

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

DANIEL CARROLL,
Appellant

v.

Case No.: B2-12-220

HUMAN RESOURCES DIVISION,
Respondent

Appearance for Appellant:

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Commissioner:

Cynthia A. Ittleman¹

DECISION ON RESPONDENT’S MOTION TO DISMISS²

The Appellant, Daniel Carroll (“Mr. Carroll” or “Appellant”), filed a timely³ appeal with the Civil Service Commission (hereinafter “Commission”) on July 27, 2012, contesting the decision of the state Human Resources Division (“HRD”) to deny him credit for an Associate of Applied

¹ The Commission acknowledges the assistance of Law Clerk Hannah Filkins in the drafting of this decision.

² The Respondent’s Motion is captioned “Respondent’s Motion for Summary Decision” but in the text of the Motion the Respondent repeatedly and only refers to the Motion as a motion to dismiss. Therefore, the Motion is treated as a motion to dismiss.

³ Mr. Carroll filed his appeal by letter pro se, not using a Commission appeal form, and did not indicate whether he filed his appeal pursuant to G.L. c. 31, § 2(b) and/or § 24. Section 24, where applicable, requires appeals to the Commission of a decision by the Human Resources Division to be filed within seventeen (17) days of the date the decision was mailed. Neither party produced evidence of the date the Human Resources Division mailed its decision to Mr. Carroll. However, since Mr. Carroll filed his appeal within seventeen (17) days of the date of the letter he received from the Human Resources Division, timeliness is not an issue. Mr. Carroll attended the prehearing conference pro se but retained counsel some time thereafter.

Science in Fire Science Degree (“Degree”) from Columbia Southern University (“CSU”) in connection with his score following the 2012 promotional exam for the position of Deputy Fire Chief in Brookline. A pre-hearing conference was held at the Commission on September 18, 2012. On September 21, 2012, HRD filed a Motion to Dismiss. On October 18, 2012, Mr. Carroll filed a Memorandum in Opposition to the Respondent HRD’s Motion to Dismiss (“Opposition”). A hearing on the Motion to Dismiss was held on October 22, 2012. At the Motion Hearing, the parties were ordered to provide supplemental information, which they did. The Motion Hearing was recorded and the Commission sent each party a copy of the recording. For the reasons stated herein, the Motion to Dismiss is granted and the appeal is dismissed.

Based on the Motion to Dismiss and Opposition and arguments at the Motion Hearing, and taking administrative notice of all matters filed in the case, as well as pertinent statutes, regulations, case law, policies, and rules, a preponderance of the evidence and reasonable inferences therefrom establishes:

1. Mr. Carroll is a permanent civil service employee in the position of Fire Captain in the Brookline Fire Department. His civil service seniority date is December 10, 1984.
(Motion Exhibit A)
2. On March 24, 2012, Mr. Carroll took Deputy Fire Chief examination #5354. Mr. Carroll received a total score of 80 on the exam.⁴ (Motion Exhibit A)
3. The examination contains a section where applicants can indicate their education to seek credit for their education and experience (“E+E”)⁵ The E+E section of the 2012 Deputy Fire Chief exam instruction booklet stated in pertinent part:

⁴ HRD determined Mr. Carroll’s score applying a formula as follows: step 1. Mr. Carroll earned a score of 76.24 on the written exam and a score of 84.10 for Education and Experience; step 2. $(4 \times 76.24) + 84.10 = 389.06$; step 3. $389.06/5 = 77.81$, which is rounded to 78; step 4. $78 + 2 = 80$. (Motion Exhibit F)

HRD only recognizes degrees granted by **regionally accredited** higher education institution a) in the United States, or b) institutions granting degrees or degree program credits that are recognized by one of the regional United States accrediting agencies or that are transferable to a **regionally accredited** higher education institution in the United States (Motion Exhibits C, E)(emphasis added)

