

Decision mailed: 8/15/08
Civil Service Commission
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**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

ANTHONY GIACALONE, JR.,
Appellant

v.

CASE NO: G1-08-65

**CITY OF GLOUCESTER and
HUMAN RESOURCES DIVISION,**
Respondents

Appellant:

Anthony Giacalone, Jr, Pro Se
316 Main Street
Gloucester, MA 01930

City of Gloucester Representative:

John Beaudette, Chief
Gloucester Police Department
9 Dale Avenue
Gloucester, MA 01930

HRD Attorney:

Suzanne L. Faigel, Esq.
Labor Counsel, HRD
One Ashburton Place
Boston, MA 02108

Commissioner:

Paul M. Stein

DECISION ON MOTION TO DISMISS

The Appellant, Anthony Giacalone, Jr., acting pursuant to G.L.c.31, §2(b), appealed a decision of the Massachusetts Human Resources Division (HRD) declining to change, *nunc pro tunc*, a Certification of eligible candidates for reserve police officer issued to the City of Gloucester, as Appointing Authority, to reflect his claim of veteran's preference approved after the Certification had issued. HRD moved to dismiss the appeal on the grounds that the Appellant is not a person aggrieved through no fault of his own and is not entitled to relief from the Commission under Chapter 310 of the Acts of 1993.

On July 7, 2008, the Commission held a hearing on the motion. Oral arguments and written submissions were received in support of the motion from HRD (Exhibits A through M) and in opposition from the Appellant (Exhibits 1 & 2). One tape recording was made of the hearing. The record was kept open to permit HRD to submit additional documents requested by the Commission which were received on July 23, 2008 (Exhibit N), to which the Appellant was allowed 14 days to respond but has not done so.

FINDINGS OF FACT

I find there is no genuine dispute as to the following facts:

1. On or about April 1, 2007, the Appellant, Anthony Giacalone, Jr., applied on-line through the HRD website to take the entry level police officer examination scheduled to be held on May 19, 2006. (Exhibit C)

2. A link appears on the instructions page for on-line applications, directing the applicant to the Examination Announcement. Accompanying this link is a request asking all applicants to read the Examination Announcement. (Exhibits A, C)

3. The Examination Announcement (Exhibit M) contains the following information concerning claims for veteran's preference:

POLICE OFFICER	EXAMINATION DATE: MAY 19, 2007	ANNOUNCEMENT NUMBER: 8580
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CLAIMS FOR PREFERENCE

YOU WILL BE ADVISED AT THE EXAMINATION SITE HOW TO CLAIM ANY OF THE PREFERENCES LISTED BELOW.

VETERANS' PREFERENCE: If you are claiming veterans' preference and if your eligibility for veterans' preference has not been approved before by HRD, you must submit a copy of your DD Form 214 (Release From Active Duty) in order to receive proper credit. Your notice to appear for the examination will indicate whether or not you are already classified as a veteran. Qualifying service must have been in the Army, Navy, Marine Corps, Coast Guard, or Air Force of the United States. Please note that active duty exclusively for training in the National Guard or Reserves does NOT qualify you for veterans' preference. Guard Members must have 180 days and have been activated under Title 10 of the U.S. Code - OR- if activated under Title 10 or Title 32 of the U.S. Code or Massachusetts General Laws, chapter 33, sections 38, 40, and 41, must have 90 days, at least one of which was during wartime, per the chart below. The Members' last discharge or release must be under honorable conditions.

DEFINITION OF MASSACHUSETTS VETERAN M.G.L. c. 4, sec. 7, cl. 43rd as amended by the Acts of 2004 Effective August 30, 2004: To be a "veteran" under Massachusetts law, a person is required to have either 180 days of regular active duty service and a last discharge or release under honorable conditions OR 90 days of active duty service, one (1) day of which is during "wartime" and a last discharge or release under honorable conditions. A chart defining "wartime" service is available on-line on the Veterans' Services website. Claims for status as a disabled veteran require written confirmation from the US Veterans Administration of a continuing service-connected disability rated 10% or higher. Applicants wishing to claim status as disabled veterans will get the opportunity to claim such at the test site with further instructions to follow. (See Clause 43, Section 7 of Chapter 4 and Section 1 of Chapter 31 of the Massachusetts General Laws for a full definition of a qualifying veteran.)

CURRENT MILITARY PERSONNEL: ALL military personnel who, in connection with current service, CANNOT be in Massachusetts on May 19, 2007 should contact the Human Resources Division to request a make up examination. To request a make up, you must file an application and processing fee by the last filing date and request such accommodation in writing, with a copy of your military orders attached. Please include in your letter either your daytime base phone number and/or name and phone number of a Massachusetts resident with whom you are in regular contact.

4. Elsewhere on the HRD website (Exhibit B), but not specifically linked to the on-line application page or disclosed in the Examination Announcement, is the following information concerning veteran's preference:

The Official Website of the Human Resources Division (HRD)

Human Resources Division

Mass.Gov

[HRD Home](#) [Mass Gov](#) [State Agencies](#) [State Online Services](#)

[Home](#) > [Civil Service](#) > [Veteran & Active Duty Military Applicant Information](#) >

SEARCH

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Verifying Veteran's Status & Preference

Applicant claiming Veteran's Status or Preference:

- You may claim veteran's status or preference during the life of the eligible list.
- Check this [chart](#) to ensure that you meet the definition of Massachusetts veteran.

