

COMMONWEALTH OF MASSACHUSETTS

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

BENJAMIN MAHAN & VICKIE BAGU,
Appellants

v.

B2-20-155 & B2-20-164

HUMAN RESOURCES DIVISION,
Respondent

Appearance for Appellants:

Pro Se
Benjamin Nahan
Vickie Bagu

Appearance for Respondent:

Alexis Demirjian, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

Commissioner:

Christopher C. Bowman

ORDER OF DISMISSAL

1. On October 16, 2020, Appellant Benjamin Mahan (Mahan), a Field Parole Officer A/B (FPO A/B) at the Massachusetts Parole Board (MPB), filed an examination appeal with the Civil Service Commission (Commission).¹
2. On November 17, 2020, I held a remote pre-hearing conference via Webex videoconference which was attended by Mahan and counsel for the state's Human Resources Division (HRD).
3. Three (3) other individuals joined the remote pre-hearing indicating that they had an interest in the issues that were the subject of the Appellant's appeal.
4. At the pre-hearing conference, Mahan clarified that his appeal related to the promotional examination for FPO C and Field Parole Officer D (FPO D), administered by HRD.
5. The parties stipulated to the following:

¹ Approximately one month later, Vickie Bagu filed an appeal with the Commission regarding similar issues, as discussed in more detail below. She was joined as intervenor in this appeal given the similarity of issues.

- A. On August 6, 2020, Mahan took the examination for FPO C and FPO D.
 - B. The FPO C examination consisted of 80 written questions. Candidates wishing to take the FPO D examination completed an additional 20 questions.
 - C. Mahan chose to complete all 100 questions (i.e. – take both the FPO C and FPO D examinations).
 - D. On September 15, 2020, HRD released the scores for the FPO C and FPO D examinations (and another examination held the same day for Institutional Parole Officer C (IPO C)). Mahan was notified that he received a total score of 68.75 on the FPO C exam and a total score of 76 on the FPO D exam. The passing score for each examination was 70.
 - E. Also on September 15, 2020, HRD established an eligible list of candidates for both positions. Mahan’s name does not appear on the FPO C eligible list and his name appears 12th on the FPO D eligible list.
 - F. Also on September 15, 2020, HRD received email communication from Mahan asking for a copy of the test questions.
 - G. On a date on or after September 15, 2020, (date not provided by either party), HRD notified Mahan that examination questions were confidential.
 - H. On October 16, 2020, the Appellant filed the instant appeal with the Commission.
6. As referenced above, it also appears undisputed that, in addition to FPO C and FPO D, examinations were also held on August 6, 2020 for the Institutional Parole Officer series.
 7. During the pre-hearing conference, Mahan stated that the reason he sent an email to HRD on September 15, 2020 asking for a copy of the exam questions was because he believed that some of the questions on the examination could have more than one answer; some of the questions on the examination contained grammatical errors; and other questions on the examination were no longer applicable and/or were superseded by COVID-19 protocols.
 8. The three other persons who participated in the remote pre-hearing indicated that they had each taken the promotional examination(s) in question; had received failing scores; had difficulty understanding the process for filing an appeal with HRD; and/or had communication with HRD in which they had expressed, in their opinion, a desire to file an appeal regarding the examination(s) for the same reasons articulated by Mahan above.
 9. For all of the above reasons, I ordered the following:

