

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

MICHAEL DELANEY,
Appellant

v.

G1-10-296

HUMAN RESOURCES
DIVISION,
Respondent

Appellant’s Attorney:

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Cornell & Gollub
75 Federal Street
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Respondent’s Attorney:

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Commissioner:

Christopher C. Bowman

DECISION

The Appellant, Michael Delaney (hereinafter “Delaney” or “Appellant”), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (hereinafter “Commission”), claiming that the state’s Human Resources Division (hereinafter “HRD”) erroneously removed his name from an eligible list of police officer candidates on November 1, 2010.

The appeal was filed with the Commission on November 9, 2010. A pre-hearing conference was held on November 30, 2010. Both parties filed a Motion for Summary Decision and a motion hearing was held on December 20, 2010.

Based on the briefs submitted, the attachments and the statements at the motion hearing, I find the following:

FINDINGS OF FACT:

1. The Appellant is a lifelong resident of Milton, Massachusetts, a graduate of Milton High School and an active participant in the Town's social and business affairs.
(Appellant's Brief)
2. The Appellant obtained his Bachelor's degree from Boston College and is now employed there as a campus police officer after recently completing the Transit Police Academy training program. (Appellant's Brief)
3. On May 19, 2007, HRD held an open competitive examination for Police Officer, Announcement #8580. The Appellant took and passed this examination with a score of "Band 9". HRD established the eligible list from the 2007 examination on November 1, 2007.¹ (HRD Brief: Attachment A)
4. On June 28, 2008, the Appellant took and passed the next open Competitive Examination for Police Officer, Announcement #8027, with a score of band 10 (98)². (HRD Brief: Attachments B and C)
5. On November 1, 2008, HRD established a new eligible list for Police Officer by merging the names of those who passed the 2007 examination with the new eligible list from the 2008 examination. (HRD Brief: Attachment B)
6. Pursuant to M.G.L. c. 31, § 25, if an individual passed the 2007 and 2008 examination, his/her eligibility was determined based on the results of the 2008

¹ Examination scores from the 2007 Police Officer examination were initially issued as bands.

² HRD subsequently reverted to using raw scores and "unbanded" the scores.

examination. Consequently, the Appellant's eligibility on the 2008 Police Officer eligible list was determined by his score on the 2008 examination, 98. (HRD Brief: Attachment C)

7. On April 25, 2009, HRD held another open competitive examination for: 1) Police Officer and State Trooper, Announcement #8434; 2) just Police Officer, Announcement #8265, and 3) just State Trooper, Announcement #8373. (HRD Brief: Attachment D)
8. On the examination poster for the 2009 examinations, applicants were instructed to apply for the examination(s) they wanted via the appropriate announcement number. Applicants were instructed to choose whether they wanted their examination results to apply toward eligibility for both titles of Police Officer and State Trooper, or only Police Officer, or only State Trooper. (HRD Brief: Attachment D)
9. The examination poster also stated that "Applicants will have to select one of [these] options when applying. Applicants are reminded to carefully select their choice **BECAUSE YOU WILL NOT BE ALLOWED TO CHANGE YOUR CHOICE AFTER THE EXAMINATION IS HELD ON APRIL 25, 2009.**" (emphasis in original.) (HRD Brief: Attachment D)
10. The examination poster also informed applicants that if they passed the 2008 Police Officer examination but chose not to take the 2009 Police Officer examination, their eligibility would expire in October 2010. Specifically, the examination poster stated, "Q: I took the 2008 Police Officer test and I do not want to be a State Trooper, do I need to take the 2009 test to remain on the Police Officer list. A: No, if you took the 2008 test you may opt not to take the 2009 exam, since your eligibility from the 2008

exam will continue until October 2010 on the Police Officer eligible list.” (emphasis added). (HRD Brief: Attachment D)

