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

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

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

THOMAS PRATT, BOSTON POLICE PATROLMENS' ASSOCIATION, MASS. COALITION OF POLICE AND NINE OTHERS,
Appellants
*v.*
HUMAN RESOURCES DIVISION,
Respondent

E-09-65
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Alan Shapiro, Esq.
Sandulli Grace
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BOSTON POLICE SUPERIOR OFFICERS FEDERATION, SGT. MICHAEL McCARTHY AND LT. JOSEPH GILLESPIE,
Appellants
*v.*
HUMAN RESOURCES DIVISION,
Respondent

E-09-60
Harold Lichten, Esq.
Pyle, Rome, Lichten, Ehrenberg and Liss-Riordan, P.C.
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INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, DENISE DUGUAY, JEFFREY HARLOW AND MICHAEL BANAS,
Appellants
*v.*
HUMAN RESOURCES DIVISION

E-09-67[1]

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Hearing Officers:

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

[1] The appellants under Docket No. E-09-67 filed their appeal with the Commission on March 12, 2009 and requested that their appeal, filed under Section 2(b), be consolidated with other related cases with an "I" docket number. As their appeal was filed under Section 2(b), we assume that the IBPO appellants wished to have their appeal consolidated with similar appeals with an "E" Docket Number. For that reason, and the fact that they have raised the same issues as the appellants in the earlier-filed "E" cases, the Commission has granted their request and consolidated their appeal with Case Nos. E-09-60 and E-09-65. Hereinafter, when referring collectively to all appellants listed in the above caption, we will employ the term "Appellants."

ORDER OF DISMISSAL

*Procedural Background*

Pursuant to the provisions of G.L. c. 31, § 2(b), the above-named Appellants have filed appeals with the Commission claiming that they have been aggrieved by the state Human Resources Division's (hereinafter "HRD") practice of "banding" police promotional scores.[2]

A pre-hearing conference was conducted at the offices of the Commission on March 3, 2009. 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 each of the appellants in Case Nos. E-09-65 and E-09-60 and HRD were present along with some of the individual appellants and members of the public. Counsel for each of the appellants and HRD provided oral argument and responded to questions from the presiding Commissioners. At the conclusion of the pre-hearing conference, all parties present indicated that they did not wish to submit any additional written information prior to a ruling by the Commission regarding the merits of conducting an investigation.

*Factual Background*

On October 18, 2008, HRD administered a set of examinations given to police officers for the purpose of testing those who seek to be promoted to the rank of sergeant, lieutenant, or captain within the Boston Police Department and dozens of other civil service communities in Massachusetts.

Pursuant to G.L. c. 31, §§ 25 and 26, HRD is responsible for grading the above-referenced examinations, integrating these scores with the "training and experience"

[2] Most of the Appellants have also filed a request for investigation under G.L. c. 31, § 2(a). *See* Response issued by the Commission on March 13, 2009 under Docket Nos. I-09-55 and I-09-66.

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' names 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). *See also* Officers for Justice v. Civ. 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 used 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 eligibility lists that are the subject of the instant appeals, 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)

In their corresponding "requests for investigation" under G.L. c. 31, § 2(a) (*See* Docket Nos. I-09-55 and I-09-66) and/or § 2(b) submissions, the Appellants argued that: 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. The Commission has issued a response to those petitions declining to open an investigation.

*Arguments*

In their instant appeals, filed pursuant to G.L. c. 31, § 2(b), the Appellants – including Thomas Pratt – argue that they are aggrieved persons. Mr. Pratt in particular argues that he is a "person aggrieved" for the following reason: HRD notified him that he achieved a written raw test score of 85.6, placing him in "Band 4" for the Boston Police Promotional Sergeants' eligible list, and within less than 0.25 points of "Band 5." In his argument, he claims to be aggrieved because "at or near the top of 'Band 4', his opportunities for promotion will be greatly diminished, since he will be effectively tied with officers who scored up to almost seven points lower than he did." The final width of the score bands has yet to be established by HRD, however.

HRD argues that neither Mr. Pratt nor any of the other appellants are aggrieved persons as they cannot show that their employment status has been harmed by any action or inaction on the part of HRD.

*Conclusion*

The Appellants have no standing to pursue these appeals in that they are not at this point "persons aggrieved" who have suffered "actual harm" to their "employment status" pursuant to G.L. c. 31, § 2(b). The appellant unions, of course, are not "persons" at all. For the same reasons set forth in our Decision on Motions to Dismiss in Boston Police Patrolmen's Ass'n , et al. v. City of Boston, et al., Commission Docket No. G-07-33 (March 15, 2007), which we will not repeat here, these unions lack standing to maintain these appeals.

