COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

JEFFREY MARTUCCI &
JULIO TOLEDO,
Appellants

v.

G2-10-284 (MARTUCCI)
G2-10-285 (TOLEDO)

HUMAN RESOURCES
DIVISION,
Respondent

Appellants' Attorney: Donald C. Keavany, Jr.
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Worcester, MA 01608

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Commissioner: Christopher C. Bowman

DECISION

The Appellants, Jeffrey Martucci and Julio Toledo, (Appellants) pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD) that they were not eligible to sit for the October 16, 2010 promotional examination for Springfield Police Lieutenant. The issue in dispute here

regards the correct interpretation of G.L. c. 31, § 59 and a related Appeals Court decision. (See Weinburgh v. Civil Service Comm'n & Haverhill, 72 Mass. App. Ct. 535, 538 (2008).

There are three other (3) other related appeals pending before the Commission regarding whether HRD is correctly interpreting Section 59 and the Weinburgh decision.[1] As part of the these appeals, the Commission requested additional information regarding Certifications upon which Paul Weinburgh's name appeared in 2003. I take administrative notice of that information.

A pre-hearing conference was held on November 10, 2010 at the Springfield State Building in Springfield, MA. I heard oral argument from counsel for the Appellants and HRD and the parties subsequently submitted written briefs upon which the Commission would render a decision.

The following facts are not in dispute:

1. G.L. c. 31, § 59 provides in pertinent part, "…no such [promotional] examination [for public safety positions] shall be open to any person who has not been employed in such force for at least one year after certification in the lower title or titles to which the examination is open…" G.L. c. 31, § 59.
2. An eligible list is "a list established by the administrator, pursuant to the civil service law and rules, of persons who have passed an examination…from which certifications are made to appointing authorities to fill positions in the official service." G.L. c. 31, § 1.

[1] See Hallisey v. Human Resources Division, CSC Case No. E-10-278 (2010); Dickinson v. Human Resources Division, CSC Case No. E-10-274 (2010); Jordan v. Human Resources Division, CSC Case No. E-11-3.

3. A certification is "the designation to an appointing authority by the administrator of sufficient names from an eligible list or register for consideration of the applicants' qualifications for appointment pursuant to the personnel administration rules." Id.
4. In or around 1979, HRD delegated the civil service promotion approval process to the City of Springfield. HRD provides Springfield with an eligible list when it is established. Springfield, however, is responsible for creating certifications, contacting candidates, making promotions from certifications, and providing bypass and selection reasons to the applicants in accordance with civil service laws and rules as well as maintaining proper documentation of such.
5. On July 13, 1998, Springfield appointed Mr. Martucci to the title of permanent Police Officer.
6. On October 15, 1996, Springfield appointed Mr. Toledo to the title of permanent Police Officer.
7. On October 20, 2007, Mr. Martucci and Mr. Toledo took and passed examination for Springfield Police Sergeant, Announcement number 9983.
8. From March 30, 2008 to April 4, 2010, HRD established and maintained the eligible list for Springfield Police Sergeant.
9. Springfield issued two certifications from the March 2008 eligible list.
10. For eight weeks, from October 24, 2008 to August 24, 2008, Mr. Martucci and Mr. Toledo's names first appeared on a certification for Police Sergeant - Certification number 08-0024 for

appointment of five permanent Police Sergeants. Neither individual was appointed from Certification number 08-0024.

11. For two months and eight days, from October 19, 2009 to December 26, 2009, Mr. Martucci and Mr. Toledo's names appeared on a second certification for Police Sergeant - Certification number 09-0004 for appointment of three permanent Police Sergeants.

12. On December 26, 2009, Springfield appointed Mr. Martucci and Mr. Toledo to the title of permanent Police Sergeant from Certification number 09-0004.

13. On or around August 6, 2010, HRD announced that it would offer a promotional examination for Springfield Police Lieutenant, Announcement number 4501, on October 16, 2010. HRD's announcement stated that the Police Lieutenant examination was open to permanent employees in the qualifying title of Police Sergeant who had been employed in such title for at least one year after certification from which the applicant was appointed to the qualifying title.

14. HRD calculated Mr. Martucci and Mr. Toledo's Police Lieutenant examination eligibility by adding the time they spent on Certification number 09-0004 and the time they were employed in the title of Police Sergeant prior to the date of the examination, October 16, 2010.

