

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

SIXTO MERCED,
Appellant

Docket No. B2-14-280

v.

BOSTON POLICE DEPARTMENT and
HUMAN RESOURCES DIVISION
Respondents

Appearance for Appellant:

Sixto Merced, *Pro Se*

Appearance for Respondent, HRD:

Wendy Chu, Esq.
Human Resource Division
One Ashburton Place
Boston, MA 02108

Appearance for Respondent, BPD:

Nicole I. Taub, Esq.
Boston Police Department
1 Schroeder Plaza
Boston, MA 02120-2014

Commissioner:

Paul M. Stein

DECISION ON BPD'S MOTION TO DISMISS

The Appellant, Sixto Merced, a Police Officer with the Boston Police Department (BPD), acting pursuant to G.L.c.31, §2(b) and §24, brings this appeal to the Civil Service Commission seeking to nullify the results of the Written Technical Knowledge Test and the two components of the Ability Based Assessment Examination of the 2014 Boston Police Sergeant Promotional Examination administered by the BPD under a Delegation Agreement with the Massachusetts Human Resources Division (HRD). BPD filed a Motion to Dismiss the appeal as untimely which Officer Merced opposed. On April 15, 2015, the Commission held a hearing on the motion. For the reasons stated, the motion to dismiss as untimely is denied. HRD is ordered to

conduct a substantive fair test review of the BPD 2014 Sergeant's Promotional Examination as required by G.L.c.31, §22¶3 and §23. Nothing in this Decision, however, addresses the merits as to whether or not the Appellant's claims regarding the 2015 BPD Sergeant's Promotional Examination, or any portion thereof, meet statutory requirements for establishing that the examination was not a "fair test".

FINDINGS OF FACT

Based on the submission of the parties, I find the following facts are not in dispute:

1. The Appellant, Sixto Merced, is a BPD Police Officer who took and passed the Promotional Examination for Police Sergeant administered by the BPD under a Delegation Agreement with HRD. He is currently in 116th place, tied with 27 others, out of a total of 560 Police Officers placed on the current eligible list for promotion to the rank of Sergeant. (*BPD Motion; Claim of Appeal; Administrative Notice [BPD Police Sergeant 2015 Eligible List]*)

2. In April 2013, after years without giving any promotional examinations for BPD superior officer positions, HRD entered into a Delegation Agreement with BPD to enable BPD to engage a consultant to design and administer departmental promotional examinations for the positions of Boston Police Sergeant, Boston Police Lieutenant and Boston Police Captain. (*Claim of Appeal [MUP-13-3371, pp.14-18]; BPD Motion*)¹

3. Pursuant to the Delegation Agreement, BPD retained a consultant, with HRD's approval, who designed and administered the examinations for each position (Sergeant, Lieutenant &

¹ I take administrative notice of the fact that the hiatus in the BPD promotional examination process can be attributed largely to pending legal challenges asserted by certain BPD officers that the written multiple-choice style examinations employed in 2008 (and in prior examinations) had a racially disparate impact on minority candidates and were insufficiently job-related to pass muster under federal civil rights laws. I also take notice that the intent of the parties to the Delegation Agreement, in significant part, was to conduct a "comprehensive" analysis that addressed the concerns raised in that litigation, and that over \$1,600,000 was spent in development of the 2014 examination process. See Findings of Fact, Rulings of Law and Order, Smith v. City of Boston, -- F.Supp.3d --, 2015 WL 7194554 at 9-10 (November 16, 2015). See also, Lopez v. City of Lawrence, 2014 U.S. Dist. LEXIS 124139, appeal pending, No. 14-1952 (1st Cir. 2014)

Captain) that comprised three examination components administered in two phases.

- Phase I was a Technical Knowledge Written Test administered to all candidates on June 28, 2014.
- Phase II was an Ability Based Assessment, consisting of two components: (A) Written Work Sample Test administered to Sergeant candidates on September 9, 2014 and (B) an Oral Board Test administered to Sergeant Candidates over a five day period from November 17th to November 21st 2014.

(BPD Motion; Claim of Appeal [Examination Announcement; Sergeant Promotional Examination Candidate Preparation Guides; Notices to Appear])

4. As to appeals of examination results, the Delegation Agreement stated:

“Reviews permitted pursuant to Section 22 of Chapter 31 shall be the responsibility of the consultant, with the approval of HRD.”

