was given a conditional offer of employment on May 16, 2013, pending successful completion of the medical evaluation, the psychological screening assessment and the physical abilities test (PAT). (*HRD's Motion, Attachment 2; Appellant's Opposition*).

4. The state HRD Physician's Guide, Initial-Hire Medical Standards, October 2007

("Medical Standards") provides,²

"...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,

"...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 8*, 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 8*, 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

² 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 8 that includes the same medical standards. Both are cited in this decision.

on the Farnsworth is a Category A condition. (*Medical Standards*, p.9; *HRD Motion*, Attachment 8, p. 32-33).

7. The Farnsworth D-15 test is explained as,

“The D15 test is intended for classification instead of more time-consuming in-depth study of color vision defects using the 100-Hue test. Each D15 set contains a reference disc and fifteen numbered discs, which make up an incomplete color circle. Following an attempt to sequentially arrange the discs by the patient, evaluation determines color perception or defects in deutan, protan or tritan axis discrimination. . . . The Farnsworth D-15 test is called ‘dichotomous’ because it was designed to separate subjects into one of two groups: 1.) Strongly/Medium color deficient or 2.) Mildly color deficient or color normal. This is accomplished by the arrangement of vivid (saturated) colored discs. This makes the test fairly easy and a non-perfect score is indicative of a strong color deficiency.”
(*Farnsworth D-15 and Lanthony Test Instructions*, p. 1).

8. Mr. Griffin reported for the medical examination that included a vision examination on May 22, 2013 at Quadrant Health in Beverly, MA. He was examined by Marcelo Targino, MD. (*HRD Motion*, Attachment 3).
9. Mr. Griffin failed the Ishihara vision screen and the Farnsworth D-15 Testing was requested. Dr. Targino ultimately disqualified Mr. Griffin because he had a Category A condition under Section (b) Eyes and Vision because he did not pass the Farnsworth D-15 test as required under subsection (d).³ (*HRD’s Motion*, Attachment 3).
10. On May 28, 2013, Mr. Griffin saw Irwin M. Nathanson, O.D., his own physician, for a comprehensive visual examination with the purpose of evaluating Mr. Griffin with the Farnsworth D-15 test. (*HRD Motion*, Attachment 6; *Appellant’s Opposition*, p.2).
11. On June 4, 2013, Dr. Nathanson wrote a letter to Chief of Police, Paul Tucker, stating,

³ The results of the Farnsworth D-15 test are supposed to result in a circular shape. See Farnsworth D-15 and Lanthony Test Instructions provided at motion hearing. A “major error” under the Medical Standards section (b)1.d., it appears that there are a number of errors evident on Mr. Griffin’s test results. See HRD’s Motion, Attachment 3. Specifically, rather than creating a circular shape, Mr. Griffin’s exam responses produced a series of intersecting diagonal lines.

“Mr. Griffin’s color vision evaluation noted several errors indicating a red-green color deficiency. It is my opinion that the results of this particular examination should not preclude Mr. Griffin from performing the tasks of a law enforcement agent. Mr. Griffin can identify colors when presented to him individually (such as traffic lights).” (*HRD’s Motion, Attachment 6*).

12. Around July 12, 2013, Dr. David Roston, from AllOne Health, informed the Salem Police Department that he confirmed Quadrant Health’s determination that Mr. Griffin falls into a Category A medical condition under the Medical Standards. Dr. Roston provided the Department’s second opinion. (*HRD’s Motion, Attachment 4*).
13. On July 16, 2013, Police Chief Tucker informed Mr. Griffin that he was bypassed because he had a Category A condition under the Medical Standards pertaining to his vision. (*HRD’s Motion, Attachment 5*).
14. Mr. Griffin filed his appeal with the Commission on September 12, 2013.
15. At the hearing for the Motion to Dismiss, the Department presented a letter from Police Chief Tucker to the Commission, stating the Department’s support of Mr. Griffin’s candidacy. (*Salem Police Department Letter to the Civil Service Commission December 3, 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; HRD Physician's Guide, Initial-Hire

Medical Standards, Oct. 2007. 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 indicates that if the candidate fails to pass the reexamination, his or her appointment must be rescinded.

HRD's Argument in Favor of Motion to Dismiss

HRD argues that the Commission lacks jurisdiction to hear Mr. Griffin's appeal because he has no further rights to appeal the medical determination as he failed both the original medical examination and the reexamination and, as a result, his offer of employment must be rescinded under G.L. c. 31, §61A. 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. Mr. Griffin has a reexamination and failed. Additionally, 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, according to HRD, 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

Mr. Griffin argues that, despite impairment of his color vision, he is capable of performing the essential functions of a police officer, as supported by his doctor as well as the Department. Further, Mr. Griffin argues that he brings his appeal not under G.L. c.31 § 61A, as HRD asserts, but that under G.L. c.31, § 2(b), he is aggrieved by HRD's decision to compose and issue Medical Standards that go against basic merit principles. "Under § 2(b), the Commission has the power '[t]o hear and decide appeals by a person aggrieved by any decision, action, or failure to act by HRD.'" Mr. Griffin asserts that the Medical Standards are inconsistent

with basic merit principles because they discriminate based on handicap when his handicap does not prevent him from performing the essential functions of a police officer.

Analysis

Failure requires only two (2) major errors on the Farnsworth examination; Mr. Griffin has at least that many errors. Mr. Griffin does not refute that he failed the Farnsworth D-15 test on both the original test and the reexamination. His argument centers on his belief that the Farnsworth D-15 test and his color vision impairment do not impact his abilities to perform as a reserve police officer. To support this assertion, Mr. Griffin's own doctor, Irwin M. Nathanson, O.D., wrote to the Salem Police Department explaining that he tested Mr. Griffin using the Farnsworth D-15 Color Test and that, despite his acknowledgment of several errors indicating a red-green color deficiency, he does not think the results of this examination should preclude Mr. Griffin from becoming a police officer. (*HRD's Motion, Attachment 6*). See Finding of Fact No. 11. Even the Department supports the candidacy of Mr. Griffin because of his excellent work within the department as a civilian dispatcher and his work as a regional Incident Management Assessment team member. (*Letter from Police Chief Tucker to the Commission, December 3, 2013*).

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 8, 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. Mr. Griffith was found to have a Category A condition under Eyes and Vision, Subsection (d), which states, "[t]esting 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. 29; HRD Motion, Attachment 8). Mr. Griffith does not contend that he should have passed the Farnsworth exam or that he did not have two or more major errors. He just does not agree that his color vision impairment should disqualify a candidate from becoming a police officer.

Although Mr. Griffin may have good reason to be frustrated by the Medical Standards as currently written and would like them to be revised, the Commission is not the venue to do this. HRD created these standards in accordance with G.L. c. 31, §61A and with approval by the Legislature. There is no evidence that the tests are flawed or were conducted improperly. Nor is there evidence of bias or other inappropriate motives. Under the circumstances, “HRD must abide by legislative mandates and the Commission has no choice but to 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,” Mr. Griffin 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, Mr. Griffin’s offer of employment must be rescinded. Based on the facts here, there is no recourse through the Commission for Mr. Griffin, who admittedly has a Category A condition. See id.

Conclusion

Based on the facts and the law herein, the Respondent’s Motion is *granted* and the

Appellant's appeal under Docket No. G1-13-201 is hereby *dismissed*.

Civil Service Commission

Cynthia A. Ittleman, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman and Stein [McDowell – absent], 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)(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:

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Andrew Levrault, Esq. (for HRD)

John Marra, Esq. (HRD)