

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

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

DANIEL KENNEALLY &  
MATTHEW KENNEALLY,  
Appellants

v.

B2-17-091 (DANIEL)  
B2-17-098 (MATTHEW)

HUMAN RESOURCES DIVISION,  
Respondent

Appearance for Appellants:

Pro Se  
Danniel Kenneally  
Matthew Kenneally

Appearance for Respondent:

Melissa Thomson, Esq.  
Human Resources Division  
One Ashburton Place: Room 211  
Boston, MA 02108

Commissioner:

Christopher C. Bowman

**DECISION ON MOTION FOR SUMMARY DECISION**

On May 15<sup>th</sup> and May 16<sup>th</sup>, 2017, the Appellants, Daniel Kenneally and Matthew Kenneally (the Appellants or Daniel and Matthew) (who are brothers), filed appeals with the Civil Service Commission (Commission), contesting the amount of education and experience (E&E) credit awarded to them by the state's Human Resources Division (HRD) regarding a promotional examination for Boston Fire Lieutenant (Daniel) and Boston Fire Captain (Matthew).

On May 23, 2017, I held a pre-hearing conference which was attended by the Appellants and counsel for HRD. On June 14, 2017, HRD filed a Motion for Summary Decision, asking the Commission to either dismiss the appeals as untimely or, in the alternative, dismiss the appeals

based on the argument that there is no genuine issue of fact and the Appellants have no reasonable expectation of prevailing. Although the Appellants did not submit a reply to HRD's motion, they did present cogent oral argument at the pre-hearing conference and submitted email correspondence (prior to HRD's motion being filed) regarding the timeliness issues. For the reasons stated below, I find that, although the appeals were timely filed, HRD's motion should be allowed given the uncontested facts coupled with HRD's broad statutory authority regarding the administration of civil service examinations.

In short, the substantive issue raised here by the Appellants is as follows. In prior promotional examinations for Fire Lieutenant and Fire Captain, HRD awarded 2.0 "education and experience" points for candidates holding an EMT certification and 1.0 additional "education and experience" point for candidates holding CPR/BLS Instructor Certification. During this examination period, HRD awarded 3.0 E&E points for holding an EMT certification and no points for candidates holding CPR/BLS Instructor Certification.

The Appellants' argument is two-fold. First, they argue that HRD's changes fail to account for the value the CPR/BLS Instruction Certification brings to the position of Boston Fire Lieutenant and Captain and that increasing the points for the EMT certification doesn't make sense given that, according to them, this EMT certification is a minimum job requirement in the Boston Fire Department. Second, the Appellants argue that HRD should have notified applicants in advance of this change, if for no other reason than allowing applicants to avoid the cost and time associated with obtaining CPR/BLS Instructor Certification.

HRD argues that they followed their longstanding practice when developing these examinations, including consultation with "subject matter experts" (SMEs) that included existing

and retired fire personnel in higher titles. According to HRD, that process resulted in the changes referenced above, which were applied statewide.

The issue of timeliness relates to whether the Appellants' appeals to the Commission (and the underlying appeal to HRD) constituted a "training and experience" appeal or a "fair test" appeal under Section 22 of the civil service law which, depending on certain factors, may trigger a different start date regarding the time period for an applicant to file an appeal with HRD. (See G.L. c. 31, s. 22 & O'Neill v. Civ. Serv. Comm'n and Human Resources Division, Middlesex Superior Court No. 09-0391 (2009).)

HRD argues that the Appellants' claims here are not related to "the marking of the applicants' training and experience", (E&E appeals) but, rather, is a request to review whether the examination taken by the applicants was "a fair test of the applicants' fitness to actually perform the primary or dominant duties of the position for which the examination was held" (fair test appeals). A valid legal (and common sense) argument can be made for either proposition. In this particular case, I have concluded that the Appellants filed timely E&E appeals with HRD within seven (7) days of receiving their E&E scores and, which, pursuant to the second paragraph of G.L. c. 31. s. 22, were timely appeals. Further, their appeals to the Commission were E&E appeals, which pursuant to G.L. c. 31, s. 24 were timely, as they were filed with the Commission within seventeen (17) days of receiving the determination from HRD.

That turns to the substantive issue of HRD's decision to award 3.0 E&E points for holding an EMT certification and no points for candidates holding CPR/BLS Instructor Certification. Pursuant to G.L. c. 31, § 5(e), HRD is charged with: "conduct[ing] examinations for purposes of establishing eligible lists." G.L. c. 31, § 22 states in relevant part: "In any competitive examination, an applicant shall be given credit for employment or experience in the position for

which the examination is held.” In Cataldo v. Human Resources Division, 23 MCSR 617 (2010), the Commission stated that “ ... under Massachusetts civil service laws and rules, HRD is vested with broad authority to determine the requirements for competitive civil service examinations, including the type and weight given as ‘credit for such training and experience as of the time designated by HRD.’ G.L. c. 31, § 22(1).” Put another way, it is not the Commission’s role to fine-tune how many E&E points are awarded for each category on a promotional examination but, rather, to ensure that HRD’s decision-making process was not arbitrary or capricious and that the awarding of E&E points was done uniformly. There is no evidence here that HRD did not follow its-well established process, including consulting SMEs, prior to making the one-point changes referenced in these appeals nor is there any evidence (or allegation) that these changes were not uniformly applied.

I concur with the Appellants that a better course here would be for HRD to be more transparent regarding the E&E process. While HRD argues that E&E is a “component of the examination”, logic and common sense show that it is highly distinguishable from the multiple choice questions that are asked to assess the skills of the applicants. There is nothing prohibiting HRD from sharing how education and experience points are awarded prior to the examination, including any changes from previous examinations. Rather than jeopardizing the integrity of the examination, it would instill more confidence in the examination process and allow for a more level playing field of all candidates. The statute, however, does not require HRD to notify applicants of changes to the E&E formula and the decision not to issue such notifications does not provide the Appellants with any basis to prevail on their appeals.

For all of these reasons, the Appellants’ appeals under Docket Nos. B2-17-091 and B2-17-098 are hereby *dismissed*.

Civil Service Commission

/s/ Christopher Bowman

Christopher C. Bowman  
Chairman

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman – Yes; Camuso, Commissioner – No; Ittleman, Commissioner – Yes; Stein, Commissioner – Yes; and Tivnan, Commissioner – No.) on March 16, 2018.

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:

Daniel Kenneally (Appellant)

Matthew Kenneally (Appellant)

Melissa Thomson, Esq. (for Respondent)