

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
100 Cambridge Street, Suite 200
Boston, MA 02114
(617) 979-1900

BRAD T. FLANNERY,
Appellant

v.

E-23-050

HUMAN RESOURCES DIVISION,
Respondent

Appearance for Appellant:

Pro se
Brad T. Flannery

Appearance for Respondent:

Carolyn A. McMenemy, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

Commissioner:

Christopher C. Bowman¹

DECISION ON RESPONDENT’S MOTION TO DISMISS

Background

On April 25, 2023, the Appellant, a Captain in the Weymouth Fire Department, filed an examination appeal with the Civil Service Commission (Commission). The Appellant is challenging the amount of points he was awarded by the Human Resources Division (HRD) for the Education & Experience (E&E) component of his exam score.

¹ The Commission acknowledges the assistance of Law Fellow Courtney Timmins, Esq. with the drafting of this decision.

On May 23, 2023, I held a remote pre-hearing conference attended by the Appellant and counsel for HRD. During the pre-hearing conference, the parties stipulated to certain facts and provided an overview of their arguments. The Appellant argued that HRD prevented him from receiving credit for fourteen months of experience as a full-time firefighter in the Rockland Fire Department, a position from which he was laid off due to budgetary reasons through no fault of his own. HRD argued that the appeal should be dismissed for lack of jurisdiction based on untimely filing. HRD also asserted that the appeal should be denied on substantive grounds because the decision-making process was not arbitrary or capricious, and E&E credit was awarded in a uniform manner. HRD subsequently submitted a Motion for Summary Decision, and the Appellant filed a response in opposition to HRD's Motion.

Facts Underlying the Instant Appeal

1. The Appellant is a Captain in the Weymouth Fire Department. He has been a firefighter in the Weymouth Fire Department since August 17, 2007. (*App. Ex. L*)
2. Before the Appellant joined the Weymouth Fire Department, he worked as a firefighter in the Rockland Fire Department from April 23, 2006 to June 30, 2007. The Appellant was laid off from the Rockland Fire Department and hired by Weymouth shortly thereafter from HRD's reemployment list. (*App. Ex. L-M*)
3. On May 21, 2022, the Appellant took the promotional examination for Deputy Fire Chief administered by HRD. (*Stipulated Fact*)
4. On April 29, 2022, HRD sent all examinees (including the Appellant) a notice with instructions regarding the Online E&E Claim and how to access it. The notice directed examinees to carefully read all information in the posting. (*Resp. Ex. A*)
5. The posting stated:

This is an Examination Component: In this examination component you will rate your own education, training, and work experience against a standard schedule. You will do so by filling out this Online E&E Claim. A standard schedule is a list of all types and levels of education, training, work experience, licensure, and other credentials which demonstrate your qualifications for the examination title and for which you may receive credit toward your overall final examination score. Everything that will receive credit is included in this Online E&E Claim. Each section of the standard schedule is preceded by specific instructions. The amount of credit that corresponds to each item on the schedule will receive has been determined in advance and is displayed in parentheses next to each response. E&E credit will be scored for all candidates.

(Resp. Ex. B)

6. The Appellant timely submitted his Online E&E Claim and supporting documentation on May 25, 2022. *(Resp. Motion)*
7. The Appellant claimed 1.8 points (48 to 59 months of experience) for Category 7A, which asked:

Permanent Full-time Firefighter or higher 12 to 17 years prior to the examination date. This is the first of two categories which allow you to receive credit for experience **in the specified department** as a Firefighter, Fire Lieutenant, Fire Captain, or District Fire Chief which occurred prior to the timeframes credited in Categories 1 through 5.

(Emphasis added). (Resp. Motion; App. Ex. A2)

8. On August 19, 2022, HRD notified the Appellant of his exam scores, consisting of the written score, E&E score, and final score. The notice informed the Appellant that his E&E claim for 1.8 points under Category 7A had been adjusted to 1.0 points (reflecting 24 to 35 months of experience). *(Resp. Ex. F; App. Ex. A2)*
9. The Appellant appealed the E&E score adjustment. *(App. Ex. A1)*
10. On September 15, 2022, HRD notified him that his appeal had been reviewed and denied.

