

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

BARRY GAYNOR & ELEVEN¹ OTHERS,
Appellants

v.

Docket Nos.: (See Below)

BOSTON FIRE DEPARTMENT &
HUMAN RESOURCES DIVISION,
Respondents

LIST OF APPELLANTS:

Table with 5 columns: CSC Case No., Appellant, Disabled Veteran / Veteran?, Considered?, and Hired?. Rows list individuals like Barry Gaynor, Robert Walsh, Michael McDonagh, etc.

OTHER JOINED PARTIES⁴

- Douglas Felton, Arturo Perez, Justinian Plaza, Jorge Diaz, Margaret Connolly, Rafael Hernandez, Keith McNair, James Walsh, John Amado, Jeremy Mejia, Elbert Pereira, Giovanni Arroyo, Emanuel Brandao, Bryan Denehy, Tony Docanto, Rogelio Juarez, Fidia Pina, Makeurys Baez, Chris Castillo, Gregory D'Antona, Sean Ferguson, Nathalie Fontanez, Sergio Garcia, Ritchie Melo and Samuel Perez-Rosado.

1 This appeal was originally filed by Barry Gaynor and 7 others. I subsequently allowed motions to intervene regarding 4 additional individuals who now have an "I-12" prefix associated with their docket numbers: Castellanos, Kavanaugh, Lane and Rooney.

2 "Considered" means that the individual was within the statutory 2n + 1 formula, he/she indicated a willingness to accept if appointed, and the BFD either appointed or did not appoint the individual. According to the BFD, the two (2) Appellants that were not considered during the hiring cycle that was ongoing at the time of their appeals are now being considered as part of a subsequent hiring cycle.

3 According to counsel for Mr. Castellanos, his status was eventually changed to disabled veteran.

4 In a Procedural Order dated June 1, 2011, I joined as parties all of the 25 individuals on the Spanish-speaking Certification (Certification No. 204542) who indicated a willingness to accept employment. For reasons related to administrative efficiency, these individuals were not assigned docket numbers by the Commission.

COMMISSION RESPONSE TO REQUEST FOR INVESTIGATION

Procedural History

On March 28, 2011, the Appellants, all firefighter candidates for the Boston Fire Department (BFD), filed a request for investigation pursuant to G.L. c. 31, § 2(a) with the Civil Service Commission (Commission). That request stated in relevant part:

“We understand that the City is currently seeking to fill some 50 positions for a new Fire Academy class beginning this summer. It is our understanding that the Fire Department has requested a PAR [8]⁵ list of Spanish-speaking candidates in order to fill 15 of these positions. We further believe that the Human Resources Division approved the PAR [8] request, and thereby ensured that at least some of our clients will not be reached for hire this year. There was no justification for a PAR [8] list in this case, and the action therefore violated basic merit and constitutional principles.”
(emphasis added)

On April 26, 2011, a pre-hearing conference was held at the offices of the Commission for the purpose of determining whether an investigation was appropriate. Counsel for the Appellants, the state’s Human Resources Division (HRD) and the BFD were present along with most of the Appellants. The Appellants and the BFD each submitted a pre-hearing memorandum and HRD submitted copies of all information in its possession as it related to this request. I also heard oral argument from counsel for the Appellants and the BFD.

On June 1, 2011, the Commission issued a Procedural Order. As part of that Order, the Commission: denied the Appellants’ request to prevent the processing of the Spanish-speaking certification; joined those individuals on the Spanish-speaking Certification as parties; and scheduled a full evidentiary hearing for September 21, 2011, with an accompanying schedule for discovery.

⁵ The letter from the Appellants actually referenced a PAR 10 list. It is now clear that this was a scrivener’s error and the Appellants meant to reference a PAR 08 list. To avoid confusion, the request for a special certification is referenced as a PAR 08 request throughout the remainder of this decision.

Prior to and on the day of the September 21, 2011 hearing, I ruled on the parties' various motions. I denied the City's motion to reconsider the decision to conduct an investigation and I made rulings (outlined on Page 1) regarding who was a party to this matter.