4. In the section of the exam where applicants can indicate their education, Mr. Carroll indicated that he had earned a Degree from CSU. (Motion Exhibit B)
5. CSU's address is in Orange Beach, Alabama. CSU is not a regionally accredited institution recognized by HRD. (Motion Exhibit C) Rather, it is accredited by the distance education and training council ("DETC"), a national accrediting entity. (Opposition Exhibit 3)⁶
6. On or around June 1, 2012, HRD mailed Mr. Carroll his exam score information, which did not grant him credit for the CSU Degree. (Motion Exhibit C)
7. On June 12, 2012, Mr. Carroll submitted a request to HRD, asking HRD to review his E+E credit for the March 24, 2012 Deputy Fire Chief exam. (Motion Exhibit D)

⁵ G.L. c. 31, §§ 22-24 refer to credit for "training and experience," which is commonly referred to as "education and experience." Section IV of the examination announcements referenced herein, which describes the process for requesting education credit, is entitled, "Education and Training."

⁶ Opposition Exhibit 3 references the U.S. Department of Education ("USDOE") website with regard to higher education accreditation. Elsewhere on the USDOE website there is information regarding two types of accreditation. It states, in part, "The United States has no federal Ministry of Education or other centralized authority exercising single national control over postsecondary education institutions in this country In order to insure a basic level of quality, the practice of accreditation arose in the United States as a means of conducting nongovernmental, peer evaluation of educational institutions and programs There are two basic types of education accreditation, one referred to as 'institutional' and the other referred to as 'specialized' or 'programmatic.' Institutional accreditation normally applies to an entire institution, indicating that each of an institution's parts is contributing to the achievement of the institution's objectives, although not necessarily all at the same level of quality. The various commissions of the regional accrediting agencies, for example, perform institutional accreditation, as do many national accrediting agencies. Specialized or programmatic accreditation normally applies to programs, departments, or schools that are parts of an institution. Most of the specialized or programmatic accrediting agencies review units within an institution of higher education that is accredited by one of the regional accrediting agencies. However, certain accrediting agencies also accredit professional schools and other specialized or vocational institutions of higher education that are freestanding in their operations. Thus, a 'specialized' or 'programmatic' accrediting agency may also function in the capacity of an 'institutional' accrediting agency." http://www2.ed.gov/admins/finaid/accrred/accreditation_pg2html (February 24, 2014)

8. On June 14, 2012, HRD received Mr. Carroll's Request for Review of his E+E credit. In the letter, Mr. Carroll claimed that because CSU is an accredited institution of higher education and credits from the school are transferrable to regionally accredited higher education institutions in the United States, HRD should recognize, and give him E+E credit for the CSU Degree he was awarded on June 30, 2011. (Motion Exhibit C)
9. Bruce Howard is the Director of Operations for the Civil Service Unit at HRD. He has been employed at HRD since February, 2001. His duties and responsibilities include the business operations of the HRD Civil Service Unit. (HRD Affidavit of Bruce Howard, Nov. 16, 2012)
10. The Civil Service Unit at HRD "... is responsible for developing and administering civil service exams, maintaining eligible lists, and monitoring the civil service appointment process for consent decree communities." (HRD Affidavit of Bruce Howard, Nov. 16, 2012) As part of the promotional exam process, applicants can apply for E+E credit. (Id.)
11. "Since 2005 it has been HRD's policy to only grant education credits for degrees earned at regionally accredited colleges and university (sic) within the United States." (HRD Affidavit of Bruce Howard, Nov. 16, 2012)
12. Unbeknownst to Mr. Howard, "... in 2009 and 2010, HRD incorrectly/mistakenly granted [Mr. A] education credit for degree credits and his degree earned at [CSU], a non-regionally accredited college in the United States." (HRD Affidavit of Bruce Howard, Nov. 16, 2012)⁷

