

Decision mailed: 8/12/11
Civil Service Commission JB

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

Suffolk, ss.

Civil Service Commission
One Ashburton Place, Room 503
Boston, MA 02108
(617) 727-2293

John F. Nee,
Appellant

v.

Docket No.: B2-11-194

Human Resources Division,
Respondent

DECISION ON MOTION TO DISMISS

Apparently, pursuant to G.L.c. 31, §2 (b), and other applicable sections of chapter 31 the Appellant, John F. Nee, Jr. (hereinafter the "Appellant" or "Nee") filed an appeal with the Civil Service Commission (hereinafter "the Commission") on June 8, 2011, claiming that the personnel administrator or the Human Resources Division, (hereinafter "the administrator" or "HRD"), failed to give him proper credit for Education and Experience (hereinafter "E&E") on the written civil service promotional exam he took for Fire Lieutenant. Such E&E credit is weighted, averaged, calculated, and incorporated by HRD into the written exam score for the candidates' average score and then a final score.

A scheduled hearing was held on June 28, 2011 at the offices of the Commission. The parties appeared, presented documentation and argumentation for their respective positions. Thereafter, the parties were ordered to file dispositive motions, with supporting

documentation and /or affidavits by July 28, 2011. The parties were allowed ten (10) days after receipt of filings to file any responsive pleadings.

On July 14, 2011, HRD filed a Motion To Dismiss supported by fourteen (14) numbered Exhibits and an affidavit of Stephen P. White, HRD Information Officer II, the Affiant White's responsibilities includes review of E&E credits for civil service examinations. On July 15, 2011, the Appellant filed a detailed signed statement.

HRD's Motion To Dismiss to the Commission, is pursuant to 801 CMR 1.01 (7) (g) of the Standard Adjudicatory Rules of Practice and Procedure. On June 8, 2011, the Appellant filed the present appeal challenging his "E&E" credits for the open competitive Fire Lieutenant's examination. HRD claims in its' Motion that the current appeal should be dismissed because, 1.) It was untimely filed pursuant to M.G.L. c. 31, § 24, 2.) The Commission lacks jurisdiction to hear appeals regarding the grading of examinations pursuant to M.G.L. c. 31, § 24, 3.) The Appellant has no recourse to the review procedures established in M.G.L. c. 31, § 22 and 4.) The Appellant is not a person aggrieved pursuant to M.G.L. c. 31, § 2(b).

In support of its Motion to Dismiss, HRD presented the following:

1. Massachusetts General Laws (hereinafter, "G.L.") c. 31, § 2(b) confers upon the Commission the power "to hear and decide appeals by a person aggrieved" by a decision, action, or failure to act by either the administrator or local appointing authority.
2. Chapter 31, § 2(b) of the General Laws requires that a "person aggrieved" be able to show through specific allegations that a decision, action or failure to act was in violation of the rules or basic merit principals.
3. Under G.L. c. 31, § 1, basic merit principals are defined as recruiting, selecting and advancing employees on the basis of 1.) relative ability and 2.) knowledge and skills. Basic merit principals are also defined as "assuring fair treatment of all applicants...in all aspects of personnel administration."

4. G.L. c. 31, § 2(b) confers upon the Commission the power “to 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...” (Emphasis added.)
5. G.L. c. 31, § 16 states that, “A person who has taken a civil service examination pursuant to this paragraph shall not have recourse to the review procedures set forth in section twenty-two.”
6. G.L. c. 31, § 22 provides the following;

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.

The administrator shall determine the passing requirements of examinations...Except as otherwise provided by sections sixteen and seventeen, an applicant may request the administrator to conduct one or 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 by the administrator that the applicant did not meet the entrance requirements for the examination...Such request for review 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 on the examination...(Emphasis added.)

7. G.L. c. 31, § 24 states;

An applicant may appeal to the commission from a decision of the administrator made pursuant to section twenty-three 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 of the applicant’s fitness to actually perform the primary or dominant duties of the position for which the examination was held. Such appeal shall be filed no later than seventeen days after the date of mailing of the decision of 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 his section, the commission shall not allow credit for

training or experience unless such training or experience was fully stated in the training and experience sheet filed by the applicant at the time designated by the administrator. (Emphasis added.)

