

Decision mailed: 1/27/12
Civil Service Commission *JS*

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

RAMI AWAD,
Appellant,

CASE NO: E-11-277

v.

**MASSACHUSETTS HUMAN
RESOURCES DIVISION,**
Respondent

Appellant, Pro Se:

Rami Awad

HRD Attorney :

Martha Lipchitz O'Connor, Esq.
Human Resources Division
One Ashburton Place, Room 211
Boston, MA 02108

Commissioner:

Paul M. Stein

DECISION ON MOTION FOR SUMMARY DECISION

The Appellant, Rami Awad, appealed to the Civil Service Commission (Commission) pursuant to G.L.c.31, §2(b), claiming that the Massachusetts Human Resources Division (HRD), on November 1, 2010, prematurely removed his name from the active civil service eligible list of candidates for appointment as a police officer, which denied him the opportunity for consideration for a position with the Boston Police Department (BPD) for the BPD's hiring cycle in 2011.

On October 28, 2011, HRD served and filed a Motion for Summary Disposition on the grounds that the Appellant had failed to comply with HRD's requirements that were a prerequisite to entitling him to maintain his eligibility beyond November 1, 2010. Mr.

Awad filed an opposition to HRD's motion on November 7, 2011, The Commission held a hearing on the motion on December 11, 2011, which was digitally recorded.

FINDINGS OF FACT

Giving appropriate weight to the documents and oral argument submitted by the parties, I find the following material facts to be undisputed:

1. The Appellant, Rami Awad, is a life-long resident of the City of Boston who holds a Bachelor's Degree from Boston University and is currently employed as civilian dispatcher with the BPD (*Claim of Appeal; Undisputed Representations at Motion Hearing; HRD Motion*)

2. On June 28, 2008, Mr. Awad took and passed an open civil service competitive examination for Police Officer (HRD Announcement #8027), He received a score of 97. His name was placed on the eligible list established by HRD, effective November 1, 2008. (*HRD Motion, Exhs. A & B; Appellant's Opposition*)

3. Approximately a year later, HRD announced another open competitive examination to be administered on April 25, 2009, that would include a combined examination for Police Officer and State Trooper (HRD Announcement #8434)), just State Trooper (HRD Announcement #8373), and just Police Officer (HRD Announcement # 8265). Applicants were allowed to select one of three options to have their exam results apply – both State Trooper and Police Officer, just State Trooper or just Police officer – via the appropriate announcement number. The instructions stated:

“Applicants will have to select one of [the three] options when applying on-line. Applicants are reminded to carefully select their choice **BECAUSE YOU WILL NOT BE ALLOWED TO CHANGE YOUR CHOICE AFTER THE EXAMINATION IS HELD ON APRIL 25, 2009.**

(*HRD Motion, Exhs. C & G*)

4. By law, a civil service eligible list remains effective until a new eligible list is established from the results of a subsequent examination, which, as a general rule, cannot be a period more than two years, *(HRD Motion; Administrative Notice [G.L.c.31, §25])*

5. The April 25, 2009 examination notice also contained the following information about the eligibility status of applicants who had previously taken the 2008 Police Officer examination and appeared on the current November 1, 2008 eligible list:

Q. I do not want to lose my score from the 2008 Police Officer test because I scored well but I want to be on the 2009 State Trooper list, can you use my score from the 2008 exam for the 2009 State Trooper list?

A. No, you cannot use your exam score from the 2008 test to be on the State Trooper list. You must take the 2009 exam and request that your exam results from the 2009 apply ONLY to the State Trooper list. If you file on-line you will be prompted to make a choice and if you file with a paper application you will need to enter the appropriate announcement number on it.

Q. I took the 2008 Police Officer test and I do not want to be a State Trooper, do I need to take the 2009 test to remain on the Police Office list.

A. No, if you took the 2008 test you may opt not to take the 2009 exam, since your eligibility from the 2008 exam will continue until October 2010 on the Police Officer eligible list.

