

COMMONWEALTH OF MASSACHUSETTS

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

BRIAN DASEY,
Appellant

v.

E-22-168

HUMAN RESOURCES DIVISION,
Respondent

Appearance for Appellant:

Pro Se
Brian Dasey

Appearance for Respondent:

Michele Heffernan, Esq.
General Counsel
Human Resources Division
100 Cambridge Street: Suite 600\
Boston, MA 02104

Commissioner:

Christopher C. Bowman

SUMMARY OF DECISION

Concluding that HRD's decision to limit registration for the March 25, 2023 District Fire Chief examination to those who registered for the examination administered in May 2022 was permissible under the civil service law and was not arbitrary or capricious, the Commission dismissed the Appellant's appeal in which he sought an order overturning HRD's decision.

DECISION ON HRD'S MOTION FOR SUMMARY DECISION

On December 12, 2022, the Appellant, a Boston Fire Captain, filed a non-bypass equity appeal under G.L. c. 31, § 2(b) with the Civil Service Commission (Commission), asking the Commission to order the state's Human Resources Division (HRD) to allow him to sit for a Boston District Fire Chief promotional examination to be held on March 25, 2023.

On January 10, 2023, I held a remote pre-hearing conference which was attended by the Appellant and counsel for HRD. The following facts do not appear to be disputed:

1. On July 21, 2017, the Appellant was promoted to BFD Fire Captain.
2. On May 21, 2022, HRD administered an examination for Boston District Fire Chief. The Appellant did not register for this examination.
3. The results from that examination, administered to others, were not issued when it was discovered that an unacceptable percentage of the exam items were derived from source material not identified in the reading material.
4. A Boston District Fire Chief examination was scheduled to be administered by HRD on November 19, 2022. HRD only registered those candidates who participated in the May 2022 examination for the November 2022 examination.
5. After the issuance of the Superior Court's decision in [Tatum et al v. Human Resources Division](#) on October 27, 2022, HRD did not administer the Boston District Fire Chief exam or state-wide promotional examinations for Fire Lieutenant and Fire Captain, both scheduled for November 19, 2022.
6. After the Commission held a show cause conference regarding this matter on November 17, 2022, HRD convened a stakeholders' committee consisting of various stakeholders including the President of the Professional Firefighters of Massachusetts and the President of the Boston Firefighters Union Local 718. The stakeholders committee meets once every other week.
7. A Boston District Fire Chief examination is now scheduled to be held on March 25, 2023. HRD is only registering those candidates who participated in the May 2022

examination for the March 25, 2023 examination.¹

8. The examination being administered on March 25, 2023 will have a different format than the May 2022 examination. In addition to assessing technical knowledge, the written portion of the examination will now include a situational judgment section to evaluate candidates' competencies using hypothetical situations that are based on real life work situations. Candidates' total scores will be comprised of this two-part written component, as well as the education and experience component, with the weight of each component determined by HRD based on the input of subject matter experts.
9. Upon being notified of the March 25, 2023 examination, two candidates² who participated in the May 2022 examination contacted the Commission via email seeking confirmation that HRD would not register additional candidates for the March 25 examination, which they argued was the only fair way to proceed. HRD confirmed that it would not be registering additional candidates.
10. The Appellant and one other BFD Fire Captain,³ both of whom did not sit for the May 2022 examination, have filed appeals with the Commission, asking the Commission to order HRD to allow new candidates to register for the March 25 examination.

The Appellant also makes the following factual assertion which, solely for the sake of ruling on this motion, I am required to accept as true:

- A. Between June 9, 2022 and January 25, 2023, eight Boston Fire Captains (Cherry, Higginbottom, Walsh, Johnson, Mitchell, Ostiguy, Estrella and one other not identified),

¹ The one exception to this policy appears to be if a candidate, prior to the administration of the May 2022 examination, submitted a timely request to take a make-up examination and said request was approved by HRD.

² Captain Keith M. Kelly and Captain Michael Feeney.