⁷ The Appellant filed an affidavit of Mr. A, dated October 31, 2012, in which Mr. A asserts that he was awarded E+E credit for his CSU degree in the 2012 exam but HRD subsequently rescinded it. Mr. A contacted HRD to appeal the reported rescission and awaited a response at the time of his affidavit. Mr. A suggests that his credit was rescinded about the time the Appellant appealed though it's not clear if he is referencing the Appellant's appeal to

13. Mr. B took a promotional exam for Fire Chief in 2011 and sought credit for his CSU Degree. HRD denied the credit sought. Mr. B filed an appeal at the Commission in this regard but subsequently withdrew his appeal. (HRD Affidavit of Bruce Howard, Nov. 16, 2012) Mr. B's case, "... prompted the Civil Service Unit at HRD to examine HRD's instruction booklets and clarify the existing language in the E&E portion of those instruction booklets to more clearly reflect HRD's policy to only accept degree credits and degrees from regionally accredited colleges and universities in the United States." (Id.)

14. Stephen P. White (hereinafter "Mr. White") was the Senior Information Officer at HRD at pertinent times hereto. He began working at HRD in 2004 and left HRD to work in another agency shortly after Mr. Carroll appealed HRD's decision to the Commission in 2012. Beginning in 2005, Mr. White was responsible for reviewing E+E credits. Mr. White reviewed Mr. Carroll's request for E+E credit following the 2012 promotional exam and determined that, based on the information provided by Mr. Carroll and HRD's policy and practice, Mr. Carroll's Degree from CSU did not qualify for any E+E credit. (Motion Exhibit C)

15. Mr. White determined that CSU was not a regionally accredited institution within the U.S., pursuant to part (a) of the 2012 exam instruction booklet, that part (b) of the instruction booklet applied only to higher education institutions outside of the U.S., and that, therefore, Mr. Carroll's Degree did not qualify for E+E credit. (Motion Exhibit C)

HRD or to the Commission). I make no findings regarding Mr. A's 2012 credit and/or rescission thereof. Mr. C, who, at the time was number one on the Brookline promotional list, above Mr. Carroll, who was number two, wrote to the Commission shortly before the hearing in this case. I sent a copy of this letter to counsel for Mr. Carroll and HRD. Mr. C, of course, concurs with the position of HRD and asserts that a Commission ruling in favor of Mr. Carroll would negatively affect him.

16. By letter dated, July 11, 2012 to Mr. Carroll, Mr. White informed Mr. Carroll that, upon review of Mr. Carroll's appeal, HRD determined that his score accurately reflected the E+E credit awarded to Mr. Carroll without credit for his CSU Degree. The letter also stated that even if HRD were to credit Mr. Carroll's Degree, Mr. Carroll's final score would not have been affected due to weighting and averaging of the components of his score pursuant to HRD policy. The letter further explained that HRD denied Mr. Carroll's request for credit because clause (b) of the relevant section of the E&E instruction booklet, which references transferability of courses or degrees, only applies to institutions outside of the U.S. (Motion Exhibits C, G)
17. By letter dated July 14, 2012 addressed to Mr. White at HRD, Mr. Carroll stated that he would be appealing HRD's decision not to award him E+E credit for his CSU Degree. Mr. Carroll indicated that although the credit did not affect his E&E score for the March 24, 2012 exam, it could affect him in the future. (Motion Exhibit H)
18. Mr. Carroll filed this timely appeal at the Commission on July 27, 2012.

DISCUSSION

Standard for Motion to Dismiss

The United States Supreme Court has held that in order to survive a motion to dismiss, the non-moving party must plead only enough facts to state a claim to relief that is plausible on its face. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007). Thus, the non-moving party must plead enough facts to raise a reasonable expectation that discovery will reveal evidence in support of the allegations. *See id.* at 545. Similarly, the Massachusetts Supreme Judicial Court has held that an adjudicator cannot grant a motion to dismiss if the non-moving party's factual allegations are enough to raise a right to relief above the speculative level based

on the assumption that all the allegations in the appeal are true, even if doubtful in fact. *See Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008). The Standard Adjudicatory Rules of Practice and Procedure (hereinafter “Rules”) govern administrative adjudication. 801 CMR 1.01, *et seq.* However, Commission policy provides that when such rules conflict with G.L. c. 31, the latter shall prevail; there appears to be no such conflict here. The Rules indicate that the Commission may dismiss an appeal for lack of jurisdiction or in the event the appeal fails to state a claim upon which relief can be granted. 801 CMR 1.01(7)(g)(3).

