

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

RICHARD MONAGLE,
Appellant

v.

G1-06-44

MEDFORD FIRE DEPARTMENT,
Respondent

Appellant's Attorney:

F. Robert Houlihan, Esq.
Heavey, Houlihan, Kraft & Cardinal
229 Harvard Street
Brookline, MA 02446
(617) 277-3477

Respondent's Attorney:

Mark E. Rumley, Esq.
City Solicitor
City of Medford Law Department
85 George P. Hassett Drive
Medford, MA 02155
(781) 393-2470
mrumley@medford.org

HRD Attorney:

Martha L. O'Connor
Commonwealth of Massachusetts
Human Resources Division
One Ashburton Place: Room 211
Boston, MA 02108
(617) 878-9766
Martha.oconnor@hrd.state.ma.us

Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of M.G.L. c. 31, § 2(b), the Appellant, Richard Monagle, seeks review of the Medford Fire Department's decision not to allow the Appellant to re-take the Human Resources Division's Physical Abilities Test (PAT), successful

completion of which is necessary for his reinstatement to the Medford Fire Department, pursuant to the Appellant's approved retraining program under G.L. c. 31, § 39. The Human Resources Division (HRD) informed the Medford Fire Department that it would permit the Appellant to participate in the PAT preview and a PAT re-test if agreed to by the Appointing Authority. The Appointing Authority declined to permit the Appellant to take a PAT re-test and denied him reinstatement. Parties filed motions and cross-motions for Summary Decision; and a motion hearing was held on February 1, 2007. A full hearing was held on March 23, 2007 at the offices of the Civil Service Commission before Commissioner Christopher Bowman. The Commission did not rule on the motions prior to the full hearing. At the start of the full hearing, the Appointing Authority sought a ruling on the admissibility of an affidavit completed by HRD representative Philip Ierardi, the individual who coordinates Physical Abilities Tests for HRD and who had a conversation with the Appellant regarding his ability to take a PAT re-test on the day the Appellant failed the initial PAT. Counsel for HRD informed the Commission that Mr. Ierardi was asked the day before the hearing whether he had any information regarding the instant appeal and whether he could appear at the Commission hearing today. According to HRD, Mr. Ierardi indicated that he did have information regarding the instant appeal, but would be unable to attend the hearing. He did, however, at the request of counsel for HRD, prepare an affidavit that the Appointing Authority sought to enter into evidence. Counsel for the Appellant strongly objected to the document's admissibility, which he had never seen until it was offered by the Appointing Authority at the hearing. I took the issue regarding the document's admissibility under advisement until after hearing the testimony of Chief Giliberti and the Appellant. I subsequently

denied the City's motion to enter the exhibit as it would be prejudicial to the Appellant without the opportunity to cross-exam Mr. Ierardi. This appeal was filed over one year ago and the full hearing was preceded by a pre-hearing and a motion hearing attended by all parties. The City and HRD had ample opportunity to arrange for Mr. Ierardi to appear as a witness; they did not. Further, upon being notified that Mr. Ierardi was in the field conducting PATs, I gave HRD the opportunity to call Mr. Ierardi and have him testify via conference call. HRD was unable to make contact with him.

FINDINGS OF FACT:

Eight (8) joint exhibits were entered into evidence at the hearing. Based on these exhibits and the testimony of the following witnesses:

For the Appointing Authority:

- Frank Giliberti, Jr.; Fire Chief;

For HRD:

- Wendy Chu, Labor Counsel, Human Resources Division;

For the Appellant:

- Richard Monagle, Appellant;

I make the following findings of facts:

1. The Appellant retired on accidental disability from the Medford Fire Department in 1992 as a Temporary Captain after approximately 14 years of service. His disability resulted from an accident in which a Medford fire truck backed into him. (Stipulated Facts and Testimony of Appellant)