(Claim of Appeal [MUP-13-3371, p. 16])

5. The Phase I Technical Knowledge Written Test was a one day “closed book” examination comprising approximately 100 multiple choice questions drawn exclusively from materials contained in the required reading list provided to the candidates. Passing the Written Technical Knowledge Test was a condition to proceeding to the Written Work Sample and Oral Board Tests in Phase II. *(Claim of Appeal [Sergeant Promotional Examination Candidate Preparation Guide for Written Technical Knowledge Test. BPD Reading List])*

6. On or about August 1, 2014, Officer Merced learned that he passed the Phase I Written Technical Knowledge Test, scoring 67, which placed him in the 75th percentile of all candidates. Overall, 625 candidates scored above the passing cut-off of 48 and 224 candidates who took that test failed to pass. *(BPD Motion; Claim of Appeal [Written Knowledge Test Notification])*

7. The Written Work Sample Test was a one-day examination in which the candidate was asked to assume the role of a newly promoted Sergeant and to provide “written, narrative responses to job situations typical of those a Sergeant might encounter.” Candidates were provided various documents describing an “exercise scenario” and required to prepare a written

Response Booklet to respond to the issues presented. The Response Booklet was evaluated by a two-member panels of trained examination assessors (sworn officers at a level equivalent to Sergeant or above) who separately score the test on a nine point scale (where 9 is high and 1 is low) in four categories: Written Communication, Interpersonal Interactions, Analyzing and Deciding, Managing Activities. The two assessors' scores in each category were averaged and then totaled to arrive at the final Written Work Sample Test score. (*Claim of Appeal [Examination Announcement; Sergeant Promotional Examination Candidate Preparation Guide for Written Work Sample and Oral Board Tests]*)

8. The Oral Board Test was a one-day examination in which candidates were presented with two scenarios, with a different set of scenarios administered to candidates during one of the five separate days of the Oral Board examination period. The "Incident Supervision" exercise simulated the kinds of activities involved in responding to, and taking command, of an incident scene. The "Subordinate Performance" exercise simulates the kinds of activities involved in correcting subordinate performance problems. Candidates were allowed approximately 30 minutes to review the materials provided and, then, made an 8 minute oral response to a panel of three assessors. The Incident Command exercise was scored, using the 9-point scale, in the categories of Oral Communication, Analyzing and Deciding, Managing Activities and Adaptability. The Subordinate Performance exercise was scored, using the 9-point scale, in the categories of Oral Communication, Interpersonal Interactions, Analyzing and Deciding and Managing Activities. The total score for the Oral Board Test was derived by computing the average ability scores across the two Oral Board exercises and adding those average scores together. (*Claim of Appeal [Examination Announcement; Sergeant Promotional Examination Candidate Preparation Guide for Written Work Sample and Oral Board Tests]*)

9. Prior to computing overall component scores, BPD's consultant "standardized" the raw component scores using an unspecified statistical method meant to account for unusual deviations from the average scores for any particular component. In addition, the consultant's staff compared the ratings given out by each of the panels of assessors and made adjustments that it deemed necessary to "standardize the ratings by panel to remove any advantage/disadvantage as a result of the panel to which the candidate was assigned." (*Claim of Appeal [Examination Announcement; Sergeant Promotional Examination Candidate Preparation Guide for Written Work Sample and Oral Board Tests]*)

10. The final step in arriving at a candidate's final examination score was to calculate a weighted total of the average score on each examination component, giving 40% weight to the Written Technical Knowledge Test, 16% weight to the Written Work Sample Test, and 16% weight to the combined score on the two exercises in the Oral Board Test. The cumulative total of these weighted scores counted 80% toward the candidate's final grade. (*BPD Motion; Claim of Appeal [Examination Announcement; Sergeant Promotional Examination Candidate Preparation Guide for Written Work Sample and Oral Board Tests]*)

11. The remaining 20% of the candidate's final grade consisted of Education and Experience (E&E) Points, calculated from information provided to BPD on an Employment Verification and Education and Experience Rating Sheet through which candidates self-reported his/her academic and employment record and supplied all supporting documentation, due within a week after the June 28, 2014 Phase I Written Technical Knowledge Test. Officer Merced's "fair test" appeal does not involve the E&E examination component. (*BPD Motion; Claim of Appeal [Examination Announcement; Notice to Appear]*)

12. Candidates received extensive materials to explain the examination process and enable the candidates to prepare for the examination. These materials included a February 18, 2014 promotional Examination Announcement, an examination reading list and Preparation Guide focused on the Written Technical Knowledge Test and a similar Preparation Guide for the Written Work Sample and Oral Board Tests. Candidates were advised: “The Boston Police Department’s Human Resources Division is completely committed to assisting all of our Officers with this process.” (*Claim of Appeal [Examination Announcement; Sergeant Promotional Examination Candidate Preparation Guides]*)

