

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108
(617) 979-1900

MICHAEL CALLAHAN,
Appellant

v.

B2-21-042

HUMAN RESOURCES DIVISION,
Respondent

Appearance for Appellant:

Pro Se
Michael Callahan

Appearance for Respondent:

Patrick Butler, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

Commissioner:

Christopher C. Bowman

DECISION ON CROSS MOTIONS

On February 25, 2021, the Appellant, Michael Callahan (Appellant), a firefighter in the Lowell Fire Department, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD) to not grant him 0.5 points on Question 4 and 0.75 points on Question 5 of the Education and Experience (E&E) component of the Fire Lieutenant examination for time served as a Temporary Fire Lieutenant.

On March 30, 2021, I held a remote pre-hearing conference, which was attended by the Appellant, counsel for HRD and the Lowell Fire Chief. Based on the information provided and/or reviewed at the pre-hearing conference, the following does not appear to be in dispute:

- A. HRD administered a promotional examination for Fire Lieutenant on November 21, 2020.
- B. The deadline for completing the E&E component of the examination, and submitting the supporting documentation, was November 28, 2020.
- C. The Appellant completed the online E&E module before the filing deadline.
- D. As part of the E&E module, the Appellant claimed 0.5 points and 0.75 points for Questions 4 and 5 for time served as a Temporary Fire Lt.
- E. The Appellant submitted supporting documentation to HRD before the filing deadline, including an Employment Verification Form completed and signed by the Fire Chief, and many pages itemizing the shifts worked.
- F. The Employment Verification Form did not list the time spent as Temporary Fire Lt.
- G. HRD, relying on the Employment Verification Form, did not give the Appellant credit for the 0.5 and 0.75 points.
- H. On February 22, 2021, HRD released the scores to candidates.
- I. That same day, the Appellant filed an appeal with HRD, which included an appeal of the points in question.
- J. Also that same day, HRD emailed the Appellant stating: “Your score does not reflect the acting time you claimed as it was not provided on official letterhead and signed by a chief / appointing authority.”
- K. On February 23, 2021, prior to the establishment of the eligible list, Lowell’s Fire Chief penned a letter stating: “This letter is in reference to Firefighter Michael Callahan and verification of him working as a temporary officer. Firefighter Callahan worked as Temporary Lieutenant from 9/26/11 through 6/18/20 for a total of 1740 hours. If any additional information is needed please contact my office at ...”.

L. On February 25, 2021, the Appellant filed an appeal with the Commission stating:

“May I please have my Acting Temporary Lieutenant time added to my E&E Score. My original E&E paperwork included all my days, dates and hours. It came from the Fire Chief’s office from the city computer. It has [C]ity of Lowell [l]logo on the top corner. I received the [HRD email] that Civil Service needed a signed letterhead form the Chief. The following day [l] Chief P. Charron made such letter and I have emailed it to Civil Service. You’re welcome to call the office to verify. Also, see attached letter. I would like to fix this before the promotional list is posted at Civil Service and the City next Monday, March 1st.”

M. On March 1, 2021, HRD established the eligible list for Lowell Fire Lt.

N. The Appellant’s total score on the examination was 84.77, resulting in him being tied with 4 other persons for 5th on the eligible list.

O. The Lowell Fire Department breaks ties by going down to the one-hundredth decimal point.

P. While HRD was unable to confirm this at the pre-hearing conference, it is likely, but not certain, that crediting the Appellant with these additional points would change his placement vis-à-vis other candidates tied for 5th, when broken down to the hundredth decimal point.

Q. On March 22, 2021, the Appellant sent an email to the Commission and HRD stating:

“This is sent to all involved in the pre-hearing appeal scheduled for 3-30-21

This week I was going over my paperwork for the test and for my appeal and upcoming pre-hearing video conference with Civil Service. My coworker reviewed my documents and discovered my (HRD) Fire Dept Promotional Exam Employment Verification Form may have been missing information. The Chiefs office did in fact send the supporting documentation with the shifts and hours for supporting documentation that I forwarded for the exam but the office didn’t note the information on the [l] HRD form. This was a clerical error from the Chiefs office that should have been picked up on but wasn’t by the office staff or me. This was my first exam and I trusted the documents from the office would be correct.

I’m asking if you could please extend to me the E&E for working as a temporary lieutenant (1714hrs) 1.25 point in the E&E. This would be greatly appreciated.

I’m not sure if this applies or not but I do have a lifelong reading disability that is well documented and covered under the Americans with Disabilities Act. At this point I’m hoping Civil Service could grant the points and be understanding and act in my behalf. I feel this would be a reasonable request.”

- R. On March 23, 2021, the Lowell Fire Chief forwarded an email to HRD and the Commission stating: “Please see attached the amended copy of the Employment Verification Form with supporting documentation for Michael T. Callahan.” The Employment Verification Form now listed the time the Appellant served as Temporary Lt. The attachments were identical to the attachments that were initially sent to HRD.
- S. On March 30, 2021, the Fire Chief attended the remote pre-hearing conference and took responsibility for the administrative error related to the initial Employment Verification Form (e.g. – not listing the time as Temporary Lt. on the actual form, although providing an itemized list that supported what the Appellant sought credit for on the examination).

