

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

**CIVIL SERVICE COMMISSION**

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

DANIELE BARRASSO,  
*Appellant*

v.

B2-20-019

HUMAN RESOURCES  
DIVISION,  
*Respondent*

Appearance for Appellant:

*Pro Se*  
Daniele Barrasso

Appearance for Respondent:

Melinda Willis, Esq.  
Human Resources Division  
100 Cambridge Street: Suite 600  
Boston, MA 02114

Commissioner:

Christopher C. Bowman

**DECISION ON HRD'S MOTION TO DISMISS**

1. On November 21, 2019, the Appellant, Daniele Barrasso (Mr. Barrasso), filed a "fair test" appeal with the Civil Service Commission (Commission) regarding the November 16, 2019 promotional examination for Fire Lieutenant.
2. On December 10, 2019, I held a pre-hearing conference at the offices of the Commission which was attended by Mr. Barrasso, his union representative, and counsel for the state's Human Resources Division (HRD).
3. As part of the pre-hearing conference, the parties stipulated to the following:
  - A. On November 16, 2019, Mr. Barrasso took the promotional examination for fire lieutenant.

- B. Based on his diagnosed anxiety disorder and dyslexia, he was granted accommodations by HRD, which included having more time to complete the examination and taking it in a separate room to avoid distractions.
  - C. On November 18, 2019, Mr. Barrasso filed a fair test appeal with HRD
  - D. On November 21, 2019, Mr. Barrasso filed an appeal with the Commission, prior to HRD issuing a determination on his appeal.
4. At the pre-hearing conference on December 10<sup>th</sup>, it was agreed that Mr. Barrasso's appeal to the Commission was premature; and that the appeal would be dismissed with a future effective date, allowing Mr. Barrasso to file a new appeal, with no filing fee, after he received his examination score.
  5. On December 19, 2019, the Commission issued an Order of Dismissal with a Future Effective Date.
  6. On January 17, 2020, HRD denied Mr. Barrasso's fair test appeal.
  7. On or about February 3, 2020, HRD notified Mr. Barrasso that he had failed the written portion of the examination, having received a score of 63.
  8. On February 4, 2020, Mr. Barrasso filed a renewed appeal with the Commission.
  9. On February 25, 2020, I held a pre-hearing conference which was attended by Mr. Barrasso, his union representative and counsel for HRD.
  10. At the pre-hearing conference, Mr. Barrasso stated that his fair test appeal to HRD was based on his conclusion that many<sup>1</sup> of the 80 multiple choice questions did not correspond with the suggested reading material. Further, he concluded that additional multiple choice questions could be answered correctly with more than one answer.
  11. At the pre-hearing, counsel for HRD indicated that, after receiving Mr. Barrasso's appeal (and others), HRD did a careful and thorough review of the examination and determined that some questions on the examination did not correspond with the reading material. Those questions were removed from the examination and were not counted in the score. For reasons attributed to confidentiality and the integrity of the testing process, HRD has opted not to indicate how many such questions were removed.
  12. Further, after the above-referenced review, HRD identified additional questions in which more than one answer would be considered correct. Those questions remained in the score with candidates being given credit for a correct answer if they responded with one of the

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<sup>1</sup> In his subsequent brief, Mr. Barrasso estimated that 12 of the multiple choice questions did not correspond with the reading material. Another appeal, heard the same day, and for which a decision is also being issued the same day as this appeal, estimates the number to be 13. On March 24, 2020, I conducted pre-hearing conferences in separate appeals involving the same issue presented here. As part of those pre-hearing conferences, HRD indicated that the total number of questions removed entirely was "less than 13".

multiple correct answers. The written correspondence from HRD to Mr. Barrasso indicates that 4 questions fell into this category.

13. Specific to his appeal, Mr. Barrasso argued that the high number of questions that did not correspond to the reading material exacerbated his anxiety, removed his “margin of error” and, thus, he argued that he should be deemed as having passed the promotional examination and placed on the eligible list for fire lieutenant.
14. Mr. Barrasso also argued that HRD should disclose how many questions were removed from consideration to determine if the test should be deemed an unfair test.
15. An eligible list for fire lieutenant was established by HRD on or around March 1, 2020.
16. As discussed at the pre-hearing conference, HRD filed a Motion to Dismiss and Mr. Barrasso filed a reply.