15. On October 6, 2010, HRD notified Mr. Martucci and Mr. Toledo that they were ineligible to take the Police Lieutenant examination.

16. On October 16, 2010, HRD administered the examination for Police Lieutenant.

17. During the pre-hearing conference regarding the present matter held on November 10, 2010, Appellants' counsel stated that Mr. Martucci and Mr. Toledo's employment for one year after certification should start on October 24, 2008 when their names first appeared on a certification number 08-0024 for Police Sergeant, which would qualified them to take the Police Lieutenant examination.

CONCLUSION

At issue here is whether HRD is correctly applying G.L. c. 31, § 59 consistent with the Court's decision in Weinburgh v. Civil Service Commission & City of Haverhill, 72 Mass. App. Ct. 535, 538 (2008). This is one of five appeals filed with the Commission in calendar year 2010 in which an individual claims that HRD has misinterpreted Section 59 and the Weinburgh decision and erroneously denied them the opportunity to sit for a public safety promotional examination or, in the alternative, allowed them to sit for the examination, but refused to score it.

Not all of the appeals have been consolidated and there are distinguishable fact patterns that raise different issues for the Commission to consider. However, for the purposes of clarity, and because all of the appeals involve HRD's interpretation of Section 59, the decisions are being issued simultaneously and are cross-referenced as appropriate.

HRD asserts that, in accordance with Section 59 and the Appeals Court decision in Weinburgh, eligibility for promotional examinations must be calculated by adding the time an applicant's name appears on the certification from which he was appointed to the qualifying title and the time spent in the qualifying title.

The Appellants argue that Section 59, coupled with the Appeals Court decision in Weinburgh, requires only the following with respect to eligibility to sit for police or fire promotional examinations: 1) the applicant must be a permanent employee in the next lower title in the particular police or fire force; and 2) the applicant must have been employed in the applicable police or fire force for at least one year after his / her name first appears on any certification in the lower title or titles to which the examination is open, even if this is not the Certification from which he/she was hired from.

In the instant appeals and the Dickinson and Hallisey appeals, the question ultimately presented to the Commission focuses on whether HRD has erred by only considering the "certification" from which he/she was appointed to the qualifying title, as opposed to a certification in which the person's name appeared, but he was not appointed, either because he was not considered because he was not within the statutory "2n + 1" formula or he was part of the 2n + 1 formula, was considered, but not appointed.

In the Jordan appeal, the question is whether HRD erred by requiring the Appellant to have actually served in the qualifying title.[2]

For clarity, and to ensure that all of the global issues covered in this and the three other related appeals are covered, the following example is offered to illustrate how three hypothetical candidates would each be *denied* the opportunity to sit for a promotional examination under

[2] Although the pro se Appellant in Jordan focused his response on whether he should have been reinstated to his position as lieutenant at a later date, this is not the relevant issue. Rather, for reasons discussed in detail in this decision, the more relevant question is whether HRD erred by not considering the Appellant's time in the force after his name appeared on a certification for the lower qualifying title, as opposed to time spent in the title.

HRD's interpretation of Section 59, but would be *allowed* to sit for the promotional examination under the interpretation offered by the Appellants in this and/or the other related appeals.

HYPOTHETICAL SCENARIO

Town X, (the Town), with a population of 45,000, employs 44 individuals in its Fire Department who are covered by civil service law and rules, including 1 Fire Chief, 1 Deputy Fire Chief, 2 Fire Captains, 10 Lieutenants and 30 Firefighters.[3]

The Town anticipates that several lieutenants will be retiring over the next several years. In anticipation of these vacancies, the Town asks HRD to administer a promotional examination for Fire Lieutenant every two years.

On January 1, 2011, all 30 firefighters in the Town take and pass the promotional examination for Fire Lieutenant (the next higher title), scoring from 100 to 71 (with training and experience and 2-point veteran preference included), with each candidate separated by 1 point. All 30 individuals were appointed as firefighters as of January 1, 2001, ten years prior to the examination. Except for one of the candidates, this was the first time that any of these firefighters had sat for a promotional examination. One candidate, who scored a 99 on this 2011 promotional examination, had taken a prior exam for lieutenant in 2009 and also received a score of 99 on that exam. His name previously appeared on a Certification on August 1, 2009 for the position of lieutenant, but he was not selected for promotion from that Certification.

