

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

100 Cambridge Street, Suite 200
Boston, MA 02114
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Tracking No. I-23-091

**Re: REQUEST TO INVESTIGATE CERTAIN ALLEGED IRREGULARITIES
IN THE MARCH 25, 2023 BOSTON FIRE PROMOTIONAL EXAMINATION**

Summary of Commission Response

The Commission declined the Petitioner's request for investigation as nothing in the request for investigation warrants further investigation by the Commission into alleged irregularities in the March 2023 Boston Fire Promotional Examination that have not already been thoroughly plowed by the Commission or, as they raise legitimate concern about the Petitioner's own standing on the eligible list, cannot appropriately be addressed in the adjudication of his ECT&E appeal.

COMMISSION RESPONSE TO REQUEST FOR INVESTIGATION

Background

On July 10, 2023, Daniel Kenneally, a Lieutenant in the Boston Fire Department (BFD) (Lt. Kenneally or Petitioner), filed a petition with the Civil Service Commission (Commission), asking the Commission to open an investigation, acting under its discretion pursuant to G.L. c. 31, § 2(a), into certain alleged irregularities in the March 25, 2023 BFD Fire Lieutenant and Fire Captain Promotional Examination (Boston Fire Promotional Exam) administered by the Human Resources Division (HRD) on March 25, 2023.

On July 18, 2023, I held a show cause conference to provide the Petitioner with the opportunity to show cause why such an investigation should be initiated by the Commission, which was attended by the Petitioner, counsel for HRD, and representatives from the City of Boston. As it appeared that the Petitioner also intended to file an individual examination appeal pursuant to G.L. c. 31, § 24, for review of HRD's scoring of his Education, Certification, Training & Experience (ECT&E) component of the Boston Fire Promotional Examination, and certain of the concerns raised by the Petitioner's request for investigation appeared likely to be more appropriately addressed through the Petitioner's Section 24 examination appeal, I issued an Interim Procedural Order to defer further action on this investigation request, pending the filing of Lt. Kenneally's individual Section 24 appeal.

On August 9, 2023, Lt. Kenneally filed his Section 24 ECT&E examination component appeal (CSC No. B2-23-115). The ECT&E examination component review has addressed, or is in the process of addressing, Lt. Kenneally's concern with the alleged lack of clarity in how his ECT&E claims were scored, including, in particular, the proper scoring of his ECT&E claims for BFD experience.

Commission's Authority to Conduct Investigations

The Commission, established pursuant to G.L. c. 7, § 4I, is an independent, neutral appellate tribunal and investigative entity that is not affiliated with HRD or its civil service unit. Section 2(a) of Chapter 31 grants the Commission broad discretion upon receipt of an alleged violation of the civil service law's provisions to decide whether and to what extent an investigation might be appropriate.

Further, Section 72 of Chapter 31 provides for the Commission to "investigate all or part of the official and labor services, the work, duties and compensation of the persons employed in such services, the number of persons employed in such services and the titles, ratings and methods of promotion in such services."

The Commission exercises its discretion to investigate only "sparingly," typically only when there is clear and convincing evidence of systemic violations of Chapter 31 or an entrenched political or personal bias that can be rectified through the Commission's affirmative remedial intervention.

Commission's Response

The March 25, 2023 Boston Fire Promotional Examination (along with a Statewide Fire Promotional Examination administered on that same date), followed a months-long process by HRD to redesign the civil service fire promotional examinations following the judicial decision of the Suffolk Superior Court that held that prior promotional examinations administered by HRD had unlawfully discriminated against minority candidates. See Findings of Fact and Conclusions of Law on Phase I (Liability), Tatum v. Commonwealth, Suffolk Sup. Ct. No. 0984CV00576 (10/27/2022) (Wilkins, J.) (Tatum Decision).

The Tatum decision caused HRD to cancel certain fire and police promotional examinations conducted or scheduled (in the ordinary course) during 2022, pending the completion of the redesign of the examinations by outside Subject Matter Experts (SMEs). HRD also established a working "stakeholders" group (including representatives from the Commission, appointing authorities, fire service unions, and other governmental agencies and interested parties) to provide information and feedback on the progress of HRD's work in producing new examinations.