Applicable Civil Service Law

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

“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, § 5(e) states in relevant part that:

“The administrator [HRD] shall have the following powers and duties:

...

To conduct examinations for purposes of establishing eligible lists.”

G.L. c. 31, § 22 states in relevant part that:

“The administrator shall determine the passing requirements of examinations. In any competitive examination, an applicant shall be given credit for employment or experience in the position for which the examination is held. In any examination, the applicant shall be allowed seven days after the date of such examination to file with the administrator a training and experience sheet and to receive credit for such training and experience as of the time designated by the administrator.”

PAR.06(1)(c) stated in relevant part that:

“The grading of the subject of employment or experience as a part of an entry-level examination shall be based on a schedule approved by the administrator which shall include credits for elements of employment or experience *related to the title for which the examination is held*”.
related to the title of CO I.”

Standard of Review: Motion for Summary Decision

The Commission may, 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). Accord 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 plaintiffs standing required denial of motion to dismiss).

Analysis

As cited by HRD in its motion for summary decision, precedent-setting judicial decisions and a long line of Commission decisions have affirmed that, under Massachusetts civil service law

and rules, HRD is vested with broad authority to determine the requirements for competitive civil service examinations, including the technical requirements related to completing the examination.

HRD's discretion, however, is not without limits. Intervention by the Commission is warranted when an action or inaction by HRD is contrary to basic merit principles and/or arbitrary and capricious. There is a difference between ensuring uniformity to protect the integrity of the civil service examination process as opposed to a rigid, inflexible interpretation of granular requirements that may undermine confidence in the testing process. HRD's determination here is an example of the latter for the reasons discussed below.

First, HRD's argument that the documents attached to the Employment Verification Form could not be accepted because they were not "affirmed or attested to as true" is not supported by their own instructions in which no such affirmation or attestation is referenced as a requirement. It also seems to contradict HRD's initial position, as stated in an email to the Appellant, that the documents could not be accepted because they were "not on official letterhead and signed by a chief / appointing authority."

Second, HRD's argument that those same documents should not be accepted because they reference "Temporary Acting Officer" instead of "Temporary Acting Lieutenant" seems to be holding the Appellant responsible for how such service is recorded by the Lowell Fire Department's payroll system.

Third, it is now clear, based on the statements by the Fire Chief at the pre-hearing conference, that the Fire Chief's office provided the Appellant with the supporting documentation that was attached to the Employment Verification Form, a form that was signed by the Fire Chief.¹

¹ The attached supporting documents also had the seal of the City of Lowell in the upper left corner.

Fourth, in a fairly rare occurrence, the City's Fire Chief participated in the pre-hearing conference and took full responsibility for the administrative error which resulted in the Appellant's hours as temporary lieutenant not being listed on the actual Employment Verification Form that was submitted to HRD in a timely manner.² Once informed of the error, he provided an updated form with the same supporting documentation to HRD.

In this context, failing to credit the Appellant for the 1740 hours that he worked as a Temporary Fire Lieutenant appears to be inconsistent with basic merit principles which includes, in part: "... recruiting, selecting and advancing of employees on the basis of their relative *ability, knowledge and skills* ..." as opposed to penalizing the Appellant for failing to notice an administrative error of the City's Fire Chief.

As the Commission has recommended in the past, I encourage HRD to incorporate some type of "good cause" provisions into their rules to address these infrequent circumstances and ensure an outcome that is consistent with basic merit principles. During my tenure in state government, I have seen various state agencies and tribunals incorporate such provisions into their governing procedures. For example, the Probate and Family Court allows judges to deviate from state-issued child support guidelines in limited circumstances as long as the presiding judge records his/her reasons for doing so. The state's Division of Unemployment Assistance can effectively waive certain repayment of non-fraudulent overpayments when such repayment would be against equity and good conscience. The Commission's own rules include good cause provisions which allows for an Appellant to explain, for example, why an appeal should not be dismissed for failure to appear for a scheduled pre-hearing or hearing despite receiving notice.

² The Fire Chief stated that he does not want the Appellant penalized for his administrative error and supports the Appellant's appeal.

Conclusion

For all of the above reasons, HRD's Motion to Dismiss is denied; and the Appellant's reply, which I have deemed a Motion for Summary Decision, is allowed. HRD shall credit the Appellant for his hours served as Temporary Fire Lieutenant; adjust his score accordingly and notify the Appellant and the Lowell Fire Department of this adjusted score, broken down to the one-hundredth decimal point.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 3, 2021.

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:

Michael Callahan (Appellant)
Patrick Butler, Esq. (for Respondent)
Phillip A.J. Charron (Lowell Fire Chief)