

**COMMONWEALTH OF MASSACHUSETTS**

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

DANIEL FLYNN,  
Appellant

B2-20-039

v.

HUMAN RESOURCES DIVISION,  
Respondent

Appearance for Appellant:

Joseph Sulman, Esq.  
391 Totten Pond Road, Suite 402  
Waltham, MA 02451

Appearance for Respondent:

Melissa Thomson, Esq.  
Human Resources Division  
100 Cambridge Street: Ste. 600  
Boston, MA 02204

Commissioner:

Christopher C. Bowman

**DECISION ON RESPONDENT’S MOTION FOR SUMMARY DECISION**

1. On March 5, 2020, the Appellant, Daniel Flynn (Lt. Flynn), a Fire Lieutenant in the Winthrop Fire Department (WFD), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state’s Human Resources Division (HRD) to not award him any “E&E” credit on a recent promotional examination for Fire Captain.
2. On March 24, 2020, I held a pre-hearing conference via videoconference which was attended by Lt. Flynn, his counsel and counsel for HRD.
3. As part of the pre-hearing conference, it was agreed that:
  - A. On November 16, 2019, Lt. Flynn took the Fire Captain examination.

- B. The deadline for completing the E&E component of the examination was November 23, 2019.
  - C. Lt. Flynn did not complete the online E&E component of the examination.
  - D. Rather, he submitted, via an attachment to an email to HRD, his employment verification form from the Winthrop Fire Department.
  - E. Lt. Flynn received a 75.36 on the written component of the examination.
  - F. As a result of not completing the online E&E component, he received an E&E score of “0”, resulting in a final score of 60.29.
  - G. The passing score for the Fire Captain examination was 70.
  - H. Since Lt. Flynn failed the examination, his name does not appear on the current Fire Captain eligible list in Winthrop.
  - I. Two firefighters (the exam was open to lieutenants and firefighters) did pass the promotional examination and appear on the eligible list making it a “short list”.
  - J. When a “short list” exists, an Appointing Authority may choose not to make permanent, promotional appointments, but, rather, make a provisional promotion until such time as an eligible list is established with three names on it.
4. As part of the pre-hearing conference, Lt. Flynn indicated that the Fire Chief and the two firefighters whose names now appear on the eligible list were all supportive of his appeal, or rather, are “rooting for [him].”
5. Based on all of the above, I asked HRD to determine what Lt. Flynn’s rank would have been on the eligible list had he been given credit for the years of experience noted on his employment verification form.

6. HRD, upon review, determined that Lt. Flynn would have been ranked 2<sup>nd</sup> on the current eligible list had he been given credit for the employment experience.
7. In its response, HRD indicated that, even if the Fire Chief and two firefighters supported granting him relief (i.e. – placing his name 2<sup>nd</sup> on the eligible list), HRD would not support such relief and would seek to file a Motion for Summary Decision seeking to dismiss the Appellant’s appeal.
8. I provided Lt. Flynn with ten days to submit correspondence to the Commission, from the Fire Chief and the two firefighters on the eligible list, indicating whether they would support granting him relief by placing his name 2<sup>nd</sup> on the existing eligible list for Winthrop Fire Captain.
9. On April 9, 2020, Lt. Flynn submitted a reply to the Commission with a written statement from the Town’s Fire Chief stating that, based on the above-referenced information, he had “no objection” to placing Lt. Flynn second on the existing eligible list.
10. The Appellant’s reply also stated in part that the two (2) firefighters currently ranked first and second on the eligible list had declined to issue any statement to the Commission as they “did not want to do anything that might prejudice their future promotional opportunities.”
11. On April 20, 2020, HRD filed a Motion for Summary Decision and the Appellant filed an opposition on April 30, 2020.

### *Legal Standard*

G.L. c. 31, § 2(b) addresses appeals to the Commission regarding persons aggrieved by “... any decision, action or failure to act by the administrator, except as limited by the provisions of section twenty-four relating to the grading of examinations ....” It provides, *inter alia*,

“No decision of the administrator involving the application of standards established by law or rule to a fact situation shall be reversed by the commission except upon a finding that such decision was not based upon a preponderance of evidence in the record.”

Pursuant to G.L. c. 31, § 5(e), HRD is charged with: “conduct[ing] examinations for purposes of establishing eligible lists.”

G.L. c. 31, § 22 states in relevant part: “In any competitive examination, an applicant shall be given credit for employment or experience in the position for which the examination is held.”

G.L. c. 31, § 24 allows for review by the Commission of exam appeals. Pursuant to § 24, “[t]he 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.”

In Cataldo v. Human Resources Division, 23 MCSR 617 (2010), the Commission stated that “... under Massachusetts civil service laws and rules, HRD is vested with broad authority to determine the requirements for competitive civil service examinations, including the type and weight given as ‘credit for such training and experience as of the time designated by HRD.’ G.L. c. 31, § 22(1).”

### *Analysis*

The Appellant, and all applicants who took this most recent fire lieutenant examination, had until November 23, 2019 to file an E&E Claim with HRD. With the exception of supporting documentation, all applicants must complete the E&E application online. There is no evidence to show that the Appellant submitted the E&E claim on or before November 23<sup>rd</sup>. Since the Appellant cannot show that he followed HRD’s instructions regarding the E&E component, he cannot show that he has been harmed through no fault of his own. Thus, he is not an aggrieved person.

While the Commission, based on the above, must dismiss this appeal, two issues warrant discussion. First, as in many other prior appeals, we once again see a situation where a longtime public employee provided HRD with the necessary supporting documentation regarding his employment experience in a timely manner. He failed, however, to complete the online module that corresponds with that information. Thus, he was given a “0” on the E&E portion of the examination, resulting in his “failing” the overall examination. While consistency and uniformity bolster confidence in the examination process, this is a perfect example of how rigid adherence, with no exceptions, to non-statutory guidelines can produce an illogical result that prevents a Fire Department from promoting a person who may be best suited for the position of Fire Captain. As the Commission has noted in the past, there is nothing preventing HRD from developing a fair, objective process to prevent this unfortunate result, including the establishment of a process allowing candidates to show good cause as to why they should be able to complete the online E&E module beyond the deadline, particularly if the candidate, as here, has submitted the supporting documentation in a timely manner. I renew the recommendation.

Second, as noted above, the eligible list currently in place here is a “short list” that, under civil service law, allows the appointing authority the ability to make a *provisional* promotion or appointment until an eligible list with at least three names has been established. While provisions of the applicable CBA may have some bearing on the use of a provisional appointment, it would behoove the WFD to carefully review the judicial decisions which prescribe the rules that apply when there is a conflict between a CBA and the civil service law, which may or may not provide an alternative means of resolving the problem with which the WFD is confronted here.

For all of the above reasons, HRD's Motion for Summary Decision is allowed and the Appellant's appeal under Docket No. B2-20-039 is hereby *dismissed*.

Civil Service Commission

/s/ Christopher Bowman  
Christopher C. Bowman  
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 18, 2020.

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:

Joseph Sulman, Esq. (for Appellant)

Melissa Thomson, Esq. (for Respondent)