2. On July 27, 2005, PERAC's Restoration to Service Medical Panel determined that the Appellant was able to perform the essential duties of the position and ordered his return to service. (Stipulated Facts)
3. On November 1, 2005, the Human Resources Division (HRD) notified the Appellant that he would have to successfully complete a retraining program developed by the City of Medford and approved by HRD, and that the retraining program may include the HRD Physical Ability Test. HRD also enclosed a copy of the Massachusetts Fire Departments Physical Ability Test Preparation Guide. (Stipulated Facts)
4. Medford Fire Chief Frank Giliberti testified that the Appellant was the first firefighter during the Chief's tenure that sought reinstatement after collecting accidental disability retirement. In devising the reinstatement plan, the Chief testified that it was the City's intention to apply the same standard regarding the Physical Abilities Test that is required of initial appointments. (Testimony of Chief Giliberti)
5. On January 18, 2006, pursuant to G.L. c. 31, § 39, the Medford Fire Department submitted a proposed retraining program, for the Appellant, to HRD for approval. (Exhibit 3 and Stipulated Facts)
6. The above-referenced proposed retraining program stated in relevant part that one part of the retraining program was, "Successful completion of a full Physical Abilities Test (PAT) administered by the Human Resources Division. (emphasis added) (Exhibit 3)
7. On January 19, 2006, pursuant to G.L. c. 31, § 39, HRD approved the retraining program for the Appellant that included a full-body medical examination, the HRD

Physical Abilities Test (PAT), and an approved Fire Academy/Drill School.

(emphasis added) (Exhibit 5 and Stipulated Facts)

8. The Appellant had fourteen weeks to prepare for the PAT from the date he was notified by HRD that the retraining program may include the HRD Physical Ability Test and given a copy of the Massachusetts Fire Departments Physical Ability Test Preparation Guide. (Stipulated Facts)
9. HRD permits applicants to take a PAT preview test before the official PAT.
Although HRD is not statutorily required to conduct a PAT preview, it is a courtesy available to interested parties. (Stipulated Facts)
10. Passing a full physical examination is a prerequisite to participation in the PAT preview test and the official PAT. Confirmation of an individual's passing of such physical examination must be provided to HRD prior to taking the PAT preview and PAT. (Stipulated Facts)
11. On January 23, 2006, the Appellant took and passed a medical examination.
(Testimony of Appellant)
12. On January 24, 2006, the Appellant was not allowed to participate in the PAT *preview* because no written confirmation of the Appellant passing his medical examination was available to HRD, which administers the PAT. (Stipulated Fact)
13. On January 31, 2006, the Appellant appeared for the PAT in Hudson, MA at approximately 8:30 A.M. Prior to this time, the Appellant had been going to the gym approximately 5 nights per week for 2 years and had been practicing for the exam by following the HRD guidelines provided to all candidates. (Testimony of Appellant)

14. Upon arriving at the testing facility in Hudson, MA, the Appellant checked in and was told to wait with the other applicants in a gymnasium. According to the Appellant, the first candidate was called for testing at approximately 10:00 A.M. (Testimony of Appellant)
15. At approximately 1:00 P.M., the Appellant was called to take his PAT. The PAT is divided into seven different physical activities which must be completed within a certain time period. If you fail to pass one portion of the examination within the proscribed time period, you are not allowed to continue with the other activities and are considered to have failed the PAT. (Exhibit 6 and Facts Stipulated at Hearing)
16. The Appellant successfully completed the first portion of the PAT by completing the “step mill” activity in 200 seconds. The cutoff is 200 seconds. (Exhibit 6)
17. The Appellant successfully completed the second portion of the PAT by completing the “ladder event” in 27.14 seconds. The cutoff is 35.56 seconds. (Exhibit 6)
18. While taking the third portion of the PAT, the “hose advance” test, the Appellant slipped, which resulted him missing the 20 second cutoff by 3.54 seconds. (Exhibit 6 and Testimony of Appellant)
19. What transpired after the Appellant failed to complete the “hose advance” test within 20 seconds is pivotal to the instant appeal.
20. According to the Appellant, he was told by HRD representative Philip Ierardi that he would be able to re-take the PAT at another time. (Testimony of Appellant)
21. Medford Fire Chief Frank Giliberti testified before the Commission that he had previously informed the Appellant that if he failed the PAT on January 31st, he would have the opportunity to re-take the PAT the same day. (Testimony of Giliberti)