Civil Service Statutes and Rules

A central tenet of civil service law involves basic merit principles. Specifically, G.L. c. 31, § 1 provides,

“Basic merit principles”, shall mean (a) **recruiting, selecting** and advancing of employees **on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment**; (b) providing of equitable and adequate compensation for all employees; (c) providing of training and development for employees, as needed, to assure the advancement and high quality performance of such employees; (d) retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected; (e) **assuring fair treatment of all applicants** and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion **and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens**, and; (f) assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.
(Id.)(emphasis added)

Individuals aggrieved by an action of the HRD Administrator regarding exams and certain related matters may appeal to the Commission pursuant to G.L. c. 31, § 2(b). The statute gives the Commission the power to:

[H]ear and decide appeals by a person **aggrieved** by any decision, action, or failure to act by the administrator, except as limited by the provisions of section twenty-four relating to the grading of examinations
(Id.)(emphasis added)

G.L. c. 31, § 2(b). Section 2(b) also states:

No person shall be deemed to be **aggrieved** . . . 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.
(Id.)(emphasis added)

According to G.L. c. 31, § 16, “[e]xaminations shall be conducted under the direction of the administrator, who shall determine their form, method, and subject matter.” This affords HRD considerable authority with regard to examination administration. The statute provides the broad parameters of HRD’s authority, stating that, “[e]xaminations shall fairly test the knowledge, skills and abilities which can be practically and reliably measured and which are actually required to perform the primary or dominant duties of the position for which the examination is held.” G.L. c. 31, § 16. In addition, Rule PAR.06(1) of the Personnel Administration Rules, promulgated by HRD, provides the manner in which training and experience are to be assessed, stating, “[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 which shall include credits for elements of **training and experience** related to the position for which the examination is held.” PAR.06(1)(emphasis added).

The second paragraph of section 16 of G.L. c. 31 provides, in pertinent part,

... The administrator shall ... examine, qualify, and rank applicants for original or promotional appointment solely on the basis of training, experience, education or other criteria considered appropriate by the administrator (a) for a scientific or professional position for which education at or above the master’s degree level is required by statute or under authority thereof; (b) when the major duty of a position is such that applicants are required to have successfully completed a course in emergency medical case pursuant to the provisions of chapter one hundred and eleven C; (c) when the major duty of a position is such that applicants are required to possess a certificate, registration or license issued after examination by a state board of registration or examiners or by a professional association specified by the administrator. A person who has taken a civil service examination pursuant to this paragraph **shall not have recourse to the review procedures set forth in section twenty-two.**

(Id.)(emphasis added)

Like the second paragraph of G.L. c. 31, section 16, section 17 bars recourse to HRD review procedures pursuant to section 22 with regard to HRD's holding of a competitive examination to establish an eligible list of persons with bachelor's degrees and related matters.

Section 22 of G.L. c. 31 indicates the appropriate subjects and timing of requests to review certain HRD determinations. Specifically, it provides, in part:

... 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.

Except as otherwise provided by sections sixteen and seventeen, an applicant may request the administrator to conduct one or more of the following reviews relating to an examination: (1) a review of the marking of the applicant's answers to essay and multiple choice questions; (2) a review of the marking of the applicant's **training and experience**; (3) a review of a finding by the administrator that the applicant did not meet the entrance requirements for the examination

Such request for review of the marking of the applicant's answers to essay questions, of the marking of the applicant's **training and experience**, or of a finding that the applicant did not meet the entrance requirements for appointment to the position shall be filed with the administrator no later than seventeen days after the date of mailing by the administrator of the notice to the applicant of his mark on the examination or his failure to meet the entrance requirements for appointment to the position.

