

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

100 Cambridge Street – Suite 200
Boston, MA 02114
617-979-1900

SEAN KELLY,
Appellant

B2-23-080

v.

HUMAN RESOURCES DIVISION,
Respondent

Appearance for Appellant:

Sean Kelly, *Pro Se*

Appearance for Respondent:

Michele Heffernan, Esq.
General Counsel
Human Resources Division
100 Cambridge Street – Suite 600
Boston, MA 02114

Commissioner:

Paul M. Stein¹

DECISION ON RESPONDENT’S MOTION TO DISMISS

On June 21, 2023, the Appellant, Sean Kelly, a firefighter in the Holyoke Fire Department, purporting to act pursuant to G.L. c. 31, §§ 22-24, filed an appeal with the Civil Service Commission (Commission) contesting his score on the Statewide Fire Lieutenant examination administered by the Human Resources Division (HRD) on March 25, 2023. The Appellant received notice of his score on June 14, 2023. The Appellant’s appeal claims that the March 25, 2023 examination was unfair, asserting, in particular:

On March 25, 2023 the fire lieutenants exam was held after being cancelled [in] November. Those who signed up for the test were told by email that “information on the most relevant sections within the original reading list will be provided soon” (11/18/22). Not until January 20, 2023 were test takers updated that no changes were made to the list. Also no relevant sections were given. A new subjective

¹ The Commission acknowledges the assistance of Law Clerk Alana Khan with the preparation of this decision.

section was added which was a completely unreasonable evaluation and completely unknown how this section was graded. The testing site (DCU Center) also was hosting a dance event which could be heard all throughout the testing room. It was very disappointing how unprofessional the administrating of the exam, which has many life-changing opportunities for those taking it.

I held a remote pre-hearing conference on July 5, 2023, at which the Appellant, counsel for HRD, and counsel for the City of Holyoke appeared. On July 21, 2023, in accordance with the Procedural Order issued as a result of hearing the parties at the Pre-Hearing Conference, the Human Resources Division (HRD) filed a Motion to Dismiss the appeal on the grounds that the Appellant had not first filed a timely fair test appeal with HRD's civil service unit directly, and thus the Commission lacks jurisdiction to hear this appeal. The Appellant was promptly notified of the Motion to Dismiss and given leave to respond on or before August 2, 2023, but he filed no response.

APPLICABLE LEGAL STANDARD

A motion to dismiss an appeal before the Commission, in whole or in part, may be filed pursuant to 801 C.M.R. 1.01(7)(h). These motions are decided under the well-recognized standards for summary disposition as a matter of law, i.e., “viewing the evidence in the light most favorable to the non-moving party”, the undisputed material facts affirmatively demonstrate that the non-moving party has “no reasonable expectation” of prevailing on at least one “essential element of the case”. See, e.g., Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550 n.6 (2008); Maimonides School v. Coles, 71 Mass. App. Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005).

Section 22 of G.L. c. 31 states in relevant 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.*" (emphasis added)²

Section 24 of G.L. c. 31 states:

"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. Such appeal shall be filed no later than seventeen days after the date of mailing of the decision of the administrator. [. . .] 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 and form and unless a decision on such request for review has been rendered by the administrator." (emphasis added)

ANALYSIS

The undisputed facts, viewed in a light most favorable to the Appellant, establish that, for the reasons stated in HRD's Motion to Dismiss, the Appellant does not meet the conditions to warrant an appeal to the Commission. Every one of the reasons the Appellant states for claiming that administration of the March 25, 2023 examination was "unreasonable" and "unprofessional" were known to him on or before the date he took the examination.

On March 6, 2023, the Appellant was notified of the Situational Judgement component of the exam and given a preparation guide for it, and then was notified by HRD of his appeal rights on March 16, 2023. So, the Appellant was well aware that a new component was added to the examination prior to taking it on March 25, 2023. Despite notice of the component and appeal rights, the Appellant did not file, or attempt to file, an appeal with HRD after taking the examination. Similarly, any disruptive activity that may have occurred at the testing site was

² References to "the administrator" in sections 22-24 of G.L. c. 31 mean the head of HRD or their designee. G.L. c. 31, § 1 (definition of "administrator").

known to the Appellant when he took the exam. Yet the Appellant did not file a request for a fair test review of the Statewide Fire Lieutenant Exam with the administrator (HRD) within 7 days of the examination (or at any time thereafter), as prescribed by G.L. c. 31, §§ 22 & 24.

In sum, absent a timely request for review of the Appellant's claims by HRD as required by the civil service law, the Commission lacks jurisdiction to hear this appeal. Thus, the Appellant's appeal must be dismissed for lack of jurisdiction.

CONCLUSION

For the above reasons, HRD's Motion to Dismiss is hereby *allowed* and the Appellant's appeal, under Case No. B2-23-080, is *dismissed*.

Civil Service Commission

/s/Paul M. Stein

Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chair; Stein, McConney, and Tivnan, Commissioners [Dooley – Absent]) on August 10, 2023.

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. 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:

Sean Kelly (Appellant)

Michele Heffernan, Esq. (for Respondent)