[3] The staffing level is not meant to be an actual estimation of the staffing level of a community of this size, but, rather, is used solely for the basis of this hypothetical scenario.

On March 1, 2011, using the results of the January 1, 2011 promotional examination, HRD establishes an eligible list of 30 fire lieutenant candidates in rank order, from Score 100 to Score 71. Assuming that none of the exceptions in Section 25 apply, this eligible list will stay in place for 2 years and expire on February 28, 2013.

On August 1, 2011, 1 Fire Lieutenant in the Town retires, thus creating a vacancy. Prior to October 1, 2009, the Town was required to requisition a certification from HRD to fill this position. HRD would then certify (by creating a Certification), the names standing highest on the eligible list in order of their place on such list. Insofar as possible, "sufficient names" would be certified by HRD to enable the Town to make appointments from the so-called "2n + 1" formula, where n equals the number of vacancies. (PAR.08 and PAR.09)

Thus, in this case, HRD (prior to October 1, 2009) could certify anywhere from 3 to 30 names from the eligible list and issue this Certification to the Town, depending on how HRD defined "sufficient names."

Complicating the matters involved in these appeals is the fact that HRD has, since October 1, 2009, delegated this certification responsibility for promotional appointments to cities and towns, thus leaving it up to the individual city or town to determine how many "sufficient names" from the eligible list are certified (put on a Certification) for each vacancy. The relevance of this recent development is more than parenthetical. While HRD may have had some established formula for determining "sufficient names" to be certified for each vacancy, there is no uniform formula for this exercise among the approximately 200 civil service communities to which this

responsibility has now been delegated. I base this on first-hand observations made during the hundreds of pre-hearing conferences I have presided over during the post-delegation era.

For the sake of illustration, however, assume that on August 1, 2011, the Town, using its delegated authority, creates a Certification (Certification #1) containing the first 6 names from the 30-person eligible list, starting with the candidate with a score of 100 and ending with the name of the candidate with a score of 95. Thus, 6 candidates have now been "certified" for promotional appointment to lieutenant, while the remaining 24 candidates on the eligible list have not. All 6 candidates receive notification that their names appear on the Certification and all 6 candidates sign the Certification indicating their willingness to accept a promotional appointment to lieutenant.

Although the names of 6 candidates have now been "certified", and all 6 indicated a willingness to accept employment, the Town may select only from among the first 3 candidates (scores 100, 99 and 98), assuming they are qualified, under the so-called "2n + 1" formula, where n equals the number of vacancies. (G.L. c. 31, § 27 and PAR.09). Thus, although candidates ranked 4th, 5th and 6th (scores 97, 96, 95) have been certified, they can not be considered for promotional appointment during this hiring cycle since they do not fall within the proscribed 2n + 1 formula. Once this Certification has been created, the Town has three weeks from which to make an appointment unless it requests an extension, presumably from themselves under their delegated authority. (PAR.08(2)(a))

The Town appoints the second-ranked candidate on this Certification (Score 99 Candidate) for promotional appointment to lieutenant, bypassing the top-ranked candidate (score 100

candidate) and also not selecting the third-ranked candidate (Score 98 Candidate). Score 99 Candidate, the selected candidate, begins serving as a fire lieutenant on August 22, 2011 (three weeks after the Certification was created) and Score 100 Candidate files a bypass appeal with the Civil Service Commission.

On September 1, 2011, a second lieutenant vacancy is created by another retirement. The Town, consistent with the PARs and its responsibility under the delegation agreement, creates a second Certification (Certification 2) that day. Consistent with Certification 1, the Town places the names of 6 candidates from the eligible list, starting with Score 100 Candidate, followed by Score 98 Candidate (as Score 99 Candidate was selected for the prior vacancy) and then followed by candidates with scores 97, 96, 95 and 94. Once again, all six candidates sign the Certification as willing to accept appointment. The Town, as referenced above, is limited to selecting the three highest ranked candidates willing to accept employment, (Score 100 Candidate, Score 98 Candidate and Score 97 Candidate). In this hiring cycle, the Town again bypasses Score 100 candidate) and appoints Score 98 candidate. Score 98 candidates begins serving as a lieutenant on September 22, 2011 (three weeks after the Certification was created).

In the interim, on September 1, 2011, Score 99 candidate, selected from Certification 1, was injured, and is ultimately out of work for four months, returning to duty on January 1, 2012.