- I. Mahan had 10 days to file a “More Definite Statement” clearly articulating why he believes he is an aggrieved person.
 - II. As discussed at the pre-hearing conference, the persons who participated in the pre-hearing conference other than Mahan had 10 days to file a motion to intervene, explaining the basis for the motion, including a detailed description of any efforts they took to file an examination appeal with HRD and for what purpose.
10. I informed the parties that, after receiving the above-referenced information, additional orders would be issued regarding the procedural next steps of this appeal.
11. I did not receive a more definite statement from Mahan.
12. Nine (9) other applicants who are Parole Board employees filed Motions to Intervene as follows:
- a. Nathan Mendes (FPO D applicant), in his motion to intervene, stated in part: “ ... it is my belief that the process to exercise ones appeal right under MGL Sec 22 lacks clarity and does not truly provide a clear and concise method to initiate an appeal.” According to Mr. Mendes, he submitted an examination appeal with HRD on September 24, 2020, which HRD deemed untimely.
 - b. Brian Lussier (FPO C applicant), in his motion to intervene, stated in part: “I had previous (sic) appealed my exam for the Field Parole Officer C on 9/24/20. I received an email from HRD that stated me (sic) appeal was not received in a timely fashion so therefore it was denied. My appeal is based on the fairness of questions that were asked.”
 - c. Shawna Hawksley (FPO C and D applicant), stated in her motion to intervene: “The content of the exam did not represent the skills relevant to the Field Parole Officer D position Furthermore, many questions in the exam were inherently flawed. I recognized the following issues: 1) questions with missing information, 2) questions with two correct answers, 3) questions with no correct answers, and 4) questions with incoherent logic.
 - d. Michelle Wetherbee (Institutional Parole Officer C applicant), in her motion to intervene, stated in part: “The overall process of how to appeal was only explained to me by one of my colleagues although I had called and sent emails asking such questions. In order to appeal a test that is what determines our [livelihood] should be much easier.” Ms. Wetherbee listed various alleged deficiencies in the exam, including: “The questions on the test that pertained to the Victim Services Unit and the Field Services Unit would not be part of this job function.” (Ms. Wetherbee filed a separate E&E appeal with the Commission which has been denied.)

- e. Vicky Bagu (Institutional Parole Officer C applicant), who filed her own fair test appeal with the Commission (B2-20-164), filed a motion to intervene stating in part, “... I also want to point out that contacting [] Civil Service HRD did not make the appeal process an easy transition. I sent in a request via emails to Civil Service regarding my appeal via my personal email as well as my state email several times. First time sending questions regarding the process in September 9/16/2020 to appeal to be aware and understand the process to receiving my answer sheet on 10/9/20 with just several letters in a row not understanding what answers were correct or right.”
 - f. Kelley Sylvia (Institutional Parole Officer C applicant), in her motion to intervene, stated in part, “Personally, I feel some of the test questions were poorly written. I feel some of the questions had more than one correct choice. The questions should have been clear and concise with only one correct answer.” (Ms. Sylvia subsequently withdrew her request to intervene.)
 - g. Lawrence Mittica (FPO C applicant), in his motion to intervene, stated in part: “... I took the Field Parole Officer C promotional exam. I received a failing grade and attempted several times to request an appeal, but was never given the opportunity.” He also stated in part that: “... I sent approximately seven emails to Civil Service requesting an appeal or information on how to file an appeal and no one responded.”
 - h. Daniel Wight (FPO C and FPO D applicant), in his motion to intervene, stated that, on 10/15/20, he received an email from HRD stating that his appeal was timely as it had been received within 17 days, only to receive a subsequent email on 10/28/20 indicating that his appeal was not timely as it had not been received within 7 days.
 - i. Kimm Yonika (FPO C and FPO D applicant) also filed a motion to intervene, stating in part that a number of the questions on the FPO C examination were “confusing and conflicted with how MA parole operates.”
 - j. Eric Mawhinney (FPO D applicant) also filed a motion to intervene, stating in part that he had difficulty “follow[ing] protocols of appeal in a timely manner.” He also stated in part that the test questions were “constructed around policy where there was incorrect information either in question or answer forms on various occasions.”
13. In summary, nine (9) incumbent employees at the Massachusetts Parole Board took the FPO C, FPO D or Institutional Parole Officer promotional examination and notified the Commission that: a) they found the process for how to file an exam-related appeal with HRD to be unclear and/or confusing; and/or b) some of the questions on the examination should be reviewed as they were either unclear and/or did not reflect the current job duties and responsibilities of the position(s).
14. For these reasons, I requested that that HRD provide the following information:

