

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. & ROBERT
LAZARIS, Complainants

v.

DOCKET NO. 07-BEM-01850

HUMAN RESOURCES
DIVISION,
Respondent

DECISION OF THE HEARING OFFICER

Appearances:

Adam P. Whitney, Esq. for Robert Lazaris

Wendy Chu, Esq., for Human Resources Division

I. PROCEDURAL HISTORY

On or about July 25, 2007, Robert Lazaris filed complaints with this Commission charging the City of Lynn (“Lynn”) and Lynn Fire Department (“LFD”) with discrimination on the basis of handicap (mental illness) and age (Docket No. 07-BEM-01848) and, in the instant complaint, charging the Massachusetts Human Resources Division (“HRD”) with handicap discrimination and aiding and abetting discrimination for approving the City of Lynn’s request to by-pass him for the position of firefighter based on his handicap.

Complainant resolved his claims against the City of Lynn and Lynn Fire Department¹ and those claims were dismissed. The present case against HRD was suspended pending the Supreme Judicial Court’s decision in the case of Lopez, et al., v. Commonwealth et al., 463 Mass. 696 (2012) which held, *inter alia*, that HRD was not an employer with respect to

¹ These claims were settled for a significant amount of monetary compensation.

candidates for public safety positions, but could be liable, pursuant to M.G.L.c.151B s.4(4A), for interference with a right protected under c. 151Bs.(4). Based on the ruling in Lopez, Complainant's claim of employment discrimination against HRD was dismissed; however, the aiding and abetting claim remained and the complaint was amended to add a claim of interference pursuant to G.L. 151B, s.4(4a). The issue at hand is whether HRD's approval of Lynn's request to by-pass Complainant for the position of firefighter in 2006 constituted a violation of the above cited provisions of G.L. c. 151B.

A public hearing was held before me on March 18-21 and 28, 2013. After careful consideration of the entire record before me and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Complainant, Robert Lazaris has resided in Lynn, MA for most of his life. Complainant currently owns and operates a locksmith business in that city. At the time of the public hearing he was 55 years old. (Testimony of Complainant)2. Respondent Human Resource Division ("HRD") is the state agency charged with administering appointments to entry level public safety positions, including the position of firefighter, in communities where such positions are subject to the Civil Service law and regulations. G.L. c. 31.

2. Respondent administers the Commonwealth's civil service examinations for firefighters and, after each such examination, compiles a list of individuals who passed the examination and are eligible for consideration for appointment as civil service firefighters. G. L. c. 31, § 27. The list ranks eligible candidates by score and by other criteria unrelated to Complainant's claims.

When a municipality, such as the City of Lynn, proceeds to appoint new firefighters, it submits a requisition to HRD stating the number of positions it desires to fill. G. L. c. 31, § 6. Upon receipt of this request, HRD creates a certification list of the eligible candidates who took and passed the last civil service examination.

3. A municipality may “by-pass” a higher scoring applicant in favor of a lower scoring applicant, for legitimate reasons that are then reviewed by Respondent HRD, which may approve or disapprove the by-pass.

4. Richard Currier has been employed by Respondent since January 2004. In 2006, Currier’s position was personnel analyst, and his duties included handling public safety appointments for certain municipalities, including the City of Lynn. In 2006, Currier had decision-making authority to approve or reject by-pass requests from the Lynn Fire Department.

5. Complainant testified that he has suffered from anxiety, depression and social anxiety throughout his life. Complainant is currently treated by a “pharmaceutical nurse,” a therapist, and his primary care physician, who treats him for high cholesterol. He currently takes the medications Remeron, an anti-depressant, Buspar and Inderol, as well as cholesterol medication. (Testimony of Complainant)

6. When Complainant was a student, he frequented the Lynn Fire House after school, where he ran errands for the firefighters, who treated him well and where he found “safe haven” from his emotional problems.