³ BFD Fire Captain Kevin Ranahan.

“who likely applied for the May 2022 exam” were promoted to District Chief, thus reducing the number of potential District Fire Chief exam applicants by eight.

Motion for Summary Decision Standard

When a party is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and he or she is entitled to prevail as a matter of law, the party may move, with or without supporting affidavits, for summary decision on the claim or defense. 801 CMR 1.01(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 an evidentiary hearing. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). Accord Milliken & Co. v. Duro Textiles LLC, 451 Mass. 547, 550 n.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).

HRD's Argument

HRD argues that, even when viewing the facts in the light most favorable to the Appellant, HRD's decision to limit the applicants for the March 2023 exam to those who registered for the May 2022 exam was not arbitrary or capricious. In support of its argument that its decision here was reasonable, unprejudiced, and grounded in commonsense, HRD states:

- I. The May 2022 candidates are blameless in this process and should be able to take the promotional examination and have an eligible list established with the original complement of test takers as constituted the May 2022 cohort.
- II. Increasing the number of test-takers will impact the logistics of administering the exam and may lead to delays.
- III. HRD intends to resume its annual schedule of administering fire promotional examinations, allowing any appointing authority to participate in examinations each and every year.

Appellant's Argument

The Appellant mounts a two-prong argument. First, he argues that the March 2023 exam is a “new” examination and, as such, he argues that the civil service law and rules *explicitly require* HRD to open the registration up to additional applicants. He lists the following factors in support of the premise that this is a bona fide “new examination” including that: a) a new job analysis was completed; b) a new component has been added; and c) different weights will be assigned to each component of the examination as compared to the May 2022 examination. Second, the Appellant argues that HRD’s decision to not open the March 2023 examination up to new applicants is arbitrary and capricious, creating an unfair advantage for a now-smaller group of applicants with more time to study for a promotional examination that will form the basis for the next round of promotions.

Analysis

The facts underlying this appeal reinforce the wide-reaching impact of the Tatum decision on those public safety employees who are part of the civil service system in Massachusetts. In short, as this appeal shows, the decision reaches beyond those applicants who

were scheduled to take the November 2022 (now March 2023) examination, but, rather, has also impacted many others, including the Appellant who likely planned on taking the next regularly scheduled promotional examination for Boston District Fire Chief (which back in May of 2022 reasonably could have been expected to be repeated no later than May of 2024). The precarious domino effect does not stop there. The resulting extension of eligible lists, the question of whether to revive previously-revoked eligible lists, and a myriad of other related issues are confronting police and fire departments across Massachusetts. This not only creates discomfort and uncertainty, it also inevitably produces winners and losers, based on how each civil service community responds to these events.

For example, keeping eligible lists in place longer than anticipated may improve the chances of promotion of a candidate ranked lower on that eligible list, who may not have been considered for promotional appointment if a new examination had been administered on schedule (resulting in the establishment of a new eligible list, with others ranked higher, before a particular vacancy arose). Conversely, a candidate who is not on the existing eligible list, but who was scheduled to take an examination that would have resulted in a new eligible list in 2022, may now have to wait longer for promotional opportunities—or, in some cases, lose out altogether on a promotional appointment filled by a candidate whose name remained on the extended eligible list. I acknowledge 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.

Here, however, the Appellant has not shown that the civil service law and rules *require* HRD to register him for the March 2023 promotional examination; nor has he shown that HRD's decision was arbitrary or capricious. In his brief, the Appellant takes literary license in regard to

the relevant civil service law. Specifically, the Appellant writes:

[Section 19 of Chapter 31] says “The administrator *shall* prepare a notice of *each* competitive examination to be held for a promotional appointment. [Sections 9 and 59] state that such a promotional examination is open to *all* who have the requisite year in the next lower title. Dasey respectfully suggests HRD has no choice but to issue a new notice for the new changed exam, open to all Captains who now have the requisite one year because do anything else is both *contrary to law* and *prejudicial* to all Captains with the one year. (Emphasis in Appellant’s brief)

