

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

DARRIN GREELEY,
Appellant

v.

B2-16-100

HUMAN RESOURCES DIVISION,
Respondent

Appearance for Appellant:

Pro Se
Darrin Greeley

Appearance for Human Resources Division:

Patrick Butler, Esq.
Human Resources Division
One Ashburton Place: Room 211
Boston, MA 02108

Appearance for Boston Police Department:

Nicole Taub, Esq.
Boston Police Department
Office of the Legal Advisor
One Schroeder Plaza
Boston, MA 02120

Commissioner:

Christopher C. Bowman

DECISION

In June 2014, the Appellant, Darrin Greeley (Mr. Greeley) sat for a promotional examination for the title of Police Captain in the Boston Police Department (BPD).

Also in June 2014, Nora Baston (Ms. Baston) sat for a promotional examination for the title of Police Lieutenant in the BPD. (See Baston v. Human Resources Division, 29 MCSR 62 (2016)) (Baston Decision).

Both Mr. Greeley and Ms. Baston, as part of their examinations, applied for education and experience (E&E) credit, including time served in the non-civil service title of Deputy Superintendent.

The most recent promotional examinations for BPD were delegated to BPD by the state's Human Resources Division (HRD). Notwithstanding this delegation, HRD was still responsible for grading the E&E component of these examinations.

HRD denied E&E credit to both Mr. Greeley and Ms. Baston for time served as a Deputy Superintendent.

On December 9, 2014, Mr. Greeley filed an appeal of his E&E claim with the Director of Human Resources for the BPD.

On January 6, 2015, Ms. Baston also filed an appeal of her E&E claim with the Director of Human Resources for the BPD.

On March 5, 2015, HRD issued a decision denying both requests for E&E credit for time served in the title of Deputy Superintendent.

In the March 5, 2015 notice sent to both Mr. Greeley and Ms. Baston was the following:

“If you are dissatisfied with the outcome of your examination appeal ... you may forward an additional appeal to the Massachusetts Civil Service Commission. You have 17 days from today to submit this appeal.”

G.L. c. 31, § 24 provides that certain appeals regarding examinations may be made to the Commission but “such appeal shall be filed no later than seventeen days after the date of mailing of the decision of the administrator [HRD]” and “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 frame.”

On March 17, 2015, within the above-referenced statutory time frame, Ms. Barton filed an appeal with the Commission. Mr. Greeley acknowledges that he did not file an appeal with the Commission within the seventeen-day statutory time frame.

On February 4, 2016, the Commission issued the Baston decision, allowing Ms. Baston's appeal, concluding that Ms. Baston should receive E&E credit for time served as a Deputy Superintendent. As part of the decision, the Commission ordered HRD to "adjust Deputy Baston's overall examination score to provide the appropriate amount of Category 1 experience credit for her service in a position of 'Captain or higher' consistent with this Decision."

On May 22, 2016, Mr. Greeley filed the instant appeal with the Commission, stating:

"I am appealing the denial of my Deputy Superintendent time in the Education and Experience for Police Captain. I appealed and was denied by BPD Human Resources. I am requesting the Civil Service Commission review the matter relative to the Nora Baston Decision."

On June 14, 2016, I held a pre-hearing conference which was attended by Mr. Greeley, counsel for HRD and counsel for BPD. As part of the pre-hearing conference, HRD argued that Mr. Greeley's appeal should be dismissed as it is untimely. Counsel for BPD stated that it concurs with Mr. Greeley and that Mr. Greeley, along with three (3) other individuals who took promotional examinations should be awarded E&E credit for time served as a Deputy Superintendent. I joined the BPD as a party and set a briefing schedule.

On June 23, 2016, HRD filed a motion seeking the dismissal of Mr. Greeley's appeal.

On July 1, 2016, nine individuals¹ tied or ranked higher on applicable promotional eligible lists, filed a motion to intervene, stating that a decision in favor of Mr. Greeley may result in them being moved below Mr. Greeley on the eligible list.