Based on the case file, pleadings, parties' argument and other documents provided and the reasonable inferences therefrom; I find that the following facts are established and/or proven:

8. The Appellant is a permanent civil service employee in the position of Firefighter with the Boston Fire Department. His civil service seniority date as a Firefighter with the Boston Fire Department is October 29, 1997. (Exhibit 1).
9. On November 20, 2010, the Appellant sat for an open competitive examination for the position of Fire Lieutenant, pursuant to examination announcement 7002. (Exhibit 2).
10. On above-mentioned date, the Appellant filled out an E&E Rating Sheet. (Exhibit 3).
11. Pursuant to its authority contained in G.L. c 31, § 16, HRD has developed a sophisticated method for weighting relevant E&E experience. Recent experience in a particular position is weighted more heavily than older experience in the same position. (Exhibit 4).
12. On his E&E Rating Sheet the Appellant claimed 12-23 months of recent Category 3 experience, 48-59 months of recent Category 4 experience, and 12-23 months of recent Category 5 experience. (Exhibit 3).
13. Category 3 experience is experience in the specified department in the Firefighter position from November 20, 2005 to November 20, 2010. Category 4 experience is experience as a Fire Cadet, call, intermittent or reserve Firefighter from November 20, 2005 to November 20, 2010. Category 5 experience is experience in the specified department as a full-time Firefighter which occurred prior to November 20, 1998. (Exhibit 4).
14. The Appellant verified the information contained on his E&E Rating Sheet through an Employment Verification Form (hereinafter, "EVF") dated November 16, 2010. (Exhibit 5.) On this Form the Appellant stated that he had worked 2,436 hours (or 14 months) between January 2006 and October 2010 as a Temporary after certification Fire Lieutenant. Id.
15. In support of his EVF, the Appellant submitted a letter from the Deputy Fire Chief of the Boston Fire Department confirming that the Appellant had

worked the above-mentioned hours as a Temporary after certification Fire Lieutenant. (Exhibit 6).

16. On or around February 24, 2011, HRD mailed the Appellant his examination score. (Exhibit 7, White affidavit). The Appellant received a score of 77.50 on his written examination. The Appellant received an E&E score of 86.40 based on the information provided by the Appellant on his E&E Rating Worksheet and reviewed by Stephen White, HRD Information Officer II. Id. **The Appellant's two scores were weighted and averaged for a total score of 79. (White Affidavit). The Appellant received two additional Veterans Preference points for a total examination score of 81. Id.**
17. On March 4, 2011, the Appellant filed a timely appeal to the Administrator pursuant to G.L. c. 31, § 22 and requested a review of his E&E credits. (Exhibit 8). HRD proceeded with this review as if it had been timely filed. The Appellant wrote that he should receive 48 months of Firefighter credit for the five years prior to the examination. Id.
18. In support of his appeal, the Appellant submitted new documentation from the Boston Fire Department which stated that the Appellant had, in fact, worked 12 months as a Temporary after Certification Lieutenant, not 14 months as he first reported at the time of the examination. (Exhibit 9).
19. On May 9, 2011, HRD Information Officer, Stephen White, responded to the Appellant after a careful audit of the Appellant's E&E credits. (Exhibit 10). Mr. White stated that the maximum score any applicant can receive for recent work experience is 59 months. In addition, Mr. White informed the Appellant that pursuant to his revised EVF, the Appellant would have 47 months of Firefighter time, which did not change his overall E&E credits and therefore his overall examination score would remain the same. Id.
20. In the above-mentioned letter, Stephen White erroneously wrote that the Appellant had 30 days from the receipt of the letter, instead of the Section 24 stated 17 days after date of mailing, to file an appeal with the Commission. (Exhibit 10). The Appellant did file with the Commission within the erroneously stated 30 day period. (Appellant)
21. On May 26, 2011, HRD issued a certified eligible list for Fire Lieutenant for the Boston Fire Department. The Appellant's name appears on the list in spot 39. (Exhibit 11).