On September 21, 2011 and November 1, 2011, I conducted a hearing at the offices of the Commission. As part of his opening statement, counsel for the Appellants reiterated what was stated in the initial request for investigation (there was no justification here for the issuance of a PAR.08 Certification), but also stated, for the first time in these proceedings that:

“I think this is very important and has not yet been explored – is that the statute MGL Chapter 31 Section 26 which was described in Feeney v. Commonwealth of Massachusetts, a case that went all the way up to the Supreme Court, as an absolute preference that forbade the hiring of people who were not veterans before veterans had been exhausted. PAR 8 is a rule and maybe it has the force and effect of a regulation. But it doesn't have the force and effect of a statute. And therefore under common rule of construction, a statutory requirement obviously takes precedence over a regulatory requirement if there is an inconsistency. Now it is possible that you could argue that in those cities and towns where for example they use PAR 8 lists to attempt to get paramedics – but being a paramedic is a requirement of the job by law – that a PAR 8 list would be an appropriate use and an exception might exist. But when you're dealing with a PAR 8 list that in this case calls for a quality that is perhaps nice to have but not necessary and not a requirement of having the job – and indeed hundreds of thousands of people don't have that ability and are still hired as firefighters – the statute has to take precedence to the regulation. And there is no way that you can construe the statute other than an absolute preference as the courts have done. And therefore the PAR 8 system itself is unlawful and will be held unlawful hopefully by the Commission.” (emphasis added)

FINDINGS OF FACT:

Based on the seventeen (17) documents submitted and the testimony of:

Called by HRD:

- Regina Caggiano, Deputy Director of Organizational Development and Civil Service Unit, HRD;

Called by Boston Fire Department:

- Ronald Keating, Fire Chief, Boston Fire Department⁶;
- Alvaro Eduardo de Castro e Lima, Director of Research, Boston Redevelopment Authority (BRA);
- Kelly McCormick, Deputy Superintendent, Boston Police Department;
- Rayshawn Johnson, Fire Lieutenant, Boston Fire Department;
- Dion Irish, Assistant Commissioner / Director of Housing Inspections, Inspectional Service Department, City of Boston;
- Roderick Fraser, Jr., Fire Commissioner, Boston Fire Department;
- Darrell Higginbottom; Fire Lieutenant, Boston Fire Department;

Called by Appellants:

- William Meyer, retired firefighter, Boston Fire Department;
- Dan Magoon, firefighter, Boston Fire Department; (also identified himself as a liaison for the non-profit organization, “Veteran Advocacy Services”);
- Brian Toohey, retired Fire Captain, Boston Fire Department;

I find the following:

1. On April 24, 2010, the Appellants took and passed the examination for Firefighter, Announcement number 4813. (Stipulated Fact)
2. On December 1, 2010, HRD established the eligible list for Firefighter. (Stipulated Fact)
3. On January 5, 2011, the BFD requested a Certification from HRD to fill 50 Firefighter vacancies. (Exhibit 6)
4. On January 22, 2011, HRD forwarded Certification No. 203549 to the BFD, containing a sufficient number of names to generate enough candidates willing to accept appointment to meet the statutory “2N + 1” formula which, in this case, would be 101 candidates. (Exhibit 7)

⁶ Mr. Keating has subsequently retired from the Boston Fire Department after forty-one (41) years of service.

