

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

NORA L. BASTON,
Appellant

v.

HUMAN RESOURCES DIVISION,
Respondents

B2-15-55

Appearance for Appellant:

Nora L. Baston, *Pro Se*

Appearance for Respondent, HRD:

Mark Detwiler, Esq.
Human Resource Division
One Ashburton Place
Boston, MA 02108

Appearance for Respondent, BPD:

Kate Hoffman, Esq.
Boston Police Department
1 Schroeder Plaza
Boston, MA 02120-2014

Commissioner:

Paul M. Stein

DECISION ON HRD' S MOTION FOR SUMMARY DECISION

The Appellant, Nora L. Baston, acting pursuant to G.L.c.31, §2(b) & §24, appealed to the Civil Service Commission from the decision of the Massachusetts Human Resources Division (HRD) to deny her request to add Education and Experience (E&E) points to her score on the competitive examination for promotion Police Lieutenant with the Boston Police Department (BPD). HRD moved for Summary Decision on the grounds that the Appellant's request was not supported by any facts that qualified her for the E&E points she sought and, therefore, the appeal failed to state a claim upon which relief can be granted. The Commission held a hearing on the motion, which was digitally recorded and copies of the CD were supplied to the parties.

FINDINGS OF FACT

Based on the submission of the parties, I find the following facts are not in dispute:

1. The Appellant, Nora L. Baston, is a sworn BPD officer who began her employment with BPD in 1996. She was promoted to Sergeant in 2005, the position in which she holds civil service tenure. In 2007, she was promoted to BPD Deputy Superintendent, which is a non-civil service position. (*HRD Motion; Appellant's Opposition; Claim of Appeal*)

2. The position of Deputy Superintendent is one rank higher than the civil service title of Captain, and three ranks below the position of Police Commissioner, the highest ranking position in the BPD. (*Administrative Notice [BPD Rule 101, Sec. 3]*)

3. As a Deputy Superintendent, the Appellant is considered a part of the BPD "Command Staff". As a Deputy Superintendent, the Appellant has performed the following duties:

- Worked directly with the Police Commissioner and with every District Captain on issues and problems associated with homelessness, including a review of existing policies and procedures, development of new policies and direct oversight of the BPD's "Street Outreach Team".
- Provided oversight of the "Safe Streets Teams", which involved daily and monthly oversight of the work of seven District Captains to ensure that their teams adhered to the ideals of community policing, working with them to develop new programs to strengthen community relations, and collecting and reviewing monthly reports from these Captains required by the federal grants received for the program.
- Served as Zone Commander of Area E, with full accountability for three Districts: Jamaica Plain, West Roxbury and Hyde Park. Supervised the three District Captains on day-to-day operations and regularly met with them and the other officers under their

command on operational, budgeting and personnel issues, and responded to any major incident or shooting in these three districts.

- Currently oversee the “Neighborhood Watch Unit”, “Street Outreach Team” and community engagement citywide, which requires working one-on-one with each District Captain and other officers, coordination of efforts with the “School Policy Unit” on elementary school programs designed to build trust with residents and youth, and management and allocation of community policing grants.

(Claim of Appeal; Appellant’s Opposition)

4. Deputy Superintendent Baston took and passed the 2014 competitive promotional examination for BPD Lieutenant administered by the BPD under a Delegation Agreement with HRD. *(HRD Motion; Claim of Appeal)*

5. Education and Experience (E&E) claims were one component of the promotional examination. E&E points are awarded based on education, training and work experience as determined by a candidate’s self-reporting of the information, including any supporting documentation, required to qualify him or her for points according to the provisions of BPD’s E&E Rating Sheet. *(HRD Motion; Claim of Appeal)*

6. For work experience, BPD’s E&E Rating Sheet Instructions divided experience into eight “Categories” with credit awarded in each Category depending on the time frame involved (generally, more points for service at a higher grade than a lower one, and more points for recent versus older service). An Employment Verification Form was required, signed by the Appointing Authority (here, the BPD Police Commissioner) or his designee “certifying the information provided for each promotional applicant is correct.” *(HRD Motion; Claim of Appeal; Administrative Notice [HRD Police Promotional Exams, Employment Verification Form])*

7. The categories for which experience points were awarded included:

- Category 1 covered “Experience in the specified department [which the instructions define as the BPD] in Police Captain or higher position”, with a maximum of 10.8 points awarded for service during the past five years (preceding June 28, 2014) and up to 7.8 additional points for service during the next preceding five year period (June 28, 2002 through June 28, 2009).
- Category 3 covered “Experience in the specified department in Police Sergeant or higher positions below the rank of Police Lieutenant”, with a maximum of 7.2 points for service as a Sergeant in the last five years and a maximum of 5.2 points for service as a Sergeant during the next preceding five year period.
- Category 5 covered “Experience in the specified department related to police work below the rank of Police Officer such as reserve officer, police cadet, or police dispatcher. Do not include experience in the Police Officer career ladder.” A maximum of 3.6 points were awarded for service in the last five years and up to 2.6 additional points for service in the next preceding five year period.
- Category 6 provided points for “Experience in the specified department in a permanent full-time Police Officer position or higher” between ten and fifteen years earlier
- Category 7 provided points for “Experience outside the specified department in a recognized federal, state, or municipal police department in a supervisory capacity (e.g., as a Police Chief, Deputy Police Chief, Captain, Lieutenant, Sergeant or as a supervisor of employees in jobs described in Category 8 . . .”