22. On June 8, 2011, the Appellant filed the present appeal to the Civil Service Commission asserting the following three claims¹;

1. "...My E&E right now for my Firefighter time is 5.60 and Acting Lieutenant tie is 3.00 for 8.60. I feel my E&E should be based on 60 months and my firefighter time should go up to 7.20 for a total of 10.20..."
2. "In their instructions under crediting Acting or provisional service. They state you may choose either your permanent title or higher acting title. Whichever gives you the most credit. At the time I filled out by E&E which is the above paragraphs. But, if I don't get the above from you, I should get 7.20 points as a firefighter for 48 months and 1.50 points as an acting lieutenant for 6 to 11 months for a total of 8.70 which is better than my 8.60 points I currently have now which would move me up at least 1 to 3 spots on the current lieutenant's list."
3. "According to my E&E responses and remarks HRD mailed to me they state *Maximum experience credited within 5 years of exam is 5 years total. Remainder credited as older work experience. If I have 48 months as a firefighter for 7.20 and 6 to 11 months as an acting lieutenant for 1.50 points. Remainder credit as older work experience would give me additional 4 months for .25 points in column 2 as an acting lieutenant and an E&E score of 8.95." (Exhibit 12).

23. Both the E&E Rating Worksheet and E&E Rating Sheet Instructions, provided to all applicants, and available online on the HRD website, states that applicants are credited for recent experience "within [the past] 5 years". (Exhibit 3, 4). Therefore the maximum credit any applicant can receive for recent experience is 59 months. On the E&E Rating Worksheet, the maximum number of credits under Column 1 in any category is 48-59 months. Id.

24. The E&E Rating Sheet Instructions also clearly state in several places that Applicants may not include experience for which they have already given themselves credit in a previous category. (Exhibit 4).

25. The E&E Rating Sheet Instructions and G.L. c. 31, § 22 state that Applicants have only seven days from the date of the examination to submit changes to their E&E credit information. Specifically, the Instructions state, "No new type of credit can be claimed once you submit your education and experience Rating Sheet. The education and experience Rating Sheet must be submitted

¹ At the pre-hearing held on June 28, 2011, the Appellant confirmed these three arguments as the basis for his appeal.

at the examination or by statute [§ 22] within seven days after the date of the examination.” (Exhibit 4).

26. The Appellant admitted in his filed statement that he used 60 months to calculate his E&E credit points instead of the 59 months specified in the HRD Rating Sheet Instructions. He further admitted that to allow him 60 months for calculating his E&E credit points while limiting other candidates to only 59 months would be unfair to the other competing candidates, and he rescinded his appeal for that reason. (Appellant’s filed statement)
27. However, the Appellant then goes on to request that he be allowed to “re-write my E&E on my second and third appeal” as he requested at the Commission’s pre-hearing conference. (Appellant’s filed statement)
28. The Appellant, as with all the other candidates had the original opportunity to follow the HRD- E&E Rating Sheet instructions and accurately complete a proper Rating worksheet. The Appellant then had a second opportunity for a careful review by HRD’s Stephen White, which did not increase his E&E credit points. It would be fundamentally unfair to the other competing candidates to now allow him to re-write and resubmit his rating worksheet to the Commission or to HRD for what he admits is at least his second and third appeal. It would be unfair to the other competing candidates to now, belatedly allow the Appellant another opportunity to re-write or modify his E&E Rating Worksheet. (Exhibits, Appellant’s Statement, White Affidavit and reasonable inferences)
29. HRD’s Information Officer Stephen White conducted a thorough and accurate audit, review and calculation of the Appellant’s E&E credits. He applied HRD’s established formula for this purpose. He applied the formula uniformly and consistently with the application to all candidates. He concluded that applying the formula; after weighing and averaging his written and E&E scores, that the Appellant’s average score of 79 is accurate. Additionally, with two preference points for Veteran status awarded, the Appellant’s final score of 81 is accurate. (Exhibits and White Affidavit)

CONCLUSION

HRD argues here that the Appellant’s appeal should be dismissed as untimely pursuant to G.L c. 31, § 24.

HRD claims that Section 24 clearly states that Appellant’s may only appeal decisions from the Administrator “no later than seventeen days after the date of mailing of the decision of the administrator.” Here, the Appellant filed a timely request for

review directly with the Administrator contesting his E&E credits. The Administrator responded to the Appellant's request for review by a decision mailed on May 9, 2011. The Appellant did file an appeal directly to the Commission on June 8, 2011, within the 30 days from receipt of the mailing of the Administrator's decision. The 30 days from receipt of mailing deadline for filing at the Commission was the filing deadline erroneously stated by HRD's Stephen White in his May 9th letter to the Appellant. HRD erroneously misled the Appellant with the stated 30 day filing deadline for an appeal to the Commission. The Appellant relied on HRD's mistaken representation of a 30 day period to file his appeal at the Commission. Ordinarily, the statutory filing deadline would prevail. However, here it would be fundamentally unfair to now preclude the Appellant from the filing of his appeal due to his reliance on HRD's representation. If the Appellant's appeal were deemed untimely here, he would then potentially become an "aggrieved" person "by decision, action or failure to act by the administrator...", whose rights were abridged, denied or prejudiced in such a manner as to cause actual harm to his employment status, See G.L. c., § 2(b). Therefore, the Appellant's appeal is deemed to be timely filed under these circumstances.

