

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

One Ashburton Place - Room 503
Boston, MA 02108
(617) 727-2293

SHAWN GRAJALES
Appellant

v.

**CITY OF ATTLEBORO and
HUMAN RESOURCES DIVISION**
Respondents

CASE NO: G1-14-7

Appearance for Appellant:

Shawn Grajales, Pro Se

Appearance for City of Attleboro:

Kevin P. Feeley, Jr., Esq.
Feeley & Brown, PC
1600 Boston-Providence Hwy, Suite 209A
Walpole, MA

Appearance for HRD:

Melinda Willis, Esq.
Human Resources Division
One Ashburton Place
Boston, MA 02108

Commissioner:

Paul M. Stein

DECISION ON MOTION FOR SUMMARY DECISION

The Appellant, Shawn Grajales, appealed to the Civil Service Commission (Commission), pursuant to G.L.c.31,§2(b), to overturn the decision of the City of Attleboro (Attleboro), rescinding its conditional offer of employment as a Firefighter/Paramedic with the Attleboro Fire Department (AFD) for failing to meet the medical standards (vision) required of a public safety candidate, as promulgated by the Massachusetts Human Resources Division (HRD). The Commission added HRD as a party, and ordered that Mr. Grajales be afforded an opportunity for a re-examination of his vision pursuant to G.L.c.31,§61A.. On July 28, 2014, Attleboro filed a Motion for Summary Decision which asserted that Mr. Grajales's retest demonstrated that he unequivocally failed to meet the vision requirements. Mr. Grajales opposed the motion.

FINDINGS OF FACT

Based on the information provided in Attleboro's motion, the stipulated facts and other information received from the parties, I find these material facts to be undisputed:

1. The Appellant, Shawn Grajales, took and passed the civil service examination for Municipal Firefighter in May 2012. His name appeared on Certification 01021 issued in or about October 2013 by HRD to Attleboro and he received a conditional offer of employment for appointment to the position of Firefighter/Paramedic with the AFD, subject to satisfactory completion of further pre-employment screening pursuant to the then applicable Initial Medical and Physical Fitness Standards for Municipal Public Safety Personnel", promulgated by HRD as revised in September 2007 (the "HRD Medical Standards") (*Stipulated Facts; Attleboro's Motion; Claim of Appeal*)

2. The HRD Medical Standards prescribe two levels of Medical Conditions that may disqualify a candidate.

- A Category A Medical Condition is one that "would (1) preclude an individual from performing the essential functions of a municipal firefighter or police officer in a training or emergency operational environment, or (2) present a significant risk to the safety and health of that individual or others." (emphasis in original)
- A Category B Medical Condition is one that "based on its severity or degree, may or may not (1) preclude an individual from performing the essential functions of a municipal firefighter or police officer in a training or emergency operational environment, or (2) present a significant risk to the safety and health of that individual or others." (emphasis in original)

(*HRD Medical Standards, 02 Definitions*)

3. As to eyes and vision, a Category A Medical Condition under the HRD Medical Standards for municipal firefighters includes:

- 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 degrees temporally and 45 degrees nasally in either eye. . . 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.

*(HRD Medical Standards, 07(6)(b)(1))*¹

4. By letter dated December 10, 2013, AFD Fire Chief Scott Lechance informed Mr. Grajales that the conditional offer made to him was rescinded, based on the results of his pre-employment medical examination received on or about November 11, 2013. The notice did not identify the basis for the medical disqualification or inform Mr. Grajales of his rights to a re-examination. *(Claim of Appeal)*

5. Assuming that his vision had disqualified him, Mr. Grajales went to Leonardo J. Velazquez, MD, an ophthalmologist, who examined Mr. Grajales and reported:

I evaluated Mr. Shawn R. Grajales on December 13, 2013. His vision (both corrected and uncorrected) in the right was 20/20, and Count Fingers at 3 feet in his left eye. He does not need glasses as he does not need them for his right eye, and they will not help his left eye. His peripheral field of vision (as tested by using a Goldman-type perimeter with a III4e isopter) was found to be 155 degrees right eye only, 63 degrees left eye only, and 163 degrees total binocularly (both eyes).