7. Complainant testified that because of his positive experiences with firefighters, he developed a lifelong dream to become a Lynn Firefighter, believing the profession would allow him to perform a job in which he could help people. Complainant took the prerequisite Civil

Service exam numerous times over a 25-year period. On two occasions, in 1988 and in 2001, Complainant received conditional offers of employment from the Lynn Fire Department, but on both occasions his offer was rescinded for budgetary and other reasons. (Ex. 16; Testimony of Complainant)

8. In 1979, Complainant began working as a Postal Service letter carrier in Chelsea and later in Lynn, where he continued to work until 2002.

9. Sometime around 2000, Complainant attended Emergency Medical Technician (“EMT”) school and obtained his state EMT license, hoping this additional training would help him to obtain a firefighter position. However, he never worked as an EMT.

10. Complainant testified that he continued to work for the U.S. Postal Service until the 1990s, when the work environment deteriorated, causing an increase in his anxiety and depression. New managers instituted draconian policies, such as a “golden hour” during which employees were not allowed to use the bathroom. Complainant stated that managers constantly scrutinized his work and timed his duties. He had difficulty working in such an adversarial environment and was ultimately unable to maintain regular attendance. (Testimony of Complainant)

11. In 2002, Complainant retired from the Post Office for reasons related to his disability of anxiety and depression. His retirement documents and contemporaneous medical records state that he was disabled from performing the Postal Service job. At the time of his retirement he was taking anti-anxiety and anti-depressant medications. His condition remained much the same after his retirement. (Testimony of Complainant; Ex. 25)

12. From 2003 to 2005, Complainant worked part-time as a van driver for Greater Lynn Senior Citizens. During this time he was taking the anti-depressant Remeron, but the

medication did not affect his ability to safely transport the agency's handicapped clients.

(Testimony of Complainant)

13. Complainant testified that he considers himself disabled by major depression, anxiety and social phobia. He stated that his anxiety causes him to worry constantly and lose sleep, and his depression causes feelings of hopelessness. The severity of these symptoms has not changed much from 2006, when he applied to be a firefighter. Complainant suffers from panic attacks which he states are diminished in severity when he is performing a task requiring concentration, such as driving. He testified that his social phobia has never prevented him from working at positions other than the post office.

14. Complainant left the job with Greater Lynn Senior Citizens in order to attend a locksmith course from February 2005 to June 2006. After completing the course, he worked as a locksmith for others and now has his own business.

15. In 2006 Complainant was taking Remeron and a statin for high cholesterol and was seeing a psychotherapist and his primary care physician.

16. On May 5, 2006, Complainant took the firefighter's civil service examination once again. Based on his score and statutory preferences, Complainant was selected for an interview with the Lynn Fire Department on July 18, 2006. (Stip. Fact iii; iv)

17. Complainant completed the employment application and passed a drug test. The application required Complainant to list his employment history and his reasons for leaving each past position. On his application, Complainant wrote that he left the postal service for "medical reasons." (Stip. Fact vi; Ex. 7)

18. The Fire Department assembled a panel of six to interview the candidates for firefighter positions. The panel was chaired by then Acting Deputy Chief, Rocco Gecoy. Other

members of the panel included Capt. James Carritte, Firefighter Scott Watson, Donald Cordova, Firefighter Turner, and Lt. Legere.²

19. Gecoy's responsibility was to ask each interviewee hypothetical questions drafted by then Chief Edward Higgins and to report the results of the panel's interviews to Chief Higgins, who made the final hiring decisions.³ (Testimony of Gecoy; Ex. 10)

20. Complainant's interview took place on July 18, 2006. One of Gecoy's hypothetical questions to Complainant asked what he would do if he observed a co-worker remove a resident's cash from the scene of a fire and observed the co-worker deny knowledge of the missing cash to the Chief. Gecoy testified that Complainant hesitated in his response to this question and stated that he "might" have to tell the truth.

21. Gecoy testified that he asked Complainant why he should be chosen over another equally qualified applicant and Complainant responded that he had been trying for a long time and deserved a chance. Gecoy asked Complainant an additional question because of his hesitation in answering the other questions.

