Decision mailed: 3/13/09
Civil Service Commission CB

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108

HENRY ARAICA, et al.,
Appellants
v.
HUMAN RESOURCES DIVISION,
Respondent

I-09-54
John Solis Scheft, Esq.
846 Massachusetts Ave.
Arlington, MA 02476

THOMAS PRATT, BOSTON POLICE PATROLMEN'S ASSOCIATION, MASS. COALITION OF POLICE AND 9 OTHERS,
Appellants
v.
HUMAN RESOURCES DIVISION,
Respondent

I-09-55
Bryan Decker, Esq. and
Alan Shapiro, Esq.
Sandulli Grace
One State Street, Suite 200
Boston, MA 02109

BOSTON POLICE SUPERIOR OFFICERS FEDERATION, SGT. MICHAEL McCARTHY AND LT. JOSEPH GILLESPIE,
Appellants
v.
HUMAN RESOURCES DIVISION,
Respondent

I-09-66
Harold Lichten, Esq.
Pyle, Rome, Lichten, Ehrenberg and Liss-Riordan, P.C.
18 Tremont Street
Boston, MA 02108

Attorneys for Human Resources Division:

Michelle Heffernan, Esq., and
Tsuyoshi Fukuda, Esq.
Human Resources Division
One Ashburton Place, Room 211
Boston, MA 02108

Hearing Officers:

Christopher C. Bowman,
John E. Taylor, and
Angela C. McConney

COMMISSION'S RESPONSE TO APPELLANTS' PETITIONS FOR INVESTIGATION IN REGARD TO BANDING OF POLICE PROMOTIONAL SCORES

Procedural Background

Pursuant to the provisions of G.L. c. 31, § 2(a), the petitioners have asked the Civil Service Commission (hereinafter "Commission") to investigate the practice of "banding" police

promotional examination scores by the state's Human Resources Division (hereinafter "HRD").[1]

A pre-hearing conference was conducted at the offices of the Commission on March 3, 2009 for the purpose of determining whether an investigation is appropriate.[2] This public hearing was presided over by Commission Chairman Christopher C. Bowman, Commissioner John E. Taylor, and Commission General Counsel Angela C. McConney. The hearing was recorded. Counsel for all petitioners and HRD were present, along with some individual petitioners and the public. Counsel for each of the petitioners and HRD provided oral argument and responded to questions from the presiding Commissioners. At the end of the pre-hearing conference, the parties declined to submit additional pleadings to the Commission before its ruling with respect to the merits of conducting an investigation.

Factual Background

On October 18, 2008, HRD administered promotional examinations for the ranks of sergeant, lieutenant, and captain within the Boston Police Department and dozens of other civil service communities in Massachusetts. According to the petitioners in Araica et al., docket no. I-09-54, there were approximately 1700 test-takers statewide. These promotional examinations are administered by HRD on an annual basis.

Pursuant to G.L. c. 31, §§ 25 and 26, HRD is responsible for grading the above-

---

[1] *See* Docket No. I-09-54. In this petition, Henry Araica and 118 others, all police officers, also seek an investigation in regard to a change from the historical norm in the setting of the passing score for the examinations administered by HRD in October 2008.

Re Docket Nos. I-09-55 and I-09-66: These petitioners -- Thomas Pratt (a Boston police officer), the Boston Police Patrolmen's Association (BPPA), the Massachusetts Coalition of Police (MCOP) and 9 others (all police officers), the Boston Police Superior Officers Federation (BPSOF), Sgt. Michael McCarthy, and Lt. Joseph Gillespie -- also filed an appeal under G.L. c. 31, § 2(b). *See* Decision rendered by the Commission under Docket Nos. E-09 60 and E-09-65 on March 12, 2009.

[2] General Laws c. 31, § 2(a), confers "significant discretion upon the Commission in terms of what response and to what extent, if at all, an investigation is appropriate." Boston Police Patrolmen's Ass'n, et al. v. Mass. Civ. Serv. Comm'n and Boston, et al., Suffolk Super. Ct. nos. SUCV2006-4617 and 2007-1220, Memorandum of Decision at 9 (filed January 8, 2008) (Brassard, J.).

referenced examinations, integrating these scores with the "training and experience" component required by G.L. c. 31, § 22, as well as the additional two (2) points provided to veterans and individuals with twenty-five years of experience in a regular police force, and then establishing eligibility lists based on the candidates' final "marks."