5. On January 23, 2011, the BFD returned Certification No. 203549 to HRD without taking any action on it.
6. On February 10, 2011, the BFD requested a Certification from HRD to appoint ten (10) Spanish-speaking Firefighters, pursuant to PAR.08(6).
7. PAR.08(6) provides, “[if] a requisition is made calling for persons having special qualifications in addition to the general qualifications tested by an examination, the administrator may issue a selective certification of the names of such persons from the appropriate eligible list.”
8. The above-referenced February 10, 2011 request was the first time that the BFD had ever sought a special certification for candidates who are fluent in another language.
9. On February 15, 2011, the Boston Fire Commissioner, who is the Appointing Authority, testified before the Boston City Council Committee on Post Audit and Oversight. As part of a colloquy with the Chairman of that committee regarding diversity in the BFD, the Fire Commissioner stated that he had recently requested a Certification to hire Spanish-speaking Firefighters⁷.
10. On February 18, 2011, HRD denied the BFD’s February 10, 2011 request due to a lack of supporting documentation. (Exhibit 2)
11. On February 24, 2011, the BFD resubmitted a PAR.08 requisition to appoint ten (10) Spanish-speaking Firefighters. (Exhibit 3)
12. On March 15, 2011, the BFD submitted additional information to support a request to increase its requisition from ten (10) Spanish-speaking Firefighters to fifteen (15) Spanish-speaking Firefighters. (Exhibit 4)
13. On March 18, 2011, HRD issued Certification No. 204542 to the BFD for fifteen (15) Spanish-speaking Firefighters. (Exhibit 5)
14. Certification No. 204542 contained the names of those individuals who self-identified themselves to HRD as being fluent in Spanish⁸ at the time of the examination, with the names of Spanish-speaking disabled veterans and veterans appearing before those Spanish-speaking non-veterans. The names of individuals, including disabled veterans and veterans who are not fluent in Spanish, do not appear on this certification, which is the crux of the matter currently before the Commission.

⁷ The Fire Commissioner’s statements before the City Council have been a bone of contention underlying this request for an investigation. The Appellants argue that the Commissioner’s comments show that the reason for requesting the Spanish-speaking certification under PAR.08 was related to the BFD’s desire to appoint more minorities, which is not justification for issuing a PAR.08 certification. The Fire Commissioner’s testimony before the Commission on this issue is contained in later findings.

⁸ The BFD verifies that all candidates who self-identify as being fluent in Spanish are indeed fluent by requiring them to complete an examination administered by the Boston Language Institute.

15. On March 28, 2011, the Appellants submitted a request for the Commission to conduct an investigation, pursuant to G.L. c. 31, § 2(a), regarding the BFD's request for, and HRD's approval of, the Certification for fifteen (15) Spanish-speaking Firefighters.
16. On March 30, 2011, the BFD requested a new Certification to appoint thirty-five (35) firefighters.
17. Fire Commissioner Roderick Fraser, the Appointing Authority for the Boston Fire Department, testified that it was his intention all along to request a special certification for Spanish-speaking candidates, but that miscommunication between him and BFD Deputy Commissioner Karen Glasgow, resulted in the erroneous request for fifty (50) firefighters (as opposed to a subset of the fifty (50) being drawn from a special language certification).
18. On March 31, 2011, HRD issued Certification No. 204795 to the BFD for thirty-five (35) Firefighters. The names of all of the Appellants, with the exception of Christopher Rooney, appeared on this Certification, were within the statutory "2n + 1" formula, and were considered for appointment as a firefighter.
19. On April 26, 2011, a pre-hearing conference was held at the offices of the Commission.
20. The Appellants argued that the BFD was improperly using the PAR.08 special certification process to promote diversity among the ranks of Boston firefighters, rather than using other appropriate recruitment efforts, citing in part the above-referenced comments of the Fire Commissioner at a public meeting.
21. The Appellants asked that the Commission prevent the processing of the Spanish-speaking Certification until such time as an investigation was initiated and concluded by the Commission regarding the request and issuance of that Certification.
22. The BFD argued that it has demonstrated a need for Spanish-speaking Firefighters, that the Appellants are not aggrieved, and that there is no evidence that the special Spanish-speaking Certification should not have been requested or issued.
23. On June 1, 2011, the Commission denied the Appellants' request to prevent the processing of the Spanish-speaking Certification and scheduled a full hearing, which eventually occurred over two days on September 21st and November 1st, 2011.
24. On September 21st and November 1st, 2011, I heard testimony from witnesses called by HRD, the BFD and the Appellants. A summary of their testimony follows.
25. Regina Caggiano is the Deputy Director of the Civil Service Unit for HRD. She has worked for HRD for more than fourteen (14) years, twelve (12) of which have been involved with the administration of civil service. (Testimony of Caggiano)