22. According to Chief Giliberti, it has been the standard practice during his 8 ½ years as Fire Chief to require any candidate seeking to re-take the PAT to take the reexamination the same day. (Testimony of Giliberti)
23. The Appellant does not dispute that Chief Giliberti told him that he would need to take the PAT the same day if he failed it. However, the Appellant testified that he conveyed this information to HRD representative Philip Ierardi. According to the Appellant, HRD representative Philip Ierardi, even after being told of the Chief's instructions, told the Appellant that he would be able to take the test at another time. Again according to the Appellant, he was instructed by this HRD representative to sign a form waiving his right to wait an additional 16 weeks before taking the re-test and was then told by the same HRD representative that he would probably hear about a re-test date within two weeks. (Testimony of Appellant and Exhibit 6)
24. Page 4 of Exhibit 6 contains the above-referenced waiver form signed by the Appellant and another HRD representative (Paul Veo). The waiver states in full, "If candidate who fails the PAT wants to re-test before the 16-week preparation period has concluded, please sign below to waive any additional time remaining in the 16-weeks to prepare for a re-test." (Exhibit 6)
25. There is no dispute that the Appellant was never told by any HRD representative that day that he must re-take the examination that day or forfeit his right to a re-examination.
26. According to the Appellant, he left the facility at approximately 2:00 P.M. and went for coffee, believing he would be scheduled for a retest in approximately two weeks. (Testimony of Appellant)

27. Later that day, the Appellant called his wife and informed her that he failed the PAT.

According to the Appellant, his wife suggested that the Appellant call Chief Giliberti and inform him of this. (Testimony of Appellant)

28. At approximately 4:30 P.M., the Appellant called Chief Giliberti and informed him that he failed the PAT. (Testimony of Appellant and Chief Giliberti) The Appellant and Chief Gilibert provided divergent accounts of what was said during this phone conversation.

29. In regard to the above-referenced telephone call, Chief Giliberti testified before the Commission that the Appellant told him that, “he did not pass the PAT”. Asked what he said in reply, Chief Giliberti testified that, “I asked him if he took it again and his response was that he did not.” Chief Giliberti then referenced a previous conversation he had with the Appellant the week before. When asked by this Commissioner what he told the Appellant during this particular phone conversation, the Chief stated, “I asked him why he didn’t take it again. I told him he could take it again. He chose not to.” Asked what the Appellant said in response to this, Chief Giliberti stated, “he chose not to take it.” Asked again what the Appellant said, Chief Giliberti testified that he couldn’t remember what the Appellant said and couldn’t remember how the conversation ended.” (Testimony of Chief Giliberti)

30. In regard to the same telephone conversation, the Appellant testified that, “I told him (Giliberti) that I flunked the test and they (HRD) told me that they’d let me know in a couple of weeks about getting the re-test.” According to the Appellant, the Chief responded by stating, “if I hear anything I’ll let you know.” Asked by this

Commissioner if the Chief asked him if he re-took the test that day, the Appellant stated that he wasn't sure. (Testimony of Appellant)

31. On February 10, 2006, HRD informed the Medford Fire Department that HRD is willing to afford the Appellant the opportunity to participate in the PAT preview and PAT re-test so long as the Appointing Authority was in agreement. (Stipulated Facts)
32. The Medford Fire Department was not willing to afford the Appellant an opportunity to participate in the PAT re-test. (Stipulated Facts)
33. At some point, the Appellant called the Mayor of Medford who told him, "The Chief said you refused to re-take the test; that's the end of it." (Testimony of Appellant)
34. On February 23, 2006, the Medford Fire Department notified the Appellant that in light of his failure to successfully complete the PAT, it was not reinstating him to the position of Fire Lieutenant. (Stipulated Facts)
35. On March 13, 2006, the Appellant filed an appeal with the Civil Service Commission. (Stipulated Facts)