Instead of the traditional practice of establishing these eligibility lists through strict rank-ordering of candidates by examination marks calculated on a 1 to 100 point scale, HRD will create the 2009 promotional lists (hereinafter "eligibility lists") through a process known as "banding."

> [B]anding [is] a technique that combines candidates with close test scores into one unit from which the hiring authority may appoint any member. . . . [It] remove[s] statistically inappropriate barriers to appointing candidates who are best able to succeed, and enable[s] government hiring officials to include modern workplace competencies in [the] selection analysis.

John W. Lasky, Loosen the Shackles on Pennsylvania Local Government's Hiring Authority: An Argument for Banding, 37 Duq. L. Rev. 445, 458 (1999) (hereinafter, "Lasky"). *See also* Officers for Justice v. Civil Serv. Comm'n, 979 F.2d 721, 723, 727-28 (9th Cir. 1992) for a more detailed explanation of the practice of banding test scores.

HRD first employed the practice of "banding" in 2008 when it established eligibility lists for the entry-level positions of police officer and firefighter. With regard to the promotional eligibility lists that are the subject of the instant petitions, HRD is required to establish these lists no later than April 21, 2009, which is 6 months (plus a holiday weekend) after the examination date of October 18, 2008. G.L. c. 31, § 25.

As outlined in their petitions and clarified during the pre-hearing conference before the Commission, the petitioners' arguments are two-fold: (1) HRD has not shown that the practice of banding is justified; and (2) even if it had, this change in practice by HRD requires a rule change to be preceded by a public hearing and review process pursuant to G.L. c. 31, §§ 3 and 4.

In addition to opening an investigation pursuant to G.L. c. 31, § 2(a), the petitioners are also asking the Commission to enter an interim order prohibiting HRD from establishing the forthcoming promotional eligibility lists through the use of banding.

Conclusion

We address the petitioners' more substantive issue first. Through an investigation proceeding by the Commission, the petitioners are seeking a forum in which to contest the justification for the use of banding in establishing eligibility lists as opposed to the establishment of such lists via strict rank-ordering using an individual's test score calculated on a 1 to 100 point scale. In deciding whether or not such an investigation is warranted, it is appropriate for the Commission to look at the decades of precedent-setting judicial decisions and other legal proceedings regarding this issue, beginning with the most recent such one (currently pending in federal district court).

In Lopez, et al. v. Commonwealth and City of Lawrence, et al., Case No. 2007-CA-11693-JLT (D. Mass.),[3] the African-American and Hispanic police officer plaintiffs claim that the prevalent practice in Massachusetts of making only rank-order promotional appointments based upon examination marks has a disparate and adverse impact on minorities in violation of Title VII of the 1964 Civil Rights Act (42 U.S.C. § 2000e-2).[4] In the face of

---

[3] Counsel for the plaintiffs in Lopez also represents the petitioners in the instant Docket No. I-09-66.

[4] In prior cases decided by the U.S. Supreme Court and lower federal courts, minority plaintiffs have successfully sued on a disparate impact theory by demonstrating that the skewed results of a testing procedure caused the selection of applicants in a racial pattern that differs materially from the demographic characteristics of the overall pool of applicants. *See, e.g.,* Connecticut v. Teal, 457 U.S. 440, 445-451 (1982); Bridgeport Guardians v. City of Bridgeport, 933 F.2d 1140, 1146 (2nd Cir. 1991) (holding that, in the face of an adverse impact on minorities, city's proposed use of police examination results to make strict rank order promotions would violate Title VII).

