

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place, Room 503
Boston, MA 02108

KIMBERLY GOODMAN,
Appellant

v.

E-10-185

HUMAN RESOURCES DIVISION,
Respondent

Appellant's Attorney:

Pro Se
Kimberly Goodman



Respondent's Attorney:

Martha O'Connor, Esq.
Human Resources Division
One Ashbuton Place: Room 211
Boston, MA 02108

Commissioner:

Christopher C. Bowman

**DECISION ON RESPONDENT'S MOTION TO DISMISS
AND APPELLANT'S OPPOSITION TO MOTION TO DISMISS**

The Appellant, Kimberly Goodman (hereinafter "Goodman" or "Appellant"), filed an appeal with the Civil Service Commission (hereinafter "Commission") on August 2, 2010 contesting the Human Resources Division's (hereinafter "HRD") decision denying her request to re-take the Entry Level Physical Abilities Test (hereinafter "ELPAT") for firefighter. HRD filed a Motion to Dismiss the Appellant's appeal (HRD's Brief) and the Appellant filed an opposition (Appellant's Brief).

The following facts appear to be undisputed:

1. Since 2008, HRD has incorporated the Physical Abilities Test (hereinafter “PAT”) into the entry-level Firefighter civil service examination. All candidates are now required to take a two-part examination that consists of a multiple choice examination and an Entry Level Physical Abilities Test (hereinafter “ELPAT”). These two portions of the examination are then weighted fifty-percent each, by HRD and the candidate is given a final score. A passing score of the 2010 entry-level Firefighter examination is a 70. Candidates must take and pass both components in order to be placed on the eligible list for appointment in a civil service city or town. (*HRD’s Brief*)
2. The ELPAT is designed to assess a candidate’s capacity to perform the tasks ordinarily performed by a firefighter while on the job. This is accomplished by requiring the candidate to perform a series of seven events that both simulate firefighting activities and depend on the physical abilities required to perform the firefighter’s job. These abilities include cardiovascular fitness, muscle strength, muscular endurance and flexibility. (*HRD’s Brief*)
3. Each candidate is provided access to a program called Standings and On-line Applicant Record Information System (“SOARIS”). SOARIS is only accessible by those on current active eligible lists and/or those who have applied to take an upcoming scheduled examination. (*HRD’s Brief*)
4. In regard to the ELPAT, a candidate is able to reschedule the date of his/her ELPAT up to 72 hours prior to their scheduled ELPAT. (*HRD’s Brief*)
5. There are no instructions on HRD’s website advising individuals what to do if they need to reschedule the ELPAT within 72 hours of the exam. (*Appellant’s Brief*)

6. According to HRD, if a candidate needs to reschedule within 72 hours of the scheduled ELPAT, he /she would be required to email HRD's civil service unit at the email address that appears on the candidate's notice to appear as well as the HRD website, which is also on the candidate's notice to appear. *(HRD's Brief)*
7. According to HRD, if a candidate is physically unable to participate in the ELPAT prior to the start of the examination, the candidate must request to reschedule and provide sufficient medical documentation supporting the request. *(HRD's Brief)*
8. The Appellant was initially scheduled to take the ELPAT on April 23, 2010. She rescheduled the ELPAT twice and HRD scheduled her to take the ELPAT on Friday, July 23, 2010. *(HRD's Brief)*
9. According to the Appellant, she became sick on July 20, 2010, within 72 hours of the ELPAT. She still hoped to complete the ELPAT at that point. *(Appellant's Brief)*
10. On the morning of Friday, July 23, 2010, at approximately 10:00 A.M., the Appellant attended the ELPAT. *(HRD's Brief and Appellant's Brief)*
11. According to the Appellant, she explained to the EMT and the examiner on the floor who administered the examination that she was not feeling well. *(Appellant's Brief)*
It is undisputed that the Appellant did not ask the EMT or anyone else at the test site to reschedule the examination prior to the commencement of the exam.
12. Prior to taking the ELPAT, the Appellant signed a waiver form wherein she acknowledged and agreed that, " ... it is my sole responsibility to determine whether I am sufficiently fit and healthy enough to safely participate in the PAT ... I acknowledge that I must be physically fit to participate in the PAT. I understand that I am permitted and strongly encouraged to consult with a physician as to my fitness to

perform each task required by the PAT. I have no condition that might reasonably indicate that I should not participate in the PAT.” (*HRD’s Brief*)

13. Prior to initiating the ELPAT, the monitor-in-charge read the following statement to all candidates: “Please be advised that you may only partake in the actual PAT once. No re-takes will be permitted. No candidate will be allowed to take the PAT more than once.” (*HRD’s Brief*)

14. The Appellant never saw a physician prior to July 23, 2010. (*Appellant’s Brief and HRD’s Brief*)

15. The Appellant began the ELPAT. She failed the first two events, the Step Mill and the Ladder Event. The Appellant did not start the third event, the Hose Advance, and refused to complete the ELPAT. As such, the Appellant failed the ELPAT and was provided a copy of the failure report. (*HRD’s Brief*)

