

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

**CIVIL SERVICE COMMISSION**

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

SARAH FISHER,  
*Appellant*  
v.

G1-12-312

HUMAN RESOURCES DIVISION,  
*Respondent*

Appearance for Appellant:

Jeffrey M. Guiel, Esq.  
Labrie, Pouliot, LaRocque & Guiel, P.C.  
641 Grattan Street  
Chicopee, MA 01020

Appearance for Respondent:

Ernest Law, Esq.  
Labor Counsel  
Human Resources Division  
One Ashburton Place  
Boston, MA, 02108

Commissioner:

Cynthia Ittleman<sup>1</sup>

**DECISION**

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Sarah Fisher (hereinafter “Ms. Fisher” or “Appellant”), filed an appeal at the Civil Service Commission (“Commission”) on July 10, 2012 regarding the decision of the City of Chicopee (hereinafter “City” or “Appointing Authority”), to bypass her for appointment to the position of firefighter, she avers, due to the delay by the state’s Human Resource Department (hereinafter “HRD” or “Respondent”) in responding to her requests to reschedule the entry level physical abilities test (“ELPAT”) portion of the entry level firefighter’s exam after her pregnancy. On December 10, 2012, the City filed a Motion to Dismiss (“City’s Motion”).

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<sup>1</sup> The Commission acknowledges the assistance of Law Clerk Ryan Clayton in the drafting of this decision.

A pre-hearing conference was held on December 12, 2012, at the offices of the Commission. On or about December 19, 2012, the Appellant filed an Opposition to the City's Motion and a Motion to Add Parties<sup>2</sup>; at about the same time, the Commission joined HRD as a party in view of its involvement in this matter, rendering the Appellant's Motion to Add Parties moot. On February 12, 2013, the City's Motion to dismiss the appeal as a whole was denied but the motion against the City was granted, providing, "...since the City never received the Appellant's name on the Certification provided by HRD, the appeal against the City is dismissed. ...” (Ruling on City's Motion to Dismiss)

A hearing was held on February 14, 2013 and it was digitally recorded. Copies of the recording were sent to the parties. At the hearing, HRD orally moved to dismiss the appeal. I heard oral argument and denied the oral motion at that time. A full hearing on the merits of the appeal immediately followed the ruling on HRD's motion to dismiss. As allowed at the conclusion of the hearing, the Respondent filed a combined Motion to Dismiss and Recommended Decision on March 13, 2013. The Appellant filed a combined opposition to the Motion to Dismiss and Recommended Decision on or about April 1, 2013. For the reasons stated herein, the Motion to Dismiss the appeal is moot and the appeal is denied.

#### **FINDINGS OF FACT:**

Twelve (12) exhibits were entered into evidence at the hearing. Based on these exhibits and the testimony of the following witnesses:

*For HRD:*

- Regina Caggiano, Deputy Director of the Civil Service Unit and Organization Development Group, Human Resources Division

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<sup>2</sup> The Appellant's Motion to Add Parties sought to add HRD, Mr. Bruce Howard, and the ELPAT Administrator. Since Mr. Howard and the ELPAT Administrator are at HRD, HRD was joined as a party.

*For the Appellant:*

- Robert Shaw
- Sara Fisher, Appellant

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, the credible evidence, and reasonable inferences therefrom, and information provided via electronic mail on March 27, 2014 by HRD to the Commission and the Appellant in response to the Commission's inquiry, establishes the following findings of fact by preponderance of the evidence:

1. Ms. Fisher is a 34 year-old mother of three children and is a resident of Chicopee, Massachusetts. She has worked as a full-time medical secretary at a Renal Specialty office since 1999. (*Stipulated Facts*)
2. Ms. Fisher is a graduate of Chicopee Comprehensive High School and attended American International College and earned an Associate's Degree in Fire Science at Springfield Technical Community College. She is also a licensed Emergency Medical Technician (EMT). (*Stipulated Facts*)
3. Ms. Fisher's grandfather was a firefighter and her father is currently a firefighter. She has always wanted to be a firefighter herself, having taken the written portion of the exam five (5) times and the ELPAT two (2) times since she was 18 years old. (*Testimony of Fisher*)
4. The entry level firefighter examination consists of two components: the written exam and the ELPAT. Each portion constitutes fifty percent (50%) of the entire examination. (*Exhibit 2 and Testimony of Caggiano*)