13. Each candidate who registered to take a promotional examination was randomly assigned a Candidate ID number that was different from his/her BPD identification or badge number. Devin Taylor, BPD’s Human Resources Division Director, was the only person involved in the examination process who had a master list of the candidate names and Candidate ID numbers. (*BPD Motion; Claim of Appeal [Notices to Appear]*)

14. The materials that BPD distributed to candidates contained the following information about the process for appealing examination results:

- The Sergeant’s Candidate Preparation Guide for the Written Technical Knowledge Test, dated December 2013, stated:

“The following appeals process will be used for the Written Closed-Book Test of Technical Knowledge. Additional instructions and any modifications to the instructions below will be announced at the test site prior to the start of the test.”

“Appeals may ONLY be completed at the test site immediately following the administration of the Written Closed-Book Test of Technical Knowledge. Immediately following the conclusion of the test, there will be an additional 30 minutes for completion of written appeals to test items. Once this time 30-minute appeal period has elapsed, no additional appeals will be accepted.”

“Candidates will be required to complete a separate appeal form for EACH item they wish to appeal. For each appeal (and appeal form), candidates will be required to provide . . . the number of the test item they are appealing, the answer(s) they believe should be keyed as correct, the rationale to support their

appeal, and any reference citation within the applicable knowledge source that supports their appeal. Candidates should be as detailed as possible in their appeals to ensure full consideration is given.”

- The Sergeant’s Candidate Preparation Guide for the Written Work Sample and Oral

Board Tests, dated March 2014, stated:

“Appeals for either the Written Work Sample or the Oral Board Exercises must be submitted within one week of the completion of the administration component being appealed. Candidates are permitted to appeal for one of two reasons:

1. A Procedural Appeal: If a candidate believes that the proper administrative procedures (i.e., time allotted for a specific activity, etc.) were not followed when he/she tested.
2. A Computational Appeal: If a candidate believes that his/her test scores were not combined properly (i.e., a mathematical error was made) to create his/her overall examination score.

“Appeals shall be submitted to Devin Taylor, Director of Human Resources in the Boston Police Department. The specific steps to follow in submitting an appeal will be outlined in a separate document.”

- In an e-mail dated July 10, 2014 from Devin Taylor, BPD Human Resources Director, all candidates were informed that, after “considerable review” by HRD, BPD determined that its the prior instructions that required all appeals about the Phase I test be completed on-site was erroneous. Candidates were informed that such appeals could be filed within a seven (7) day period following the exam, i.e. on or before July 17, 2014. The e-mail attached a copy of the required form entitled “Request for Written Knowledge Test Question Review” that “must” be submitted to Devin Taylor directly in order to appeal each test question separately.
- On July 14, 2014, another e-mail from Devin Taylor informed candidates that they could contact BPD Human Resources “to review an exam item in order to complete your appeal” within the July 17, 2015 deadline.

- In an e-mail from Devin Taylor to all candidates, dated August 6, 2014, entitled “Phase II update”, candidates were advised: “At the time of issuance [of the Preparation Guides] some details were not finalized. The purpose of this e-mail is to provide that information.” As to the “Appeal Process”, the e-mail stated:

“The appeal process is outlined in your prep guide.”

“Procedural appeals must be made within 7 days from the date of the exam.

Captain/Lieutenant – procedural appeal deadline is 9/13/14

Sergeant – procedural appeal deadline is 9/16/2014

Computational Appeals must be made within 7 days of receiving your score”

“All appeals should be submitted on a Departmental Form 26 to the attention of Devin Taylor. Appeals must be submitted in-hand and will not be accepted after 5 p.m. on the deadline indicated.”

(Claim of Appeal [Sergeant Candidate Preparation Guides (EMPHASIS IN ORIGINAL); Written Knowledge Test Notification Letter]; BPD Motion, Exhs. 1 through 3)

15. On December 5, 2014, Officer Merced filed the present appeal.² His appeal asserts that the 2014 BPD Sergeant’s Promotional Examination was tainted by a variety of errors, including:

- Failure to collaborate with the police officers’ collective bargaining units and provide the unions with “relevant and reasonably necessary information when requested”.
- Compromising the “confidential ID” protocol by disseminating lists at the Technical Knowledge Test and Written Work Sample Test sites, contrary to the representation that only one BPD individual would have access to that information.
- Compromising the security of the Written Technical Knowledge Test and the Written Work Sample Test by permitting BPD civilians access to the examination room and using cell phones to text and talk during the examination.
- Failure to include input to learn that certain procedures covered in the Written

² Officer Merced subsequently filed an appeal of the denial by BPD and HRD to award his E&E points for his teaching experience, in which the Commission granted HRD’s motion for summary decision, dismissing that appeal on the merits. Merced v. Human Resources Division, 28 MCSR 396 (2015).