In determining whether a particular promotional process has an unlawful adverse impact on minorities, federal courts routinely turn to the *Uniform Guidelines on Employee Selection Procedures*, 29 C.F.R. § 1607 (1978 & 2008 ed.). The *Guidelines* provide that if the challenged process yields "[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of

actionable evidence of adverse impact, the employer may be required by federal law to implement an alternative promotional procedure to lessen the adverse impact. *See* 42 U.S.C. §§ 2000e-2(h) and 2000e-2(k).[5] One federal court of appeals has declared that "before utilizing a procedure that has an adverse impact on minorities, the [employer] has an *obligation* pursuant to the *Uniform Guidelines* to explore alternative procedures and to implement them if they have less adverse impact and are substantially equally valid to rank ordering." Officers for Justice v. Civil Serv. Comm'n, 979 F.2d 721, 728 (9th Cir. 1992) (*citing* 29 C.F.R. § 1607.3B) (emphasis in original).

Wholly apart from the adverse impact on minorities sometimes associated with strict rank-ordered promotions of police officers, some expert commentators believe that traditional rank-ordering processes, as a means of determining the best candidates, are "inherently flawed." *See, e.g.,* Lasky, *supra.* The United States Supreme Court advanced this conclusion in Johnson v. Transportation Agency, 480 U.S. 616 (1987), when it quoted an amicus curiae brief submitted by the American Society for Personnel Administration:

> It is a standard tenet of personnel administration that there is rarely a single, "best qualified" person for a job. An effective personnel system will bring before the selecting official several full-qualified candidates who each may possess different attributes which recommend them for selection.

Johnson at 641 n.17. Frequently, reliance on test scores alone does not result in selection of the most able candidate. Lasky, *supra*, at 455. Indeed, some maintain that "[s]trict

---

the rate for the group with the highest rate," then Federal enforcement agencies (and courts) will generally see it as "evidence of adverse impact." Id. at § 1607.4(D). "The use of any selection procedure which has an adverse impact on the hiring . . . of members of any race, sex or ethnic group will be considered to be discriminatory[.]" Id. at § 1607.3(A).

[5] Section 703(h) of Title VII [42 U.S.C. § 2000e-2(h)] prohibits an employer from administering a test that discriminates on the basis of race, color or sex. Section 703(k) requires that if a selection procedure adversely impacts minorities, and if an alternative selection method exists having equal validity and less

compliance with civil service selection protocols is an 'overrationalized personnel procedure' that falls short of identifying the best candidate." Id., quoting Donald Klinger, Reinventing Public Personnel Administration as Strategic Human Resources Management, 22 Public Personnel Management 565 (1993).

Strict rank-order selection based on an examination taken by hundreds of candidates (as here) is premised on the false notion that, at the upper score levels, each additional point separates the better-qualified candidate from the merely adequately qualified. *See* Ensley Branch of the NAACP v. Seibels, 31 F.3d 1548, 1574 n.12 (11th Cir. 1994).

> To determine appointment merit effectively . . . , a competitive test must produce scores that distinguish two test takers' ability to succeed on the job. This task appears to be impossible. Tests often produce eligibility lists that separate numerous candidates by only one percent. However, a test can be only so precise, and tests generally are incapable of truly distinguishing between two candidates who are very close in score.

Lasky, *supra*, at 454 (citing Stephen Wollack, Confronting Adverse Impact in Cognitive Examinations, 23 Public Personnel Management 217, 221 (Summer 1994) ("[I]t is statistically inappropriate to make employment decisions based upon small differences in test scores.")). *See also* Fred E. Inbau, Integrity Tests and the Law, Security Management (Jan. 1994) (citing an American Psychological Association conclusion that all tests include a degree of fallibility).

An alternative procedure that generally better serves the personnel objectives of police departments, while often lessening the adverse impact of standardized exams upon minorities, is the process known as banding. Lasky, *supra*, at 458. The Ninth Circuit has offered the following explanation of how banding works:

> The 'band' is a statistically derived confidence range that is applied to the examination results. Differences between scores within the band are considered

---

adverse impact, the employer ordinarily must choose the less discriminatory method. 42 U.S.C. § 2000e-2(k).

> to be statistically insignificant due to measurement error inherent in scoring the examination. * * *
> [Since] test scores themselves are imprecise measurements of future job performance[,] by banding the scores and considering secondary criteria in making promotion decisions, the [employer] may increase the probability that the most qualified candidates will be promoted.

Officers for Justice, 979 F.2d at 723, 727-728.