22. Complainant testified that after he responded to the hypothetical questions, a panel member, whose name he did not know, asked him why he retired from the Post Office. Feeling he had no choice but to respond, Complainant reluctantly told the panel that he had retired because of depression. The panel continued to inquire along the same lines. In response to a question about medications, Complainant stated that he took 15 mg of Remeron daily. He testified that a panel member then looked up Remeron on a PDA and questioned Complainant about its side effects, its severity and whether he was suicidal. I credit Complainant's testimony.

² Gecoy, Carritte, Watson and Cordova testified at the public hearing.

³ Higgins, who is retired and living out of state, did not testify at the public hearing.

Other panel members testified that Watson, a paramedic, possessed a PDA that allowed him to search medications and their side effects. Watson testified that he did not recall asking Complainant why he left the post office; however on his interview notes he wrote “Remeron 15 mg. No issue/suicidal.” I find that Watson researched information about the medication Remeron during the interview.

23. Other panel members testified credibly that Complainant did not interview well and was hesitant in his answers and unsure of himself. (Testimony of Carritte, Watson and Cordova) They also noted that Complainant suffered from depression or that he had a problem with medication. (Ex. 10)

24. After the interview, the panel members discussed Complainant’s interview and unanimously voted to recommend not hiring him. Gecoy wrote on an interview form, under the heading Oral Board’s Consensus Results of Candidate’s Interview: “Do Not Hire. Unanimous. Committee remarks: Poor presentation. He will have trouble at the academy. Chairman’s remarks: He is on medication for depression. Very hesitant with answers. Seemed indecisive in response.” (Testimony of Gecoy; Ex. 10) Gecoy informed Chief Higgins about the panel’s recommendation. (Testimony of Gecoy)

25. In an undated letter, Chief Higgins wrote to Respondent that Lynn Fire Department recommended Complainant not be appointed to the position of firefighter because of his medical problems and questions about his poor judgment. Higgins stated:

“1. Applicant retired on medical disability from the Postal Service in 2002 and is still currently taking medication for depression, the side effects of which would directly affect his ability to operate vehicles, tools and equipment, as well as affect the safety of fire ground operations for him and others.”⁴

⁴ The bold lettering appeared in the original letter to HRD.

2. [Complainant] “presented himself extremely poorly... did not effectively answer interviewer’s questions without being prompted... and was indecisive in his answers...answers to hypothetical questions displayed a lack of understanding of right and wrong... when asked...about what he would do after seeing his Officer steal money from a fire scene he was extremely hesitant to answer and after being prompted several times finally answered, “well, I guess I might have to do the right thing.” When asked why he should be hired over his competition he answered that he “deserved” the job, and that he should get the job because of past perceived injustice. Applicant did not satisfactorily impress the committee as to his commitment, suitability and fitness to perform the duties of a firefighter during the interview.

After a complete overall review of Candidate’s personal background, work history, attitude, and oral board interview it is my recommendation to by-pass candidate Robert Lazaris for the above listed reasons.

(Ex. 13)

26. Respondent’s personnel analyst, Richard Currier received Higgins’ by-pass request and approved Complainant’s by-pass. On December 4, 2006, Currier sent Complainant a letter along with a copy of the Department’s reasons for by-passing him stating that he had determined that the reasons given justified the Department’s by-passing Complainant and appointing individuals ranked lower on the list than Complainant. The letter also advised Complainant of his right to appeal the decision to the Civil Service Commission. (Ex. 13; Ex. 15)

27. Currier testified that Respondent’s role was to protect basic merit principles and that he looked to ensure a fair and equitable hiring process for everyone. He stated that in upholding the by-pass, he applied the standard of “sound and sufficient job-related reasons,” as set forth in Respondent’s by-pass guidelines. He acknowledged that one purpose of the by-pass approval process was to ensure there was no unlawful discrimination in the hiring process. (Testimony of Currier)

28. HRD’s guidelines regarding medical and psychiatric conditions, titled, “Regulations for Initial Medical and Physical Fitness Standards Tests for Municipal Public Safety Personnel provide for “Category A” and “Category B” medical and psychiatric conditions. “Category A”

medical conditions are those that would preclude an individual from performing the duties of a firefighter or would be considered a significant safety risk to the individual and others.

