

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

ERIK AQUINO,
Appellant

v.

Case No. B1-14-13

HUMAN RESOURCES DIVISION,
Respondent

Appearance for Appellant:

Pro Se

Appearance for Respondent:

Andrew Levrault, Esq.
Human Resources Division
One Ashburton Place, Room 211
Boston, MA 02108

Commissioner:

Cynthia A. Ittleman, Esq.¹

DECISION ON HUMAN RESOURCES DIVISION’S MOTION TO DISMISS

The Appellant, Erik Aquino (“Appellant” or “Mr. Aquino”) filed an appeal with the Civil Service Commission (“Commission”) on January 2, 2014 against the state’s Human Resources Division (“HRD” or “Respondent”), contesting HRD’s decision to deny him Education and Experience (“E&E”) credit on the municipal police officer exam, which was administered on June 15, 2013.²

A pre-hearing conference was held on February 18, 2014 at the offices of the Commission. On March 11, 2014, HRD filed a Motion to Dismiss with the Commission. Mr. Aquino submitted an Opposition to HRD’s Motion to Dismiss on March 18, 2014. Mr. Aquino waived the motion hearing since he is located in New York and it would be difficult for him to

¹ The Commission acknowledges the assistance of Beverly J. Carey, Esq., in the drafting of this decision.

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

attend a hearing. For the reasons stated herein, HRD's Motion to Dismiss is allowed and Mr. Aquino's appeal is denied.

FINDINGS OF FACT

Based on the Motion, the Opposition, the documents produced by the parties, the arguments made at the hearing on the Motion, and taking administrative notice of all matters filed in the case and pertinent statutes, case law, regulations and policies, and reasonable inferences from the evidence, I make the following findings of fact:

1. Mr. Aquino has been employed full-time by the New York City Police Department ("NYPD") beginning on or about January 20, 2004. As of October 25, 2013³, Mr. Aquino was still employed by the NYPD as a sergeant.⁴ (HRD's Motion to Dismiss, Attachments 2 & 4; Opposition)
2. On or about June 15, 2013, Mr. Aquino took and passed the examination for original appointment to the position of municipal police officer. (HRD's Motion to Dismiss, Attachment 3)
3. On or about November 1, 2013, the eligible list was created based on the June 15, 2013 examination. The eligible list expires on October 31, 2015. (HRD's Prehearing Document)
4. On or about June 11, 2013, Mr. Aquino submitted a claim to HRD for E&E points based on his full-time employment as a police officer and Sergeant at the New York Police Department ("NYPD"). (HRD's Motion to Dismiss, Attachments 2 & 4) The exam announcement states, regarding E&E, that claims must include, inter alia, the number of

³ This is the date of Mr. Aquino's employment verification letter, which was sent by the New York Police Department to HRD. (HRD's Motion to Dismiss, Attachment 4)

⁴ Prior to becoming a sergeant on March 30, 2012, Mr. Aquino was a police officer from January 20, 2004 until March 30, 2012. (HRD's Motion to Dismiss, Attachment 2)

hours worked at the job for which the applicant claims credit. (HRD's Motion to Dismiss, Attachment 1)

5. On or about October 15, 2013, HRD provided Mr. Aquino with notice that he had passed the 2013 police officer examination. In this same letter, HRD denied Mr. Aquino's E&E claim for his police experience at NYPD because his letter of verification was not on official letterhead stationary of the NYPD. (HRD's Motion to Dismiss, Attachments 2 & 3)
6. The letter sent by HRD on or about October 15, 2013 included information about the process for asking HRD to reconsider its determination under G.L. c. 31, § 22. No other such statutory information is included in the letter. (HRD's Motion to Dismiss, Attachment 3)
7. On or about October 29, 2013, Mr. Aquino resubmitted his E&E claim to HRD. This time, Mr. Aquino's employment verification letter was on NYPD official letterhead, although it did not state the Appellant's weekly work hours. (HRD's Motion to Dismiss, Attachment 4)
8. On or about November 21, 2013, HRD again denied Mr. Aquino's claim stating that the verification letter he submitted to HRD did not specify if Mr. Aquino's employment was part-time or full-time. (HRD's Motion to Dismiss, Attachment 5)
9. This November 21, 2013 letter from HRD repeated the same statutory appeal information provided in HRD's October 15, 2013 letter regarding an appeal under G.L. c. 31, § 22. This letter did not contain any statutory information pertaining to an appeal of HRD's decision under G.L. c. 31, § 24, which requires such an appeal to be filed at the Commission within seventeen (17) days of the date that HRD mailed its decision. (HRD's Motion to Dismiss, Attachment 5)

10. On January 2, 2014, Mr. Aquino appealed HRD’s denial of E&E credit to the Commission. (Administrative Notice; HRD’s Motion to Dismiss, Attachment 6)

11. Mr. Aquino’s appeal to the Commission was outside the seventeen (17) day period allowed under G.L. c. 31, § 24. (Administrative Notice)

DISCUSSION

Legal Standard for Motion to Dismiss

In accordance with 801 CMR 1.01(7)(g)(3), the Commission may at any time, on its own motion or that of a Party, dismiss an appeal for lack of jurisdiction to decide the matter or for failure of the Appellant to state a claim upon which relief can be granted. Such motions are decided under the well-recognized standards for summary disposition as a matter of law, i.e., “viewing the evidence in the light most favorable to the non-moving party,” the undisputed material facts affirmatively demonstrate that the non-moving party has “no reasonable expectation” of prevailing on at least one “essential element of the case.” See, e.g., Milliken & Co. v. Duro Textiles LLC, 451 Mass. 547, 550 (2008); Maimonides Sch. v. Coles, 71 Mass. App. Ct. 240, 249 (2008); Lydon v. Mass. Parole Bd., 18 MCSR 216 (2005).