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 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.

(Id.)(emphasis added)

Id. Section 23 of G.L. c. 31 addresses the timing and nature of HRD's response to requests for review of certain of its determinations. It states, in pertinent part:

Within six weeks after receipt of a request pursuant to section twenty-two, the administrator shall, subject to the provisions of this section, conduct such review, render a decision, and send a copy of such decision to the applicant. If the administrator finds that an error was made in the marking of the applicant's answer to

an essay question, or in the marking of the applicant's **training and experience** . . . the administrator shall make any necessary adjustment to correct such error. (Id.)(emphasis added)

When an applicant has requested that HRD review certain matters related to an examination pursuant to the statutes cited herein, the applicant may appeal the pertinent HRD decision to the Commission. Specifically, pursuant to G.L. c. 31, § 24, 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. Such appeal shall be filed no later than seventeen days after the date of mailing of the decision of the administrator. . . .

The commission shall refuse to accept any petition for appeal unless the request for appeal, which was the basis for such petition, was filed in the required time and form and unless a decision on such request for review has been rendered by the administrator. In deciding an appeal pursuant to this section, the commission shall not allow credit for **training or experience** unless such training and experience was fully stated in the **training and experience sheet** filed by the applicant at the time designated by the administrator. . . .

(Id.)(emphasis added)

Thus, section 24 provides, *inter alia*, a person can appeal the credit HRD gave to his or her training and experience as long as the person properly entered the required information on his or her training and experience sheet of the exam, timely filed an appeal to HRD in this regard, HRD rendered a decision regarding the person's appeal, and the person timely appeals HRD's decision to the Commission.

Parties' Arguments

HRD argues that the Appellant is not aggrieved by its decision not to credit his Degree from CSU in its E+E calculation under G.L. c. 31, § 2(b) because if such credit were allowed, his score would remain unaffected because of the formula it applies. HRD argues further that given

that Mr. Carroll is not an aggrieved party, the Commission does not have jurisdiction to hear his appeal. HRD also argues that under G.L. c. 31, § 16, the Appellant does not have “recourse to the review procedures set forth in section twenty-two” Further, it argues that even if the Commission has jurisdiction, the Commission should dismiss the appeal because HRD has broad statutory discretion in creating the methodology used in assessing E+E credits and it properly exercised its discretion here. HRD maintains that the only reasonable interpretation of the E+E portion of the exam instruction booklet is that CSU is not a regionally accredited institution of higher education in the U.S. under part (a) and that part (b) of the booklet indicates that credits can otherwise only be given when they were earned at certain higher education institutions outside of the U.S. Specifically, under part (b) of the booklet, degree or degree program credits from non-U.S. higher education institutions will not be awarded unless they are recognized by a regionally accredited higher education institution in the U.S. Since CSU is neither a regionally accredited institution in the U.S. nor an institution outside the U.S. whose degree or degree program credits are transferable to a regionally accredited institution within the U.S., HRD asserts that CSU does not fall within the guidelines of section (b) and HRD properly denied the Appellant’s CSU Degree E+E credits. Therefore, HRD states that the Commission lacks jurisdiction of the appeal and the appeal should be dismissed.

The Appellant argues that he has been aggrieved by HRD’s decision such that the Commission has jurisdiction to hear his appeal. The Appellant acknowledges that HRD reached the conclusion that his score, which is based on weighted averages, remains an 80 with or without the E+E credits for his Degree but that HRD failed to take into consideration that his score increases from a 79.81 to 80.41 (0.6 differential) if HRD grants him E+E credits for his CSU Degree. The Appellant further argues that since the first ranked candidate scored 80.6 on

the exam, should the Appointing Authority choose to consider the candidates' non-rounded scores, HRD's decision to not credit his Degree could be significant. The Appellant argues that since he was ranked second on the Deputy Fire Chief promotion list, the scoring differential could affect future Appointing Authority decisions as well. Since the scoring differential affects Mr. Carroll's civil service promotional rights, he avers, the Commission has jurisdiction over this appeal and should deny the Motion to Dismiss.