“Category B” conditions based on their severity or degree, may or may not preclude an individual from performing the essential job functions of a firefighter, and may not present a significant safety risk to the individual and others. Under these regulations, psychiatric conditions are considered “Category B” conditions. (Ex. 4) Currier had no training to determine which medical conditions were considered automatically disqualifying and those which were not. His job did not involve medical examinations. (Testimony of Currier)

29. Currier testified credibly that he had no contact with Lynn concerning Complainant’s application process and he never saw or requested evidence in support of the Department’s by-pass request. Currier assumed the Department had acquired medical information about Complainant through background information but was aware that it had not ordered a medical examination for Complainant. He stated that if a candidate failed a medical exam, the HRD would approve a by-pass on that basis. (Testimony of Currier)

30. Currier testified that an applicant could not be by-passed for discriminatory reasons. He testified that if a municipality provided a reason for by-pass that was not acceptable he would advise the municipality not to rely on that reason but to provide another reason.

31. Currier testified that the most common reasons for by-pass were poor interviews and poor driving records and he testified that Respondent routinely approved by-passes where the applicant’s poor interview was the sole reason given.

32. Currier’s review was based solely on Higgins’s letter. He did not receive or review the panel’s interview notes and did not discuss the matter with anyone from Lynn and did not know how they arrived at their decision to by-pass Complainant. He did not consult with a

supervisor, despite that fact that this was the first medically related by-pass he had ever reviewed. (Ex. 13)

33. Complainant believed he was able to live with a small group of firefighters and operate the necessary equipment. He stated that there were no side effects from his medications that would prevent him from doing so.

34. Complainant's name remained on the Civil Service list. He filed an appeal of his by-pass to the Civil Service Commission, which he later withdrew. He testified that he did not take the firefighter's exam after 2008 because he felt stigmatized and believed he had no chance to be hired by the Lynn Fire Department.

35. The deposition of Complainant's primary care physician was admitted into the record. (Ex. 26) In the deposition, his physician stated that he believed that Complainant was able to perform the duties of a firefighter in 2006. On October 26, 2009, Complainant's physician wrote a letter "to whom it may concern," stating that Complainant was able to perform the duties of a firefighter in 2006 and currently. (Ex. 28)

36. From 2007-2010, Complainant worked for the MBTA as a part-time operator on the Green Line during the morning and evening rush hours. In this position he had no problems interacting with customers. Between shifts at the MBTA, Complainant performed work as a locksmith.

37. In April 2010, Complainant opened his own locksmith shop. He voluntarily left the MBTA in October 2010 because he did not have sufficient time to work at both jobs.

38. Complainant settled his complaint against the City of Lynn Fire Department and received monetary compensation.

III. CONCLUSIONS OF LAW

Complainant alleges that Respondent, Department of Human Resources, aided and abetted the Lynn Fire Department in its discriminatory actions in violation of M.G.L. c. 151B,s. 4(5) and interfered with the exercise and enjoyment of his right to be free from discrimination on the basis of handicap in violation of M.G.L. c. 151B s.4(4a).

A. Underlying claim

Complainant filed an MCAD complaint against the City of Lynn and its Fire Department for handicap and age discrimination for its decision to by-pass him for appointment to the position of firefighter in 2006. Notwithstanding that his claims against the City and the Fire Department were settled prior to litigation, a discussion of the underlying facts is warranted as they are inextricably linked to the present claims against Respondent.