5. On April 24, 2010, HRD held an examination for entry level firefighter. Ms. Fisher took the written portion of the entry level firefighter exam on that date. (*Testimony of Fisher and Caggiano*)
6. Ms. Fisher was originally scheduled to take the ELPAT exam on August 28, 2010. However, on August 27, 2010, Ms. Fisher contacted HRD to request a postponement of her ELPAT because she was pregnant. HRD approved this request. (*Testimony of Fisher and Caggiano*)
7. There is no HRD policy in place regarding the rescheduling of the ELPAT exam for pregnant applicants. With the exception of current military personnel who cannot be in Massachusetts on the date of the exam, no applicant has a right to a make-up examination due to personal or professional conflicts. However, to date, HRD has allowed all pregnant candidates to reschedule the ELPAT upon their request, with the submission of supporting documentation. (*Exhibit 2 and Testimony of Caggiano*)
8. The eligible list for the April 24, 2010 exam was established on December 1, 2010. (*Exhibit 1*)
9. On February 25, 2011, HRD received a Requisition Form 13 from the City for a Certification from which it may appoint ten (10) permanent, full-time firefighters. (*Exhibit 3*)
10. HRD issued Certification number 204147 on both March 1, 2011 with twenty-one (21) names and issued additional names on March 23, 2011. (*Exhibits 4 and 5*)
11. Ms. Fisher's name did not appear on Certification 204147 since she had not completed the ELPAT portion of the exam yet. (*Testimony of Caggiano*)
12. Ms. Fisher gave birth to her daughter on April 26, 2011. (*Exhibit 9*)

13. Beginning in or about July 2011, Ms. Fisher attempted to contact HRD through electronic mail messages and phone calls to reschedule the ELPAT portion of the exam, to which HRD failed to respond. (*Testimony of Fisher and Shaw; Exhibits 7, 10 - 12*)
14. On December 30, 2011, Ms. Fisher sent an additional electronic mail message to HRD, stating that she had sent several electronic mail messages to the agency to try to reschedule the ELPAT portion of the exam. She received no response to this electronic message. She also called HRD on December 30, 2011.<sup>3</sup> (*Exhibits 7, 10 - 12*)
15. In March, 2012, the City hired eleven (11) new fire fighters from Certification number 204147. (*Testimony of Caggiano and Fisher*)
16. On March 28, 2012, Ms. Fisher contacted a legislator, explaining that she had been trying to contact HRD to reschedule the ELPAT portion of the exam but to no avail. (*Exhibit 10, Testimony of Caggiano*)
17. On April 2, 2012, HRD sent Ms. Fisher an electronic mail message stating: “We have received an email from [a legislator’s] office. We apologize for any confusion and delay in response; we were under the impression that an answer had been provided to you back in January.” (*Exhibit 11*)
18. The lengthy time period over which HRD failed to respond to Ms. Fisher to reschedule the ELPAT portion of the exam may be the result of limited staff in the HRD Civil Service Unit. (*Testimony of Caggiano*)
19. Ms. Fisher was rescheduled to retake the ELPAT portion of the exam on April 27, 2012 and she did so. Her resulting complete score for the 2010 exam was 94. Ms. Fisher also

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<sup>3</sup> It is unclear if the Appellant succeeded in speaking with someone at HRD on December 30, 2011 when she phoned the agency.

subsequently took the 2012 written and ELPAT portions of the exam, scoring a 96.

*(Testimony of Fisher)*

20. Ms. Fisher was added to the 2010 list in August, 2012, which was months after the City had hired firefighters from Certification number 204147. *(Testimony of Caggiano; Administrative Notice)*

21. Since Ms. Fisher was not included in the eligible list until August, 2012, her name could not have appeared on Certification number 204147 issued by HRD in March 2011. *(Testimony of Caggiano)*

22. HRD does not issue a Certification from an eligible list for consideration by an appointing authority until it receives a request for a Certification from the appointing authority. Once the candidates are informed that their name is on a Certification, they have eight (8) business days in which to sign the Certification, indicating that they are willing to accept appointment if selected. *(Testimony of Caggiano)*