(Letter 12/17/2013 from Dr. Velazquez)

¹ HRD has subsequently issued “The 2014 Revised Regulations for Initial Medical and Physical Fitness Standards Tests for Municipal Public Safety Personnel” (2104 HRD Medical Standards). See Mass. Reg. No. 1272, pp. 5-48 (10/2/2014). These revised regulations have significantly modified the vision requirements and, among other things, now specify that “far visual acuity less than 20/40 binocular” and “monocular vision” are a Category A disqualifying condition, and makes the minimum standard for peripheral vision a Category B condition. These 2014 HRD Medical Standards would apply to any future applications the Appellant may make, and he may or may not qualify under these new conditions, but that is not a question presently before the Commission. For purposes of this appeal, the 2007 version in effect in 2013 controls on the Commission’s decision here.

6. On May 30, 2014, pursuant to the Commission's procedural orders, Mr. Grajales was re-examined by Peter M. Fay, MD, an ophthalmologist chosen by Attleboro. Dr. Fay reported the results of his examination by letter to Attleboro: "Mr. Grajales was found to have a visual acuity of 20/20 uncorrected in his right eye and 20/800 best corrected in his left eye. . . . According to the medical standards set forth by the Commonwealth of Massachusetts, which you have supplied me, Mr. Grajales, unfortunately, has a Category A condition (uncorrected vision worse than 20/100 in either eye)." (*Letter (undated) from Dr. Fay to Janice Silverman*)

7. Mr. Grajales presented evidence, which is not disputed, that he has been employed as a Call Firefighter for the Fairhaven Fire Department since September 2, 2011. According to Fairhaven Fire Chief Timothy Francis, Firefighter Grajales "attended, passed and was certified FF I/II [Firefighter I/II by the Department of Fires Services Massachusetts Fire Training Council. He had a complete medical examination pursuant to [HRD Medical Standards] in December 2010. He also passed the Massachusetts Physical Ability Test in August 2011. Not only has FF Grajales been performing as a Call Firefighter responding to fire and hazards calls, but he has also been performing as a Paramedic and driver on EMS calls as needed. . . . [W]e have not found any issues with is ability to perform any firefighting skill or paramedic skill due to his vison problems, which we have been aware of." (*Documents Provided by Appellant, Attached to Commission Procedural Order dated 2/6/2014*)

8. In response to "questions received from municipal physicians and from problem areas identified in an audit of public safety medical examinations", HRD promulgated a

document entitled: “Frequently Asked Questions and Answers on Public Safety Medical Examinations”. One of these FAQs relates to the vision requirements:

- Q. Must applicants for positions as police officers and fire fighters meet the visual standard in each eye?
- A. The visual acuity standard for both municipal police officers and fire fighters is a monocular standard. This standard may be met by demonstrating the required visual acuity in either eye separately or with both eyes together. The peripheral vision standard requires two functioning eyes (no less than 70 degrees temporally and 45 degrees nasally in either eye) to achieve a view field of 140 degrees in the horizontal median. The examiner should also note that there are different standards for corrected and uncorrected vision for police officers and firefighters. The police officer standard includes, in addition, a color standard and a vision testing by Ishihara or Richmond pseudo-isochromatic plates.

(Documents Provided by Appellant, Attached to Commission Procedural Order dated 2/6/2014) (emphasis added)

Standard of Review

The party moving for summary disposition pursuant to 801 C.M.R. 7.00(7)(g)(3) or (h) in an appeal pending before the Commission is entitled to dismissal as a matter of law under the well-recognized standards for summary disposition, i.e., “viewing the evidence in the light most favorable to the non-moving party [i.e. Mr. Grajales],” Attleboro has presented substantial and credible evidence that Mr. Grajales has “no reasonable expectation” of prevailing on at least one “essential element of the case”, and/or that Mr. Grajales has not produced sufficient “specific facts” to rebut this conclusion. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550,n.6, 887 N.E.2d 244, 250 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249, 881 N.E.2d 778, 786-87 (2008).