On February 1, 2012, Score 100 candidate prevails in his bypass appeal before the Commission. The Commission grants him the traditional relief, by ordering that his name be placed at the top of the next Certification for the position of lieutenant and, if appointed, that he

be given a retroactive civil service seniority date back to August 22, 2011, the same date as Score 99 candidate.

As a result of a third vacancy in the position of lieutenant, the Town creates another Certification (Certification 3) on February 1, 2012. Score 100 candidate's name appears on the top of the Certification, both because of his score and the relief granted by the Commission. The next 5 candidates on the Certification are candidates with scores 97, 96, 95, 94 and 93. Score 100 candidate is ultimately promoted as a part of this third hiring cycle. He begins his duties as a fire lieutenant on February 22, 2012 and received a retroactive civil service seniority date in the position of lieutenant of August 22, 2011. This is the last lieutenant appointment from this eligible list and all of the selected candidates serve continuously in the title of lieutenant until August 1, 2012.

On August 1, 2012, HRD is scheduled to administer a promotional examination for the position of fire captain for the Town. Under HRD's interpretation of Section 59 and Weinburgh, *none* of the three lieutenants referenced above would be eligible to sit for the promotional examination.

Under the Appellants' interpretation, *all three* of the lieutenants referenced above would be eligible to sit for the examination. A brief summary of the above-referenced hypothetical scenario and the relevant dates and calculations is contained in the chart below.

(A)	(B)	(C)	(D)	E	(F) (E) – (B)	(G) (D) – (C)	(H) (E) – (D)	(I) (G) + (H)	(J)
Candidate (by score)	Date Name First appeared on any Certification for Lieutenant (the qualifying lower title)	Date Name appeared on a Certification from which he was promoted to Lieutenant	Date promoted to Lieutenant	Date of Captain Promotional Examination	**Appellants' Calculation** As of Aug. 1, 2012, amount of time served in force after name first appeared on any certification for lieutenant.	As of August 1, 2012, Amount of time name appeared on Certification from which he was promoted	As of August 1, 2012 Time Served in title of lieutenant	**HRD Calculation** Amount of Time on Cert from which you were promoted + time served as lieutenant	In qualifying title as of August 1, 2012?
100	Aug. 1, 2011	Feb. 1, 2012 (Cert 3)	Feb. 22, 2012	Aug. 1, 2012	**1 year**	3 weeks	5 months, 1 week	**6 months**	YES
99	August 1, 2009	Aug. 1, 2011 (Cert. 1)	Aug. 22, 2011	Aug. 1, 2012	**2 years, 8 months** **(after factoring in 4 months of leave)**	3 weeks	7 months, 1 week (after factoring in 4 months of leave)	**8 months**	YES
98	Aug. 1, 2011	Sept. 1, 2011 (Cert. 2)	Sept. 22, 2011	Aug. 1, 2012	**1 year**	3 weeks	10 months, 1 week	**11 months**	YES
97	Aug. 1, 2011	NA	Not promoted	Aug. 1, 2012	1 year	NA	NA	NA	NO
96	Aug. 1, 2011	NA	Not promoted	Aug. 1, 2012	1 year	NA	NA	NA	NO
95	Aug. 1, 2011	NA	Not promoted	Aug. 1, 2012	1 year	NA	NA	NA	NO
94	September 1, 2011	NA	Not promoted	Aug. 1, 2012	1 year	NA	NA	NA	NO
93	February 1, 2012	NA	Not promoted	Aug. 1, 2012	1 year	NA	NA	NA	NO
71 – 92	Never Certified	NA	Not promoted	Aug. 1, 2012	0	NA	NA	NA	NO

As referenced above, under HRD's interpretation of Section 59 and Weinburgh, *none* of the 3 candidates promoted to the position of lieutenant would be eligible to sit for the captain's promotional examination on August 1, 2012. HRD calculates a candidate's eligibility to sit for a promotional examination by adding the time an applicant's name appears *on the certification from which he was appointed to the qualifying title* and the time spent in the qualifying title. If

the sum of these two time periods is not at least 1 year, HRD deems the person ineligible to sit for the promotional examination.

