

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

**SUFFOLK, ss.**

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

**DANIEL NAPOLI,**  
Appellant

v.

**CASE NO: G1-08-283**

**HUMAN RESOURCES DIVISION,**  
Respondent

Appellant's Attorney:

Domenic J. Scalise, Esq.  
89 Main Street  
North Andover, MA 01845

HRD'S Attorney:

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Labor Counsel  
Human Resources Division  
One Ashburton Place – 3<sup>rd</sup> Floor  
Boston, MA 02114

Commissioner:

Paul M. Stein

**DECISION ON MOTION TO DISMISS**

The Appellant, Daniel Napoli, acting pursuant to G.L.c.31, §2(b), appealed from an alleged action or inaction of the Massachusetts Human Resources Division (HRD) to exclude him from placement on the eligible list for original appointment as Firefighter. HRD moved to dismiss the appeal on the grounds that the Appellant had failed to register for the Physical Abilities Test (PAT) and, therefore, could not be considered for appointment by law. The Appellant opposed the motion. A motion hearing was held by the Civil Service Commission (Commission) on April 28, 2009. The hearing was digitally recorded. The record was left open to receive further information from HRD, which the Commission received on May 4, 2009. .

## **FINDINGS OF FACT**

Giving appropriate weight to the documents submitted by the parties, and the argument presented by the Appellant and HRD, and inferences reasonably drawn from the evidence, I find the following material facts to be undisputed:

1. On or about December 4, 2007, HRD issued Announcement Number 4546 for the Open Competitive Examination for Firefighter Municipal Service to be conducted in April 2008. (*HRD Motion, Exhibit A*)

2. The Announcement described the Selection and Hiring Process: “You must take and pass a written examination and a physical abilities test to be placed on the eligibility list for appointment as a Firefighter. You must also take another physical abilities test after you have been given a conditional offer of employment” (*HRD Motion, Exhibit A*)

3. The Announcement notice also states:

**“The Entry-level PAT will assess the physical capability of candidates to perform the essential functions of a firefighter’s job. Applicants will be notified of how to apply for Entry-level PAT’s, which will be administered beginning in July 2008. There will be a separate fee of \$100 for the PAT. A complete description of the PAT and a training guide will be available on our website by April 1, 2008.”**

(*HRD Motion, Exhibit A*) (**Emphasis in original**)

4. The Announcement explains “How to Apply” as follows:

You may apply for this examination, using a Visa or Mastercard, on-line at the Human Resources division website: <https://www.csceexam.hrd.state.ma.us/hrd/>. A confirmation number for each successful transaction will be issued to the applicant.

You may also obtain a paper application form, and file it alone with the examination-processing fee . . . in person or by mail at HRD (see address below).

(*HRD Motion, Exhibit A*) (emphasis added)

5. On December 9, 2007, Mr. Napoli logged-on to the HRD “Standings and On-line Applicant Record Information System (SOARIS), and created a user account number

6. On or about December 18, 2007, Mr. Napoli received, via first class mail, a written notice informing him of the date, time and location for him to appear to take the examination (April 24, 2008 in Haverhill MA). He received the notice and took the examination as scheduled. (*HRD Motion, Exhibit C; Appellant's Response; Undisputed Representation of Counsel*)
7. On June 18, 2008, HRD e-mailed a notice to Mr. Napoli, at the e-mail account "napps302@aol.com" inviting him to attend a free "walk-through" of the PAT on July 2, 2008. Mr. Napoli says he has no knowledge that he ever received this e-mail. (*HRD Motion, Exhibit D; Representation of Appellant's Counsel*)
8. On or about July 23, 2008, HRD mailed, and Mr. Napoli received in the ordinary course, a notice of his score on the written examination, indicating that he placed in Band 10 (the second highest scoring band), along with 2580 other candidates. Overall, 7131 candidates passed the written examination. (*HRD Motion, Exhibit E; Appellant's Response; Undisputed Representations of Counsel*)
9. The July 23, 2008 notice Mr. Napoli received states, in part:

Thank you for participating in Phase 1 (the written examination) of the 2008 testing and selection process for firefighters for the Commonwealth of Massachusetts. The scoring of Phase 1 has been completed and your Phase I score band is presented below and is also available in the HRD Standings and On-line Applicant Record System (SOARIS)

Applicant's Phase 1 Score Band: 10
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A majority of the Phase 1 participants scored in bands 2-11. *If an applicant receives a Score Band of 1 . . . the applicant will not be permitted to continue in the 2008 testing and selection process.*

If you scored in one of the higher bands (2-11), you may continue in the 2008 testing and selection process and apply to take the Entry Level Firefighter Physical Ability Test (PAT). Please be advised that you must take and pass the PAT in order to have your name placed on the 2008 Firefighter Eligibility List.

...

If you are eligible but have not applied to take the PAT, please log into the HRD Standings & On-line Applicant Record Information System (SOARIS) at <https://www.cscexam.hrd.state.ma.us/standings/> and apply online. If you have not already set up a SOARIS User Account with HRD, we urge you to create one at your earliest convenience. . . . The deadline to apply has been extended from July 25 to August 4, 2008. Upon receipt of your online application, HRD will schedule you automatically on a first-come first-serve basis. There is a fee of \$100 for the PAT but eligible applicants may request a fee waiver online.

(HRD Motion, Exhibit E; Appellant's Response) (*emphasis added*)

10. On or about August 13, 2008, HRD sent an e-mail to Mr. Napoli at his e-mail account

"napps302@aol.com" informing him that the deadline for applying for the PAT was extended and would expire at midnight on August 14, 2008. Mr. Napoli claims he did not get this notice although he regularly checked his e-mail. (HRD Motion, Exhibit F; Appellant's Response; Representation of Appellant's Counsel)

11. According to HRD, e-mail notices sent to applicants with a SOARIS user account

were sent to the personal e-mail address provided by the applicant and , also, posted to his SOARIS account and, normally, could have been viewed there as well. (HRD Motion, Exhibit J; Representation of HRD Counsel)

12. According to HRD's records, Mr. Napoli logged on to his SOARIS account only once after creating the account, on September 3, 2008. (HRD Motion, Exhibit I)

13. On November 11, 2008, notice was mailed to Mr. Napoli informing him he did not pass the 2008 Firefighter Entry-Level Examination because he failed to take the PAT.

The Appellant received this notice. (HRD Motion, Exhibit H; Appellants Response)

14. HRD established the current active firefighter list on December 1, 2008. There are currently 5,044 candidates on the list. (HRD Supplemental Brief)

## **CONCLUSION**

### **Applicable Standard on Dispositive Motion**

The party moving for summary disposition of an appeal before the Commission pursuant to 801 C.M.R. 7.00(7)(g)(3) or (h) is entitled to dismissal as a matter of law under the well-recognized standards for summary disposition, i.e., “viewing the evidence in the light most favorable to the non-moving party”, i.e., HRD has presented substantial and credible evidence that the opponent has “no reasonable expectation” of prevailing on at least one “essential element of the case”, and that Mr. Dinicola has not produced sufficient “specific facts” to rebut this conclusion. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005); cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, 887 N.E.2d 244, 250 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249, 881 N.E.2d 778, 786-87 (2008)

Specifically, this motion to dismiss must allowed when the Appellant fails to raise “above the speculative level” sufficient facts “plausibly suggesting” that Mr. Napoli is aggrieved by any action or failure to act by HRD that violates any Civil Service law or rules. See generally Iannacchino v. Ford Motor Company, 451 Mass. 623, 635-36, 888 N.E.2d 879, 889-90 (2008) (discussing standard for deciding motions to dismiss); cf. R.J.A. v. K.A.V., 406 Mass. 698, 550 N.E.2d 376 (1990) (factual issues bearing on plaintiff’s standing required denial of motion to dismiss)

