

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

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

JOHN P. McDONALD,  
Appellant

v.

B2-18-246

HUMAN RESOURCES DIVISION &  
CITY OF BROCKTON & MICHAEL McKENNA,  
Respondents

Appearance for Appellant:

Gregory V. Sullivan, Esq.  
Malloy & Sullivan  
59 Water Street  
Hingham, MA 02043

Appearance for Human Resources Division:

Mark P. Detwiler, Esq.  
Human Resources Division  
100 Cambridge Street: Suite 600  
Boston, MA 02114

Appearance for City of Brockton:

Karen A. Fisher, Esq.  
City of Brockton  
45 School Street  
Brockton, MA 02301

Appearance for Intervenor Michael McKenna:

Joseph G. Donnellan, Esq.  
Rogal & Donnellan PC  
100 River Ridge Drive, Suite 203  
Norwood, MA 02062

Appearance for Participants (Appellants in  
Borjeson et al):

Patrick N. Bryant, Esq.  
Pyle Rome Ehrenberg PC  
2 Liberty Square, 10<sup>th</sup> Floor  
Boston, MA 02109

Commissioner:

Christopher C. Bowman

## DECISION ON CROSS MOTIONS FOR SUMMARY DECISION

### *Procedural History*

1. On December 18, 2018, the Appellant, John P. McDonald (Lt. McDonald), a lieutenant in the Brockton Fire Department, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD) to award certain employment / experience (E/E) credits to another candidate (Brockton Fire Lt. Michael McKenna) regarding a Fire Captain examination.
2. On February 5, 2019, I held a pre-hearing conference via phone; participating were Lt. McDonald, his counsel and counsel for HRD. As Lt. McDonald's appeal also referenced a recent Commission decision regarding Borjeson et al v. HRD, counsel for the Appellants in that appeal also participated.<sup>1</sup>
3. On February 6, 2019, I issued a Procedural Order that, among other things, joined the City of Brockton as a party to this appeal.
4. That same day, Lt. McKenna sought to be joined as a party to this appeal. That request was allowed.
5. On March 8, 2019, Appellant John McDonald filed a Motion for Summary Decision, asking the Commission to order HRD to rescind certain E/E credit awarded to Lt. McKenna.
6. On April 5, 2019, HRD filed a Motion for Summary Decision to dismiss Appellant McDonald's appeal.
7. On April 8, 2019, Lt. McKenna filed an opposition to Lt. McKenna's Motion for Summary Decision.
8. Also on April 8, 2019, the Participants submitted correspondence to the Commission opposing Lt. McDonald's Motion for Summary Decision.
9. On April 24, 2019, I held a motion hearing at the offices of the Commission. That motion hearing was held concurrently with a pre-hearing and show cause conference regarding another appeal and request for investigation in which the underlying issues relate to the instant appeal.

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<sup>1</sup> I have deemed the Appellants in Borjeson et al as Participants in the instant appeal.

## Background

10. HRD is responsible for administering civil service examinations in Massachusetts, including public safety promotional examinations.<sup>2</sup>

11. The promotional examination consists of two (2) portions: a written portion and a portion rating the candidates' education and experience (E&E).

12. G.L. c. 31, § 22 states in part:

“The administrator shall determine the passing requirements of examinations. In any competitive examination, an applicant shall be given credit for employment or experience in the position for which the examination is held. In any examination, the applicant shall be allowed seven days after the date of such examination to file with the administrator a training and experience sheet and to receive credit for such training and experience as of the time designated by the administrator.” (emphasis added)

13. Personnel Administration Rule 06, Section C (PAR.06 (b)): states:

“The grading of the subject of training and experience as a part of a promotional examination shall be based on a schedule approved by the administrator which shall include credits for elements of training and experience related to the position for which the examination is held.”

14. HRD has had a longstanding practice (or schedule), in place for at least twenty (20) plus years, regarding the related experience that is included in the E&E component of a promotional examination. That related experience has, for at least twenty (20) plus years, included: a) hours worked *in the position* for which the examination is given (including in a permanent, temporary, provisional, or “acting” capacity); and b) hours worked *in lower positions* (including in a permanent, temporary, provisional or “acting” capacity.)

15. For example, a candidate taking a Fire Captain examination has, based on HRD's longstanding practice, received credit for: hours worked as: a) a *Fire Captain* (including in a permanent, temporary, provisional or “acting” capacity) and: b) hours worked as a *Fire Lieutenant and Firefighter* (including in a permanent, temporary, provisional or “acting capacity”).

16. On November 18, 2017, HRD administered a statewide promotional examination for Fire Captain and Fire Lieutenant which includes the written portion and an E&E portion.

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<sup>2</sup> HRD may also delegate responsibility for conducting examinations, including “Assessment Center” examinations to Appointing Authorities. No such delegation was involved in this appeal. Rather, this was a “traditional” written examination administered by HRD, which included credit for a multiple choice component and an education / experience component.