CONCLUSION:

Permanent civil service employees who are separated from their positions because of disability have an opportunity to be reinstated to their former positions. G.L. c. 31, § 39. After determination by the retirement board that an employee is capable of employment that "employee shall be placed in a position in the same or similar title in the department from which he was separated or any other department prior to the appointment from any civil service list." Id. However, if the employee has been separated from his position for more than five years, "such placement right shall be subject to the completion by such

employee of a retraining program established by the appointing authority, and approved by the personnel administrator.” Id.

In the present case, the appointing authority established a retraining program for the Appellant. HRD approved that retraining program. The retraining program required, among other things, “the successful completion of a full Physical Abilities Test (PAT) administered by the Human Resource Division.”

HRD argues that without the City’s authorization permitting the Appellant to re-test, he was not guaranteed a re-test pursuant to civil service law or the HRD approved retraining program. Specifically, HRD argues that *Section 39* does not grant an employee a second opportunity to pass a component of the re-training program and that, in the case of a reinstatement, it is up to the appointing authority whether or not to allow an employee to re-take a failed PAT.

The Appellant argues that c. 31, § 61A requires that he be given an opportunity for a re-test. In response, HRD argues that Section 61A only applies to entry level and in-service individuals and does not apply to returning disability retirees.

According to the testimony of Medford Fire Chief Frank Giliberti, the Appellant is the first firefighter during the Chief’s tenure that sought reinstatement after collecting accidental disability retirement benefits. However, in devising the reinstatement plan, the Chief testified that it was the City’s intention to apply the same standard regarding the Physical Abilities Test that is applied to initial applicants.

G.L. c. 31, § 61A, which governs physical ability tests for the initial appointment of police and fire fighters, states in relevant part, “The appointing board or officer shall provide initial medical and physical fitness examinations. If such person fails to pass an

initial medical or physical fitness examination, he shall be eligible to undergo a reexamination within 16 weeks of the date of the failure of the initial examination.”

(emphasis added)

As there is no dispute that the City has always intended to give the Appellant the same right to a re-test afforded to initial applicants, the sole issue in this case is whether or not the Appellant lost the opportunity re-take the PAT by not re-taking it the same day he failed the initial PAT.

Chief Giliberti testified that it has been the City’s policy during his 8 ½ year tenure as Fire Chief that any candidate seeking to re-take a failed PAT must complete the reexamination the same day. There was no documentary evidence submitted to the Commission regarding this practice of the City. Further, there is no dispute that the PAT is administered by the state’s Human Resources Division, not the City.

The Commission was not presented with any evidence even suggesting that HRD requires applicants exercising their right to a re-test to take the re-test the same day they failed the initial test. In fact, the HRD waiver form signed by the Appellant is specifically designed for applicants to waive their right to wait 16 weeks before re-taking the PAT. Further, the Commission finds the Appellant’s testimony that he was told by an HRD representative that he could re-take the PAT test at another time to be credible. Given how high the stakes are for the Appellant, it is inconceivable that he would have walked out of the testing facility without taking a re-test that day if hadn’t been told by an HRD representative that he could take the re-test at another time.

Pursuant to its powers inherent in Chapter 310 of the Acts of 1993, the Commission hereby orders HRD to schedule the Appellant for a PAT re-test at the next available test

and allow him the opportunity to re-take the PAT. Should the Appellant successfully pass the PAT re-test, the City of Medford is hereby ordered to reinstate him to the position of firefighter, assuming he has satisfied all other requirements of reinstatement.

Civil Service Commission

Christopher C. Bowman, Commissioner

By vote of the Civil Service Commission (Bowman, Guerin, Marquis, Commissioners [Taylor – Absent] on April 5, 2007.

A true record. Attest:

Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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:

F. Robert Houlihan, Esq.

Mark Rumley, Esq.

Martha O'Connor, Esq.