

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

100 Cambridge Street – Suite 200
Boston, MA 02114
617-979-1900

RICHARD J. CORREALE, JR.,

Appellant

B2-23-184

v.

HUMAN RESOURCES DIVISION,

Respondent

Appearance for Appellant:

Richard J. Correale, Jr., *Pro Se*

Appearance for Respondent:

Sheila B. Gallagher, Esq.
Labor Counsel
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

Commissioner:

Paul M. Stein

Summary of Decision

The Commission dismissed the Appellant’s appeal and affirmed the decision by the Human Resources Division (HRD) that revoked his eligibility to take the replacement Statewide Police Captain Promotional Examination. He had signed up, but did not take, the 2022 Statewide Captain Examination that HRD determined to be a prerequisite to sitting for the 2023 replacement examination. The Commission’s decision is premised on the expectation that the Malden Police Department will participate in the next statewide promotional examination expected to be offered in the fall of 2024.

DECISION ON RESPONDENT’S MOTION TO DISMISS

On September 21, 2023, the Appellant, Richard J. Correale Jr., a Police Lieutenant in the Malden Police Department (MPD), appealed to the Civil Service Commission (Commission)¹, contesting the decision by the Human Resources Division (HRD) that rescinded his registration to

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.01 (formal rules), apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

sit for the Statewide Police Captain Promotional Examination administered on September 23, 2023. I held a remote pre-hearing conference in this appeal, along with a related appeal (Bailey v. HRD, CSC No. B2-23-176) on October 2, 2023, attended by the two appellants, counsel for HRD and counsel for the MPD and the City of Malden, added as participants to the appeal. I encouraged the parties to consider whether the particular circumstances presented at the pre-hearing conference might suggest a path for the parties to resolve the dispute. When those efforts were not fruitful, on November 22, 2023, HRD filed a Motion to Dismiss, to which Lt. Correale responded on December 6, 2023. The City of Malden withdrew as a participant on November 21, 2023.

For the reasons stated below, HRD's motion is allowed and this appeal, and the related appeal in Bailey v. HRD, are dismissed. This Decision should not deter the Appellants from exploring with the MPD all other options available under civil service law to request that HRD administer another Captain's promotional examination at the earliest opportunity that is open to the Appellants as well as all other qualified MPD officers.

UNDISPUTED FACTS

Based on the submission of the parties, the following facts are not disputed:

1. The Appellant, Richard J. Correale, Jr., is a Lieutenant in the Malden Police Department (MPD).
2. Lt. Correale duly registered for Statewide Departmental Promotional Examination for Police Captain (2022 Captain Exam) administered by HRD on September 17, 2022. (*Claim of Appeal; HRD Pre-Hearing Submission*)
3. The HRD Examination Announcement for the 2022 Captain Exam contained the following statement regarding makeup examinations:

Makeup Examination: With the exception of current military personnel as described above, no candidate has a right to a makeup examination due to personal or professional conflicts on the testing date. Candidates are advised to consider this before applying for the examination. If you file an examination application by the application deadline, but are unable to appear for the examination on the examination date due to an emergency or unanticipated hardship, you may request a makeup examination by filing a written request with verifiable documentation to HRD no later than seven calendar days from the original written examination date. HRD reserves the right to approve or deny your request. HRD may require an additional examination processing fee upon approval of your request.

(HRD Pre-Hearing Submission)

4. Lt. Correale paid the \$150 examination processing fee and purchased the prescribed reading materials and began to prepare for the examination. For reasons that he has not more specifically explained, he did not sit for the 2022 Captain Exam on September 17, 2022. *(Claim of Appeal; HRD Motion)*

5. Originally five MPD Lieutenants had signed up for the 2022 Captain Exam but only two sat for the exam when it was initially administered on September 17, 2022. *(HRD Motion; Undisputed Fact Stipulated at Pre-Hearing)*

6. Lt. Correale did not request approval from HRD to take a makeup examination in lieu of sitting for the 2022 Captain Exam on September 17, 2022. *(Claim of Appeal; HRD Motion)*