26. Ms. Caggiano testified that Appointing Authorities requesting a special “language” certification are required to fill out a standard form and submit supporting documentation that is analyzed by HRD. According to Ms. Caggiano, HRD looks to see “why they’re requesting ... someone be proficient in another language and how it relates to the actual job duties being performed in the title.” HRD “ask[s] for the demographics of the overall community in which they’re requesting it for. And the population ... that they’re looking to serve. [HRD] also looks at the departmental ... staffing as far as how many folks do they have in the department ... and how many people might be proficient in that language already. One of the last questions that [HRD] look[s] at is [they] ask for the appointing authority to describe the nature and the frequency in which they have contact in which individuals in this title would need to have the ability to be fluent in another language to actually serve the citizens.” (Testimony of Caggiano and Exhibit 1: Request for Bilingual Selective Certification)
27. Ms. Caggiano was involved in the review and ultimate approval of the Certification issued to the BFD for fifteen (15) Spanish-speaking candidates. (Testimony of Caggiano)
28. Ms. Caggiano testified that the above-referenced approval was granted after reviewing documentation that included the overall demographics of the City, how many individuals residing in the City considered Spanish their primary language and how these statistics broke down by the nine districts served by the Boston Fire Department. According to Ms. Caggiano, the BFD showed that there were a disproportionately high number of individuals in three Fire Districts (East Boston, Jamaica Plain and Roxbury) where Spanish was the primary language of individuals calling the BFD for service.
29. As part of its decision to approve the Spanish-speaking Certification, HRD considered information submitted by the BFD stating that 14% of their calls come from primarily Spanish-speaking [individuals] and only 3.8% of their then-existing workforce was fluent in Spanish. (Testimony of Caggiano)
30. Alvaro Lima is the Research Director for the Boston Redevelopment Authority (BRA). In 2009, Mr. Lima’s office produced a report titled “New Bostonians 2009” on behalf of the Mayor’s Office of New Bostonians. (Testimony of Lima and Exhibit 10)
31. Among the findings, as summarized by Mr. Lima, of the above-referenced 2009 report are:
 - a) In 2007, Boston had 608,352 residents, with the foreign born accounting for almost 28% of that population;
 - b) In 2007, over 35% of Boston residents spoke a language other than English at home, up from almost 26% in 1990.
 - c) In 2007, over 14% of Boston residents spoke Spanish at home, up from 9.5% in 1990. (According to Mr. Lima,
 - d) In all Boston neighborhoods, 35% of the total population speak a language other than English at home;