Q. I took the 2008 Police Officer test and plan to take the 2009 test and have my score from the 2009 test apply to both the Police Officer and State Trooper lists. What happens to my 2008 Police Officer score?

A. If you take both the 2008 and 2009 Police Officer exam, your 2009 exam result will replace your 2008 exam result on the Police Officer list when the exam result 2009 list becomes active on November 1, 2009.

(HRD Motion, Exh. C)

6. Mr. Awad registered on-line to take the 2009 examination. He said that he intended to register for both the Police Officer and State Trooper exams, but mistakenly “clicked the wrong link” and registered only for the State Trooper exam. He said he understood that his 2009 exam score would replace his 2008 results, but he also figured that he would do well on the second time taking the test and that, from his familiarity with the hiring cycles at the BPD, he knew that, as a non-veteran, the chances of being

reached before the expiration of the current list were not very high, (*HRD Motion, Exh. G; Claim of Appeal; Representation at Motion Hearing*)

7. Within a day or two, Mr. Awad realized his error and contacted the HRD Civil Service Unit. He said that he spoke over the telephone with an employee in the HRD Civil Service Unit and told the employee he wanted to correct the error. Mr. Awad said he was informed that it would not be necessary for him to re-register for the Police Officer exam, but that he should advise the exam proctor of the situation when he arrived at the test site. He said he did this, and the proctor took his name and told him he would “take care” of the mistake. Mr. Awad does not know the name of the HRD employee he spoke to or the name of the proctor. He said he might recognize the proctor if he saw him again. (*Claim of Appeal; Representations at Motion Hearing*)

8. At the test site, Mr. Awad completed an examination “bubble” form, on which he filled in the “Booklet No” for the State Trooper Examination (#8373) which he said he copied from the notice he had received from HRD to appear for the examination. He said he did not realize that the number on the notice was the “State Trooper only” announcement number. (*HRD Motion, Exh. D; Representations at Motion Hearing*)

9. On or about February 16, 2010, Mr. Awad received notice from HRD that he passed “Examination No. 8373 Open State Trooper” test with a score of 97. Mr. Awad said he didn’t pick up that the notice only referenced the State Trooper test, and did not reference the Police Officer exam. (*HRD Motion, Exhs. E & F; Representations at Motion Hearing*)

10. At some point around October 2010 (eight months after receiving the notice he had passed the “State Trooper” only exam), Mr. Awad logged onto his online SOARIS

System HRD account and saw that his record showed that he was not shown on the eligible list for Police Officer after November 1, 2010. He made numerous phone calls and wrote to HRD requesting that HRD restore his name to the eligible list. On February 24, 2011, HRD wrote to Mr. Awad, stating that review of the proctor's examination reports failed to show any record of his claim and, therefore, denied his request, (*Claim of Appeal; HRD Motion, Exh.H & I*)

11. According to HRD, a total of 1,059 applicants who had already passed the 2008 Police Officer examination registered for the 2009 examination and 873 of those individuals passed the examination. (*HRD Motion*)

12. Mr. Awad's score on the 2008 and 2009 examinations placed him around 300th on that list. Had his eligibility been extended through the expiration of the merged list, the parties agree he would have been reached for consideration by the BPD just prior to the expiration of that merged list in November 2010. (*Representations at Motion Hearing*)

13. Mr. Awad subsequently took the April 2011 Police Officer Examination and was notified on September 1, 2011 that he had passed that test, again, with a score of 97, which, this time, placed him about 500 places from the top of the new eligible list, due in part to the statutory preferences for veterans and the total number of non-veteran applicants who took the examination and scored above Mr. Awad. Given his lower place on the 2011 list, it is reasonable to infer that it is possible, but not probable, that his name will be reached by the BPD within the two year life of that list. (*HRD Motion, Exh.J; Representations at Motion Hearing*)

14. On September 9, 2011, this appeal to the Commission ensued (*Claim of Appeal*)

CONCLUSION

Applicable Legal Standard

The Commission may, either on motion or upon its own initiative dismiss an appeal at any time for lack of jurisdiction or for failure to state a claim upon which relief can be granted. 801 CMR 7.00(7)(g)(3). A motion for summary disposition of an appeal before the Commission, in whole or in part, may be filed pursuant to 801 C.M.R. 1.00(7)(h).