Technical Knowledge Test (housing female prisoners, evidence logging) have changed in practice and no longer conform to what the published, but outdated, BPD Rules and Regulations specify.

- Compromising the integrity and security of the Written Technical Knowledge Test by enabling some candidates access to their answers along with the questions prior to being allowed to make appeals as to the questions.
- Using cut-off score of 48 on the Written Technical Knowledge test (less than 50% out of 100%) to enable candidates to move forward to Phase II.
- Compromising the integrity and security of the Written Work Sample Test by allowing five (5) candidates entry to the examination room after the stated time that the exam doors were closed.
- Compromising the integrity of the Oral Board by conducting it over multiple days, during which Officer Merced claims he saw officers who had taken the Oral Board Test providing information about the scenarios to others who had not yet been tested.

(Claim of Appeal)

16. At the time of the present appeal, Officer Merced had not received his scores on the Phase II Written Work Sample Test and Oral Board Test, or his overall score. He did subsequently receive that information on or before May 2015. *(Claim of Appeal; Administrative Notice [Merced v. Human Resources Division, 28 MCSR 396 (2015)])*

STANDARD OF REVIEW

An appeal before the Commission may be disposed of summarily, in whole or in part, pursuant to 801 C.M.R. 1.01(7)(g) and 801 C.M.R.1.01(7) (h) when, as a matter of law, the undisputed material facts affirmatively demonstrate that there is “no reasonable expectation” that

a party can prevail 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)

Applicable Civil Service Law

The process for HRD review and appeal to the Commission to challenge the results of a civil service examination are contained in G.L.c.31, Sections 22 through 24 and follow a distinctly different statutory path from other forms of civil service appeals from HRD actions (or inactions). See, e.g., G.L.c.31, §2(b) (Commission is granted power and duty “[t]o hear and decide appeals by a person aggrieved by any decision, action, or failure to act by the administrator, except as limited by the provisions of section twenty-four relating to the grading of examinations”) These statutes provide, in relevant part:

§22. Passing requirements of examinations; credits; requests for review. The administrator shall determine the passing requirements of examinations. 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.

. . .[A]n applicant may request the administrator to conduct one of more of the following reviews relating to an examination: (1) a review of the marking of the applicant’s answers to essay and multiple choice questions; (2) a review of the marking of the applicant’s training and experience; (3) a review of a finding that by the administrator that the applicant did not meet the entrance requirements

Such request for review of the marking of the applicant’s answers to essay questions, of the marking of the applicant’s training and experience or of a finding that the applicant did not meet the entrance requirements . . . shall be filed with the administrator no later than seventeen days after the date of mailing by the administrator of the notice to the applicant of his mark in the examination

An applicant may require the administrator to conduct a review of whether an examination taken by such an 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.

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 references 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.

§23. Review of examination papers; errors. Within six weeks after receipt of a request pursuant to section twenty-two, the administrator shall, subject to the provisions of this section, conduct such review, render a decision, and send a copy of such decision to the applicant. If the administrator finds an error was made in the marking of the applicant's answer to an essay question, or in the marking of the applicant's training and experience or in the finding that the applicant did not meet the entrance requirements . . . the administrator shall make any necessary adjustment to correct such error.

The administrator may refuse to conduct a review pursuant to this section where . . . the applicant has failed to file the request for review within the required time or in the required form.

§24. Appeals; petitions. 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 . . . ; or (c) a finding that the examination taken by such applicant was a fair test 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. . . . [T]he commission shall conduct a hearing and . . . 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 and experience was fully stated in the training and experience sheet filed by the applicant at the time designated by the administrator.