7. On November 9, 2022, HRD informed Lt. Correale and all other applicants who had registered for 2022 Captain Exam administered on September 17, 2022 that, for reasons associated with an October 2022 Superior Court decision in Tatum v. Human Resources Division (the “Tatum Decision”), that September promotional examination would not be scored. *(Claim of Appeal; HRD Motion)*²

² After a comprehensive review of the promotional examination process, the *Tatum Decision* held that prior Police Sergeant Promotional Examinations over a period of years had unlawfully violated civil service law and discriminated against minority candidates. As the conclusion reached by the court in the *Tatum Decision* had implications for all promotional examinations, HRD elected to suspend scoring and administering future examinations pending a comprehensive review of the *Tatum Decision* and implementation of any necessary remedial action.

8. On June 8, 2023, Lt. Correale received the following notice from HRD:

Dear Richard Correale:

Re: Exam Fee Waived for 2022 Police Captain Examination

As you are aware, the police promotional exam, originally scheduled for September 17, 2022 had been cancelled. The Human Resources Division (HRD) refunded the exam fee to all test takers. HRD is announcing the date of September 23, 2023 for the re-administration of the cancelled exam.

HRD is waiving the examination fee for the re-administration of the exam. Any applicants who originally applied for and paid to take the September 17, 2023 exam will be automatically enrolled to take the new exam.

More information on the new exam will be available in the coming weeks.

Thank you,

Civil Service Team

(Attachment to Claim of Appeal) (emphasis added)

9. On June 10, 2023, Lt. Correale received another notice from HRD as follows:

Dear Richard Correale:

Re: Reading List Update of 2022 Police Captain Examination

HRD has completed a review of the reading list for the upcoming rescheduled exam to be administered on September 23, 2023.

A link to the reading list is provided for your reference.

NOTE: The reading list can be found under the year 2022, with the notation of Amended.

HRD will provide additional updates as information becomes available.

Thank you,

Civil Service Team

(Attachment to Claim of Appeal)

10. Lt. Correale purchased the new books in the Amended reading materials and began planning to take the September 23, 2023 rescheduled 2022 Captain Exam, including using approximately two weeks of vacation time to study. *(Claim of Appeal)*

11. On August 18, 2023, five weeks before date of the rescheduled examination, HRD sent Lt. Correale the following notice:

Dear Richard Correale:

Please be advised that after HRD review it has been determined that you did not sit for the 2022 Police Promotional exam series.

Only candidates who applied, sat for, or were approved for a makeup exam are eligible for the re-administration of the 2022 police promotional exam series: 2022 Police Captain.

Therefore, you are not eligible for the 2022 re-administration scheduled for September 23, 2023.

If you have any questions or need additional assistance, please email civilservice@mass.gov.

Sincerely,

The Civil Service Team

(Attachment to Claim of Appeal) (emphasis added)

12. After attempts were made to contact HRD's Civil Service Unit without success, Lt. Correale filed this appeal. *(Claim of Appeal)*

13. As of the date of the 2022 Captain Exam, no active eligible list existed for the position of MPD Police Captain. *(Administrative Notice; Undisputed Fact Stipulated at Pre-Hearing)*

14. The eligible list for MPD Police Captain established from the re-administered 2022 Captain Exam will contain no more than two names. *(Undisputed Fact Stipulated at Pre-Hearing)*

15. HRD has applied the same rule for eligibility to sit for police sergeant and lieutenant—and fire service—promotional examinations that were cancelled and re-administered as a result of the *Tatum Decision* as it has applied to the 2022 Captain Exam; namely, only candidates who had signed up for and taken the originally administered examination were allowed to sit for the examination on the re-administered date. *(HRD Motion)*

APPLICABLE LEGAL STANDARD

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 1.01(7)(g)(3). A motion to resolve an appeal before the Commission, in whole or in part, via summary decision may be filed pursuant to 801 C.M.R. 1.01(7)(h). An appeal may be disposed of, however, on summary disposition only when, “viewing the evidence in the light most favorable to the non-moving party”, the undisputed material facts affirmatively demonstrate that the non-moving party has “no reasonable expectation” of prevailing 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). See also Mangino v. HRD, 27 MCSR 34 (2014) and cases cited (“The notion underlying the summary decision process in administrative proceedings parallels the civil practice under Mass.R.Civ.P. 56, namely, when no genuine issues of material fact exist, the agency is not required to conduct a meaningless hearing.”); Morehouse v. Weymouth Fire Dept., 26 MCSR 176 (2013) (“a party may move for summary decision when . . . there is no genuine issue of fact relating to his or her claim or defense and the party is entitled to prevail as a matter of law.”)