Banding "offers a methodology geared to employer and candidate fairness and selection reliability." Lasky, *supra*, at 458.[6] Recognizing that small test score differentials are insignificant predictors of job candidates' success, banding allows the hiring authority to focus on candidates' superior qualifications as opposed to modest test result differences. *See* Sims v. Montgomery County Comm'n, 887 Supp. 1479, 1486 (M.D. Ala. 1995), *aff'd,* 119 F.3d 9 (11th Cir. 1997). In Officers for Justice, Chief Judge J. Clifford Wallace of the Ninth Circuit explained banding's effectiveness:

> Banding is premised on the belief that minor differences in test scores do not reliably predict differences in job performance. It also recognizes that an individual is unlikely to achieve an identical score on consecutive administrations of the same examination. Because some measurement error is inevitable, strict rank order [appointments] will not necessarily reflect the correct comparative abilities of the candidates. The smaller the difference between observed scores, the more likely it is a result of measurement error, and not a variance in job-related skills and abilities.

Id. at 723-24. After considering evidence that banding "is more valid, or at least 'substantially equally valid' to rank and order promotions," and mindful of the *Guidelines*' directive to implement the procedure bearing the least adverse impact on minorities, the Ninth Circuit held in Officers for Justice that the banding process employed by the San Francisco Police Department "is valid as a matter of constitutional and federal law." Id. at 728.

The First, Second, and Seventh Circuit Courts of Appeal have also supported the concept of

---

[6] Banding is as equally appropriate a methodology at the entry level as it is at the promotional level when it comes to selecting police officers. *See* Lasky, *supra*, at 459-461.

banding as a useful alternative to strict rank-order selection of public safety candidates. In Chicago Firefighters Local 2 v. City of Chicago, 249 F.3d 649 (7th Cir. 2001), the Seventh Circuit concluded that the use of banding is not a form of "race norming" (which is prohibited by Title VII), even when the results of banding, in practice, may favor a particular racial or ethnic group. Id. at 656. The court upheld Chicago's use of banding because banding is a "universally and normally unquestioned method of simplifying scoring by eliminating meaningless gradations," which differs from adjusting lower scores so that they appear higher. Id.[7] The Second Circuit found banding to be an appropriate remedy upon a determination that a police department's promotional examination had an adverse impact on minorities. Bridgeport Guardians v. City of Bridgeport, 933 F.2d 1140, 1145 (2nd Cir.1991). After finding that plaintiff had established a prima facie of disparate impact discrimination if the test results were used to make strict rank-order promotions, the Second Circuit held that, because the City could have used banding to mitigate this disparate impact without disserving its legitimate interests, such an alternative selection procedure was required under Title VII. Id. at 1146-1148. Finally, in Boston Police Superior Officers Fed'n v. City of Boston, 147 F.3d 13 (1st Cir. 1998), the First Circuit cited with approval expert testimony and case precedents in endorsing the banding approach utilized by the BPD in selecting new Boston police lieutenants in the mid-1990's. Id. at 24 and n.5. *See also* Bradley v. City of Lynn, 443 F. Supp. 2d 145, 174 (D. Mass. 2006) (Saris, J.) ("banding . . . seems consistent with [the Commonwealth's civil service] statutory scheme and applicable case law under Title VII"); Chmill v. City of Pittsburgh, 412 A.2d 860,

---

[7] Judge Posner, writing for the Seventh Circuit, also noted that banding in theory does not favor one racial group over another. To illustrate this point, the court gave as an example the practice of many teachers to convert number scores to banded letter grades: a student who scores a 90 gets the same grade (an "A") as one who scores 100, but a student who scores 89 is grouped with students at the bottom of the "B" band, regardless of that student's race. Chicago Firefighters at 656.

874 (Penn. 1980) (banding "does not conflict with the statutory requirement of merit selection" under a Pennsylvania civil service statute that is very similar to Massachusetts civil service statutes).

In conclusion, after carefully considering all of the information presently before the Commission, including our own survey of the law, as well as the likelihood that further inquiry would not lead us to conclude differently, and weighing the risk of harm to all of the potentially impacted candidates, appointing authorities, and the public interest should the establishment of new eligible lists be delayed in contravention of G.L. c. 31, § 25, the Commission declines to exercise its jurisdiction to conduct any further investigation.

