

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

RE:

Request by Jack Kervin and Nine (9) other registered voters to investigate the Boston Police Department and the Human Resources Division (HRD)'s decision not to videotape the upcoming oral board interview component of a promotional assessment center examination for police sergeant, lieutenant and captain.

Tracking No. I-14-169

Appearance for Petitioners:

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Appearance for Boston Police Department:

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Commissioner:

Christopher C. Bowman

RESPONSE TO REQUEST FOR INVESTIGATION

On July 15, 2014, the Petitioners, ten (10) registered voters in the Commonwealth, filed a request for the Civil Service Commission (Commission) to conduct an investigation, pursuant to G.L. c. 31, § 2(a), into "the Boston Police Department [BPD] and [the Human Resources

Division] (HRD)'s decision to not record the assessment center components of the forthcoming promotional process.”

On July 18, 2014, the Commission issued an Order to Show Cause regarding Petitioners' request and scheduled a conference to give the Petitioners the opportunity to show why the Commission should conduct an investigation.

On August 12, 2014, I held a show cause hearing, which was attended by co-counsel for the Petitioners, co-counsel for the BPD, counsel for HRD and representatives of the BPD and the Boston Police Superior Officer Federation (BPSOF).

Based on the statements of the parties, the following appears to be undisputed:

1. No promotional examinations have been administered for Boston Police Sergeant, Lieutenant or Captain since 2008.
2. A primary reason for the lack of promotional examinations has been pending litigation related to Lopez et al v. City of Lawrence, CA #07-11693-GAO and a companion case in Suffolk Superior Court.
3. HRD has extended the eligible lists established in 2008 for BPD sergeant, lieutenant and captain and all promotions for these positions have been made from Certifications generated from these extended eligible lists.
4. In April 2013, HRD and the BPD entered into a “delegation agreement” regarding said promotional examinations. Instead of HRD administering traditional paper-and-pencil, multiple choice examinations to establish eligible lists for these positions, the BPD was permitted to hire a consultant to develop an alternative “assessment center” examination that would include various components including, but not limited to, an “oral board” (or the equivalent, depending on position) component. The weight given to this portion of the

assessment center examination depends on the title in question (with more weight being assigned to this component for the higher titles of lieutenant and captain).

5. Over six hundred (600) sergeant candidates and dozens of lieutenant and captain candidates have been scheduled for the oral board component of the examination which will occur in September and November 2014 at two (2) different locations in Boston.
6. The oral board portion of the assessment center will be evaluated by Superior Officers from other police departments outside of Massachusetts. BPD, in consultation with their testing consultant, EB Jacobs, has decided not to record the oral board component of the assessment center of the examination.

Petitioners' Argument

The Petitioners, via counsel for the BPSOF, argue that, to ensure a "fair test" that is consistent with basic merit principles and to avoid irreparable harm to the applicants, the Commission should initiate an investigation and order the BPD to record the oral board component of the assessment center examination.

The Petitioners submitted a ten (10)-page "Affidavit and Expert Opinion" of a psychometrician. As part of that affidavit, the psychometrician stated that the lack of video recording has "serious implications including: a) It precludes administrative or judicial appeals of the grading of the oral examination responses by assessors; b) It makes it basically impossible to measure the reliability of grading of the oral examination responses, all the more serious because multiple groups of assessors will be used; and c) It ignores the high level of distrust on the part of the applicants resulting from appeals to similar examinations in the past."

The Petitioners, citing several prior Commission bypass decisions, point to what they argue is the Commission's well-established position that recording oral interviews is a preferred method of evaluating candidates for appointment and promotion.

In regard to whether the Commission has authority to issue the order requested here, the Petitioners cite to the Commission's broad authority under G.L. c. 31, §§ 2(a) and 72 and Chapter 310 of the Acts of 1993 to issue the relief requested.

BPD's Argument

The BPD argues that the Petitioners' request here is actually an appeal under Section 2(b) of the civil service law, cloaked as a request for investigation under Section 2(a) and, since the Petitioners have not identified any person that has been aggrieved, the Commission has no authority to act on the Petitioners' request for relief.

In regard to the decision not to record the oral board component of the examination, the BPD stated that it has relied on the experts at EB Jacobs who have informed the BPD that: there is no national standard requiring such recording; they have never recorded similar components in the past; and that such recordings would only produce anxiety among the applicants to the detriment of the examination process.

Legal Standard

G.L. c. 31, § 2 states in relevant part:

“In addition to its other powers and duties, the commission shall have the following powers and duties:

- (a) To conduct investigations at its discretion or upon the written request of the governor, the executive council, the general court or either of its branches, the administrator, an aggrieved person, or by ten persons registered to vote in the commonwealth.”
- (b) 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; provided that no decision or action of the

administrator shall be reversed or modified nor shall any action be ordered in the case of a failure of the administrator to act, except by an affirmative vote of at least three members of the commission, and in each such case the commission shall state in the minutes of its proceedings the specific reasons for its decision. (emphasis added)

This statute confers significant discretion upon the Commission in terms of what response and to what extent, if at all, an investigation is appropriate. See Boston Police Patrolmen's Association et al v. Civ. Serv. Comm'n, No. 2006-4617, Suffolk Superior Court (2007). (See also Dennehy v. Civ. Serv. Comm'n, No. 2013-00540, Suffolk Superior Court (2014) (“The statutory grant of authority imparts wide latitude to the Commission as to how it shall conduct any investigation, and implicitly, as to its decision to bring any investigation to a conclusion.”))