To ensure clarity, the relevant parts of Sections 19 and 59 actually state:

Section 19

The administrator shall prepare a notice of each competitive examination to be held for a promotional appointment in the official service. The administrator shall send copies of such notice to the appointing authority for the departmental unit in which the promotional appointment is to be made and to the appointing authority for any other departmental unit in which persons eligible to take such examination may be employed. Any appointing authority receiving such notice shall cause it to be posted in conspicuous places in the departmental unit and in each of its branch offices. Such appointing authority shall mail a copy of such notice to any eligible employee of such unit who, during the entire period of such posting, is on sick or military leave, on vacation, or off the payroll. The appointing authority shall make provision for fully informing all employees in such departmental unit of the places where such notices are posted.

Each notice required by this section shall state the duties, compensation, and title of and required qualifications for the position for which the examination is to be held, the time, place and manner of applying for admission to the examination, the entrance requirements, and any other information which the administrator determines should be included because of its relevancy and usefulness.

Section 59

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, or the number of applicants eligible for the examination 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.

Neither of these sections, standing alone or read together, specifically address whether HRD can *limit registration* for the examination to be administered in March 2023 to those who registered for the examination that was administered in May 2022 (but subsequently nullified). Further, the Appellant's emphasis on the language in Section 59 stating that the promotional examination must be "open to *all* permanent employees in lower titles in such force" is only applicable when an insufficient number of applicants has signed up for the examination, which is not the case here.

HRD is responsible for "conduct[ing] examinations for purposes of establishing eligible lists" for promotion. G.L. c. 31, § 5(e). No section of the civil service law or rules specifically addresses the question presented in this appeal; rather, the overall scheme of the civil service system gives broad discretion to HRD when making such decisions. See Callanan v. Personnel Adm'r for Commonwealth, 400 Mass. 597, 601 (1987), (referencing the "sound discretion" afforded to HRD). Similarly, Section 16 of Chapter 31 states that examinations shall be conducted under the direction of HRD who shall determine their "form, method, and subject matter."

Thus, the question before the Commission is whether HRD, in exercising its broad discretion, acted arbitrarily and capriciously by deciding to limit registration for the March 2023 examination to those who registered for the May 2022 examination. "A decision is arbitrary and capricious when it lacks any rational explanation that reasonable persons might support." Cambridge v. Civ. Serv. Comm'n, 43 Mass. App. Ct. 300, 303 (1997). That is not the case here.

HRD has offered a rational explanation as to why it made the decision to limit registration to those who had registered to participate in the May 2022 examination. Specifically,

HRD based its decision largely on the premise that, given the rather unique events that have transpired here, the May 2022 candidates should be able to take the promotional examination and have an eligible list established with the original complement of test takers as had been expected to result from the original administration. The following explanation supports the reasonableness of HRD's decision. If the promotional examination administered in May 2022 had been scored, an eligible list would have been established a few months later in 2022 and the Appellant most likely would not have had the opportunity to participate in a promotional examination (and be placed on an eligible list) until 2024. Put another way, it is at least "reasonable" for HRD to deny the Appellant and other similarly situated individuals the option of joining the promotional list a year *earlier* (i.e., in 2023) than would have been the case had there been no issues with the administration of the May 2022 examination.⁴

Conclusion

For all of the above reasons, HRD's Motion for Summary Decision is allowed and the Appellant's appeal under Docket No. E-22-168 is ***dismissed***.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chair

By a vote of the Civil Service Commission (Bowman, Chair; Dooley, McConney, Stein and Tivnan, Commissioners) on February 23, 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.

⁴ Given the unique circumstances presented here, it may behoove the Boston Fire Department to consider participating in subsequent promotional examinations for this position on an expedited basis.

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 to:

Brian Dasey (Appellant)

Michele Heffernan, Esq. (for Respondent)