Applicable Civil Service Law

The authority to establish medical and physical fitness standards for public safety positions has been delegated to HRD, pursuant to G.L.c.31, §61A, which provides, in relevant part:

The administrator [HRD], 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 [HRD] 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 . . . 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. . . . If such person fails to pass an initial medical or physical fitness examination, he shall be eligible to undergo a reexamination If he fails to pass the reexamination, his appointment shall be rescinded. . . .

[HRD] shall submit regulations promulgated pursuant to this section to the clerks of the house of representatives and senate, who shall refer such regulations to the appropriate standing committee of the general court. . . . If the general court takes no final action relative to said regulations within forty-five days of the date on which said regulations are first referred to said committee, said regulations shall be filed with the state secretary pursuant to the provisions of section five of chapter thirty A. . . .

The HRD Medical Standards, insofar as they have been created in accordance with the statutory procedures set forth in Section 61A, duly submitted to and “ratified” by the legislature and promulgated as required by the statute, carry “the full force of law”. Carleton v. Commonwealth, 447 Mass. 791, 808-809 (2006) (Carleton) (affirming validity of prior version of HRD Medical Standards that precluded appointment of person as firefighter who required hearing aids). The Commission has consistently ruled that it is bound to apply the HRD Medical Standards as written, and, while it can construe their intent, does not have the authority to revise, change or invalidate them, just as the

Commission could not change or invalidate any other statutory requirement of the civil service law. See Griffin v. Salem Police Dep't, 27 MCSR 422 (2014) (color blindness in police applicant); Diiorio v. City of Worcester, 27 MCSR 413 (2014) (police officer candidate with one prosthetic eye); Grantland v. Human Resources Division, 19 MCSR 268 (2006) (firefighter candidate failed to meet minimum uncorrected vision standard); Miller v. Worcester Fire Dep't, 9 MCSR 100 (1995) (vision in only one eye); cf. Reilly v. Town of Belmont, 14 MCSR 186 (2001) (overruled disqualification of police officer candidate based on proof that a flawed test for depth perception had been used)

Analysis

For the reasons explained above, the scope of the Commission's review of an appointing authority's withdrawal of a conditional offer of employment to a candidate for a public safety position is narrowly circumscribed. Absent a basis to believe that an applicant's test result was flawed, or that the statutory procedures for re-examination have not been followed, or that some other error of law was committed by HRD or an appointing authority, an applicant who claims to be aggrieved by disqualification for failure to meet the HRD Medical Standards has no right to an evidentiary review of that decision before the Commission.

In this case, the undisputed facts establish that Mr. Grajales has "uncorrected vision worse than 20/100" in his left eye, which fits within the plain meaning of a Category A automatic disqualifying condition, namely HRD Medical Standard 07(6)(b)(1)a. Under this circumstance, his disqualification for appointment in December 2013 is supported, indeed compelled, as a matter of law.

Mr. Grajales makes a strong argument that his satisfactory completion of the Fire Services Academy and active service as a municipal call firefighter and paramedic belies the validity of the contention that the HRD Medical Standards bar his qualification for appointment as a municipal firefighter due to his visual acuity. He relies on the reference in the HRD Medical Standards “FAQs” to the vision requirement as a “monocular standard” to imply that the regulation DOES NOT REQUIRE vision in more than one eye. He also relies on the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* and federal regulations for licensing interstate motor carrier operators, 49 CFR 391.64 which do not make “monocular vision” (vision requirements met in only one) an automatic disqualifier for employment.

The HRD “FAQs” do state: “The visual acuity standard for both municipal police officers and fire fighters is a monocular standard.” Standing alone, the inference could be drawn that the use of the term monocular “standard” was meant to allow a person with vision in only one eye to qualify. But the next sentence states: “This standard may be met by demonstrating the required visual acuity in either eye *separately* or *with both eyes together*.” While this language still leaves some ambiguity, there is no such ambiguity in the actual HRD Medical Standards, which have the force of law and are controlling over the FAQs. In addition, the FAQs and the HRD Medical Guidelines can be reasonably reconciled by inferring that the FAQs were referring to the “corrected vision” standard (which does reference both monocular and binocular tests) [(b)(1)b], but not the ‘uncorrected vision’ standard which clearly states that each eye must have a minimum level of uncorrected vision [(b)91)a]. The Commission is required to apply the HRD Medical Standards as written.