- e) Spanish is highly represented in East Boston, Roxbury, and Jamaica Plain with over 20% of people speaking Spanish at home.
 - f) Just over 28,000 households in Boston are linguistically isolated, in which no person aged 14 years and over is English proficient.
(Exhibit 10)
32. All of the above-referenced information in Exhibit 10 was submitted to HRD as part of the BFD's request for a Spanish-speaking certification.
33. In preparation for the hearing before the Commission, the BFD asked Mr. Lima to provide additional data regarding the English proficiency of those residents who speak Spanish at home. According to Mr. Lima, 26,785 Boston residents (4.4% of the population), from 11,173 households, whose primary language is Spanish, speak English "not well" (15,621) or "not at all" (10,164). (Testimony of Lima and Exhibit 12)
34. Mr. Lima was not asked to and did not prepare similar data regarding the English proficiency of those Boston residents who speak other non-English languages at home (i.e. – Chinese, Portuguese, Haitian Creole, etc.).
35. During his testimony before the Commission, Fire Commissioner Fraser was asked to explain why he requested a Spanish-speaking Certification. He cited the number of neighborhoods in the City of Boston where Spanish is the primary language and the need to communicate with these residents, particularly regarding medical-related calls, which comprise 50% of all calls to the BFD. (Testimony of Fraser)
36. Commissioner Fraser, responding to questions related to his testimony before members of the Boston City Council, testified that the Spanish-speaking Certification was not requested in order to promote a diverse workforce because there is no guarantee that a person hired off the Spanish-speaking Certification would be Hispanic. Commissioner Fraser testified that the BFD is seeking to promote a diverse workforce through other means including expanded recruitment efforts. (Testimony of Fraser)
37. Commissioner Fraser testified that the reason he referenced the Spanish-speaking Certification in response to Councilor Yancey's question was because, "the fact that we had recently done that just came to my mind, so I stated it." (Testimony of Fraser)
38. Rayshawn Johnson is a Fire Lieutenant with the BFD, where he has served as a firefighter since 1998. He has served in various fire districts, including East Boston. (Testimony of Johnson)
39. Mr. Johnson testified that the BFD regularly encounters language barrier problems at fire and other scenes. According to Mr. Johnson, it is helpful when another firefighter is fluent in the language spoken by those residents at the scene. (Testimony of Johnson)
40. According to Mr. Johnson, when there is no firefighter available who is fluent in the language being spoken at a scene, he has had to refer to a game of "charades" to try and

figure out the nature of a medical emergency, pointing to his chest or stomach. While the non-English speaking resident may point to his or her chest or stomach, he is unable to communicate the specific nature of the problem (i.e. – are you experiencing indigestion or heart pain?) (Testimony of Johnson)

41. Mr. Johnson testified about a call that occurred on April 22, 2011 that he responded to where a 3-year old child had taken a whole bottle of prescription medication. When he arrived, he saw two other young children nearby, who only spoke Spanish. Since another firefighter proficient in Spanish was on scene, he was able to determine that the child had taken at least 30 pills and that the two other children had also taken some of the pills that “tasted like candy” to them. (Testimony of Johnson)
42. Mr. Johnson testified about another incident that occurred across from Hyde Park High School. As the ladder truck approached the scene, he and other firefighters saw a father yelling loudly -- in Spanish. Mr. Johnson sought the assistance of the ladder truck driver, who is proficient in Spanish. Through the ladder truck driver’s translation, they determined that the nine-day old infant was experiencing respiratory problems. Prior to the translation, fire and EMS personnel did not know the exact nature of the medical emergency. (Testimony of Johnson)
43. I also heard testimony from three (3) witnesses for the Appellants that are current or former employees of the BFD. Their testimony, while considered, was not compelling to me. I infer that the purpose of their testimony was to show that there was no need or justification for appointing firefighters from a Spanish-speaking Certification. Their testimony failed to show that.⁹
44. Kelly McCormick is the Deputy Superintendent in charge of labor relations at the Boston Police Department. He began his service as a police officer over twenty-three (23) years ago. (Testimony of McCormick)
45. Mr. McCormick testified that medical-related emergency calls are often responded to by the Fire Department, the Police Department and the City’s EMS. According to Mr. McCormick, this protocol is in place to ensure that the first-responder closest to the emergency is able to respond (i.e. – if a police officer is on patrol in the area, he / she may be able to respond more quickly than a firefighter or EMS employee). (Testimony of McCormick)
46. According to Mr. McCormick, the Police Department has been utilizing special language certifications since 1994, requesting special language certifications for individuals proficient in such languages as: Spanish, Haitian Creole, Chinese, Vietnamese. (Testimony of McCormick)

⁹ For example, Firefighter Dan Magoon testified that while serving tours of duty in Iraq and Afghanistan, he was able to communicate with non-English-speaking individuals through hand signals, learning some basic words and other techniques. Another long-term firefighter testified that language barriers never prevented him from performing his duties.

