

**THE COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, ss.**

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

**CIARA TRAN,**  
*Appellant*

*v.*

**BOSTON POLICE DEPARTMENT,**  
*Respondent*

**CASE NO: G1-11-36**

Appellant's Attorney:

Leonard E. Milligan III, Esq.  
Milligan Coughlin LLC  
7 Liberty Square  
Boston, MA 02109

Respondent's Attorney:

Jane DePalma, Esq.  
Boston Police Dep't – Office of Legal Advisor  
One Schroeder Plaza  
Boston, MA 02120

Commissioner:

Paul M. Stein

**DECISION**

The Appellant, Ciara Tran, duly appealed to the Civil Service Commission (Commission), pursuant to G.L.c.31, §2(b), from a decision by the Respondent, Boston Police Department (BPD), as the Appointing Authority acting with delegated authority from the Personnel Administrator of the Massachusetts Human Resources Division (HRD), to bypass Ms. Tran for original appointment to the position police officer, due to her failure to meet the medical standards required to perform the essential functions of a municipal police officer. A full hearing was held on February 15, 2012 at the offices of the Commission. BPD called one witness and eight (8) exhibits were entered into evidence at the hearing. The hearing was digitally recorded. Both parties waived submission of proposed decisions.

## **FINDINGS OF FACT**

Based upon the Exhibits and the testimony of Dr. Kristian Arnold, MD, and inferences reasonably drawn from the evidence I find credible, I make the findings of fact set forth below.

1. On or about July 23, 2010, the Appellant, Ciara Tran, successfully completed the initial screening process for appointment as a BPD police officer and received a conditional offer of employment from the BPD. The conditional offer was expressly subject to successful completion of the subsequent medical and psychological screening components of the process. (*Exhs 1 & 2*)

2. BPD contracts with Dr. L. Kristian Arnold, MD, to oversee workers' compensation injuries of BPD police officers as well as certifying the medical fitness of recruits applying to become BPD police officers. Dr. Arnold is a Board Certified physician in emergency and family medicine (but not ophthalmology or optometry). Dr. Arnold had ultimate responsibility for deciding whether Ms. Tran could proceed further and take the state administered Police Officer Physical Abilities Test (PAT). A BPD recruit cannot take the PAT without Dr. Arnold's signature on the Medical Verification Section of the HRD Medical Examination Form, indicating that there are no disqualifications. (*Exhs. 3 & 5; Testimony of Dr. Arnold*)

3. Medical standards for initial-hire police officers are set forth in the "Initial Medical Standards for Municipal Police Officers", and contained in HRD's "Physician's Guide Initial-Hire Medical Standards [HRD Physician's Guide]. The requirements are separated into two categories: Category A and Category B. A Category A condition is "absolutely disqualifying" for meeting the medical requirements of becoming a police officer. A Category B condition is not an automatic disqualifier, but it may disqualify an applicant, if the severity or degree of the condition would "preclude an individual from performing the essential job functions of a municipal . . . police officer in a training or emergency environment, or . . . present a significant

risk to the safety and health of that individual or others.” (*Exh. 8 [§ IV(5); Testimony of Arnold]*)

4. The HRD Physician’s Guide contain Section IV.6((b)1.c, as a “Category A” requirement:

“peripheral vision of less than 70 degrees temporarily and 45 degrees nasally in either eye. . . [with] 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 1114e isopter.”

(*Exhs. 8; Testimony of Arnold*)

5. The essential functions required to perform the position of a municipal police officer are set forth in Section VI of the HRD Physician’s Guide and include such activities as operating a motor vehicle at a high rate of speed, participating in building and area searches, patrolling an area on foot or in a vehicle, and the pursuit and arrest of suspects. These activities, among others, call for an officer to be aware of his or her surroundings and, hence, the requirement for substantial peripheral vision needed to accomplish the tasks effectively and without risking the safety of the officers or others. (*Exh. 8; Testimony of Dr. Arnold*)

6. After initial review of the relevant medical records, Dr. Arnold noted a concern about Ms. Tran’s peripheral vision, which had been affected by a head trauma suffered from a serious motor vehicle accident several years earlier. He directed that Ms. Tran undergo further testing – specifically: “Goldmann perimeter visual field testing with report of binocular visual field with independent eye report as well. . . with 1114e isopter”. (*Exh. 3; Testimony of Dr. Arnold*)

7. On or about October 26, 2010, Dr. Arnold received the results of a Goldmann perimeter test performed under the auspices of Ms. Tran’s treating optometrist, Dr. Douglas Hoffman, OD, Director of Eye Care Services at Dorchester House, Boston MA. In follow-up with Dr. Hoffman, Dr. Arnold confirmed that, in Dr. Hoffman’s opinion, the test showed that Ms. Tran did not achieve a 140° horizontal field of vision. (*Exh. 4; Testimony of Dr. Arnold*)

8. On or about November 9, 2010, Dr. Arnold determined that he could not certify Ms.

Tran's fitness for duty as a police officer. In particular, he determined that Ms. Tran was medically disqualified due to a Section IV.6(a)3.b.viii "Category A" eye and vision medical condition that is "absolutely disqualifying". (*Exh. 4 & 5; Testimony of Dr. Arnold*)

