

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

**SUFFOLK, ss.**

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

**MARK BETTENCOURT,**  
Appellant,

**CASE NO: G1-11-91**

v.

**MASSACHUSETTS HUMAN  
RESOURCES DIVISION,**  
Respondent

Appellant, Pro Se:

Mark E. Bettencourt  
6 Antrim Road  
Peabody, MA 01960

HRD Attorney :

Martha Lipchitz O'Connor, Esq.  
Human Resources Division  
One Ashburton Place, Room 207  
Boston, MA 02108

Commissioner:

Paul M. Stein

**DECISION ON MOTION TO DISMISS**

The Appellant, Mark Bettencourt, appealed to the Civil Service Commission (Commission) pursuant to G.L.c.31, §2(b), claiming that the Massachusetts Human Resources Division (HRD) denied him the opportunity to sit for a departmental promotional examination for Police Sergeant in the Lynnfield Police Department (LPD). On June 29, 2011, HRD served and filed a Motion for Summary Disposition on the grounds that the Appellant did not have the necessary one year of service with the LPD to qualify to take the exam. The Appellant filed an Opposition on September 15, 2011. Following a Procedural Order dated September 27, 2011, the Commission was informed that the parties agreed to submit the matter for decision on the papers filed.

**FINDINGS OF FACT**

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

1. The Appellant, Mark E. Bettencourt, was appointed by the City of Peabody on September 30, 2001, to the position of permanent Police Officer. (*HRD Motion, Exh.A*)

2. On December 5, 2010, HRD approved Officer Bettencourt's request for a voluntary permanent transfer to the LPD. (*HRD Motion Exh. B*)

3. On May 11, 2011, the LPD duly held a Delegated Sole Assessment Center Departmental Promotional Examination for LPD Police Sergeant, Announcement #9442. (*HRD Motion, Exh. C*)

4. Announcement # 9442 states:

"To be eligible for this examination you must be an employee in the Lynnfield Police Department with permanent civil service status in the below listed title [Police Officer] You are also required to have been employed in the qualifying title on a permanent or temporary civil service basis for twelve months preceding the examination date. . . .[Y]ou must have permanent civil service status in the qualifying title as of the date of the examination in order to be eligible. . . ." (*emphasis added*)

5. Officer Bettencourt was not permitted to take the May 11, 2011 LPD Police Sergeant Departmental Examination because he had not been employed with the LPD for at least one year preceding the date of the examination. (*HRD Motion*)

6. M.G.L.c.31,§59 provides, in part:

"An examination for a promotional appointment to any title in a police or fire force shall be open only to permanent employees in the next lower title in such force, except that if the number of such employees is less than four, the examination shall be opened to permanent employees in the next lower titles in succession in such force until either four such eligible employees have applied for examination or until the examination is open to all permanent employees in lower titles in such force; provided, however, that no such examination shall be open to any person who has not been employed in such force for at least one year after

certification in the lower title or titles to which the examination is open; and provided, further, that no such examination for the first title above the lowest title in the police or fire force of a city or town with a population in excess of fifty thousand shall be open to any person who has not been employed in such force in such lowest title for at least three years after certification.” (*emphasis added*)

7. Regina Caggiano has been employed with HRD since 1999 and currently is Deputy Director for the HRD Civil Service Unit. She previously served as the Assistant Director for the Civil Service Unit. Pursuant to her duties with HRD during the past twelve years, she has had responsibility to oversee, and possesses considerable specific and personal knowledge about, civil service promotional examinations and administration. (*HRD Motion, Exh. D*)

8. Since 1999, HRD has consistently applied the phrase “in such force” as appears in Section 59 of Chapter 31 to mean “the department for which the examination is held” and not “any” department in which the employee has held a permanent civil service position. (*HRD Motion Exh. D*)

9. According to Officer Bettencourt, he has personal knowledge of two occasions on which a police officer who had transferred from another department was permitted to take a promotional examination held by his new department although he had been with that department less than the period of one, or three, years specified in Section 59: (1) an officer who had transferred from the Lynn Police Department to the MDC Police in 1983 was permitted to take a sergeant’s examination after only nine months with the MDC Police; and (2) an officer transferred from the LPD to the Lynn Police Department in 1985 was allowed to take the sergeant’s promotional exam after only seven months with the Lynn Police Department. (*Opposition of Appellant*)

## 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 the 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

In accordance with established principles of statutory construction, the Commission has consistently ruled that the phrase “in such force” contained in Section 59 of Chapter 31 must be interpreted according to its plain meaning to refer to the “only the force in

which the person seeking the promotion” is currently serving and does not include time “in the force of any other city(s) or town(s). . . in which the person has had at least [the requisite number of years] of employment, either standing alone or in combination.” See Williams v. Boston Fire Dep’t, 20 MCSR 588 (2007); Swan v. Boston Police Dep’t, 18 MCSR 248 (2005); Shaffer v. Boston Fire Dep’t, 16 MCSR 51 (2003); Kelly v. Boston Fire Dep’t, 16 MCSR 51 (2003); Cahoon v. Department of Personnel Admin., 7 MCSR 166 (1994). See generally City of Lawrence v. Civil Service Comm’n, 66 Mass.App.Ct. 309 (construing Section 59 to permit tacking of service with the appointing authority “in such force” as including the both regular and reserve officer). There is nothing that has been brought to the Commission’s attention in this case that warrants revisiting the conclusions that it reached in those prior decisions.

Officer Bettencourt points to the language of the Departmental Examination Announcement which requires one year of service “in the qualifying title” but does not use the phrase “in such force”, which he contends does not give clear notice that it means only service with the LPD. While the language of the announcement might have been worded more clearly, whether it is ambiguous or not, neither the LPD nor HRD may unilaterally alter the statutory requirements that are set forth in Section 59.

Officer Bettencourt also argues that he has been treated disparately than other officers in the past. That point is not without some merit. Fairness and uniformity of treatment is an important part of the merit principles inherent in the administration and enforcement of civil service law. While the Appellant is to be commended for bringing up the point, the Commission cannot undo those apparently erroneous decisions that predate its’ definitive decisions on the subject by a decade or two, and it cannot compound the

apparent error by ordering HRD to violate what is now established as the clear mandate of the civil service law.

In sum, for the reasons stated above, HRD's Motion to Dismiss will be and hereby is granted and the appeal of the Appellant, Mark Bettencourt, is hereby, *dismissed*.

Paul M. Stein

Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, McDowell & Stein, Commissioners; Marquis [Absent]) on October 20, 2011

A True Record. Attest:

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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)(1), 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:

Mark E. Bettencourt (for Appellant)

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