ANALYSIS

The undisputed facts, viewed in a light most favorable to the Appellant, establish that this appeal must be dismissed.

Among other responsibilities delegated to HRD under civil service law, HRD is vested with broad authority to design and administer civil service examinations. G.L. c. 31, §§ 3 through 5; § 16 and § 22; Personnel Administration Rules, PAR.06. Generally, absent a finding that HRD has acted unreasonably, arbitrarily, or otherwise in violation of basic merit principles, the Commission has consistently deferred to HRD’s technical expertise in matters involving the design, administration, and interpretation of civil service examinations. See, e.g., Ralph v. HRD, 32 MCSR 73 (2019), *aff’d sub nom.* Ralph v. Civil Service Comm’n, 100 Mass. App. Ct. 199 (2021); Carroll v. HRD, 27 MCSR 157 (2018); Peters v. HRD, 23 MCSR 647 (2010). See also Ash v. Police Comm’r of Boston, 11 Mass. App. Ct. 650, 652 (1981) (“the Personnel Administrator [HRD] is the skilled professional authorized by G. L. c. 31 to decide technical matters such as the scoring and interpretation of examinations.”)

HRD's broad authority over the administration of examinations is not absolute. See Mahan v. HRD, 34 MCSR 278 (2021) (fair test appeals dismissed as untimely but Commission noted concern that nine candidates had legitimate questions about the relevancy and accuracy of certain questions on a Parole Officer promotional examination and encouraged HRD to take proactive measures to address them so as to bolster future confidence in the examination process); Nugent v. HRD, 31 MCSR 114 (2018) (noting that when HRD's actions, apparently motivated to save administrative costs, may have had the unintended consequence of creating a process that potentially lacks the type of transparency that instills confidence in the examination process, it "warranted a second look").

HRD correctly cites three recent Commission decisions that supported HRD's decision to limit the eligibility to sit for a re-administered promotional examination necessitated by the *Tatum Decision* against challenges that such limitation was unfair, unreasonable, arbitrary or capricious. Dasey v. HRD, 36 MCSR 64 (2023), involved the appeal of a Boston Fire Captain who did not register for the May 2022 Boston District Fire Chief examination administered by HRD but never scored (initially, for reasons other than the *Tatum Decision*). Ranahan v. HRD, 36 MCSR 88 (2023) involved a Boston Fire Captain who had not been eligible to take the May 2022 examination. Those two appellants sought permission to register for the re-administration of that promotional examination, eventually rescheduled for March 2023. HRD denied the request on the grounds that it would only allow those candidates who participated in the May 2022 examination to take the March 2023 exam and would not allow new candidates to register for the re-administered examination.

In Dasey and Ranahan, HRD contended that (1) the May 2022 cohort of exam takers were blameless and it would not be fair to those candidates who had once taken the May 2022 exam and

who had the expectation that an eligible list would be established from that complement of test takers as constituted the May 2022 cohort; (2) adding new registrants would adversely impact the logistics of administering the replacement examination; and (3) HRD had announced that it would be administering fire promotional examinations on an annual basis, so that, going forward, appointing authorities would be able to participate in examinations each and every year, rather than having to wait several years as often had been the past practice.