In the alternative, the Appellant avers that he need not prove that he was aggrieved as his claim survives under G.L. c. 31, § 24, which does not require that a person be aggrieved. Moreover, he argues, HRD's failure to award him the E+E credit he seeks violates basic merit principles, as defined in G.L. c. 31, § 1. Specifically, the Appellant argues that HRD's exam instruction booklet is unfair and arbitrary in that part (b) of the booklet allows students of foreign higher education institutions to be awarded degree E+E credits but denies such credits to domestic institutions that are accredited. He asserts that CSU has agreements with at least five (5) accredited higher education institutions which allow transfer of CSU credits. Thus, if CSU were a foreign institution its credits could transfer to a regionally accredited institution and satisfy part (b) of the exam instruction booklet. However, since CSU is a domestic institution, regardless of an applicant's ability to have his or her credits transferred to a regionally accredited institution, he or she will not be awarded E+E credits for a CSU degree. Further, he asserts, HRD's refusal to grant him E+E for his CSU Degree is unfair and arbitrary because it denies credit for a comparable education, whether the education is regionally accredited or nationally accredited. For example, the Appellant compared the CSU Fire Science Degree with a degree from Berkshire Community College, which is a regionally accredited higher education

institution.⁸ Both programs are similar in length, he asserts, as both require a minimum of sixty (60) credit hours. Both programs also share the core coursework required, such as Fire Protection, Fire Prevention, Building Construction, Fire Protection Systems, and Water Supply and Hydraulics. (See Opposition Exhibit 13) Lastly, he argues, the Mass. Board of Higher Education requires out-of-state institutions operating in Massachusetts to be accredited by either a regional or national accrediting agency. CSU is accredited by the Distance Education and Training Council, which the U.S. DOE recognizes as a national accrediting entity. Therefore, he avers “...CSU would, at minimum, meet the accreditation requirements of the Massachusetts Board of Higher Education if it was subject to such jurisdiction.” (Affidavit of Keith Padgett, Program Director of the fire science program at CSU, submitted by Appellant, paragraph 9) For these reasons, the Appellant argues the Commission has jurisdiction over this appeal and it should deny HRD’s Motion.

Analysis

There can be little doubt that the cited 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. The Commission has recognized HRD’s considerable discretion in this regard as warranted. See Michael Peters v HRD, 23 MCSR 647, 650 (October 22, 2010), citing Callanan v Personnel Administrator for the Commonwealth, 400 Mass. 597 (1987); citing G.L. c. 31, § 23; G.L. c. 31, §§ 18, 19; McCue v Director of Civil Service, 325 Mass. 605, 608 (1950); Araica v HRD, 22 MCSR 183 (2009).⁹ However, HRD’s application of

⁸ There is no indication that Berkshire Community College is a distance learning higher education institution.

⁹ The Appellant cites Rodriguez and Araujo v Boston Police Department, 22 MCSR 509 (September 11, 2009) for the proposition that administrative convenience for HRD or appointing authorities cannot trump basic merit principles. However, in that case, the Commission denied a motion to dismiss a bypass appeal regarding a new HRD process to “band” (or cluster) the scores of examinees, rather than list them individually by score pursuant to explicit text in G.L. c. 31, §§ 25 and 27, pending a court injunction. That case is inapposite here since there is no new process here and the sections of Chapter 31 cited here provide HRD with considerable discretion in this regard.

section 16 of G.L. c. 31 to bar an appeal pursuant to section 22 in this case is not supported. Section 16 precludes review by HRD of certain matters in original appointments or promotions involving scientific or professional positions requiring Master's degrees and above and/or professions requiring certain certificates, registration, or licensing, which is not applicable here.