47. Mr. McCormick testified that when a patrol officer encounters a language barrier, he / she goes on the radio and asks for assistance from a fellow officer who is proficient in that particular language. That officer, regardless of their location at the time, is asked to come to the scene where there is a language barrier. (Testimony of McCormick)
48. According to Mr. McCormick, the assignment of police officers is at the discretion of the Boston Police Commissioner, and is not based on factors such as a police officer's seniority, etc. (Testimony of McCormick)
49. At the time of the Commission hearing, Ronald Keating served as Fire Chief for the BFD. He has been a firefighter for over forty-one years and was appointed Fire Chief in 2009. (Testimony of Keating)
50. Mr. Keating testified that assignments and transfers in the BFD, unlike the Boston Police Department, are governed by provisions in the collective bargaining agreement related to seniority. However, initial assignments of new firefighters are made by headquarters. According to Mr. Keating, individuals from the Spanish-speaking Certification in question would likely be initially assigned to East Boston. (Testimony of Keating)¹⁰

APPLICABLE STATUTES AND RULES

G.L. c. 31, § 2 states:

“In addition to its other powers and duties, the commission shall have the following powers and duties:

- (a) To conduct investigations at its discretion or upon the written request of the governor, the executive council, the general court or either of its branches, the administrator, an aggrieved person, or by ten persons registered to vote in the commonwealth.”

This statute confers significant discretion upon the Commission in terms of what response and to what extent, if at all, an investigation is appropriate. See Boston Police Patrolmen's Association et al v. Civ. Serv. Comm'n, No. 2006-4617, Suffolk Superior Court (2007).

¹⁰ According to published reports, some of the firefighters appointed from the Spanish-speaking Certification were assigned to other areas of Boston, including the Downtown / Financial district, which was not identified by any BFD witness as being an area with a high concentration of Spanish-speaking residents who are “linguistically isolated”.

G. L. 31, § 26 states, in part,

“The names of persons who pass examinations for original appointment to any position in the official service shall be placed on eligible lists in the following order: (1) disabled veterans, in the order of their respective standings; (2) veterans, in the order of their respective standings ... upon receipt of a requisition, names shall be certified from such lists according to the method of certification prescribed by the rules.

The rules referenced in Section 26 are the Personnel Administration Rules (PARs) promulgated by HRD pursuant to G.L. c. 31, § 3 which provides in part that:

“... [t]he administrator shall make and amend rules which shall regulate the recruitment, selection, training and employment of persons for civil service positions; provided, however, that the commission shall review such rules and in the event the commission determines that any proposed rule violates the basic merit principles outlined in this chapter, it may, within fifteen days of receipt of such proposed rule, by a three-fifths vote, disapprove such proposed rule...”

PAR.08(6) provides that:

“[i]f a requisition is made calling for persons having special qualifications in addition to the general qualifications tested by an examination, the administrator may issue a selective certification of the names of such persons from the appropriate eligible list.”

APPELLANTS’ ARGUMENT

The Appellants argue that given the strong and absolute statutory preference provided by Section 26, a PAR.08 special Certification for entry-level firefighters based upon foreign language skills may not be used until all veterans on the eligible list (including those not fluent in Spanish) have first been processed. According to the Appellants, PAR.08 cannot be read as authorizing such a Certification to “trump” Section 26 statutory preferences, because such an interpretation would make PAR.08 inconsistent with Section 26 and therefore unlawful.

Even assuming, however that PAR.08 could lawfully be used to request a Spanish-speaking Certification, the Appellants argue that the BFD requested the special Certification for improper and/or unsupported reasons.

HRD'S ARGUMENT

HRD argues that Section 26 was not intended by the legislature to trump all other relevant laws, including PAR.08 which, according to HRD, has the full effect of law. Further, HRD argues that the preference for veterans articulated in Section 26 is not absolute, citing Starr v. Bd. of Health, 252 N.E.2d 893, 896 (Mass. 1969).

HRD argues that Section 26 and PAR.08 should be read to complement one another, which, according to HRD, is what it did when it issued the special certification containing the names of Spanish speaking candidates. Within that PAR.08 list, the disabled veterans and veterans are listed first. According to HRD, Section 26 does not require it to exhaust the inclusion of all eligible veterans before issuing another selective certification and, if the Legislature intended for this result, it would have so stated.