11. Applicants were also informed that if they took “both the 2008 and 2009 Police Officer exams, your 2009 exam result will replace your 2008 exam result on the Police Officer list with the exam result 2009 list becomes active...” (HRD Brief: Attachment D)
12. On or around March 30, 2009, the Appellant signed up online to take only the State Trooper examination. (HRD Brief: Attachment E)
13. On April 25, 2009, the day of the examination, the Appellant wrote that he was applying only for the State Trooper examination by writing the Announcement number “8373” and filling in the corresponding bubbles for each number on his answer sheet. The Booklet number is the announcement number for the examination. (HRD Brief: Attachment F).
14. The Appellant passed the 2009 State Trooper examination, with a score of 94. (HRD Brief: Attachment G)
15. On March 16, 2010, HRD established a new eligible list for Police Officer. The results from the 2008 Police Officer examination were merged with the 2009 Police Officer examination results.³ (HRD Brief: Attachment F)
16. The Appellant stated that he believed the term “merged” to mean that the 2008 and 2009 eligible lists would be “merged for all purposes” and that his eligibility would extend for an additional two years. (Appellant’s Brief)

³ The 2008 examination scores were unbanded. Names of those who only took 2007 examination were removed from eligible list.

17. The Appellant stated that he formed his belief regarding an additional year of eligibility by calling and speaking to a male HRD representative. The Appellant states that he told the HRD representative that he currently had a score of Band 10 and then asked the HRD representative if there would be “any benefit” to taking the 2009 police officer examination and was told “no”. (Appellant’s Brief)
18. Pursuant to G.L. c. 31, § 25, on November 1, 2010, the eligibility of those individuals who only took the 2008 Police Officer examination expired. The Appellant’s name was removed from the eligible list for Police Officer on November 1, 2010. (HRD Brief)
19. Also on November 1, 2010, the Appellant was no longer able to obtain his online account information and was informed by HRD that his name had been removed from the eligible list. This appeal followed. (Appellant’s Brief)

Appellant’s Argument

The Appellant states that he was confused by HRD policies, the meaning of the term “merged” and how it would impact his standing on an eligible list of candidates for police officer in Milton. Further, the Appellant states that when he asked an unnamed HRD representative if there was “any benefit” to taking the 2009 examination for police officer, he was told “no”. As a result, the Appellant states that he believed that his eligibility for police officer would be valid through 2011, even though the last examination he took was in 2008 and he did not take the police officer examination offered in 2009. The Appellant further states that he was confused by HRD’s extension of the 2007 eligible list as a result of pending litigation regarding the issue of “banding” scores.

Citing the prior Commission decision of Giacalone v. City of Gloucester and HRD (21 MCSR 460 (2008)), the Appellant argues that there is precedent for establishing that a person can be aggrieved by HRD's lack of clarity and inconsistency regarding exam-related issues (Giacalone involved the issue of establishing veteran preference).

For all of the above reasons, the Appellant argues that he is an aggrieved person who was harmed through no fault of his own when HRD removed his name from the eligible list of candidates for police officer on November 1, 2010.

The Appellant seeks whatever relief the Commission deems appropriate that would allow him to be considered for upcoming police officer vacancies in the Milton Police Department and points to the Town's support of his appeal as further reason to grant such relief.

HRD's Argument

HRD argues that the Appellant's appeal should be dismissed because the failure of the Appellant to be on the current eligible list for Police Officer is not the result of a violation of the civil service law or rules and his rights were not abridged, denied or prejudiced. As such, HRD argues that the Appellant is not a person aggrieved.

According to HRD, the facts clearly establish that the Appellant's eligibility from the 2008 examination expired as a matter of law on November 1, 2010 and that HRD does not have the discretion to extend eligibility for any reasons beyond those listed in Section 25.

HRD argues that, on March 30, 2009, when the Appellant signed up for the 2009 examination, and again on April 25, 2009, when he took the examination, he affirmatively and knowingly chose to take only the State Trooper examination and not