Applicable Civil Service Law

Under G.L. c. 31, § 1, the civil service phrase “basic merit principles” is defined, in part, as,

- (a) recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment; ... (e) assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens

....
(Id.)

Section 2(b) of G.L. c. 31 provides, in part, that the Commission is authorized,

[t]o hear and decide appeals by a person aggrieved by any decision, action, or failure to act by the administrator, except as limited by the provisions of section twenty-four relating to the grading of examinations; provided that no decision or action of the administrator shall be reversed or modified nor shall any action be ordered in the case of a failure of the administrator to act, except by an affirmative vote of at least three members of the commission, and in each such case the commission shall state in the minutes of its proceedings the specific reasons for its decision....

No decision of the administrator involving the application of standards established by law or rule to a fact situation shall be reversed by the commission except upon a finding that such decision was not based upon a preponderance of evidence in the record.

(Id.)

HRD is vested with considerable authority to determine the requirements for competitive civil service examinations. Under G.L. c. 31, § 22, “[t]he administrator shall determine the passing requirements of examinations.” The statute also states that “[i]n any competitive examination, an applicant shall be given credit for employment or experience in the position for which the examination is held.” Id. The Personnel Administration Rules (“PAR”) promulgated by HRD provide the following, in pertinent part: “[t]he grading of the subject of employment or experience as a part of an entry-level examination shall be based on a schedule approved by the administrator which shall include credits for elements of employment or experience related to the title for which the examination is held.” PAR .06(c).

Under G.L. c. 31, § 22, an applicant may request that the administrator conduct a review of the marking of the applicant’s training and experience. An applicant may then appeal to the Commission from a decision of HRD pursuant to G.L. c. 31, § 24. While the first paragraph of G.L. c. 31, § 24 does not expressly list “training and experience” appeals, such appeals are referenced in the second paragraph of the statute. In O’Neill v. Civil Serv. Comm’n, 10-P-384 (February 15, 2011; per Rule 1:28), the Appeals Court ruling established that “a fair reading of the entire statute ‘indicated an intent by the Legislature that training and experience scores may be appealed under § 24. . . .’” Pursuant to G.L. c. 31, § 24, an Appellant is allowed seventeen (17) days after the date of mailing of HRD’s decision to file an appeal with the Commission.

The Respondent's Argument

In making its Motion to Dismiss, HRD relies upon the argument that Mr. Aquino's appeal to the Commission is untimely and, therefore, argues that the Commission lacks jurisdiction to hear his appeal. In addition, HRD maintains that nothing in G.L. c. 31 requires HRD to affirmatively provide a person with notice regarding their right to appeal a determination by HRD to the Commission.

The Appellant's Argument

Mr. Aquino acknowledges that his appeal is untimely. However, Mr. Aquino avers that he was never provided with notice by HRD regarding the appeal process under G.L. c. 31, § 24. In addition, Mr. Aquino points out that he initially provided his weekly work hours and that the NYPD does not have part-time police officers.

Analysis

There is no dispute that Mr. Aquino's appeal before the Commission was outside of the seventeen (17) day period allowed by G.L. c. 31, § 24. Further, a preponderance of the evidence establishes that the Appellant was not aggrieved by HRD's action, or failure to act, in that it did not provide the Appellant with accurate notice regarding the appeal process under G.L. c. 31, § 24. HRD does not have a specific statutory obligation under G.L. c. 31 to provide notice regarding certain appeal rights to persons taking examinations. However, HRD provides information to persons taking examinations regarding appeals to HRD pursuant to G.L. c. 31, § 22. In subsequently ruling on the request for HRD to review its initial E+E determination, HRD's response again refers the candidate to G.L. c. 31, § 22, which is incorrect. Although HRD has considerable authority regarding the scoring of E+E, that authority does not extend to incorrectly advising examinees that an HRD redetermination is to be further appealed to it, rather than the Commission. Just as HRD provides information about asking HRD to review its

initial E+E determination pursuant to G.L. c. 31, § 22, HRD should similarly provide correct information about appealing HRD's secondary determination to the Commission under G.L. c. 31, § 24. That said, the Appellant did not send a second appeal to HRD but to the Commission. Therefore, the Appellant was not aggrieved by HRD's action or inaction.

The process here warrants further comment. Mr. Aquino filed a timely request with HRD to review his E&E score, in accordance with G.L. c. 31, § 22. Mr. Aquino made every effort to provide HRD with correct and accurate information regarding his employment with the NYPD. When he provided his employment verification letter on NYPD letterhead, as required, he was still not granted E+E credit for his experience at NYPD. HRD then averred that the letter on NYPD letterhead did not indicate whether the Appellant was a full-time or part-time employee. However, the letter that the Appellant initially submitted to HRD indicated that he was a full-time employee. The Appellant indicated that the only reason his employment verification submitted on NYPD letterhead (the second verification he submitted) did not specify whether he was a full time or part-time officer is that NYPD does not have part-time officers.

Conclusion

For the foregoing reasons, the Respondent's Motion to Dismiss is hereby *allowed* and the Appellant's appeal under Docket Number B1-14-13 is hereby *denied*.

Civil Service Commission

/s/ Cynthia A. Ittleman

Cynthia A. Ittleman, Esq.
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners) on July 9, 2015.

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)(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-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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice:

Erik Aquino (Appellant)

Andrew Levrault, Esq. (for Respondent)

John Marra, General Counsel (HRD)