

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

WILLIAM KELLEY,  
*Appellant*

v.

B2-20-015

HUMAN RESOURCES  
DIVISION,  
*Respondent*

Appearance for Appellant:

*Pro Se*  
William Kelley

Appearance for Respondent:

Melinda Willis, Esq.  
Human Resources Division  
100 Cambridge Street: Suite 600  
Boston, MA 02114

Commissioner:

Christopher C. Bowman

DECISION ON HRD'S MOTION TO DISMISS

1. On January 30, 2020, the Appellant, William Kelley (Mr. Kelley), filed a "fair test" appeal with the Civil Service Commission (Commission) regarding the November 16, 2019 promotional examination for Fire Lieutenant.
2. On February 25, 2020, I held a pre-hearing conference at the offices of the Commission which was attended by Mr. Kelley and counsel for the state's Human Resources Division (HRD).
3. As part of the pre-hearing conference, the parties stipulated to the following:
  - A. On November 16, 2019, Mr. Kelley took the promotional examination for fire lieutenant.

- B. On November 21, 2019, Mr. Kelley filed a fair test appeal with HRD
  - C. On January 27, 2020, HRD denied Mr. Kelley's fair test appeal.
  - D. On January 30, 2020, Mr. Kelley filed an appeal with the Commission.
  - E. On February 3, 2020, Mr. Kelley received his score. According to Mr. Kelley, he received an 80.88 on the written portion of the examination; and an 89.70 on the E/E portion of the examination, for a combined score of 85.
4. At the pre-hearing conference, Mr. Kelley indicated that his fair test appeal to HRD was based on his conclusion that 13 of the 80 multiple choice questions did not correspond with the suggested reading material. Further, he concluded that an additional 3 multiple choice questions could be answered correctly with more than one answer.<sup>1</sup>
  5. At the pre-hearing, counsel for HRD indicated that, after receiving Mr. Kelley's appeal (and others), HRD did a careful and thorough review of the examination and determined that some questions on the examination did not correspond with the reading material. Those questions were removed from the examination and were not counted in the score. For reasons attributed to confidentiality and the integrity of the testing process, HRD has opted not to indicate how many such questions were removed.
  6. Further, after the above-referenced review, HRD identified additional questions in which more than one answer would be considered correct. Those questions remained in the score with candidates being given credit for a correct answer if they responded with one of the multiple correct answers. As part of a separate appeal that was heard the same day, it was established that 4 questions fell into this category.
  7. Mr. Kelley argues that HRD should disclose how many questions were removed from consideration and, if that number exceeds more than 1-2% of the total questions, the test should be deemed an unfair test and invalidated with a new examination administered to all candidates.
  8. An eligible list for fire lieutenant was established by HRD on or around March 1, 2020.
  9. As discussed at the pre-hearing conference, HRD filed a Motion to Dismiss and Mr. Kelley filed an opposition.

### *Parties' Arguments*

HRD argues that, even if, after review, 13 of the 80 test questions were effectively removed from the examination because those questions were not referenced in the reading list, the

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<sup>1</sup> On March 24, 2020, I conducted pre-hearing conferences in separate appeals involving the same issue presented here. As part of those pre-hearing conferences, HRD indicated that the total number of questions removed entirely was "less than 13".

Appellant cannot show that this promotional examination was not a fair test of his abilities to perform the duties of a Fire Lieutenant.

Mr. Kelley argues that HRD has an obligation to ensure that all questions on the examinations are based on the reading material. He argues that, when questions appear on the examination that are not from the reading list, it can cause confusion and the triggering of “false memories”. He argues that candidates spend considerable time studying the reading material and that including questions that were not from the reading material is inherently unfair, warranting an order from the Commission invalidating the entire examination and calling for a new examination in which 100% of the questions are based on the reading material.

### *Applicable Law*

G.L. c. 31, s. 2(b) states in part:

“No person shall be deemed to be aggrieved under the provisions of this section unless such person has made specific allegations in writing that a decision, action, or failure to act on the part of the administrator was in violation of this chapter, 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.”

G.L. c. 31, s. 22 states in part:

“An applicant may request the administrator to conduct a review of whether an examination taken by such applicant was a fair test of the applicant's fitness actually to perform the primary or dominant duties of the position for which the examination was held, provided that such request shall be filed with the administrator no later than seven days after the date of such examination.”

G.L. c. 31, s. 24 states in part:

An applicant may appeal to the commission from a decision of the administrator made pursuant to section twenty-three relative to (a) the marking of the applicant's answers to essay questions; (b) a finding that the applicant did not meet the entrance requirements for appointment to the position; or (c) a finding that the examination taken by such applicant was a fair test of the applicant's fitness to actually perform the primary or dominant duties of the position for which the examination was held.”

### *Analysis*

I carefully reviewed Mr. Kelley’s argument presented at the pre-hearing conference and stated in his written brief. Mr. Kelley and many other firefighters spent considerable time preparing for the fire lieutenant examination by reviewing the reading material offered by HRD. He and others are frustrated that apparently up to 13 of the 80 questions on the examination were

effectively removed as they were not contained in the reading material. While that frustration is warranted, Mr. Kelley has not shown that the overall test was unfair and/or that the Commission should invalidate the examination.

As referenced in HRD's brief, the Commission squarely addressed this issue in O'Neill v. Lowell and Human Resources Division, 21 MCSR 683 (2008). Although the appeal was dismissed based on timeliness, the Commission did still address the issue of certain questions being faulty and/or effectively removed from the examination. In O'Neill, 20% of the examination questions were determined to be faulty. The Commission concluded that the "defect rate" of 20% did not, standing alone, rise to the level of proof necessary to deem the test unfair. The underlying facts here are not distinguishable from O'Neill, nor should the result be.

While Mr. Kelley has not shown that this examination was an "unfair test", he and others have raised legitimate concerns regarding how so many questions apparently were not contained in the reading material. At a minimum, that should prompt HRD to conduct a thorough review of the process used to validate examinations on a going-forward basis.

For all of the above reasons, HRD's Motion to Dismiss is allowed and Mr. Kelley's appeal under Docket No. B2-20-015 is hereby *denied*.

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 March 26, 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)(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:

William Kelley (Appellant)  
Melinda Willis, Esq. (for Respondent)