17. Consistent with HRD's longstanding practice, the E&E schedule included credit for: a) hours worked *in the position* (of either Fire Captain or Lt.) and b) hours worked *in lower titles* (i.e. – Fire Lt., Firefighter, etc.)
18. Although HRD's schedule included credit for hours in the position and lower positions, HRD, contrary to its longstanding practice, did not provide credit for any hours worked in an "acting capacity" (either in title or in lower positions) for this promotional examination.
19. The Appellant (Lt. McDonald) and the Intervenor (Lt. McKenna), both Brockton Fire Lieutenants, took the promotional examination for Brockton Fire Captain that was administered by HRD on November 18, 2017.
20. Pursuant to PAR.07(4), "... examination marks shall be presented on eligible lists in whole numbers." For example, a candidate who receives a score of 81.15, would receive a score of 81.0.
21. In whole numbers, both Lt. McDonald and Lt. McKenna received a score of 81, resulting in them being [tied for 5<sup>th</sup> on the eligible list](#) established by HRD for Brockton Fire Captain.
22. The Commission has long held that the appointment of a candidate among those with the same rank on a Certification is not a bypass. See Edson v. Reading, 21 MCSR 453 (2008) (upheld by Superior Court; Edson v. Civil Service Comm'n, Middlesex Sup. Ct. No. 08-CV3418 (2009); Bartolomei v. Holyoke, 21 MCSR 94 (2008); Coughlin v. Plymouth, 19 MCSR 434 (2006); Kallas v. Franklin School Dep't, 11 MCSR 73 (1998); Servello v. Dep't of Correction, 28 MCSR 252 (2015); See also Thompson v. Civil Service Comm'n, Suffolk Superior Ct. No. MICV 1995-5742 (1996) (concluding that selection among tied candidates does not present a bypass); Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 261 (2001) ("In deciding bypass appeals, the commission must determine whether the appointing authority has complied with the requirements of Massachusetts civil service law for selecting lower scoring candidates over higher scoring candidates); Cotter v. Boston, 193 F. Supp. 2d 323, 354 (D. Mass. 2002) (citing HRD's guide), *rev'd in part on other grounds*, 323 F.3d 160 (1St Cir. 2003) ("when a civil service exam results in a tie -score, and the appointing authority ... promotes some but not all of the candidates, no actionable `bypass ' has taken place in the parlance of... civil service").
23. Based on the above, if Brockton were to promote Lt. McKenna to Fire Captain, there would be no bypass that Lt. McDonald could appeal to the Commission. Similarly, if Brockton were to promote Lt. McDonald to Fire Captain, there would be no bypass that Lt. McKenna could appeal to the Commission.
24. In Brockton, when candidates on an eligible list are tied, the City uses a tie-breaking method based on the examination score broken down to the second decimal point (i.e. – a candidate with a score of 81.15 would be appointed over a candidate with a score of 81.10.). While HRD provides this information to the City upon their request, it does not change the ranking of the candidates on the eligible list established by HRD.

25. Based on the information that HRD provided to the City, Lt. McDonald received a score, broken down to the second decimal point, of 80.82 on the November 18, 2017 examination and Lt. McKenna received a score of 80.72 on the same examination.
26. As referenced above, in calculating the E&E portion of the scores for all candidates who took the November 18, 2017 examination, *HRD continued its longstanding practice of giving credit for hours worked in the title and in the lower titles*, but chose not to include time spent in an “acting capacity”, either in-title or in a lower title.
27. On March 2, 2018, four (4) individuals who took the statewide examination for Fire Lt. and Fire Captain filed an appeal with the Commission, contesting HRD’s decision to end its longstanding practice of counting “acting” time, both in-title and in the lower titles. Those appeals were not related to whether HRD would continue its longstanding practice of providing credit for hours worked in-title and in lower titles (which it did). Rather, those appeals were limited to the question of whether HRD was justified in no longer providing credit for hours worked in an acting capacity, whether in-title or in a lower title.
28. After two (2) days of hearing, which included testimony from various witnesses, the Commission, on August 30, 2018, issued a twenty-two (22)-page interim decision, concluding that HRD’s decision to no longer count acting time in the E&E portion of the score was arbitrary and capricious and inconsistent with basic merit principles. ([See Borjeson et al v. HRD](#), 31 MCSR 267 (2018)). Further, the Commission, consistent with prior decisions, concluded that, in order to be fair and equitable, any relief, including the re-scoring of examinations, would need to be applied statewide. Recognizing the logistical challenges associated with any such relief, the Commission provided the parties with additional time to propose mutually acceptable relief that may minimize those logistical challenges.
29. After providing the parties with an opportunity to consult regarding the appropriate relief, the Commission, on September 17, 2018, issued a [final decision](#) effectively restoring the status quo (statewide) on a prospective, going-forward basis, by ordering HRD to return to its longstanding practice of counting hours worked in an acting capacity in the E&E portion of the examination score. The Commission’s final decision did not order any other changes to the grading process, at the time or going-forward. Rather, the decision’s relief was solely related to the only issue brought forward by the Appellants – whether acting time should continue to be counted in the E&E component of the score.
30. Consistent with the Commission’s final decision, HRD re-scored the Fire Captain and Lt. examinations statewide, provided candidates with credit for hours worked in an acting capacity, and established a new eligible list that would be used on a going forward basis of January 3, 2019. In short, HRD did precisely what the Commission ordered: restored the status quo in regard to giving credit for acting time.
31. As a result of the restoration of the status quo, the new eligible lists established by HRD on January 3, 2019, resulted, in some cases, in a change in ranking on the eligible lists that were first established for Fire Captain or Fire Lt.