The notice included the following note at the bottom:

Pursuant to Chapter 31, Sec. 24 of the Massachusetts General Laws provides that you 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 determine the form of the petition for appeal, provided that the petition shall include a brief statement of the allegations presented to the administrator for review. After acceptance of such an appeal, the commission shall conduct a hearing and, within thirty days, render a decision, and send a copy of such decision to the applicant and 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 or experience was fully stated in the training and experience sheet filed by the applicant at the time designated by the administrator.

(Resp. Ex. G)

11. The “commission” referred to in G.L. c. 31, § 24 is the Civil Service Commission, but the information provided by HRD did not specify that. *(Administrative Notice; Resp. Ex. G)*
12. On September 27, 2022, the Appellant emailed HRD’s Civil Service Unit to request a hearing before the commission under G.L. c. 31, § 24. The email stated, in part:

Please accept this email as an appeal to the commission from a decision of the administrator pursuant to your email dated September 15, 2022 for the above titled examination. This is regarding the denial of an appeal for the reduction in points on the education and experience component of the exam. In accordance with your email, I am making this appeal under category C which states " (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".²

² The Appellant has clarified that “this [was] not an appeal of the test questions or content, but rather the scoring of the E&E test component.” *(App. Opposition)*. This is clear from the record.

In brief, I am appealing to the commission based on the fact that the education and experience component of this exam provided parameters that did not fairly test or completely assess my overall fitness to perform the primary duties of the Deputy Chief position because it prevented me from properly claiming and receiving credit for 14 months of full time experience in a civil service department (Rockland) from which I was laid off. By forcing the exclusion of this experience and providing no other category to claim it under created an inherently unfair situation and has essentially penalized me for being separated from a department under no fault of my own. Per MGL chapter 31, I believe this 14 months experience should be credited and calculated under category 7A as part of my overall length of experience running consecutively with my reinstatement to a full time firefighter position at my current department.

(App. Ex. B1)

13. The same day, the Appellant received an automated reply email from HRD stating: “Thank you; please be advised that your email has been received. We will respond accordingly as soon as possible.” *(App. Ex. C)*
14. HRD did not answer the Appellant’s email or forward the appeal to the Civil Service Commission. *(App. Opposition)*
15. On November 7, 2022, the Appellant sent a follow-up email to HRD: “I am writing to request an update on my appeal to the commission on a decision of the administrator as detailed below. If you could please provide the status of this request as soon as you’re able. Thank you.” HRD did not respond. *(App. Ex. F1)*
16. In January 2023, the Appellant called HRD and left a voicemail seeking an update on his hearing request. This went unanswered. *(App. Opposition)*
17. The Appellant sent another email to HRD on February 8, 2023, stating:

As such, the applicable filing deadline is the seventeen-day deadline specified in the notice to the Appellant, not the seven-day deadline for fair test appeals which concern the substance of exams.

I am writing to you today with my **3rd request** for an update to my email of 9/27/2022 requesting a hearing before the commission regarding my appeal of an education and experience score reduction. I have also left a voicemail with your office requesting the same and have received no response at all. Please advise ASAP, a promotion from the exam scores that I am contesting has already occurred. Thank you.

(App. Ex. F2)

18. Three weeks later, on March 1, 2022, HRD responded to the Appellant with an email stating:

“The Civil Service Unit has received your E & E appeal and an email notification to the denial, was sent on September 15th, 2022. If you would like to file an appeal with the commission, I have included the link here for your convenience: [Civil Service Commission | Mass.gov.](#)” *(App. Ex. G)*

19. The Appellant subsequently filed an appeal with the Civil Service Commission on April 25, 2023. *(Stipulated Fact)*

Respondent’s Motion for Summary Decision

HRD presented two arguments in its Motion for Summary Decision:

- A. “Appellant filed the instant appeal on April 25, 2023, over six months past the October 2, 2022 deadline. The Commission lacks jurisdiction to hear appeals that are untimely filed, and therefore this appeal must be dismissed.”
- B. “Based upon HRD’s sound, established process of developing the E&E component, the Appellant has no reasonable expectation of proving that the decision to score candidates on their years of service in the same department to which they’re applying for a promotion was arbitrary and capricious.”