apply his examination score toward eligibility for the Police Officer position. To apply the Appellant's State Trooper examination score toward eligibility as a Police Officer, according to HRD, would violate basic merit principles for the following reasons. The Appellant is now asking the Commission for relief with the benefit of knowing that he scored well, 94, on the 2009 State Trooper examination. At the time of the examination, the Appellant affirmatively chose to have his guaranteed score of 98 carried forward through the expiration of the two year eligibility period, i.e., October 31, 2010, rather than having an unknown and possibly lower score that would provide him a new eligibility period of two years starting on March 16, 2010. Based on the Appellant's decision to only take the State Trooper examination in 2009, HRD argues that it properly granted him two years of eligibility from November 1, 2008 through October 31, 2010. Further, according to HRD, over one thousand (1,000) applicants who passed the 2008 Police Officer examination, chose to roll the dice for an extended eligibility period of two new years and had their eligibility determined by their 2009 examination score, for better or worse. To now permit the Appellant to apply his 2009 State Trooper examination score to the Police Officer position with the benefit of knowing his score, would, according to HRD, violate basic merit principles. HRD argues that every individual who passed the 2008 Police Officer examination with a score of 94 and above who then took the 2009 Police Officer examination and scored below a 94 would be aggrieved because the Appellant, if the Commission grants him relief, would surpass them on the Police Officer eligible list.

Conclusion

Most of the relevant facts are not in dispute here. The Appellant aspires to be a police officer in his home town of Milton, a community where such appointments are subject to the civil service law. Thus, candidates such as the Appellant must first take and pass a competitive civil service examination and have their names placed on an “eligible list”, created by HRD in rank order based on the Appellant’s exam score, veteran’s status and residency.

The Appellant took and passed a civil service examination for police officer in 2007. His score was high enough to be included in “Band 9”, the second highest “band” of scores after veterans.

The Appellant then took and passed a civil service examination for police officer in 2008. Regardless of whether his score was higher or lower than his 2007 score, Section 25 requires that his 2008 score be used on a “merged” eligible list. The Appellant’s 2008 score (subsequently “unbanded” to a raw score of 98) placed him in a higher band of candidates, Band 10. This higher score was used for the new “merged” list.

HRD offered another civil service examination for police officer in 2009. Candidates taking the 2009 examination had the option of using this examination to qualify for consideration as a State Trooper.

The Appellant, and hundreds of others who also took the 2008 examination, had a choice at the time: 1) take the 2009 examination for police officer and risk receiving a lower score that would replace the 2008 score on a merged list; or 2) *don’t* take the 2009 examination for police officer and preserve the 2008 score.

For those individuals, such as the Appellant, who chose option 2, their eligibility for appointment as a police officer, expired on October 31, 2010, exactly two years after the

creation of an eligible list from the 2008 examination. As poignantly – and correctly – stated by HRD, over one thousand (1,000) applicants who passed the 2008 Police Officer examination chose option 1 and “rolled the dice” for an extended eligibility period of two new years and had their eligibility determined by their 2009 examination score, for better or worse.

G.L. c. 31, § 25 is clear on how long a candidate’s name can remain on an eligible list of candidates stating:

“The administrator [HRD] shall establish, maintain and revise eligible lists of persons who have passed each examination for appointment to a position in the official service. The names of such persons shall be arranged on each such list, subject to the provisions of section twenty-six, where applicable, in the order of their marks on the examination based upon which the list is established.

Persons on an eligible list shall be eligible for certification from such list for such period as the administrator shall determine, but in any event not to exceed two years, unless one of the following exceptions applies: (1) such eligibility is extended by law because such persons are in the military or naval service; (2) the administrator is temporarily enjoined by a court order from certifying names from an eligible list, in which case eligibility of persons on such list shall be extended for a period equal to the duration of such order; or (3) no new list is established, in which case eligibility of all persons on such list shall be extended until a new list is established for the same position for which the original list was established; provided, however, that the administrator may revoke the eligibility of the entire list or of any persons on such list subsequent to said two-year period if he shall determine that the effective maintenance of the merit system so requires such revocation and, provided further, that a written notice and explanation for said revocation is sent to the clerks of the senate and house of representatives.” (emphasis added)

None of the statutory exceptions are applicable to the present matter. Specifically, the Appellant was not in military or naval service; HRD was not temporarily enjoined by a court order from certifying names from an eligible list; and a new list was established on March 16, 2010 pursuant to Section 25. If the Legislature had intended that an individual’s eligibility could be extended for a reason other than those provided, it would

have so stated. The Legislature, however, did not state this. Therefore, the Commission may “not add words to a statute that the Legislature did [or did] not put there, either by inadvertent omission or by design.” Commonwealth v. Callahan, 440 Mass. 436, 443, 799 N.E.2d 113 (2003), quoting Commonwealth v. McLeod, 437 Mass. 286, 294, 771 N.E.2d 142 (2002), and cases cited.