These motions are decided under 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 substantial and credible evidence established that the non-moving party has “no reasonable expectation” of prevailing on at least one “essential element of the case”, and has not rebutted this evidence by “plausibly suggesting” the existence of “specific facts” to raise “above the speculative level” the existence of a material factual dispute requiring evidentiary hearing. *See, e.g., Lydon v. Massachusetts Parole Board*, 18 MCSR 216 (2005). *cf. Milliken & Co., v. Duro Textiles LLC*, 451 Mass. 547, 550n.6, (2008); *Maimonides School v. Coles*, 71 Mass.App.Ct. 240, 249, (2008). *See also Iannacchino v. Ford Motor Company*, 451 Mass. 623, 635-36, (2008) (discussing standard for deciding motions to dismiss); *cf. R.J.A. v. K.A.V.*, 406 Mass. 698 (1990) (factual issues bearing on plaintiff’s standing required denial of motion to dismiss)

Relevant Civil Service Law

G.L.c.31, §2(b) authorizes appeals to the Commission by persons aggrieved by the actions or inactions of HRD which have abridged their rights under civil service law and rules. The statute provides:

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.

Chapter 310 of the Acts of 1993 prescribes the discretionary authority granted to the Commission to remediate a violation of civil service law:

If the rights of any person acquired under the provisions of chapter thirty-one of the General Laws or under any rule made thereunder have been prejudiced through no fault of his 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 or protection of such rights.

Except for bypass appeals from the non-selection of a candidate for original or promotional appointment under G.,L.c,31, §27 and PAR.08(3), appeals that challenge the actions or inactions of HRD must be filed with the Commission within 30 days of the appellant's receipt of notice of the violation. Standard Rules of Adjudicatory Procedure, 801 CMR 1.00(6)(b).

The Appellant's Claim to Equitable Relief

Mr. Awad makes a credible and undisputed case that, at the time he took the 2009 examination, he did intend that the results would be applied to place his name on the new State Trooper eligible list and to replace his score from the 2008 Police Officer examination to extend his eligibility for consideration for a position as a BPD Police Officer beyond November 1, 2009. His current employment with the BPD and clear aspiration to advance to the position of Police Officer, his understanding of the limited chances of being reached before November 1, 2010 given his place on the 2008 list, and his credible self-confidence that he would continue to do well on the examination, is persuasive evidence that he had no intention of forgoing the opportunity to extend his

eligibility for another year or suffering a hiatus of a year in his chances for appointment as a BPD Police Officer (i.e. (from November 2010 to the establishment of the next eligible list in November 2011)). Mr. Awad presents a strong academic and professional resume that shows many of the credentials that are desired of law enforcement professionals.

In considering this appeal, however, the Commission must consider more than Mr. Awad's laudable credentials and good intentions. The facts are also undisputed that, to a significant degree, Mr. Awad's current dilemma is a creature of his own making. While he can be credited with diligence in recognizing his initial error in "clicking the wrong link" and registering only for the 2009 State Trooper examination, he was less prudent in the degree of care and attention that he took thereafter.

Mr. Awad essentially placed his career aspirations in the hands of an unknown HRD examination proctor, without taking any steps to document his actions or follow-up. When he received notice of his February 2010 exam results, he either failed to see that the notice expressly indicated that his score was being applied only to the State Trooper exam or he did notice it and did nothing about it at that time., In fact, he took no steps to confirm his continued eligibility for Police Officer until October 2010, and, even then, did not put anything in writing until February 2011. Although HRD denied his claim on February 24, 2011, he delayed filing this appeal until September 2011.