In regard to Score 99 candidate, promoted during the first hiring cycle referenced above, HRD gives him credit for 3 weeks for the time his name "appeared on the certification from which he was appointed" to the qualifying title [August 1, 2011 to August 22, 2011] and 7 months for "time spent in the qualifying title [of lieutenant]", since the Appellant was out on leave for four months after being promoted." Under HRD's calculation, Score 99 candidate has 7 months, 3 weeks of "qualifying time" and falls short of the 1-year requirement as defined by HRD. Thus, he is deemed ineligible to sit for the captain's promotional examination on August 1, 2012.

In regard to Score 98 candidate, promoted during the second hiring cycle referenced above, HRD gives him credit for 3 weeks for the time his name "appeared on the certification from which he was appointed" to the qualifying title [September 1, 2011 to September 22, 2011] and 10 months, 1 week for "time spent in the qualifying title of lieutenant." Under HRD's calculation, Score 98 candidate has 11 months of "qualifying time" and falls short of the 1-year requirement. Thus, he is also deemed ineligible to sit for the captain's promotional examination on August 1, 2012.

In regard to Score 100 candidate, promoted during the third hiring cycle referenced above, HRD gives him credit for 3 weeks for the time his name "appeared on the certification from which he was appointed" to the qualifying title [February 1, 2012 to February 22, 2012] and 5 months, 1 week for "time spent in the qualifying title of lieutenant". Under HRD's calculation,

Score 100 candidate has 6 months of "qualifying time" and falls short of the 1-year requirement. Thus, he is also deemed ineligible to sit for the captain's promotional examination on August 1, 2012.

Collectively, the Appellants in the five related appeals argue that HRD's interpretation has misapplied the Court's decision in Weinburgh and impermissibly added words to Section 59. Under the Appellants' interpretation, all three of the above-referenced lieutenants in the hypothetical scenario meet the simple two-pronged test established by Section 59. First, as of the date of the captain's promotional examination on August 1, 2012, it is undisputed that each of them is serving in the qualifying lower title of lieutenant. Second, each of them has served in the force for at least one year after their name was first certified in the lower qualifying title (August 1, 2011 for Score 100 and 98 candidates and August 1, 2009 for Score 99 candidate). The Appellants argue that nothing in Section 59 allows HRD to consider the amount of time their name appeared on a Certification nor does it allow HRD to only consider a certification from which they were appointed to the lower qualifying title. Finally, the Appellants argue that by calculating the time served in the qualifying title, as opposed to time served in the force, HRD has disregarded the Court's decision in Weinburgh.

For the reasons discussed in detail below, I agree with the Appellants on all counts. HRD has misinterpreted the court's decision in Weinburgh and established a qualifying formula regarding eligibility for promotional examinations that is contrary to Section 59.

First, HRD's continued reliance on time served in the lower qualifying title after certification, as opposed to time served in the force, contradicts the clear language of Weinburgh.

Section 59 states in relevant part:

" … no such examination shall be open to any person who has not been employed in such force for at least one year after certification in the lower title or titles to which the examination is open …".

In Weinburgh, the court concluded in relevant part, that Section 59 "requires that an employee: (1) be on the promotion list (and, thus, certified) for the immediate lower position one year prior to taking the exam for the higher position; and (2) actually serve in the force for one year after certification, but not necessarily in that lower position. (emphasis added)

Despite the Court's clarity on this point, HRD continues to argue that "time spent in the qualifying title prior to the date of examination" determines a candidate's eligibility to sit for a promotional examination, as opposed to the Court's definitive conclusion that time spent "in the force" is controlling. While the Commission concurs with HRD that there are strong public policy arguments to interpret the statute this way, and we joined HRD in articulating those reasons in the Weinburgh litigation, we are required to abide by the Court's interpretation. Thus, HRD's reliance on time spent in the qualifying title after certification can not stand in regard to determining an individual's eligibility to sit for a promotional examination.

Further, HRD appears to have added words to the statute, and acted contrary to the court's decision in Weinburgh on another front. As referenced above, the court concluded in part that: an individual's name must: (1) be on the promotion list (and, thus, certified) for the immediate lower position one year prior to taking the exam for the higher position. HRD has read this to be the finite period of time that starts when the Certification is created and ends when the

appointment(s) have been made from the Certification. Under HRD's interpretation, this finite period of time will usually not exceed three weeks, as the Personnel Administration Rules limit the period of time for public safety promotions to three weeks from the creation of the Certification. This could not possibly be what the court envisioned, when it concluded that an individual's name must be certified for the immediate lower position "one year prior to taking the exam." Clearly, the court was looking at whether the actual "certification" occurred one year prior to taking the exam, not whether an individual's name appeared continuously on a certification for one year that, by rule, can not last beyond three weeks in duration without an extension.