Analysis

The Commission has recently reviewed the statutory provisions governing administrative review of challenges to the validity of civil service examinations, including the lengthy legislative history that led to the present statutory scheme, in the context of three other appeals arising from the 2014 BPD Promotional Examination. See Wilbanks v. Human Resources

Division, CSC No. B2-15-57, 29 MCSR --- (2016), on motion for reconsideration, 29 MCSR --- (2016) (review of essay and oral examinations); Clarke v. Human Resources Division, CSC No. B2-15-58, 29 MCSR --- (2016) (same); Sousa v. Human Resources Division, CSC No. B2-15-86 (same) The Commission also addressed these issues in an earlier decision in which the Commission declined the request of certain BPD police officers to intervene and order a modification of the form of the Oral Board component of the BPD Promotional Examination. In Re: Request by Jack Kervin and Others for an Investigation, 27 MCSR 507 (2015). See also Swan v. Human Resources Division, 28 MCSR 631 (2015), citing O'Neill v. Civil Service Comm'n, 78 Mass.App.Ct. 1127 (2011) (timing of “fair test” appeal); Pulchansingh v. Human Resources Division, 28 MCSR 351 (2015), citing Lincoln v. Personnel Administrator, 432 Mass. 208 (2000) (plenary HRD review of examination claims is a necessary and important prerequisite to appeal to Commission); Aquino v. Human Resources Division, 28 MCSR 335 (2015) (HRD has duty to accurately inform examination candidates of their appeal rights)

The Commission need not plow this ground anew. The applicable civil service law, as drawn from the teaching of these decisions, includes the following principles:

- HRD review of a candidate’s claims that the BPD promotional examination was not a “fair test” of the “fitness actually to perform the primary or dominant duties of the position for which the examination was held”, or that the “marking” of the candidates’ answers was erroneous, is an essential and important statutory requirement. This review enables the personnel administrator, who “possesses expertise in regard to the grading and weighting of the examinations” to determine “whether there has been a mistake, or an issue that has been overlooked, that can be easily corrected before an eligibility list is certified.” Lincoln v. Personnel Administrator, *supra*, 432 Mass. at 212-13.

- This important statutory function cannot be delegated by HRD to the BPD or its consultant.
- Although BPD and HRD are not statutorily obligated to inform examination candidates of their appeal rights, when they do provide such information, they have the duty to ensure that the information provided is complete and accurate.
- A candidate may request that HRD review the “marking” of written examination questions within seventeen (17) days after receiving the examination scores.³
- A candidate may request that HRD conduct a “fair test” review within seven (7) days after the “date of the examination”, except when “due process” requires that the time for making such a request is tolled, up to when the candidate receives his exam scores or some other time that allows the candidate reasonably to discover the facts upon which such a review may be asserted.
- HRD’s review and decision on markings of examination essay questions and HRD’s “fair test” review are prerequisite to further appeal to the Commission. The Commission should not presume how HRD would decide these questions. See Ahern-Stalcup v. Civil Service Comm’n, 79 Mass.App.Ct. 210, 216-17 (2011)

Application of these principles to the present appeal leads to the conclusion that Officer Merced’s civil service rights have been impaired and he is entitled to appropriate relief. Specifically, he is entitled to a substantive HRD review of his “fair test” claim and, subject to HRD’s decision on that review, may seek further appeal to the Commission.

³ G.L.c.31, §22, ¶2 provides for HRD review of the marking of both multiple choice and “essay” questions, but the deadline for filing review requests and the duty to render a decision on such requests in G.L.c.31,§22,¶3 and G.L.c.31,§23 reference only “essay question” review. This omission seems most likely a scrivener’s error attributable to the fact that, for many years, the statute only provided for review of essay questions and the authority for HRD review of multiple choice questions was inserted into the statute by amendment in 1989. St.1989, c.269. The most reasonable interpretation of the legislative intent would seem to imply that the same seventeen day period be applied to all requests for HRD review of the scoring of questions. The statute provides no right to request HRD review of an oral examination. See Wilbanks v. Human Resources Division, CSC No. B2-15-57, 29 MCSR --- (2016) See generally, O’Neill v. Civil Service Comm’n, 78 Mass.App.Ct. 1127 (2011) (due process entitled candidate to receive the answer key to multiple choice exam before being required to file a “fair test” appeal)