In terms of diligence, an appellant who seeks equitable relief from the Commission, a delayed response in pursuing an appeal is, essentially, a jurisdictional issue. See Garfunkel v. Department of Revenue, 22 MCSR 291 (2009) (noting the 30-day limitations period for non-bypass appeals); O'Toole v. Human Resources Division, 21

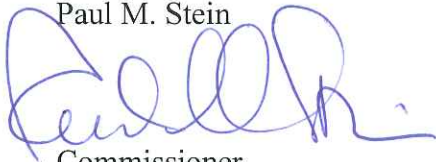
MCSR 561 (2008) (questioning, but not deciding whether written notice may be necessary to trigger the time for a section 2(b) appeal in all cases). With no name to associate with the exam proctor who Mr. Awad spoke to, and little hope to identify that person more than a year later, the delay in follow-up here clearly could be viewed as a material mistake. Similarly, the delay between the date (February 24, 2011) on which Mr. Awad was notified in writing that HRD rejected his claim, and the date (September 9, 2011) that he finally filed this appeal with the Commission, does not reflect the degree of reasonable diligence that fits the requirements for a timely pursuit of a violation of civil service rights.

Moreover, the Commission is empowered to grant equitable relief to correct a violation of civil service law only when the appellant has demonstrated “actual” harm to his civil service rights “through no fault of his own”. Here, HRD committed no specific violation of any civil service law or rule, and, indeed, was simply applying the rules and instructions it had issued to test applicants. To be sure, if Mr. Awad’s recollection of his interaction with HRD is accurate, HRD might have been partly responsible for passing off his request to the uncertain future actions of a test proctor, rather than taking what would seem to have been a simple administrative correction to his online registration and second, by the proctor’s apparent oversight in follow-through of his own. Ultimately, however, the Mr. Awad also shares responsibility for not taking the steps he could have on his part to assure that his record was corrected and documented his efforts with more clarity..

In general, the Commission does not interpret “fault” within the meaning of Chapter 310 relief to be limited to willful or knowing error. In particular, with respect to the 2009

State Trooper/Police Officer examination, the Commission has rejected numerous prior appeals from persons whose negligence or interpretation of ambiguities in their favor caused those other appellants to be dropped from the eligible list. See Regan v. City of Salem & HRD, 24 MCSR 490 (2011); Monk v. City of Salem & HRD, 24 MCSR 481 (2011); Kochansky v. City of Salem & HRD, 24 MCSR 472 (2011); Fontaine v. HRD, 24 MCSR 469 (2011); Bourgeois v. HRD, 24 MCSR 466 (2011); Delaney v. HRD, 24 MCSR 110 (2011); Caccamo v. HRD, 24 MCSR 100 (2011). These decisions reflect the Commission's careful deliberation that equitable relief is not appropriate to advantage one applicant who has been wholly or substantially responsible for his plight, over the literally thousands of other totally innocent applicants who also took and passed these tests in good faith and who secured a place on the eligible list ahead of those who are not completely innocent. Especially when the Commission is asked, as here, to grant relief that would change the order of names on the current November 2011 eligible list, the Commission cannot justify, within the mandate of basic merit principles underlying civil service law, putting Mr. Awad, whose situation is attributable, in material part, to his own negligence, above all veterans on that list who have been granted a statutory preference by the Legislature or ahead of other fully compliant applicants who scored higher on the 2011 examination than did Mr. Awad.

In sum, for the reasons stated above, HRD's Motion for Summary Decision is allowed. The appeal of the Appellant, Rami Awad, is hereby, *dismissed*.

Paul M. Stein

Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis [absent], McDowell & Stein, Commissioners) on January 26, 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)(I), 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:

Rami Awad (Appellant)

Martha Lipchitz O'Connor, Esq.. (HRD)