HRD also argues that the Commission lacks subject matter jurisdiction to hear this appeal regarding the grading of examinations pursuant to G.L. c. 31, § 24.

HRD further argues that the Commission lacks jurisdiction to hear this appeal under the civil service law. In addition to the filing limitations placed on Appellants previously stated, HRD also argues that G.L. c. 31, § 24 also places limits on the Commission from hearing cases where the Appellant is asking to make changes to his E&E credits after the statutory time for changes to E&E credits has expired. Section 24 specifically states, "In deciding an appeal pursuant to this section, the commission shall

not allow credit for training or experience unless such training or experience was fully stated in the training and experience sheet filed by the applicant at the time designated by the administrator. (Emphasis added.) HRD claims that statutorily, candidates have seven days from the date of the examination to make any changes to their E&E credits. HRD points out that this information is clearly posted in the E&E Rating Sheet Instructions. (Exhibit 4). The examination for Fire Lieutenant was held on November 20, 2010. On March 4, 2010, the Appellant filed his request and changes to how his E&E credits are applied, the Appellant filed his request for review with the Administrator pursuant to Section 22. The Appeals Court addressed the Section 22 seven day review request deadline. The Appeals court agreed with the superior court judge's ruling that, "*as a matter of due process, the time did not begin to run until the applicant received his test result.*" Stephen O'Neill vs. Civil Service Commission, 10-P-384, Memorandum and Order pursuant to Rule 1:28, entered February 15, 2011. The Appeals Court O'Neill order also agreed that "*a fair reading of the entire statute 'indicated an intent by the Legislature that training and experience scores may be appealed under § 24, and applied the seventeen day time limit to O'Neill's training and experience appeal.'*"

However, HRD did accept this request for review as timely filed and did subsequently conduct a thorough audit and review of his E&E credits. On or about February 24, 2011, the exam score results were mailed to the Appellant by HRD. On May 9, 2011, HRD's Stephen White sent the Appellant the administrator's decision on the request for review of the E&E credits. This administrator's decision did not change the Appellant's overall E&E credits or his overall final examination score.

However, together with his request for review to the administrator, on March 4th, the Appellant did submit new paperwork from the Boston Fire Department. This new paperwork from the BPD reduced his time as a Temporary after certification Fire Lieutenant from 14 months to 12 months. (Exhibit 9). In the Appellant's appeal to the Commission under his Scenario 2, he specifically asks the Commission to grant his request to change his selection on the E&E Rating Sheet. When he first filled out his Rating Sheet he counted 12-23 months as recent Firefighter experience but now asks to reduce this to 6-11 months in the recent category so he can receive more credit in the Fire Lieutenant category because he feels this will give him more credits. In his Affidavit, Mr. White asserts that not only would the Appellant's final score remain the same under this scenario, but the Appellant cannot request changes to his E&E credits after seven days from the examination. (White Affidavit).

The Appellant filed his appeal of the E&E credit score at the Commission on June 8, 2011, with proposed changes to his E&E rating worksheet. He appeared at the Commission for a Pre-Hearing conference on June 28, 2011 and there again proposed changes (scenarios) in his E&E rating worksheet to achieve a higher score. On July 15, 2011 the Appellant filed a detailed signed statement reiterating those changes to his E&E rating worksheet. Any decision now from the Commission, allowing the Appellant to change how he counts his E&E credits would be in clear violation of the seven day time limitation of Section 22. The seven day time limit was also clearly stated in the E&E Instructions, and such a decision would also violate basic merit principals as the seven day limitation is and was applied consistently to all the competing candidates. Despite his possibly late request for review to HRD accompanied by a new E&E rating worksheet,

the Appellant did receive a thorough review and audit by HRD; its decision denied his request for increased E&E credits.