Finally, HRD argues that it was justified in issuing the Spanish-speaking Certification after the BFD established a rational and justified public safety need for fifteen Spanish speaking firefighters based on the statistical data coupled with the fact that in public safety positions there are situations that time is critical when communicating with the public.

BOSTON FIRE DEPARTMENT'S ARGUMENT

The BFD argues that it had reasonable justification to request a PAR.08 Spanish-speaking Certification from HRD. According to the BFD, the fact that Boston firefighters must respond to all types of emergencies justifies the Department's legitimate

need for personnel who can communicate directly with the recipients of the Department's services, including medical runs, which account for approximately half of all calls.

Further, the BFD argues that their actions are consistent with the need to establish "language assistance plans" required by federal law that encourage the hiring of bilingual employees.

Finally, the BFD argues that the request for a PAR.08 Certification was not done as a subterfuge for hiring Hispanics without any interest in enhancing language access. According to the BFD, Commissioner Fraser was motivated by a desire to enhance language access to Fire services to avoid treating Bostonians with limited English proficiency like second-class Bostonians.

Even if there was such a motivation, the BFD argues that the Commission would then be presented with a "dual motives" case where the Appellants failed to show that "but for" an impermissible motive, the employment action would not have been undertaken.

CONCLUSION

The Appellants asked the Commission to investigate the narrow question regarding whether there was reasonable justification for HRD to issue a special, Spanish-speaking (PAR.08) Certification to the BFD to appoint fifteen (15) permanent full-time firefighters.

Months after the investigation request was filed, the Appellants, via an opening statement on the first day of hearing, expanded their request to include the question of whether the entire PAR.08 certification process was unlawful. I address this belatedly-raised issue first.

The Commission has, for many years, acknowledged the underlying legitimacy of the PAR.08 process for seeking candidates who speak second languages. In Maynard v. MBTA Police Dep't, 20 MCSR 190 (2007), the Commission explicitly stated, “When an appointing authority recognizes the need for a special qualification, such as certain language skills, the Commonwealth’s Personnel Administration Rules allow for the appointing authority to requisition a ‘selective certification’ from HRD based on the special needs of the position to be filled. *See* PAR.08(3). When such a selective certification is requisitioned and approved, only the candidates who possess that qualification even appear on the certification form provided by HRD, so there is no need to ‘bypass’ individuals without the identified special skill.”

Further, as correctly argued by HRD, the Appellants’ reliance on Feeney v. Personnel Administrator, 442 U.S. 256 (1979) is misplaced. In Feeney, the court did not address the question of reconciling PAR guidelines with section 26. The court did not mention, or even provide any examples of, the absolute nature of section 26; it merely reflected on the function of the statute, and the duty of the administrator to implement the underlying legislative policy.

Finally, even the Appellants tacitly acknowledge the legitimacy of the PAR.08 certification process, stating that such special certifications may not be unlawful if the certification is related to an essential function of the job (i.e. – EMT special certifications).

In regard to whether there was reasonable justification for HRD, in this particular case, to issue a special, Spanish-speaking (PAR.08) Certification to the BFD to appoint fifteen (15) permanent full-time firefighters, that is a closer call.

The Appellants' position, put simply, is that the BFD, seeking to increase the diversity of its workforce, sought a PAR.08 certification for Spanish-speaking candidates, under the operating assumption that a large percentage of these candidates would be Hispanic. Thus, according to the Appellants, the BFD was doing an end-run around the PAR.10 special certification process, where special certifications, based on "race, color, national origin or sex" can only be issued in limited circumstances to address past practices of discrimination against those protected classes. This proposition is not without any basis, for the reasons discussed below.