- i. An overview of the process for applicants who took the examinations to file an appeal with HRD.
 - ii. A copy of any instructions provided to the applicants detailing this process.
 - iii. For the above referenced applicants, a summary of any communication these applicants had with HRD regarding a potential appeal; whether it was deemed to be a timely appeal by HRD; and, if not deemed timely, why such a determination was made.
 - iv. A copy of any instructions regarding how applicants can contest an adverse HRD determination regarding an examination appeal to the Commission.
 - v. A summary of any timely fair test or other appeals received by HRD regarding these promotional examinations, and what, if any adjustments were made as a result of these timely appeals.
15. On March 3, 2021, HRD provided the Commission, the Appellants and the remaining intervenors with a response to the Commission's orders.
16. According to HRD's response, applicants must file a multiple choice and/or fair test appeal with HRD within seven (7) days of the examination, either by sending an email to HRD or going to www.governmentjobs.com/careers/massachusetts and searching for the application titled "Promotional Exam Review".² According to HRD, applicants received notice of their right to appeal, with this link, on July 27, 2020, approximately ten (10) days prior to the examination. However, according to HRD, five (5) of the nine (9) applicants referenced above (Mahan, Mendes, Hawksley, Yonika and Wight) did not receive the notice due to a clerical error.
17. Also according to HRD, "all applicants were provided instructions on how to file a test appeal prior to the start of their examinations."
18. HRD also provided the following information regarding the nine (9) applicants now relevant to this appeal:

² The web page applicants are directed to if they follow the search functions states in part: "**For Fair Test Reviews:** Attach a document that specifies in detail why you believe this examination was not a fair test of the applicant's fitness to perform the primary or dominant duties of the position."

Applicant	Item Appeal Notice Sent to Applicant?	Exam Date	Date Scores Released	Date Applicant Communicated with HRD	Summary of Communication	HRD Reply to Applicant
Mahan ³ (FPO C & D)	No	8/6/20	9/15/20	9/15/20	Asked for a copy of the questions.	Informed applicant that test questions are confidential.
Mendes (FPO C & D)	No	8/6/20	9/15/20	9/24/20	“... a few flawed questions on the exam as written were not conducive to answering in a manner that would produce a proper written response ...”	Denied the request as untimely and noted that “the items cited were investigated and not found valid for changing the key...”
Hawksley (FPO C & D)	No	8/6/20	9/15/20	“No record of fair test appeal”	NA	NA
Wetherbee (IPO C)	Yes	8/6/20	9/15/20	“No record of fair test appeal”	NA	NA
Bagu (IPO C)	Yes	8/6/20	9/15/20	9/16/20	“I am looking to appeal and challenge the test that was given for the 2020 Institutional Parole Officer C examination. Any information would be greatly appreciated.”	Denied the request as untimely and noted that “the request did not state in detail allegations upon which the request was based ...”
Mittica (FPO C)	Yes	8/6/20	9/15/20	9/27/20 ⁴ ; 10/24/20; 10/29/20	9/27/20: “Emailed HRD looking for a review of the promotional examination scoring. 10/24/20: “I don’t believe my parole promotional exam was graded properly and I’d like to appeal it.” 10/29/20: “Emailed HRD asking for a status update”	Denied the request as untimely and noted that “the request did not state in detail allegations upon which the request was based ...”
Wight (FPO C & D)	Yes	8/6/20	9/15/20	9/29/20	“Emailed HRD writing to contest his score results based on unfair questions on the Parole Officer D Examination taken on August 6, 2020. Wight asked for a review of several questions.”	Denied the request as untimely. “Despite the timeliness issue, HRD investigated the issues raised by Wight. HRD determined that even if the appeal had been received by the deadline and was timely filed, the test questions referenced in Wight’s email would not have resulted in any scoring changes.”
Yonika (FPD C & D)	No	8/6/20	9/15/20	“No record of fair test appeal”	NA	NA
Mawhinney (FPO D)	No	8/6/20	9/1/20	9/18/20	“I am appealing the test”	Denied the request as untimely and noted that “the request did not state in detail allegations upon which the request was based ...”

Applicable Civil Service Law

³ HRD’s response did not reference Mahan, presumably because the information was already available to the Commission.

⁴ HRD’s information says “October 27, 2020; I presume this was a scrivener’s error and should state September.