Appellant's Opposition

The Appellant offered several arguments in opposition to HRD's Motion for Summary Decision. Below are the material points:

- A. The Commission should "refuse to accept or consider, and summarily dismiss, HRD's Motion for Summary Decision based on the fact that it was submitted 24 days after the expiration of the 30 day written deadline [set by the Chair] for the motion to be submitted."
- B. In multiple email correspondences both before and after the exam, HRD did not provide sufficiently clear information on how to request a hearing before the Commission or what exactly was required. The Appellant submitted a written hearing request to HRD prior to the seventeen-day deadline which outlined his contentions. HRD then failed to respond to any of the Appellant's multiple attempts to follow up on his hearing request.
- C. Pursuant to G.L. c. 31, §§ 33 and 46, the Appellant's fourteen months of experience with the Rockland Fire Department "should be credited and calculated under Category 7A as part of [his] overall length of service"
- D. *Callahan v. HRD*, B2-21-042 (June 3, 2021) should apply here, in which the Commission found that HRD acted inconsistently with basic merit principles by failing to credit the appellant for 1740 hours worked as a Temporary Fire Lieutenant due to an administrative error made by the City's Fire Chief.

Motion for Summary Decision Standard

A party before the Commission may file a motion for summary decision pursuant to 801 CMR 1.01(7)(h), which provides:

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.

Such motions are decided under the well-recognized standard for summary disposition as a matter of law: whether, “viewing the evidence in the light most favorable to the nonmoving party,” the substantial and credible evidence establishes that the nonmoving 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., Burns v. North Attleborough*, 32 MCSR 149, 151 (2019); *Green v. Brockton*, 28 MCSR 39, 40 (2015); *Ralph v. Civ. Serv. Comm’n*, 100 Mass. App. Ct. 199, 203 (2021), quoting *Kobrin v. Bd. of Registration in Med.*, 444 Mass. 837, 846-48 (2005) (“A summary decision . . . is appropriate whenever ‘there was no issue of material fact for which a hearing was required.’”); *see also Iannacchino v. Ford Motor Company*, 451 Mass. 623, 635-36 (2008) (discussing standard of review for motions to dismiss); *Milliken & Co. v. Duro Textiles LLC*, 451 Mass. 547, 550 n.6 (2008).

Applicable Civil Service Law

Section 2(b) of Chapter 31 authorizes appeals to the Commission by individuals aggrieved by certain actions or inactions of HRD. The statute provides:

No 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.

G.L. c. 31, § 22(b).

The Commission is charged with ensuring that the civil service system operates on “basic merit principles,” which means, in relevant part, “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills . . .” and “assuring that all employees . . . are protected from arbitrary and capricious actions.” G. L. c. 31, § 1; *see* PAR.02 (Personnel Administration Rules). “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).

HRD is vested with broad authority to develop, administer, and score civil service examinations. Section 22 of Chapter 31 provides:

The administrator³ shall determine the passing requirements of examinations. 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.**

(Emphasis added). Pursuant to PAR.06(1)(b), “[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.” (Emphasis added).

Analysis

To begin, I will not reject HRD’s Motion for Summary Decision on the basis that it was submitted after the thirty-day deadline. This was a timeframe I set for the purposes of moving

³ “Administrator” means “the personnel administrator of the human resources division within the executive office for administration and finance” (*i.e.*, the head of HRD or their delegated subordinate). G.L. c. 31, § 1.

this appeal forward. It was not a statutory deadline that affects jurisdiction or the Commission's ability to review a submission. The Appellant wrote, "I struggle to believe an appellant like myself would be afforded the same privileges," but I would like to assure the Appellant that any party, no matter who they are, is afforded the same privileges when it comes to timeframes set by Commissioners without the force of statutory deadlines.