¹ Keith Dalrymple, Steven Sweeney, James Fitzpatrick, Therese Kozimiski, Kevin McGoldrick, Leighton Facey, John Flynn, John Hughes & Sean Wilbanks.

On July 6, 2016, Mr. Greeley filed an opposition to HRD’s motion, an opposition to the motion to intervene, along with a request for the Commission to initiate an investigation and grant him relief under Chapter 310 of the Acts of 1993. On July 7, 2016, the BPD filed a “response” to HRD’s motion, arguing that, at a minimum, a further review [by HRD] of Mr. Greeley’s appeal and any other such appeals is warranted.

On August 3, 2016, Luis A. Cruz, an individual currently ranked higher than Mr. Greeley on the BPD Police Captain eligible list, also filed a motion to intervene.

HRD’s Argument

As stated above, HRD’s argument is that Mr. Greeley’s appeal is untimely and should therefore be dismissed. Further, HRD argues that the Baston decision is “fact-specific” and that an E&E appeal is distinguishable from appeals involving multiple choice question appeals. In multiple choice appeals, HRD acknowledges that if, for example, it determines that another response is acceptable (i.e. – both A & C instead of just A), the scores are adjusted for all test-takers, and not just the person filing the appeal.

HRD also cites the Commission’s decision in Boston Police Superior Officers Federation v. Boston Police Department and Human Resources Division, 21 MCSR 59 (2008), an examination appeal in which the Commission limited relief to only those individuals who filed an appeal with the Commission.

Mr. Greeley’s Argument

Mr. Greeley argues that fairness and equity require that any individuals similarly situated to Ms. Baston should be granted the same relief. Specifically, Mr. Greeley argues that any individuals who served as Deputy Superintendent should receive the same relief (appropriate E&E credit) for time served in the position, the relief granted to Ms. Baston.

Mr. Greeley cites the Commission's recent decision in Nathan Souza v. Human Resources Division, 28 MCSR 624 (2015), in which the Commission, as part of an E&E appeal, ordered HRD to "conduct a further review of Mr. Souza's E&E Claim, *and all other similar claims submitted related to this promotional examination*, and award .2 E&E points for each (six-month) period in which a DOC employee served as a Field Training Officer for (a) new recruit(s)." (*emphasis added*)

Notwithstanding that his appeal is untimely, Mr. Greeley argues that the Commission should initiate an investigation under G.L. c. 31, s. 2(a) and, pursuant to Chapter 310 of the Acts of 1993, grant him the same relief that was awarded to Ms. Baston.

BPD's Argument

BPD generally concurs with Mr. Greeley's argument and, as stated above, believes a further review of E&E claims was/is warranted by HRD as a result of the Baston decision.

Analysis

Education and Experience scores may be appealed to the Commission under G.L. c. 31, § 24, but these appeals must be received by the Commission within seventeen (17) days after the date of mailing of an adverse decision of the Administrator [HRD]. See O'Neill v. Civ. Serv. Comm'n, Middlesex Sup. Ct. No. 09-0391 (2009). In O'Neill, the Commission dismissed the Appellant's E&E appeal as it was filed with the Commission approximately *fifty (50) days* after HRD notified the Appellant that his E&E score would not be changed. Here, Mr. Greeley's appeal was not filed with the Commission until *over a year* after he was notified by HRD that his E&E score would not be changed.

The failure to file an appeal with the Commission within the statutory time is jurisdictional, or akin to a statute of limitations, and cannot be improperly expanded by the Commission. See

Falmouth v. Civil Serv. Comm'n, 441 Mass. 814, 822 (2006); Donnelly v. Cambridge Public Schools, 21 MCSR 665 (2008); Volpicelli v. Woburn, 22 MCSR 448 (2009); Novia v. Boston, 20 MCSR 639 (2007); Maurice v. Massachusetts Dep't of Mental Health, 19 MCSR 328 (2006); Konikowski v. Department of Correction, 10 MCSR 79 (1997); Springer v. Saugus, 8 MCSR 154 (1995).