### **Applicable Civil Service Law**

The authority to conduct and administer civil service examinations is vested in the Personnel Administrator, i.e. HRD, with limited recourse of appeal to the Commission in certain cases. See G.L.c.31, §5(e), §§16 through 24. In order to successfully challenge a

### The Appellant's Claim

Mr. Napoli maintains that he was misled by the notices he received from HRD about the procedure he was obliged to follow to sign up for the PAT component, after being informed that he had passed the written component of the firefighter's examination. He claims that he did not ever receive any of the e-mail notices about the PAT testing process and the written notices he did receive were ambiguous and led him to believe that he did not need to take any action to sign up for the PAT component until he had received a further written notice to that effect by mail.

The Commission accepts, for purposes of this motion, Mr. Napoli's assertion that it was his regular practice to check his e-mail and, for whatever reason, he did not receive the e-mail messages from HRD concerning the PAT "walk-through" and testing schedules. Even assuming those facts to be true, however, the Commission concludes that other undisputed facts clearly demonstrate that HRD provided Mr. Napoli with other sufficient actual notice and opportunity to register for the PAT upon which a person, in the exercise of due diligence, would have acted.

In HRD's July 23, 2008 notice to Mr. Napoli that he successfully passed the written component of the firefighters' exam, receipt of which he acknowledged, Mr. Napoli was specifically reminded that he was required to take and pass the PAT in order to be placed on the 2008 Firefighter Eligible List, and that the deadline to apply for the test was August 4, 2008, less than two weeks later. Instructions on registering on-line were clearly described. Assuming that this written notice was the only information Mr. Napoli had received, he was clearly on notice that he was obliged to take prompt action and, having received no further notice as the deadline approached, he should reasonably have been proactive to inquire further. He need have done no more than call HRD, or simply log-in to his SOARIS account, where he would have found all of the information that would have led him to successfully register for the PAT. In fact, even if he had inquired soon after August 4, 2008, he would have learned that the deadline had been further extended to August 14, 2008, and he could still register. However, Mr. Napoli apparently did nothing until September 3, 2008, when he finally logged on to his SOARIS account for the first time. This failure, alone, is sufficient to find Mr. Napoli responsible for missing the deadline to register for the PAT and, therefore, ineligible for relief, because the harm, if any, to his employment rights cannot be considered "no fault of his own." St. 1993, c.310. See Galgay v. Human Resources Division, 22 MCSR 181 (2009)

Mr. Napoli argues that his neglect was excusable because the July 23, 2008 notice stated only that he "may" register for the PAT on-line, which left him with the impression he could expect further information about registering by mail. Such an interpretation of the notice, however, is unreasonable. The context of the language "may" reveals a plain meaning that, having passed the written component, an applicant is now "allowed or

permitted” to sign up for the PAT, not a usage that would indicate, in a different context, “a certain measure of likelihood or possibility”. See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4<sup>th</sup> Ed. 2009) The notice was clearly distinguishing the right of persons who passed the written test (Bands 2-11) who were permitted to register for the PAT, from those who failed (Band 1) and were not permitted to proceed to take the PAT. The Commission notes that, when on-line registration was optional, as for the written component, the notice clearly stated there were two options (and, incidentally, Mr. Napoli elected to register on-line for that test). The Commission also find significant that, thousands of other candidates (who took and passed the written and PAT components) managed to understand the requirement to duly register for the PAT on-line; so far as the Commission is informed, no one other than Mr. Napoli was led astray. The Commission finds no requirement in civil service law that would raise a question about the reasonableness of HRD’s notices to Mr. Napoli or its reliance on an applicant’s proactive responsibility to register for the PAT on-line as the notice provided.

Accordingly, for the reasons stated above, the appeal of the Appellant, Daniel Napoli, is hereby *dismissed*.

Civil Service Commission

Paul M. Stein  
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis & Stein; Taylor [absent], Commissioners) on August 13, 2009..

A True Record. Attest:

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Commissioner



Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), 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 to:

Domenic J. Scalise, Esq. (for Appellant)

Lidia Rincon, Esq. (for HRD)