The undisputed facts in this case show that there is "no reasonable expectation" that the Appellant can prevail on at least one "essential element of the case." Rather, the record indicates that the Appellant is not an aggrieved individual under G.L. c. 31, § 2(b). The E&E component contained detailed instructions about what was required in order to successfully claim E&E points for the exam. The Category at issue here awarded points for permanent full-time firefighter experience **in the specified department**. That is the Weymouth Fire Department, where the Appellant has worked since 2007 and where he is trying to become Deputy Fire Chief. HRD credited the Appellant for all of his firefighter experience in Weymouth, consistent with the instructions, and consistent with how HRD treated all examinees. "[I]t is not the Commission's role to fine-tune how many E&E points are awarded for each category on a promotional examination but, rather, to ensure that HRD's decision-making process was not arbitrary or capricious and that the awarding of E&E points was done uniformly." *Kenneally v. HRD*, 31 MCSR 108 (2018). HRD did not act arbitrarily or capriciously here, and it awarded E&E points in a uniform manner.

The Appellant noted his length of service calculated under G.L. c. 31, § 33, which includes his fourteen months of employment with the Rockland Fire Department before he was laid off and hired by the Weymouth Fire Department. The Appellant also pointed to G.L. c. 31, § 46, which governs reinstatement. However, overall length of service under Section 33, as well

as reinstatement under Section 46, are both separate and distinct from HRD's determination of E&E points for examinations. Again, the category in dispute explicitly awarded points for experience **in the specified department**. Experience in a different department does not fall under this category, and that was the same for every examinee.

The Appellant also cited *Callahan v. HRD*, B2-21-042 (June 3, 2021), in support of his arguments, but that is inapposite to the present case. *Callahan* involved an examination for Temporary Fire Lieutenant, and the E&E category at issue awarded points for time served as a Temporary Fire Lieutenant. HRD refused to credit the appellant for 1740 hours worked as a Temporary Fire Lieutenant, due to an administrative error made by the City's Fire Chief that was subsequently clarified and amended. Those facts differ from this case, where HRD properly awarded E&E points for all applicable experience in the Weymouth Fire Department, in accordance with the instructions laid out to the Appellant in the E&E component. Because the Appellant is not an aggrieved individual under G.L. c. 31, § 2(b), the appeal must be dismissed.

I now turn to the issue of timeliness. I decline to dismiss this appeal on the basis that it was not filed in a timely manner. Although HRD included an excerpt from G.L. c. 31, § 24 in its notice to the Appellant, the instructions were vague and failed to identify the Civil Service Commission or inform the Appellant how to request a hearing before the Commission. More importantly, HRD received a timely hearing request from the Appellant on September 27, 2022, which was explicitly identified as "an appeal to the commission from a decision of the administrator." After sending unclear instructions to the Appellant and then receiving an appeal which the Appellant clearly believed to be in compliance with those instructions, it is unfortunate that HRD neither responded to the appeal nor forwarded it to the Commission. More than five months passed until HRD sent the Appellant a link to the Commission's website. This prejudiced

the Appellant. Although I am dismissing this appeal on the merits, I appreciate the Appellant's frustration with this process. To better serve civil service candidates and to prevent this problem from occurring again, HRD should provide candidates with more clarity regarding how to file an appeal with the Civil Service Commission, including a link to the Commission's website.

Conclusion

For the reasons explained above, HRD's Motion to Dismiss is allowed and the appeal of Brad T. Flannery, under Docket No. E-23-050, is hereby *dismissed*.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chair

By vote of the Civil Service Commission (Bowman, Chair; Dooley, McConney and Tivnan, Commissioners [Stein – Absent]) on September 7, 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)(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 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 their 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:
Brad T. Flannery (Appellant)
Carolyn A. McMenemy, Esq. (for Respondent)