COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108
(617) 979-1900

KENNETH KOCERHA,
Appellant

v.

B2-20-049

HUMAN RESOURCES
DIVISION,
Respondent

Appearance for Appellant:	Gerard S. McAuliffe, Esq. 43 Quincy Avenue Quincy, MA 02169
Appearance for Respondent:	Melinda Willis, Esq. Human Resources Division 100 Cambridge Street: Suite 600 Boston, MA 02114
Commissioner:	Christopher C. Bowman

DECISION ON HRD'S MOTION TO DISMISS

1. On March 12, 2020, the Appellant, Kenneth Kocerha (Appellant), a Fire Lieutenant, filed an appeal with the Civil Service Commission (Commission), arguing that the recent Fire Captain examination administered by the state's Human Resources Division (HRD) was not a "fair test", as according to the Appellant, 14 of the 80 questions were either not included in the reading material or were questions in which multiple answers were acceptable.

2. On May 19, 2020, I held a pre-hearing via videoconference which was attended by the Appellant, his counsel and counsel for HRD.
3. As part of the pre-hearing conference, the parties stipulated to the following:
    a. On 11/16/19, the Appellant took the Fire Captain examination.
    b. On 11/19/19, the Appellant filed a fair test appeal with HRD.
    c. On February 3, 2020, the scores were released.
    d. The Appellant received a score of 90.
    e. On March 3, 2020, HRD sent the Appellant a reply to this fair test appeal.
    f. HRD's reply stated in part: "Your appeal has been denied. Be advised that all test questions that were presented from information outside the reading list have been accounted for and the results of these changes have been applied to the final scores for all candidates."
    g. On March 4, 2020, the eligible list was established.
    h. The Appellant is tied for 8th on the local eligible list.
    i. On March 12, 2020, the Appellant filed a timely appeal with the Commission.
    j. The Appellant has been serving as a Temporary Fire Captain since 2/7/20.
4. The Commission recently issued a series of decisions regarding a similar issue related to the Fire Lieutenant examination administered the same day (e.g. – Pellizzaro v. Human Resources Division).
5. In the decisions related to the Fire Lieutenant examination, it was alleged that up to 13 of 80 questions were removed from the examination as they were not contained in the reading material.

6. Here, HRD indicated at the pre-hearing conference that the amount of questions removed for this reason from the Captain examination was "less than the Fire Lt. examination."
7. At the pre-hearing conference, HRD argued that the Commission should reach the same decision here as it did in the Fire Lt. Examinations.
8. Counsel for the Appellant argued that there are potential factual disputes which could distinguish this matter from the Fire Lt. Examinations (i.e. – was one entire section of the examination eliminated; or were the removal of questions disbursed across various sections?) At the pre-hearing conference, HRD stated that no examination topics were excluded as a result of the removal of certain questions.
9. HRD submitted a Motion to Dismiss and the Appellant submitted an opposition.

Applicable Law

G.L. c. 31, s. 2(b) states in part:

> "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."

G.L. c. 31, s. 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."

G.L. c. 31, s. 24 states in part:

> 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.

Summary Disposition 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)

Parties' Arguments

HRD makes the same argument here that it did in Pelizzaro, arguing that, even if, after review, 14 of the 80 test questions were effectively removed from the examination because those questions were not referenced in the reading list, the Appellant cannot show that this promotional examination was not a fair test of his abilities to perform the duties of a Fire Captain. Further, HRD argues that the circumstances here are no different than the circumstances before the Commission when it decided O'Neill v. Lowell and Human Resources Division, 21 MCSR 683 (2008) (The Commission concluded that the "defect rate" of 20% did not, standing alone, rise to the level of proof necessary to deem the test unfair.)

The Appellant's brief, submitted by his counsel, includes unsupported statements or suggestions that: a) Dismissing this appeal will result in HRD being able to continue its "in competence (sic)";

b) the removed questions were part of some pre-planned, nefarious attempt by HRD to "change the scope of the exam"; c) the Commission has dismissed prior appeals dealing with identical issues because HRD is a "fellow State Administrative Agency" and/or because the Appellants were not represented by counsel. The brief goes on to raise a series of other hypothetical scenarios and questions which are not reflective of the undisputed facts in the instant appeal or are just farcical (i.e. – what if 40% of the questions were removed?; "If and when I go out expecting to buy a new car, I am not satisfied if I get a car that is eighty (80%) per cent (sic) of what I expected especially if I were told I was getting something one hundred (100%)."

Analysis

The reality here is that the Commission has previously addressed when a test administered by HRD would not constitute a "fair test" warranting intervention by the Commission which could potentially result in the entire examination being rescinded. In DiRad v. Civ. Serv. Comm'n, 352 Mass. 130 (1967), the Massachusetts Supreme Judicial Court reviewed the Commission's decision to cancel a ten-question examination for the position of artist. The Commission had determined that cancellation was appropriate where "some applicants had the advantage of using certain drawing aids which they had brought to the examination, whereas the appealing applicants had not brought aids with them because the notice of the examination gave no indication that their use would be permitted. Id at 195. The Court upheld the Commission's decision, noting that it had been "correct in deciding that the evidence showed that the use of drawing aids was a factor in the results of the examination, that the applicants at large had not been given an equal opportunity to use them, and that a new examination with uniform standards was the feasible way to provide an equal opportunity." Id. at 196 Here, there is no allegation that

the Appellant was treated differently (i.e. – unfairly) from any other applicant and/or that HRD did not apply uniform standards.

In Boston Police Super. Officers Federation v. Boston Police Dep't and HRD, I-02-606 (2008), the Commission allowed a series of appeals where the subject matter relating to a "Rule 200" was not included in the reading material, but questions appeared on the examination related to this "Rule 200". The Commission ordered that the applicants' examinations be re-scored after removing the "Rule 200" questions from the examination. Here, consistent with the Commission's 2008 decision, HRD, after review, proactively removed those exam questions on the 2019 Fire Captain examination that were found not to be specifically referenced in the reading material.

In O'Neil, as referenced above, the Commission, after hearing, squarely addressed the central issue of the Appellant's instant appeal: whether or not HRD's decision to remove questions from the examination that were not referenced in the reading material made the test "unfair"? The answer was "no". In O'Neil, the number of questions removed constituted 20% of the total questions. Here, even viewing the facts most favorably to the Appellant, the number of questions removed for the same reason is *less* than 20%.

The Appellant's suggestion that the 14 questions removed could all involve one subject matter appears to be a red herring designed to distinguish the facts of this appeal from O'Neil. The Appellant never raised such an argument in his appeal to HRD, something he clearly would have known at the time. Further, his counsel doesn't actually make such an allegation as part of the brief, but, rather, only suggests that such a possibility exists.

In short, the Appellant's appeal is not distinguishable from O'Neil. Even if 14 questions were removed from the Fire Captain examination, that would not deem it an "unfair" test that would

warrant intervention and relief (i.e. – vacating the examination) by the Commission. Since the Appellant is dismissive of those parts of prior decisions urging HRD to take proactive steps to ensure that all future examination questions correspond to the reading material, I will not repeat them here.

Conclusion

For all of the above reasons, HRD's Motion to Dismiss is allowed and the Appellant's appeal under Docket No. B2-20-049 is hereby ***dismissed.***

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on August 27, 2020.

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:
Gerard McAuliffe, Esq. (for Appellant)
Melinda Willis, Esq. (for Respondent)