- If you have completed your military service, please submit a copy of your DD214--Member 4 Form (Release From Active Duty) for HRD review.
- If you are still in military service, you must submit a verification letter for HRD review.
 - from your commanding officer,
 - on official letterhead with appropriate signature,
 - with details of your military service to date including
 - the dates of full-time active duty,
 - current assignment, and
 - estimated time of separation.
- If you are still in military service, please provide official documentation of honorable discharge to the hiring department and HRD at the time of appointment.
- You may submit your documentation:
 - at the exam site on the testing date
 - or after the exam and during the life of the eligible list along with a completed [Add Preferences & Skills Form](#) to HRD:
 - by fax: 617-727-0399
 - by email: CivilService@hrd.state.ma.us
 - by postal mail:
Human Resources Division
One Ashburton Place
Boston, MA 02108

Applicant claiming Disabled Veteran's Status or Preference:

- You may claim Disabled Veteran's status or preference during the life of the eligible list.

- Please submit the following for HRD review at the exam site on the testing date:
 - Documentation verifying that you are a qualified Massachusetts veteran (See Request for Veteran's Status or Preference)
 - Written confirmation from the US Veterans Administration of a continuing service-connected disability rated 10% or higher.
- or after the exam date and during the life of the eligible list:
 - Documentation verifying that you are a qualified Massachusetts veteran (See Request for Veteran's Status or Preference)
 - Written confirmation from the US Veterans Administration of a continuing service-connected disability rated 10% or higher.

<http://www.mass.gov/?pageID=hrdterminal&L=3&L0=Home&L1=Civil+Service&L2=Ve...> 8/13/2008

5. Prior to the date of the examination, the Appellant received a Notice to Appear which indicated, in part, that the Appellant's status was "NOT VET". (Exhibits A, N).

6. The Appellant took the entry level police examination on May 19, 2007. (Exhibit E)

7. At the beginning of all entry level police officer exams, HRD proctors read examination instructions (Exhibit L) which state the following concerning the process an applicant must complete to apply for veteran's preference:

ANNOUNCE: *If you wish to be considered for Veteran's preference, you will need to provide a DD Form 214 (MEMBER 4 FORM) as proof of your service. You may hand in your DD Form 214 to me today, or send a copy to the address on the board.*

If you do have a DD Form 214, EMT certificate, or other information and wish to submit it at this time, please write your name, Social Security number, and the four digit announcement number 9600 at the top right-hand corner of each form. Place them on the right-hand corner of your desk. I will collect them after you finish the next section.

8. The Appellant questioned the HRD proctor's announcement at the examination about how he could claim veteran's preference since he would not be issued a DD214 until he was discharged from his current active duty with the Coast Guard, which was not due to occur until 2008. The proctor indicated that the Appellant would need to wait until he received his DD214 to claim veteran's preference. (Giacalone Testimony)

9. On or about October 10, 2007, the Appellant was notified that he had passed the examination. (Exhibit A)

10. On or about November 19, 2007, HRD received a requisition from the City of Gloucester requesting a certification from which to appoint four (4) permanent reserve police officers. HRD issued the requested Certification on December 11, 2007.

(Certification No. 271228). Appellant's name was not listed on this Certification because, without veteran's preference, he was not within the "2n+1" range for inclusion on the eligible list. (Exhibit G, H)

11. The Appellant was on active duty with the United States Coast Guard from October 28, 2003 until the end of his obligated service on or about January 27, 2008. Accordingly, under applicable HRD rules (as described on HRD's website – Exhibit B – noted above), the Appellant, in fact, was eligible to apply for veteran's preference to HRD anytime after January 25, 2004 (following 90 days of active duty).

12. On December 10, 2007, following inquiry by the Appellant's mother (while the Appellant was deployed overseas), HRD e-mailed information to the Appellant's mother for transmittal to the Appellant, indicating that a DD214 was not necessary to claim veteran's status and describing the alternative means of qualifying by obtaining a commanding officer's verification letter. (Exhibit I)

13. On or about January 18, 2008, the Appellant's commanding officer forwarded (via fax) to HRD the appropriate information verifying the Appellant's active duty veteran's status. (Exhibit F)

14. Upon receipt of the verification letter, HRD revised the current police officer eligibility list to reflect the Appellant's veteran's preference. (Exhibit J)

15. The Appellant also requested that HRD revise the prior Certification issued to the City of Gloucester to reflect his veteran's preference, but HRD declined to do so.