For this reason, the Commission does not have jurisdiction to hear Mr. Greeley's E&E appeal under G.L. c. 31, § 24.

Possibly anticipating this result, Mr. Greeley asks the Commission to consider his request by initiating an investigation under G.L. c. 31, § 2(a).

The Commission maintains authority under Section 2(a) to conduct investigations. 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). See also Erickson v. Civ. Serv. Comm'n & others, No. 2013-00639-D, Suffolk Superior Court (2014). We exercise this discretion "sparingly". See Richards v. Department of Transitional Assistance, 24 MCSR 315 (2011). Here, Mr. Greeley's request does not, even remotely, fall within the type of matters for which the Commission has previously exercised its discretion to initiate an investigation and it would be inappropriate to take such action here.

Although not explicitly stated, Mr. Greeley is effectively asking the Commission to re-open the Baston appeal for the sole purpose of determining whether other, similarly situated individuals, including Mr. Greeley, should be granted the same relief as Ms. Baston.

Courts have recognized that agencies "have inherent power to reopen their concluded proceedings in compelling situations as justice may require." Ung v. Civ. Serv. Comm'n & City

of Lowell, Suffolk Sup. Ct. No. 11-4391 ((2012) citing Covell v. Department of Social Servs., 42 Mass.App.Ct. 427, 434 (1997) (reasoning that this power extends beyond cases which suggest that fraud affected the decision making process), citing Aronson v. Brookline Rent Control Bd., 19 Mass.App.Ct. 700, 703-706 (1985) An agency’s authority to reopen proceedings, however, “should be exercised by an agency with due circumspection ‘sparingly’ Covell, at 433.

I carefully considered whether the Commission should take the rare step of re-opening the Baston appeal for the purpose of considering whether individuals other than Ms. Baston should be granted relief. In doing so, I reviewed the two (2) prior Commission decisions cited by the parties here involving examination-related appeals, one in which the Commission granted relief only to those individuals who had filed an appeal with the Commission (Boston Police Superior Officers Federation v. Boston Police Department and Human Resources Division, 21 MCSR 59 (2008)), and one in which the Commission granted relief to both the Appellant and any similarly situated individuals, including those who had not filed an appeal with the Commission (Nathan Souza v. Human Resources Division, 28 MCSR 624 (2015)).

Both fact-specific decisions offer compelling reasons why the Commission, *at the time*, decided to grant the relief that it did. Here, however, the question is whether the Commission, based on the request of a non-party, should *re-open* an appeal and apply the relief granted to other individuals. Ultimately, I don’t think this is the rare case in which justice requires such action be taken.

Finally, I have considered – and denied – the motions to intervene received by those individuals who, should the relief in Baston be expanded, would potentially be adversely impacted by having their rank on the eligible list lowered. The Commission regularly grants relief to aggrieved individuals, including placing the names of certain erroneously bypassed

candidates at the top of the next Certification to ensure reconsideration, that, by definition, results in other individuals being lowered in rank on that Certification. (i.e. – a candidate ranked first on the Certification may be lowered to second when the Commission orders such relief). That relief is granted to make an aggrieved individual whole and to rectify an unjustified decision by an Appointing Authority. The concerns of those employees who may see their rank lowered on the Certification must be balanced against the Commission's core mission to ensure that hiring decisions are made consistent with basic merit principles. Granting intervenor status to all individuals, including those here, who would be impacted by a Commission decision, is not appropriate or warranted.

Conclusion

For all the reasons discussed above, Mr. Greeley's appeal under Docket No. B2-16-100 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 September 1, 2016.

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 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:

Darrin Greeley (Appellant)

Patrick Butler, Esq. (for HRD)

Nicole Taub, Esq. (for BPD)

James Hykel, Esq. (for Keith Dalrymple, Steven Sweeney, James Fitzpatrick, Therese Kozimiski, Kevin

McGoldrick, Leighton Facey, John Flynn, John Hughes & Sean Wilbanks)

Luis A. Cruz