"It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, ... the sole function of the courts is to enforce it according to its terms. It is not proper for a court [or Commission], under the guise of correcting a perceived inadequacy or injustice in a statutory scheme, to 'read into [a] statute a provision which the Legislature did not see fit to put there, whether the omission came from inadvertence or of set purpose.'" Commonwealth v. Boe, 456 Mass. 337, 347-348 (2010)(internal citations omitted). "It is not the province of courts to add words to a statute that the Legislature did not choose to put there in the first instance." Global NAPs, Inc. v. Awiszus, 457 Mass. 489, 496 (2009); see further, Dart v. Browning -Ferris Indus., 427 Mass. 1, 8 (1998)("we will not add to a statute a word that the Legislature had the option to, but chose not to, include"); Alves's Case, 451 Mass. 171, 176 (2008), quoting Walsh v. Bertolino Beef Co., 16 Mass. Workers' Comp. Rep. 151, 154 (2002) ("Where there is such a plain and rational meaning to be applied, we are obliged to apply it, rather than set off on an interpretative quest.... '[A]

basic tenet of statutory construction is to give the words their plain meaning in light of the aim of the Legislature, and when the statute appears not to provide for an eventuality, there is no justification for judicial legislation'"). See also, HRD's Motion, p. 9("The Commission or the Court 'cannot add [or remove] words to a statute that the Legislature did [or did] not put there, either by inadvertent omission or by design.'").

The third and final piece of HRD's post-Weinburgh formula is a closer call. HRD, in determining an individual's eligibility to sit for a promotional examination, only considers that Certification from which the individual was appointed to the lower qualifying title. For example, in the case of Score 98 candidate, his name was first "certified" for the lower qualifying title on August 1, 2011. However, he was not promoted to the position of lieutenant from this Certification. Rather, he was appointed from the second Certification that was created on September 1, 2011. Thus, at the time the captain's promotional examination to be given on August 1, 2012, HRD's formula leaves Score 98 candidate 1 month short of the time necessary to sit for the promotional examination. Although HRD presents a strong argument for this interpretation, it is inconsistent with the underlying facts of Weinburgh.

As referenced in the procedural history of these appeals, I asked HRD to produce information regarding when Mr. Weinburgh's name appeared on Certifications for the lower qualifying title. According to HRD records, Mr. Weinburgh's name first appeared on Certification No. 230772 on August 28, 2003 for the position of Haverhill Fire Lieutenant. He was not appointed from this Certification. His name then appeared on a second Certification (No. 230912), that was created on October 16, 2003. He was also not appointed from this Certification. Finally, his name appeared on a third Certification

(No. 231131) that was created on December 12, 2003. This is the Certification from which Mr. Weinburgh was actually promoted to the position of lieutenant. The captain's promotional examination was administered on November 20, 2004. In its decision, the Court stated in relevant part that: "In the summer of 2003 … Weinburgh was certified for the position of fire lieutenant and placed on the fire lieutenant promotion list. After officially being appointed to this position on December 21, 2003, [Weinburgh] filed a bypass appeal with the [Commission]." The Court ultimately concluded that since Mr. Weinburgh's name was certified in the "summer of 2003", he was eligible to sit for the promotional examination that was held more than one year later, on November 20, 2004. Although the record before the Court did not clearly delineate that Mr. Weinburgh was not actually promoted from the August 28, 2003 certification, I reasonably infer that it would not have altered their conclusion, given their reasoning that "certification" was a mere "administrative landmark." Mr. Weinburgh took and passed a civil service examination for the lower qualifying title of lieutenant and his name was "certified" for this qualifying title on August 28, 2003. Although he was not promoted from this Certification, this is the Certification that the Appeals court relied on in deciding that he met the statutory 1-year requirement

I am mindful of HRD's concerns about the ramifications of such an interpretation of Section 59. Under this interpretation, Candidates in the above scenario with Scores 97 down through 93, all of whom were "certified" in 2011 or 2012, but not promoted, could ultimately use this Certification to qualify to sit for a captain's promotional examination that doesn't occur until several years later. While this a valid concern, the Court succinctly addressed this issue in Weinburgh, stating,

"The commission's concern that this reading will allow individuals to skip rank by sitting for the fire captain's examination without ever serving in the lower position of fire lieutenant is addressed by the restrictive language in G. L. c. 31, s. 59, requiring that an examination for a promotional appointment to any title in a police or fire force shall be open only to permanent employees in the next lower title in such force. Therefore, while we conclude that an individual need only be certified in the lower position for one year to sit for the higher position's examination, actual service of some length in the lower is required to be appointed to the higher."