16. On March 14, 2008 the Appellant filed his present appeal to the Commission.

17. While his appeal was pending (on or about June 30, 2008), the City of Gloucester returned the Certification and Form 14 to HRD reflecting the appointment of the two

disabled veterans whose names appeared first and second on the Certification and two veterans whose names appeared fourth and sixth on the Certification. (Exhibit N)

18. If the Appellant's veteran's preference had been taken into account at the time of the original Certification to the City of Gloucester, his name would have appeared sixth on the list, in a tie with four other veteran applicants, one of whom was appointed from the December 11, 2007 Certification. (Exhibits J, N)

CONCLUSION

The Civil Service Law requires that "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; . . . (4) all others, in the order of their respective standings" and "*upon receipt of a requisition* [from an appointing authority], *names shall be certified from such lists . . .*" M.G.L.c.31, §26. (*emphasis added*)

The procedures for claiming a veteran's preference are clearly spelled out on HRD's website. It is the obligation of the applicant to make HRD aware of his or her claim of preference and provide the necessary supporting information required to establish the preference. (See Exhibit B; Findings of Fact 3 and 4)

Unfortunately, the information provided to applicants about the veteran's preference on the on-line application webpage and in the instructions provided by HRD proctors at the commencement of an examination does not appear to be completely consistent. (Exhibits L, M: Findings of Fact 3, 7 and 8) The lack of clarity surely contributed to the Appellant's initial misunderstanding about his ability to claim a veteran's preference without a DD214, and his delayed submission of the required information necessary for

HRD to place him on eligible civil service lists as a veteran. The Commission suggests that HRD review the information it provides about veteran's preferences with a view to assuring better clarity and consistency of the information, a more "user-friendly" format to access the information, and/or other outreach to those who currently serve in the armed forces, so as to minimize similar misunderstandings by future applicants.

The Commission does not believe it is appropriate to grant Section 310 relief to alter the December 11, 2007 Certification or require any change to the hiring process that resulted from that Certification. The Commission must take into account the facts that the appointment process had proceeded well beyond the establishment of an "eligible list" before the Appellant made his claim known to HRD and that Gloucester has since appointed four police officers (all veterans) from the Certification. The prejudice to the City of Gloucester and the selected applicants that would be visited on them if the Appellant were permitted, in effect, now to question those appointments, outweighs the Appellant's singular claim to equitable relief.

However, the Commission concludes that the Appellant's predicament here cannot fairly be considered to be his fault. The Appellant leaves a very positive impression of his honesty and credentials that are likely to serve him well in pursuit of the career in public safety to which he is clearly committed. Thus, the circumstances of the case do justify the discretionary exercise of the Commission's power to grant Chapter 310 relief so that the Appellant is assured at least one future opportunity to be considered for appointment as a police officer by the City of Gloucester which has been denied to him through no fault of his own.

If the Appellant's veteran's status had been accounted for from the beginning, it would have placed him in a tie with four other veterans on the Certification. Commission decisions have well-established that, when a civil service exam results in a tie-score, the Appointing Authority may appoint any of the tied candidates. See, e.g., Edson v. Town of Reading, Case No. G2-07-257. See generally, Thompson v. Civil Service Commission, No. 95-5742, Middlesex Superior Court (1996); Cotter v. City of Boston, 193 F. Supp.2d 62, 323 (D. Mass. 2002), rev'd other grounds, 323 F.3d 160 (1st Cir.), cert.den., 540 U.S. 825 (2003). Thus, although it is not known whether the Appellant would have been appointed had the Appellant's veteran's status been taken into account, at least, he would have been entitled to be given equal consideration for appointment along with the other candidates with veteran's status with whom he would have been tied. The Commission concludes that Chapter 310 relief is appropriate to assure that the Appellant receives at least one such consideration in the future.

Accordingly, the Commission exercises its discretion and, based on the undisputed facts, orders the Chapter 310 relief set forth below. The Motion to Dismiss is denied and the Appellant's appeal is hereby *allowed in part*.

RELIEF TO BE GRANTED


Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission directs:

- (1) the Division of Human Resources (HRD) place the name of the Appellant, Anthony Giacalone, at the top of the eligibility list for original appointment to the position of Police Officer so that his name appears at the top of any current list and any future certification and list from which the next original appointment to the

position of Police Officer in the Gloucester Police Department shall be made, so that he shall receive at least one opportunity for consideration from the next certification for appointment as a police officer in the Gloucester Police Department.

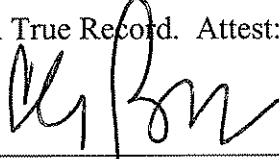
(2) The Commission further directs that, if and when Anthony Giacalone is selected for appointment, his civil service records shall be retroactively adjusted to show, for seniority purposes, a starting date of June 30, 2008, the Employment Date of the other persons selected from Certification No. 271228;

(3) HRD shall provide a report to the Commission within 30 days of the receipt of this Decision as to the action taken to make appropriate changes to the disclosures provided about veteran's preference for active duty military personnel in the proctor's announcements provided to applicants at the commencement of examinations, in the Examination Announcement, and otherwise as HRD may deem proper.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Marquis, Stein and Taylor, Commissioners; Henderson [absent]) on August 14, 2008.

A True Record. Attest:



Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(I), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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

Notice to:

Anthony Giacalone, Jr. (Appellant)

John Beaudette, Chief of Police (Appointing Authority)

Suzanne L. Faigel, Esq (HRD)