G.L. c. 31, § 2(b) specifically requires a person to be "aggrieved" by the actions of the Personnel Administrator in order to seek relief via appeal to the Commission. As the Commission stated in Kendrick, et al v. HRD, 21 MCSR 242 (June 13, 2008), "... the statute requires that aggrieved persons show that the person has already 'been harmed.' In its use of the past tense, the legislature intended the statute to apply in cases where the harm has already occurred. The legislature expounded that this past harm must show that the person's rights had already been 'abridged, denied, or prejudiced in such a manner as to cause actual harm.' The harm must be definite and already have taken place, not potential, speculative and in the future." Id. In the instant case, the Appellant is the second highest person on the certification. He acknowledges that his score would not change if HRD granted him E+E credit for his CSU Degree. However, he avers that he could be aggrieved under the following summarized scenario: by failing to grant him credits for his CSU Degree, the Appellant would be aggrieved because he would be precluded from showing that his unrounded score is in fact closer to the unrounded score of the first candidate on the list than their rounded scores suggest. The smaller distance between the scores of the two candidates, the Appellant asserts, would enable the appointing authority to bypass the first candidate with the higher score because the difference between the two scores is "artificial." Opposition, p. 19. As this argument is conjecture and speculation, it does not satisfy the requirement of G.L. c. 31, § 2(b) that the person is

Moreover, application of HRD's policy requiring regional accreditation for E+E credit appears does not appear to provide administrative convenience since it requires HRD to review the many examinees and their E+E requests for each exam.

“aggrieved.” Similarly, as the appeal is based on speculation, the appeal cannot survive a motion to dismiss.

In the alternative, Mr. Carroll’s opposition to the Motion asserts that his claim survives under G.L. c. 31, §24 whether or not he is aggrieved pursuant to G.L. c. 31, § 2(b) and that HRD’s refusal to grant him E+E credit for his CSU Degree is arbitrary, unfair, unreasonable, and an abuse of discretion. Therefore, he asserts, HRD’s E+E determination violates basic merit principles. The Appellant is in error. An appeal of an HRD decision denying a request for review of education and experience is an appeal pursuant to G.L. c. 31, § 2(b) that is governed by Sections 22 – 24 of G.L. c. 31. O’Neill v Lowell and HRD, 21 MCSR 683 (December 11, 2008)(*aff’d* O’Neill v Civil Service Commission and HRD, Middlesex Superior Court C.A. No. 09-0391 (November 12, 2009); *aff’d* O’Neill v Civil Service Commission, 10-P-384 (February 15, 2011 per Rule 1:28)) If this were not the case, we would be called upon to issue a remedy under section 24 where, as here, there has been no harm. Since there is no question that the Appellant seeks relief from an action of HRD, his claim falls under section 2(b). However, since he has not been “aggrieved,” the Commission has no jurisdiction to hear his appeal.¹⁰

The Appellant also argues that the Commission has jurisdiction to entertain his appeal under section 24 because HRD’s E+E determination was an abuse of its discretion or it was otherwise “... unfair, unreasonable, or arbitrary.” Appellant’s Recommended Decision, p. 21. To be sure, HRD’s actions must be reasonable. In this regard, the Appellant relies upon Silva

¹⁰The authorities cited by the Appellant in this regard are inapposite. Opinion of the Attorney General (September 1, 1965)(analyzing a prior form of portions of G.L. c. 31, Commission’s jurisdiction is limited regarding written examination scoring after the statutory appeal period has elapsed); Jones v Boston Fire Department, 19 MCSR 5 (January 5, 2006)(Commission has no jurisdiction of an appeal regarding multiple choice questions); Stallworth v Boston Fire Department, 19 MCSR 9 (January 12, 2006)(Commission has no jurisdiction of an appeal regarding multiple choice questions); *cf* Lynch v HRD, 13 MCSR 87 (June 29, 2000)(Commission has jurisdiction of appeal regarding scoring of multiple choice question under § 2(b) but not under § 24 but appellant failed to establish that HRD’s choice of answer was error, mistake or in bad faith).