First, Commissioner Fraser was asked a simple, straightforward question by a member of the Boston City Council regarding efforts to promote diversity in the BFD's workforce. He responded by referencing the PAR.08 request, made only five (5) days earlier, for Spanish-speaking candidates. His testimony before the Commission that the Spanish-speaking Certification request "just kind of came to mind" did not sufficiently rebut the claim being made by the Appellants here.

Second, the BFD offered only scant evidence about the thought process behind the request for a Spanish-speaking Certification, in sharp contrast to the thoughtful, well-developed efforts to promote diversity in the workforce. The diversity efforts are part of an overall strategic plan, with specific staff dedicated to the effort, including an aggressive recruitment effort to attract more minority applicants. In sharp contrast, the request for a Spanish-speaking Certification appears to have been made unilaterally by the Fire Commissioner, with little or no consideration regarding such issues as whether other language certifications (i.e. – Portugese, Haitian Creole, Chinese) should be

requested and/or how those appointed could be assigned, initially and on an ongoing basis, in specific areas of the City.

For these reasons, I reach the reasonable inference that the BFD's request for a Spanish-speaking certification was based, at least in part, on the belief that a potential, ancillary benefit to requesting a Spanish-speaking Certification would be increased diversity in its workforce.

That inference notwithstanding, the BFD presented strong evidence to justify the issuance of the Spanish-speaking Certification under PAR.08. In summary, the BFD has shown, through credible evidence, that 26,785 Boston residents (4.4% of the population), from 11,173 households, whose primary language is Spanish, speak English "not well" (15,621) or "not at all" (10,164), thus being classified as "linguistically isolated". Based on the overall data presented, a reasonable inference can be drawn that the highest percentage of these Spanish-speaking linguistically-isolated residents live in East Boston, Jamaica Plain and Roxbury, which are purportedly the geographic areas where those appointed from the Special Certification will be initially assigned.

Further, the BFD presented strong evidence to show that the most effective way to address this language barrier is to increase the number of firefighters who are fluent in other languages. Longtime firefighters provided credible testimony that illustrated the critical need to be able to communicate with residents in their spoken language when responding to medical and other emergencies. Their testimony was buttressed by Boston Police Department officials who testified about the value of having police officers fluent in other languages available when responding to calls, including medical emergencies that require a joint BPD-BFD response.

While I'm troubled that the BFD failed to present a fully developed implementation plan regarding the deployment and retaining of Spanish-speaking firefighters in targeted geographic areas, they presented sufficient evidence to show that these objectives could be met, at least as part of their initial assignments.

In summary, even if the BFD anticipated an ancillary benefit of increasing diversity by requesting this PAR.08 certification, there was reasonable justification for the BFD to request, and for HRD to approve, the PAR.08 certification for Spanish-speaking firefighters.

Finally, it should not be lost here that ten (10) of the twelve (12) Appellants who requested an investigation were not aggrieved by the issuance of the PAR.08 certification, as they were considered via another certification issued almost simultaneously with the Spanish-speaking certification – and the two (2) other Appellants are now being considered via a subsequent Certification issued as part of a current hiring cycle.

For all of the above reasons, the Commission's investigation of this matter is now closed and the request for relief by the Appellants is denied.

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on May 3, 2012.

A True Record. Attest:

Commissioner

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.

Notice to:

Harold Lichten, Esq. (for Appellants)

Robert Boyle, Esq. (for BFD)

Martha O'Connor, Esq. (for HRD)

Twenty-five (25) individuals on Certification No. 204542 willing to accept employment if appointed:

Douglas Felton
Arturo Perez
Justinian Plaza
Jorge Diaz
Margaret Connolly
Rafael Hernandez
Keith McNair
James Walsh
John Amado
Jeremy Mejia
Elbert Pereira
Giovanni Arroyo
Emanuel Brandao
Bryan Denehy
Tony Docantq
Rogelio Juarez
Fidia Pina
Makeurys Baez
Chris Castillo
Gregory D'Antona
Sean Ferguson
Nathalie Fontanez
Sergio Garcia
Ritchie Melo
Samuel Perez-Rosado