Mr. Grajales contends that the HRD Medical Standards violate laws prohibiting employment discrimination on the basis of disability. This claim, however, is properly presented in another forum and is not appropriate for the Commission to adjudicate here.² In Carleton, 447 Mass. at 807-811, the Supreme Judicial Court addressed this specific issue, holding that HRD lawfully decided that firefighter candidates must meet hearing standards “unaided”, despite the fact that the same regulations allowed police officer candidates to meet the standards with hearing aids. The Court acknowledged that medical fitness standards for employment that “fail any basic standards of rationality are void”, but, found that HRD had a rational basis for its rules, noting that the “consultant firm and the expert panels were cognizant of the requirements of Massachusetts and Federal discrimination laws” and the “approach the consulting firm selected to ensure test components are linked to essential job functions ‘satisfies the [Americans with Disabilities Act] criterion.’” Id., 447 Mass at 805. Specifically, the Court noted:

Firefighters perform highly demanding and exceptionally dangerous work, requiring that a wide range of physical abilities be readily available under potentially catastrophic conditions” and the Massachusetts employment discrimination laws should not be read to preclude HRD from setting higher standards for firefighters due to the “dangerous type of work involved and the nature of the risk to public safety . . . This is particularly so where such a determination is based on consultations with medical and occupational experts in the field; it is not the product of prejudice, stereotypes, or unfounded fear; and is ratified by the Legislature.

Id., 447 Mass. at 808-810.³

² One state agency that the legislature failed to include in the G.L.c.31, Section 61A consultative process for promulgating public safety employment regulations is the Massachusetts Commission Against Discrimination. Although not currently a requirement, in view of the common interest in the public policy issues involved, allowing for input from MCAD in HRD’s regulatory process might be worth considering.

³Similar to Mr. Grajales, the candidate in Carleton also had been certified as a Firefighter I and worked as a call firefighter for the Town of Stow where he had successfully been performing all the duties of a firefighter and EMT. Carleton, 447 Mass. at 794-796. Unlike Mr. Grajales, however, the candidate did not present evidence that he had been medically cleared under the HRD standards by another civil service community. Id. However, whether or not that single distinction is material to Mr. Grajales’s anti-discrimination claim under the precedent set by Carleton is a matter for judicial, not Commission, review.

The Appellant's reference to the vision standards for interstate motor carrier operators promulgated by the Federal Motor Carrier Safety Administration requires only a brief mention. These regulations are not binding on the Commission. Moreover, the ability to qualify as a driver with monocular vision requires a specific waiver of the general standard which requires: "Distant acuity of at least 20/40 in each eye" and "Monocular vision is disqualifying". 49 CFR 391.41(b) (1-13) The waiver is available only to a limited number of drivers who were licensed prior to 1996 and are "grandfathered" subject to annual re-examination. 49 CFR 391.64

Finally, this decision does not address whether Mr. Grajales's visual acuity is sufficient under the newly adopted 2014 HRD Medical Guidelines. As the Carleton decision noted, updating the regulations to meet developments in technology and medical knowledge is an important factor that a court must consider in assuring that HRD's regulations have been supported by some rational basis. Carleton, 447 Mass. at 801, 808-810. See also Dahill v. Police Dep't of Boston, 434 Mass. 233, 241 (2001) ("Advancements in medicine and the biological science, as well as rehabilitative technologies, now offer new hope to many individuals who previously may have been totally or significantly incapacitated by an impairment."). Should he persist in his interest in a position with the AFD or another fire service, and appear on a subsequent Certification for appointment, the new rules will apply and may or may not make a difference. Nevertheless, under the prior version of the regulations in effect at the time, his disqualification was consistent with the applicable civil service law.

CONCLUSION

Accordingly, for the reasons stated above, Attleboro's Motion for Summary Decision is hereby allowed, and the appeal of the Appellant Shawn Grajales, under CSC Docket No. G1-14-7, is hereby, *dismissed*.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein
Commissioner

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

Either party may file a motion for reconsideration within ten days of the receipt of a 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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:
Shawn Grajales (Appellant)
Kevin P. Feeley, Jr., Esq. (for Appointing Authority)
Melinda Willis, Esq. (for HRD)