COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

ROGER KENDRICK et al.[1],
Appellants

v.

B2-08-90

HUMAN RESOURCES DIVISION,
Respondent

Appellants' Attorney:

Harold L. Lichten, Esq.
Pyle, Rome, Lichten, Ehrenberg
& Liss-Riordan, P.C.
18 Tremont Street: Suite 500
Boston, MA 02108

Respondent's Attorney:

John Marra, Esq.
General Counsel
Human Resources Division
One Asbhurton Place: Room 211
Boston, MA 02108

Commissioners:

Christopher C. Bowman
John E. Taylor

DECISION ON RESPONDENT'S MOTION TO DISMISS

Procedural History

On April 18, 2008, Roger Kendrick and 17 other individuals (hereinafter "Appellants"), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (hereinafter "Commission,") appealing the April 4, 2008 decision of the

state's Human Resources Division (hereinafter "HRD") to cancel the November 17, 2007 promotional examination for the position of lieutenant in the Boston Fire Department.

A pre-hearing conference was conducted at the offices of the Commission before Commissioners Bowman and Taylor on May 6, 2008. At that proceeding HRD submitted a Motion to Dismiss the Appellants' appeal. The Appellants filed their opposition on May 14, 2008.

Factual Background

On November 17, 2007, HRD administered the promotional examination for Boston Fire Lieutenant to 186 test-takers. After allegations of misconduct regarding the examination, HRD investigated the matter and found that misconduct had indeed occurred. HRD further concluded that the integrity and fairness of the examination was compromised and canceled the examination. A new promotional examination is scheduled for June 21, 2008.

HRD's Argument in Favor of Motion to Dismiss

HRD offers a two-pronged argument in favor of its Motion to Dismiss the Appellants' instant appeal. First, HRD argues that the Commission lacks jurisdiction to hear the instant appeal pursuant to G.L. c. 31 § 2 (b). G.L. c. 31, § 2(b) grants the Commission jurisdiction "to hear and decide appeals by a person aggrieved by any decision, action or failure to act by the administrator, *except as limited by the provisions of section twenty-four relating to the grading of examinations…" (emphasis added).* §24 governs an applicant's appeal rights in regard to an exam. It provides that "[a]n applicant may appeal to the commission from a decision of the administrator pursuant to section twenty-

[1] The other 17 Appellants are: Sean Coppney, James Cahill, Carolos Roque, Michael Kates, Christopher McGrath, Lorenzo Thompson, John Nee, Gerald Powers, Glan Martin, Christopher Sloane, Francis Foley,

three relative to (a) marking of the applicant's answer 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." HRD argues that the legislature - through §24, and in conjunction with § 2(b) - specifically limited the rights of individuals to appeal actions by HRD regarding examinations. Since §24 does not provide for an appeal of the Personnel Administrator's decision to cancel an examination, HRD argues that it was the intent of the legislature to exclude the right of appeal of the Personnel Administrator's decision. Thus under HRD's line of reasoning, the Commission does not have jurisdiction to hear the instant appeal.

Second, HRD argues that the Appellants lack standing to file the instant appeal: they are not "persons aggrieved" as defined by G.L. c. 31, § 2(b), because they have not suffered actual harm to their employment status.

Appellants' Argument in Opposition to HRD's Motion to Dismiss

The Appellants argue that HRD has misread how §§ 2(b) and 24 relate to each other. The Appellants argue that § 2(b) allows for any type of appeal due to a failure to act by the Personnel Administrator, except for the three types of appeals which would instead be governed by § 24. According to the Appellants, it can not be that the broad grant of authority in § 2(b) means that any other matter relating to an exam, no matter what action HRD has taken, can not be challenged under § 2(b) because it is not specifically enumerated in § 24.

Anthony Rowan, Robert Martin, Edwin Melecio, Michael Whelan, Stephen Perry and Daniel Mullen.

In regard to whether or not the Appellants have standing to file the instant appeal, the Appellants argue that they *are* "persons aggrieved" as defined by G.L. c. 31, § 2(b). The Appellants argue that they have been harmed by HRD's act in canceling the exam for which they studied for up to 1,000 hours. The Appellants argue that they are certain that if the exams in question were to be scored, "many of them would have high scores, much higher than the score they may actually receive" on the exam scheduled for June 21, 2008.

Conclusion

We concur with the Appellants that HRD has misread the § 2(b) as it relates to § 24. As argued by the Appellants, it is clear that §2 (b) grants the Commission substantial authority to review the actions of the Personnel Administrator to aggrieved persons, and that the reference to § 24 constitutes a limitation *only with respect to the three(3) types of claims enumerated under § 24.*

The Appellants in this case have failed to demonstrate, however, that they have standing to pursue the instant appeals with the Commission as they have not demonstrated that they are "persons aggrieved" pursuant to G.L. c. 31, § 2(b).

The applicable jurisdictional requirements of Chapter 31 are clear. § 2(b), under which the Appellants have filed their appeal, requires that petitioners show that they are persons who have been "aggrieved" by a "decision, action, or failure to act by the administrator …" and requires that they show that their rights "… were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status." The statute further states:

> "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 …. Any person appealing a decision, action or failure to act of the administrator shall file a copy of the allegations … with the administrator …. Said allegations shall clearly state the basis of the aggrieved person's appeal, and make specific references to the provisions of this chapter or the rules of the department or basic merit principles promulgated thereunder *which are alleged to have been violated, together with an explanation of how the person has been harmed." (emphasis added)*

The Appellants are not persons "aggrieved" by the actions of the Personnel Administrator (in the decision of HRD on behalf of the Administrator) because the statute requires that aggrieved persons show that the person has already "been harmed." In its use of the past tense, the legislature intended the statute to apply in cases where the harm has already occurred. The legislature expounded that this past harm must show that the person's rights had already been "abridged, denied, or prejudiced in such a manner as to cause actual harm." The harm must be definite and already have taken place, not potential, speculative and in the future.

In this matter, the Appellants speculate that they *may* have done well on the November 2007 examination, and that they *may* receive a lesser score on the new June 2008 examination. Although the Commission is mindful of the fact that the Appellants studied countless hours for the November 2007 examination, they have failed to demonstrate to the Commission that they have *already* suffered the requisite harm whose "employment status" has been adversely affected.

For this reason, the Appellants' appeal under Docket No. B2-08-90 is hereby

dismissed.

Civil Service Commission

_____
Christopher C. Bowman
Chairman

_____
John E. Taylor
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on June 12, 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. 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:
Harold L. Lichten, Esq. (for Appellants)
John Marra, Esq. (for HRD)