That audit and review decision by HRD affirming its original determination of his E&E credits and final exam score has been found here to be proper and accurate. He now wants a further opportunity, at the Commission, to belatedly adjust and change his E&E rating worksheet. In effect, the Appellant is now asking for a third bite of the apple where virtually all other candidates received only one. HRD has a clearly stated policy that it will not accept requests to change E&E credits after the statutory seven day time period has expired. However, the Appeals Court O'Neill Order *ibid* states that as a matter of due process the seven day time period did not begin to run until the applicant received his test results. The Commission will not consider an extension of that seven day time period to change his E&E rating worksheet despite HRD's acceptance of his request for review, accompanied by the new E&E rating worksheet filed with HRD on March 4, 2011.

The Legislature specifically choose to give candidate's seven days to make changes to their E&E credits and it would create an administrative nightmare if HRD were to allow candidates to make changes to how their E&E credits were applied at any stage in the appointment process and therefore, the Appellant's subsequent modified request under his scenarios one, two and three are dismissed.

HRD further argues here that pursuant to G.L. c. 31, § 16, the Appellant has no recourse to the review procedures established in G.L. c. 31, § 22.

HRD claims here, an exclusion of review pursuant to the second paragraph of G.L. c. 31 §16, which states the following: "The administrator shall, subject to the provisions of section twenty-six, where applicable, examine, qualify, and rank applicants

for original or promotional appointments solely on the basis of training, experience, education or other criteria considered appropriate by the administrator (a) for a scientific or professional position for which education at or above the master's degree level is required by statute or under authority thereof; (b) when the major duty of a position is such that applicants are required to have successfully completed a course in emergency medical care pursuant to the provisions of chapter one hundred and eleven C; (c) when the major duty of a position is such that applicants are required to possess a certificate, registration or license issued after examination by a state board of registration or examiners or by a professional association specified by the administrator. “A person who has taken a civil service examination pursuant to this paragraph shall not have recourse to the review procedures set forth in section twenty-two.” (Emphasis added.)

HRD's argument is inapplicable here regarding the above stated § 16 exclusion of the review procedures set forth in § 22. The second paragraph of section sixteen clearly refers only to distinctive types of positions, such as “scientific or professional positions” requiring a Master's degree level education or other specialty position requiring a “certificate, registration or license.

The Commission has previously determined that HRD should be given discretion in creating the methodology used in scoring examinations, including E&E credits. *See Michael Peters v. Human Resources Division*, G2-09-263 (2010). There, the Commission confirmed that the Administrator has a special expertise in assessing the weight to be given to candidates past experience. (“...it follows that an administrator also has a high degree of discretion to award or deny applicants credit for prior training and experience during promotional testing, as long as the decision does not violate basic merit principles.

The administrator typically has a better understanding and is better positioned to make these types of assessments regarding what categories of past experiences are best indicative of candidate's qualifications for the promotion.”). Id. at 11. HRD the discretion to establish its own formulas and review procedures for the scoring of E&E credits. Additionally, the Appellant did indeed receive a thorough audit and review from HRD of his E&E credits, which affirmed his original E&E credit and exam score results

Appellant's Section 2(b) Appeal

The civil service law, grants the Civil Service Commission authority “[t]o hear and decide appeals by a person aggrieved by any decision, action, or failure to act by the administrator...” (Emphasis added). It defines an “aggrieved” person as one whose “rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person’s employment status.” G.L. c. 31, § 2(b).

The Appellant is not a “person aggrieved” under Section 2(b) of the law. To be a person aggrieved, the Appellant must demonstrate that any decision or action by the administrator was not made in accordance with Chapter 31 or basic merit principles. The credible and reliable evidence in this matter shows that the Appellant did receive a thorough HRD audit and review decision of his E&E credits incorporated into his final exam score. This audit and review affirmed his original E&E credits and final exam score. If the Commission granted the Appellant’s untimely request for a third opportunity to modify his E&E work sheet, the Appellant would be receiving an extra benefit that all other competing civil service candidates did not receive.


WHEREFORE, for all of the above, HRD’s Motion To Dismiss is allowed and the Appellant’s appeal on Docket No. B2-11-194 is *dismissed*.

Civil Service Commission,


Daniel M. Henderson
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman, Henderson, Stein, Marquis and McDowell, Commissioners) on August 11, 2011.

A True Record. Attest:



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 does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of a Civil Service Commission's final decision.

Under the provisions of MGL c. 31 S. 44, 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:

John F. Nee

John Marra, Atty. HRD