

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

EDGARD ARTY,
Appellant

v.

E-11-81

HUMAN RESOURCES
DIVISION,
Respondent

Appellant's Attorney:

Pro Se
Edgard Arty

Respondent's Attorney:

Tsuyoshi Fukuda, Esq.
Human Resources Division
One Ashburton Place
Boston, MA 02108

Commissioner:

Christopher C. Bowman¹

ORDER OF DISMISSAL

The Appellant, Edgard Arty (hereinafter "Arty" or "Appellant"), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (hereinafter "Commission"), claiming that he was aggrieved when the state's Human Resources Division (hereinafter "HRD") failed to include his name on the eligible list of candidates for Boston firefighter because he did not meet the G.L. c. 31, § 58A age requirement at the time of the exam.

¹ The Commission acknowledges the assistance of legal intern Jihyun Choi.

The Appellant filed his appeal on March 8, 2011. A pre-hearing conference was held on March 29, 2011. The Appellant and HRD attended.

The following facts are not in dispute:

1. On April 22, 2010, the Appellant took and passed the written portion of the civil service examination for firefighter. He scored 98. He also passed the Entry-level Physical Abilities Test (ELPAT) portion of the examination and scored 7/7.
2. The Appellant was born on June 13, 1973. On the date of the examination, his age was 36 years and 10 months.
3. G.L. c. 31, § 58A states:

“No person shall be eligible to have his name certified for original appointment to the position of firefighter or police officer if such person has reached his thirty-second birthday on the date of the entrance examination. Any veteran shall be allowed to exceed the maximum age provision of this section by the number of years served on active military duty, but in no case shall said candidate for appointment be credited more than four years of active military duty.” (emphasis added)

4. The Appellant did not examine G.L. c. 31, § 58A before applying and taking the examination. He instead relied upon the City of Boston’s web page dealing with Veteran and Active Duty Military Applicants. That web page states:

“Veteran status is a common merit that can be used to reward military service with several benefits throughout the selection for employment process. In order to be eligible for veterans' benefits, one must be a "veteran" or a dependent of a "veteran" as defined by Chapter 4, Sec. 7, Clause 43 of the General Laws of Massachusetts' terms of eligibility. All those qualifying to receive veterans' benefits may claim residency preference within the first 30 days following an honorable discharge. Those who have served on active duty in the military may add up to four (4) years served to the maximum age limit of thirty-two (32) in the application process, allowing eligible individuals to apply up to the age of thirty-six (36). Returning Veterans must establish residency within 30 days of discharge to qualify for the city of Boston residency preference. Veterans should refer to the state web site concerning special information regarding the definition of a veteran, taking a makeup test, the Military

Pay Act, eligibility extensions, and the documentation needed for veteran's preference.” (*emphasis added*)

5. In regard to active military status, the HRD website states:

“The cities and towns followed by two asterisks [Boston] are communities, that have accepted the provisions of M.G.L. c. 31, section 58A and they only accept candidates that were younger than age 32 as of the exam date as new public safety hires. However, if you are a qualified veteran... you may add up to a maximum of four (4) years of service time to your age (to a maximum age of 36) and still be eligible for appointment in communities that have accepted section 58A.”
6. At the time of the examination, the Appellant had served on active duty in the United States Army for ten years, from 1995 to 2005. Pursuant to G.L. c. 31 § 58A, the Appellant was eligible for four years credit of active military duty. Thus, he could be treated as if his age were 32 years and 10 months at the time of the examination.
7. The Appellant claimed that the City of Boston webpage is ambiguous and misleading. He believed that he was eligible to sit for the examination on June 22, 2010.
8. HRD did not include the Appellant’s name on the eligible list of candidates for Boston firefighter, determining that the Appellant did not meet the Section 58A age requirement.
9. On March 8, 2011, the Appellant filed an appeal with the Commission, contesting HRD’s decision.
10. On March 29, 2011, the Appellant and HRD attended the pre-hearing conference. Both parties presented oral argument.
11. HRD argued that it acted in accordance with the civil service law and that the Commission should not find that the Appellant is aggrieved.
12. On March 30, 2011, HRD filed a Motion to Dismiss.
13. The Appellant did not file a reply.

Conclusion

Under G.L. c. 31, § 2(b), the Commission has the power and duty to:

“[H]ear and decide appeals by a person aggrieved by any decision, action, or failure to act by [HRD], 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 person shall be deemed to be aggrieved under the provisions of this section unless such person has made specific allegations in writing that a decision, action, or failure to act on the part of the administrator *was in violation of this chapter, the rules or basic merit principles promulgated thereunder* and said allegations shall show that such person’s rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person’s employment status.” (*emphasis added*)

St. 1993, c. 310 provides:

“If the rights of any person acquired under the provision of chapter thirty-one of the General Laws or under any rule made thereunder have been prejudiced *through no fault of their own*, the civil service commission may take such action as will restore or protect such rights, notwithstanding the failure of any person to comply with any requirement of said chapter thirty-one or any such rule as a condition precedent to the restoration of such rights.” (*emphasis added*)

801 CMR 1.01 (7) (g) (3) states:

“The Presiding Officer may at any time, on his own motion or that of a Party, dismiss a case for lack of jurisdiction to decide the matter, for failure of the Petitioner to state a claim upon which relief can be granted or because of the pendency of a prior, related action in any tribunal that should first be decided.”

G.L. c. 31 § 58A states, “No person shall be eligible to have his name certified for original appointment to the position of firefighter or police officer if such person has reached his thirty-second birthday on the date of the entrance examination. Any veteran shall be allowed to exceed the maximum age provision of this section by the number of years served on active military duty, but in no case shall said candidate for appointment be credited more than four years of active military duty.”

According to the statute, the applicant must be less than 32 years of age at the time of the examination. If the applicant has active military service, he is entitled to add a maximum of four additional years.

The Appellant was born on June 13, 1973. He was 36 years and 10 months old when he took the civil service examination on April 22, 2010. Therefore, he was over the requisite age at the time of examination, within the meaning of the statute. Because he had served on active duty in the United States Army for ten years, he was allowed to exceed the maximum age and was entitled to add four additional years. However, he had reached his *thirty-sixth birthday* at the time of the examination. The Appellant did not meet the G.L. c. 31, § 58A age requirement, and thus he is not eligible to have his name certified for original appointment.

While the Appellant's appeal must be dismissed as a matter of law, I urge HRD and the City to consider using the exact language of Section 58A on their web page in order to avoid ambiguity and confusion. Specifically, I urge them to use the term "*thirty-second birthday*," rather than "*thirty-two (32)*" as the maximum age limit. I urge HRD to add that those who have served on active duty in the military may add up to four (4) years served to the maximum age limit, but the applicant would not be eligible for original appointment if he had reached his "*thirty-sixth birthday*" at the time of the examination. In the alternative, HRD may cite G.L. c. 31, § 58A, and encourage the applicant to refer to it.

For all of the above reasons, the Appellant's appeal under Docket No. E-11-81 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell and Stein, Commissioners) on June 30, 2011.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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:
Edgard Arty (Appellant)
Tsuyoshi Fukuda, Esq. (for HRD)