First, as to the BPD's assertion that Officer Merced's right to assert a "fair test" claim is untimely, the undisputed facts do not support that assertion. The BPD does correctly point out that Officer Merced filed his appeal to the Commission on December 5, 2014, which is clearly more than seven (7) business days from the last possible examination date (November 21, 2014). But the undisputed facts also establish that BPD provided woefully inaccurate information to the candidates about their rights to challenge the examination process. BPD acknowledged that it had provided erroneous information to candidates as to the appeal of specific examination questions and acknowledged that its original process for such appeals (requiring them to be completed on site within 30 minutes of the completion of the examination) contravened the statutory requirements. Even as modified, BPD got the appeal timeline wrong – reviews of marking of examination questions may be requested within seventeen (17) days after the scores are issued, not within seven (7) days of the date of the exam. Moreover, both the appeal process and the instructions to candidates were completely devoid of any reference to a "fair test" review, either by BPD or HRD. Finally, it is not disputed that HRD was never involved in the review of the examination (other than as to E&E scores, not involved here) as the statute required and, in that sense, Officer Merced's appeal to the Commission is more appropriately deemed premature, not untimely. To the extent that his actions fail to comply with the statutory requirements for filing a "fair test" appeal, he was placed in that situation by the improper procedures and notices afforded to him by BPD (and, implicitly, endorsed by HRD). Thus, in these circumstances, his civil service rights have been impaired and he is clearly aggrieved.

Second, the Commission had put BPD and HRD on notice well before the Written Work Sample and Oral Board Tests that corrective action was necessary to conform the process for examination review and appeals from the 2014 Promotional Examination to the requirements of

civil service law, and in particular, with respect to HRD review of “fair test” appeals and the obligation to ensure that candidates received accurate information about their appeal rights. E.g., In Re: Request by Jack Kervin and Others for an Investigation, 27 MCSR 507 (2015); Pulchansingh v. Human Resources Division, 28 MCSR 351 (2105), citing Lincoln v. Personnel Administrator, 432 Mass. 208 (2000); Aquino v. Human Resources Division, 28 MCSR 335 (2015). It is disheartening that these recommendations went unheeded and the Commission is justified to take this factor into account in fashioning relief. Whatever equities might have been applied to find Officer Merced’s delay in seeking a fair test review of the Phase I Written Technical Knowledge Test, for which he had received his scores in August 2014, precluded any right to an HRD review of that component, are outweighed by the “unclean hands” of the BPD and HRD in taking no action even when the need for corrective action was known. As an HRD “fair test” review of the 2014 BPD Sergeant’s Promotional Examination is clearly necessary, it is appropriate that HRD conduct such a review as to both the Phase I and Phase II components of the examination.

For purposes of clarity, the Commission is not deciding that every aspect of the 2014 BPD Sergeant’s Promotional Examination questioned by Officer Merced in his Claim of Appeal falls into the category of a “fair test” appeal. Some of his concerns do seem to fit into the category of challenging the “marking” of specific questions on the Written Technical Knowledge Test (such as the proper response to allegedly ambiguous questions about housing female prisoners or logging in evidence). BPD correctly asserts that, to the extent Officer Merced takes issue with the marking of a specific question, that challenge is not necessarily the same as a request for a “fair test” review. Although BPD’s process for seeking review of the marking of a specific question also left something to be desired, it did provide a specific path to initiate such review.

Although the required process was flawed, Officer Merced did not take even those steps to preserve his rights. As to any review of the marking of specific questions, Officer Merced's situation is not comparable to those other candidates who did preserve their rights to such a review by following the procedure that BPD had prescribed, and he is not now entitled to convert this appeal into a request for such a review. See, e.g., Wilbanks v. Human Resources Division, CSC No. B2-15-57, 29 MCSR --- (2016), on motion for reconsideration, 29 MCSR --- (2016) (review of essay and oral examinations); Clarke v. Human Resources Division, CSC No. B2-15-58, 29 MCSR --- (2016) (same); Sousa v. Human Resources Division, CSC No. B2-15-86 (same)

Accordingly, for the reasons stated, BPD's Motion for Summary Decision is ***denied*** and the Appellant's appeal under Docket No. B2-14-280 is ***allowed in part***, insofar as he seeks a substantive "fair test" review of the 2014 BPD Sergeant's Promotional Examination on the grounds stated in his Claim of Appeal to the Commission. HRD is ordered to conduct such a review in a manner consistent with this Decision and in accordance with Chapter 31, Sections 22, ¶4 and 23 as prescribed by law. The Commission shall entertain a motion to reopen this appeal within seventeen (17) days following the mailing to the Appellant of a decision by HRD rendered after such a review as provided in G.L.c.31,§24. Nothing in this Decision is intended to express any opinion as to the merits of the grounds alleged by Appellant's request for a "fair test" review or any portion thereof.

Civil Service Commission

/s/ Paul M. Stein
Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein & Tivnan, Commissioners) on February 4, 2016.

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 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. 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:

Sixto Merced (Appellant)

Wendy Chu, Esq. (for HRD)

Nicole Taub, Esq. (for BPD)