Complainant has alleged that after passing the firefighters' exam and qualifying for an interview, the Department improperly considered his mental health history and prescription medications during the interview process. Complainant was questioned about his depression and the side effects of his medication. Such inquiry at the interview stage is prohibited by G.L. c. 151B as well as Respondent's guidelines for municipalities during the hiring process. Thereafter, consistent with the interview panel's recommendation, the Lynn Fire Chief notified Respondent that Complainant was being by-passed because of his poor interview and concerns that the side effects of his medication would prevent him from operating firefighting equipment.

Employers may not ask questions about a disability during the pre-employment process, whether on a job application form, in a job interview, or as part of the employer's background or reference checks. Questions about treatment for a mental condition are off limits during the pre-

employment part of the hiring process. MCAD Guidelines: Employment Discrimination of the Basis of Handicap, at IV, B, 6, 20 MDLR Supplement (1998) (hereinafter “MCAD Guidelines”)

The interview panel’s improperly obtained information was passed on to then Fire Chief Higgins, who made the decision to by-pass Complainant.

While Complainant’s underlying claim of disability discrimination against the City and the Fire Department is no longer before this Commission, the evidence adduced at the public hearing would support a conclusion that the Department acquired knowledge of Complainant’s medication and his history of depression through the improper inquiry into Complainant’s psychiatric history in contravention of M.G.L.c.151B, sec.4 (18) which prohibits inquiry regarding medical issues at the interview stage of the hiring process. Id.

B. Interference

Complainant argues that Respondent’s conduct in approving his by-pass violated M.G.L. s.4(4A), which makes it unlawful for any person, not just an employer, “to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected” by chapter 151B. “That provision independently and explicitly provides for an interference claim, not merely against employers, but against all persons.” See 804 CMR 3.00 4(b) Therefore, although it is not the employer, Respondent, because it validated and approved the by-pass, may be liable for interference with Complainant’s right to be considered for employment free from unlawful considerations of his mental health in the interview process. Lopez, et. al, v. Commonwealth et al, 463 Mass. 696(2012) (HRD may be liable under 4(4A) for administering an examination that has a disparate impact on minorities); Thomas O’Connor

Constructors, Inc. vs. M. C. A. D., et al, 72 Mass. App. Ct. 549 (2008)(contractor liable for discriminatory conduct of its supervisor toward worker on site who is not its employee); Griffin and Leftwitch v. Eastern Contractors and S & R Construction Co., 30 MDLR 113 (2008)(same); MCAD and McGrath v. Local Union No. 12004, United Steelworkers of America, et al, 26 MDLR 178 (2004) (Union liable for harassment by its members toward gay worker); Cook v. Miskel, 31 MDLR 155 (2009) (individual, not Complainant's employer liable pursuant to 4(4A) for sexual assault against Complainant in her workplace; affirmed by Full Commission on liability, but reversed as to damages)

Respondent argues that the 4(4A) interference claim should be dismissed as untimely, since it was not raised by Complainant until several years after the filing of his complaint. I do not agree with this assertion. The Commission has long recognized the authority to consider a claim where, as here, the Respondent is not prejudiced, nor are any rights substantially affected by allowing such a claim to proceed where the facts in the complaint and the record are sufficient to support a such a claim. Sturdivant v. Joshi, 12 MDLR 1134, 1146 (1990) Moreover, the right of a hearing officer to amend the complaint so that the decision conforms to the facts adduced at the public hearing has long been recognized by the Commission. See e.g., Riggs v. Town of Oak Bluffs, 23 MDLR 306, 311 (2001) affm'd on appeal to Full Commission, 25 MDLR 348 (2003); MCAD and Abrams v. Paddington's Place, et al., 26 MDLR 149(2005); (Full Commission) In this case, the consideration of an interference claim is supported by the facts as originally presented and does not prejudice Respondent or require it to investigate further or to raise additional defenses. The claim is based on the same set of circumstances and actions by Respondent that are raised in the initial complaint. Therefore, I conclude that the Commission properly amended the claim to add a charge under s. 4(4A).