We now address the more narrow procedural argument made by the petitioners – namely, that the use of banding is a violation of the Personnel Administration Rules ("PAR"), specifically, PAR .07(4). Petitioners' argument that utilization of a banding process violates the civil service law or the Personnel Administration Rules is meritless. The Legislature has conferred on HRD, through the Personnel Administrator, the authority to create, administer, and score public safety promotional examinations. G.L. c. 31, §§ 5, 9-11, 16, and 59. Furthermore, G.L. c. 31, § 25, states:

> The administrator shall establish, maintain and revise eligible lists of persons who have passed each examination for appointment to a position in the official service. The names of such persons shall be arranged on each such list . . . in the order of their marks on the examination based upon which the list is established.

In general, the methodology by which HRD scores examinations is left to the sound discretion of the Personnel Administrator.

Petitioners point to PAR .07(4), which states: "The examination marks shall be presented on eligible lists in whole numbers." At the pre-hearing conference we conducted on March 3, 2009, HRD's counsel informed us that, when it publishes the eligibility lists from the 2008 police

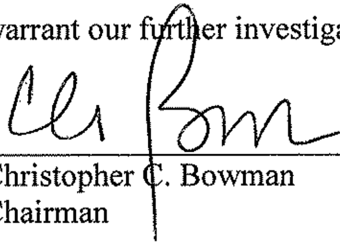
promotional examinations, HRD plans to present all passing candidates' final examination marks (which consists of more than the candidates' raw test score) on the eligibility lists in whole numbers, representing distinct bands of similar raw written test and other exam component scores grouped together in accordance with a band-width formula calculated by the agency's independent testing experts. After careful consideration, we do not believe this change in practice violates the civil service law or Personnel Administration Rules.

Further, we believe that any eleventh-hour intervention by the Commission, including an order prohibiting the use of banding, would result in a state of indefinite limbo and uncertainty for hundreds of individual test-takers who could otherwise be considered for promotion as early as the latter half of April. We decline to do so.

While we concur with HRD that the change in practice here is not a violation of the civil service law or rules, that in no way precludes HRD from embarking, forthwith, on an inclusive, transparent process to ensure effective implementation by municipalities of post-banding selection procedures. For example, with banding, cities and towns are likely going to be presented with much larger and more diverse certification lists of candidates and will probably need to employ tie-breaking or other selection methods much more frequently and, perhaps, even adopt new methods that were not necessary in the past, to choose whom to promote. HRD, in consultation with both management and labor, should be actively encouraging adoption of best practices to ensure that such tie-breaking methods are consistent with, and applied in accordance with, basic merit principles and all other applicable laws. We are confident that HRD will appreciate the importance of ensuring that this is done and that failure to do so would be an abrogation of their oversight responsibilities and a disservice to all parties. We will not stand idly by if presented with competent evidence that unlawful favoritism was the driving force

behind a particular promotional appointment.

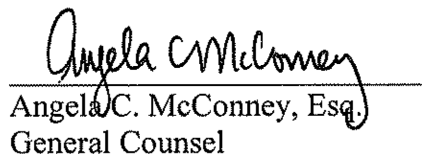
For all of the above-stated reasons, we do not believe that the petitions presently before us warrant our further investigation. Petitions dismissed.



Christopher C. Bowman
Chairman

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman – Yes; Henderson, Commissioner – No; Marquis, Commissioner – Yes; Stein, Commissioner – Yes; and Taylor, Commissioner - No) on March 12, 2009.

A true copy attest:



Angela C. McConney, Esq.
General Counsel

Notice to:

Alan Shapiro, Esq. and
Bryan Decker, Esq.
Sandulli Grace
One State Street, Suite 200
Boston, MA 02109

Harold Lichten, Esq.
Pyle, Rome, Lichten, Ehrenberg and Liss-Riordan, LLP
18 Tremont Street, Suite 500
Boston, MA 02108

John Solis Scheft, Esq.
846 Massachusetts Avenue
Arlington, MA 02476

Michelle Heffernan, Esq. and
Tsuyoshi Fukuda, Esq.
Human Resources Division
One Ashburton Place, Room 211
Boston, MA 02108