23. HRD does not add candidates to a Certification after it is finalized in order to avoid disrupting the City's hiring process generally, or to avoid harming candidates given conditional offers specifically. However, a candidate was added to the Certification for Chicopee on March 11, 2011, but it was during the eight (8) business day period for candidates to sign the Certification, not after the Certification had been finalized. *(Testimony of Caggiano, Exhibits 4 and 5)*

24. The lowest score reached on the March 2011 Certification was a 96. The lowest rank reached was 24. Since Ms. Fisher's score was 94 after taking the ELPAT portion of the 2010 exam, her name would have appeared on the eligible list but not on the Certification within the 2N+1 formula because her score would have placed her 44<sup>th</sup> in rank on the

eligible list. (*HRD post-hearing electronic mail response to Commission (copy to Appellant), March 27, 2014 4:16pm*)

25. Ms. Fisher filed this appeal with the Commission on July 10, 2012. (*Administrative Notice*)

## DISCUSSION

### *Applicable Law*

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on "[b]asic merit principles." Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001), citing Cambridge v. Civil Serv. Comm'n., 43 Mass.App.Ct. 300, 304 (1997). "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees from "arbitrary and capricious actions." G.L. c. 31, § 1. Personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. Cambridge at 304.

Pursuant to G.L. c. 31, § 2(b), the Commission has the "powers and duties," *inter alia*, to [t]o hear and decide appeals by a person aggrieved by any decision, action, or failure to act by the administrator ...." Id. The same statute also sets the standard for appealing a decision of HRD, via the administrator, stating that,

[n]o person shall be deemed to be aggrieved under the provisions of this section unless such person has made specific allegations in writing that a decision, action, or failure to act on the part of the administrator was in violation of this chapter, the rules or basic merit principles promulgated thereunder and said allegations shall show that such person's rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status.

Id.

Under section 2(b) of G.L. c. 31, on appeal to the Commission, a decision of HRD, through the administrator, shall not be reversed “ ... except upon a finding that such decision was not based upon a preponderance of evidence in the record. ...” Id.

Pursuant to provisions of section 5 of G.L. c. 31, HRD, via the administrator, has significant authority regarding examinations. It provides the administrator with the following powers and duties:

To administer, enforce and comply with the civil service law and rules and the decisions of the commission.

G.L. c. 31, § 5(a)

To evaluate the qualifications of applicants for civil service positions.

G.L. c. 31, § 5(d)

To conduct examinations for purposes of establishing eligible lists.

G.L. c. 31, § 5(e)

To maintain records of the following: examinations which have been conducted, eligible lists and registers which have been established, the names of persons certified for original and promotional appointment, and all permanent, provisional and temporary appointments to civil service positions.

G.L. c. 31, § 5(h)

In addition, civil service law places full responsibility for examinations on HRD providing, specifically, that “[e]xaminations shall be conducted under the direction of the administrator, who shall determine their form, method and subject matter. ....” G.L. c. 31, § 16.

Examinations may include entry level physical abilities tests under PAR .06(2)(a). Specifically this PAR provides that,

[a] selection procedures shall be practical in character and shall relate directly to those matters which fairly determine the relative ranking of the persons examined based on the knowledge, abilities and skills required to perform the primary duties (critical and frequent tasks) of the position title or occupational group as determined by reliable and representative job information available to the administrator. Examinations may ... include written, oral, practical or performance tests ... other generally accepted selection



procedures, or combinations of these, which, in the discretion and judgment of the administrator, are appropriate for the position title or occupational group being tested.”  
Id. Further, G.L. c. 31, § 22 authorizes the administrator to “determine the passing requirements of examinations.”  
Id.

With regard to those whom HRD determines have passed exams, section 25 of G.L. c. 31 provides that, “[t]he names of such persons shall be arranged ... in the order of their marks on the examination.” Id. Section 6 of G.L. c. 31 requires HRD to issue a Certification from an eligible list for purposes of making original appointments as follows:

Each appointment to a civil service position shall be made by an original appointment. Original appointment in the official service shall be made after certification from an eligible list established as the result of a competitive examination for which civil service employees and non-civil service employees were eligible to apply. An appointing authority desiring to make an original appointment in the official service shall submit a requisition to the administrator.  
Id. (*see* related Personnel Administrator Rule .08, “Civil Service Requisition and Certification,” in this regard)

The number of names on the Certification is determined by a formula in PAR.09(1), which states, in pertinent part,

When names have been certified to an appointing authority ... and the number of appointments or promotional appointments actually to be made is  $n$ , the appointing authority may appoint only from among the first  $2n+1$  persons named in the certification willing to accept appointment. The appointing authority may appoint only among the first persons named in the certification willing to accept.  
Id.