The same principle applies here. In order for any of the "certified" candidates not selected from the 2011-2012 Certifications to eventually be eligible to sit for a Captain's examination, actual service of some length in the title of lieutenant will be required.

Moreover, as argued by the Appellants in the instant appeals, permitting them to sit for a promotional examination will not reduce or discourage others with greater seniority and experience from sitting for the same examinations. The promotional examination is the first step in the promotional process, and is set up to weed out those who are not qualified for promotion. If the Appellants (or any other test taker) performed poorly on the examination, those results would be reflected in their placement on the eligible list established by HRD after the examination. Further, the Appellants' relatively short tenure in the next lower title would count against them, as others with greater seniority and experience would be credited for length of service in the lower position.

Furthermore, being eligible for promotion does not equate to being promoted to the next position. Brackett v. Civil Service Commission, 447 Mass. 233, 252 (2006)("The nature of competition is such that success is not automatic, but typically subject to a

combination of variables.”). Cities and towns have discretion with respect to promotional appointments. Town of Lexington v. Civil Service Comm’n, 27 Mass. L. Rptr. 106 (2010)(Curran, J.)(“the Town enjoyed discretion to choose which candidates to promote...”). Anthony vs. City of Springfield, 23 MCSR 201 (2010)(“Appointing Authorities have discretion when choosing individuals from a certified list of eligible candidates on a civil service list.”); Bariamis v. Town of Tewksbury, 20 MCSR 47 (2007)(“The law grants latitude for the discretion of the Appointing Authority in selecting candidates of skill and integrity for hire or promotion.”).

Clearly, placing first on the promotional examination does not guarantee promotion. Indeed, promotions are not based solely on the results of the promotional examination. Rather, promotional appointments are made “on the basis of merit as determined by examination, performance evaluation, seniority of service, or any combination of factors which fairly test the applicant’s ability to perform the duties of the position as determined by the administrator.” G.L.c. 31 §3(e). One primary and significant tool available to the city or town is the interview process. See, Belanger v. Town of Ludlow, 20 MCSR 285 (2007) (“the Appointing Authority often rightfully relies on an interview process to make a final determination.”); Brown v. Town of Duxbury, 19 MCSR 407 (2006)(“Not only is an interview process, which includes questions upon which each panelist uses a common scoring method permissible, it should be encouraged. Paper and pencil civil service examinations should not be used as the sole determinant when making hiring and promotional decisions, particularly when it concerns appointments as important and sensitive as a police sergeant.”). Thus, even if “unqualified” applicants somehow perform exceedingly well on the written promotional examination, the promotion process

offers many safeguards to cities and towns to protect against the promotion of any inferior candidate.

I am also mindful of other practical administrative issues that may arise under the interpretation being accepted here by the Commission. First, the existing rule presents tremendous ambiguity as to when an individual's name is first "certified" for the lower qualifying title, calling for a "sufficient number of names" to be certified to meet the 2N + 1 formula. Compounding this problem is that the certification of names, at least for promotional appointments, has now been delegated to cities and towns by HRD. As referenced above, there is no uniform application of this rule across the approximately 200 civil service cities and towns that have been delegated this function. In some cases, all names on the eligible list are "certified" every time a promotional vacancy arises. In other cases, a subset of names from the eligible list is certified based on unknown formulas. Finally, there are some cities and towns, unclear on their delegated responsibilities, that never actually create a "certification", but only rely on the eligible list as a de-facto Certification. While these may all be reasons to clarify the personnel administration rules and/or reconsider whether the statutory responsibility for certifying names should be delegated at all, they do not justify ignoring the plain language of Section 59 as interpreted in Weinburgh.

Finally, the issue of whether a retroactive seniority date impacts an individual's eligibility to sit for a promotional examination has not been raised here. Nevertheless, because public policy would benefit from the elimination of any uncertainty regarding this issue, we address it here.