In order to establish a claim of interference with a protected right, pursuant to M.G.L. c. 151B, s. 4(4A), Complainant must show that the Respondent had the authority or the duty to act on behalf of the employer; his action or failure to act implicated rights under the statute; and there is evidence that the action or failure to act was in deliberate disregard of the Complainant's rights, allowing the inference to be drawn that there was intent to discriminate or interfere with Complainant's exercise of rights.⁵ Woodason v. Town of Norton, 25 MDLR 62 (2003) I conclude that Complainant has established a prima facie case of interference under 4(4A). At the time of the events in this matter, Respondent was charged with the responsibility of reviewing and either approving or denying the by-pass of applicants for municipal firefighter positions. Respondent knew that the Department's by-pass request was based in part on medical information improperly obtained prior to a medical examination at the job interview;⁶ a practice Respondent knew or should have known was in contravention of statutory and regulatory requirements. I conclude that Respondent acted in deliberate disregard of Complainant's exercise of his rights under 151B by accepting the Department's improper reason for the by-pass and approving and validating the by-pass without making further inquiry into the hiring process or otherwise challenging the use of improperly acquired medical information.

⁵ The court in Lopez ruled that there is no "intent" requirement where Complainants charged HRD administered a facially neutral test that had a disparate impact on minority candidates. The present case is not a disparate impact case and therefore "intent," which may be inferred from the facts is required to establish a claim of "interference."

⁶ Currier testified that he thought the information may have been obtained during a background check of Complainant. Nonetheless, he should have known that it was improper to consider such information during the interview process.

C. Aiding and Abetting

It is unlawful for any person, whether an employer or an employee or not, to aid abet, incite compel or coerce the doing of any of the acts forbidden under [chapter 151B] or to attempt to do so G. L. c. 151B s.4(5). Lopez, et. al., v. Commonwealth et al., 463 Mass. 696 (2012)[citations omitted] An aiding and abetting claim under § 4 (5), however, is "entirely derivative of the discrimination claim." Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 122 (2000). As a consequence, in addition to the "individual and distinct wrong" that the defendant must be alleged to have committed, the complaint must allege the commission of an underlying act of discrimination under G. L. c. 151B, (the "main claim") by the principal offender. Lopez, supra. at 713. In this matter the Complainant alleged that the City of Lynn Fire Department was the principal offender by its actions. The Court in Lopez found that there was no basis for an aiding and abetting claim where Complainants did not allege that a specific practice or act was undertaken by one or more particular municipalities that could form the basis of a derivative aiding and abetting claim, Lopez at 713, but the court noted that an aiding and abetting claim would not necessarily fail, where the principal offender is not named as a Respondent. Lopez, at f.n. 22.

The underlying claims against the City and the Fire Department were never litigated and are not before me; however, as stated earlier, I have had to consider, as part and parcel of this litigation, certain facts which establish that the Department acquired and considered medical information improperly. While I am constrained from ruling that the Department violated c. 151B, Complainant has established facts that support his allegations that the Department did acquire medical information improperly and I conclude that because Respondent knew or should

have known that these facts were improperly acquired, Respondent aided and abetted the Department in violation of M.G.L.c. 151B s.4(5)

Notwithstanding Complainant's success at establishing that Respondent violated G.L. c. 151B, there is insufficient evidence in the record from which I could conclude that Complainant suffered any injury from Respondent's actions because it is not certain that he would have been appointed to the position of firefighter, but for the Respondent's reliance in part on medical reasons to justify the by-pass. The evidence strongly suggests that the Complainant's poor interview skills alone would have caused the Department to request a by-pass, that HRD could have justified the by-pass for this reason alone, and it would have been a sufficient and lawful reason for HRD to approve the by-pass.