### *Parties’ Arguments*

HRD argues that, even if, after review, 12 (or 13) of the 80 test questions were effectively removed from the examination because those questions were not referenced in the reading list, the Appellant cannot show that this promotional examination was not a fair test of his abilities to perform the duties of a Fire Lieutenant.

Further, HRD argues that the Commission has no mechanism by which it could determine how much Mr. Barrasso’s performance would have differed in the absence of the stress he claims adversely impacted his performance.

Mr. Barrasso argues that HRD has an obligation to ensure that all questions on the examinations are based on the reading material. He argues that the failure of HRD to do so exacerbated his clinical issues related to anxiety and dyslexia, thus causing him to fail the examination. As relief, Mr. Barrasso asks that the Commission grant him a passing score so that he may be placed on the eligible list.

### *Applicable Law*

G.L. c. 31, s. 2(b) states in part:

“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.”

G.L. c. 31, s. 22 states in part:

“An applicant may request the administrator to conduct a review of whether an examination taken by such applicant was a fair test of the applicant's fitness actually to perform the primary or dominant duties of the position for which the examination was held, provided that such request shall be filed with the administrator no later than seven days after the date of such examination.”

G.L. c. 31, s. 24 states in part:

An applicant may appeal to the commission from a decision of the administrator made pursuant to section twenty-three relative to (a) the marking of the applicant's answers to essay questions; (b) a finding that the applicant did not meet the entrance requirements for appointment to the position; or (c) a finding that the examination taken by such applicant was a fair test of the applicant's fitness to actually perform the primary or dominant duties of the position for which the examination was held.”

### *Analysis*

I carefully reviewed Mr. Barrasso's argument presented at the pre-hearing conference and stated in his written brief. Mr. Barrasso and many other firefighters spent considerable time preparing for the fire lieutenant examination by reviewing the reading material offered by HRD. He and others are frustrated that apparently up to 13 of the 80 questions on the examination were effectively removed as they were not contained in the reading material. While that frustration is warranted, Mr. Barrasso has not shown that the overall test was unfair and/or that the Commission should invalidate the examination.

As referenced in HRD's brief, the Commission squarely addressed this issue in O'Neill v. Lowell and Human Resources Division, 21 MCSR 683 (2008). Although the appeal was dismissed based on timeliness, the Commission did still address the issue of certain questions being faulty and/or effectively removed from the examination. In O'Neill, 20% of the examination questions were determined to be faulty. The Commission concluded that the “defect rate” of 20% did not, standing alone, rise to the level of proof necessary to deem the test unfair. The underlying facts here are not distinguishable from O'Neill, nor should the result be.

In regard to the specific issue of whether Mr. Barrasso, if he did not, as alleged, experience additional anxiety during the examination because certain questions did not correspond to the reading material and, if he would have received a passing score if had not experienced the additional anxiety, I concur with HRD that the alleged harm is too speculative and it would be impossible for the Commission to measure the degree of any alleged harm. That is not to diminish or understate the seriousness of the challenges that Mr. Barrasso spoke so poignantly about at the pre-hearing conference. Rather, it points to how it would be contrary to basic merit principles to arbitrarily grant Mr. Barrasso enough additional points on the examination to ensure that he received a passing score. Also, to ensure clarity, when HRD effectively removed certain

questions from the examination, the minimum number of correct answers needed to receive a passing score was also reduced.

While Mr. Barrasso has not shown that this examination was an “unfair test”, he and others have raised legitimate concerns regarding how so many questions apparently were not contained in the reading material. At a minimum, that should prompt HRD to conduct a thorough review of the process used to validate examinations on a going-forward basis.

For all of the above reasons, HRD’s Motion to Dismiss is allowed and Mr. Barrasso’s appeal under Docket No. B2-20-019 is hereby *denied*.

Civil Service Commission

/s/ Christopher Bowman  
Christopher C. Bowman  
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 26, 2020.

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:

Daniele Barrasso (Appellant)  
Melinda Willis, Esq. (for Respondent)