and Medford Police Superior Officers Association v Medford and Department of Personnel Administration, 7 MCSR 289, 291 (December 8, 1994). However, in Silva, the Commission addressed the issue of extending the life of a promotional list following an examination and determined that in order to seek relief, appellants in such cases must be aggrieved pursuant to G.L. c. 31, § 2(b). Since Silva did not involve E+E credit and the Appellant here is not aggrieved, Silva does not apply. Further in this vein, the Appellant asserts that the Commission has jurisdiction to overturn a decision of HRD's E+E determination pursuant to Boston Police Superior Officers Federation v. Civil Service Commission, 35 Mass.App.Ct. 688 (1993)("Federation"). In Federation, the Officers brought an action for certiorari in court under G.L. c. 249, § 4 to determine whether the Commission's decision that a promotional exam administered by HRD was unfair because it was comprised only of a multiple choice exam component and a training and experience component but not a performance component. There is no allegation in the instant case that HRD failed to include a performance component, nor does the Appellant allege that HRD failed to include the training and experience component in his score; rather, he disputes HRD's decision regarding his E+E credit. In view of HRD's statutory considerable discretion in granting E+E credit, its expertise, and the manner in which HRD has exercised its discretion, the Commission cannot state that HRD's actions were clearly arbitrary or otherwise unsupported by "logic or reason." Lynch v HRD, 13 MCSR 87, 89 (June 29, 2000). Further, the Appellant's disagreement with HRD's E+E determination does not render it arbitrary, unfair, or an abuse of discretion. HRD established a policy, approximately seven years prior to the Appellant's exam, that it would grant E+E credit only for degrees or credits from regionally accredited institutions of higher education. The U.S. DOE website references two forms of accreditation: regional and national. HRD's policy indicates that it chose to accept

credits from one of the two available sources of accreditations. I find nothing arbitrary, unfair or unreasonable in HRD's policy. Therefore, HRD did not exceed its authority and the Commission has no jurisdiction here.¹¹ A handful of errors in implementing the policy, amidst the many thousands of examinations HRD has processed, does not undermine the policy.

CONCLUSION

Based on the facts and the law provided herein, HRD's Motion to Dismiss is hereby *granted* and the appeal is *dismissed*.

Civil Service Commission

Cynthia A. Ittleman

By vote of the Civil Service Commission (Ittleman, McDowell and Stein, Commissioners; Bowman, Chairman) on March 6, 2014.

A true record. Attest:

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)(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

¹¹ The Appellant goes to great lengths to assert, *inter alia*, that HRD's determination is arbitrary because CSU is an appropriately accredited as an institution of higher education by the U.S. Department of Education and that its Fire Science courses and/or degree program are similar, for example, to that of Berkshire Community College, and/or that CSU's credits or degrees are transferable to regionally accredited institutions of higher education. *See* Opposition Exhibits 6 - 10. I note that some of them appear to apply only to CSU students who have earned B.A. degrees while others apply to CSU students who have earned A.A. degrees. One of the institutions, Waldorf College in Iowa, permits transfer of up to ninety (90) credit hours from CSU students who have earned a B.A. in Fire Science to receive a regionally accredited degree if the students take thirty-one (31) additional credit hours at Waldorf. An agreement between CSU and Edmonds Community College permits Edmonds students to transfer certain credits to CSU (not vice versa). An Agreement between Northcentral University and CSU states that Northcentral is a "private, distance learning institution" (Ex. 7) Pursuant to other agreements, certain CSU students can transfer to Strayer University for graduate programs and to Kaplan University. I make no findings in these regards as it is beyond the Commission's ken.

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.

Notice:

Jack J. Canzoneri, Esq. (for Appellant)

Andrew Levrault, Esq. (for Respondent)

John Marra, Esq. (HRD)