Several members of the panel testified credibly that Complainant made a poor impression at the interview, responded to questions in a hesitant manner and one member felt Complainant would never make it through the fire academy. Their testimony was consistent with Complainant's self-described "social phobia" and his demeanor at the public hearing, which I observed to be quite reserved and reticent, even given the inherently stressful circumstances of the hearing. The evidence established that a poor job interview was a common reason for approving a municipality's request for a by-pass, and was often the only reason for a by-pass. HRD considered this an acceptable reason standing alone to justify a by-pass. Thus, even absent the impermissible inquiry into Complainant's mental health, Respondent would likely have approved the by-pass of Complainant based on his poor interview alone. Therefore, Complainant cannot prove that he suffered any injury from HRD's unlawful action and therefore is not entitled to additional damages.

Moreover, had Complainant not been by-passed and been offered conditional employment, he would have had to submit to, and pass, a physical and/or mental examination. Such an exam never occurred because he was not offered an appointment. Therefore the only evidence before me is what was adduced at the public hearing.⁷ Complainant testified that he considers himself disabled by major depression, anxiety and social phobia and that his symptoms were same in 2006 as at the time of the public hearing. He has been treated continuously by mental health professionals for these conditions. His symptoms were so severe that he could no longer remain employed at the Postal Service in what was arguably a much less stressful job than firefighting with no potential life-threatening conditions presenting themselves on a daily basis.

A conclusion that Complainant would ultimately have been able to perform the position of firefighter in 2006, must be based on substantial medical evidence that despite his mental health impairments, Complainant was a qualified handicapped person, who was capable of performing the essential job functions of a firefighter and performing under severely stressful and potentially life-threatening conditions on a daily basis. I conclude that the medical evidence of record is insufficient to support Complainant's bare assertion that he was a qualified handicapped person, capable of performing the duties of a firefighter in 2006 with or without a reasonable accommodation.

The medical documentation consists of the deposition transcript, letters and partial medical records of Complainant's primary care physician, who stated in a deposition that he believed Complainant capable of performing the duties of a firefighter. However, there is no supporting documentation whatsoever from Complainant's treating mental health providers with respect to his ability to perform the duties of a firefighter given his long-standing depression and

⁷ Whether Complainant could have passed the required medical exams and proven himself capable of performing as a firefighter at the time of his application and whether he submitted sufficient medical evidence of his ability to perform the job at the public hearing are two separate issues.

anxiety at the time of the by-pass. Absent medical evidence relating to Complainant's actual mental and emotional disabilities and how they might impact his ability to function in the high stress position of firefighter, I conclude that he has not satisfied one of the necessary elements of his prima facie case. Given this fact, and the established evidence that a poor interview alone would have sufficed to justify a by-pass of Complainant, to conclude that Complainant would have ultimately succeeded in being appointed as a firefighter is entirely speculative.

For the reasons stated above, I conclude while Respondent violated G. L. c. 4(4A) and 4(5) by failing to sufficiently review a by-pass based on a mental disability,⁸ there is insufficient evidence that Complainant suffered further injury from Respondent's action given that Respondent could have justified its approval of the by-pass based solely on the other reason provided and likely would have done so, had it been the sole reason advanced. In addition, I have concluded that there is insufficient medical information before me to establish that Complainant would ultimately have succeeded in being appointed a firefighter. Given the above, despite my conclusion that Respondent violated ss. 4(4A) and 4(5) there are no compensable damages flowing from HRD's unlawful action and Complainant's claims for damages are hereby dismissed.⁹

⁸ There was no evidence with respect to Respondent's current practice regarding by-pass.

⁹ Because the Complainant has prevailed on liability in this matter, Complainant's counsel is entitled to attorney's fees and shall submit a petition for attorney's fees and costs within 10 days of receipt of this decision.

IV. ORDER

1. Respondent is hereby ordered to cease and desist from utilizing improperly acquired medical information in determining whether to approve the by-pass of candidates for public safety positions.

2. Respondent is hereby ordered to submit to the Commission for review, documentation detailing the procedures and or policies it currently utilizes to review by-pass requests.

This constitutes the final decision of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal to the Full Commission within ten days of receipt of this order and a Petition for Review with the Full Commission within 30 days of receipt of this order.

SO ORDERED, this 28th day of January, 2014

JUDITH E. KAPLAN
Hearing Officer