- Category 8 covered experience outside the specified department in a recognized federal, state or municipal police department in a non-supervisory capacity which involved full police powers”

The instructions also specified that a candidate “may choose to include any ‘acting’ or ‘provisional’ experience, i.e., experience in higher titles than your permanent title(s), in either the higher “acting” title(s) or in the lower permanent title(s), whichever gives you the most credit.¹

. . . You may include experience in the higher title that is officially recognized by your appointing authority even if your jurisdiction does not pay acting experience at the higher rate.”

(HRD Motion; Claim of Appeal; Administrative Notice [HRD Police Department Promotional Exams, Employment Verification Form])

8. Deputy Superintendent Baston claimed Category 1 credit for her experience from 2007 to 2014 in a position of Captain or higher, Category 3 credit for her experience from 2005 to 2007 as a Sergeant, as well as credit for her prior service as a Police Officer. *(Claim of Appeal; HRD Motion)*

9. By letter dated March 5, 2015, Deputy Superintendent Baston was informed that her request for education credits had been reviewed by HRD and her appeal was denied. The reason for the denial stated: “”Time served as Deputy Superintendent is not a Civil Service title therefore cannot be claimed. Cat 1 – Pts not awarded; cat 3A no claim, pts awarded; cat. 3B credited (+) to 46 mths; cast. 4B credited (-) to 33 mths.” This result, in effect, awarded Deputy Superintendent Baston experience points as a Sergeant for all time served from 2005 through 2014. This appeal duly ensued. *(HRD Motion; Claim of Appeal)*

¹ Reference to “acting” time is assumed to relate to Category 8 service “outside the specified department”, i.e., a non-civil service job, as time spent by an employee “acting” in a civil service position, pursuant to civil service rule, is not recognized to be unless the employee was temporarily appointed to the position pursuant to civil service law and rules. See PAR.11(1)

STANDARD OF REVIEW

An appeal before the Commission may be disposed of summarily, in whole or in part, pursuant to 801 C.M.R. 1.01(7)(g) and 801 C.M.R.1.01(7) (h) when, as a matter of law, the undisputed material facts affirmatively demonstrate that there is “no reasonable expectation” that a party can prevail on at least one “essential element of the case”. *See, e.g., Milliken & Co., v. Duro Textiles LLC*, 451 Mass. 547, 550 n.6, (2008); *Maimonides School v. Coles*, 71 Mass.App.Ct. 240, 249 (2008); *Lydon v. Massachusetts Parole Board*, 18 MCSR 216 (2005)

ANALYSIS

Pursuant to G.L.c.31, §22, HRD “determine[s] the passing requirements of examinations.” G.L.c. 31, §3 directs that HRD shall make rules which include provisions for “open competitive and other examinations to test the practical fitness of applicants.” According to the Personnel Administration Rules (PAR) promulgated by HRD, “[t]he grading of the subject of training and experience as a part of a promotional examination shall be based on a schedule approved by the administrator [HRD] which *shall include credits for elements of training and experience related to the position for which the examination is held.*” PAR.6(1)(b) (*emphasis added*)

The Commission has consistently deferred to HRD’s discretion in designing and administering competitive civil service examinations. As stated in *Carroll v. Human Resources Division*, 27 MCSR 157 (2014):

“There can be little doubt that the cited [civil service] statutes reflect a Legislative intent to endow HRD with considerable discretion in crafting, administering and scoring examinations, as well as crediting education as part thereof.”

Id. 27 MCSR at 161-62 and cases cited. *See also Merced v. Human Resources Division*, 28 MCSR 396 (2015) (affirming HRD’s requirement that university teaching credit required faculty status of adjunct professor or higher); *Cataldo v. Human Resources Division*, 23 MCSR 617 (2010) (noting HRD’s broad authority to determine the “type and weight” given to training and

experience) While HRD’s discretion is not unfettered, so long as the rule has been clearly established, it is reasonable and firmly grounded in common sense”, and HRD has uniformly applied it, the Commission will not disturb HRD’s rational judgment in matters that directly involve its technical expertise in the administration of examinations. E.g., Clarke v. Boston Police Dep’t, CSC No. B2-15-58, 29 MCSR --- (2016); Merced v. Human Resources Division, 28 MCSR 396 (2015)