Individuals, such as the candidate with Score 100 in the example above, who are bypassed for original appointment or promotional appointment have a right of appeal to the Commission. If successful, they are generally granted relief in the form of having their name placed at the top of the next certification and, if appointed, granted a retroactive civil service seniority date equivalent to the individual who bypassed them. Thus, in the example referenced above, Score 100 candidate, although promoted after Score 99 candidate, was eventually granted the same civil service seniority date. The question here is whether that retroactive date impacts the individual's eligibility to sit for a promotional examination.

Under the interpretation of Section 59 being adopted here by the Commission, a retroactive civil service seniority date would be irrelevant in regard to sitting for a promotional examination in the next higher title when the lower qualifying title was obtained through a promotional appointment. As Section 59 only requires one year of service in the force, a retroactive civil service seniority date in the title obtained through a promotional appointment would be irrelevant. For example, regardless of whether he was granted a retroactive civil service seniority date in the position of lieutenant, Score 100 candidate, even without that retroactive date in the title, continued to serve in the force after first being certified for lieutenant on August 1, 2011. Thus, the retroactive civil service seniority date does not improve or detract from the candidate's eligibility to sit for a promotional examination for captain.

For a somewhat different reason, the same holds true regarding retroactive civil service seniority dates in regard to original appointments. For example, a candidate's name appears on a Certification for original appointment to firefighter on February 1,

2011. He is bypassed for appointment by a lower scoring candidate who is appointed on February 22, 2011. The bypassed candidate files an appeal with the Commission. On February 1, 2012, he prevails in his bypass appeal. He is subsequently appointed on February 22, 2012 from a Certification created on February 1, 2012. Per the Commission's order, he receives a retroactive civil service seniority date of February 22, 2011. Although the candidate's civil service seniority date has been backdated by one year, he must still serve in the force for at least one year prior to being eligible to sit for a promotional examination for the next higher title of lieutenant. Thus, the candidate's retroactive civil service seniority date is not being used to determine his eligibility to sit for the promotional examination. The date of certification, consistent with this decision, would be February 1, 2011 (when his name first appeared on a certification), but he would still need to serve in the force for at least one year, or until at least February 22, 2013, before he was eligible to sit for the promotional examination for lieutenant.

In summary, HRD has misapplied the Weinburgh decision and, in doing so, is ignoring the plain language of Section 59 by adding words that do not exist. Based on a the plain reading of Section 59 and the Weinburgh decision, HRD must calculate an individual's eligibility to sit for a promotional examination as follows. First, is the individual serving in the next lower title as of the date of the examination? If so, has the individual served in the force for at least one year[4] since his name was first certified for that lower qualifying title, regardless of whether that certification resulted in his appointment to the lower qualifying title. It is irrelevant how long an individual's name appeared on any individual certification.

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[4] A longer duration of time is required in cities and town with a population grater than 50,000.

How this applies to the instant appeals

When applied to the instant appeals, the Appellants, Julio Toledo and Jeffrey Martucci, were eligible to sit for the police lieutenant's promotional examination on October 16, 2010 for the following reasons.

The Appellants were serving in the position of police sergeant at the time of the October 16, 2010 promotional examination for lieutenant. Further, the Appellants' names were first certified for the position of police sergeant on October 24, 2008. They served <u>in the force</u> after this certification for more than one year. Specifically, they served in the force from October 24, 2008 to October 16, 2010 (1 years, 51 weeks). Thus, they met the requirements of Section 59 to sit for the October 16, 2010 promotional examination for lieutenant.

For all of the above reasons, the Appellants' appeal under Docket Nos. G2-10-284 and G2-10-285 are hereby ***allowed*** . The Commission, pursuant to its authority under Chapter 310 of the Acts of 1993, hereby orders HRD to permit the Appellants to sit for a make-up police lieutenant promotional examination. In the event that the Appellants receive a passing score, their names are to be added to the eligible list of candidates for police lieutenant in the Springfield Police Department in the appropriate rank order.

Civil Service Commission

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Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, McDowell, Stein and Marquis, Commissioners) on April 21, 2011.

A true record. Attest:

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Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice:
Donald C. Keavany, Jr., Esq. (for Appellants)
Martha O'Connor, Esq. (for HRD)
Suzanne Shaw, Esq. (for City of Springfield)