9. On December 13, 2010, the BPD informed Ms. Tran that she had not been selected for appointment as a BPD police officer because she failed to successfully complete the medical component. This appeal duly ensued. (*Exh. 5; Claim of Appeal*)

10. Subsequent to the appeal, Ms. Tran was reexamined by Dr. Hoffman. This examination indicated that her peripheral vision had not changed since the prior examination and that she still did not meet the minimum requirement for a 140° peripheral vision. Dr. Arnold testified that her condition was not likely ever to change significantly. (*Exhs. 6 & 7; Testimony of Dr. Arnold*)

11. Dr. Arnold testified that he knows of no person who has been appointed as a BPD police officer who failed to meet the peripheral vision requirement. He also testified that he knows of no BPD police officer who was injured on duty and suffered a trauma that impaired the officer's peripheral vision and whom the BPD returned to full duty with that condition or returned even to limited desk duty without reasonable medical certainty that proved the condition was only temporary. Such officers with peripheral vision loss would be placed on injured duty leave and/or retired on the basis of their disability. (*Testimony of Dr. Arnold*)

## **CONCLUSION**

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

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

Rule PAR.08(3) of the Personnel Administration Rules, promulgated by HRD to implement this statutory requirement, provides:

“A bypass will not be permitted [without]. . . a “complete statement . . . that shall indicate all reasons for selection or bypass. . . . No reasons . . . that have not been disclosed . . . shall later be admissible as reason for selection or bypass in any proceedings before . . . the Civil Service Commission.”

These requirements mean that candidates are considered according to their placement on the certification, which creates a rank ordering based on their relative scores on the competitive qualifying examination administered by HRD, along with certain statutory preferences. In order to deviate from this paradigm, an appointing authority must show specific reasons, positive or negative, that are consistent with basic merit principles, to affirmatively justify picking a lower ranked candidate. G.L.c. 31, §1, §27. See, e.g., Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971), *citing* Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928); Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321n.11, 326 (1991). See also MacHenry v. Civil Service Comm’n 40 Mass.App.Ct. 632, 635(1995),rev.den.,423 Mass.1106(1996) (noting that personnel administrator [then, DPA, now HRD] (and Commission oversight) in bypass cases is to “review, and not merely formally to receive bypass reasons” and evaluate them “in accordance with [all] basic merit principles”).

When hearing a bypass appeal, the task of the Commission is “to determine . . . whether the appointing authority sustained its burden of proving, by a preponderance of the evidence, that there was reasonable justification for the action taken by the appointing authority. . . .Reasonable justification in this context means ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.’ ” E.g., Brackett v. Civil Service Comm’n, 447 Mass. 233, 543 (2006) and cases cited; Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003) (affirming

Commission's decision to reject appointing authority's proof of appellant's failed polygraph test and prior domestic abuse orders and crediting appellant's exculpatory testimony rebutting that evidence) (*emphasis added*). cf. Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (inconsequential differences in facts found were insufficient to find appointing authority's justification unreasonable); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (same). See generally Villare v. Town of North Reading, 8 MCSR 44, reconsid'd, 8 MCSR 53 (1995) (discussing need for de novo fact finding before a "disinterested" Commissioner in context of procedural due process); Bielawski v. Personnel Admin'r, 422 Mass. 459, 466 (1996) (same)

The "preponderance of the evidence test" requires the Commission to conclude that an appointing authority established, through substantial, credible evidence presented to the Commission, that the reasons assigned for the bypass of an appellant were "more probably than not sound and sufficient." Mayor of Revere v. Civil Service Comm'n, 31 Mass. App. Ct. 315, 321, 577 N.E.2d 325, 329 (1991); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427, 430 (1928) (*emphasis added*) The Commission must take account of all credible evidence in the record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 462 (2001)

Especially when it comes to hiring an applicant for a sensitive public safety position, "the commission owes substantial deference to the appointing authority's exercise of judgment in determining whether there was 'reasonable justification' shown . . . Absent proof that the [appointing authority] acted unreasonably . . . the commission is bound to defer to the [appointing authority's] exercise of its judgment" that "it was unwilling to bear the risk" of

hiring the candidate for such a sensitive position. Id., 78 Mass.App.Ct. at 190-91. See also Town of Reading v. Civil Service Comm’n, 78 Mass.App.Ct. 1106 (2010) (Rule 1:28 opinion); Burlington v. McCarthy, 60 Mass.App.Ct. 914,(2004) (rescript opinion); City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 303-305 (1997); Massachusetts Dep’t of Corrections v. Anderson, Suffolk Sup. Ct. No. 2009SUCV0290 (Memorandum of Decision dated 2/10/10), reversing Anderson v. Department of Correction, 21 MCSR 647, 688 (2008).