With respect to the non-union appellants, the applicable jurisdictional requirements of c. 31 are clear. Section 2(b), under which the individual appellants have filed these appeals, requires that they show that they are persons who have been "aggrieved" by a "decision, action, or failure to act by the administrator ...," and further requires that they show that their rights "were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status." The statute expounds:

> "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 .... Any person appealing a decision, action or failure to act of the administrator shall file a copy of the allegations ... with the administrator ... Said allegations shall clearly state the basis of the aggrieved person's appeal, and make specific references to the provisions of this chapter or the rules of the department or basic merit principles promulgated thereunder *which are alleged to have been violated, together with an explanation of how the person has been harmed.*" G.L. c. 31, § 2(b) (*emphasis added*).

None of the individually-named appellants, however, including Mr. Pratt, is a person "aggrieved" by the actions of the Personnel Administrator (or the decision of HRD on behalf of the Administrator) because the statute requires that aggrieved persons show that the person has already "been harmed." Using the past tense, it is clear that the Legislature intended the statute to apply in cases where the harm has already occurred. Indeed, the Legislature appears to have determined that this principle is so important that it repeated and expanded upon it in the same section, stating that the appeal must show how the person's rights had already been "abridged, denied, or prejudiced in such a manner as to cause actual harm." It is not enough to speculate that they *may* be harmed at some undetermined time in an undetermined manner. At this point, no Boston (or other municipal) promotional eligibility list based on the 2008 examination has

been finalized or released by HRD yet. Nor has the Boston Police Department advised HRD yet that it intends to make any promotions when the list does become available.

Further, many of the putative appellants identified in each of these appeals may actually turn out to be advantaged by the introduction of banding, as their exam scores, together with the 2n+1 formula as previously applied, may have excluded them from consideration, while the use of banding may enhance their chances of consideration and hiring, depending on the actual number of candidates on any eligibility list or in any particular band, the precise methodology used, and other screening and selection criteria employed. *Cf.* Burns v. Sullivan, 619 F.2d. 99, 104 (1st Cir. 1980) (candidates' expectations based upon exam scores are substantially diminished by lawful consideration of secondary factors, such as performance in an interview).

For all of the above reasons, the Appellants' appeals under Docket Nos. E-09-60, E-09-65 and E-09-67 are hereby *dismissed.*

Christopher C. Bowman
Chairman

By a 3-2 vote of the Civil Service Commission[3] (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

Any party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. The motion must identify a clerical or mechanical error in the decision or a significant factor the Commission 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.

[3] Minority Opinion attached.

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:

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# MINORITY OPINION OF COMMISSIONERS HENDERSON AND TAYLOR:

The Appellants/Petitioners have filed an appeal versus HRD, under G.L. c. 31§ 2(b) concerning the change in scoring method from whole number individual scores to "banding" of individual scores into a group or range of scores(band). The banding of Police Departmental Promotional Examination scores by the Human Resources Division ("HRD")is proposed to be applied to scores emanating from the its exam, administered on October 18, 2008.

This appeal is filed by Boston Police Patrol Officer Thomas Pratt Michael, McCarthy, Joseph Gillespie and others, who took the October 18, 2008 examination for Police Sergeant, Lieutenant and Captain. This appeal is also filed by the Massachusetts Coalition of Police ("MCOP"), the Boston Police Patrolmen's Association ("BPPA") and the Boston Police Superior Officers Federation ("BPSOF") hundreds of whose members or others similarly situated, took the October, 2008 departmental promotional examinations for police sergeant, lieutenant, and captain in dozens of cities and towns throughout the Commonwealth, including Boston.

HRD has published its intention to establish eligibility lists for the promotional positions of police sergeant, police lieutenant, and police captain by rank-ordering the scores in "bands," rather than "whole numbers." This policy violates HRD's rules, the Civil Service law, and probably also violates the purposes behind the civil service system, including the recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills, ("basic merit principles").

This proposed change to a banding method of scoring and therefore the resulting established eligibility list for selections is a dramatic departure from HRD's traditional method. Pursuant to G.L. c. 31, §§ 25 and 26, HRD has historically graded examination scores, integrated those scores with the "training and experience" component credit required by G.L. c. 31, § 22, and established eligible lists on which the marks are

presented in whole numbers using a scale of 0 to 100. This practice is required by Personnel Administrator Rule PAR.07 (4), which states:

> The examination marks shall be presented on eligible lists in whole numbers.

PAR.07 (4).

On or about February 13, 2008, HRD began to notify individuals who had taken the October 18, 2008 police promotional examinations of their scores on that examination. In addition to notifying test takers of their individual score, HRD announced its intention to "band" scores together when establishing eligible lists for promotion in the upcoming weeks. For example, the following information was provided to employees who had taken the Sergeant's exam:

2008 Statewide Police Sergeant Exam
Legend for Score Bands
(Includes General Average Plus Preference)
6=92.92-100
5=85.84-92.91
4=78.76-85.83
3=71.68-78.75
2=66.00-71.67
1 = Failed Written and failed overall exam

As shown, the proposed bands for police sergeant incorporate approximately seven points each.