32. The restoration of the status quo did not change the civil service ranking of either Lt. McDonald or Lt. McKenna. Rather, they remained tied on the eligible list for Fire Captain in the fifth position.
33. As referenced above, Brockton uses a tie-breaking method that relies on examination scores broken down to the second decimal point. Upon the establishment of the new eligible list, the City asked HRD for a list of scores broken down to the second decimal point. Lt. McDonald score remained at 80.82, but Lt. McKenna's score rose from 80.72 to 81.08, .26 points higher than Lt. McDonald.
34. Lt. McDonald filed the instant appeal with the Commission, effectively seeking to overturn the Commission's decision in Borjeson and order HRD to rescind the credit given to Lt. McKenna for hours worked as an Acting Lt.

*Lt. McDonald's argument*

Lt. McDonald relies on the second sentence of G.L. c. 31, § 22 to argue that the civil service law does not allow HRD the authority to grant Lt. McKenna with credit for hours worked *in an acting capacity* in any position other than Captain.

As referenced above, G.L. c. 31, § 22 states:

“The administrator shall determine the passing requirements of examinations. In any competitive examination, an applicant shall be given credit for employment or experience *in the position for which the examination is held.* In any examination, the applicant shall be allowed seven days after the date of such examination to file with the administrator a training and experience sheet and to receive credit for such training and experience as of the time designated by the administrator.” (emphasis added)

*Analysis*

Lt. McDonald presents a literalist, illogical and result-driven interpretation of the statute that is inconsistent with commonsense and the Personnel Administration Rules. Further, it is contrary to how HRD has awarded E&E points for over two (2) decades. The granting of his motion by the Commission would result in Lt. McDonald's examination being scored differently than all other statewide exam applicants.

Lt. McDonald's argument is illogical. As noted by the Participants:

“Lt. McDonald's literalist interpretation of the statute might have more force if he was asserting that HRD, based on the second sentence of Section 22, cannot grant any credit for any experience in a lower title, whether that time is acting, temporary, provisional or permanent. But because Lt. McDonald is not making such an argument, the actual issue presented to the Commission is: *when* HRD credits experience in a title other than that for

which the examination is held, is HRD permitted to exclude (or not credit) time in a non-permanent capacity, whether temporary, provisional ... or acting? The answer clearly is no, as Borjeson established that there is no reasonable basis to distinguish between experience pursuant to an RD certification and “acting” or other time in a title that is not pursuant to an HRD certification ...”.

Lt. McDonald’s argument is inconsistent with the Personnel Administration Rules. As referenced above, Personnel Administration Rule 06, Section C (PAR.06 (b)): states:

“The grading of the subject of training and experience as a part of a promotional examination shall be based *on a schedule approved by the administrator* which shall include credits for elements of training and experience ***related to the position*** for which the examination is held.” (emphasis added)

This rule, which has been in place since at least 2002, clearly establishes that, pursuant to the second sentence of G.L. c. 31, s. 22, in addition to the statutory mandate in the first sentence of the paragraph, HRD has the discretionary authority to grant credit for “such” other training and experience as HRD deems to be *related to the position*, which include hours served as Acting Lieutenant.

Lt. McDonald’s argument is contrary to HRD’s logical application of the statute for over twenty (20) years. Put simply, HRD has reasonably concluded that a candidate applying for Fire Captain should be given more credit for hours worked as an Acting Fire Lieutenant as opposed to hours worked as a Firefighter. Acceptance of Lt. McDonald’s interpretation of Section 22 would prohibit HRD from making this logical distinction.

Finally, the actions taken by HRD, per Order of the Commission, did not change Lt. McDonald’s ranking on the civil service eligible list for Fire Captain. Rather, he remained tied with Lt. McKenna. While the re-scoring may impact the tie-breaking method used by City, his non-selection by the City would not constitute a bypass appealable to the Commission, either before or after the re-scoring that he is contesting.

For all of the above reasons, Appellant McDonald’s Motion for Summary Decision is denied and his appeal under Docket No. B2-18-246 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 July 18, 2019.

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:

Gregory V. Sullivan, Esq. (for Appellant)

Mark Detwiler, Esq. (for Respondent)

Joseph Donnellan, Esq. (for Intervenor)

Patrick Bryant, Esq. (for Participants)

Karen Fisher, Esq. (for City of Brockton)