It is the purview of the hearing officer to determine the credibility of the testimony presented through the witnesses who appear before the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance.” E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003); (In cases where live witnesses giving different versions do testify at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing)

When an Appointing Authority relies on scientific evidence provided through expert witnesses to support the justification for a bypass decision, the Commission is mindful of the responsibility to ensure: (a) the scientific principles and methodology on which an expert’s opinion is based are grounded on an adequate foundation, either by establishing “general acceptance in the scientific community” or by showing that the evidence is “reliable or valid” through an alternative means, e.g., Canavan’s Case, 432 Mass. 304, 311, 733 N.E.2d 1042, 1048 (2000) citing Commonwealth v. Lanigan, 419 Mass. 15, 641 N.E.2d 1342 (1994); (b) the witness is qualified by “education, training, experience and familiarity” with special knowledge bearing

on the subject matter of the testimony, e.g., Letch v. Daniels, 401 Mass. 65, 69-69, 514 N.E.2d 675, 677 (1987); and (c) the witness has sufficient knowledge of the particular facts from personal observation or other evidence, e.g., Sacco v. Roupenian, 409 Mass. 25, 28-29, 564 N.E.2d 386, 388 (1990). The Commission however, is granted broader discretion in the admission of evidence than permitted in the Massachusetts courts. Compare G.L.c.30A, §11(2) with Department of Youth Services v. A Juvenile, 398 Mass. 516, 531, 499 N.E.2d 812, 821 (1986).

Experts' conclusions are not binding on the trier of fact, who may decline to adopt them in whole or in part. See, e.g., Turners Falls Ltd. Partnership v. Board of Assessors, 54 Mass.App.Ct. 732, 737-38, 767 N.E.2d 629, 634, rev. den., 437 Mass 1109, 747 N.E.2d 1099 (2002). As a corollary, when the fact-finder is presented with conflicting expert evidence, the fact-finder may accept or reject all or parts of the opinions offered. See, e.g., Ward v. Commonwealth, 407 Mass. 434, 438, 554 N.E.2d 25, 27 (1990); New Boston Garden Corp. v. Board of Assessors, 383 Mass. 456, 467-73, 420 N.E.2d 298, 305-308 (1991); Dewan v. Dewan, 30 Mass.App.Ct. 133, 135, 566 N.E.2d 1132, 1133, rev.den., 409 Mass. 1104, 569 N.E.2d 832 (1991).

No specific degree of certitude is required for expert testimony and it may be accepted if the opinion is "reasonable" and expressed with sufficient firmness and clarity. See, e.g., Commonwealth v. Rodriguez, 437 Mass. 554, 562-63, 773 N.E.2d 946, 954 (2002); Bailey v. Cataldo Ambulance Service, Inc., 64 Mass.App.Ct. 228, 235, 832 N.E.2d 12, 11-18 (2005); Resendes v. Boston Edison Co., 38 Mass.App.Ct. 344, 352, 648, N.E.2d 757, 763, rev.den., 420 Mass. 1106, 651 N.E.2d 410 (1995). So long as the expert's opinion is sufficiently grounded in the evidence, but certain facts were unknown or mistakes were made in some of the expert's assumptions, that generally goes to the weight of the evidence. Commonwealth v. DelValle, 443



Mass. 782, 792, 824 N.E.2d 830, 839 (2005); Sullivan v. First Mass. Fin. Corp., 409 Mass .783, 79-92, 569 N.E.2d 814, 819-20 (1991).

When reviewing the Commission’s decision, a court cannot “substitute [its] judgment for that of the commission” but is “limited to determining whether the commission’s decision was supported by substantial evidence” and must “give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it. . . . This standard of review is highly deferential to the agency on questions of fact and reasonable inferences drawn therefrom.’ ” Brackett v. Civil Service Comm’n, 447 Mass. 233, 242-42 (2006) and cases cited.

Applying these principles to the facts of the present appeal, the BPD has proved by a preponderance of the evidence that it had reasonable justification to bypass Ms. Tran for the position of BPD Police Officer for failure to meet medical standards. The BPD showed, through credible expert testimony, that it relied on a thorough independent review of the relevant facts, including an opinion from Ms. Tran’s treating optometrist, which confirmed that she suffers from a “Category A” medical condition, i.e., inadequate peripheral vision that is a rationally established “automatic disqualifier” for the position of a police officer. The Appellant proffered no expert testimony to refute the medical opinion that her peripheral vision prevented her from performing the essential duties of a police officer. The Appellant argued that it was possible for the BPD to make a reasonable accommodation for the condition, but the substantial evidence failed to establish that contention. Peripheral vision is not only essential to the full duties of a police officer, but it goes to many of the core functions of the job. The BPD is reasonably justified to decline to make an accommodation for a medical condition defined in the governing regulations, and supported by substantial evidence, to be an “automatic disqualifier”.

For all of the above reasons, the appeal of the Appellant, Ciara Tran, under Docket No. G1-11-36 is hereby *dismissed*.

Civil Service Commission

Paul M. Stein  
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Marquis [Absent], McDowell and Stein, Commissioners) on March 22, 2012.

A true record. Attest:

---

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of a Civil Service Commission's final decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:

Leonard E. Milligan III, Esq. [for Appellant]  
Jane DePalma, Esq. [for Appointing Authority]