When drafting Section 25, the Legislature contemplated that a new eligibility list may be created during the active life of an older list. See id. (providing that most recent examination results for an individual determine ranking on merged eligible list). “Applicants are able to protect their interests in remaining eligible by taking the later examinations.” Callanan v. Personnel Administrator, 400 Mass. 597, 602 (1987).

The Supreme Judicial Court and the Commission have held that individuals who fail to take a later examination and lose their eligibility are not entitled to relief. See Callanan supra at 601 (“The system the Legislature created, in which eligibility lists expire and are replaced by new lists, involves the risk that position might become available immediately after the expiration of an old list or immediately before the establishment of a new list. The overall pattern of the statute does not justify expectations that certain positions will become available during the period of a single list.”); Saunders v. Haverhill, 21 MCSR 337 (2008)(no relief granted to appellant who chose not to take the most recent examination and was, thus, not on the eligible list for certification).

The Appellant argues that he did not choose to apply his 2009 examination results toward eligibility for Police Officer because he liked his score from the 2008 examination, and because he relied on information he received from HRD. The Appellant never asked HRD when his 2008 eligibility would expire. Rather, according to

him, he asked an unnamed HRD representative, if there would be “any benefit” to taking the 2009 police officer examination and was told “no”. At best, the Appellant chose to interpret ambiguity in his favor and interpreted this answer to mean that his eligibility on the merged list would last as long as those who chose to “roll the dice” and take the 2009 examination.

Further, his question, was unambiguously answered on the 2009 examination poster.⁴

The 2009 examination poster, Frequently Asked Questions, provides,

Q: I took the 2008 Police Officer test and I do not want to be a State Trooper, do I need to take the 2009 test to remain on the Police Officer list.

A: No, if you took the 2008 test you may opt not to take the 2009 exam, since your eligibility from the 2008 exam will continue until October 2010 on the Police Officer eligible list.

There is no question that the Appellant had notice prior to taking the 2009 examination that if he did not take the 2009 Police Officer examination, his eligibility would only continue through October 2010. The Appellant also had prior notice that he would not be able to change his choice of examination after April 25, 2010. The 2009 examination poster clearly states, “Applicants will have to select one of [these] options when applying. Applicants are reminded to carefully select their choice **BECAUSE YOU WILL NOT BE ALLOWED TO CHANGE YOUR CHOICE AFTER THE EXAMINATION IS HELD ON APRIL 25, 2009.**” (emphasis in original.) Despite HRD’s notice and directive, the Appellant now asks the Commission to permit him to change his choice of examination after he received, and is pleased with, his 2009 State

⁴ HRD Personnel Selection Specialist Veronica Gross signed an affidavit under the pains and penalties of perjury that the exam announcement submitted was a true and accurate copy of the 2009 police officer / state trooper exam announcement that was posted on November 14, 2008.

Trooper examination score. I do not doubt the Appellant's sincere desire to become a Milton police officer. However, permitting the Appellant to extend his eligibility on the Police Officer eligible list would violate Section 25 and basic merit principles by infringing on the rights of other candidates who properly followed the examination poster directions and chose to, or not to, apply the 2009 examination results to the position of Police Officer and who are currently living with the consequences.

Finally, the Appellant's reliance on Giacalone is misplaced. In Giacalone, the Appellant was seeking a veteran's preference that is provided for under the statute. Here, the Appellant is seeking to have his eligibility extended for a period greater than two years, which is contrary to the plain language of Section 25.

For all of the above reasons, the Appellant's appeal under G1-10-296 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, McDowell and Stein, Commissioners [Marquis – Absent]) on February 24, 2011.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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 the decision or a significant factor the Agency or the Presiding Officer may

have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice:

Gregg P. Bailey, Esq. (for Appellant)

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