Here, HRD’s rule that Deputy Superintendent Baston cannot receive experience credit for the senior level job she has performed since 2007 because her job title is not classified under Civil Service is neither rational nor consistent with HRD’s practice in granting education credits for other non-civil service experience as a police officer. There is no dispute that HRD’s E&E Instruction sheet makes provisions for Category 1 experience as BPD superior officer of a “Captain or higher.” There is no dispute that the position of BPD Deputy Superintendent is a rank above the Civil Service title of BPD Captain.² There is no dispute that civil service law requires, and HRD grants, education credit for regular police officers who serve in non-civil service Massachusetts communities as well as in regular police forces outside the Commonwealth. See, e.g., Verderico v. Human Resources Division, 28 MCSR 229 (2015) (credit for experience as a NYPD police officer); DeFrancesco v. Human Resources Division, 21 MCSR 662 (2008) (rejecting HRD’s claim that only credit for experience as a police officer in a civil service position can be allowed)

I am not persuaded by HRD’s contention that it does not know “how the BPD command structure works” and it would be “arduous and burdensome” to investigate whether a BPD

² Deputy Superintended Baston’s point is well-taken that HRD wrote the E&E Instruction Sheet and, presumably knew that a Captain is the highest civil service rank in the “specified department”, i.e., BPD, so the provision for experience credit for a BPD Captain “or higher” is irreconcilable with HRD’s current position that no credit is allowed for any BPD position “higher” than a Captain.

Deputy Superintendent ranks above a Captain because HRD only knows about civil service titles. In this regard, it must be kept in mind that Category 1 experience is applicable only to service in the “specified department”, i.e., the BPD. Thus, the question is quite different from the one presented in the recent Commission decisions, cited by HRD, in which the Commission accepted HRD’s position that, as to campus police forces (as opposed to “regular” police forces), there were many differences in the authority and operation of such forces, so that it was reasonable to understand why HRD would not be in the position to determine which of the many dozen such forces were equivalent to a “regular” police force and which were not. See Verderico v. Human Resources Division, 28 MCSR 229 (2015); Persampieri v. Human Resources Division, 28 MCSR 211 (2015); Maurice v. Human Resources Division, 28 MCSR 203 (2015). Here, what is involved is HRD’s professed lack of knowledge about the command structure of a single police force, the BPD, the largest civil service police force in the Commonwealth, which is well-documented and easily confirmed.³

Similarly, I am not persuaded by HRD’s argument that it cannot determine whether Deputy Superintendent Baston’s “assignment” was temporary or permanent, part-time or full-time, and so it had “no way to verify” that she was performing, if at all, full-time at the “higher” title and only as a Sergeant at other times. The E&E Instructions make clear that service for a month or more, presumably even in an “acting” non-civil service capacity, may qualify for credit. The E&E verification form, certified by the Police Commissioner or his designee, should suffice as a reliable basis for such confirmation but, if further data are needed, I find it inconceivable that no

³ It is worth noting that the 2014 promotional examination administered through a Delegation Agreement between HRD and BPD was the product of a “comprehensive” collaborative analysis that addressed long-standing concerns with the examination process and that over \$1,600,000 was spent in its development. See Findings of Fact, Rulings of Law and Order, Smith v. City of Boston, -- F.Supp.3d --, 2015 WL 7194554 at 9-10 (November 16, 2015). See also, Lopez v. City of Lawrence, 2014 U.S. Dist. LEXIS 124139, appeal pending, No. 14-1952 (1st Cir. 2014)

more than little effort would be required to obtain the necessary information from BPD to satisfy that Deputy Commissioner Baston's job qualifies as "training and experience [in a position of Captain or higher] related to" her fitness for the position of a BPD Lieutenant.

I am mindful of the limited resources available to HRD and the difficult job it has to manage those resources to fulfil its statutory duties under civil service law as best it can. That said, however, civil service rights provided by law should not be sacrificed solely for administrative convenience. The addition of experience credits has real meaning to the career advancement potential of a BPD police officer. Those points can make the difference between a candidate's placement on the eligible list and, since civil service law requires that the BPD may consider only a specific number of candidates for promotion (the so-called "2n+1 rule), the differences could put the candidate with a Category 1 or 2 Associates Degree in high enough position for consideration, but leave those in Deputy Baston's situation lower on the list and out of contention for consideration.

CONCLUSION

Accordingly, for the reasons stated, HRD's Motion for Summary Decision is **denied** and the Appellant's appeal under Docket No. B2-15-55 is **allowed**. HRD is ordered to adjust Deputy Baston's overall examination score to provide the appropriate amount of Category 1 experience credit for her service in a position of "Captain or higher" consistent with this Decision.

Civil Service Commission

/s/ Paul M. Stein
Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein & Tivnan, Commissioners) on February 4, 2016.

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)(1), 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 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. 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 to:

Nora Baston (Appellant)

Mark Detwelier, Esq. (for HRD)

Kate Hoffman, Esq. (for BPD)