G.L. c. 31, § 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. (emphasis added)

The administrator shall determine the form of a request for review. Each such request shall state the specific allegations on which it is based and the books or other publications relied upon to support the allegations. References to books or other publications shall include the title, author, edition, chapter and page number. Such reference shall also be accompanied by a complete quotation of that portion of the book or other publication which is being relied upon by the applicant. The administrator may require applicants to submit copies of such books or publications, or portions thereof, for his review.”

G.L. c. 31, § 24 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 determine the form of the petition for appeal, provided that the petition shall include a brief statement of the allegations presented to

the administrator for review. After acceptance of such an appeal, the commission shall conduct a hearing and, within thirty days, render a decision, and send a copy of such decision to the applicant and 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. In deciding an appeal pursuant to this section, the commission shall not allow credit for training or experience unless such training or experience was fully stated in the training and experience sheet filed by the applicant at the time designated by the administrator.” *(emphasis added)*

G.L. c. 31, § 72 states in relevant part:

“The commission or the administrator may 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 or the administrator may report the results of any such investigation to the governor or the general court.”

Chapter 310 of the Act of 1993 states:

“If the rights of any person acquired under the provisions of chapter thirty-one of the General Laws or under any rule made thereunder have been prejudiced through no fault of his own, the civil service commission may take such action as will restore or protect such rights, notwithstanding the failure of any person to comply with any requirement of said chapter thirty-one or any such rule as a condition precedent to the restoration or protection of such rights.” *(emphasis added)*

Analysis

I have carefully reviewed the Petitioners’ request for the Commission to: a) initiate an investigation; and b) issue an order requiring the BPD to record the oral board component of an *ongoing* assessment center examination for the positions of sergeant, lieutenant and captain. (Non-oral board components of the examination have already been completed and graded.) As part of my review, I considered the arguments presented at the show cause hearing and the Petitioners’ written submission, including the thought-provoking affidavit submitted by an experienced psychometrician.

Based on this review, I reached the inescapable conclusion that the Petitioners have, in effect, filed a hybrid of a premature “fair test” appeal and a premature “bypass” appeal, arguing that: 1) the promotional examinations, *which have yet to be completed*, may not be a fair test because of the likely challenges the consultant will face in grading said examinations as a result of unrecorded oral boards; and 2) bypassed or other non-selected candidates will be hamstrung in the appeal process by the lack of any recording of the oral board component.

These are not invalid arguments. However, the statutory framework related to both “fair test” appeals, which can be filed with Commission under Section 24, and “bypass” appeals, which can be filed under Section 2 (b), is clear. Fair test appeals cannot be filed until *after* the examination has been completed and must *first* be filed with the Administrator (HRD). Only *after* these non-ministerial benchmarks have been met, does the statute allow the Commission to entertain such appeal. In regard to bypass appeals, the statute only allows an *aggrieved* person to file an appeal with the Commission, contesting their non-selection. The examinations in question have not yet been completed and the Petitioners cannot show that any person has already been aggrieved.

More broadly, given the facts and arguments presented here, the Commission has no authority to intervene in an ongoing examination process that falls squarely, at this juncture, under the jurisdiction of HRD, which is charged with overseeing and administering the civil service examination process.

For these reasons, the Commission has opted not to exercise its discretion to conduct an investigation beyond the preliminary actions referenced in this response. The request for investigation is *denied*.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman and Stein, Commissioners [McDowell – Absent] on August 21, 2014.

Notice:

Patrick Bryant, Esq. (for Petitioners)
Michael McDevitt, Esq. (for Boston Police Department)
Nicole Taub, Esq. (for Boston Police Department)
Wendy Chu, Esq. (HRD)

ADDENDUM

Subsequent to voting on this Response to Request for Investigation, the Commission received documentation from HRD that was requested as part of the conference on this matter, including a “Summary of the Exam Appeal Process”, jointly submitted by HRD and the BPD.

As part of the Summary, Paragraph 7 states in part that: “Any ‘fair test’ appeals may be filed with EB Jacobs within seven days of the completion of all of the components of the examination.”

Paragraph 8 states in part that: “Pursuant to G.L. c. 31, § 24, an applicant dissatisfied with the outcome of his/her examination may appeal to the Commission ...”

Based on these two statements, it appears that HRD’s intention here is to delegate responsibility for reviewing fair test appeals to EB Jacobs, with applicants then appealing EB Jacobs’s determination directly to the Commission.

As referenced in this Response, G.L. c. 31, § 24 states in relevant part that: “An applicant may appeal to the commission from a decision of the administrator ... 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.” (emphasis added)

Further, G.L. c. 31, § 5(1), only allows HRD to: “delegate the administrative functions of the civil service system, so far as practicable, to the various state agencies and cities and towns of the commonwealth.” (emphasis added)

Based on the plain reading of Sections 24 and 5(1), we do not believe that delegating the review of an applicant’s fair test appeal to a private vendor is permissible. Rather, HRD should review such appeals and then the applicant should be permitted to appeal HRD’s decision to the Commission.

Addendum reviewed and adopted by a vote of the Commission (Bowman, Chairman; Ittleman, Stein, Commissioners [McDowell – Absent] on August 25, 2014.