The Commission dismissed those appellants' appeals, finding that nothing in the civil service law required HRD to open up a re-administered examination to those who did not participate in a prior, nullified examination, and agreeing that HRD had provided a rational explanation for its decision that was neither unreasonable, arbitrary or capricious. In reaching its decision, the Commission took account of the complications that had been created by the *Tatum Decision* throughout the public safety civil service realm, in which there was bound to be "discomfort and uncertainty" that "inevitably produces winners and losers, based on how each civil service community responds" to the choices it faced; the Commission also recognized "the (very) consequential nature of these divergent outcomes on the men and women who have given years of service in vital – and dangerous – public safety positions." *Id.*

A third matter, In Re: Request by Jonathan Blodgett to Investigate the Human Resources Division's Decision to Limit the Persons Entitled to Take the 2023 Police Promotional Examination, 36 MCSR 269 (2023), involved a request by a recently promoted Peabody Police Sergeant (who had been ineligible to take the Statewide Promotional Examination for Police Sergeant initially administered on September 17, 2022) to allow him to register for the re-administration of the exam scheduled for September 23, 2023. HRD denied his request because of its practice to permit only those candidates who actually sat for the initial September 2022

administration to take the September 2023 re-administered exam. In denying the request for an investigation, the Commission adopted my conclusion that:

I find nothing in the facts of the present request or the applicable law to distinguish this matter from those prior requests. In fact, the recent Superior Court decision denying a temporary restraining order to the Tatum Plaintiffs and declining to allow the Petitioner to intervene in that civil action further reinforces the Commission's prior conclusions that HRD's decision to restrict those entitled to take the re-administration of the 2022 promotional examination to those who registered for the originally scheduled 2022 examinations was within its authority as a matter of sound discretion over the administration of civil service examinations, and was neither unreasonable, arbitrary, nor capricious.

Id., 36 MCSR at 275.

Finally, in Hall & Phelon, 36 MCSR 289 (2023), the Commission dismissed the appeals of two Westfield Police Lieutenants who had been denied the opportunity to register for the 2022 Captain Exam because they had not registered for the initial September 17, 2022 examination. The two appellants, then the only two lieutenants on the current Westfield Police Captain's eligible list created in 2021, chose not to register for the September 2022 Captain's exam (which would have been merged with the 2021 list). Four other candidates registered for the 2022 Captain's Exam, but only two sat for it. Consistent with its standing rule, HRD allowed the two Westfield Lieutenants who sat for the initial 2022 Captain Exam to sit for the re-administration on September 17, 2023, but denied the requests of the two appellants because, despite having signed up to take the examination, they did not actually sit for that initial exam. In granting HRD's motion for summary decision and denying those appeals, the Commission stated:

The Appellants have not shown that HRD's decision here is arbitrary or capricious. Further, as noted by HRD in their cross motion, HRD has consistently held that eligibility to sit for the re-administered promotional examinations is limited to those who sat for the September 2022 promotional examinations that were never scored. We see nothing here that sufficiently distinguishes the Appellants' request from HRD's prior determinations which have been upheld by the Commission. Finally, the Commission considered that nothing in the civil service law or rules prevents the City from promoting one of the

Appellants to permanent, full-time police captain now. Rather, the City has simply exercised its discretion not to do so from a short list of candidates.

Id., 36 MCSR at 294.

The Commission's prior decision are fairly distinguishable from Lt. Correale's appeal in some respects. On the one hand, unlike the other appellants, who either were ineligible to register for the initial 2022 examination (Ranahan, Blodgett) or chose not to register (Dasey, Hall, Phelon), Lt. Correale and Lt. Bailey did duly register for the initial 2022 examination.

Similarly, both Lt. Correale and Lt. Bailey were informed by HRD in early June 2023 that, as "applicants who originally applied for and paid to take the September 17, 2022 exam, they had been automatically registered to take the rescheduled Statewide Captain's Examination without additional fees. Also, in early June 2023, HRD provided both Lt. Correale and Lt. Bailey with the link to the new list of study materials for the September 23, 2023 rescheduled exam. In reasonable reliance on these notices, both officers purchased the materials and began to prepare to take the examination. Then, in late August, more than two months later, HRD notified Lt. Correale that he was not eligible to take the rescheduled exam because, as HRD now stated, only candidates who had "applied, sat for, or were approved for a makeup exam" were eligible for the re-administration of the 2022 Captain Exam and, "after review", it had been determined that he had not actually sat for the original exam.³