16. According to the Appellant, she did not proceed to the third event since she did not want to be in jeopardy of failing the exam. (*Appellant’s Brief*)

17. On July 23, 2010 at 2:27 P.M., the Appellant emailed HRD and requested to retake the ELPAT. (*HRD’s Brief and Appellant’s Brief*)

18. HRD has never permitted a candidate to re-take the ELPAT once he/she started the examination, except in the event of an equipment malfunction. (*HRD’s Brief*)

19. HRD denied the Appellant’s request to re-take the ELPAT. (*HRD’s Brief*)

20. The Appellant appealed HRD’s decision to the Commission.

Appellant’s Argument

The Appellant argues that HRD rules allow for candidates to reschedule the ELPAT exam three times. According to the Appellant, she understood that she had one

opportunity to reschedule left and saved that one rescheduling opportunity in case of an emergency or sickness. After she began the ELPAT and failed two of the events, the Appellant argues that she realized that she would not be able to complete the remaining events because she was sick and she feared not being at her full potential for the remainder of the exam. Further, the Appellant argues that she was unaware that she could have sought to reschedule the ELPAT within 72 hours of its commencement if she was ill.

HRD's Argument

HRD argues that the Appellant is not a person aggrieved because HRD's decision denying the Appellant a re-take of the ELPAT was not in violation of civil service law or rules, or basic merit principles. According to HRD, neither Chapter 31 nor the Personnel Administration Rules permit a candidate to re-take an examination or a component of an examination for placement on an eligible list.

HRD argues that the Appellant's employment status has not been harmed through no fault of her own as her failure of the ELPAT was a result of her own voluntary actions. She voluntarily appeared at the ELPAT, allegedly felt sick, but she never requested to reschedule the examination. She signed a written statement acknowledging that it was her sole responsibility to determine whether she was sufficiently fit and healthy enough to safely participate in the PAT. Prior to taking the ELPAT, she was informed that she would not be permitted to re-take the ELPAT.

Conclusion

The party moving for summary disposition of an appeal before the Commission pursuant to 801 C.M.R. 7.00(7)(g)(3) or (h) is entitled to dismissal as a matter of law

under the well-recognized standards for summary disposition, i.e., “viewing the evidence in the light most favorable to the non-moving party”, the movant has presented substantial and credible evidence that the opponent has “no reasonable expectation” of prevailing on at least one “essential element of the case”, and that the non-moving party has not produced sufficient “specific facts” to rebut this conclusion. See, e.g., Lydon v. Massachusetts Parole Bd., 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, 887 N.E.2d 244, 250 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249, 881 N.E.2d 778, 786-87 (2008).

A person is defined as aggrieved when “such person has made specific allegations in writing that a decision, action, or failure to act on the part of the administrator [HRD] was in violation of [Chapter 31], 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. c. 31, § 2(b).

St. 1993, c. 310 provides, “If the rights of any person acquired under the provision of chapter thirty-one of the General Laws or under any rule made thereunder have been prejudiced through no fault of their own, the civil service commission may take such action as will restore or protect such rights, notwithstanding the failure of any person to comply with any requirement of said chapter thirty-one or any such rule as a condition precedent to the restoration of such rights.”

Viewing the evidence in the light most favorable to the Appellant, she can not establish that she is a person aggrieved or that her rights have been prejudiced through no fault of her own.

Although the Appellant argues that she became ill within 72 hours of the ELPAT, she did not visit a physician nor did she ever tell anyone at HRD or the test site that she was too ill take the ELPAT. Rather, she signed a written statement acknowledging that it was her sole responsibility to determine whether she was sufficiently fit and healthy enough to safely participate in the PAT and that she had no condition that might reasonably indicate that she should not participate in the ELPAT. Prior to taking the ELPAT, she was informed that she would not be permitted to re-take the ELPAT. After failing the first component of the test, the Appellant then informed the monitors that she was too ill to complete the ELPAT. She candidly acknowledged that she did not proceed to the third event since she did not want to be in jeopardy of failing the exam. HRD has never permitted a candidate to re-take an ELPAT examination after the candidate begins the exam, except in the event of an equipment malfunction.

Finally, HRD's decision was firmly grounded in basic merit principles. HRD fairly argues that it would be unfair to hundreds of candidates who only had one shot at the ELPAT if the Appellant were allowed a second opportunity to perform. She would have an advantage because she had participated in two events and observed the others. This is something the other candidates did not have the opportunity to do. If HRD were to grant the Appellant's request, despite having a normal temperature and blood pressure reading prior to the ELPAT, and did not ask HRD to reschedule, it would open the floodgates to all candidates who fail the first several events of the ELPAT and want a chance to better their score.

For all of the above reasons, the Appellant's appeal under Docket No. E-10-185 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and McDowell, Commissioners) on September 23, 2010.

A true Copy. Attest:

Commissioner
Civil Service Commission

Either party may file a motion for reconsideration within ten days of the receipt of this 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 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:
Kimberly Goodman (Appellant)
Martha O'Connor, Esq. (for HRD)