The Commission has decided several appeals and requests for investigation of HRD's decisions concerning the March 2023 Fire Promotional Examination and the subsequently scheduled September 2023 Police Promotional Examination. See, e.g., Ranahan v. Human Resources Division, CSC No. E-22-170 (2023); Kelly v. Human Resources Division, CSC B2-23-080 (2023); Request for Investigation of the Commonwealths Human Resources Division by

Richard McKinnon, Jr., et al., CSC Tracking I-23-035 (2023); Request by Waltham Police Dep't, to Revive Revoked Eligible List, CSC E-23-020 (2023); Lynch v. Human Resources Division, CSC No. CSC No. B2-23-005 (2023); Request for Investigation against the Human Resources Division (HRD) by Petitioners The Professional Firefighters of Massachusetts (PFFM), et al., CSC Tracking I-22-149 & I-22-150 (2022); Request for Investigation against the Human Resources Division (HRD) by Petitioners The International Brotherhood of Police Officers, et al., CSC Tracking I-22-165 (2022).

I find nothing in the request for investigation by this Petitioner that warrants further investigation by the Commission into alleged irregularities in the March 2023 Boston Fire Promotional Examination that have not already been thoroughly plowed by the Commission or, as they raise legitimate concern about Lt. Kenneally's own standing on the eligible list, cannot appropriately be addressed in the adjudication of his ECT&E appeal.

In disposing of prior appeals and requests for investigation, the Commission has specifically rejected the Petitioner's allegations that an examination-wide investigation was needed because the examination was tainted by the unreasonably short advance notice to study and by alleged loose enforcement at the test sites. As to the alleged irregularity caused by the last-minute appointment of a BFD District Fire Chief, without appointing a Fire Captain to replace him before the prior list expired, the person most directly affected by that action presently has his own appeal pending before the Commission. Bonaceto v. Boston Fire Dep't, CSC No. B2-23-109. As to the allegations that examination experience points did not consider "breaks in service" due to military deployment, HRD has explained that, if such a situation existed, it would likely be an isolated incident attributable to a lack of oversight by the Appointing Authority responsible for verifying employment experience, which is best addressed on a case-by-case specific basis. As to the alleged unfair advantage gained by two unnamed test-takers who were also participants in the "stakeholders" working group, it is unlikely that such participation could possibly have afforded any "stakeholder" access to the proprietary information about the substantive content of actual examination questions.¹ Finally, the Petitioner's asserted speculation that the SMEs responsible for designing the test possessed outdated knowledge is far too little, and comes too late, to justify the Commission opening an investigation.

I do not overlook the fact that the March 2023 examination and creation of a new eligible list was put on a fast-track for reasons not entirely within HRD's control and for the express benefit of appointing authorities and fire service officers who had been prevented from promotions for an unusual period of time due to the Tatum decision, which is a situation that is not likely to be repeated. I also note that, in matters of examination design and administration, HRD is generally entitled to exercise reasonable discretion and the Commission will act only when it finds that HRD has acted unreasonably, arbitrarily, or capriciously. Finally, to the extent the Petitioner seems to suggest that the flaws he raises would require the Commission to require administration of a new, replacement examination, such remedial relief would likely cause more harm than good to the efficient administration of the civil service system. I acknowledge that the process may not have

¹ The Commission's general counsel participated in every scheduled stakeholder meeting and is well aware of the considerable lengths HRD went to preclude stakeholder access to any confidential proprietary information about the substantive content of actual examination questions.

been perfect but, under all the circumstances, the Petitioner has not shown cause for the Commission to intervene.

In sum, I recommend that the Commission deny the Petitioner's request for investigation at this time.

Civil Service Commission

/s/ Paul M Stein
Commissioner

On October 5, 2023, the Commission (Bowman, Chair; Dooley, McConney, Stein and Tivnan, Commissioners) voted to accept the above recommendation and close the request for investigation.

Notice:

Daniel Kenneally (Petitioner)

Sheila B. Gallagher, Esq. (for HRD)

Connie Wong, Esq. (for BFD)

Robert Boyle, Esq. (for BFD)