Thus, these statutes and rules provide HRD with considerable discretion generally to uphold the tenets of civil service law with regard to examinations and specifically to ensure the proper preparation and maintenance of eligible lists resulting from examinations, as well as Certifications based on eligible lists as appropriate.

## *Analysis*

This began as an appeal of the actions of the City. However, it was learned subsequently that the City's actions were based on a Certification provided to the City by HRD on which Ms. Fisher's name did not appear. For this reason, the Commission granted the City's Motion to Dismiss it from the appeal, by which time HRD had been joined as a party. Therefore, this appeal contests the actions or failure to act by HRD. Appeals by a person alleging that she or he has been aggrieved by HRD's actions or failure to act are available under G.L. c. 31, § 2(b). Section 2(b) defines a "person aggrieved" as one whose "rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status." *Id.* The same statute also confers upon the Commission the power "to hear and decide appeals by a person aggrieved by any decision, action, or failure to act by the administrator..."

As indicated above, HRD has considerable statutory authority regarding examinations, and the issuance of eligible lists and Certifications, and related matters. Examinations are to be conducted by HRD, which is responsible for determining the form, method, and subject matter of the exams. The firefighter exam is comprised of two parts: a written portion and the ELPAT. The Appellant took the April 24, 2010 written exam; her score on the written exam was 94. She was scheduled to take the ELPAT part of the exam on August 28, 2010. However, the day before she was rescheduled to take the ELPAT, the Appellant asked for a postponement because she was pregnant. HRD approved the request. The Appellant gave birth to her daughter on April 26, 2011. Beginning in or about July, 2011, the Appellant repeatedly attempted to contact HRD to reschedule the ELPAT portion of the exam but got no response in that regard until April 2, 2012 (i.e. approximately nine (9) months later), when a legislator contacted HRD to inquire on her behalf. Thereafter, HRD rescheduled the ELPAT portion of the exam for the Appellant,

which she took on April 27, 2012. The Appellant's score, combining her written and ELPAT score, was 94. HRD did not add the Appellant's name to the 2010 eligible list until August, 2012. More than a year and a half earlier, the City requested a Certification to appoint ten (10) permanent, full-time firefighters. HRD sent the City a Certification of candidates who had successfully completed both the written and ELPAT parts of the exam, and the City filled the existing vacancies.

Ms. Fisher had not completed the ELPAT portion of the exam when HRD created the Certification and did not include her name on the Certification. The analysis does not end there. Even if Ms. Fisher had taken the ELPAT portion of the exam earlier, her name would not have been reached among the first "2N+1" highest ranked persons named on the Certification because her exam score was too low. Specifically, the lowest score reached on the March 2011 Certification lists was a 96, and the lowest rank reached was 24<sup>th</sup>. With Ms. Fisher's score of 94 after completing both parts of the exam, her rank would have been 44<sup>th</sup>, and she would not have appeared on the Certification within the 2N+1 formula and she would not have been eligible for appointment. As these facts have been established by a preponderance of the evidence, Ms. Fisher is not a person aggrieved under G.L. c. 31, § 2(b) by any action, or failure to act, by HRD and HRD's actions or failure to act do not violate basic merit principles, nor do they reflect political considerations, favoritism, bias, or other inappropriate motive.

That said, HRD's failure to respond to Ms. Fisher over what appears to have been many months of her efforts to reschedule the ELPAT portion of the exam falls short from a customer service perspective. Even with limited resources, HRF should be able to respond to its customers in a more timely manner, especially given the time sensitivity involved in the law enforcement exam and hiring process.

## CONCLUSION

Based on the findings of fact and applicable law noted above, the Appellant's appeal under Docket No. G1-12-312 is hereby *denied*.

Civil Service Commission

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Cynthia A. Ittleman, Esq.,  
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on April 20, 2014.

A true record. Attest:

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Commissioner

Either party may file a motion for reconsideration within ten (10) 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 (30) 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.

Notice:

Jeffrey M. Guiel, Esq. (for Appellant)  
Ernest Law, Esq. (for Respondent)  
John Marra, Esq. (HRD)