Thus, here, the issue is not whether HRD's decision to limit eligibility for a rescheduled examination to those candidates who were eligible and did register for the initial examination

³ Although HRD's intent is not in doubt, I note that the comma and the absence of the word "and" after the first clause "who applied" in HRD's August notice does leave the plain meaning of the language ambiguous, at best; i.e., does a candidate "who applied" for the original exam continue to hold a stand-alone reason to qualify to take the rescheduled exam, or must that criterion be coupled with either the second or the third criteria ("sat for, or were approved for a makeup exam").

is reasonable but, rather, whether it is reasonable to deny eligibility to a candidate who did register, but did not sit for, an examination that was subsequently nullified and who had originally been led to believe by HRD that he was eligible was eligible for the readministered exam and reasonably relied on that representation to his detriment.

On the other hand, Lt. Correale's appeal to the Commission was filed two calendar days before the September 21, 2023 examination date. He did not seek any interim relief such as allowing him to sit for the exam, pending a decision on his eligibility, which, as a practical matter probably would have been unlikely. Thus, the only relief possible here would be to permit him to take a makeup examination at some future date.

Finally, based on the best estimates of the parties, the time frame for possible promotion of a current MPD Lieutenant to Captain is not imminent or immediately foreseeable.

I have carefully considered the Commission's prior decisions and the distinguishing factors described above, as presented in this appeal. Although HRD's policy to limit the right to sit for a rescheduled examination to candidates who previously sat for the prior, cancelled examination, cannot be found to be arbitrary and unreasonable as a general rule, I conclude that Lt. Correale has articulated a compelling argument that, on the particular, undisputed facts of this case **revoking** his eligibility to take the rescheduled 2022 Captain Exam after misleading him to believe he was eligible, was unreasonable. In particular, Lt. Correale invested considerable time and effort in reliance on HRD's ambiguous and, in part, misleading representations that reasonably led him to believe that she would be allowed to sit for the rescheduled 2022 Captain Exam and to begin to study and to take vacation time to study accordingly. I also conclude, however, that, as there are appropriate alternatives available to

the Appellant, he has not been aggrieved by HRD's actions such that the Commission must exercise its discretion to grant him equitable relief.

Specifically, HRD has announced that it intends to offer public safety promotional examinations on an annual basis. So long as the MPD participates in the 2024 police promotional examination cycle, it would afford Lt. Correale and all other potential candidates a timely shot at consideration for the next likely promotion to MPD Captain eligible that is roughly equivalent to the result that would be achieved by granting relief and ordering HRD to conduct a separate make-up examination for the exclusive benefit of Lt. Bailey (and Lt. Correale). In either case, candidates who passed such a make-up examination or who passed a potential 2024 exam would be merged into the eligible list created from the recent rescheduled 2022 Captain Exam. Moreover, candidates on that list created from the 2022 Captain Exam would be able to elect to take the 2024 examination and improve their standing or remain on the list according to their score on the readministered 2022 Captain Exam. To that end, while the Commission will not order relief regarding such a future examination at this time, as the Commission has noted in its prior decisions, going forward, I urge both HRD and the MPD to recognize "the (very) consequential nature" of the choices that HRD and each civil service community faces "on the men and women who have given years of service in vital – and dangerous – public safety positions." Should the missteps taken here not be cured, the Commission will remain open in the future to consider appeals from all candidates who act diligently to show that they have been aggrieved and are entitled to equitable relief should the circumstances warrant it.

CONCLUSION

For the reasons stated above, HRD's Motion to Dismiss is *allowed*, and the Appellant's appeal

under Case No. B2-23-176 is *dismissed*.

Civil Service Commission

/s/Paul M. Stein

Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chair; Dooley, McConney, Stein, and Tivnan, Commissioners) on December 28, 2023.

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 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:

Richard J. Correale, Jr. (Appellant)

Sheila B. Gallagher, Esq. (for Respondent)