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)

In O’Neill v. HRD (<https://www.mass.gov/doc/oneill-stephen-v-city-of-lowell-and-hrd-related-superior-court-decision-111209/download>), the Superior Court ruled that:

“HRD initially denied O’Neill’s fair test review request because he did not file it within seven days of the exam administration, as required by G. L. C. 31, § 22. This court does not agree that the seven day filing limit begins running from the date of the exam in the present situation, **because the applicant could not know the number of faulty questions until he receives his answer key.** In *that situation*, due process would seem to impose a discovery rule, in which the time limit begins at the time the applicant knew or should have known of the facts giving rise to his fair test challenge.” (emphasis added)

Analysis

There is a threshold question regarding whether the Appellants (Mahan and Bagu) filed timely fair test appeals with HRD. G.L. c. 31, § 22 states that such appeals must be filed with HRD “ ... no later than seven days after the date of such examination.” However, the Superior Court in O’Neill, based on the facts related to that appeal, applied a “discovery rule”, and concluded that the timeline for filing the fair test appeal with HRD in that case could be as late as seven days after O’Neill received his examination score.

In regard to timeliness, the undisputed facts regarding the instant appeals distinguish this matter from O’Neill. In O’Neill, the basis of his fair test appeal was the number of questions deemed faulty by HRD, something he could not have known until he received his score and was notified of the issue regarding faulty questions. That is not the case here. Each of the Appellants and Intervenors, based on their own verbal and written statements, had concluded, *at the time that they took the examination*, that some of the questions, to them, raised questions about the fairness of the test. Applying the same “discovery rule” relied on in O’Neill, there is no justification to deviate from the plain language of the statute, which requires applicants to file a fair test appeal within seven days of the date of the examination. It is undisputed that none of the Appellants or Intervenors filed an appeal with HRD within seven days of the date of the examination.

That leads to the issue of whether the confusion regarding how the Appellants were notified of their right to appeal should effectively toll the statutory deadline for filing an appeal with HRD. In addition to proctors notifying applicants of their right to appeal at the outset of the examination, HRD’s intent was to email a link to each applicant, allowing him/her to file an examination appeal online. By HRD’s own admission, Mahan and some of the intervenors, apparently due to technical reasons, never received the email with the link. Had HRD not verbally instructed applicants of their right to appeal prior to beginning the examination, this technical glitch may have warranted tolling of the filing deadline.⁵ While the failure to send all applicants the email to facilitate the online filing of an appeal would justify waiving the form in which such appeal must be filed (i.e. - a brief statement of the allegations regarding why the exam was not a fair test), it does not warrant waiving the time period in which such an appeal must be filed with HRD.

⁵ On a going forward basis, a far better practice would be to ensure that instructions regarding appeal rights are memorialized in writing, something the Commission will consider when determining whether statutory filing deadlines in this regard should be tolled.

Since none of the Appellants or Intervenors filed timely appeals with HRD, the Commission lacks jurisdiction to hear these appeals as, “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.” *Id.* (emphasis added)

While these appeals must be dismissed based on the Commission’s lack of jurisdiction, that should not be the end of the story here. As referenced above, nine incumbent employees of the Massachusetts Parole Board have raised concerns about: a) the relevancy and accuracy of certain questions on these examinations; and b) the lack of unambiguous instructions regarding the proper manner to file an appeal with HRD. HRD should address both issues. There is something seriously wrong when more than half of the participants in this matter did not get notified via email of the option to file an appeal online. HRD should implement quality control measures to ensure that these email notifications have been sent to all applicants before and immediately after the examination.

Further, HRD, in its continuing efforts to safeguard the integrity of the testing process, should take notice (and action) when this number of incumbent employees raise concerns about the fairness of the test, even if the appeals were not received in a timely manner. At a minimum, greater transparency around certain issues (i.e. – the pass / fail rate; the mean and median scores; how many fair test appeals were received and the disposition of each, etc.) would bolster confidence in the examination process. I encourage HRD to take these proactive measures.

Conclusion

As the Commission lacks jurisdiction to hear examination appeals that were not timely filed with HRD, these appeals are *dismissed*.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chair

By vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 17, 2021.

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 to:
Appellants
Intervenors
HRD