If HRD implements the bands as indicated, police officers will be "banded" with many more of their colleagues than they would have pursuant to PAR.07 (4). In fact, some officers will be banded with colleagues whom they may have outscored by almost seven points. This "banding" of scores contravenes the above-cited HRD Rule (PAR. 07 (4)), and was announced by HRD without reference to any reason, and without the requisite statutory process.

Under G.L. c. 31, § 3, the Personnel Administrator is empowered to "make and amend rules which shall regulate the recruitment, selection, training and employment of persons for civil service positions." However, the statute dictates the process that the Administrator must follow prior to making or amending a rule (including rules relating to "Promotional appointments, on the basis of merit as determined by examination"). Specifically, prior to a rule change being effective, "the commission shall review such rules," and "[s]uch rules and amendments thereto shall comply with the filing provisions of section five of chapter thirty A and such regulations shall not take effect until so filed." G.L. c. 31, § 3. HRD has neither submitted the change to PAR. 07 (4) to the Commission for review, nor satisfied the filing requirements of G.L. c. 30A, §5.

In addition, HRD has acted in complete derogation of its obligations under G.L. c. 31, § 4. This statute requires HRD to:

- Send notice of a proposed new or amended rule to each member of the general court, to each city and town within the civil service system; and
- To publish the proposed rule change in at least one newspaper; and
- After the above notice, to conduct a public hearing relative to the proposed rule change, at least thirty days prior to implementation; and
- To have it reviewed by the Civil Service Commission.

To date, HRD has taken ***none*** of these mandated steps to change its rules.

In accordance with G.L. c. 31, § 2 (b), the Appellants are a "person aggrieved" by the above "decision, action, or failure to act" of HRD. For instance, officer Pratt was given a written test score of 85.6, placing him in "Band 4" for the Boston Police Promotional Sergeants' eligible list, and within less than 0.25 of "Band 5." At or near the top of "Band 4," his opportunities for promotion will be greatly diminished, since he will be effectively tied with officers who scored up to almost seven points lower than he did.

The individual Appellants here being qualified for such promotion, decided to invest their own time and money for career advancement based on the legal and administrative status quo at the time that they applied to take this promotional exam and pay the application fee. Each individual exercised their legal right to apply for and take this promotional exam. Each individual assumedly invested varying amounts of study and

preparation time for this exam, either beginning before their application or thereafter. Their reliance on the existing statutes, rules and long-standing practice, referenced here, in deciding to invest their time and funds to prepare for and take this promotional exam, was both reasonable and appropriate. They might not have invested their time or as much time or their money, if HRD had given them prior notice that a new banding method would be applied to the exam scores for establishing eligibility lists.

HRD created this present expeditious situation of a small window, (6 months from exam) for the establishment of the eligibility lists. Time now, is of the essence. If HRD had intended to limit or eliminate the harm to or detrimental reliance of the exam takers, it previously had the option of either giving them prior (pre-exam application) notice of their intended change to a "banding" method of scoring or of complying with all of the statutory and rule requirements to make the change: Personnel Administrator Rule PAR.07 (4) and G.L. c. 30A § 5 and c. 31, §§ 3, 4, 22, 25 & 26. HRD decided to undertake neither of these options. HRD should not now be rewarded by the time-coercion it created and allowed to implement its desired new scoring method of banding.

The Appellants/Petitioners have made a prima facie case to show that the Commonwealth's Human Resources Division (HRD) has published its clear intention to initiate a new scoring/consideration method for the establishment of promotional eligibility lists for the positions of police sergeant, lieutenant and captain. HRD intends to apply this new scoring/consideration method for the police promotional, eligibility lists resulting from the civil service, police promotional examination administered by HRD on October 18, 2008. This imminent event of a change from a whole number score to a group or band of scores is a substantive change in the method of scoring and establishing eligibility lists. This substantive change affects and injures the employment status of the Appellants, of which promotion or career advancement is an integral part. The Appellants had the legal right to expect that the promotional testing and scoring would be done in conformity with the existing statutes, rules and practice or changed by a process, in conformity with the law. Under the circumstances of this matter, the imminent new "banding" method is tantamount to an actual harm having already been suffered by the

Appellants. Balancing the countervailing interests of the parties would be best served by maintaining the status quo ante.

Therefore, the Appellants are "aggrieved person" under G.L. c. 31, § 2 (b) by the Personnel Administrator's failure to score the exam and establish eligibility lists for promotion there from, in full conformity with the law. The above-described actions of HRD failed to comply with the above-cited statutes, regulations, the basic purposes of civil service law and basic merit principles.

The Commission should order HRD to comply with its present rules and establish eligible lists from the October 2008 police promotional examinations in whole numbers and not to utilize a banding or another new method. To the extent that HRD desires to amend PAR. 07 (4), the Commission should then order that no such amendment become effective unless and until HRD complies with all of the relevant statutory requirements, including those of G.L. c. 31, §§ 3 and 4.

By the minority,

Daniel M. Henderson,
Commissioner

John E. Taylor (dmh)

John E. Taylor,
Commissioner

March 12, 2009